

---

NATIONAL HOUSING FINANCE AND INVESTMENT CORPORATION  
BILL 2018

---

EXPOSURE DRAFT EXPLANATORY MATERIALS







---

# Glossary

---

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
Bill	National Housing Finance and Investment Corporation Bill 2018
Board	Board of the National Housing Finance and Investment Corporation
Bond Aggregator	Affordable Housing Bond Aggregator
Chair	Chair of the National Housing Finance and Investment Corporation
CEO	Chief Executive Officer of the National Housing Finance and Investment Corporation
CHP	Registered community housing provider
Finance Minister	The Minister who administers the <i>Public Governance, Performance and Accountability Act 2013</i>
Legislation Act	<i>Legislation Act 2003</i>
Minister	Treasurer
NHFIC	National Housing Finance and Investment Corporation
NHIF	National Housing Infrastructure Facility
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
PGPA Rule	<i>Public Governance, Performance and Accountability Rule 2014</i>
Remuneration Tribunal Act	<i>Remuneration Tribunal Act 1973</i>



---

# ***General outline and financial impact***

---

## **National Housing Finance and Investment Corporation**

This Bill gives effect to the Government's commitment to establish a new corporate Commonwealth entity, the NHFIC, to improve housing outcomes for Australians. This commitment was announced as part of the Government's *Reducing Pressure on Housing Affordability* plan in the 2017-18 Budget.

### **Context**

Housing plays a critical role in the social and economic wellbeing of Australians and the economy as a whole. Housing is fundamental to employment, educational and health outcomes, and is a significant driver of investment, productivity and participation.

Australia has experienced a significant appreciation in house prices over the last 15 years, driven by a range of factors including high population growth, increased access to finance, sustained economic growth, increased investor activity and the fact that housing supply has not kept up with demand, particularly in major metropolitan areas.

The most noticeable impacts of sustained increases in house prices have been the reduction in home ownership experienced by younger Australians, an increase in the percentage of Australians renting, and greater competition in the rental market, especially for properties at the more affordable end of the market.

This Bill gives effect to elements of the Government's *Reducing Pressure on Housing Affordability* plan, including establishing the NHFIC – a new corporate Commonwealth entity dedicated to improving housing outcomes, and providing broad functions to enable it to administer:

- a \$1 billion NHIF which will help to finance critical infrastructure to increase the stock of housing, particularly affordable housing, and to bring forward the supply of such housing; and
- a Bond Aggregator which will improve the efficiency of financing for CHPs, enabling them to improve housing outcomes for their clients (CHPs are non-government organisations, including not-for-profit organisations, which provide subsidised housing for people on a very low, low or moderate income or for people with additional needs).

This is part of the Government's broader plan to improve outcomes across the housing sector, which is focused on three key pillars:

- boosting the supply of housing and encouraging a more responsive housing market, including by unlocking Commonwealth land;
- creating the right financial incentives to improve housing outcomes for first home buyers and low- to middle-income Australians, including through the Government's First Home Super Saver Scheme; and
- improving outcomes in social housing and addressing homelessness, including through tax incentives to boost investment in affordable housing.

This work is further supported by the efforts that the Commonwealth and State and Territory governments are making to address housing affordability through the development of a new National Housing and Homelessness Agreement.

## **Elements of the Bill**

Key elements of this Bill include:

- The NHFIC is to be established as a corporate Commonwealth entity.
- The NHFIC will be governed by an independent, skills-based, part-time Board consisting of a Chair and between four and six other voting members, responsible for decision making and the efficient and effective performance of the NHFIC's functions. A Commonwealth official may be appointed on a time-limited basis as a non-voting observer to attend and participate in Board meetings.
- The Government will set its expectations about the performance of the NHFIC's functions in an Investment Mandate (a non-disallowable legislative instrument), which must be issued by the Minister. The Investment Mandate may include directions about such matters as strategies and policies which the Board must observe, decision-making criteria, and risk and return on investments. The Investment Mandate may not, however, direct the NHFIC in relation to specific investments.
- NHFIC is a financial intermediary, with its key function to make loans and investments and issue grants, within constitutional limitations, to improve housing outcomes.



Initially, this function will be performed through the administration of the Bond Aggregator and the NHFIC, which will be described in the Investment Mandate.

- The Board must maintain adequate capital and reserves of the NHFIC and will consider, at the end of each financial year, whether a dividend may be paid to the Commonwealth.
- Liabilities of the NHFIC will be guaranteed by the Commonwealth.
- A Chief Executive Officer will be responsible for the day to day administration of the NHFIC, and the NHFIC will be able to employ staff and consultants as needed. The Board may establish committees to assist it.
- The NHFIC will be subject to the requirements relating to corporate Commonwealth entities in the PGPA Act, including reporting requirements. The NHFIC will need to include certain additional detail in its annual report, including the particulars of any changes to the Investment Mandate and a summary of activities undertaken pursuant to its key function.
- Rules may be made under the Bill.
- The operation of the Bill will be reviewed three years after its commencement.



---

# Chapter 1

## Preliminary

---

### Outline of chapter

1.1 Part 1 of the Bill sets out the objects of the Act, arrangements for commencement, and definitions.

### Detailed explanation of new law

#### *Short title*

1.2 This section provides that the Bill, when enacted, may be cited as the *National Housing Finance and Investment Corporation Act 2018*. [Clause 1]

#### *Commencement, application and transitional provisions*

1.3 The Bill will apply from commencement, that is, on the day after Royal Assent, to enable the initial establishment of the NHFIC including appointment of board members and establishment of governance structures. [Clause 2]

1.4 Transitional provisions will provide that the NHFIC may only commence making decisions regarding the making of loans, investments or grants after 30 June 2018.

1.5 The Bond Aggregator and NHIF functions of the NHFIC will commence operation on a date after 30 June 2018.

#### *Objects*

1.6 The object of the Bill is to establish the NHFIC to contribute to efforts to increase the supply of housing by:

- encouraging investment in housing, particularly in the social or affordable housing sector; and
- providing finance, grants or investments that complement, leverage or support Commonwealth, State or Territory activities relating to housing; and
- contributing to the development of the scale, efficiency and effectiveness of the community housing sector in Australia.

[Clause 3]

***Simplified outline of the Act***

1.7 The Bill contains a simplified outline that summaries its operation. The simplified outline is intended to assist users of the Bill to understand the substantive provisions but is not otherwise comprehensive. For a detailed understanding users of the Bill need to refer to the substantive provisions and explanation in this explanatory material. *[Clause 4]*

***Definitions***

1.8 The Bill defines a number of terms. The terms that are defined for the purposes of the structure of the NHFIC include NHFIC, Board, Board member, CEO and Chair. The Finance Minister is defined as the Minister administering the PGPA Act. Paid work is defined as work for financial gain or reward irrespective of the status of the person undertaking the work (e.g. an employee or otherwise). *[Clause 5]*

***Crown to be bound***

1.9 This Act binds the Crown in each of its capacities but does not make the Crown liable to prosecution for an offence. *[Clause 6]*

---

# Chapter 2

## The NHFIC

---

### Summary of new law

- 2.1 Part 2 of the Bill:
- establishes the NHFIC and sets out its functions, powers and constitutional limits; and
  - provides for the Investment Mandate for the NHFIC.

### Detailed explanation of the new law

#### Establishment of the NHFIC, functions, powers and constitutional limits

##### *Establishment*

2.2 This Bill establishes the NHFIC as a corporate Commonwealth entity. This reflects the intention that the NHFIC will operate independently from government in exercising its functions and adopt a corporate model of governance.

2.3 As a corporate Commonwealth entity the NHFIC is subject to the PGPA Act which imposes obligations regarding reporting and the use and management of public resources. *[Subclause 7(1) and note to Subclause 7(1)]*

- 2.4 The NHFIC is:
- a body corporate;
  - required to have a seal that must be secured as directed by the Board and only used as authorised by the Board;
  - able to acquire, hold and sell real and personal property; and
  - able to sue and also be sued.

*[Subclauses 7(2) and (3)]*

##### *Functions of NHFIC*

- 2.5 The functions of the NHFIC include:
- making loans, investments and grants to improve, directly or indirectly, housing outcomes;
  - setting terms and conditions for such loans, investments and grants;

- any other functions conferred on the NHFIC by the Bill or any other Commonwealth law;
- to do anything that is incidental or assists in the performance of the above functions;
- granting financial assistance to States and Territories for the purposes of any of the matters mentioned above in this paragraph; and
- setting the terms and conditions of such grants of financial assistance.

*[Subclauses 8(1) and (2)]*

2.6 NHFIC's functions reflect its role as an intermediary with its main function to provide financial assistance to improve, whether directly or indirectly, housing outcomes for Australians.

2.7 The initial activities or 'business lines' of the NHFIC will be to operate the Bond Aggregator and NHIF, details of which are intended to be included in the Investment Mandate. The NHFIC will have the capacity to deliver other housing related programs in the future in accordance with its functions.

2.8 In performing its functions, the NHFIC is required to act in a proper, efficient and effective manner. This ensures that public monies are used in an appropriate way. *[Subclause 8(3)]*

***Powers of NHFIC***

2.9 The NHFIC has power to do all things necessary or convenient to be done for or in connection with the performance of its functions. For example, the NHFIC would have the power to enter into any contract. *[Clause 9]*

***Constitutional limits***

2.10 The Bill ensures that it is not implied that the NHFIC can perform functions that exceed the Commonwealth's legislative power under the Constitution. Therefore the Bill enables the NHFIC to perform its functions only for purposes related to specific constitutional powers. NHFIC would be likely to perform its functions for purposes related to:

- the corporations power in paragraph 51(xx) of the Constitution, however it may only do so if:
  - the NHFIC has entered into an arrangement, with a constitutional corporation, that sets out the terms and conditions on which money may be payable to the corporation under the arrangement; and

- those terms and conditions provide for the circumstances in which the corporation is required to repay amounts paid under the arrangement;
- the external affairs power in the Constitution, including:
  - implementing the *International Covenant on Economic, Social and Cultural Rights*<sup>1</sup> done at New York on 16 December 1966, and in particular Article 11 of that Covenant; or
  - implementing another international agreement to which Australia is a party;
  - addressing matters of international concern; or
  - performing its functions in a place outside Australia;
- granting financial assistance to which section 96 of the Constitution applies; and/or
- a Territory.

2.11 The Bill, however, lists other Constitutional powers on which the NHFIC may rely in performing its functions. The Bill therefore also enables the NHFIC to perform its functions for purposes related to:

- collecting statistics; or
- trade or commerce:
  - between Australia and places outside Australia; or
  - among the States or within a Territory, between a State and a Territory or between two Territories; or
- using postal, telegraphic, telephonic or other like service under paragraph 51(v) of the Constitution; or
- people of any race under paragraph 51(xxvi) of the Constitution; or
- railway construction or extension under paragraph 51(xxxiv) of the Constitution; or
- providing service, or financial assistance, to the Commonwealth or an authority of the Commonwealth for a purpose of the Commonwealth; or
- the implied power of the Parliament to make laws with respect to nationhood; or
- the executive power of the Commonwealth; or

---

<sup>1</sup> Australian Treaties Library on the AustLII website — <http://www.austlii.edu.au>

- incidental matters to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth.

*[Clause 10]*

***Privileges and immunities of the Crown***

2.12 The NHFIC does not have the privileges and immunities of the Crown in right of the Commonwealth. *[Clause 11]*

**The Investment Mandate**

2.13 The Minister may, by legislative instrument, give the Board directions about the performance of the NHFIC's functions, and must give at least one such direction. The directions together constitute the Investment Mandate. The Investment Mandate will be the key vehicle for the Government to set out its expectations for the NHFIC. *[Subclause 12(1)]*

2.14 The legislative instrument is not subject to disallowance under the Legislation Act as it forms part of a class of legislative instruments to which disallowance does not apply—see regulations made for the purposes of paragraph 44(2)(b) of that Act. *[Note to subclause 12(1)]*

2.15 Directions made by the Minister for the Investment Mandate must take into account the object of the Bill and any other matters the Minister considers relevant. *[Subclause 12(2)]*

2.16 In performing its functions, the NHFIC must take all reasonable steps to comply with the Investment Mandate in the course of undertaking its functions. This ensures that the NHFIC focuses on satisfying the Investment Mandate that applies to it. *[Subclause 12(3)]*

***Matters covered by the Investment Mandate***

2.17 The Investment Mandate may include:

- strategies and policies that the NHFIC must adhere to for its effective performance;
- decision-making criteria for the provision of financial assistance;
- limits on the extent of financial assistance; and
- risk and return relating to the NHFIC's investments.

*[Paragraphs 13(a), (b), (c) and (d)]*

2.18 The Minister may also include other matters in the directions to ensure that there is sufficient flexibility to address emerging issues or other matters that the Government considers are important. *[Paragraph 13(e)]*

2.19 It is expected that the Investment Mandate will set out:



- the eligibility criteria for NHIF finance, investments and grants, and bond aggregator finance;
- the types of financing mechanisms for the NHIF and the bond aggregator functions;
- matters that must be considered by Board when making lending decisions;
- matters that must be considered by Board in determining lending conditions;
- benchmark returns for NHFIC investments and finance;
- the level of risk acceptable for NHFIC investments and finance;
- additional corporate governance and transparency matters; and
- the types of support services that NHFIC may provide to CHPs to assist in building the capacity and capability of the sector.

#### ***Limits on Investment Mandate***

2.20 The Bill provides a number of limits on the direction making power to ensure the independence of the NHFIC. A Government direction cannot require that specific projects or entities receive (or not receive) assistance or investment. The Bill also requires that a direction cannot be inconsistent with the Bill or the objects of the Bill. This ensures that directions cannot conflict with the intention of the Bill or its objects. ***[Clause 14]***

2.21 Accordingly, the Minister must not give a direction concerning the Investment Mandate that:

- directly or indirectly requires or may require the Board to:
  - make (or not make) a particular investment; or
  - provide (or not provide) financial assistance for a particular project or entity; or
  - take (or not take) an action relating to an investment or financial assistance provided for a project or to an entity.

***[Clause 14]***



---

# **Chapter 3**

## **Board of the NHFIC**

---

### **Summary of new law**

3.1 Part 3 of the Bill establishes the Board, and provides for its membership and meetings.

### **Detailed explanation of new law**

#### **Establishment and functions of the Board**

3.2 Division 1 of Part 3 provides for the establishment of the Board of the NHFIC. As discussed above, the NHFIC is a corporate Commonwealth entity. As a consequence, by operation of the PGPA, the Board as the governing body is the accountable authority of the NHFIC (subsection 12(2) of the PGPA Act).

#### ***Establishment of the Board***

3.3 The Bill provides that the Board of the NHFIC is established.  
*[Clause 15]*

#### ***Functions of the Board***

3.4 The functions of the NHFIC Board are:

- to make decisions about the strategies and policies that the NHFIC is to follow, within the scope of the Investment Mandate;
- to ensure the proper, efficient and effective performance of the NHFIC's functions; and
- any other functions that the Board has under the Bill.

#### ***[Subclause 16(1)]***

3.5 The Board has power to do all things that are necessary or convenient to be done relating to the performance of its functions to ensure that it can effectively carry out its functions. *[Subclause 16(2)]*

3.6 Anything done in the name of, or on behalf of, the NHFIC by the Board, or with the authority of the Board, is taken to have been done by the NHFIC. This ensures it is clear that actions of the Board or with the authority of the Board are treated as having been undertaken by the NHFIC. *[Subclause 16(3)]*

## **Board members**

### ***Membership***

3.7 The Board is comprised of the Chair and a minimum of four members but no more than six other members. This provision ensures that the Minister can appoint a Board with the breadth of skills, qualifications and experience required to oversee NHFIC's functions. *[Clause 17]*

3.8 The Minister must appoint one of the Board members as the Chair by written instrument. The instrument of appointment is not a legislative instrument under the *Legislation (Exemptions and Other Matters) Regulation 2015*. *[Clauses 17 and 19]*

3.9 The Minister can by written instrument also make an acting appointment of a Board member to be the Chair. This ensures that there is flexibility to have an alternative Board member appointed as the acting Chair as required, and supports the continued effective functioning of the Board. An acting appointment can be made for:

- the period of any vacancy in the office of Chair (including where the position has not previously been filled); or
- any period during which the Chair is absent from duty, is not in Australia or cannot otherwise perform the duties of the office.

*[Clause 21]*

3.10 Sections 33AB and 33A of the Acts Interpretation Act also contain rules that apply to appointments that are made on an acting basis.

3.11 Board members are to be appointed by the Minister by written instrument, on a part-time basis. The instrument must set out the period, which must not be for more than five years, for which a Board member holds office. *[Subclause 18(1) and 20]*

3.12 Section 33AA of the Acts Interpretation Act provides that any power to appoint in legislation is treated as including a power to reappoint an office holder. *[Note to Clause 20]*

3.13 To ensure that Board members have relevant expertise, a person cannot be appointed as a Board member unless the Minister is satisfied that the person has appropriate qualifications, skills or experience in:

- banking and finance;
- law;
- housing;
- infrastructure planning and financing;
- local government;

- public policy; or
- expertise prescribed by the rules made by the Minister under the rule-making power in Clause 60 of this Bill.

*[Subclause 18(2)]*

***Conditions of appointment***

3.14 A Board member is to be paid the remuneration that is determined by the Remuneration Tribunal. If a determination of remuneration has not been made by the Tribunal that is in operation then the member is paid the remuneration that is prescribed by the rules. However, allowances payable to Board members are prescribed solely under the rules. *[Subclauses 22(1) and (2)]*

3.15 Any rules that are prescribed for Board member remuneration are subject to the operation of the Remuneration Tribunal Act. *[Subclause 22(3)]*

3.16 The Minister may grant leave of absence to the Chair on the terms and conditions that the Minister determines. In turn, the Chair may grant leave of absence to another Board member on the terms and conditions that the Chair determines. *[Subclauses 23(1) and (2)]*

3.17 The Chair must notify the Minister if the Chair grants another Board member leave of absence for a period that exceeds 3 months. This ensures that the Minister is informed of significant periods of leave of absence by Board members that are granted by the Chair. *[Subclause 23(3)]*

3.18 A Board member can resign their appointment by advising the Minister in writing of their resignation. The resignation has effect from the day it is received by the Minister or if the resignation specifies a later day, that later day. *[Clause 24]*

3.19 The Bill ensures that the Minister can terminate the appointment of any Board member in appropriate circumstances to ensure that good governance standards apply. The PGPA Act also contains rules that apply to terminating the appointment of an accountable authority, or a member of an accountable authority, for contravening general duties of officials. Termination of appointment may occur under the Bill if the Board member:

- misbehaves;
- cannot perform their duties of office due to physical or mental incapacity;
- applies under the law for relief of bankrupt or insolvent debtors;
- compounds with their creditors;
- assigns their remuneration for the benefit of their creditors;
- does not attend (other than if on a leave of absence) three consecutive Board meetings;

- engages in paid work that the Minister considers conflicts or may conflict with the proper performance of their duties; or
- has, in the Minister's assessment, demonstrated unsatisfactory performance for a significant period.

*[Clause 25]*

3.20 The Minister may also determine other terms and conditions upon which a Board member holds office. *[Clause 26]*

### ***Observer***

3.21 The Bill also provides scope for the appointment of a Commonwealth government official as an observer. The observer is entitled to be notified of Board meetings and to attend and participate in those meetings as they choose, but may not participate in voting at such meetings. Not being a Board member, the presence of an observer at a meeting does not count towards the quorum requirement. *[Subclause 27(1)]*

3.22 The capacity to appoint an observer is intended to support Government visibility of decision making, particularly in exceptional circumstances such as the establishment phase of the NHFIC or during periods of financial market uncertainty. The Board would however remain the decision maker in all circumstances relating to the performance of NHFIC's functions.

3.23 Any appointment of an observer must be time limited. The observer may be appointed by the Minister on a part-time basis for a period not exceeding six months, and may be re-appointed. The appointment must be made by written instrument, and may be terminated by the Minister at any time. *[Subclauses 27(2) to (4)]*

3.24 The Minister has the power to grant the observer leave of absence on terms and conditions that the Minister considers appropriate. *[Subclause 27(5)]*

3.25 An observer can resign by written notice to the Minister, effective on the day it is received by the Minister (or such later day specified in the resignation). *[Subclause 27(6)]*

3.26 An observer is an official for the purposes of the PGPA Act, and accordingly is subject to duties including to exercise reasonable care and diligence, to act in good faith and for proper purpose, not to use the office to gain an advantage, and to disclose interests. *[Subclause 27(7)]*

3.27 An observer would not be remunerated by the NHFIC.

### **Meetings of the Board**

3.28 The Board is required to hold meetings to ensure the efficient performance of its functions. *[Subclause 28(1)]*

3.29 The Chair has the power to convene a meeting at any time, but must convene:

- at least four meetings each calendar year; and
- a meeting within 30 days of receiving a request in writing from another Board member for a meeting.

*[Subclause 28(2)]*

3.30 The Chair must preside at all meetings at which he or she is present, and if the Chair is not present the other Board members present must appoint one of themselves to chair the meeting. *[Clause 29]*

3.31 A majority of Board members need to be present at a meeting of the Board to form a quorum. However if a Board member is required not to be present because of a material personal interest in a matter, and if when that member has left the meeting there is no longer a quorum, the remaining members present constitute a quorum for the purpose of any deliberation or decision in respect of the matter concerned. *[Clause 30; section 29 PGPA Act; Rule 15 PGPA Rule]*

3.32 A question arising at a Board meeting must be determined by a majority of the votes of the members present and voting at that meeting. However, the person presiding at the meeting of the Board (generally the Chair) has a deliberative vote and, if the votes are equal, a casting vote. This ensures that the Board has the capacity to decide matters that need to be determined at Board meetings. *[Clause 31]*

3.33 The Board may, subject to the other provisions of the Bill regarding Board meetings, conduct meetings as it considers appropriate. Further information about the ways in which Board members may participate in meetings is set out in section 33 of the Acts Interpretation Act. *[Clause 32]*

3.34 The Board must keep minutes of all its meetings to ensure that matters considered and decisions taken at meetings are properly recorded. *[Clause 33]*

3.35 The Board is treated as having made a decision at a meeting if:

- without meeting, a majority of the Board members entitled to vote on the proposed decision (and who would have been entitled to vote on it if the matter had been considered at a meeting) advise they agree with the decision;
- that agreement has been provided in accordance with any method determined by the Board for the making of decisions of that kind; and
- all the Board members were informed of the proposed decision (or reasonable efforts were made to inform them of it).

*[Subclauses 34(1), (2) and (3)]*

3.36 The Board must keep a record of decisions made that are taken without Board meetings. This ensures that both decisions at formal Board meetings and those made without a meeting are recorded. *[Subclause 34(4)]*

### **Reporting obligations of the Board**

3.37 Section 46 of the PGPA Act requires the Board to prepare annual reports and to provide them to the Minister. A NHFIC annual report for a period must include:

- details of changes to the Investment Mandate during the period (if any) and their impact on the operations of the NHFIC;
- for each type of financial support provided by the NHFIC during the period, a summary of:
  - the amount of that financial support; and
  - the risks and returns to the Commonwealth.

*[Clause 35]*

3.38 The Minister may, by written notice, require the Board to prepare a report or document about one or more specified matters or information relating to the Board's performance of its functions, and to give the Minister copies within a period specified in the notice. The Board is required to comply with such a notice. *[Subclauses 36(1) to (3)]*

3.39 The Minister may have the report or document published (whether on the internet or otherwise). The Bill provides that such report or document is not a legislative instrument. This is because they are administrative in nature. *[Subclauses 36(4) to (6)]*

3.40 In addition to reports or documents required by the Minister to be prepared and provided, the Board must keep the Minister informed of its operations and provide the Minister with such reports, documents and information in relation to those operations as are appropriate. *[Clause 37]*



---

# **Chapter 4**

## **Chief Executive Officer, staff, consultants and committees**

---

### **Summary of new law**

4.1 Division 1 of Part 4 of the Bill establishes the CEO of the NHFIC, including setting out:

- procedures for appointment and resignation;
- functions;
- remuneration;
- terms and conditions; and
- acting appointments.

4.2 Division 2 of Part 4 deals with the recruitment of staff and consultants and committees.

### **Detailed explanation of new law**

#### **CEO**

##### *Establishment*

4.3 Division 1 of Part 4 of the Bill establishes the CEO of the NHFIC. [Clause 38]

##### *Functions*

4.4 The CEO is responsible for the day to day administration of the NHFIC, and has power to do all things necessary or convenient to be done for or in connection with the performance of his or her duties. [Subclauses 39(1) and (2)]

4.5 The CEO is to act in accordance with policies and strategies determined by the Board, and in accordance with the Board's written directions to the CEO. The CEO must comply with such directions, which must not be inconsistent with any direction given to the Board under Division 2 of Part 2, about the performance of the CEO's duties. [Subclauses 39(3), (4) and (5)]

4.6 A direction by the Board to the CEO is not a legislative instrument within the meaning of section 8 of the Legislation Act. This is appropriate because such directions are administrative in character, and facilitate the

carrying out of the CEO's powers and functions without altering their scope or effect (*Legislation (Exemptions and Other Matters) Regulation 2015*, subsection 6(1)). [*Subclause 39(6)*]

### ***Appointment***

4.7 The CEO is to be appointed by the Board on a full time basis, by written instrument of appointment, and holds office for a period specified in the instrument (but not for a period of more than five years). The Board must not appoint a Board member as CEO. [*Clause 40*]

### ***Acting appointment***

4.8 The Board is empowered to appoint, by written instrument, a person other than a Board member to Act as CEO during a vacancy in the office (whether or not a CEO has previously been appointed), or during any period when the CEO is absent from duty or from Australia or is for any reason unable to perform the duties of CEO. [*Clause 41*]

4.9 The Acts Interpretation Act (sections 33A and 33AB) contains provisions dealing with acting appointments that have effect in relation to acting appointments made under this Bill as follows:

- In the event that the occasion for the appointment has not arisen, or there was a defect or irregularity in connection with a person's appointment, or the appointment had ceased to have effect, a person's appointment to act under will not invalidate anything done by the person;
- an acting appointment may be expressed to have effect only in the circumstances specified in the instrument of appointment;
- the appointer may determine the terms and conditions of the appointment, including remuneration and allowances, and terminate the appointment at any time;
- where the appointment is to act in a vacant office, the appointee must not continue to act in the office for more than 12 months;
- where the appointee is acting in an office other than a vacant office and the office becomes vacant while the appointee is acting then, unless his or her instrument of appointment provides otherwise, the appointee may continue to act until the appointer otherwise directs, the vacancy is filled, or a period of 12 months from the day the vacancy ends, whichever happens first;
- the appointment ceases to have effect if the appointee resigns in writing directed to the appointer; and

- while the appointee is acting in the office, he or she has and may exercise all the powers, and is to perform all the functions and duties, of the holder of the office and this Act and any other legislation will apply in relation to the appointee as if the appointee were the holder of the office.

#### ***Remuneration and allowances***

4.10 The CEO is to be paid remuneration that is determined by the Remuneration Tribunal, or, if no such determination has been made, the remuneration prescribed by rules made under section 60 of this Bill. The CEO is also to be paid allowances as set out in the rules made under section 60. The remuneration and allowances payable to the CEO are subject to the Remuneration Tribunal Act. *[Clause 42]*

#### ***Leave of absence***

4.11 The CEO is entitled to the recreation leave entitlements determined by the Remuneration Tribunal, as well as such other leave entitlements (other than recreation leave) as granted by the Board. *[Clause 43]*

#### ***Outside employment***

4.12 The CEO must not engage in paid work outside the duties of his or her office without the Chair's approval, and the Chair must notify the Minister of any such approval. *[Clause 44]*

#### ***Other terms and conditions***

4.13 The CEO holds office on the terms and conditions determined by the Board, to the extent (if any) that such matters are not covered by this Act. *[Clause 45]*

#### ***Resignation of CEO***

4.14 The CEO may resign his or her appointment by giving the Board a written resignation. Such resignation takes effect on the day it is received by the Board, or, if a later day is specified in the resignation, on that later day. The Chair must notify the Minister of the CEO's resignation. *[Clause 46]*

#### ***Termination of appointment of CEO***

- 4.15 The Board may terminate the appointment of the CEO:
- for misbehaviour; or
  - if the CEO is unable to perform the duties of his or her office because of physical or mental incapacity; or
  - if the CEO:
    - becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds

- with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- engages, except with the Chair’s approval, in paid work outside the duties of his or her office; or
- fails, without reasonable excuse, to comply with section 29 of the PGPA Act (which deals with the duty to disclose interests) or rules made for the purposes of that section; or
- if the Board:
  - is satisfied that the performance of the CEO has been unsatisfactory for a significant period.

*[Subclause 47(1)]*

4.16 If the Board terminates the appointment of the CEO, the Board must notify the Minister of the termination. *[Subclause 47(2)]*

## **Staff and consultants**

4.17 Division 2 of Part 4 of the Bill provides for the NHFIC to employ staff and consultants.

### *Staff*

4.18 The NHFIC may employ such persons as it considers necessary for the performance of its functions and the exercise of its powers. An employee is to be employed on the terms and conditions that the NHFIC determines in writing. *[Subclauses 48(1) and (2)]*

4.19 In addition, the NHFIC may make arrangements for the services of officers or employees of the following to be made available to the NHFIC:

- the Commonwealth, a State or a Territory;
- an authority of the Commonwealth or of a State or Territory;
- any other organisation or body.

*[Subclause 48(3)]*

### *Consultants*

4.20 The NHFIC may engage consultants, on the terms and conditions it determines, to assist in the performance of its functions. *[Clause 49]*

## **Committees**

4.21 Division 3 of Part 4 of the Bill provides for the NHFIC Board to establish committees to advise or assist in the performance of its or the NHFIC's functions. *[Subclause 50(1)]*

### ***Constitution***

4.22 A committee may be constituted by Board members, non-Board members, or a combination of the two. *[Subclause 50(2)]*

### ***Terms of reference***

4.23 The Board may determine, a committee's terms of reference, the terms and conditions of appointment of the members of the committee, and the procedures to be followed by the committee. *[Subclause 50(3)]*

### ***Status of members***

4.24 The members of the committee (other than Board members) are not officials for the purposes of the PGPA Act *[Subclause 50(4)]*



---

# Chapter 5

## Finance

---

### Summary of new law

5.1 Part 5 of the Bill sets out the arrangements for NHFIC financial affairs in relation to:

- payment of dividends to the Commonwealth;
- maintenance of adequate capital and reserves;
- borrowings;
- guarantee by Commonwealth; and
- taxation.

### Detailed explanation of new law

#### Maintenance of adequate capital and reserves

5.2 The Board is required to ensure, according to sound commercial principles, that the capital and reserves of the NHFIC at any time are sufficient:

- to meet the likely liabilities of the NHFIC; and
- to make adequate provision for default in the repayment of principal, or in the payment of interest or other charges, in connection with loans made by the NHFIC.

*[Subclause 51(1)]*

5.3 If, at any time, the Board determines:

- that the capital and reserves of the NHFIC are not sufficient to meet the likely liabilities, and make to the required provision; or
- that there are reasonable grounds for believing that, at a time in the future, the capital and reserves of the NHFIC may not be sufficient to meet the likely liabilities, and make the required provision;

the Board must, as soon as practicable, inform the Minister in writing of its determination and the reasons for that determination. *[Subclause 51(2)]*

## **Payment of annual dividends to the Commonwealth**

5.4 Within 4 months after the end of each financial year, the Board must make a recommendation to the Minister, in writing, as to whether the NHFIC will pay a specified dividend, or not pay a dividend, to the Commonwealth for that financial year. *[Subclause 52(1)]*

5.5 Within 30 days after receiving the recommendation of the Board, the Minister must give the NHFIC written notice either:

- approving the recommendation; or
- where the Board has recommended the payment of a dividend or that no dividend be paid—directing the payment of a different specified dividend; or
- where the Board has recommended that no dividend be paid—directing the payment of a specified dividend.

*[Subclause 52(2)]*

5.6 When making a recommending, approval or direction in relation to whether or what dividend is to be paid, the Board and the Minister must have regard to:

- policies of the Commonwealth Government, and the general policy of the NHFIC in relation to the performance of its functions; and
- such commercial considerations as the Board or the Minister, as the case may be, considers appropriate.

*[Subclause 52(3)]*

5.7 The Board may not recommend, and the Minister may not approve or direct, a dividend for a financial year exceeding the NHFIC's profit for that year. *[Subclauses 52(3) and (4)]*

5.8 The NHFIC must pay to the Commonwealth any dividend approved or directed by the Minister in respect of a financial year. *[Subclause 52 (5)]*

5.9 The period beginning on the commencement of this Act and ending on 30 June 2018 is not to be taken to be a financial year for the purpose of dividends. *[Subclause 52(6)]*

5.10 It is not envisaged that NHFIC will be in a position to recommend the payment of dividends in its initial establishment phase, but that once adequate capital reserves have been built, the NHFIC would be expected to consider dividends rather than further accumulating capital.



---

## Borrowings

### *Borrowings from the Commonwealth*

5.11 The Finance Minister may, on behalf of the Commonwealth, out of money appropriated by the Parliament for the purpose, lend money to the NHFIC on such terms and conditions as the Finance Minister determines. [Subclause 53(1)]

### *Other borrowings*

5.12 The NHFIC has broad powers to borrow or raise money. It may:

- borrow money otherwise than from the Commonwealth; or
- raise money otherwise than by borrowing;

including by dealing with securities. [Subclauses 53(2) and (3)]

### *Security*

5.13 The NHFIC may give security over all or any of its assets:

- for the repayment of money and interest on its borrowings; or
- for the payment of money (including interest) it is liable to pay in respect of money raised other than by borrowing.

[Subclause 53(4)]

### *Limitation on borrowing*

5.14 The NHFIC must not otherwise borrow or raise money. [Subclause 53(5)]

## Guarantee by Commonwealth

5.15 The due payment by the NHFIC of any money that becomes payable by it to a person other than the Commonwealth is guaranteed by the Commonwealth. [Subclause 54(1)]

5.16 The Treasurer may, by legislative instrument, make a determination revoking the guarantee in relation to money that becomes payable under a contract entered into on or after a particular date. The day on which such a determination comes into effect cannot be earlier than either 1 July 2023 or 60 days after the instrument is registered. [Subclauses 54(2) and (3)]

5.17 The Bill provides for the Commonwealth guarantee on the recommendation of the Expert Panel of the Affordable Housing Implementation Taskforce, established to advise the Government on the viability of an affordable housing bond aggregator.

5.18 The guarantee also recognises that the ability of CHPs to use their assets as security for loans is often complicated by State and Territory interests

in the underlying assets. A guarantee will mitigate much of this uncertainty for investors, lowering borrowing costs for NHFIC that can then be passed through to eligible CHPs.

### **Exemption from taxation**

5.19 For the purposes of section 50-25 of the *Income Tax Assessment Act 1997*, the NHFIC is taken to be a public authority constituted under an Australian law. This means the NHFIC is exempt from income tax. [*Subclause 55(1), note to subclause 55(1)*]

5.20 The NHFIC is not subject to taxation under a law of a State or Territory, if the Commonwealth is not subject to the taxation. [*Subclause 55(2)*]

---

## **Chapter 6**

### **Miscellaneous**

---

#### **Summary of new law**

6.1 Part 6 of the Bill sets out delegations, the requirement for a review of the operation of the Act, and the rule making power.

#### **Detailed explanation of new law**

##### **Delegation by NHFIC**

6.2 To promote the efficient operation of the Act and to ensure timely administration, the NHFIC is empowered to delegate all or any of its functions under the Act, in writing under seal, to a Board member or to the CEO. *[Subclause 56(1)]*

6.3 The Board member or CEO to whom powers are delegated must comply with any directions of the NHFIC in exercising any powers or functions under the delegation. *[Subclause 56(2)]*

##### **Delegation by Board**

6.4 The Board may, in writing, delegate to a Board member or the CEO any of its powers or functions under this Act. *[Subclause 57(1)]*

6.5 In exercising any powers or performing any functions under the delegation, the delegate must comply with any directions of the Board. *[Subclause 57(2)]*

##### **Delegation and subdelegation by CEO**

6.6 The CEO may, in writing, delegate to a senior member of the staff employed by the NHFIC any of the CEO's powers or functions under this Act. *[Clause 48 and subclause 58(1)]*

6.7 If the NHFIC or the Board delegates a power or function to the CEO, the CEO may, in writing, subdelegate the power or function to a senior member of the staff of the NHFIC. *[Clause 48 and subclauses 56(1), 57(1) and 58(2)]*

6.8 In exercising any powers or performing any functions under the delegation or subdelegation, the delegate or subdelegate must comply with any directions of the CEO. *[Subclause 58(3)]*

6.9 Allowing the delegation of powers or functions to a senior staff who would undertake the tasks concerned is a normal administrative arrangement.

6.10 Sections 34AA, 34AB and 34A of the Acts Interpretation Act apply in relation to a subdelegation in a corresponding way to the way in which they apply in relation to a delegation.

### **Review of operation**

6.11 The Minister must cause a review of the operation of this Act to be undertaken as soon as possible after the period of three years of its commencement and the persons undertaking the review must give the Minister a written report of the review. *[Subclauses 59(1) and (2)]*

6.12 The Minister must table a copy of the report of the review in each House of the Parliament within 15 sitting days of that House after the report is given to the Minister. *[Subclause 59(3)]*

### **Rules**

6.13 The Minister may, by legislative instrument, make rules prescribing matters:

- required or permitted by this Act to be prescribed by the rules; or
- convenient to be prescribed for carrying out or giving effect to this Act.

*[Subclause 60(1)]*

6.14 The rules may not:

- create an offence or civil penalty;
- provide powers of:
  - arrest or detention; or
  - entry, search or seizure;
- impose a tax;
- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act; or
- directly amend the text of the Act.

*[Subclause 60(2)]*