

Intervention Guidelines for the Registrar of Housing Agencies

August 2005

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These guidelines are established by the Minister for Housing pursuant to subsection 3 of section 130 of the Housing Act 1983 (the Act) as amended by the Housing (Housing Agencies) Act 2004 (the amending Act). They relate to the exercise of powers by the Registrar (Registrar) under Division 8 of Part VIII of the Act.

The guidelines should be read in conjunction with the Act and with Performance Standards determined by the Minister under section 93 of the Act.

Introduction

The focus of the amending Act is to provide a regulatory framework for non-profit rental housing agencies providing low-cost rental housing for low income tenants. Besides these guidelines, other key components of the framework are:

- a registration system for those rental housing agencies; and
- Performance Standards determined by the Minister for Housing relating to, among other things, an agency's governance, management, probity, financial viability, tenancy management, housing management and maintenance, allocations policy, rent setting policy and risk management.

Intervention philosophy

The Government's objective is to facilitate the growth in the provision of affordable housing by non-profit rental housing agencies within the community housing sector, to enable that sector to maintain viability, and in the case of Registered Housing Associations, to be self-sustaining.

While public housing will continue to provide the mainstay for low cost rental housing for low income Victorians, the Government acknowledges that the community housing sector provides low income tenants with an alternative choice to public housing.

The merit in supporting alternative service provision lies in the sector's capacity to respond to housing needs in a flexible and cohesive way, through its close links with other community services, and its particular ability to work successfully with its members and the tenants it represents. To preserve and build on its achievements, the sector should operate autonomously within broad regulatory parameters, to develop its own strategies for meeting housing needs.

In addition, the Government has broader responsibilities that require it to ensure that the rights of tenants and prospective tenants are duly recognised, and that public funds disbursed within the sector are responsibly spent and properly accounted for. It also has a responsibility to provide a measure of confidence to institutional investors and philanthropic organisations committing funds to affordable housing strategies.

With those competing considerations in mind, the primary focus of the regulatory framework is to establish registration criteria and Performance Standards reflecting the benchmarks against which successful performance can be assessed, and to provide the mechanism by which the Registrar of Housing Agencies can ensure that registered agencies continue to meet the standards set.

Compliance with Performance Standards in the first instance is a matter of agency self-assessment. The role of the Registrar of Housing Agencies is to review assessments and to monitor the performance of each agency and the sector as a whole.

Formal intervention powers are provided to ensure that Performance Standards are maintained at an effective level. Achievement of this purpose also helps to ensure that the viability of the affordable housing market is maintained; the reputation of the sector is protected; and publicly funded assets are preserved for the purpose for which they are acquired.

The formal powers of intervention are considered to be powers of last resort, to be used where the registered agency's ability or willingness to deliver on Performance Standards or other matters of compliance with the Act is compromised significantly. This minimal approach to intervention relies heavily on trust, co-operation and dealings in good faith between the Director of Housing, the Registrar and registered agencies.

Broad principles of intervention

In deciding whether formal intervention is appropriate, the Registrar must have regard to the Government's intervention philosophy above.

Further, in deciding whether to exercise an intervention power, the Registrar must have regard to:

- the overall circumstances of the agency;
- the nature of the circumstances forming the intervention trigger;
- any action the agency has taken to mitigate or resolve the intervention trigger, and the success of such action;
- alternative approaches which would enable the agency to successfully manage and mitigate the specific circumstances of the intervention trigger;
- sources of assistance or support which may be available to the agency;
- the likelihood of the intervention trigger being swiftly and appropriately remedied;
- the degree to which the agency has kept the Registrar informed of the circumstances forming the intervention trigger, and the level of co-operation it displays towards the Registrar; and
- the overall compliance history of the agency.

Where:

- the agency appears to be functioning effectively; and
- the intervention trigger appears to be capable of being appropriately remedied in an acceptable period; and
- the agency demonstrates co-operation; and
- the agency has a good compliance history;
- the Registrar may simply request the agency to remedy the intervention trigger. Any request must be recorded.

Where the Registrar is not satisfied about one or more of these matters, or if the registered agency does not comply with the informal request made, the Registrar may exercise an appropriate power under Division 8 of Part VIII.

Use of intervention powers

The ability of the Registrar to intervene in the affairs of a registered agency is strictly limited.

Intervention trigger

First, the Registrar must be satisfied that there is an 'intervention trigger'. The following grounds for intervention set out in subsection 130 (1) of the Act are the only permissible intervention triggers. They are:

- (a) A failure to meet the registration criteria or Performance Standards;
- (b) A failure to comply with a requirement or direction under any of sections 91, 100, 104, 106, 108 or 109;
- (c) An adverse effect (or potential adverse effect) on an agency's capacity to comply with registration criteria or Performance Standards, or its capacity to provide affordable housing, arising from either a change to the agency's governing instrument or business activities; or
- (d) A failure to comply with a recommendation of the Registrar concerning an appointment or appointments to the agency's governing body.

Appropriate action

Further, subsection 130 (2) provides that the Registrar must not exercise a power under Division 8 of Part VIII of the Act unless the Registrar is satisfied that such exercise is appropriate in the circumstances and accords with these guidelines.

Exercise of the intervention powers

For the avoidance of doubt, the Registrar will not exercise the power under Section 131 unless an intervention trigger listed at (a) – (c) above exists, and may exercise one or more of the powers under Section 132 if any of the triggers listed at (a) – (d) exist. The exercise of a power under either section will be subject to the intervention being reasonable and in compliance with these guidelines.

Types of formal intervention

Section 131 – Recommendations for appointments to the governing body

The Registrar may recommend the appointment of one or more appropriately qualified persons to the governing board of the agency under section 131 of the Act. The Registrar must first consult with the governing body of the agency about a proposed recommendation, and must consider any nominations put forward by the governing body.

When may the Registrar consult with an agency and recommend an appointment?

An 'intervention trigger' under section 130(1)(a)–(c) must exist.

The Registrar should consider the use of power under section 131 in circumstances where:


- the agency's ability to comply with registration criteria, Performance Standards or otherwise comply with the requirements of the Act is adversely affected by the decision making processes operating within the governing body; and
- it seems likely that the appointment of one or more members to the governing body would result in more effective decision making; and
- it seems likely that the altered composition of the governing body will enable the agency to achieve compliance with registration criteria, Performance Standards and the requirements of the Act; and
- the agency's viability will not be compromised by such an approach.

Specific guidelines:

1. In exercising this power, the Registrar must consider the interests of the agency and its tenants and other stakeholders.
2. Provided it will not result in undue delay in resolving the intervention trigger, the governing body of the agency should be given the opportunity to consult its members about a proposed recommendation via the democratic processes provided by its governing instrument. It is to be noted that any decision of the Registrar is reviewable to VCAT within 28 days. The Registrar should endeavour to accommodate further requests for consultation with the governing body of the agency made within the 28-day period after it has consulted its membership.
3. All other things being equal in terms of candidates' skills, experience and ability to achieve the desired outcome of intervention, the Registrar may agree to recommend any nomination for appointment made by the agency.
4. The Registrar must be satisfied that any nominee (of the agency or of the Registrar) is available for appointment within an appropriate time frame and has given informed acceptance of the appointment.
5. The Registrar must also consider whether to recommend to the Minister that an indemnity be offered to the proposed appointee. No representations may be made to any party that an indemnity will or may be provided until both the Minister and the Treasurer have provided their written approval.

Section 132 – Instructions to a registered agency

The Registrar may issue one or more instructions under section 132 of the Act, and the agency must carry out those instructions in accordance with the legislation under which it is incorporated. To the extent that implementation of the instruction is inconsistent with the provisions of Chapters 2B and 5, and the provisions listed in section 141 of the Corporations Act 2001, the latter is displaced. (See section 129 of the Act.)



There are two limitations on the instructions power: the Registrar must take all reasonable steps to consult with the 'relevant regulatory body' before issuing an instruction; and in issuing an instruction or approval, the Registrar must have regard to the interests of tenants of the agency. The Registrar may also consult with the agency's creditors prior to issuing an instruction. The relevant regulatory body is the body under which the agency is incorporated.

Instructions may be made about any matter relating to the registered agency, and in particular, about:

- entering into arrangements with one or more other registered agencies;
- appointments to the governing body of the agency;
- the appointment of an administrator; and/or
- the winding up of the agency and distribution of its assets.

'Arrangements' can include transfers of some or all of an agency's land in which the Director of Housing has an interest to other agencies or a merger of one or more agencies.

When should the Registrar consider issuing instructions?

An 'intervention trigger' under section 130(1) must exist.

The situations in which consideration should be given to issuing instructions of the above nature include:

- where the Registrar has serious concerns about the on-going financial viability of the agency, and about the agency's ability to resolve those concerns;
- the agency has failed to satisfactorily respond to informal requests by the Registrar that it maintain eligibility for registration and/or comply with one or more Performance Standards; and/or
- where it appears that the agency's ability to meet the Performance Standards and otherwise function effectively may be seriously compromised.

The Registrar's view on the matters above should be informed by the reports provided by the agency (or by the failure to provide adequate reports) and by the results of any inspection undertaken under Division 7 of Part VIII of the Act. The Registrar should also take into account relevant information provided by tenants, the agency's relevant regulatory body and creditors of the agency.

The Registrar must brief the relevant regulatory body on the matters giving rise to the intervention trigger, and on the course of intervention action the Registrar proposes to adopt. Any view expressed by the relevant regulatory body must be taken into account before formal intervention commences.

Specific guidelines

In addition to applying the broad principles of intervention above, the Registrar must apply the following specific guidelines:

Arrangements with other agencies

1. The Registrar must consider whether an instruction to enter into an arrangement with another registered agency, when implemented, will minimise the loss of affordable housing stock to the sector, and will minimise any dislocation of tenants.
2. The agency or agencies with which arrangements are to be made must be fully briefed on what is proposed, and must agree with the proposed course of action. The Registrar cannot compel a complying agency to accept a merger proposal.
3. Where a merger or transfer of land is proposed, the Registrar must take into consideration whether adequate provision has been made for the agency's debts, and whether the merged entity will be able to operate viably.
4. The Registrar should also consider whether any financial assistance to an entity will be required for any purpose associated with the exercise of an intervention power. With the prior approval of the Minister, the Registrar may initiate an approach to the Department of Treasury and Finance seeking the Treasurer's approval to an appropriate form of financial accommodation to the entity.

No representations may be made to any party that a financial accommodation will be made to an entity until both the Minister and the Treasurer have provided their written approval.

Instructions to make appointments to the governing body

1. The Registrar must not issue an instruction concerning the appointment of one or more persons to the governing body under section 132 unless the agency has failed to comply with a recommendation made under section 131.
2. The guidelines that apply to making a recommendation under section 131 also apply to giving an instruction under subsection 132 (2) (b), except that further consultation with the governing body of the agency, is at the discretion of the Registrar.

Instructions to appoint an administrator to control and direct the registered agency in general, where the circumstances allow:

1. If an independent financial audit of the agency has not been undertaken within the preceding 3 months, the agency should be directed to obtain this forthwith.
2. Creditors of the agency should be consulted to ascertain their intentions with respect to enforcement of debts.
3. The Registrar should not direct the agency to appoint an administrator unless
 - (a) creditors support this course of action;
 - (b) the audit report indicates there is a reasonable prospect that the agency will be able to trade out of difficulty within a reasonable period of time; and
 - (c) the Registrar reasonably believes the interests of tenants are best served by this course of action.
4. Nothing in guidelines (1) to (3) precludes the Registrar from issuing an instruction without following these procedures if the Registrar reasonably believes that to do so would cause an undue delay in taking action.

Instructions to wind up and distribute the assets of the registered agency

1. In general, the Registrar must not issue an instruction for an agency to commence a winding up and distribution of assets unless:
 - (a) the governing body of the agency agrees, or
 - (b) the Registrar reasonably believes that other courses of action outlined above are undesirable or not cost-effective, having regard to the interests of tenants and creditors of the agency.
2. The Registrar must approve the agency or agencies to which the balance of assets are to be transferred.

Other matters the Registrar thinks fit.

The Registrar must frame instructions to an agency in a manner most likely to resolve the intervention trigger. This can include other directions than those listed above, provided these would reasonably be expected to produce satisfactory outcomes.

