EXPLANATORY STATEMENT

Issued by authority of the Minister for Housing, Minister for Homelessness and Minister for Small Business

National Housing Finance and Investment Corporation Act 2018

National Housing Finance and Investment Corporation Investment Mandate Amendment (Social and Affordable Housing) Direction 2022

Subsection 12(1) of the *National Housing Finance and Investment Corporation Act 2018* (the NHFIC Act) provides that the Minister may, by legislative instrument, give the Board of the National Housing Finance and Investment Corporation (the NHFIC) directions about the performance of the NHFIC's functions.

The NHFIC Act established the NHFIC to improve housing outcomes for Australians. The NHFIC is a corporate Commonwealth entity dedicated to improving housing outcomes and it commenced operation on 30 June 2018.

The NHFIC's functions include, among others, the administration of the National Housing Infrastructure Facility (the NHIF). The NHIF seeks to overcome barriers to the establishment of new housing supply, particularly affordable housing, that are due to the absence of supporting critical infrastructure (such as water, sewerage, electricity, telecommunications or transportation infrastructure). Under the NHIF, finance, in the form of grants, concessional loans and investment financing, is available for eligible infrastructure projects that would not otherwise have proceeded, or that would only have proceeded at a much later date or with a lesser impact on new affordable housing.

The purpose of the *National Housing Finance and Investment Corporation Investment Mandate Amendment (Social and Affordable Housing) Direction 2022* (the Instrument) is to amend the *National Housing Finance and Investment Corporation Investment Mandate Direction 2018* (Investment Mandate) to broaden the remit of the NHIF to allow it to be used to directly finance social or affordable housing projects in addition to financing housing-enabling infrastructure.

This expanded remit will help address the housing and homelessness challenges and housing supply constraints currently facing Australia and improve access to safe and secure housing. As part of the widened remit, the NHFIC Board must administer the NHIF in a manner that ensures access to the facility for social or affordable housing projects. Therefore, the NHFIC must make reasonable efforts to identify projects, or potential projects from all States and Territories that could be suitable for funding under the NHIF.

Widening the remit of the NHIF in this way will provide additional flexibility for that financing to be used to attract more private capital into the social and affordable housing sector to further help improve the returns available, including from superannuation funds and other institutional investors. This is consistent with the NHFIC's mandate to encourage other financiers to increase the supply of housing, particularly social and affordable housing, in response to a recommendation from the Statutory Review of the Operation of the *National Housing Finance and Investment Corporation Act 2018*.

Public consultation on an exposure draft Instrument and the accompanying Explanatory Statement was undertaken from 8 November to 14 November 2022. Ten submissions were received in response to the consultation from industry stakeholders. In response to submissions, several minor technical errors in the operation of the draft Instrument were corrected by amendments to the Instrument. The NHFIC was also consulted on drafts during the development of the Instrument and Explanatory Statement.

Details of the Instrument are set out in Attachment A.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Instrument is exempt from the sunsetting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* as a result of regulations made for the purposes of paragraph 54(2)(b) of the Act. Item 3 of the table under section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provides for class exemptions from sunsetting if the instrument is a direction by the Minister to any person or body. The Instrument is a direction from the Minister to the NHFIC, and therefore is exempt from sunsetting.

The Instrument is further subject to the automatic repeal process under section 48A of the *Legislation Act 2003*. This section provides that where a legislative instrument only repeals or amends another instrument, without making any application, saving or transitional provisions relating to the amendment or repeal, that instrument is automatically repealed. By virtue of subparagraph 48A(2)(a)(i), the Instrument automatically repeals on the day after the commencement of the Instrument. Once repealed, the sunsetting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* is no longer relevant to the Instrument.

The Instrument is also exempt from disallowance under section 42 of the *Legislation Act 2003* as a result of regulations made for the purposes of paragraph 44(2)(b) of that Act. Item 2 of section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015,* provides for class exemptions from disallowance if the instrument is a direction by the Minister to any person or body. The Instrument is a direction from the Minister to the NHFIC, and therefore is exempt from disallowance. This provides the NHFIC with certainty in the administration of its activities and provides assurance to any eligible project proponents that benefit from the NHIF that it has ongoing operation and is not subject to disallowance or sunsetting.

The Instrument commences the day after registration.

The Office of Best Practice Regulation (OBPR) has been consulted (OBRP ID# 22-03134) and a regulation impact statement is not required as the measure has been assessed to be machinery in nature.

ATTACHMENT A

Details of the *National Housing Finance and Investment Corporation Investment Mandate Amendment (Social and Affordable Housing) Direction 2022*

Section 1 – Name of the Instrument

This section provides that the name of the Instrument is the *National Housing Finance and Investment Corporation Investment Mandate Amendment (Social and Affordable Housing) Direction 2022* (the Instrument).

Section 2 – Commencement

This section provides that the Instrument commences the day after registration.

Section 3 – Authority

This section provides that the Instrument is made under the *National Housing Finance and Investment Corporation Act 2018* (the NHFIC Act).

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedule to this Instrument will be amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Legislative references in this attachment are to the *National Housing Finance and Investment Corporation Investment Mandate Direction 2018* (Investment Mandate) unless otherwise stated.

Expansion of the National Housing Infrastructure Facility to new social or affordable housing

The expansion of the remit of the National Housing Infrastructure Facility (NHIF) provides flexibility to use the existing funds of the NHIF to directly finance social or affordable housing projects, in addition to the funds being used to finance housing-enabling infrastructure projects. This widened remit helps address the housing and homelessness challenges and housing supply constraints currently facing Australia, improves access to safe and secure housing for those in need, and will assist in attracting finance from superannuation funds and other sources of private capital into the social and affordable housing sector.

National Housing Infrastructure Facility

Items 1, 2, 3 and 4 of the Instrument update existing definitions and insert a number of definitions into section 4 of the Investment Mandate, to improve the clarity of certain provisions and support the NHIF’s operations. They are:

- Act – the amendments insert a definition for the NHFIC Act;

- constitutional corporation – the amendments make clear that a constitutional corporation refers to a corporation to which paragraph 51(xx) of the Constitution applies;
- housing-enabling infrastructure – the amendments insert a signpost in the definitions section that refers to the definition of housing-enabling infrastructure under subsection 21A(2);
- housing-enabling infrastructure project – the amendments insert a signpost in the definitions section that refers to the definition of housing-enabling infrastructure project under subsection 21A(1);
- housing-enabling infrastructure special purpose vehicle (housing-enabling infrastructure SPV) – the amendments insert a signpost in the definitions section that refers to the definition of housing-enabling infrastructure SPV under subsection 22(2);
- local governing body – the amendments make clear that the term has the same meaning as in the *Local Government (Financial Assistance) Act 1995*;
- social or affordable housing project – the amendments insert a signpost in the definitions section that refers to the definition of social or affordable housing project under subsection 21A(3);
- social or affordable housing special purpose vehicle (social or affordable housing SPV) – the amendments insert a signpost in the definitions section that refers to the definition of social or affordable housing SPV under subsection 22A(2);
- special purpose vehicle – the amendments repeal the definition of special purpose vehicle as new definitions for social or affordable housing SPV and housing-enabling infrastructure SPV clarify these terms; and
- underlying eligible member – the amendments update the definition of this term to make clear the meaning of an underlying eligible member of a housing-enabling infrastructure SPV and the meaning of an underlying eligible member of a social or affordable housing SPV.

Item 5 of the Instrument amends the guide material of Part 4 to provide an overview of the NHIF's purpose. The purpose of the NHIF is to overcome impediments to the provision of housing that are due to the lack of necessary infrastructure, and to increase the availability of social and affordable housing. The NHFIC, via the NHIF, may provide finance for eligible housing-enabling infrastructure projects and social or affordable housing projects.

Meaning of housing-enabling infrastructure projects and social or affordable housing projects

Item 6 of the Instrument defines a ‘housing-enabling infrastructure project’, ‘housing-enabling infrastructure’ and a ‘social or affordable housing project’.

A ‘housing-enabling infrastructure project’ is a critical infrastructure project linked to new housing supply whether on the site or connecting to or linking to infrastructure. Housing-enabling infrastructure projects provide housing-enabling infrastructure and do not directly provide housing. Examples of ‘housing-enabling infrastructure’ include (but are not limited to):

- critical infrastructure to support new housing (particularly new social or affordable housing), including new or upgraded infrastructure for services such as water, sewerage, electricity, telecommunications, stormwater or transportation; and
- site remediation works relating to new housing (particularly new social or affordable housing), including the removal of hazardous waste or contamination.

A housing-enabling infrastructure project does not include a project that provides community infrastructure such as parks, day-care centres or libraries.

In contrast, a ‘social or affordable housing project’ provides housing to support social or affordable housing outcomes. The term has an inclusive meaning. It can include a project that would provide new social housing, or a project that would provide new affordable housing, or a project that would provide a mix of new social and affordable housing. This expansion provides the NHIF with flexibility to use existing funds to directly finance projects that provide social or affordable housing.

A ‘social or affordable housing project’ may include community infrastructure such as parks, day-care centres or libraries, provided this is part of a project that primarily creates new housing (for example, an indoor community centre constructed alongside new housing, specifically for the use of residents of the housing).

Eligible project proponents for housing-enabling infrastructure projects

Items 7 to 12 make consequential amendments to ensure consistency in the Investment Mandate and to clarify the project proponents eligible for housing-enabling infrastructure projects. They are:

- heading to section 22 – minor editorial amendments to provide that this section sets out the project proponents eligible for housing-enabling infrastructure projects;
- subsection 22(1) – minor editorial amendments to provide that this section sets out the project proponents eligible for housing-enabling infrastructure projects;
- paragraph 22(1)(b) – removal of the reference to the *Local Government (Financial Assistance) Act 1995*, as the relevant definition has been inserted into section 4;

- paragraphs 22(1)(c) and (d) – removal of the description of a constitutional corporation, as the relevant definition has been inserted into section 4;
- paragraph 22(1)(g) – minor editorial amendments as the relevant definition has been updated in section 4; and
- subsection 22(2) – the amendments make clear that an entity is a housing-enabling infrastructure SPV if it has a purpose of undertaking housing-enabling infrastructure projects and has at least one member that is an eligible recipient listed in paragraph 22(1)(a) to (f). In this context, the member is an entity that has an ownership or participation interest in the housing-enabling infrastructure SPV (for example, a shareholder if the housing-enabling infrastructure SPV is a company).

Eligible project proponents for social or affordable housing projects

Item 13 of the Instrument inserts a new section 22A to provide the project proponents eligible for the NHIF financing for a social or affordable housing project. The NHFIC may provide finance under the NHIF for a social or affordable housing project to a:

- State or Territory, including a State or Territory agency representing the State or Territory such as a government owned corporation but not a utility provider;
- local governing body;
- local governing body owned corporation that is a constitutional corporation and not a utility provider (but not necessarily an emanation of the local governing body);
- State government owned corporation that is a constitutional corporation and not a utility provider (but not necessarily an emanation of the State);
- Territory government owned corporation that is a constitutional corporation and not a utility provider (but not necessarily an emanation of the Territory); and
- registered community housing provider that is a constitutional corporation.

If the project proponent is a local governing body, the project may only be financed through a grant of financial assistance to a State or Territory.

The NHFIC may also provide finance to a social or affordable housing SPV that is a constitutional corporation. The social or affordable housing SPV must have a purpose of undertaking social or affordable housing projects and have at least one member that is an eligible recipient listed above (the underlying eligible member or members). In this context, an underlying eligible member is an entity that has an ownership or participation interest in the social or affordable housing SPV (for example, a shareholder if the social or affordable housing SPV is a company).

Selection of project proponents is intended to ensure that the NHIF financing is offered to proponents who are best positioned to generate and complete these projects, due to their existing networks with the community. As financing will be targeted to proponents with the specific capabilities and resources to develop social or affordable housing, the efficiency of the program will increase overall.

Eligible projects under the NHIF

Item 14 of the Instrument repeals paragraphs 23(a) to (c) and inserts a revised paragraph 23(a) which provides that financing is only provided by the NHIF where projects satisfy the definitions established in item 6 for either housing-enabling infrastructure projects or social or affordable housing projects.

Additionally, Item 15 amends paragraph 23(d) to make a consequential amendment to extend its operation to social housing. Accordingly, funding will only be approved under the NHIF for projects which would be unlikely to proceed, or would only likely proceed at a much later time, or with a lesser impact on new social or affordable housing, without the NHIF assistance. This requires the NHFIC to consider the extent to which the NHIF assistance would accelerate or increase the supply of either housing-enabling infrastructure or social or affordable housing.

Identification and reporting of eligible projects

Items 16, 17 and 18 make minor editorial amendments to section 23A to improve the clarity of the provision. Item 17 requires the NHFIC to identify projects, or potential projects, across Australia which could be suitable to be financed by the NHIF. This requirement reflects the need to administer the program in such a way that project proponents are encouraged to make applications for the NHIF financing regardless of their location.

In line with the new section 28A reporting requirements in relation to the NHIF introduced in item 27 (as discussed below), item 19 repeals subsection 23A(2) which required the NHFIC to report on the activities conducted by the NHFIC in accordance with section 23A.

Financing mechanisms for eligible social or affordable housing projects

Items 20 and 21 of the Instrument provide that both housing-enabling infrastructure projects and social or affordable housing projects can receive financing through one or more of loans, grants and investments from the NHIF. The available financing mechanisms for social or affordable housing projects have been limited to grant and concessional loan financing to ensure projects are financed efficiently and assistance is provided promptly to address the current housing crisis.

Item 22 of the Instrument specifies that for social or affordable housing projects where a local governing body is the responsible project proponent, funding options are limited to grants to a State or Territory.

Criteria for financing decisions and concessions

Items 23 to 26 make the following minor editorial amendments to ensure consistency in the Instrument:

- paragraph 25(1)(a) – amendments to include proponents eligible for social or affordable housing projects;
- paragraph 25(2)(a) – amendments to include consideration of the likely effect of the project on the supply and ongoing availability of social or affordable housing;

- paragraph 25(2)(h) – amendments to include both SPVs which are eligible under the NHIF; and

- paragraph 26(1)(b) – amendments to include consideration of the extent of any public benefit from either the housing-enabling infrastructure or the new social or affordable housing, when determining whether the NHFIC should offer concessions to proponents.

Reporting mechanism for eligible projects

Item 27 inserts a new section 28A which requires quarterly reporting to the Minister on the activities undertaken in relation to the social or affordable housing projects and the housing-enabling infrastructure projects approved by the NHFIC during the relevant quarter. This includes reporting on activities undertaken under section 23A. Item 27 reiterates that this new reporting mechanism applies to projects under the NHIF from the day after the Instrument is registered, with the first report to occur as soon as practicable three months on or after 1 January 2023.

The new subsection 28A(2) details the specific information which must be included by the NHFIC for any projects that have been approved in the latest quarter. The reports are required to cover a range of topics such as the geographic distribution of projects, the type and extent of funding provided by the NHIF, the project proponents, the intended project recipients that will benefit from the projects, and the approximate date of completion.

Quarterly reports have been introduced to provide greater transparency to the Minister on the operation of the NHIF on a regular basis and ensure both the NHIF and project proponents are accountable for the effective use of financing and the completion of projects. This information will also be used to ensure the program is constantly improved and continues to benefit Australians in need of social or affordable housing and housing-enabling infrastructure.

Application of amendments

Item 28 inserts a new Division into Part 7 to provide that the repeal of subsection 23A(2), as repealed by item 19, applies in relation to periods of 3 months starting on or after 1 January 2023.This application provision ensures that there is no overlap or duplication of reporting requirements under the previous subsection 23A(2) reporting requirements and the new reporting requirements provided in section 28A.