Positioning Paper

Peer Reviewed

Regulatory frameworks and their utility for the not-for-profit housing sector

authored by

Max Travers, Rhonda Phillips, Vivienne Milligan and Tony Gilmour

for the

Australian Housing and Urban Research Institute

Southern Research Centre

UNSW-UWS Research Centre

Queensland Research Centre

April 2010

AHUR**i**

Australian Housing
and Urban Research Institute

ACKNOWLEDGEMENTS

DISCLAIMER

AHURI POSITIONING PAPER SERIES

AHURI Positioning Papers is a refereed series presenting the preliminary findings of original research to a diverse readership of policy makers, researchers and practitioners.

PEER REVIEW STATEMENT

An objective assessment of all reports published in the AHURI Final Report Series by carefully selected experts in the field ensures that material of the highest quality is published. The AHURI Final Report Series employs a double-blind peer review of the full Final Report – where anonymity is strictly observed between authors and referees.

CONTENTS

LIST OF TABLES

LIST OF FIGURES

ACRONYMS

ACT	Australian Capital Territory
AHURI	Australian Housing and Urban Research Institute Ltd.
CDC	Community Development Corporation (USA)
CHFA	Community Housing Federation of Australia
COAG	Council of Australian Governments
CSHA	Commonwealth State Housing Agreement
NAHA	National Affordable Housing Agreement
NBJP	Nation Building and Jobs Plan
NL	The Netherlands
NRAS	National Rental Affordability Scheme
NSW	New South Wales
NT	Northern Territory
QLD	Queensland
RSL	Registered Social Landlord (England)
SA	South Australia
TAS	Tasmania
TSA	Tenant Services Authority (England)
WA	Western Australia
VIC	Victoria

EXECUTIVE SUMMARY

This study is concerned with questions about the purpose of regulatory frameworks; the impact of regulation, especially impacts on service outcomes and organisational culture; and the development of effective regulation.

The objective of this positioning paper is to review the potential strengths and weaknesses of regulation as a means of expanding the not-for-profit sector in Australian housing. This review takes place at an interesting time in that the Commonwealth and state governments are in the process of negotiating a new compact that will establish a national regulatory system, and determining the long term approach to investment in affordable or social housing (these terms are defined in the introduction). This positioning paper should be published during a period of stakeholder consultation about a national model for regulation. The paper is not intended to advance a particular micro-policy objective (for example, by favouring one model of regulation over another). It is meant to assist policy-makers, through reviewing debates in this field. However, it is only a positioning paper. The research team believes that understanding of the underlying issues will be advanced through conducting empirical research to obtain the views and perspectives of regulators, those being regulated, and other key stakeholders.

The first chapter introduces the hopes currently placed on regulation as a means of expanding the small social housing sector in Australia. It sets out criteria for determining whether this regulation is effective. Chapter 2 then reviews the case made for regulation in a number of policy reports (some by members of this research team). It reports on how regulation has developed, its achievements to date and the current state of play. Chapter 3 fills a gap in the policy literature by offering a critical perspective on the risks that arise in regulation. It considers the nature of regulatory burdens, the potential for ritualism and the problem of regulatory capture, all of which can happen in any area of government. Chapter 4 examines the problems that can arise as regulation develops through examining aspects of the provision of affordable housing in Britain, the Netherlands and the USA. The history of regulation in these countries illustrates how this can become burdensome, or captured by particular stakeholders, but that relaxing regulation can make it difficult to achieve social objectives. Chapter 5 sets out objectives for conducting empirical research about regulation in four Australian states using stakeholder perspectives as an analytic framework.

The paper concludes through considering how it is possible to develop effective regulation in the field of social housing. The key objective in regulating the provision of affordable housing is to balance the interests of different stakeholders, such as providers, tenants and investors. We argue that these groups will only welcome regulation if this is accompanied by significant, long term public investment in affordable housing. Moreover, the same problems and tensions that have occurred in other countries as regulation develops will arise in Australia. Policy-makers can, to some extent, prepare for these problems through establishing mechanisms to allow concerns from stakeholders to be addressed, and for the system of regulation to itself answer to regular reviews.

1   INTRODUCTION

1.1   Background and aims

This positioning paper reports some initial thinking in a research project funded by the Australian Housing Research Institute (AHURI) about the value of regulatory frameworks for affordable housing. It grows out of a series of reports commissioned by governments, AHURI and other organisations about the not-for-profit sector's housing function (Kennedy & Co. 2001; Berry 2003; Milligan et al. 2004; Milligan et al. 2009; SGS 2009; ARTD 2009). These have documented the growth of the sector, and advanced the positive view that a new regulatory framework will help in expanding affordable housing. However, because there has been progress in implementing specialist regulation in some jurisdictions and the Commonwealth and state governments are now in the process of negotiating a national approach to regulation, it seems appropriate to examine the issues more critically, and also to forewarn policy-makers of possible regulatory problems to be addressed as the not-for-profit sector expands.

It should also be stated, at an early point, that we approach these issues as researchers working in the academic fields of housing and regulation studies, rather than as conducting a technical evaluation of policy for a government agency. This means, firstly, that at certain points in this paper we would like to show how wider debates about regulation and the provision of affordable housing are relevant to those working in this field. The research team have diverse disciplinary and theoretical perspectives and we do not necessarily agree about the nature of scientific explanation, but we are all committed to the idea that it would be valuable to identify some underlying structural tensions between stakeholder interests that may help to explain the problems that arise in regulation.

Secondly, as researchers we would prefer to take the long view, rather than address the specific policy and political questions that will be debated, often behind closed doors, when this report is published. We do not have the insider knowledge of current policy considerations, nor are we able to predict which model of regulation will work best (no one knows this for sure). We would ideally like to devise a model that could explain what is happening in five or ten year's time.

Thirdly, it seems important to state that, as researchers, we know that there is no substitute for conducting empirical research. While we will draw on general models and debates in this paper, we know that these have to be tested against how actual people and organisations understand regulation, or the impact of changes in policy.

Fourthly, we are also committed to the view that ordinary people who are affected by government policy should have their views represented in these reports. One example would be that smaller housing providers, with a social mission, may be adversely affected by these reforms. In the next stage of the research we will be conducting research on the perspectives of different stakeholders, including regulators, large and small providers, tenants' groups and investors, and submitting a final report later in 2010. This paper is written for this larger community as much as for policy-makers and managers in government agencies.

1.2   Definitions

At this point it is useful to discuss the scope and focus of the study by defining its scope and key subjects and explaining our approach to defining regulation, social and affordable housing and not-for-profit housing.

In essence, *regulation* can be seen as the 'imposition by public agencies of mandatory requirements over matters of social importance in order to address the likelihood and consequences of market failure' (Milligan et al. 2009: p. 29). Regulation should be introduced where the risk is seen as significant enough to warrant regulation and the benefits are considered to outweigh the costs (Kennedy & Co. 2001; COAG 2007). To address these risks, 'regulation imposes 'rules' that must be followed by the organisations covered by the regulation' (Kennedy & Co. 2001). Regulation can also include forms of self or industry regulation such as codes of conduct; standards and performance monitoring (Kennedy & Co. 2001; COAG 2007). In this study, we are primarily concerned with specialist statutory-based regulation that establishes requirements and expectations for not-for-profit housing organisations in Australia.

The policy goals, service delivery structures and institutional arrangements for social and affordable housing in Australia have changed markedly in recent years and there is a blurring of previously distinct concepts of public, community and private housing provision (Phillips et al. 2009; Milligan et al. 2004). Consequently, new language and definitions are emerging to describe and make sense of the changing landscape. The concept of *social housing* is now commonly adopted to encompass highly subsidised and targeted housing provided by both government (public housing) and a variety of not-for-profit (community housing) entities.

Affordable housing is used more generally to refer to forms of housing that are provided at a price that low and moderate income households can pay while also meeting other living costs. Affordable housing may include housing for rent or purchase that meets affordability benchmarks and may be provided by not-for-profit providers or by the private sector (Milligan et al. 2004).

In this report we are concerned with non-government, not-for-profit organisations providing social and/or affordable housing for rent to low and moderate income households. While we are interested in both small and large organisations, our focus is especially on the role of regulation in expanding not-for-profit housing and the development of housing providers that operate at scale and expand through the supply of social and affordable housing. Such organisations are commonly referred to as 'growth providers'. They may self identify or be recognised by state regulators or funders, either by being designated through the tiered registration system or as preferred providers under dedicated funding allocations.

1.3   The not-for-profit sector in Australian housing

The not-for-profit housing sector is diverse and includes welfare, self help and social entrepreneurial agencies in the form of community-based associations, not-for-profit companies, cooperatives, local authorities, religious-based agencies and traditional charities. The sector is characterised by a large number of organisations averaging a small portfolio. Of the 1,069 community housing providers at 30 June 2008, three-quarters managed less than 20 dwellings each; 15 per cent of community housing providers managed between 20 and 49 dwellings; only 11 per cent of providers managed 50 or more dwellings (AIHW 2009). Growth in the sector is predominantly within this group of larger providers who mostly manage properties owned by state housing authorities or leased with government subsidy from the private market.

Only a small number of providers operate at scale and undertake property development. Milligan et al. (2009) estimate that approximately 43 organisations can be identified as affordable housing developers or growth providers. These include: established developers (11); emergent developers (11); aspiring developers (6); growth partners—management only (4+); and service agencies and church

organisations expanding into affordable housing (11+). Milligan et al. estimate that the top 11 organisations increased their portfolios from approximately 2,400 in 2004 to 5,440 in 2009 (Milligan et al. 2009: p.73).

Some states and territories have in recent years introduced policies of directing a high proportion of new social and affordable housing supply and transfer of existing properties to the sector. This has resulted in national growth of 44 per cent in the number of dwellings from 26,753 to 38,519 over the five years from 2004–2009. During the same time, public housing dwellings reduced by 2 per cent from 345,335 to 337,866 (AIHW 2009).

The sector is currently experiencing significant expansion through additional supply under the National Rental Affordability Scheme (NRAS) and the Nation Building and Jobs Plan (NBJP) social housing initiative. An example of this situation is that in NRAS round one not-for-profits made up 21 of 36 organisations receiving offers, representing 2,106 of the 3,799 properties (Milligan et al. 2009). In round two, 78 per cent of incentives totalling 6,741 were offered to not-for-profits (Australian Government 2009). The national Housing Minister has set a target of up to 75 per cent of the 20,000 new social housing dwellings funded under the stimulus package to be owned or managed by not-for-profits (Plibersek 2009a). The distribution of these dwellings is not yet clear, but it is likely that a high proportion will go to larger housing providers, including growth organisations.

Not-for-profits have in the past owned only a small proportion of the housing they manage. This is changing as decisions are being made by state governments to transfer title to existing and new supply with the aim of facilitating the leveraging of assets to borrow for additional supply.

The greater risks inherent in the increasing scale and complexity of the not-for-profit business, especially property development, asset ownership, financing and large scale tenancy management, are driving policy interest in more robust and specialist regulation for the sector.

1.4   The hopes placed in regulation

Regulation has been widely identified as one of the preconditions to growth of not-for-profit affordable housing in Australia (Kennedy & Co. 2001; NCHF 2003; Housing NSW 2007; Department of Housing and Works 2008). The other requirements are a predictable funding/subsidy stream, financial intermediaries and capacity building (Milligan et al. 2004 & 2009). Specialist regulation has been advocated by community housing industry bodies for a number of years in the hope that it will provide confidence to government and the private sector to invest in and partner with the sector (e.g. CHFA n.d.; NCHF 2003; SGS 2009).

Commonwealth and state government housing policy-makers, faced with financially unviable public housing systems and concerned to expand the supply of affordable housing, are increasingly looking to the not-for-profit sector for solutions. They see regulation as critical to managing the risks inherent in external delivery of publicly subsidised services: maintaining policy influence, quarantining government investment, directing subsidies as intended and ensuring service quality. Policy-makers also hope that a regulated sector will be more attractive to private lenders, investors and developers, and attract partnerships and investment in affordable housing (Department of Housing and Works 2008; Housing NSW 2008).

Regulation is promoted by key players within the community housing sector as integral to achieving aspirations for growth of the sector and expanding social and affordable housing supply (SGS 2009). This represents a broad consensus between

policy-makers and housing providers about the need for both regulation and increased investment in social and affordable housing.

More recently, the case for a national approach to regulation is gaining momentum (ARTD 2009; Plibersek 2009c). In other areas of policy, such as health care and environmental management, attempts to change the relationship between the Commonwealth and state governments have led to protracted negotiations and even deadlock. Nevertheless, it would be fair to say that a broad coalition in government and among housing providers hopes that during 2010 there will be agreement on a new national policy initiative. The challenges lie in negotiating a regulatory framework that is suitable for each jurisdiction and in directing funding effectively to the not-for-profit sector, as happens in other countries (see chapter 4).

1.5   The criteria for effective regulation

This project is mostly concerned with considering the purpose of regulation, and the problems that can arise in any regulatory system. We are also, however, interested in the practical steps that can be taken to address potential problems. For this reason, it is important to set out, at an early stage, what we consider to be the criteria for effective evaluation.

We would argue that the greatest policy challenge facing government in housing regulation is to balance the interests and risks of the key stakeholders. In the final report for this project, we will look in more detail at how regulators, providers, tenants and investors understand regulation. There is considerable overlap in the interests of these stakeholders. Clearly it is in everyone's interest to have a strong, sustainable sector expanding the supply of high quality, affordable housing to those unable to access housing in the market. However, there are also divergent interests that need to be balanced for effective regulation.

There are already guides and principles that have been developed within government for designing and assessing regulation (Better Regulation Task Force 2005; COAG 2007). Housing regulators and industry bodies have adopted and promoted principles for effective regulation of this sector (Housing Registrar 2009; CHFA n.d.) Our preliminary set of conditions for effective housing regulation includes:

→ Clear policy expectations are essential to balance the tension between the social task and the business imperatives of delivering affordable housing. The relationship between policy and regulation in social programs is complex. In social housing the interaction between targeting, affordability, housing supply and public subsidies impacts on both social outcomes and financial viability.

→ Shared goals and trust provide a foundation on which regulators and housing providers are willing to freely share information and constructively address issues as they emerge.

→ Reliable and comparable information, efficiently collected and publicly available, is crucial for all stakeholders. It provides a basis for effective monitoring by the regulator and transparency in regulator decisions. Providers are able to benchmark performance and drive self-improvement, while tenants, investors and the public can confidently assess the performance of individual providers and the sector.

→ Transparent assessment criteria provide clarity to providers about expectations and consistency in regulator decision-making. Ongoing review of performance benchmarks supports continuous improvement and responsiveness to changing contexts.

→ Ongoing feedback loops and dialogue between the regulator and providers allows early identification, resolution of concerns and help to prevent problems escalating and the need for stronger intervention. This depends on an appropriate balance between the compliance and resourcing functions of the regulator.

→ Encouragement of strong governance and self assessment combined with targeted and strategic use of external auditing encourages good governance and management while retaining confidence in the integrity of the regulatory system.

→ Existence of strong intervention powers that are used only as a last resort provide confidence in the system and encourage shared responsibility for identifying and resolving problems.

→ Regular review of the regulatory system that includes feedback from all stakeholders is critical to maintaining the relevance of the system and stakeholder support.

→ A commitment to growing affordable housing and the not-for-profit sector is crucial to acceptance of the potential burdens by providers and justification of the costs of establishing and maintaining the system.

This framework criteria for effective regulation is preliminary and will be tested and further developed through empirical research in the next stage of the study.

2   THE CASE FOR REGULATION

Regulation is central to the workings of government and its efforts to create a high standard of living that can be enjoyed by everyone in an advanced, industrial society (Morgan and Yeung 2007). The case for regulation is strongest where essential public services, vulnerable service users and public subsidy are involved, as is the case in social housing. In the case of affordable housing, it has been argued that regulation is not simply a means of protecting tenants, but also of creating the conditions for more public and private investment (Kennedy & Co. 2001; SGS 2009). It does this by making possible the creation of a third sector between the market and state (Giddens 1998) that offers services previously provided solely by government agencies. This chapter will consider the different purposes of regulation. It will provide some background information on how housing regulation has developed in Australia, and the achievements of the sector. It will also review policy debates on developing a national regulatory system.

2.1   The purpose of regulation

In its broadest sense, regulation includes all the mechanisms used by government to influence society, including primary and secondary legislation, and the activities of the numerous, often interlocking agencies that implement these policies. There are numerous regulatory agencies that have been established to oversee particular sectors of the economy or public services. In Australia, these include national regulators such as the Australian Securities and Investments Commission (ASIC) and the Australian Curriculum, Assessment and Reporting Authority (ACARA). In Britain, there are numerous inspectorates that produce annual reports on different agencies, including the Office for Standards in Education (OFSTED) and, in the case of social housing, the Tenant Services Authority (TSA).

Housing providers are subject to a wide and growing range of generic and housing specific regulatory regimes in their roles as not-for-profit incorporated bodies (corporations and tax); housing developers (planning and building); landlords (tenancy); employers (workplace health and safety, industrial relations); and recipients of government funding (contracts). The forms of specific social housing regulation include statutory requirements and contractual obligations, as well as industry self regulation agreements and norms (Kennedy & Co. 2001).

Each form of regulation has a specific focus, although in practice there is considerable overlap. For example, registration-based regulation is focused at the organisational level, while capital funding contracts and leases are concerned with specific properties. Operational funding contracts or mortgages primarily deal with the source and conditions of the finance. The regulatory powers and consequences of non compliance vary depending on the form of regulation, so that the powers under a contract to withdraw or recoup funding are very different to those of a housing registrar in Victoria who can intervene in the corporate governance of a housing provider.

Although this project focuses primarily on the work of statutory regulators that have been established in the field of social housing, it is important to recognise that in many ways the most important mechanism used to control providers is through contracts. Not-for-profit housing organisations enter into multiple contracts for various funding sources, predominantly with state housing authorities under national funding schemes (Kennedy 2001). This has continued to be the case with recent initiatives impacting on housing associations, such as the NRAS and the NBJP.

In general terms, specialist housing regulators in Australia seek to do the following:

→ Minimise risks through ensuring high standards of financial probity among providers.

→ Improve the quality of services through a registration system and annual monitoring.

→ Protect tenants as a vulnerable group, through requiring surveys and complaints procedures.

→ Promote confidence in the sector among funders and investors through registration and regulatory oversight.

→ Protect investors and tenants through powers to allocate properties to another provider in the case of bankruptcy or financial difficulties.

→ Make providers accountable to consumers through the publication of league tables.

The regulatory systems that have been established in Australia are mainly concerned with the first four objectives. The Victorian system goes further than the others in having legal powers to intervene in the case of financial difficulties. None of the regulators has, so far, established a system of ranking organisations or allowing comparison through benchmarks.

2.2   The development of regulation within states

The past decade has seen the spread of specialist statutory regulation of not-for-profit housing in several jurisdictions and consideration of a national system (see Table 1).

Until the early 2000s, regulation of the community housing sector was predominantly contractual through funding agreements and other contractual tools. The exception was South Australia, where specialist legislation for the registration and regulation of community housing was introduced in 1991. Recent enactment of state-based regulatory statutes has included: Queensland (2003); Victoria (2005); NSW (2007); and the ACT (2008). Western Australia planned to introduce legislation in 2009, but this is on hold pending discussions on national regulation (personal communication). Each jurisdiction has implemented different approaches to regulation, although common elements are: registration of housing providers; mandating compliance and/or performance requirements and auditing regimes; and providing for inspection and intervention powers. All the state-based regulatory systems are comprehensive in that they apply to all community housing providers, although they have either multiple and tiered registration categories or specific requirements relating to growth providers.

A brief examination of how the regulatory system is operating in Victoria, NSW, Queensland and Tasmania is summarised below in order to provide an overview of national regulatory developments and to illustrate some differences in approach. This is an updated summary of more detailed information provided in Milligan et al. (2009). These jurisdictions have been selected because they represent a range of contemporary approaches and include the most developed systems, as well as including a small state with no statutory regulation in place. They are also the jurisdictions chosen for empirical study in the next stage of the research, so provide an introductory context for that research.

Table 1: Regulatory developments by jurisdiction

	Regulatory developments	*Features*
NSW	Legislation 2007 Registrar appointed 2008 Registration—4 tiers	Regulatory Code **Powers**: - require information, inspect, direct & deregister
VIC	Legislation 2005 Registrar appointed 2006 Registration—2 tiers	Performance standards **Powers**: - require information, inspect, direct and deregister - appoint directors/administrator; wind up and direct merger - power to register interest on title and transfer assets
QLD	Legislation 2003 Registration—2 tiers	Prescribed requirements **Powers**: - require information, inspect, direct and deregister - appoint manager - approve direct transfer of assets on wind up
SA	Legislation 1991 Preferred Growth Providers identified in 2007 Registration—2 tiers	Mandated requirements **Powers**: - inspect, direct and deregister - appoint directors & manager; wind up - statutory charge over property and power to transfer assets
WA	Legislation under consideration Administrative based system implemented 2008 Registration—4 tiers	Prescribed requirements **Powers**: - require information, inspect, direct and deregister
ACT	Legislation 2008 Registration—2 tiers	Standards **Powers**: - inspect and deregister - appoint directors & administrator; and wind up - statutory power to transfer assets
TAS	No specialist legislation	
NT	No specialist legislation	

Source: Authors

Victoria

Victoria has the most developed contemporary system of regulation for the not-for-profit housing sector in Australia. Underpinned by specialist legislation enacted early in 2005, Victoria has established performance standards under regulation and appointed a Registrar in 2006.

The Registrar is a statutory position appointed by the Governor in Council and reports directly to the Minister indicating a degree of independence. The current Registrar is a senior housing public servant with dual responsibilities for housing policy and regulation and the Office of the Registrar is administratively located administratively and physically within the state housing authority. This co-location, combined with senior staff movements between the registrar and the Office of Housing, has caused some providers to ask questions about the actual extent of separation between the funding, policy and regulatory functions. These debates also took place in England and led to the creation of an independent regulatory agency, the Tenants Services Association (see chapter 4). In the empirical stage of this project, we will be examining different views on this issue.

By June 2008, eight housing associations and four housing providers were registered and collectively managing 5,523 properties valued at nearly $1 billion (Housing Registrar 2009). By February 2010 the number of registered providers had increased to nine housing associations and 31 housing providers (Housing Registrar 2010).

Registered providers are subject to performance standards and monitoring by the Registrar. The powers of the registrar are more extensive than is the case in other jurisdictions, including appointment of Directors, imposing the wind up or merger of organisations and directing the transfer of assets. These powers, which are yet to be tested, rely on displacement provisions under the *Corporations Act*. The legislation also empowers the state to register an interest over land owned by registered providers.

Seven performance standards are established under regulation covering: governance, management, probity, financial viability, tenancy management, housing management and maintenance, and risk management. For each standard, indicators and guidance statements have been established by the regulator. Agencies are assessed against these standards prior to registration and at annual regulatory reviews based on self reporting and desk top auditing by the regulator (Housing Registrar 2007a,b,c).

Sophisticated financial modelling and management tools have been developed by the regulator to assist both the regulator and management and boards to monitor the long term financial health of organisations. The first annual regulatory report (2007–08) was released publicly by the regulator in early 2009 and the second is expected shortly.

New South Wales

The statutory regulation of not-for-profits is more recent in NSW with amendments to the New South Wales' *Housing Act 2001*, enacted in November 2007. The legislation replaced the administrative Performance Based Registration System introduced in 2004, and includes objects emphasising community housing viability, social housing diversification and housing provision for 'people on a very low, low or moderate income' (*Housing Amendments Act* 2007: p.2). The legislation includes provisions for the: appointment of a Registrar of Community Housing; establishment of a registration system; and the making of regulations, including prescribing a regulatory code for registered housing providers.

The NSW legislation provides a more limited range of and less strong intervention powers than those in place in Victoria, with NSW sanctions limited to deregistration. The legislation is silent on issues of the state's interest in funded property, although this may need to be addressed as a result of recent decisions to transfer title of up to 7,000 social housing properties to growth providers by July 2012.

Implementation of the new regulatory regime is underway with the inaugural registrar appointed in mid-2008, regulations introduced during 2009 and registration, performance guidelines and performance reporting systems implemented. The registrar is appointed by and reports directly to the Minister for Housing and has no other housing policy or funding responsibilities. As is the case in Victoria the regulation unit is administratively located within Housing NSW but it operates from premises that are physically separated from Housing NSW.

The regulations include definitions for very low, low and moderate income levels referenced to median household incomes, define four classes of registration and prescribe a regulatory code. The regulatory code comprises eight key outcome areas: fairness and resident satisfaction, sustainable tenancies and communities, asset management, sound governance, standards of probity, protection of government investment, efficient and competitive delivery of community housing, and development projects (NSW Government 2008).

By February 2010, over 90 organisations had submitted registration documentation, with 35 assessed and allocated a class. Of these, three are registered as class 1 and ten as class 2 providers.

Queensland

Queensland introduced regulation of the not-for-profit housing sector in 2003 when new legislation, the *Housing Act 2003*, was introduced. The Queensland legislation provides for the registration of all funded housing providers and the making of regulations. The registrar in Queensland is the housing authority chief executive, not an independent appointment The legislation does not explicitly provide for tiered categories of registration, but the regulations define and recognise 'affordable housing providers' and imposes additional requirements on providers seeking to use funded properties as security for loans (including being a not-for-profit company), wind up clauses for the transfer of assets to a like company approved by the chief executive, and maintaining accreditation.

Over 350 organisations are registered in Queensland, including social housing providers as well as homelessness services managing crisis accommodation and agencies providing housing assistance, such as tenancy advice and home maintenance services for older people.

The legislation includes more limited intervention powers than in Victoria, but stronger than for NSW. Interventions include appointment of an interim manager for funded housing to protect the interests of tenants and the state. The regulations set minimum requirements in the areas of financial management and accountability; governance; service delivery; tenancy matters; and property matters. In 2007, the regulations were amended to require registered providers to align eligibility, allocations and other policies with public housing.

Queensland intends to amend their system to align with the national framework (ARTD 2007). These changes are on hold pending the outcomes of national deliberations on a national regulatory system (personal communication).

Tasmania

Due to the small scale of its affordable and community housing system, Tasmania continues to rely on contracts as the main regulatory tool, but the Tasmanian Government had indicated previously that it would establish an administratively-based registration system and give consideration to partnering with other jurisdictions with developed regulatory regimes for assessments (ARTD 2007). The future is now uncertain as Tasmania considers future options for delivery of social and affordable housing and awaits resolution of proposals for national regulation.

Summary

The preceding overview demonstrates considerable state-based activity in strengthening regulation in recent years and the fast pace of reform. While some jurisdictions, such as Victoria and NSW, have proceeded with implementation and development of state-based systems, others have delayed further change until the details of a proposed national system are resolved.

2.3   The achievements of regulation

It is very difficult, given the embryonic nature of regulation and at this stage of the study, to assess the achievements of regulation in Australia. Limited public information is available about how the system operates. In particular, there is limited and mainly anecdotal evidence to date of the impact of regulation on areas such as the quality of service, management capability, or governance. The longest operating system in Victoria has been operational for less than three years and there has been no evaluation completed to date. An Auditor General review of the Victorian system is underway and may be available to inform the final report of our study.

One general objective of not-for-profit housing regulation that can be examined is that of providing the institutional conditions for growth, through increasing the confidence of public and private investors. Although the not-for-profit sector remains small, certainly in relation to the scale of the housing problem (SGS 2009), significant growth has occurred in recent years and more dramatic growth is imminent, especially as a result of the social housing initiative in the national economic stimulus package and NRAS. While up to date and comparable data regarding recent growth in not-for-profit housing is not readily available, an indication of the accelerating rate of growth can be obtained from a scan of recent reports and policy commitments:

→ In Victoria the introduction of regulation coincided with government investment of approximately $500 million in the sector over the three years to 2008 and transfer of assets worth $175 million. In addition, housing associations contributed 25 per cent of the cost of developments through leveraging private finance to achieve 1,000 new dwellings. This growth is attributed, by the Registrar, to increased government and financier confidence in the sector as a result of the strengthened regulation (Housing Registrar 2009). Further significant growth is expected in Victoria over the next two years from NBJP funding allocated to housing associations for property development (personal communications).

→ NSW has also supported expansion of the sector with 2,500 properties transferred to community housing management over the five years to 2009 and a target growth from 13,000 to 30,000 dwellings over 10 years. Since the introduction of regulation, a commitment has been made by the Minister to transfer title of 7,000 dwellings with most of these acquired through NBJP funding.

→ The rate of growth of the sector in Queensland has been more modest, although $150 million was invested in affordable housing supply through growth providers (predominantly Brisbane Housing Company) between 2004 and 2009 (Milligan et

al. 2009). Most of the 4,000 dwelling to be procured through the NBJP Initiative are also expected to be managed by not-for-profits. As well, approximately $300 million of NBJP funding is being allocated to not-for-profits for property development (personal communications).

There appears, therefore, to be evidence that strengthened regulation has coincided with, and is associated with, growth of the sector. In particular, states that have funded development projects or transferred assets to housing associations also have stronger regulation. Regulators point to higher levels of growth as justifying the amount of time spent in establishing registration systems and conducting annual reviews of performance. They believe that organisations have substantially improved their skills base and become more entrepreneurial through the process of becoming registered. However, the state differences in regulatory, funding approaches and growth trajectories make it difficult to confidently assess the contribution of regulation to sector growth or to understand the aspects of regulation that contribute to growth without further evidence. This issue will be examined further in the empirical research phase of the study.

2.4   The move towards national regulation

As discussed above, the case for specialist and statutory regulation of not-for-profit housing has been building in Australia over the past decade. Until recently, it had been widely assumed that the regulatory task would fall to the states, given their long term role as funder and the absence of Commonwealth policy interest in the issue. The impetus for a national approach to specialist regulation has intensified over the past two years as the Australian Government has taken policy leadership for housing and promoted growth of community housing (Plibersek 2009a,b,c). This section reviews the case developed over a decade for specialist community housing regulation. This is followed by an overview of current moves towards a national approach.

The most systematic case for specialist regulation has been made by the Kennedy & Co. report (2001). Kennedy reviewed the potential sources of risk in providing housing, including financial collapse. It also considered a variety of regulatory mechanisms, favouring a tailored system designed to address 'fairly marked differences' among providers:

> For example, the regulatory issues applicable to co-ops are different in a number of ways to those associated with other forms of community housing. A flexible approach to regulation, such as one which reflects the nature of risks, is generally likely to minimise costs ... and deliver an effective and efficient regulatory system. (Kennedy & Co. 2001: p.70)

More recently, a vigorous case for regulation has been made by PowerHousing, an industry network established by large providers (SGS 2009). This report also recognises that regulation will not by itself expand affordable housing, and that there are challenges in designing an effective system:

> Regulation is required to ensure that the community housing associations are well run, transparent, accountable, focussed on their social mission and well-positioned to ultimately attract institutional investment. However, regulation is a fraught and politically contested area and performance is hard to measure, because it is dependent on many factors, both internal and external to an organisation. Regulators must avoid systems which are unbalanced in their focus, narrowly concerned with financial viability, administratively burdensome, ineffective and de-motivating. They need to support the capacity of learning organisations in a constructive and developmental manner, be responsive to

tenants and draw on the experience and evidence of international best practice. (SGS 2009, section 3.1.6)

Much is made in the Australian policy literature of the need to manage the new and increased risks faced by growth providers in property development, private borrowings and asset ownership. These risks are presented as also impacting on tenants, funders and investors. Regulation is presented as the response to these risks without full and critical assessment of the capacity of regulation to effectively manage these risks or ameliorate their consequences. The emphasis on regulation as an instrument for risk management has implications for boards of housing organisations, which have primary responsibility for corporate risk management, and raises questions about how regulation can best support boards to meet this responsibility. Such questions are explored further in chapter 3 through a review of academic literature on such possible regulatory problems. They will also be addressed in the empirical phase of the study, when we examine how regulation works in practice (see chapter 6).

Building on a broad consensus about the need for specialist regulation, the impetus for a national approach to regulating large providers has grown over the past two years. During this time the Commonwealth, along with most states and the ACT, have announced intentions to expand community housing and to invest in additional housing supply through a number of designated 'growth providers'. Significant short term growth impetus is provided though targeted Commonwealth funding under NRAS and social housing components of the Nation Building and Jobs Plan. The emergence of not-for-profits that are registered in multiple jurisdictions has further highlighted the need to address future regulatory arrangements from a national perspective.

Reports, such as Kennedy (2001), do not specifically address the issue of national regulation. However, diversity within the sector is a key consideration in developing a national approach that maintains flexibility and responsiveness to the different risks associated with small locally based tenancy managers, state-based growth providers and national development agencies. The issues and options for national regulation have been canvassed in discussion papers by ARTD (2007 and 2009) in the course of consultation on a national regulatory approach for a consultancy to advise Commonwealth and state officials. The second ARTD discussion paper (2009) concludes:

It is expected that different stakeholders will have different views (and often ideological positions) about the relative strengths and weaknesses of the current ... proposal and the five alternative options for national regulation …. In all likelihood, there is no single 'best' regulatory system that will continue to remain relevant for the next twenty years. As with any regulatory system, it will need to be reviewed and adapted in response to changes in the policy environment and competition in the market. As such, we need to focus on the option that is most likely, at this point in time, to position the sector for the first phase of growth over the next five years.

We concur with this view that there is no magic bullet or one best approach to regulation and recognise that stakeholders will inevitably have divergent interests and views about the best approach.

2.5   Options for a national approach to regulation

National policy consideration of strategies to build institutional capacity for expanding the not-for-profit sector occurred in the context of a *Framework for National Action on Affordable Housing*, which was announced by the national Housing Ministers Council in August 2005. The formulation of this sector development strategy was a closed

process involving Commonwealth and state policy officers and limited engagement with a small group of external 'experts'. One of the outcomes of this process in March 2008 was ministerial agreement to a national framework for the regulation of not-for-profit affordable housing providers.

The national regulatory framework aimed to harmonise state-based systems was intended to apply only to growth providers, defined as organisations that operate at scale and have capacity to enter into partnerships with the private sector to deliver affordable housing. The objectives were concerned with the reputation of the sector, the appropriateness of housing for vulnerable households, delivering value for money for taxpayers, reducing barriers for national providers and reducing costs through national consistency.

The principles articulated in the report for regulation (proportionate, accountable, consistent, transparent, and targeted) draw on and are consistent with good practice guides adopted in Australia and overseas (COAG 2007; Better Regulation Task Force 2005). Under the national framework, each state and territory committed to:

→ Operate a multi-tiered registration system.

→ Adopt the National Regulatory Code for defining and measuring the outcomes.

→ Appoint a Registrar and maintain a Register.

→ Require that registered not-for-profit growth providers are companies registered under the *Corporations Act*.

→ Advise other jurisdictions of all not-for-profit growth registration decisions and mutual recognition of registration decisions.

→ Work cooperatively with other jurisdictions and, where appropriate, negotiate bilateral arrangements to assist smaller jurisdictions.

Almost before the ink was dry on this agreement, policy attention turned to a proposal for the 'introduction of a national regulatory and registration system for not-for-profit providers to ensure the sector's capacity to operate across jurisdictions' (Nation Building and Jobs Plan National Partnership—Clause C7e). This development coincided with decisions by the Commonwealth to boost not-for-profit providers by directing to them the majority of the social housing stimulus funding.

The fast tracking of growth in the sector and the proposed establishment of a national regulatory regime raise a number of critical issues for Commonwealth and state housing administrators and for housing providers. Australia's federal system of government presents particular problems and:

> the threshold issue has been the legal authority to make decisions in order to protect government assets (e.g. transfer of assets to another registered provider if an organisation fails)—particularly where assets have been funded by multiple jurisdictions. (ARTD 2009).

Other issues affecting the design of the system identified by ARTD (2009) through consultation include:

→ Urgency to establish regulatory stability to improve certainty for growth providers to enable long term business planning.

→ Concern that a dual national and state system based on size would split the sector, advantage organisations operating under one system and provide barriers to transitioning from small to growth provider status.

→ Some support for a dual system based on national prudential supervision and state/territory policy/service delivery supervision, but concern this may increase regulatory burden.

Participants voiced mixed views about separating regulation (Commonwealth) and funding (state) with benefits seen as reducing conflict of interest and concerns relating to interdependence of policy (rents, targeting) and financial viability. Some expressed concerns about potential duplication or conflict with other regulatory systems (for example, aged care/disability). Others proposed that housing authorities and private affordable housing providers should be supervised under the same national regulatory regime to enhance contestability.

Participants in consultations had limited confidence in the ability of states and territories to harmonise regulatory systems unless this was mandated by the Commonwealth and based on model legislation. They also believed that regulatory capacity of government needs strengthening and expressed fear of over regulation and micro management by regulators.

Aspirations for regulation included:

→ Engagement of the sector in development of the system.

→ Flexibility that supports innovation.

→ Capacity for early identification and remedy of risks.

→ Nationally consistent performance information available to providers, governments and the market.

A key message from the consultation is the importance of regulation being accompanied by clearly articulated national policy as well as medium to long term funding and investment strategies for the growth of the sector.

The consultation canvassed views on options for national regulation as summarised in Table 2 and no option received strong support, although there was almost universal opposition to option 1.

Reaching Commonwealth/State agreement on the scope and nature of national regulation is proving to be more protracted than anticipated and the uncertainty about the future regulatory arrangements appears to have halted any further reforms to state- based systems. One aspect of our empirical study will be to examine the extent to which state-based regimes are diverging or aligning with each other and the agreed national framework during this period of uncertainty about future arrangements.

2.6 Political choices: which model?

The political and policy context for making decisions about regulatory options for the not-for-profit housing sector has changed markedly over the past two years as a result of active engagement in housing policy by the Rudd Government since its election in late 2007. Reforms to federal financial relations overseen by COAG, the negotiation of a new National Affordable Housing Agreement (NAHA) and new investment in social and affordable housing through NRAS and NBJP housing initiatives all have significant impact on the not-for-profit sector and the regulatory context.

The Commonwealth is taking an active and interventionist role in housing policy that is in stark contrast to the situation over the past decade. The Commonwealth's policy directions for social housing include greater contestability based on reform of public housing and growth of the not-for-profit housing sector. Affordable housing policy also promotes a key role for the not-for-profit sector in partnership with the private sector and attraction of private finance to support increased affordable housing supply. In

this policy environment, the Commonwealth has a key interest in a robust and effective regulatory regime for housing providers operating at scale and attracting private finance.

Table 2: Options for a national regulatory system

		Legal authority to intervene and take remedial action	*Administrative authority to undertake registration assessments and ongoing verification*
1.	Regulation of specially-incorporated community housing providers	Australian govt community housing corporations legislation covering providers incorporated under this legislation	Single national Registrar set up under Australian govt legislation
2.	National regulation of community housing providers	Australian govt legislation covering community housing growth providers & other community housing providers required by states/territories to be registered	Single national Registrar set up under Australian govt legislation
3.	Australian govt regulation of growth providers and state-based regulation of other providers	Australian govt legislation covering community housing growth providers State/territory legislation covering other providers	National (growth provider) Registrar set up under Australian govt legislation State/territory Registrars set up under state/territory legislation
4.	Australian govt regulation of multi-jurisdictional providers and state-based regulation of single jurisdictional providers	Australian govt legislation covering multi-jurisdictional providers State/territory legislation covering single-jurisdictional providers	National (multi-jurisdiction) Registrar set up under Australian govt legislation State/territory Registrars set up under state/territory legislation
5.	Provider choice of Australian govt or state/territory regulation	Australian govt and state/territory (model) legislation with provider choice	Australian govt Registrar and State/territory Registrars set up under model legislation
6.	Original options developed by the Sub Group	State/territory legislation covering multi- and single-jurisdictional providers that undertake community housing activities within their jurisdiction	Nominated lead registrar for multi-jurisdictional providers State/territory Registrars for single-jurisdictional providers with common evidence guidelines and mutual recognition

Source: ARTD 2009.

This situation represents a significant change for states and territories, which have become accustomed to a high degree of autonomy in housing policy. It also directly impacts on the states' role as the predominant social housing providers and brings into question their multiple roles as housing providers, funders, regulators and strategic policy-makers.

Most states are at various stages of consolidating and expanding their not-for-profit provision and implementing or reforming their regulatory regimes. In some states, especially Victoria and NSW, significant resources have been invested in introducing legislation and implementing their systems. Regulation of growth providers is one component of tiered registration and regulation systems that apply to all funded community providers. In this context, the pace and scale of the Commonwealth reform agenda has taken states by surprise. The recent leadership role taken by the Commonwealth to promote growth of not-for-profit housing also represents a radical change. Previously, developments in this sector have been largely driven by the states, with the result that individual states have approached growth and regulation in different ways.

All of the proposed national regulatory options have significant implications for states, which are faced with the choice of referring some of their regulatory powers to the Commonwealth or committing to reform, in some cases radical reform, of their existing regulatory systems. Transfer of power to the Commonwealth for regulating growth providers, leaving responsibility for smaller providers with states, has implications for the cost effectiveness of state-based regulation. It may also impact on pathways for small providers to transition to growth provider status under national regulation. Nevertheless, the state statutory-based regulatory systems are embryonic and underdeveloped and most states continue to place heavy reliance on project, program or portfolio specific contractual regulation. Clearly there are a plethora of legal, practical, policy and financial matters to be considered by governments in designing a national approach.

Individual housing providers have different interests and views on regulation based on their size, organisational affiliations, location of operations and aspirations. Clearly the interests of large growth organisations that have set high growth targets and operate and develop properties across jurisdictional boundaries differ from those of small, local community housing providers seeking modest expansion. A key factor making decisions about regulation difficult is the current high pace of change and rapid expansion of some organisations in the sector, which makes clear definitions and arbitrary categorisations of providers extremely problematic. This fluidity also makes it difficult to make decisions about how to design an appropriate system that splits regulatory responsibilities between the Commonwealth and states.

There is limited evidence and no substantive evaluation has been undertaken yet of outcomes and impacts of recent state-based regulatory initiatives. The early stage of development in Australia of the not-for-profit sector and its regulatory regime makes it very difficult for any of the stakeholders to have fully-formed views about the most appropriate option for the future, especially when that future holds many uncertainties for national and state governments, housing providers, tenants and potential private sector partners.

A major omission in the policy literature on housing regulation in Australia is any cost benefit analysis. Given the data presented in section 1, growth providers number approximately 43, representing approximately 4 per cent of all housing providers, but control a substantial proportion of existing housing and are attracting the majority of future growth. In contrast, the large bulk of community housing providers are extremely small and manage a reducing proportion of stock. Reliable publicly available information, especially estimates of the projected growth in the number of housing providers and the number and value of dwellings they own and manage, would go some way to assessing the scope and sophistication needed in regulatory systems and determining the costs that can be justified for establishing and administering the system.

In spite of the complexity and uncertainty discussed above, there appears to be an imperative and some urgency for decisions about the immediate future of regulation, given the rapid expansion of the sector occurring currently. In the longer term, decisions about which jurisdiction administers the system are less important than the design of the system; the skills, practices and effectiveness of the regulators; the impact of the system on service delivery, tenant outcomes and organisational performance; and investment in the supply of affordable housing.

3 REGULATORY RISKS

Although policy-makers are mostly concerned with addressing immediate practical and political issues, it also seems important to take a longer view. In this project, we assume that some form of national regulatory system will be established for affordable housing in Australia. What most interests us, however, is how this may develop in five or ten years. We are also interested in whether regulation is effective, and what can go wrong. Is it possible to balance the interests of different stakeholders, or is conflict and dissatisfaction inevitable in this area of public policy?

There is a large academic literature on regulation that includes studies in the fields of sociology, political science, public administration, management and socio-legal studies (for overviews, see Baldwin et al. 1998, Ferlie et al. 2005 and Morgan and Yeung 2007.) Much of this assumes that regulation, in the broad sense of the administrative procedures employed by the state to influence conduct, is both beneficial and effective. To give an example, the Australian sociologist John Braithwaite (2002), who was once a regulator, assumes that regulation can improve the practices of businesses or aged-care homes. He seeks to improve effectiveness by encouraging regulators to adopt a soft approach at least initially in dealing with breaches by organisations. Braithwaite and associates (Hawkins 2002, Haines 1997) have developed a theory of regulatory compliance (the regulatory pyramid) that is widely cited, partly because it provides scientific validation for practices already used by regulators and others.

Despite recognising that there can be challenges and difficulties, this literature presents a generally positive view of regulation. There are, however, other theorists who adopt a negative view of regulation, and the activities of the state, even if this is seen as effective in shaping and influencing values and behaviour. One well-known position that derives from a reading of the sociologist Max Weber (1991) is that bureaucracy can be highly damaging: even if it is established with good intentions, it can quickly become self-serving and perpetuating and damage other social institutions. Then there are organisational theorists such as the new institutionalists (Meyer and Rowan 1991) who recognise that, while regulation is beneficial, it is not always effective. Many studies in the field of law and society have shown that it can take decades for legislation to influence behaviour (Travers 2009).

Even if one does not engage with these wider literatures about regulation in any depth, they are helpful in suggesting that even the best-resourced and well-intentioned regulatory system may encounter problems, both when it is established, and further down the line. This seems important when considering regulation in housing in that the policy literature and current policy discussions in Australia generally have a highly positive view. It is understandable why this happens, given that all parties are hoping for an expansion of investment in affordable housing, and regulation is seen as the means of achieving this. On the other hand, it seems wise to anticipate potential risks, especially since these have been well-documented in other countries (see chapter 4). These include the creation of bureaucratic burdens, the tendency of regulation to become ritualistic through under-resourcing, and the related problem of regulatory capture.

When regulation is used as an instrument for changing how services are delivered, there is also the potential for political opposition from stakeholders or professional groups. We would expect all these problems to arise, to varying degrees, when introducing a national system of regulation to oversee the not-for-profit sector in Australian housing. The problems can, of course, be exaggerated by critics of government policy, and it can be argued that the benefits of regulation outweigh the

potential risks. It does, however, seem prudent to recognise that there is a downside to regulation, and that it may not always achieve its objectives.

3.1 The nature of regulatory burdens

There has been a large body of literature written on the burdens created by bureaucracy in the USA, mainly concerned with the effects of the New Deal and later the expansion of the regulatory state during the 1960s. The best known work is associated with Robert Merton (Merton et al. 1952), and organisational sociologists including Philip Selznik (1949), Peter Blau (1956) and Alvin Goulder (1952). Selznik's TVA and the Grass Roots remains an important study that has lessons for any attempt to address social problems through creating a new bureaucracy. He found that this environmental agency had to form relationships and alliances with the organisations that it was regulating. He also found that there was a tendency for the bureaucracy to take on a life of its own beyond the original purposes of the legislators. There was what in contemporary language would be called 'regulatory drift' or 'mission creep'. Regulators found that the only way of obtaining more funding and resources was to collect information about a wider range of issues. There was also a tendency for procedures established to address a particular problem to remain long after this had disappeared. Although Selznik does not quantify these negative effects, or investigate how they were experienced, his study suggests that bureaucracy can become burdensome.

In recent times, many commentators have identified a shift in governance from the Keynesian welfare state to neo-liberalism (Marquand 2004). Although there are several aspects to these changes, the central feature has been an attempt by governments to reduce the size of the state, and to introduce market competition into the provision of government services. This has been achieved in Australia, Britain and elsewhere through transferring services originally delivered by publicly funded bureaucracies to non-governmental organisations that compete for state funding (Rose 1996). There has also been a greater emphasis throughout the public sector on quality, and achieving continuous improvement following a model of management that became popular in manufacturing industry during the 1970s (Berk and Berk 1993, Travers 2007). Each of these developments has created the conditions for an expansion of regulation. Michael Power (1997) has described this as the 'audit society', meaning that there is an increasing concern with measuring and monitoring performance in both public and private organisations. British researchers in the fields of public administration, management studies (for example, Pollitt 1990 and Hood et al. 1999) have described different aspects of this expansion of the regulatory state and the consequences for organisations and professional groups.

One theme in this literature is that regulation imposes administrative burdens on organisations. The term 'burden' has to be used carefully since the managers and administrators affected by the new requirements from regulation may not see these as burdensome. Nevertheless, it could be expected that regulation will result in greater demands on particular people, or perhaps opportunity costs. A senior manager in one public sector bureaucracy recently complained that so much time is spent on accountability that there is no time to apply for grants or develop new projects (personal communication).

As discussed in chapter 2, specialised regulation has only been introduced into Australian housing recently, followed by a proposal for a national system. Although there is no indication that there are concerns about over-regulation, it would be surprising if there were no concerns, especially among smaller providers (see section 3.4). In Britain, housing associations both directly—and through their trade

association, the National Housing Federation—have lobbied government about the burdens created by regulation. Though this is perhaps a natural position for regulated organisations to take, there is indication that the concerns of housing associations were taken seriously and helped shaped the new regulatory structure introduced in 2008 (see chapter 5). In a different area of public services, Travers (2007) describes how a police force was assessed by four different government bodies, none of which recognised the data collected by the other agencies.

3.2　Ritualistic regulation

An important criticism of regulation advanced by Power (1997) and others (for example, Strathern 2000, O'Neill 2002) is that it is ritualistic. This can, of course, happen simply because regulatory agencies are given insufficient resources. On paper, there is a regulatory agency giving the assurance that quality is being monitored, and that action is taken against failing or rogue organisations. In practice, the agency only has limited resources to investigate and remedy potential problems. One organisational solution is to set performance measures that can always be achieved. An example would be the requirement that an agency demonstrates, through such documents as mission statements and strategic plans, that it sets itself goals and achieves this. A great deal of the work of British inspectorates concerned with encouraging good management practices has this character.

It is important to make clear, however, that lack of resourcing is not what these critics mean by ritualism. Instead, Power (1997) argues that any method of auditing or inspection cannot address whether an organisation is performing well or badly. This is because the delivery of services always involves the exercise of judgment. In the case of professional groups, such as doctors or teachers, it has been argued that the mechanisms used to measure performance do not address what matters to the professionals, and come to be seen as burdensome (O'Neill 2002).[1] Alternatively, professionals can become complacent and fail to reflect sufficiently on their work because there are procedures prescribed by the quality assurance body. It has been suggested, for example, that measures designed to improve safety were, in fact, responsible for the Challenger Space Shuttle disaster (Vaughan 1996).

Another example that has been much discussed recently is the regulation of financial services (see, for example, Seib 2008). Contrary to what might be assumed, there was considerable regulation of the UK banking sector through the Financial Services Authority. The problem is that the regulators failed to identify banks that were at risk from a financial crisis. There have been no studies about the effectiveness of regulation of housing agencies, either in Australia or internationally. However, one can predict that even a well-resourced system will not necessarily identify many problems that can lead to financial losses.

3.3　Regulatory capture

The term 'regulatory capture' is used of regulatory bodies that are concerned with work-place safety or environmental protection (Braithwaite et al. 2007). It is well known that such organisations only have a limited ability to influence conduct (for example, large companies can easily afford to pay fines). This is why the suggestion of socio-legal researchers, such as Hawkins (2002) and Gunningham (2007), that regulators work best through persuasion and issuing warnings, makes good sense.

---

[1] There has been vigorous opposition to managerialism and regulation from some professional groups in Britain (see, for example, McGivern et al. 2009). Most professional associations have, at least publicly, welcomed regulation as strengthening their existing procedures for maintaining standards (see, for example, Kirkpatrick et al. 2005 and Hunt 2009).

Another way of describing this process is that the regulator has to work with, rather than against, the industry being regulated. An extreme case is regulatory capture when, in fact, the government agency is staffed by people in the industry, and responsive to their needs to the extent that it does not protect the public or other stakeholders from potential harm.

As will become clear in section 3.4, this tripartite model of regulation (the regulator—the group being protected—the regulatee) does not completely fit what happens in the provision of affordable housing. It makes more sense to see the regulator as bringing together and balancing the interests of a number of stakeholders, including the government (representing the public), investors and providers. Nevertheless, in the USA and European countries, a central purpose of the regulation of housing is to protect tenants. These are seen as a vulnerable group, without market or political power who can easily receive a poor deal from housing providers. In the UK, the justification for large scale investment in public housing in the first place was that tenants received a poor standard of housing or were subject to patronising social improvement programs from the housing associations of that period (Malpass 2000). The management of housing subsequently became a key issue in local elections: this was the mechanism that made managers accountable both to tenants and to those seeking affordable housing. At the risk of over-simplifying the reasons why the welfare state ran into difficulties, it is clear that this system of democratic accountability did not work effectively by the 1970s. Many local councils were perceived as unresponsive to tenants. However, when public housing stock was transferred to housing associations, it became clear that some form of accountability was needed.

There has been much debate in the UK over whether regulation has provided an adequate safeguard to tenants, or whether more could be done through the regulatory system to protect their interests (Cave 2007). In some respects, this sounds like an attempt to recreate the democratic accountability that used to be afforded by elected councils. By contrast, in Australia, neither a public nor an affordable housing model has become an issue that can influence the outcome of local, state or national elections. Tenants groups have little political weight. This means that, if the term 'regulatory capture' is relevant, one could argue that the system of regulation already established in Victoria and NSW places little emphasis on improving the position of tenants. Housing providers in Victoria, for example, are asked to conduct satisfaction surveys but not to put tenants on their boards.

3.4   The politics of regulation

This section has demonstrated that regulation can be looked at more critically than in much policy research, in which it is presented as being beneficial and effective. It should also be clear that how regulation is viewed will depend on one's political viewpoint. Firstly, there is still a debate between those who believe that services are best delivered in traditional publicly-funded agencies, and those who believe that this can be done at higher quality or efficiency through agencies that have some degree of independence. Many on the left of politics in the UK and Australia would argue that the privatisation of utilities, transport, the railways and medical services has not been a success (for example, Strangleman 2004). On the other hand, many in government believe that it makes sense to break up large public bureaucracies.

Secondly, there will also inevitably be a difference of viewpoint between regulators and those being regulated. One insider who has some experience of these conflicts in a different country remarked that, as far as he was concerned, there was no such thing as over-regulation. This viewpoint should be taken seriously, since it suggests that from this perspective regulation is far from ritualistic. It does raise standards and

reduces the risk of failure in housing organisations. An expansion in the number of regulators, and the number of administrators and managers in housing agencies may be desirable, rather than burdensome.

Thirdly, it should not be forgotten that regulation is usually a policy instrument, in addition to a means of maintaining good standards of public administration. To give an example from a different field, one aim of regulation in universities in recent years has been to support policies that seek to achieve greater participation and access. Quality assurance initiatives such as the student satisfaction survey, or teaching excellence awards, are not neutral but designed to reward particular behaviour. In housing, one regulatory purpose is to encourage or require housing providers to set affordable rents. We know that in other countries regulators have had to contend with pressures from investors, housing providers and governments (see chapter 4). This is a difficult balancing act between different political interests.

In terms of the politics of regulation in Australian housing, we would argue that the key issue has always been, and remains, whether there will be substantial investment to address a developing shortage of affordable housing. If the Commonwealth and state governments announce a major forward program of investment, the not-for-profit sector and those affected in departments of housing will welcome regulation. On the other hand, many will become disappointed and disillusioned if regulation is established but without new investment. One advocate working for a not-for-profit concerned with housing observed that the sector had seen promises without anything substantive resulting on many occasions in the last twenty years (personal communication]). The announcement about a new regulatory framework in June 2009 had seemed initially exciting, but nothing much had happened to suggest there would be substantial investment.

4   INTERNATIONAL COMPARISONS

Reports by consultants, and previous AHURI reports about the development of regulation, often look to overseas models (Kennedy & Co. 2001, Milligan et al 2009, SGS 2009). Countries in which there has been significant private investment in not-for-profit providers have developed well-resourced and elaborate systems of regulation (Lawson 2009). These countries often had existing regulatory structures in place, but modified their approach and increased the degree of regulation as the sector increased in size and took on greater risks. In countries such as England and the Netherlands, not-for-profit providers have developed their expertise and risk management to such an extent that calls for less regulation emerged.

Now that Australian governments have accepted the need for a nationally consistent system of regulation, it is perhaps time to look at the experience of overseas countries more critically. From the brief international overview in this chapter, although regulation appears to accompany sector expansion, it is not necessarily a pre-condition. In some countries greater regulation has followed rather than preceded expansion. One lesson for Australia is that regulation is not a static once-for-all process, but rather an on-going series of changes. Triggers for change include greater public and private investment, political imperatives and changing approaches to governance, such as the rise of 'managerialism'.

This chapter provides a brief overview of three countries discussed in the previous policy reports mentioned above. It summarises recent developments in social housing regulation in England, the Netherlands (NL) and the USA, focusing on the reasons for regulatory change, the differing forms that regulation can take and tensions between stakeholders. Summary information about social housing and the regulatory approach in these three countries is given in Table 3. Having greater understanding of these three countries will help to inform questions to ask during empirical research and provide pointers as to what can go wrong with regulation systems.

Table 3: Social housing and regulation in the selected countries

	Social housing	*Regulation*
Eng.	*21% of total housing stock* Mainly provided by not-for-profit housing associations, around 30% owned and managed by local councils	Traditionally strong regulation by Housing Corporation since 1964. Greater controls introduced by 1988 *Housing Act*. In 2008, Housing Corporation abolished, replaced by Tenant Services Authority, which aims for lighter regulation (and does not provide funding)
NL	*32% of total housing stock* Provided by not-for-profit housing associations	To encourage private finance, and so associations can use their own resources, regulation was relaxed during the 1990s. Due to policy concerns, the Netherlands are considering introducing tougher regulation again
USA	*5% of total housing stock* Provided by not-for-profit housing organisations (CDCs) and public sector agencies	Funding is through tax credits mixed with other public and private sources, with recipient organisations monitored on the compliance of individual housing projects. No controls applied at organisational level, unlike England or the Netherlands

Source: Authors

4.1　The value of comparative analysis

It would be possible to argue that the social and political institutions of the countries discussed in this chapter are so different it is not possible to learn anything from overseas experiences of social housing regulation that might be relevant to Australia. Even if a general causal relationship could be identified, for example between housing regulation and investment, there remains the issue of whether the specific approach of one country can be copied to another with the same effects.

On the other hand, comparison can be helpful to understanding the distinctive, path dependent character of Australia, and how we do things differently. For example, the social housing sector in Australia is small, and most social housing is provided by state agencies. Australian not-for-profit providers are expanding rapidly, though from a low base, and most remain small organisations by the standards of most European countries (though not the USA). Therefore, the regulations appropriate for Australia, with one per cent of housing stock managed by not-for-profits, may well be different from those in the Netherlands with one-third of all housing provided by this sector. Additionally, the three countries in Table 3 have been regulating not-for-profit providers for over 20 years, and often longer. They will have greater capacity for regulation, in part due to a greater number of skilled staff employed by regulatory agencies. Understanding these differences through comparative analysis is a more limited objective than seeking 'solutions' to housing regulation or looking for direct policy transference. (For a recent overview of the different purposes, methods and application of the findings of comparative housing research, see Lawson et al. 2008).

4.2　England

The expansion of English housing associations since the 1960s was made possible partly through establishing a regulatory framework under the Housing Corporation, which was also their main funder (Malpass 2000). Regulatory controls were increased in 1988, paving the way for greater private finance investment in housing associations by ensuring that banks felt comfortable with lending to the sector.

A potential lesson for Australia from the English experience is that establishing a regulatory system involves balancing the interests of different stakeholders. From 1964, regulation was carried out by the Housing Corporation, which was also the vehicle for government investment in not-for-profit housing. The regulatory system controlled rents and set standards for good governance (for example, Housing Corporation 2001). In some countries, the introduction of private finance has led ultimately to difficulties in reconciling the regulatory requirements of government and the financial position of not-for-profits (see section 4.3). However, in England there has been an expansion of affordable housing in a way that gave sufficient returns to investors due to the continuing public subsidy of tenant incomes. In Australia, support of tenant income through Commonwealth Rent Assistance is less robust than England, a further example of subtle differences between countries' housing policies making direct comparison of housing regulatory approaches challenging.

The driving force behind recent regulatory changes in England was Treasury's push to modernise the public sector following the 2005 Hampton Report. This highlighted the UK's 'immensely complex' regulatory sector, employing 60,000 staff who carried out three million annual inspections (Hampton 2005: p.11). In response, the 2006 Elton Report proposed 'to rationalise the burdens which have accumulated over time—to free [housing] associations from unnecessary or overlapping regulation and minimise the administrative burdens they face' (Elton 2006: p.6). The report's de-regulation proposals were conservative and subsequently Professor Martin Cave was asked to review the regulation of the entire social housing sector (Cave, 2007). From

December 2008, the Housing Corporation's role was split, with investment transferred to the Homes and Communities Agency and regulation to the Tenant Services Authority (TSA), which will regulate all social housing providers, not just housing associations. Although the TSA is similar in its relationship to the Minister as the Corporation had been, it has a primary duty to protect the interests of tenants and two of eight board members are tenants.

The 2008 changes to English regulation show the use of independent reviews providing evidence as the basis for policy changes. They demonstrate how a change in the social housing sector, for example, the growth of new types of housing provider, can prompt regulatory change. However, there does not appear to have been a fundamental shift in regulatory approach in 2008. Rules and regulations remain central, supported by registration and transparency through disclosure. The Cave Review adopted recommendations from the Elton Report (2006), streamlining reporting and control procedures, although retaining the same basic framework.

4.3 The Netherlands

The Netherlands offer a salutary example of what can go wrong in attempting to reduce government expenditure on housing and bureaucratic burdens on housing associations, in the hope that they will still pursue a social mission (Hupe and Meijs 2000). This is a country with a large, well-established and regulated not-for-profit sector that, up until the early l990s, had been largely dependent on financial support from government. There was then a policy shift that reduced public subsidies and public loans so that not-for-profits had to turn to their own (substantial) cash reserves and land holdings and raise loans in the private market to develop and renew their housing. Essentially, not-for-profits became financially independent of government through financial restructuring.

Under this model, housing associations are free to sell, demolish and invest, and to choose the way they allocate their funds to social housing (Milligan et al. 2009). Many housing associations have pursued a cross subsidy model, whereby they develop more profitable market housing for owner occupation and higher value rental to boost their surpluses for reinvestment in social housing.

While not regulated to the same extent as previously, Dutch not-for-profits have continued to subscribe to forms of industry self- regulation, such as a code of conduct. They remain registered by government and the Social Housing Management Order requires them to supply affordable, good quality housing, and to involve tenants in making policy decisions. Targets and performance agreements are set in agreement with local authorities. As well, prudential supervision of new projects has been retained, linked to the provision of a loan guarantee that is underwritten by the sector itself and by government.

However, this regulatory system has proved to not be effective in preventing a gradual decline in investment in social housing by housing associations. There has also been a breakdown in the use of planning and performance agreements with local authorities, with many agreements either not prepared or not enforced (SGS 2009, Milligan et al. 2009). Thus, similar to the USA (see section 4.4), most controls operate at a project, not organisational or business strategy, level. In the Netherlands, it appears that having insufficient prescription of social outcomes and declining oversight of agencies has contributed to financial considerations driving decision-making (Milligan et al. 2009). Financing strategies for housing associations have also been affected adversely by regulatory changes in the European Union that seek to prevent unfair competition between tax privileged not-for-profits and for profit developers. This development, combined with deteriorating housing market and

housing finance conditions, has undermined the business model of housing associations:

> Financially, times are increasingly tough for the Dutch housing associations and they are very concerned about their financial continuity even forecasting the end of the sector if the central government does not assist. Once the envy of social landlords across Europe, they now spend their reserves and eat up their equity to make ends meet. (Julie Lawson—personal communication, November 2009)

It would appear that those in government and in the association sector that were behind the shift to financial independence genuinely believed that housing associations would continue to pursue a social mission. Over time, however, there has been growing friction between the associations and government over their investment levels and activities, particularly over responsibility for investment in restructuring large estates that are owned by the associations in problem neighbourhoods. There have also been financial scandals; a legal challenge by an association to the validity of the registration system; and examples of poor governance, including complaints about excessive rewards to managers and ineffective or corrupt Boards (Milligan et al. 2009). Whatever their genesis, the changes in this once lauded social pillar of the Netherlands have damaged its public reputation (Mullins 2008).

Faced with these problems, the Dutch Government has rediscovered the value of regulation and is in the process of establishing a new Corporation Authority (VROM 2009). This will set targets and conduct inspections in a similar way to the regulator in England. Interestingly, there was much resistance when the bill was debated in the Dutch parliament, even though the sector is looking for more financial support from government. Although the details do not really concern us, it is clear that the relationship between stakeholders is far from harmonious in this country. Whereas in England over-regulation led to complaints from providers, in the Netherlands it would appear that there has been too little effective regulation, and a failure to think through the risks and effects of withdrawing direct state support.

4.4   USA

It is interesting to consider not-for-profit managed housing in the USA since this has developed and operates successfully without national regulation of the kind seen as essential in England, and which is being considered in Australia. From 1986, not-for-profit Community Development Corporations (CDCs) and private companies have bid for Low Income Housing Tax Credits that support equity investments in affordable rental housing. Organisations receiving this support submit annual tax compliance returns in order for investors to continue to receive tax benefits, and these returns certify that their tenants meet the eligibility requirements set by national legislation. This form of contract regulation does not impose specific requirements or controls on recipient organisations, for example, in terms of governance. As well, not-for-profit affordable housing providers complete annual national charitable status returns in the same way as other charitable organisations.

The benefit of this approach is that regulation has arisen out of specific relationships and projects, rather than being subject to a standardised system that can become burdensome or ritualistic (see section 3). In many places, CDCs benefit from support systems funded by state and city authorities. Social housing Investments are safeguarded by good business practices while continued growth and creativity in meeting a complex mission are underwritten by stable resources. A stereotypical 'one size fits all' regulatory approach would probably not have enabled CDCs to adjust to

the rapidly changing environments many have survived over the past year (Heather Macdonald— personal communication, November 2009).

The drawbacks of this system is that oversight by the taxation authorities has not always, and perhaps would not be able to, identify and resolve organisational problems. Although this contractual system has worked well for the majority of not-for-profits, it has also resulted in a small number of spectacular failures. In these situations there are no clear rescue mechanisms, with normally an informal coalition of different financiers—both public and private—struggling to put in place new finance and management arrangements to prevent tenant evictions (Gilmour 2009). There have been well-publicised not-for-profit collapses, corruption scandals, and outrage over incompetence. Some have damaged the reputation of the whole sector (see, for example, Reingold and Johnson 2003). Although there is cultural and institutional resistance to regulation in the USA, in terms of the stakeholder model in this report, their approach has not yet achieved the right balance between stakeholder interests.

4.5   Some lessons for Australia

This section has provided a brief taste of the regulation of not-for-profit housing providers in England, the Netherlands and the USA. In each case, we could give considerably more local and contextual detail. The purpose of this positioning paper is, however, to draw out some issues that may become relevant in Australia, if there is more investment in affordable housing by governments and private investors. Some of these countries provide illustrations of how regulation can go wrong or fail to fully achieve its objectives. In England, there were concerns about over-regulation and ritualistic regulation (see chapter 3). In the Netherlands, it would appear that there was regulatory capture in that the needs of private finance shaped the whole system. In the USA, the flexibility afforded by a contract-based system of regulation has helped providers to grow, without losing sight of their social objectives, but there appears to be higher risk to tenants through organisational failure. The examples reveal complex tensions between stakeholders and the need for regulatory systems to evolve in line with changes in financing and organisational developments.

5   RESEARCH APPROACH

The theoretical and empirical research for this study is centrally concerned with questions about the purpose of regulatory frameworks; the impact of regulation, especially impacts on service outcomes and organisational culture; and the development of effective regulation.

Our aim in this positioning paper has been to provide an analytic framework that can assist in thinking about the benefits, but also the potential problems with regulation for housing as this develops in Australia. In previous reports, researchers associated with this research group have argued for an expansion of affordable housing through a new regulatory system (for example, Kennedy and Co. 2001, Milligan et al. 2009, SGS 2009). Since this policy agenda is now being pursued by the Commonwealth and state governments, it is now appropriate to consider the practical and political challenges that lie ahead.

It should also be noted that this is only a positioning paper. In this section, we explain the purpose of, and our approach to, doing empirical research, and what we hope to accomplish for the final report.

5.1   The purpose of doing empirical research

Policy-makers understandably would like answers in advance of doing empirical research. They also often prefer abstract models to having to engage with the messy realities of what happens on the ground. Our perspective as researchers is rather different, since we are interested in exploring how different groups and individuals understand regulation. We expect to find a variety of views, and hope that this project will lead to informed debate and discussion within the field of social housing.

It is worth stating in this positioning paper that we would not underestimate the challenges involved in achieving what might seem a relatively simple research objective. We are aware, for example, that not every organisation has the time to assist researchers. The relatively limited expansion of affordable housing in recent years has, nevertheless, created new responsibilities for regulators and housing agencies. It is entirely possible that research intended to investigate the existence of administrative burdens might itself be viewed as burdensome. There is also the problem that some questions that interest us may be difficult or sensitive to research. We are, for example, hoping to obtain information about how rents are set and how this influences private investors.

Despite these difficulties, we anticipate that interviews with the different stakeholders will be informative. We are interested in obtaining a variety of views and perspectives. We would also like to obtain some insight into the work of regulators, and their relationship with housing associations.

5.2   A stakeholder model

We have adopted a stakeholder model as the analytical framework for this study because it assists in understanding the different groups and interests concerned with regulation. We believe that other potential approaches, such as a risk model or a cost-benefit model, do provide the same opportunity to identify and explore the full range of issues and perspectives. However, the stakeholder model allows us to view regulations from a range of perspectives and directly address the research questions concerning the operation and impact of regulation.

The key stakeholders in not-for-profit housing have been identified in this report as the government including regulators, housing providers, tenants, and private investors.

Even before doing empirical research, it is possible to identify some of the key issues likely to be of concern to each of these interest groups.

Figure 1: Housing regulation—a stakeholder model

TENANTS → Regulator ← FUNDERS INVESTORS ↑ PROVIDERS
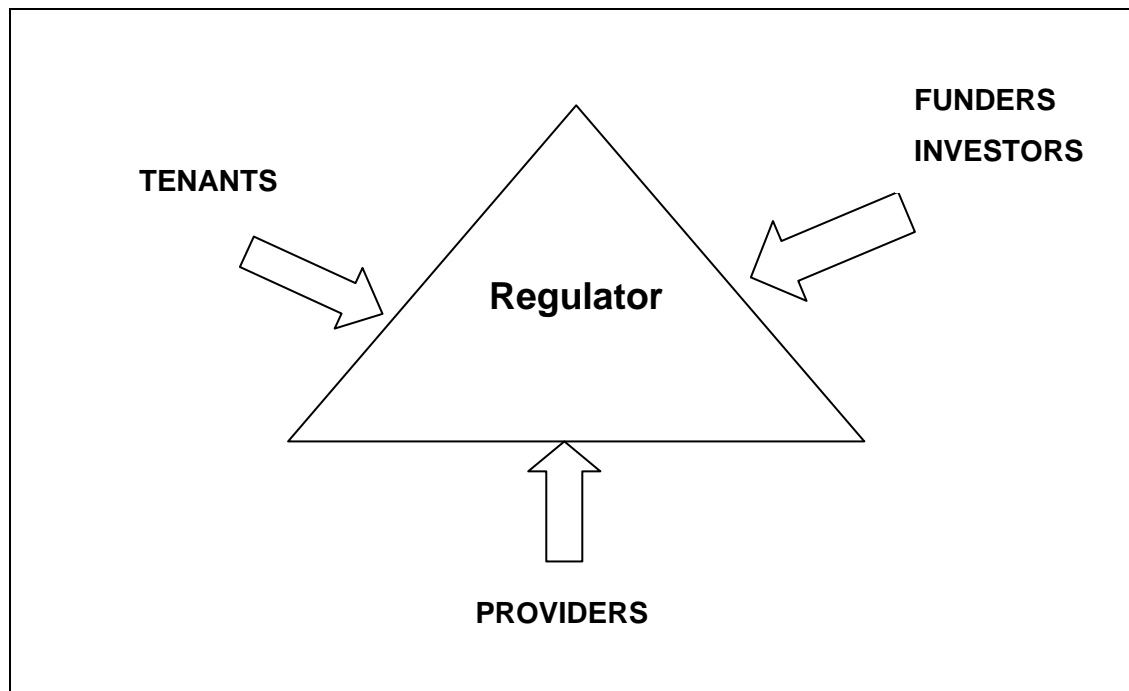
Source: authors

Government

In Australia it has traditionally been state governments that have acted as the funders and regulators of community housing, although the Commonwealth has provided policy direction and funds through the Commonwealth State Housing Agreement (CSHA). Australian policy discourse on regulating the not-for-profit housing sector has, until recently, assumed state governments as the specialist regulators. In this context, the recent move by the Australian Government to take a strong policy interest in growth of the sector and to propose national regulation represents a new approach and adds complexity to the regulatory landscape. The following discussion therefore does not distinguish between the interests of national and state governments.

Governments have multiple policy objectives and functions that influence their interests in regulation. As funders of not-for-profit housing, governments are interested in: meeting policy goals including: housing quality, targeting and affordability; achieving value for money; protecting the long term use and value of assets for social housing purposes; and attracting additional investment to the social housing task. As regulators, governments have a responsibility to protect the interests of vulnerable tenants and the wider public. It can be argued that as competing housing providers, state governments also have a potential conflict of interest in regulating other social housing providers.

Another way to view government interests in regulation is from a risk perspective. Risk management associated with the delivery of publicly funded housing services by third parties provides a predominant rationale for regulation in government policy literature (Kennedy & Co. 2001; COAG 2007). These risks have been managed for several decades through funding contracts, and the promotion of statutory regulation rests on three policy assumptions: growth of the sector through increased government

investment; an expanded role for not-for-profits in property development; and diversification of financing to include private borrowings and development partnerships. In such a scenario, project-based contracts are considered inadequate to manage the policy, development and financial risks associated with larger scale providers and increased independence from government funding.

The costs of regulation are also of significant interest to government and a cost-benefit perspective is needed to consider the cost implications of the impetus within government for risk aversion and micro-management.

Providers

Housing provider industry bodies have been at the forefront of promoting strengthened regulation of the sector in the belief that it is a precondition to attracting greater government and private sector investment. Their primary interest is that a well regulated sector will build the reputation of the sector and confidence for investors and partners (NCHF 2003; CHFA n.d.).

Sector concerns centre on the nature and administration of regulation, including issues of scope, intrusiveness, administrative burden, flexibility and fairness. Housing provider bodies are concerned to avoid over-regulation that imposes unnecessarily constraints and regulatory costs, is inconsistent with existing regulatory requirements or leads to micro-management of provider affairs. Housing providers seek to maintain flexibility to innovate, retain their organisational autonomy, and organisations with multiple activities seek to limit powers over non-housing activities and duplication across regulatory regimes. Fairness concerns include the need for dispute, complaint and appeal mechanisms and protection of confidentiality (CHFA n.d).

Tenants

Tenants are the least visible stakeholder in policy debate about regulation. They have, however, an immediate interest in the condition, amenity, location, security of tenure and cost of their housing. They also have an interest in the quality and accessibility of services, their relationship with their landlords and the way they are treated. This means their ability to have access to information about policies and the reasons for decisions and to assert their rights, for example to have complaints, reviews of decisions and grievances dealt with fairly and promptly. As citizens and as residents, social housing tenants also have an interest in influencing policy and service delivery and participating in decisions about their housing and communities. Regulation has a role in protecting the interests of tenants and providing them with a voice.

Private investors

Investors in social and affordable housing include private financiers and private and social equity partners. Equity partners may include philanthropic or religious organisations, private debt or equity investors, joint venture partners. Local governments also invest in social housing directly or by applying equity captured through planning provisions. Local government contributions may take diverse forms, including the provision of land, cash subsidies, concessions and fee waivers and in kind assistance, to support affordable housing.

The interests of debt and equity investors are twofold: firstly, to have confidence in the credentials of the organisation they invest in or partner with, and secondly, to protect their investment, especially in the event of a financial collapse or windup of the organisation. The first relies on investors having confidence in the regulatory system and its monitoring, assessment and intervention processes and access to reliable information about the housing providers. The second goes to the issue of the way the state's interest in assets is protected and the intersection between the respective

rights and obligations of the investor and government funders in the event of a default by the provider.

5.3   Obtaining the view of stakeholders

In any piece of research, choices have to be made about what is needed to obtain useful information that can illuminate a research question, and also what is practically possible. Our original intention was to conduct an in-depth case study in one provider with a focus on how it manages risk. This still seems like an important task for a pure research project. On the other hand, it became clear after making initial contacts, that providers and regulators are busy. Moreover, we do not have the resources in this project to conduct extensive ethnographic fieldwork. In some senses, there was also a chicken and egg problem. To devise questions that interest and are relevant, exploratory fieldwork has to be conducted. However, obtaining support to do fieldwork depends on having the right questions. It should be noted that the CEO in one organisation felt that the research questions in the original proposal were not sufficiently compelling: and, in retrospect, we would agree.

Instead of conducting a case study, we devised a set of themes and questions for different stakeholders, and tested them informally on insiders. As a research team, we are planning to conduct research in early 2010 in four states: Tasmania, Victoria, NSW and Queensland. The choice of these jurisdictions was, in part, practical, in that the research team members are based in or near each of these jurisdictions. This has advantages of access maximising the coverage within the available resources of time and budget. However, the main benefit for the study is that these four states provide a good mix of regulatory environments. As discussed in chapter 2, they include two (Victoria and NSW) that represent the most developed and contemporary regulatory systems providing an opportunity to examine the implementation and operation of these systems. The sample also includes Queensland where regulation is in place, but is not explicitly designed to deal with substantial growth in the sector, and Tasmania as the odd one out in that there is currently no specific housing regulation outside contracts.

We are seeking to interview people in the following categories:

→ regulators

→ larger providers

→ smaller providers

→ tenants' groups

→ investors.

In keeping with the practice in many qualitative projects that seek to contribute to an in-depth understanding of social processes, we are not seeking to conduct large numbers of interviews. Instead, in each state we are seeking to address the perspective and concerns of a few people from each category. The mix of participants will vary slightly from state to state reflecting the key stakeholders and the stage of development of regulation in that state. Recruitment will be intentional to obtain a range of perspectives in each state and nationally.

When writing up the report, we will be trying to explain the nature of different stakeholder perspectives and the tensions between them. This may require both a state by state analysis and an overall analysis of themes and issues, We are interested in presenting the material in a way that is interesting to the wider housing community to stimulate debate.

5.4   An insight into practical work

One problem with policy research is that it often stays at the level of views and perspectives (often simplified into abstract models). The difficulty here is that the practical issues that concern practitioners are not properly addressed. For this reason, we are hoping to obtain some information about how regulators approach their work, and also the work involved for the organisations being regulated (see Gilmour 2009). It would be interesting to learn, for example, what procedures are employed to check the financial viability of a company applying for registration, or the amount of paperwork involved in reporting performance annually. It would also be interesting to see if the work of regulators involves management consultancy and spreading expertise, as happens in some British inspections. This can result in close relationships with managers in the organisations being inspected, but lead to concerns about regulatory capture (Day and Klein 1990, Travers 2007). Policy reports do not usually address what happens inside organisations at this level of detail. However, we feel that some description of practical work is relevant to our research on the value and effectiveness of regulation.

6   CONCLUSION

This positioning paper is not intended to help policy-makers by addressing specific proposals for a national regulatory framework in Australia. It may, however, help policy-makers and also the wider housing community by providing an analytic framework that recognises the interests of different stakeholders. These include the government (representing the public interest), housing associations, tenants and investors. In addition, we have reviewed some of the arguments for regulation made in previous reports, and also considered a more critical literature in regulation studies and public administration.

A strong theme that has emerged from the preceding chapters is the inherent tensions in the regulatory project. The different stakeholders have competing interests. In each case, there is a need to achieve a balance between the potential benefits and the costs of regulation. Challenges for the regulator include apportioning responsibility for risk management and how to encourage voluntary compliance with standards and performance expectations, while retaining the capacity to intervene appropriately when warranted. We hope to explore these issues in more detail in our final report.

We hope that these ideas and arguments will be considered by those charged with establishing the new regulatory framework. It seems clear from the literature, and empirical studies about other areas of government, that there is a potential danger of ritualism in regulation, 'mission creep' and regulatory capture. No policy report about regulation in Australia has considered that these might be potential risks, perhaps because everyone is anxious that these reforms will take place, and sees them as the condition for greater public investment in affordable housing. One policy recommendation might be, therefore, that we need some mechanism to monitor regulation as it develops. Another is that we need to be open, and engage in discussion through the democratic political process, about the balance between say the need for greater private investment as against affordable rents.

By far the most important message we wish to advance in this positioning paper is that regulation by itself is not a panacea or magic bullet that will address what is widely recognised as a housing crisis in Australia. Without commitment to long term investment [2] and effective organisations that can use this to create affordable housing, regulation will achieve little. However, establishing a national system of regulation is an important precondition for expanding the provision of affordable housing. Australia needs both a program of long term investment in housing provided by not-for-profit organisations and an enhanced regulatory framework that is structured to ensure that appropriate outcomes result for governments, clients, provider organisations and private investors.

---

[2] For discussion of policy options, see AHURI (2006).

REFERENCES

AHURI (2006), *Financing affordable housing: A critical comparative review of the United Kingdom and Australia*, AHURI Research and Policy Bulletin, AHURI, Melbourne.

AIHW (2009), *Community housing: 2007-08*, Commonwealth State Housing Agreement National Data Reports, Australian Institute of Health and Welfare, Canberra.

ARTD Consultants (2007), *Proposal for a national regulatory framework for affordable housing*, unpublished paper.

ARTD Consultants (2009), *National regulatory system for community housing providers: Re-scoping the approach*, unpublished paper.

Australian Government (2009), National Rental Affordability Scheme. PowerPoint presentation available at http://www.chfa.com.au/Downloads/PIR%20presentation%20for%20NRAS%20Affordable%20Housing%20Summit%20Forums.pdf (accessed 2 December 2009).

Baldwin, R., Scott, C. and Hood, C. (1998,) *Reader on regulation*, Oxford University Press, Oxford.

Banks, G. (2003), 'The good, the bad and the ugly: Economic perspectives on regulation in Australia', Address to the Conference of Economists, Hyatt Hotel, Canberra, 2 October.

Berk, J. and Berk, S. (1993), *Total quality management: Implementing continuous improvement.*,Sterling, New York.

Berry, M. (2003), 'Why it is important to boost the supply of affordable housing in Australia—and how we can do it', *Urban Policy and Research*, 21(4), pp.413–35.

Better Regulation Task Force (2005), *Less is more: Reducing the burdens, improving outcome*, Cabinet Office, London.

Bisset, H. and Milligan, V. (2004), *Risk management in community housing. Report for the National Community Housing 2004 Forum*, available at http://www.nchf.org.au/publications.html

Black, J. (2005),'The emergence of risk-based regulation and the New Public Management in the UK', *Public Law*, 15(3), pp.512–49.

Blau, P. (1956), *Bureaucracy in modern society*, Random House, New York.

Braithwaite, J. (2002), *Restorative justice and responsive regulation*, Oxford University Press, New York.

Braithwaite, J., Makkai, T. and Braithwaite, V. (2007), *Regulating aged care: Ritualism and the new pyramid*, Edward Elgar, Cheltenham.

Bratt, R. (2008), 'Nonprofit and for-profit developers of subsidised rental housing: Comparative attributes and collaborative opportunities', *Housing Policy Debate*, 19(2), pp.323–65.

Cave, M. (2007), *Every tenant matters: A review of social housing regulation*, Communities and Local Government Publications, West Yorkshire.

CHFA (no date), *Regulation Principles*, Community Housing Federation of Australia, Canberra. Accessed 15 November 2009 at: http://www.chfa.com.au/Downloads/REGULATION%20PRINCIPLES%20formal.pdf

COAG (2007), *Best practice regulation: A guide for Ministerial Councils and national standard setting bodies*, http://www.innovation.gov.au/General/IndPol-SILS/Pages/PrinciplesandGuidelinesforNationalStandardSettingandRegulatoryActionbyMinisterialCouncilsandStandardSettingBodies.aspx (accessed 6 March 2008).

COAG (2009), *Nation Building and Jobs Plan National Partnership Agreement: Schedule C Social Housing*. Australian Government, Canberra.

Day, P. and Klein, R. (1990), *Inspecting the inspectorates: Services for the elderly*, Joseph Rowntree Memorial Trust, York.

Department of Housing and Works (2008), *A legislative framework for community housing: Proposed amendments to the Housing Act 1980 and request for comments*, The Government of Western Australia, Perth.

DHS (2007), *Eligibility, targeting and rent affordability framework for properties funded by the Office of Housing, policy document version 3*, Department of Human Services, Melbourne.

DHS (2006), *Towards an integrated Victorian housing strategy: A framework to address our future housing challenges*, State of Victoria, Department of Human Services, Melbourne.

Elton, L. (2006), *Review of regulatory and compliance requirements for RSLs. A report to the Housing Corporation by a review group chaired by Sir Les Elton*, Housing Corporation, London.

Ferlie, E., Lynn, L. and Pollitt, C. (eds.) (2005), *The Oxford handbook of public management*, Oxford University Press, Oxford.

France, L. (2007), *Potential governance arrangements for a future Australian affordable housing system*, AHURI, Melbourne.

Giddens, A (1998), *The Third Way. The Renewal of Social Democracy*, Polity Press, Cambridge.

Gilmour, T. (2009), *Network power: An international study of strengthening housing association capacity*, Doctoral Thesis, University of Sydney.

Gouldner, A. (1952), 'Red tape as a social problem' in R. Merton, A. Gray, B. Hockey, and H, Selvin (eds.), *Reader in bureaucracy*, The Free Press, New York, pp. 410–18.

Grover, R. and White, R. (2000), *Use of private finance in social housing: Lessons from British experience*, RICS Research Foundation, London.

Gunningham, N. (2007), *Mine safety: Law, regulation, policy*, The Federation Press, NSW.

Haines, F. (1997), *Corporate regulation: Beyond 'punish' or 'persuade'*, Clarendon Press, Oxford.

Hampton, P. (2005), *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, London.

Hawkins, A. (2002), *Law as a last resort: Prosecution in a regulatory agency*, Oxford University Press, Oxford.

Hood, C., Scott, C., Oliver, J., Jones, G. and Travers, T. (1999), *Regulation inside government: Waste-watchers, quality police and sleaze busters*, Oxford University Press, Oxford.

Housing Corporation (2001), *Treading the boards: A self-assessment framework for board performance*, Housing Corporation, London.

HPLGM (2005), *Framework for national action on affordable housing.* 4 August 2005, Housing, Planning and Local Government Ministers (HPLGM).

Housing NSW (May & December 2009), *Community Housing Division eNews.*

Housing NSW (2008), *Regulatory impact statement: Housing regulation 2009*, Housing NSW, Ashfield.

Housing Registrar (2010), *Registered Housing Sector.* Accessed 13 Feb 2010 at www.housingregistrar.vic.gov.au/registered-housing-sector/

Housing Registrar (2009), *Housing Registrar Report 2007–08*, Victorian Housing Registrar, Melbourne.

Housing Registrar (2007a), *Our regulatory framework*, Victorian Housing Registrar, Melbourne.

Housing Registrar (2007b), *Intervention guidelines for Registrar of Housing Agencies*, Victorian Housing Registrar, Melbourne.

Housing Registrar (2007c), *Performance standards for Registered Housing Agencies*, Victorian Housing Registrar, Melbourne.

Hunt, D. (2009), *The Hunt review of the regulation of legal services*, House of Lords, London.

Hupe, P. and Meijs, L. (2000), 'A hybrid domain: The field of social housing' in P. Hupe, L. Meijs, C. Lucas, M. Vorthoren and M. Rotterdam (eds.), *Hybrid governance: The impact of the nonprofit sector in The Netherland*, Erasmus University, Rotterdam.

Jacobs, K., Kemeny, J. and Manzi, T. (eds.) (2005), *Social constructionism in housing research*, Ashgate, Aldershot.

Kennedy & Co. (2001), *A regulatory framework for community housing in Australia: Volumes 1 and 2*, National Community Housing Forum, Sydney.

Kirkpatrick, I., Ackroyd, S. and Walker, R. (2005), *The new managerialism and public service professions: Change in health, social services and housing*, Palgrave, Basingstoke.

Lawson, J., Haffner, M. and Oxley, M. (2008), *Comparative housing research in the new millennium: Methodological and theoretical contributions from the first decade.* Unpublished paper.

Lawson. J. (2009), *An institutional framework for a revitalised social housing sector.* Unpublished paper for SGS.

Malpass, P. (2000), *Housing associations and housing policy: A historical perspective*, Palgrave, Basingstoke.

Marquand, D. (2004), *Decline of the public: The hollowing out of citizenship*, Polity Press, Cambridge.

McGivern, G., Fischer, M., Ferlie, E. and Exworthy, M. (2009), *Statutory regulation and the future of professional practice in psychotherapy and counselling*, King's College, London.

Merton, R., Gray, A., Hockey, B. and Selvin, H. (eds.) (1952), *Reader in bureaucracy*, The Free Press, New York.

Meyer, J. and Rowan, B. (1991), 'Institutionalised organizations: Formal structure and myth and ceremony' in W. Powell and P. DiMaggio. (eds), *The new institutionalism in organizational analysis*, University of Chicago Press, Chicago, pp.41–62.

Milligan, V. (2005), *Directions for affordable housing policy in Australia: Outcomes of a stakeholder forum*, AHURI, Melbourne.

Milligan, V., Gurran, N., Lawson, J., Phibbs, P. and Phillips, R. (2009), *Innovation in affordable housing in Australia: Bringing policy and practice for not for profit housing organisations together*. Final Report No. 134 AHURI, Melbourne.

Milligan, V., Phibbs, P., Fagan, K. and Gurran, N. (2004), *A Practical framework for expanding affordable housing services in Australia: Learning from experience*. Final Report No. 65 AHURI, Melbourne.

Morgan, B. and Yeung, K. (2007), *An introduction of law and regulation: Text and materials*, Cambridge University Press, Cambridge.

Mullins, D. (2008), *Organising non-profit housing: Some European experiences*. Keynote address to Australian National Housing Conference, February, Sydney.

NCHF (2003), *Community housing regulation: Manage the risks, develop the industry*. National Community Housing Forum (NCHF), Sydney.

NSW Government (2008), *Housing regulations 2009*, public consultation draft, mimeo.

O'Neill, O. (2002), *A question of trust: The BBC Reith Lectures 2002*, Cambridge University Press, Cambridge.

Phillips, R., Jones, A., & Milligan, V. (2009), *Integration and social housing in Australia: challenges and options*, AHURI: Melbourne.

Plibersek, T. (2009a), *Room for more: Boosting providers of social housing*. Speech by the Minister for Housing to the Sydney Institute, Sydney, 19 March 2009.

Plibersek, T. (2009b), *Housing Ministers progress housing reforms* at http://www.tanyaplibersek.fahcsia.gov.au/internet/tanyaplibersek.nsf/content/husing_report_27mar09.htm (accessed 21 April 2009)

Plibersek, T. (2009c), *Keynote address: National Housing Conference*, Melbourne.

Pollitt, C. (1990), 'Doing business in the temple: Managers and quality assurance in the public services', *Public Administration*, 68(4), pp.435–52.

Power, M. (1997), *The audit society: Rituals of verification*, Oxford University Press, Oxford.

Rheingold, K. and Johnson, C. (2003), 'The rise and fall of Eastside Community Investments Inc. The life of an extraordinary community development corporation'. *Journal of Urban Affairs*, 25(5), pp.527–49.

Rose, N. (1996), 'The death of the social? Re-figuring the territory of government,. *Economy and Society*, 25(3), pp.327–56.

Seib, C. 2008, 'The FSA Northern Rock report: The Regulator that missed the collapse', *Times Online*, 27 March 2008: http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/

Selznik, P. (1949), *TVA and the grass roots*, University of California Press, Berkeley.

SGS Economics and Planning (2009), *A vision and plan for social housing in Australia*. Report for Powerhousing Australia. SGS, Melbourne.

Strathern, M. (ed.) (2000), *Audit cultures: Anthropological studies in accountability, ethics and the academy*, Routledge, London. pp. 57–89.

Strangleman, T. (2004),*Work identity at the end of the line? Privatisation and culture change in the UK rail industry*, Palgrave, Basingstoke.

Travers, M. (2007), *The new bureaucracy: Quality assurance and its critics*, Policy Press, Bristol.

Travers, M. (2009), *Understanding law and society*, Routledge, London.

Vaughan, D. (1996), *The Challenger launch decision: Risky technology, culture, and deviance at NASA*, University of Chicago Press, Chicago.

VROM (2009), 'Kabinet wil aanpassing stelsel woningcorporaties' [Cabinet wants reforms to housing corporation system]. Ministry of Housing, Physical Planning and the Environment, The Hague http://www.vrom.nl/pagina.html?id=41794.

Weber, M. (1991), 'Bureaucracy' in H. Gerth C. Wright Mills (eds.), *From Max Weber*, Routledge, London, pp.196–244.

AHURI Research Centres

Queensland Research Centre
RMIT Research Centre
Southern Research Centre
Swinburne-Monash Research Centre
UNSW-UWS Research Centre
Western Australia Research Centre