

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 232

Issued by the authority of the Minister for Housing

National Rental Affordability Scheme Act 2008

National Rental Affordability Scheme Regulations 2008

Section 12 of the *National Rental Affordability Scheme Act 2008* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the Act is to enable the establishment of the National Rental Affordability Scheme (the Scheme) in regulation, providing conditions for applications, assessment, allocation and eligibility for incentive. The Scheme is intended to encourage the development of affordable rental housing by offering conditional incentives to individuals and entities providing new rental housing to low and moderate income households.

Section 5 of the Act provides that, to further the objects of the Act, the regulations must prescribe the following details of the Scheme: (a) the approval of participants (**approved participants**) by the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs; (b) the approval of rental dwellings by the Secretary; (c) providing incentives to an approved participant if certain conditions are satisfied; (d) a matter required or permitted by the Act to be included in the Scheme; (e) ancillary or incidental matters.

Further, section 6 of the Act provides that the Scheme may provide for any or all of the following matters: (a) the application process for an allocation; (b) the assessment criteria for an allocation (which may vary from time to time); (c) the amount of an incentive; (d) how the market value rent of a rental dwelling for an National Rental Affordability Scheme year (NRAS year) is to be determined.

The purpose of the Regulations is to prescribe these details related to the Scheme. The Scheme is a key part of the Government's \$2.2 billion affordable housing package and aims to address the shortage of rental housing in Australia. In particular, the Scheme is designed to stimulate the supply of lower-rent homes by offering an incentive to complying participants who provide new rental dwellings to low and moderate income households at 20 per cent below market rates.

The Regulations set out all the necessary details of the Scheme such as those relating to applications, allocations, receiving incentives and ancillary matters.

Details of the Regulations are outlined in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations are taken to have commenced on 1 July 2008, to coincide with the commencement of the Act. Subsection 12(2) of the Act expressly provides that regulations made before 1 July 2009 may be expressed to take effect from a date before the regulations were registered on the Federal Register of Legislative Instruments.

Consultation

The Scheme is an election commitment. The Prime Minister released the Scheme's technical discussion paper on 2 May 2008. The paper outlined the main features of the Scheme and how it would operate and sought comments and suggestions about the Scheme's design to help settle the final policy framework and administrative arrangements.

One hundred and twenty-seven submissions were received in response, with the majority positive about the Scheme and providing useful feedback on key policy matters. As a result of feedback from key housing stakeholders, consultation with States and Territories and further consideration by Treasury and FaHCSIA, the Government broadened the proposed tenant eligibility criteria to allow greater access to the Scheme by moderate income tenants. The Scheme's design was also adjusted to facilitate smaller scale proposals which will support local solutions, innovative design approaches and targeting to specifically identified groups.

The Department has held in-depth consultations with State and Territory governments, who are also contributors to the Scheme, and has consulted widely with potential investors in the Scheme throughout 2008. Public information sessions about the Scheme were widely advertised and held in all capital cities and Newcastle and Cairns during August 2008.

An exposure draft of the Regulations was publicly released on 14 October 2008 to assist with understanding of the Scheme and the Scheme's legislation was scrutinised by the Senate Community Affairs Committee.

Details of the *National Rental Affordability Scheme Regulations 2008*

Part 1 Preliminary

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *National Rental Affordability Scheme Regulations 2008*.

Regulation 2 – Commencement

This regulation provides for the Regulations to be taken to have commenced on 1 July 2008. This coincides with the commencement of the *National Rental Affordability Scheme Act 2008* (the Act).

Retrospective operation is necessary to allow eligibility of complying participants under the Scheme to be recognised from as early as 1 July 2008. Further, subsection 12(2) of the Act expressly provides the power for regulations to take effect from a date before registration under the *Legislative Instruments Act 2003*.

Regulation 3 – The National Rental Affordability Scheme

This regulation provides that, for section 5 of the Act, these Regulations constitute the National Rental Affordability Scheme (the Scheme).

Regulation 4 – Definitions

This regulation provides for numerous definitions of terms that are used in these Regulations.

This regulation also notes that numerous other terms are defined in the Act and used in these Regulations.

Regulation 5 – Meaning of rental dwelling

This regulation provides for a category of dwellings that are not rental dwellings within the definition of that term (section 4 of the Act refers). These are dwellings located in an area to which landlord, tenancy, building and health and safety laws of the State or Territory and local government area do not apply. This occurs in circumstances where an accommodation solution is offered rather than a housing solution. For example, some student accommodation located on university campuses.

Part 2 Application

Regulation 6 – Purpose

This regulation provides that the purpose of Part 2 is to set out the process for a person or entity to make an application for allocations under the Scheme.

Regulation 7 – Call for applications

This regulation provides that the Secretary may, from time to time, make a **call for applications** for allocations under the Scheme. Allocation is a defined term in the Act and set out in the note to regulation 4. An allocation is the mechanism by which an applicant becomes an approved participant and commences eligibility for incentive.

The Secretary may, with a call for applications or later, issue guidelines about how a person or entity may apply for allocations in response to the call.

A call for applications must specify the set of assessment criteria in Schedule 1 that will apply to applications in response to the call.

Regulation 8 – Form of application

This regulation provides for the requirements relating to applications for allocations under the Scheme.

There are two categories of persons who may make an application for allocations in response to a call for applications (subregulation 8(1)). These are: (a) a person or entity to whom Division 380 of the *Income Tax Assessment Act 1997* applies (relating to claims for a refundable tax offset) and; (b) endorsed charitable institutions (relating to grant payments). Endorsed charitable institutions are defined in regulation 4 to mean an entity that is endorsed as exempt from income tax by the Commissioner of Taxation under section 50-105 of the *Income Tax Assessment Act 1997*.

Applications are required to meet certain conditions (subregulation 8(2)). Namely, that they are in writing, must comply with any guidelines for the call, must contain a proposal for one or more projects of rental dwellings to be approved for the Scheme and must describe the style, size and special attributes (if any) of the proposed dwellings.

Applications may be made in relation to a project that includes dwellings that will not be available to rent until a time in the future, including dwellings that have not yet been built and cannot yet be individually identified (subregulation 8(3) refers). Special provision is made in relation to such dwellings as to, for instance, the date from which the allocation will operate and the reservation of an allocation (see further regulation 14 below).

Regulation 9 – Time for dealing with applications

This regulation provides for the time for dealing with applications. In particular, the Secretary must make reasonable efforts to determine the applications and notify applicants of the results within 6 months after the date applications are received and in any case, notify each applicant of the progress in assessment of the application by that time.

Part 3 Allocation

Regulation 10 – Purpose

This regulation provides that Part 3 of the Regulations sets out the process for determining allocations under the Scheme.

Regulation 11 – Assessment criteria for allocations

This regulation provides that the sets of assessment criteria for allocations in relation to calls are set out in Schedule 1.

This allows the Scheme's settings to be adjusted to best target the outcome of affordable rental housing and address issues identified as the Scheme develops.

Regulation 12 – Assessment of applications

This regulation provides for the assessment of applications. In particular, the Secretary is required to assess applications in accordance with the assessment criteria specified for the call for applications taking into account the overall goals expressed in the criteria as well as considering the individual applications (subregulation 12(1) refers).

The Secretary is able to seek additional information from an applicant, or any other person. The Secretary may also invite an applicant to vary an application (subregulation 12(2) refers). For example, there may be circumstances where not all proposed dwellings within an application are rated as suitable because of their location.

In addition, the Secretary may choose any combination of dwellings from the application (subregulation 12(3) refers). That is, the Secretary is not required to make an offer of approval to applicants in relation to all dwellings identified in an application (see further regulation 13).

Regulation 13 – Offers of allocation

This regulation provides for offers to be made to applicants, in accordance with an assessment under regulation 12 (subregulation 13(1) refers).

There are certain requirements that an offer must meet (subregulation 13(2) refers).

In particular, there is flexibility provided to impose special conditions on a dwelling. The special conditions may differ across a project and a project may include dwellings that are subject to special conditions and dwellings that are not subject to special conditions.

Also, circumstances may arise where special conditions may be varied, including being taken off one dwelling and imposed on a different dwelling, with the agreement of the approved participant (regulation 23 refers).

Provision is also made for the offer to specify whether it may be accepted in part (paragraph 13(2)(c) refers).

Where an offer is made that relates to a dwelling that is not yet available for rent, the offer must specify conditions that must be satisfied before an allocation will be made for the dwelling (subregulation 13(3) refers).

Further, when the Secretary is satisfied that no offer is likely to be made to a particular applicant, he or she must notify the applicant (subregulation 13(4)). The Secretary is not required to give reasons for not making an offer to an applicant or not making an offer in relation to particular dwellings (subregulation 13(5)). Consequently, a failure to give reasons for not making an offer will not invalidate the decision. However, feedback will be offered after the decision has been taken.

Regulation 14 – Allocations

This regulation provides for what is to occur when an offer is accepted by an applicant in relation to a dwelling.

The Secretary must either: (a) make an allocation in relation to the dwelling, specifying the date from which the allocation will operate or is taken to have operated or; (b) reserve an allocation in relation to the dwelling, to be made when the conditions are fulfilled.

The earliest date from which an allocation may be taken to have operated is 1 July 2008, when the Scheme commenced. Regulations 2 and 14 make provision for this by allowing for allocations to have retrospective effect.

In relation to a dwelling for which an allocation has been reserved, if that dwelling is not available for rent by the required date, or an agreed alternate date, or if the Secretary is satisfied that it will not be available by that date, the reservation may be withdrawn and the allocation may be offered in relation to another dwelling or in relation to another call for applications (subregulation 14(2) refers).

The Secretary is required to notify the applicant on making an allocation or deciding to withdraw a reservation of an application (subregulation 14(3) refers).

For the Regulations, a dwelling subject to an allocation becomes an ***approved rental dwelling*** and the applicant becomes an ***approved participant*** in the Scheme. Approved rental dwelling is a term defined in regulation 4 to mean a rental dwelling approved under regulation 14 or 20. Also, approved participant is defined in regulation 4 to mean a person or entity approved under regulation 14 or 21.

Further, in relation to capital gains tax (CGT) application, the *National Rental Affordability Scheme (Consequential Amendments) Act 2008* makes provision, amongst other things, for amendment of the *Income Tax Assessment Act 1997* to ensure that there are no CGT consequences from the receipt of incentives under the Scheme. By way of clarification, for CGT purposes, a reserve allocation is an allocation. A reserve allocation therefore gives rise to no CGT consequences.

Regulation 15 – Notification to approved participants

This regulation provides for the details that must be included in a notification of an allocation.

Regulation 16 – Conditions of allocation

Allocations are subject to certain conditions.

Some of these conditions are set out in whole or in part in section 7 of the Act. In particular, there are conditions relating to the requirements for eligible rental dwellings, eligible tenants and the maximum rent that can be charged, as well as the permitted vacancy rates set out in subsection 7(2) of the Act. For ease of reference, these conditions are also set out by way of a note in regulation 16. Further, regulation 19 makes provision in respect of eligible tenants, subregulations 16(4) to (8) and regulation 18 make provision in respect of market value rent determination and regulation 28 makes provision in relation to permitted vacancy periods.

Another condition is that an incentive may be offset or recouped in the circumstances provided for by the Scheme (paragraph 7(1)(b) of the Act refers and regulation 30 refers, see further below).

In addition, the Act provides for other conditions to be provided for by the Scheme. These other conditions are set out in regulation 16 and relate to the requirements to lodge a Statement of Compliance (regulation 17 refers, see further below), ensure compliance with relevant laws, ensure all special conditions are complied with and lodge market rent valuations, as well as providing for the circumstances when rent may be reviewed and the restrictions on rent increases.

Regulation 17 – Statement of Compliance

This regulation provides for the requirements of Statements of Compliance. These Statements will be used to assess incentive entitlements.

Regulation 18 – Determining market value rent

This regulation provides for how market rent is to be determined. An independent valuation of market value rent will be required for each dwelling when it becomes available for rent under the Scheme. Subsequent valuations will be required in the fourth and seventh years of 10 year incentive period under the Scheme. Valuations must be conducted by independent valuers who are registered in the relevant State or Territory and are subject to a Code of Conduct and professional practice standards of the Australian Property Institute.

Regulation 19 – Eligible tenants

Approved rental dwellings must be rented to eligible tenants under the Scheme (subparagraph 7(2)(b)(i) of the Act refers).

There are certain definitions used in regulation 19, namely “tenants”, “start day”, “eligibility year”, “child” and “couple”.

Eligibility is identified by reference to household type and gross income limits. There is an initial income limit to access the Scheme and an upper income limit that applies in order to maintain eligibility.

Provision is also made for when tenants cease to be eligible tenants. Where an annual review indicates that a tenant's income for the relevant year exceeds the maximum levels for continuing eligibility, there is an adjustment period of 12 months before eligibility ceases. At the end of this period there will be no entitlement to incentive for so long as the dwelling is occupied by an ineligible tenant. There is scope under regulation 20 for approval to be given to transfer the entitlement to incentive to another dwelling where that dwelling is accepted as an approved dwelling.

To allow for the income limits and upper income limits to be adjusted, the Secretary has been given the ability, by legislative instrument, to change from time to time, those limits, as well as household types. The intention is to vary income levels to effectively maintain the same target group of eligible tenants over the life of the Scheme.

Regulation 20 – Substitution of one dwelling for another

This regulation provides for the possibility of substitution of one dwelling for another under the Scheme.

This will only occur in circumstances where: (i) an approved participant applies for an allocation in respect of one rental dwelling to be transferred to a different rental dwelling and; (ii) the Secretary agrees to make the transfer.

A dwelling that is substituted becomes an approved rental dwelling (subregulation 20(2) refers).

Regulation 21 – Transfer of allocation

This regulation provides for the possibility that an approved participant may wish to apply to the Secretary to transfer their allocation to another approved participant or another person or entity.

A person or entity to whom an allocation is transferred becomes the approved participant for the dwelling (subregulation 21(2) refers).

Regulation 22 – Revocation of allocation

This regulation provides for the revocation of an allocation if the conditions of the allocation are not complied with.

If an allocation is revoked, no incentive is payable for the NRAS year in which the revocation occurred, or in any subsequent NRAS year.

Regulation 23 – Variation of special conditions

This regulation provides the Secretary with the power to vary the special conditions attaching to a dwelling, where the approved participant agrees to the variation.

Part 4 Receiving incentives

Regulation 24 – Purpose

This regulation provides that the purpose of Part 4 of the Regulations is to set out the process for receipt of incentives under the Scheme.

Regulation 25 – Eligibility to receive incentives

This regulation provides for eligibility to receive incentives. Namely, it is an approved participant for an approved rental dwelling that has satisfied the conditions of an allocation who is entitled to receive an incentive.

Regulation 26 – Full incentive amount for standard dwelling

This regulation provides for the full incentive amount for a standard dwelling.

For the period beginning on 1 July 2008 and ending on 30 April 2009, the amount of the incentive for an approved rental dwelling other than a subsidiary dwelling (regulation 27 refers, see further below) for a full NRAS year is \$5,000. This is because the first NRAS year is only 10 months.

For the period beginning on 1 May 2009 and later years beginning on 1 May, the amount of the incentive for an approved rental dwelling other than a subsidiary dwelling for a full NRAS year is \$6,000. Further, this amount is indexed to the percentage change of the NRAS incentive index.

The NRAS incentive index is defined in regulation 4 to mean the Rents component of the Housing Group of the Consumer Price Index for the year, December quarter to December quarter at 1 March of the immediately preceding financial year, using the Summary Table weighted average rate of eight capital cities housing component, as published in the Australian Bureau of Statistics publication Cat no 6401.0- Consumer Price Index, Australia, CPI: Group, Sub-group and Expenditure Class, rounded to the nearest single decimal point.

Regulation 27 – Full incentive amount for subsidiary dwelling

This regulation provides for the full incentive amount for a subsidiary dwelling. A subsidiary dwelling is a rental dwelling that is separately identifiable and tenanted, but is part of a larger dwelling (definition in regulation 4 refers).

The Secretary must determine an incentive for a subsidiary dwelling proportionately to the number of tenancies in the dwelling, to a maximum of the relevant full incentive amount for the period.

The maximum for the period beginning on 1 July 2008 and ending on 30 April 2009 is \$5,000 and the maximum for the year beginning on 1 May 2009 and later years beginning on 1 May is \$6,000 (indexed to the percentage change of the NRAS incentive index).

For example, if a dwelling consists of 5 subsidiary dwellings, the maximum incentive amount for each of them is \$1,200. So, the total for the dwelling is 5 x \$1,200 or \$6000.

Subregulation 27(3) provides that other than for subregulation (1), the Regulations apply to a subsidiary dwelling in the same way as they apply to other approved rental dwellings.

Regulation 28 – Reductions from full incentive amount

This regulation provides that the Secretary must, for each allocation, determine the reductions that are to be made from the amount of the incentive.

Reductions must be made to take account of periods when the dwelling was not available for rent under the Scheme.

Regulation 29- Receipt of incentives

This regulation provides for the receipt of incentives.

If an approved participant is an endorsed charitable institution (defined in regulation 4) the Secretary must pay the incentive for each allocation.

For all other approved participants, the Secretary must issue a tax offset certificate as set out in subregulation (2).

If an approved participant is an endorsed charitable institution for part of an NRAS year and an otherwise eligible approved participant for the remainder of the year, the Secretary must provide the incentive by way of a payment of the incentive apportioned for the period that the approved participant was an endorsed charitable institution and by way of a tax offset certificate apportioned for the period that the approved participant was an otherwise eligible approved participant.

The requirements that must be contained in the tax offset certificate are provided for in subregulation 29(3).

Regulation 30- Variation of incentive amount

This regulation provides the Secretary with the power to vary an incentive amount.

That is, if the Secretary determines that an error arose making an incentive for a particular allocation, he or she may vary the incentive to correct the error and, where appropriate, recoup any overpayment.

Subregulation 30(2) provides for what is to occur if the Secretary determines that an incentive should be increased.

Subregulation 30(3) provides for what is to occur if the Secretary determines that an incentive should be decreased.

Part 5 Ancillary matters

Regulation 31 – Record keeping

This regulation requires recipients to maintain all records in relation to an application, an allocation or a payment of an incentive for 5 years.

Regulation 32 – Sharing and use of information

It is possible that personal information within the meaning of the *Privacy Act 1988* may be obtained under the Scheme and may need to be used and/or disclosed for the purposes of administering the Scheme.

This regulation makes it clear that if personal information was obtained from an application made under the Scheme or in administering the Scheme, the Secretary may: (i) use the information or; (ii) disclose the information to a government agency of the Commonwealth or a State or Territory for the purposes of administering the Scheme.

Schedule 1 Sets of assessment criteria

For regulation 11, Set 1 of the assessment criteria for allocations are specified.

Item 1 sets out criteria dealing with the demonstrated need for the proposal, priority areas of interest, accessibility and sustainability outcomes and the applicant's demonstrated capacity and experience, as well as the financial viability of the proposal. Subitem 1(2) sets out details for the relevant priority areas of interest.