

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

National Rental Affordability Scheme Act 2008

National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017

Purpose

The purpose of the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017* (**the Regulations**) is to create protections for investors of rental dwellings in the National Rental Affordability Scheme (**NRAS**). Protecting these investors will promote rental housing affordability, by ensuring that such dwellings are not withdrawn from the Scheme.

Background

Section 5 of the *National Rental Affordability Scheme Act 2008* (**the Act**) provides that ‘the regulations must prescribe a Scheme’ to deal with certain matters listed in that provision including: the approval of participants, the approval of rental dwellings and providing incentives to an approved participant if certain conditions are satisfied.

The *National Rental Affordability Scheme Regulations 2008* (**the Principal Regulations**) prescribe the Scheme.

Under the NRAS, the Secretary may grant an entitlement (an ‘allocation’) to approved participants to receive an annual ‘incentive’ for 10 years in relation an approved rental dwelling. The incentive is a payment or a tax offset certificate of equivalent value. To receive the incentive payment each year, the approved participant must comply with certain ‘conditions of allocation’, the key conditions being that the approved rental dwelling is leased to ‘eligible tenants’, being low to middle income earners, at a rate no higher than 80% of the dwelling’s market value rent.

Issues

Investor Protection

NRAS does not require an approved participant to own the rental dwelling for which they hold an allocation. Many rental dwellings are now owned by a third party (an ‘investor’). A common arrangement is for the investor and the approved participant to have a contractual arrangement where the approved participant manages compliance with the NRAS regulatory requirements and passes on all or part of the incentive to the investor.

The Principal Regulations do not currently address the relationship between approved participants and investors, and do not provide any protections for investors. Where investors face difficulties with their approved participants, for example where the approved participant fails to pass on an incentive payment, the investor is not able to end their relationship with the approved participant without exiting NRAS. This undermines the objects of NRAS, since it reduces the number of dwellings available to rent to low to middle income earners at below market rates.

To address this, these Regulations introduce a power for the Secretary to transfer an allocation to a different approved participant, where one or more specified grounds exist.

This power is available either following a written request from an investor or on the Secretary's own initiative. This gives investors the option of requesting that the Secretary change the approved participant for their rental dwelling rather than exiting NRAS.

Further, the Regulations introduce new obligations on approved participants to comply with any requirement to pass on an incentive to an investor within a reasonable time of receiving the incentive.

Breaches of these obligations are grounds for the Secretary to transfer the allocation to a different approved participant. Alternatively, where it is appropriate, the Secretary may revoke the allocation.

False or Misleading Information

An allocation can currently be revoked if the application for the allocation contained false or misleading information. However, there are no equivalent consequences for providing false or misleading information after an allocation is made. To address this, the Regulations:

- prescribe a new condition of allocation that the approved participant must not provide false or misleading information to the Secretary or the Department; and
- prescribe that providing false or misleading information to an investor is a ground for the Secretary to transfer the allocation to a different approved participant, or for the Secretary to revoke the allocation.

Compliance with laws

Approved participants are required to ensure that the approved rental dwelling complies with landlord, tenancy, building and health and safety laws. To complement this, two additional requirements have been added, namely:

- approved participants must comply with consumer protection laws in relation to their allocation; and
- approved participants must not claim tax offsets to which they are not entitled.

A breach of either of these requirements is now a ground for the Secretary to transfer an allocation to a different approved participant, or to revoke the allocation if it is appropriate.

De-registration and Bankruptcy of Approved Participants

Currently, where an approved participant becomes bankrupt, or is likely to be de-registered as a company, the Secretary could not transfer their allocations to another approved participant unless the approved participant requested it. This led to allocations and dwellings being lost from NRAS, where it may otherwise be possible to find a new approved participant to take over the allocations.

To address this, the Regulations make these grounds for the Secretary to transfer an allocation to a different approved participant, or to revoke the allocation if it is appropriate.

Other changes

The Regulations also:

- change the indexation of household income limits for eligible tenants to use the December quarter Consumer Price Index figures, instead of the March quarter figures, giving approved participants more time to review the new figures before the next NRAS year commences on 1 May; and

- make some minor changes to the form and content of the annual statement of compliance approved participants must lodge to provide for further flexibility and to address emerging issues in NRAS.

Consultation

The Department consulted with external stakeholders in December 2016 to seek feedback on how the NRAS Regulations and administrative practices could be further improved, while continuing to promote rental affordability policy outcomes. A consultation paper and submission template was available on the Department's website for stakeholders to provide feedback.

Stakeholders were encouraged to focus on key areas of interest, including improving transparency for investors. The Commonwealth Ombudsman provided a submission, noting that the lack of regulatory powers to protect investors was at odds with the intent of the Scheme and good administrative practice.

The Department meets regularly with NRAS peak bodies representing approved participants (National Affordable Housing Providers Limited and the Community Housing Industry Association), and has discussed the proposed amendments with them.

These amendments have also been informed by information and complaints about the current operation of the Scheme provided by investors. These were provided to the Department through a variety of channels.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (**OBPR**) has advised the Department of Social Services that the proposal appears to impose only minor impacts on business, community organisations or individuals. OBPR advised that a RIS is not required. The OBPR reference number is 22848.

Commencement

The Regulations commences on the day after they are registered on the Federal Register of Legislation.

Explanation of Provisions

Section 1 – Name

Explanation of the provisions

Section 1 – Name

The instrument is titled the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017*.

Section 2 - Commencement

The Regulations commence on the day after they are registered. The amendments will be subject to the application provisions in new regulation 36, inserted by item 17 of Schedule 1.

Section 3 – Authority

The Regulations are made under the *National Rental Affordability Scheme Act 2008*.

Section 4 – Schedules

Schedule 1 amends the **Principal Regulations** in accordance with its terms.

Schedule 1 – Amendments

Item 1 – Regulation 4 (at the end of paragraph (b) of the definition of *approved participant*)

This item makes a consequential amendment to the definition of ‘approved participant’, reflecting the new transfer of allocation provision in regulation 21A (inserted by item 8).

Item 2 – Regulation 4

This item inserts two new definitions for terms that are inserted into the Principal Regulations.

‘Consumer protection law’ is defined by reference to an equivalent definition in the *Australian Postal Corporation Act 1989*. Section 90E of that Act defines ‘consumer protection law’ to mean:

- the *Competition and Consumer Act 2010* (which contains and applies the Australian Consumer Law)
- the *Australian Securities and Investments Commission Act 2001*
- the *Corporations Act 2001*
- each State or Territory’s Fair Trading Act or Consumer Affairs and Fair Trading Act
- each State or Territory’s Sale of Goods Act or Goods Act.

‘Investor’ is a key term in the new provisions inserted by these Regulations. An ‘investor’ is a person who is the owner of an approved rental dwelling (unless that is the approved participant). In some cases there may be more than one investor for a rental dwelling — for example where the dwelling is jointly owned by a couple

Item 3 – Regulation 4 (definition of *NRAS tenant income index*)

Explanation of Provisions

Item 6 – After subregulation 16(2)

This item amends the definition of ‘NRAS tenant income index’ to provide that tenant income limits (as set out in regulation 19(4)) are indexed according to the December quarter Consumer Price Index, rather than the March quarter.

Using the March quarter figures has caused a practical issue in that they are not available until April, leaving limited time to communicate the new income limits to approved participants before they take effect for the new NRAS year, being 1 May.

Item 4 – Regulation 4

This item inserts two new definitions.

‘Pass on’ has the meaning given by new subregulation 30A(2) (inserted by item 17).

‘Relevant approved participant’ has the meaning given by new subregulation 21A(1) (inserted by item 11).

Item 5 – Regulation 10

This item repeals and replaces regulation 10, which explains the purpose of Part 3 of the Principal Regulations. The new regulation 10 includes references to the transfer and revocation of allocations.

Item 6 – After subregulation 16(2)

Regulation 16 sets out the ‘conditions of allocation’, which are the conditions an approved participant must comply with to be eligible for an incentive (see regulation 25).

This item inserts a new condition of allocation: that the approved participant must not provide false or misleading information to the Secretary or the Department, or knowingly omit relevant information.

Currently, an allocation can be revoked if the application for that allocation contained false or misleading information, or the applicant knowingly omitted relevant information (see regulation 22). However, there are no equivalent consequences for providing false or misleading information after an allocation is made. This new condition of allocation addresses that inconsistency.

An example of when an approved participant would fail to comply with this condition is if the approved participant provided false or misleading information to the Secretary as part of a market rent valuation. This could include the approved participant omitting information from the market rent valuation which they knew to be relevant.

Item 7 – Subregulation 17(3)

Item 8 – Paragraphs 17(3)(e) and (f)

Item 9 – Paragraph 17(3)(h)

One of the conditions of allocation (see subregulation 16(1)) is that the approved participant must submit an annual statement of compliance. These items make some minor changes to the form and content of that statement.

Explanation of Provisions

Item 10 – After regulation 19

Item 7 amends subregulation 17(3) to provide that the statement of compliance must be in a form approved by the Secretary. This will provide administrative flexibility and ensure consistency in relation to statements of compliance. This will not prevent an approved participant from receiving an incentive due to minor non-compliance with the approved form (see section 25C of the *Acts Interpretation Act 1901*).

Items 8 and 9 remove an existing requirement that the statement of compliance contain the details of the tenancy management of the rental dwelling, and add the following:

- a requirement to provide the details of each of the investors for the rental dwelling;
- a statement that at all times during the year, the approved participant complied with consumer protection laws in relation to the allocation (or details of how they did not comply);
- a statement that the approved participant complied with the new obligations in Division 2 of Part 4 (inserted by item 15) (or details of how they did not comply); and
- such other information as is required by the form approved by the Secretary.

The requirement to provide this additional information provides further protections for investors and eligible tenants. New subregulation 16(2A) (inserted by item 6) provides that it is a condition of allocation that approved participants must not provide false or misleading information to the Department. Failing to meet a condition of allocation would be grounds for transfer under new regulation 21A (inserted by item 11) and regulation 22 of the Principal Regulations.

It is essential that the Department is able to contact investors regarding transfers of allocations. There is no practical way to obtain the contact details for investors other than from approved participants unless the investors contact the Department directly. The requirement on approved participants to provide the details of each investor for a rental dwelling authorises the Department to collect the names and contact details of investors from approved participants, rather than from investors directly. This will ensure the Department complies with Australian Privacy Principle 3.6 in Schedule 1 to the *Privacy Act 1988* when collecting personal information about investors from an approved participant.

Item 10 – After regulation 19

This item inserts a new Division 1A in Part 3 of the Principal Regulations, entitled ‘Transfer and revocation of allocations’ and consisting of regulations 20–22B.

Item 11 – After regulation 21

This item inserts new regulations 21A, 21B and 21C. Together, these new regulations will enable the Secretary to transfer an allocation (other than provisional allocations) from one approved participant (called the ‘relevant approved participant’) to another approved participant, either on the request of the investor for the dwelling that allocation relates to, or on the initiative of the Secretary.

These new regulations are in addition to existing regulation 21, which enables the Secretary to transfer an allocation to a new approved participant on the request of the existing approved participant.

Explanation of Provisions

Item 11 – After regulation 21

Regulation 21A – Transfer of allocation at Secretary’s discretion or at request of investor

This new regulation sets out the Secretary’s power to transfer an allocation to a new approved participant, including the grounds for exercising this power and when the Secretary can exercise the power. The power is subject to procedural requirements set out in new regulations 21B and 21C.

The Secretary can only transfer an allocation under the new regulation if he or she is satisfied that one or more of the specified grounds in subregulation 21A(1) exist:

- paragraphs 21A(2)(a) refers to a failure by the approved participant to comply with a condition of allocation and reflects an existing ground on which the Secretary may revoke an allocation under regulation 22.
- paragraph 21A(2)(b) refers to breach of the new obligations on approved participants in relation to investors in Division 2 of Part 4 (inserted by item 15).
- paragraph 21A(2)(c) refers to the approved participant providing false or misleading information to an investor. This might include, for example, an approved participant giving an investor misleading information about the status of an incentive.
- paragraph 21A(2)(d) refers to the approved participant contravening a consumer protection law. This might include, for example, an approved participant engaging in misleading or deceptive conduct in relation to their allocation, or engaging in unlawful anti-competitive conduct.
- paragraph 21A(2)(e) refers to an approved participant claiming an incentive in the form of a tax offset that they were not entitled to claim.
- paragraphs 21A (f) and (g) refer to the approved participant being subject to pending de-registration as a company by the Australian Securities and Investments Commission, or becoming bankrupt.
- paragraph 21A(2)(h) refers to an approved participant providing false or misleading information, or failing to provide relevant information, when making an application under the Regulations.

Subregulation 21A(3) provides that the Secretary may transfer an allocation on the Secretary’s own initiative, or on the written request of each investor. Subregulation 21A(4) provides that a request from the investor(s) must be in an approved form, and identify the ground(s) specified in subregulation 21A(2) the investor considers exists for having the allocation transferred.

Regulation 21B – Secretary to notify of proposed transfer

This new regulation sets out the procedural protections and requirements before the Secretary can transfer an allocation under new regulation 21A.

Before the Secretary can transfer the allocation, the Secretary must:

- give the current approved participant notice of the proposed transfer, including the reasons for the proposed transfer;
- give the approved participant 14 days to provide a written submission about the proposed transfer; and

Explanation of Provisions

Item 12 – Subregulation 22(1)

- have regard to any submission the approved participant makes.

An application may also be made to the Administrative Appeal Tribunal (AAT) for review of a decision to transfer an allocation under new regulation 21A (see item 18). As such, the Secretary will also be required by section 27A of the *Administrative Appeals Tribunal Act 1975* to give the approved participant a notice that includes details of the making of the final decision and their review rights,

When the Secretary proposes to transfer an allocation following a request from the investor(s), the Secretary must also give the investor(s):

- a notice of the proposed transfer;
- a list of potential alternative approved participants to whom the Secretary may decide to transfer the allocation; and
- 14 days to nominate their preference for the new approved participant.

In some cases there will only be one viable alternative approved participant. In these cases, the Secretary's notice will only list one potential alternative approved participant.

Subregulation 21B(3) being limited to transfers at the request of an investor does not prevent the Secretary from consulting with the investors (whether by this process or a different process) when the transfer is at the Secretary's initiative.

Regulation 21C – Requirements for transfer

This new regulation sets out requirements for the transfer of an allocation to another approved participant.

It requires:

- the Secretary to be satisfied that the new approved participant is suitable and has capacity to manage the allocation; and
- the new approved participant to give written agreement to the transfer.

Item 12 – Subregulation 22(1)

Item 13 – After paragraph 22(1)(a)

Regulation 22 sets out the Secretary's power to revoke an allocation. These items insert new grounds on which the Secretary can revoke an allocation, to make the power consistent with the new power to transfer an allocation in new regulation 21A (inserted by item 11). These grounds are explained above.

Item 14 – After regulation 22A

This item inserts new regulation 22B. This regulation sets out a non-exclusive list of the matters the Secretary may take into account in deciding whether to transfer an allocation under new regulation 21A, or to revoke an allocation. These are:

- whether the approved participant has failed to manage an allocation in accordance with the objects of the Scheme (which are, in part, set out in section 3 of the NRAS Act);

Explanation of Provisions

Item 15 – Part 4 (heading)

- any advice provided to the Secretary by a Commonwealth, State or Territory regulatory authority (for example, the Australian Competition and Consumer Commission) about whether the approved participant has, in relation to an allocation, contravened a law of the Commonwealth or of a State or Territory. This will assist the Secretary in deciding if she or he can be satisfied that the ground in new paragraphs 21A(2)(d) and 22(1)(ad) exists. It will also allow the Secretary to take any broader issues relating to the approved participant’s conduct and legal compliance into account;
- any matters notified to the Secretary about the approved participant’s conduct by a State or Territory government. This recognises the role of State and Territory governments in relation to the NRAS and the provision of affordable housing;
- any conduct by the approved participant in relation to an allocation which the Secretary considers may bring the Scheme into disrepute, such as approved participants using their advantageous bargaining position to force investors to comply with unreasonable requirements or systematically failing to respond to investor requests and enquiries for information, including regarding the payment of incentives. The NRAS is a program involving significant expenditure by both the Commonwealth and States and Territories. As such, it is important that it does not become associated with disreputable conduct or business practices;
- the approved participant’s current financial circumstances, including circumstances which may limit their capacity to comply with the conditions of allocation, and whether the approved participant has even been bankrupt;
- the nature, significance, persistence and seriousness of any contravention of a condition of an allocation or the new obligations in Division 2 of Part 4 (inserted by item 17). This will allow the Secretary to distinguish between, and take into consideration, contraventions which are of a minor or one-off nature and those which are serious or involve an ongoing pattern of contravention;
- the need to ensure that allocations under the Scheme are properly managed and investors maintain confidence in the Scheme. This reflects that the NRAS is dependent on investors, as owners of the rental dwellings, not withdrawing from the Scheme.

This item also creates a new Division 1B in Part 3, entitled ‘Variation of certain conditions’ and consisting of existing regulation 23 (which is unchanged).

Item 15 – Part 4 (heading)

Item 16 – Regulations 24 and 25 and subregulations 28A(2) and 29(1)

Item 17 – At the end of Part 4

These items create a new Division 2 of Part 4, entitled ‘Obligation in relation to incentives’, consisting of new regulations 30A and 30B. These regulations establish a new obligation on approved participants in relation to investors, specifically an obligation on the approved participant to pass on incentive payments to investors where there is a contractual obligation to do so. A failure to comply with this obligation is now a ground for the Secretary to transfer or revoke an allocation. (see new paragraphs 21A(2)(b) and 22(1)(aa), inserted by items 11 and 13 respectively).

Explanation of Provisions

Item 18 – Before paragraph 33(1)(a)

Regulation 30A – Approved participant’s obligations to investors

This regulation explains Division 2 of Part 4 and defines when there is an obligation to ‘pass on’ an incentive, a key concept in regulation 30B.

Subregulation 30A(2) explains that a reference to a requirement to ‘pass on’ an incentive to an investor is a reference to a contractual obligation on the approved participant to:

- make a payment to the investor in relation to the incentive. For example, where the approved participant is required to make a payment equal to some or all of an incentive to the investor after the approved participant receives the incentive (regardless of the form of that incentive);
- take steps to enable the investor to claim a tax offset to which the investor is entitled under Division 380 of the *Income Tax Assessment Act 1997* in relation to the incentive. This would apply in circumstances where the investor is directly entitled to the tax offset, but is reliant on the approved participant passing on information or taking other steps so that the investor is in a position to claim this offset;
- make an election under section 380-10 or 380-16 of the *Income Tax Assessment Act 1997*. This would apply in circumstances where the approved participant would be, by default, entitled to claim the tax offset, but they are under an obligation to make an election under the *Income Tax Assessment Act 1997* so that the investor can claim the tax offset instead.

It is intended that a reference to a requirement to ‘pass on’ an incentive will include a reference to a requirement to pass on part of an incentive. For example, the term will apply in circumstances where the approved participant is entitled in accordance with the contractual arrangement to retain part of the incentive as a fee.

Regulation 30B – Obligation to pass on incentives in timely manner

This regulation applies where an approved participant has received an incentive and is under an obligation (based on their contractual arrangement with the investor) to pass on all or part of the incentive the investor. It creates an obligation on the approved participant to comply with their existing obligation within a reasonable time after receiving the incentive.

What is a ‘reasonable time’ would vary depending on the circumstances. For example, where the requirement relates to steps required for the investor to claim a tax offset, what is reasonable could be informed by reference to when the investor needed a particular step to be completed in order to complete their tax return. It may also be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant’s business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive.

Item 18 – Before paragraph 33(1)(a)

This item amends regulation 33 to make a decision to transfer an allocation under new regulation 21A (inserted by item 11) reviewable by the AAT. This is consistent with decisions to revoke an allocation being reviewable by the AAT.

Explanation of Provisions

Item 19 – At the end of Part 6

Item 19 – At the end of Part 6

This item inserts a new Division 2 of Part 6, entitled ‘Amendments made by the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017’, consisting of new regulation 36.

Regulation 36 – Application

This regulation will govern the application of the amendments made by these Regulations:

- The new requirements for the statement of compliance will apply in relation to statements of compliance lodged on or after these Regulations commence.
- The grounds in new subregulation 21A(2) (for transfer) and added to regulation 22 (for revocation), apply to conduct occurring before, on or after the commencement of the instrument. The exception is the grounds relating to bankruptcy and de-registration, which will only apply to conduct after commencement.
- The considerations listed in new regulation 22B apply in relation to a transfer or revocation of an allocation, including allocations made before the commencement of these Regulations.
- The new obligations in Division 2 of Part 4 on approved participants to pass on incentives apply in relation to any incentive, including incentives received before the instrument commences.

Applying some provisions of the regulations to conduct which occurs before the Regulations commence will not give the amendments a retrospective effect. This is because the amendments will only alter rights or entitlements after the commencement of the Regulations when the Secretary exercises his or her power to transfer or revoke an allocation. Any exercise of this power will only affect future rights and entitlements (for example, to receive a future incentive) and will not affect any past rights or entitlements.

It is appropriate for some of these Regulations to apply to conduct that occurs before these Regulations commence. This is because the Government is aware of existing conduct of approved participants which is significantly affecting investor confidence in the scheme and undermining the objectives of the scheme. Where appropriate, it is important for the Secretary to be able to take this conduct into account when exercising the new powers inserted by the Regulations to ensure that confidence in the Scheme is maintained.

Further, applying the amendments to existing conduct that involves, for example, the provision of false or misleading information, the breach of consumer protection laws or non-compliance with contractual obligations is fair and reasonable. This is because such conduct is in contravention of existing legal restrictions and obligations. A reasonable person would know that such conduct is unacceptable and will attract consequences. The amendments are merely ensuring that the Scheme includes appropriate responses to conduct which is already unlawful.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The purpose of the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017* (**the Regulations**) is to address concerns that have been identified in relation to the protection of investors in rental dwellings that are part of the National Rental Affordability Scheme (**NRAS or the Scheme**).

The *National Rental Affordability Scheme Regulations 2008* (**the Principal Regulations**) prescribe the Scheme.

Under the NRAS, the Secretary may grant an entitlement (an ‘allocation’) to approved participants to receive an annual ‘incentive’ for 10 years in relation an approved rental dwelling. The incentive is a payment or a tax offset certificate of equivalent value. To receive the incentive each year, the approved participant must comply with certain ‘conditions of allocation’, the key conditions being that the approved rental dwelling is leased to ‘eligible tenants’ at a rate no higher than 80% of the dwelling’s market value rent.

The Scheme does not require an approved participant to own the rental dwelling they hold an allocation for. Many rental dwellings are owned by a third party (an ‘investor’). A common arrangement is for the investor and the approved participant to have a contractual arrangement where the approved participant manages compliance with the Scheme and passes on all or part of the incentive to the investor.

The Regulations will create protections for investors in the NRAS by prescribing expectations in relation to interactions between investors and approved participants, and providing investors with a means to change an approved participant where these expectations are not met.

Human rights implications

Of the human rights and freedoms recognised in the international instruments listed in the definition of human rights at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Regulations engage the right to an adequate standard of living, including housing, as referred to in Article 11.1 of the *International Covenant on Economic, Social and Cultural Rights* (done at New York on 16 December 1966 ([1976 ATS 5])).

The Regulations are consistent with furthering the right to an adequate standard of living, including housing, as it aims to promote investor confidence in the Scheme and so ensure that rental dwellings remain in the scheme and available to rent at below market rates.

Conclusion

The Regulations are compatible with human rights as they do not raise any human rights issues.

The Hon. Christian Porter
Minister for Social Services