

## ***Housing Australia (HA) – Draft Framework Funding Agreement (DFFA)***

15 January 2024

### **A. INTRODUCTION**

As instructed, we have reviewed the DFFA that was released by HA in late December 2023. We have not reviewed in any detail certain boilerplate provisions or any Schedules to the Common Terms. Capitalised terms used below have the meaning given in the DFFA, unless defined below. **Recipient** means a recipient of funding pursuant to a Framework Funding Agreement (**FFA**).

As per our engagement, in our review of the DFFA, we have focussed on material issues only. There are numerous lower order issues, which we have not addressed. These include potential amendments and drafting matters. Further, we have not provided any analysis as to whether the DFFA gives rise to any issues under unfair contract terms protections under the Australian Consumer Law (which, in any case, should really be more of an issue for Housing Australia) and we have not reviewed any tax provisions. If our advice is required in relation to any of these matters, please let us know.

For the purposes of our review, we have assumed that each Recipient would be the person who manages or provides housing services in respect of each Project for which that Recipient receives funding under a FFA. We have also assumed that Funding would typically be in the form of Concessional Loans for up to 10% of Projects costs and Availability Payments during the operations phase of a Project (noting that Grants will not be available in the first funding round and would only be offered on a by-exceptions discretionary basis and it appears that Availability Payments are likely to be the chief source of Funding).

The following is an overview only and should be read in conjunction with a detailed review of the DFFA. Ultimately, each applicant for Funding will need to consider whether the terms of the DFFA are acceptable to it or whether amendments in relation to the way the DFFA operates would need to be requested.

### **B. PRELIMINARY COMMENTS**

#### Length and complexity

The DFFA is a long and complex document that is intended to be used in relation to all funding under the Funding Programs (being Availability Payments, Concessional Loans and Grants) and for all eligible applicants, including community housing providers (**CHPs**) of all registration tiers and charities that have the primary purpose of improving housing outcomes for Aboriginal or Torres Strait Islander people (**AT Organisations**).

As an initial point, we query if the DFFA will be conducive to HA making funding available quickly.

We understand that HA aims to encourage smaller CHPs (including regional CHPs) and AT Organisations to bid for funding under the HAFFF and NHAF. Given the nature and complexity of the DFFA, we query if that aim will be realised. We expect that smaller CHPs and AT Organisations may have issues with respect to understanding certain requirements and the operation of the DFFA and would require professional legal and financial advice to assist them with

understanding those requirements and potentially additional staff to assist them with managing their obligations. Also, in relation to funding on a small scale, the DFFA seems too long and complex.

In relation to more sophisticated applicants (who we expect will also require professional advice), the one size fits all approach may raise issues, as different applicants will likely have different requirements as to amendments to the Common Terms based on organisational structure and operational needs. HA have said that its expectation is that amendments will be limited to those that are strictly required to accommodate applicant or Project specific matters, but it is not clear what strictly required means. We expect that there could be a fair degree of negotiation in relation to amendments, as, in our experience, there has been in relation to Affordable Housing Bond Aggregator (**AHBA**) financing. Such negotiation would slow down funding being made available.

The Common Terms approach does not sit well with the different types of funding available. For example, a small Grant should not require the same covenant package as 25 years of Availability Payments.

#### Missed opportunity re a partnership approach?

In many respects the DFFA covenant package is similar to AHBA funding arrangements or commercial project development loans, including oversight of development and significant reporting requirements. Such provisions may result in additional costs and administrative burden for a Recipient in relation to managing the FFA. Given the matters which require HA consent, we also note the administrative burden that numerous DFFAs will place on HA, which will require HA to have the resources, staff, understanding and attitude to deal quickly and commercially with the consent and waiver requests that are involved in any Project.

In respect of CHPs, noting that they are already appropriately regulated and monitored, an opportunity may have been missed for HA to take full advantage of that regulation and oversight and partner with CHPs on a much simpler basis than the DFFA to facilitate expedited use of funding by CHPs to help counter Australia's housing shortfall.

Rather than relying on existing regulation and oversight of CHPs, the DFFA duplicates certain requirements and imposes additional obligations. The question is why.

#### DFFA structure

The DFFA comprises:

- The operative framework provisions in clauses 1 to 7 (**Framework Provisions**). These establish the overall framework in relation to the Funding Programs with an applicant. We have limited comments on the Framework Provisions – see below.
- Attachment 1 – the form of the Project Schedule to be executed in respect of each funded Project. Upon execution of a Project Schedule, the contractual relationship for the relevant Project is constituted by the Project Schedule and the Common Terms (together, a **Project Agreement**). The form of the

Project Schedule seems appropriate and we have limited comments on it – see below. Each Project Schedule would need to be completed with care in relation to each funded Project.

- Attachment 2 – the Common Terms. In the main, our comments relate to the Common Terms.

	Clause / document	Commentary
<b><u>GENERAL</u></b>		
1.	A number of clauses in the Framework Provisions and the Common Terms, re materiality	There are certain provisions which ideally should have materiality qualifiers in relation to ensuring that rights are not exercisable by HA for immaterial matters and/or a Recipient’s obligations are appropriately limited. For example, see clause 4.1(c) of the Framework Provisions, the definition of Significant Event in the Common Terms, clause 4.4(a)(iv) of the Common Terms, clauses 8(a) and 8(b) of the Common Terms, clause 12.1 of the Common Terms (other than clause 12.1(j) which appropriately has a Material Adverse Effect qualification) and clause 17.1 of the Common Terms.
2.	Development and operating regime and provisions re change in circumstances	<p>Applicants should familiarise themselves with the detailed requirements in relation to development and operation of Projects and changes in circumstances (see clause 9 of the Common Terms) including with respect to development and operational obligations (including longstop dates, HA’s consent right with respect to modifications, WHS and NCC requirements) (see in particular clauses 4, 5 and 16.4 of the Common Terms), reporting requirements (see in particular clause 18 of, and Schedule 4 to, the Common Terms) and default events (see clause 12 of the Common Terms). It would be useful if HA could clarify if the WHS requirements only apply where a Concessional Loan or Grant is obtained for funding Project works. As Concessional Loans are limited to 10% of Project costs, the costs associated with a WHS accredited builder may reduce the benefit from concessional funding.</p> <p>Many of the relevant provisions impose onerous obligations.</p> <p>Unless amendments are accepted by HA, a Recipient will need to observe all such requirements.</p> <p><u>We would recommend that advice from construction law experts is obtained in respect of development obligations.</u></p>
<b><u>FRAMEWORK PROVISIONS</u></b>		
3.	4 – Insolvency, Change in Control or Fraud	HA may terminate a Framework Funding Agreement ( <b>FFA</b> ) for an Insolvency Event, a Change in Control or any act of fraud or dishonesty by the Recipient or any of the Recipient’s Representatives in relation to a Project. Such termination is an exception to the general principle that a Project Agreement is a contract independent of the FFA. In relation to such termination, HA may require

		<p>a Market Process in respect of each Project subject to a Project Agreement. In short, a Market Process would involve the sale of the relevant property or replacement of the Recipient of Funding. If a Market Process is unsuccessful, HA may terminate all Project Agreements.</p> <p>HA's ability to terminate due to any dishonesty by any of the Recipient's Representatives in clause 4.1(c) may be problematic. For example, if a contractor engaged by a Recipient does something dishonest in relation to any Project, even without knowledge of the Recipient, then HA can terminate the FFA for all Projects. HA's right to terminate could be limited to the Recipient's fraud or dishonesty that has a material adverse impact in relation to the Recipient's ability to proceed with the Project.</p>
4.	4.3 – Consequences of termination	<p>The provisions relating to the return of documents and information following termination by HA and a Recipient having no Claim in connection with any termination of a FFA by HA are unusual for a funding arrangement. While Recipients may be able to accept these provisions, they appear somewhat excessive and could be amended as follows:</p> <p>(a) The specific types of documents to be returned to HA could be identified, such as plans and specifications or key contracts in respect of any Projects.</p> <p>(b) Return of Confidential Information could be removed as HA is unlikely to share any Confidential Information with a Recipient.</p> <p>(c) A Recipient should be able to make a claim if HA terminates for any reason other than where entitled to do so under the terms of the FFA.</p>
5.	4.4 – No termination by Recipient	<p>Recipients have no right to terminate the FFA and, under clause 2(b), HA has unilateral rights to extend the Term of the FFA. Whilst a Recipient is unlikely to want to terminate the arrangements for some time, should more favourable funding terms arise in the future which are not compatible with the FFA query why the Recipient should not be entitled to terminate, provided the term of any Funding has ended.</p>
<b><u>PROJECT SCHEDULE</u></b>		
6.	1(c)(i) – Operation of Project Schedule – Part A Amendments to Common Terms	<p>Notwithstanding HA's aims to limit amendments, it is contemplated that amendments may be made to the Common Terms. As the draft Common Terms stand, we expect that many CHPs may require some amendments based on their business and operational requirements.</p>
<b><u>COMMON TERMS</u></b>		
7.	Definition of Available	<p>A 2% vacancy allowance is permitted before a Specified Dwelling is considered unoccupied for purposes of calculating (reductions to) Availability Payments under clause 5 of Schedule 1 to the Common Terms. Financial advice may need to be sought as to how the relevant formulas in Schedule 1 operate in calculating the vacancy allowance (which appears to also allow for 21 days between</p>

		tenancies) and whether this vacancy allowance is adequate.  It should also be noted that this vacancy allowance does not carry through clauses 3(a)(i) and 5.2(a), as to which see our comments in item 17 below.
8.	Definition of Control	Although a change in control may be unlikely in relation to a CHIA member, the 25% threshold in paragraphs (b) and (c) is unusual. Typically, the threshold would be 50%. We also query how this definition is intended to operate for companies limited by guarantee where there are members rather than shareholders.
9.	Definition of CHP Law	Paragraph (b)(ii) is overly broad given that a CHP is subject to all laws and regulations, but this definition appears intended to only relate to the laws governing CHPs specifically.
10.	Definitions of Financial Close Adjustment Protocol and Financial Model	While these definitions are only relevant for deriving final adjustments to Funding (see clause 2.2(e)), applicants will need to have the expertise, or retain advisors with expertise, to deal with these matters. The costs of creating the Financial Model, updating it on Financial Close and potentially further updating it where Project costs exceed the maximum allowance in the previous Financial Model will all add to the costs of the Project.
11.	Definition of Force Majeure	This definition does not include interruptions to utilities or industrial action. As such, the Recipient cannot request an extension to the date by which the Operating Phase must commence in relation to such events. Query whether the requirement in (d) that the event must have occurred at or in the direct vicinity of the Site is appropriate in all cases, as a force majeure event that prevents contractors accessing the Site could still cause a delay.
12.	Definition of Government Policies Schedule and 8(b)	The Recipient is required to comply with the Government Policies Schedule but that Schedule has not been provided so we cannot comment on this requirement.
13.	Definition of Project Specific Change in Law	Note the materiality qualifiers in this definition. We query why these are needed. If such a change in law occurs and has any adverse effect on a Recipient, ideally the Recipient should be compensated.
14.	Definition of Security	The drafting note indicates that HA reserves the right to take security from Recipients. This appears to apply regardless of the type of Funding. It is stated that the general intention is that security taken by HA will be subordinated to senior debt, subordinated debt and equity.  Given this general intention and that security in favour of HA will frequently necessitate intercreditor arrangements with External Financiers (which often involve significant negotiations) and, if the Department of Communities and Justice ( <b>DCJ</b> ) has an interest in the Site, with DCJ, we query the need for security in favour of HA in relation to any Funding and, in particular, in relation to Availability Payments where HA is not providing any upfront Funding.
15.	Definition of Significant Event and 12.2	Significant Events are in effect Key Default Events since the Recipient is required to remedy any such event and failure to do so can lead to a Market Process. As such, Significant Events would ideally be removed altogether from the DFFA or, if retained, should be limited to matters that have a material adverse impact on a Project.
16.	2.1 – Financial Close	Under clause 2.1 certain conditions precedent must be satisfied (or waived) before a Project Agreement comes into effect. Satisfying conditions precedent will often be an involved process. A more streamlined regime would seem preferable, in order to

		<p>ensure expedited Funding.</p> <p>In any case, for certainty all conditions precedent should be specified. HA should not have the right (as it currently does under clause 2.1(b)(vii)) to require further conditions precedent that it considers necessary or desirable.</p> <p>The requirement under clause 2.1(d) for a Recipient to provide a written report as to conditions precedent every 30 days is unusual and unnecessary.</p>
17.	3 – Fundamental obligations and risks, 5.2	<p>Each applicant should ensure that it can comply with these obligations. In respect of the obligations in clauses 3(a)(i) and 5.2 to make all Specified Dwellings Available during the Availability Term, the vacancy allowance referred to above does not apply. As such, any vacancy would breach this clause and a Recipient would have to rely on arguing that this breach does not have a Material Adverse Effect to ensure that there is no Key Default Event. This is not ideal, since any financing provided by an External Financier may contain an obligation to ensure no breach of the FFA. This should be amended to ensure there is no breach of clauses 3(a)(i) or 5.2 as the Availability Payment will be adjusted to account for the vacancy level.</p>
18.	4 – Development Phase	<p>To avoid duplication where there is an External Financier (either HA or a commercial lender), the reporting and certification requirements of that External Financier should apply. This point also applies more broadly. Where matters are addressed in external finance arrangements, HA should follow those arrangements (which will generally be comprehensive) and not impose additional requirements (unless there is a significant omission).</p>
19.	4.2 – Independent Certifier	<p>Subject to the comment in item 18 above, the Recipient would bear all costs and expenses of the Independent Certifier. Given HA's position and the aim of the Funding Program, we query if it may make sense for HA to absorb at least half of these costs.</p>
20.	4.3 – Time	<p>HA is considering a "look forward test" in respect of development which, if not satisfied, would be a Key Default Event. We suggest that this is not required. In any case, where there is senior debt in respect of a Project, the approach as to completion testing, etc under the senior debt should apply with no additional requirements under the FFA / Project Agreement.</p> <p>Under clause 4.3(c), the Recipient must provide notice of an Extension Event within 28 days of that event. As such, even where an Extension Event would not exceed the Provisional Delay Allowance, it would still need to be notified to HA to determine if the Recipient is entitled to an extension. To reduce administrative burden, it may make sense to only require such notices once the Provisional Delay Allowance has been exhausted.</p> <p>Under clause 4.3(g) any extension is reduced if the Recipient failed to take 'all steps necessary both to preclude the cause of the delay and to avoid or minimise the consequences of the delay'. The cost of taking such steps may be prohibitive, which should not disentitle the Recipient to the extension.</p>
21.	4.4 - Operations Commencement Test	<p>Passing this test is a trigger for Availability Payments. Ideally, the test would be streamlined. For example, it may be difficult to demonstrate, as required in clause 4.4(a)(iii), that the Housing Provider is ready to commence delivery of services. What exactly does HA require? Why would a breach of the FFA that is not a Key Default Event prevent the test being satisfied as the breach may no longer even be relevant and may be immaterial. Lastly, if a Specified Dwelling has been certified for occupation under an Occupancy Certificate, why is certification from an Independent Certifier necessary?</p> <p>HA has 20 Business Days in order to confirm whether or not it agrees that the test has been satisfied. Since this means that a</p>

		Recipient could be missing out on 20 Business Days of Availability Payments, query if HA should be required to respond in a shorter timeframe.
22.	5.3 - Property Modifications during Operating Phase	HA should be required to consent to any Property Modification that is required by law.
23.	6.2 Recipient-specific requirements – Registered CHP	This provision requires a Registered CHP to comply with the performance standards and requirements under CHP Law. Ideally, more reliance would be placed on those standards and requirements and the DFFA pared back.
24.	7.3 – General right of set off	HA should not have a set off right in relation to good faith claims. Set off should apply only to moneys actually owing. Clause 7.3(a)(iii) should be deleted.
25.	9.2 – Sale or lease of land	<p>The registration tier of the Housing Provider in clause 9.2(b)(ii) and 9.4(b)(i) is not relevant to its ability to provide housing services.</p> <p>The right for HA under clause 9.2(c) to register a restrictive covenant or mortgage seems unnecessary given the many other contractual protections in the DFFA and, where the Recipient is a CHP, the protections in its constitution. If HA does need such a covenant, the terms should be set out in the FFA to ensure that HA's rights are appropriate since HA may only be providing part of the funding requirements for a Project. HA should be obliged to remove the covenant upon the Final Expiry Date (following repayment of the Concessional Loan, if applicable).</p> <p>Where HA is only providing Availability Payments it is submitted that it is adequately protected by its ability to terminate and therefore stop Availability Payments.</p>
26.	11 – Insurances	These provisions are not unusual. However, each applicant (with its insurance advisers if necessary) should ensure that the obligations imposed can be met.
27.	12 – Defaults	Given the note and the position re cross-default termination, we strongly recommend that applications are made on a Project basis rather than a portfolio basis. Further, we suggest that SPVs are used for individual Projects, so as to ring-fence risks.
28.	12.1 - Key Default Events	<p>These events are in general in line with expectations. However, each applicant should consider these in detail including time periods and thresholds. Qualifiers should be considered in relation to certain provisions. For example:</p> <p>Clauses 12.1(a)-(c) relate to Specified Dwellings not being made Available - query if these should be qualified where there has been some type of damage for which the Recipient is able to claim under its insurances.</p> <p>Clause 12.1(d)(ii) should ideally include materiality qualifiers.</p> <p>Clause 12.1(l) could be deleted since HA has to approve the Financial Close Financial Model.</p> <p>Clause 12.1(m) should only apply to the Recipients Representatives actions in respect of the Project.</p>
29.	12.2 – Remediation of Key Default	Each applicant and its External Financiers will need to consider in detail clauses 12.2 and 12.3, since failure to remedy a Key Default Event, Significant Event or a circumstance that is reasonably likely to prevent the Recipient from delivering the Project in

	Events and 12.3 – Failure to remedy Key Default Event	<p>accordance with the Project Agreement can lead to a Market Process.</p> <p>10 Business Days is a short timeframe in order to prepare a remediation plan that addresses all the requirements of clause 12.2(b).</p> <p>Where the Recipient fails to implement a Market Process and HA can then undertake its own Market Process, it is submitted that HA should not be entitled to follow the process in clause 12.3(a)(vii) since HA would not have security over the shares in the Recipient. HA's rights to follow a Market Process will need to be subject to any intercreditor document.</p> <p>There should be a requirement for HA to achieve a market consideration for any Market Process, deduct only relevant Funding that it has provided and its costs and remit the balance to the Recipient. Recipients will need to consider, among other things, if they accept that the market consideration is on the basis that the building is used only for social and affordable housing.</p>
30.	13 - Termination	<p>In clause 13.1(a), query whether HA's right to terminate should only arise on the Longstop Date.</p> <p>Clause 13.2(b) should not prevent the Recipient proceeding against HA where HA has not validly terminated or has breached its obligations.</p>
31.	14 - Expiry obligations	<p>We query why HA needs to be involved in relation to plans for tenants after the expiry of Funding. We would have thought this we would be something that a CHIA member would manage as part of BAU. If regulated as set out in the DFFA the Recipient would have to provide accommodation to Social Housing tenants for at least 2 years and for Affordable Housing tenants for at least 6 months after the Recipient ceases receiving Funding.</p> <p>Further, the security rights of HA under clause 14.4 relating to remaining tenant obligations are over the top.</p>
32.	16.1 and 16.2 - Representations and warranties	<p>The representations and warranties are not unusual for a commercial financing arrangement. Each applicant should ensure that it is in a position to give the representations and warranties at the times required.</p> <p>The representations and warranties regarding documents of title may not be appropriate in jurisdictions where certificates of title are no longer issued.</p>
33.	16.5 – Intellectual Property	<p>We do not understand why HA would need to use any applicant's intellectual property (although perhaps this could relate to a Market Process by HA during the Development Phase). Unless there is a reasonable explanation for this, the provision should be deleted. See also clause 19.</p>
34.	22.2 – Assignment and novation by HA	<p>While we assume the intention is that it is only Concessional Loans that may be transferred to a bank or financial institution (see clause 22.2(a)(v)) (and such transfer would seem unlikely as Concessional Loans are interest free), it should be made clear that Project Agreements using Availability Payments cannot be transferred to banks or financial institutions. Many Recipients may require such a transfer to be subject to its prior approval unless a Key Default Event is continuing. Any such transfer would need to be subject to the transferee entering into an intercreditor arrangement with the External Financier(s).</p>
35.	22.9 Expenses	<p>The Recipient is liable for costs and expense of HA in respect of the negotiation, preparation, execution of, and satisfaction of conditions precedent under, each Funding Document. While this is standard under debt financing arrangements, given the nature</p>



		of applicants for Funding and the intent of the Funding Program, it would be ideal if (as per clause 7.6 of the Framework Provisions) if HA is liable for its own costs.
36.	Schedule 1 to Common Terms – Availability Payment Schedule	Each applicant for Availability Payments must ensure that it understands in full how the provisions in this Schedule operate. See also clause 5.
37.	Schedule 2 to Common Terms – Concessional Loan Schedule	Each applicant for a Concessional Loan must ensure that it understands in full how the provisions in this Schedule operate. Among other things, they will need to ensure that Permitted Disposals and Permitted Security definitions are broad enough in relation to their current and proposed operations.