

EXPLANATORY STATEMENT

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

Housing Australia Act 2018

National Housing Finance and Investment Corporation Investment Mandate Amendment (Housing Australia Future Fund—Preparatory Work) Direction 2023

Subsection 12(1) of the *Housing Australia Act 2018* (the Act) (previously the *National Housing Finance and Investment Corporation Act 2018*) provides that the Minister may, by legislative instrument, give the Board of Housing Australia (previously the National Housing Finance and Investment Corporation) directions about the performance of Housing Australia's functions, and must give at least one such direction.

The Instrument refers to Housing Australia as the National Housing Finance and Investment Corporation (NHFIC) as this will ensure consistency with all current references in the Investment Mandate. The *National Housing Finance and Investment Corporation Investment Mandate Direction 2018* (Investment Mandate) will be updated to change all references to NHFIC to Housing Australia to give effect to the amendment contained in the *Treasury Laws Amendment (Housing Measures No 1) Act 2023* to rename NHFIC as Housing Australia.

The Act established NHFIC to improve housing outcomes for Australians. It performs this role through its financing function, guarantee function, and capacity building function. NHFIC is a corporate Commonwealth entity in the Treasury portfolio and is governed by an independent board. NHFIC commenced operation on 30 June 2018.

On 14 September 2023, the *Housing Australia Future Fund Bill 2023* (the Bill) passed both Houses of Parliament. The Bill establishes the Housing Australia Future Fund (HAFF), which enables NHFIC to make grants and loans in relation to social and affordable housing, and acute housing needs. These grants and loans will be distributed via the Housing Australia Future Fund Facility (HAFFF).

The HAFF will give effect to the Government's policy intent regarding NHFIC's use of the funds allocated from the HAFF to support the delivery of 20,000 social and 10,000 affordable homes over the first five years of the operation of the HAFF (HAFF commitment).

The purpose of the *National Housing Finance and Investment Corporation Investment Mandate Amendment (Housing Australia Future Fund—Preparatory Work) Direction 2023* (the Instrument) is to enable NHFIC to undertake preparatory work in support of the HAFFF. This Instrument also sets out the limitations to the preparatory work which NHFIC can undertake. The purpose of these limitations is to manage the scope of preparatory work that NHFIC can undertake and ensure that it does not engage in activities that go to the actual delivery of the HAFF commitment. Later directions will provide for NHFIC to undertake the delivery of the obligations under the HAFF commitment.

The Act does not specify any conditions that need to be satisfied before the power to make the Instrument may be exercised.

NHFIC was consulted in relation to the Instrument. Wider consultation was not undertaken as the amendments only affect NHFIC's internal operations to enable it to undertake preparatory work. Public consultation has been undertaken in relation to the proposed *Housing Australia Investment Mandate Amendment (Social Housing, Affordable Housing and Acute Housing Needs) Direction 2023* as that instrument provides for the ongoing administration of the HAFFF.

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 sunseting 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 sunseting if the instrument is a direction by the Minister to any person or body. The Instrument is a direction from the Minister to NHFIC, and therefore is exempt from sunseting.

The Instrument is 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 which results in the amendment of the Investment Mandate. Once repealed, the sunseting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* is no longer relevant to the Instrument.

As a direction from the Minister to NHFIC, 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 commences the day after registration.

The Office of Impact Analysis has been (OIA) has been consulted (OIA ref: OIA23-02931) and advised that an Impact Analysis is not required. The measure has no impact on compliance costs.

Details of the *National Housing Finance and Investment Corporation Investment Mandate Amendment (Housing Australia Future Fund—Preparatory Work) Direction 2023*

Section 1 – Name

This section provides that the name of the Instrument is the *National Housing Finance and Investment Corporation Investment Mandate Amendment (Housing Australia Future Fund—Preparatory Work) Direction 2023* (the Instrument).

Section 2 – Commencement

This section provides that the Instrument commences the day it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Instrument is made under the *Housing Australia Act 2018* (the Act).

Section 4 – Schedule

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

Schedule 1 – Amendments

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

The title of the Investment Mandate will be amended to the *Housing Australia Investment Mandate Direction 2018* by the forthcoming *Housing Australia Investment Mandate Amendment (Social Housing, Affordable Housing and Acute Housing Needs) Direction 2023* (forthcoming instrument). The forthcoming instrument will also, among other things, omit National Housing Finance and Investment Corporation and NHFIC and substitute Housing Australia throughout the Investment Mandate.

However, as the Instrument precedes the forthcoming instrument, for clarity, the Instrument will refer to Housing Australia as the National Housing Finance and Investment Corporation and NHFIC as this will ensure consistency with all references in the Investment Mandate as it currently is.

Pursuant to section 10 of the *Acts Interpretation Act 1901*, a reference to the *National Housing Finance and Investment Corporation Act 2018* or NHFIC Act should be construed as a reference to *Housing Australia Act 2018*, and pursuant to subsection 25B(1) of the *Acts Interpretation Act 1901*, a reference to the National Housing Finance and Investment Corporation or NHFIC should be construed as a reference to Housing Australia.

New activity for the National Housing Finance and Investment Corporation

Section 8 of the Act sets out the functions of the National Housing Finance and Investment Corporation (NHFIC), which relevantly includes to make loans and grants to improve, directly or indirectly, housing outcomes.

Subsection 12(1) of the Act provides that the Minister may, by legislative instrument, give the Board of NHFIC directions about the performance of NHFIC's functions, and must give at least one such direction. The directions together constitute the Investment Mandate.

Part 2, Division 1 of the Investment Mandate sets out the activities and allocation of funds for NHFIC. This Instrument inserts a new activity for NHFIC in Part 2, Division 1 of the Investment Mandate.

Preparatory work for the Housing Australia Future Fund Facility to deliver 20,000 social and 10,000 affordable homes over its first five years of operation

Item 1 of the Instrument inserts a new section 8D in the Investment Mandate, which is titled 'Preparatory work for the Housing Australia Future Fund Facility'. This section sets out the preparatory work that NHFIC may undertake for the purposes of establishing the Housing Australia Future Fund Facility (HAFFF) which will be used to provide loans and grants for projects that support the delivery of 20,000 social and 10,000 affordable homes over its first five years of operation. Section 8D also includes limitations on the scope of that preparatory work. This ensures that NHFIC can undertake required preparatory work but not enter into binding contractual arrangements before the Minister has provided directions on how the HAFFF should be administered.

New subsection 8D(1) empowers NHFIC to undertake preparatory work for the delivery of the HAFFF. This is consistent with changes made by the *National Housing Finance and Investment Corporation Investment Mandate Amendment (National Housing Accord—Preparatory Work) Direction 2023* to enable preparatory work to be undertaken in relation to the Accord commitment.

Subsection 8D(1) does not specify the nature of the preparatory work that NHFIC can undertake for the delivery of the HAFFF. This is because the intention is to provide NHFIC with the flexibility to undertake a broad range of work for the purposes of preparing for the HAFFF. Some examples of the type of preparatory work that could be within scope are:

- establishing principles for engagement with state and territory governments on program delivery;
- establishing documentation and procurement processes in preparation for receiving applications from project proponents, including development of an online applications portal; and
- consulting with social and affordable housing stakeholders such as community housing providers, developers and builders, banks, and other finance providers to determine program delivery requirements.

However, the preparatory work that NHFIC may undertake is subject to the limitations set out in subsections 8D(2) and (3).

Subsection 8D(2) provides that the preparatory work must be incidental or conducive to the performance of NHFIC's functions under subsection 8(1) of the Act. This provision reinforces the scope of the work that NHFIC is permitted to undertake under paragraph 8(1)(e) of the Act, which relevantly provides that the functions of NHFIC are to do anything incidental or conducive to the performance of its functions in subsection 8(1). The purpose of this limitation is to make clear that any preparatory works that NHFIC carries out must be consistent with, and within the scope of, its functions in section 8 of the Act.

Subsection 8D(3) sets out two limitations on the scope of preparatory work that NHFIC can undertake under subsection 8D(1). Specifically, NHFIC is prohibited from:

- entering into contracts for loans and grants relating to the provision of social and affordable housing under the HAFFF; or
- commencing a process for selecting a particular recipient of a loan or grant relating to the provision of housing under the HAFFF.

These activities are not considered to be work that is preparatory in nature and, for that reason, NHFIC is specifically prohibited from undertaking that work.

The purpose of subsection 8D(3) is to provide that NHFIC cannot enter into any form of agreement that commits it to the provision of social or affordable housing under the HAFFF.

Enabling NHFIC to spend money on preparatory work for the Housing Australia Future Fund Facility

Item 2 of the Instrument omits the reference of '8C' and substitutes the reference of '8D' in paragraph 9(1)(a) of the Investment Mandate. It is a consequential amendment from the insertion of the new section 8D.

Subsection 9(1) prohibits NHFIC from spending money otherwise than for certain purposes set out in that subsection.

Paragraph 9(1)(a) allows NHFIC to spend money on activities outlined in sections 6 to 8C of the Investment Mandate, which are NHFIC's current activities. As the Instrument inserts a new activity for NHFIC by inserting section 8D into the Investment Mandate, it is necessary to amend paragraph 9(1)(a) to extend the exceptions to subsection 9(1) to include section 8D in order to enable NHFIC to spend money on the preparatory works for the HAFFF.