

# Fact Sheet – Community Housing Assets as defined under the National Law, and the NRSCH.

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The Registrar's Office is regularly asked by community housing providers to provide an opinion on whether a particular property is a "community housing asset" as defined in section 4 of the Appendix to the *Community Housing Providers (Adoption of National Law) Act 2012* (**National Law**).

Relevantly, section 15 of the *Community Housing Providers (Adoption of National Law) Act 2012* (**NSW Law**), refers to the concept of "community housing assistance".

If a provider holds either a "community housing asset" or has received community housing assistance" from a Housing Agency, then the provider must be registered.

The following represents the Registrar's view of the meaning of some of the words and phrases used in the definition contained in section 4 of the National Law and the National Regulatory System for Community Housing (**NRSCH**). The one expression, "community housing assets", has two different but closely related meanings. The difference has significant consequences.

The following is not a legal opinion or advice. It is a practical guideline to the Registrar's view of the statutory definition and the NRSCH definition, which differ, because they serve a different purpose.

If you have any doubts, questions, or disagree, please obtain your own legal opinion or discuss the matter with one of our Principal Compliance Officers.

A community housing asset as defined under the National Law may vary in character based on individual circumstances, contracts, dealings, arrangements and over time.

The concepts of "community housing asset" and "community housing assistance" predate the National Law and the NSW Law as they first appeared in the Housing Act 2001. Further, an agreement between the provider and the Housing Agency can be a community housing assistance agreement (**CHAA**) without referring to itself as a CHAA.

Following is the definition of a "community housing asset" under section 4 of the National Law and some questions and answers to assist in understanding what that definition is likely to mean in practical terms:

.....***Community housing asset of a community housing provider means:***

***(a) land vested in the provider by or under the community housing legislation of a participating jurisdiction***

1. Does "land" in this sense include land upon which structures are attached to the land as distinct from just vacant land?

Our view is – Yes, based on the definition of land in the *Real Property Act 1900* (NSW), land includes, amongst other things, land and the structures on the land.

2. Does “vested” simply mean that the land has been transferred to the provider and is now owned by the provider?

Our view is – Yes, whether or not that transfer was by contract or vested by legislation.

**(b) *land acquired by the provider wholly or partly with funding provided by a Housing Agency of a participating jurisdiction***

1. Does “land acquired” include land leased or does it only include land purchased and subsequently owned?

Our view is – “Land acquired” does not include land leased from a Housing Agency but it does include land purchased from the Housing Agency.

Land that is leased from a Housing Agency is “community housing assistance” as defined in section 15 of the NSW Law. Providers that receive this assistance are required to be registered as community housing providers. The NSW Law does not allow community housing assistance to a provider unless it is registered.

2. Does “funding provided” include only funds provided by a Housing Agency prior to the acquiring of the land specifically to assist the provider to acquire the land or would it also include funding provided to a provider after the provider has acquired the land?

Our view is – “Funding provided” includes funds provided both before or after the acquisition of the land.

3. Does funding include any funds provided to a provider so that it can supply subsidised housing generally (such as a payment to the provider for the provision of social housing) or does the funding have to be given to a provider to acquire specific land or land generally?

Our view is – Funding includes any payments made to a provider to acquire land and the principle of equitable tracing applies. Equitable tracing means, colloquially, to “follow the money”. Accordingly, if a provider sells one of their community housing assets and then uses that money to purchase another property, then that second property is also likely to be a community housing asset.

**(c) *land vested in a provider on which a Housing Agency of a participating jurisdiction has constructed housing or made other improvements***

1. Does this just include land on which a Housing Agency has constructed housing and which is then subsequently vested in a provider or does it only include land that is independently owned by a provider and, subsequently, upon which a Housing Agency then constructs housing?

Our view is – Both, anything on the land goes with the land.

**(d) *funds provided to the provider by a Housing Agency of a participating jurisdiction for the purposes of community housing***

1. Does this just include the funds (the money in the bank), given to the provider by the Housing Agency, prior to the purchase of anything with those funds by the provider or does it also include the things that are subsequently purchased with those funds?

Our view is – Both, because equitable tracing applies. Equitable tracing means “following the money”, so if a provider uses funds (the funds itself are a community housing asset) to then purchase a property, then that property also becomes a community housing asset.

**(e) any other asset of the provider that is of a class of assets declared by the community housing legislation of a participating jurisdiction as community housing assets for the purposes of this Law**

1. Does the community housing legislation declare any assets to be in this class of assets?

Our view is – No, the legislation does not currently declare any assets to be in this class of assets.

2 At this time, could any asset satisfy category (e)?

Our view is - There are no assets that could currently satisfy category (e).

**FURTHER QUESTIONS**

1. Is section 4 an exclusive list of community housing assets?

Our view is – The better view is that it is an exclusive list.

2. Is a property that is owned by a Housing Agency and leased to a community housing provider a community housing asset?

No, as properties that are leased to a community housing provider by a Housing Agency, they are viewed as an example of a Housing Agency providing “community housing assistance” to a community housing provider This does not make them “community housing assets” under section 4 of the National Law but they still fall within section 15 of the NSW Law as community housing assistance, requiring the provider in receipt of the lease to be registered.

3. Are **Affordable Housing** properties developed under *State Environmental Planning Policy (Housing) 2021* or other affordable housing “Community Housing Assets”?

Our view is – generally no, unless the Housing Agency has provided assistance within the meaning of section 15 of the NSW Law in the development or acquisition of those properties.

Affordable Housing properties are required to be managed by a registered CHP under the Housing SEPP. However, it is only if the development or acquisition of the properties was undertaken wholly or partly with Housing Agency assistance that they can be classed as community housing assets as defined by the National Law.

**NRSCH’s use of the term “community housing asset”.**

The NRSCH uses the expression “community housing asset” more broadly in its documentation and website. For example, in its “Community Housing Assets – Calculations Table”.

In that context, the expression is used more broadly than the National Law definitions and means assets held, managed, leased or owned by a community housing provider and is used for property data and other purposes, (including financial) and which may have been developed or obtained without any government assistance.

The purpose of the narrower legal definition is to ensure that the community housing assets funded by the Housing Agency remain as community housing or are returned to the Housing Agency or another registered CHP in the event of a winding up or other relevant corporate transaction or activity.

While there may be an overlap, this use of the expression by the NRSCH in a general sense is broader than the legally defined term in section 4 of the National Law. If there is no assistance given by a Housing Agency which can be traced to the asset, it is not a community housing asset as defined under the National Law. For example, private properties managed by the CHP are included in the NRSCH Calculation Table as community housing assets for most states.

However, privately owned properties do not generally meet the legal definition of community housing assets in the National Law because there is no Housing Agency assistance involved in these assets.

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