

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 140

Issued by the authority of the Minister for Housing and Homelessness

National Rental Affordability Scheme Act 2008

*National Rental Affordability Scheme Amendment (Incentive Election) Regulation
2013*

General outline

The purpose of this Regulation is to provide those applicants and approved participants under the National Rental Affordability Scheme (“NRAS” or “the Scheme”) that are endorsed charitable institutions with greater flexibility around when they are able to make an election to receive NRAS incentives in the form of a tax offset certificate instead of a monetary payment.

Background

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. Section 5 of the Act provides that “the regulations must prescribe a Scheme (the *National Rental Affordability Scheme*)” to cover certain matters listed in that provision.

For this purpose, the *National Rental Affordability Scheme Regulations 2008* (“the Principal Regulations”) establish the Scheme, providing conditions for applications, assessment, allocation and eligibility for payment of incentives.

The Scheme is intended to stimulate the supply of more affordable rental housing by offering incentives to entities to provide new rental housing to low and moderate income households, on condition that rent is charged at least 20% below market value rent. An entity which has received an allocation (an allotment of an entitlement to receive an incentive) under the Scheme is known as an approved participant. An entity which has received a reservation of allocation (an allocation to be made when certain conditions are fulfilled) is referred to as an applicant, and becomes an approved participant upon the fulfilment of the conditions of the reservation.

The Scheme provides that an incentive is payable, or made through the issue of a tax offset certificate, to an approved participant in respect of a dwelling when the conditions of an allocation for that dwelling are satisfied. Approved participants, which are not endorsed charitable institutions, receive the incentive in the form of a tax offset certificate. Approved participants, which are endorsed charitable institutions, are only able to receive incentives in the form of a monetary payment, unless they are able to make, and have made, an “election” to receive the incentive as a tax offset certificate.

Rules around such elections were inserted into the Principal Regulations by the *National Rental Affordability Scheme Amendment Regulations 2010*, which inserted regulation 28A. That provision, prior to these amendments, provides for limited circumstances in which an approved participant which is, or becomes, an endorsed charitable institution, may elect to receive the incentive as a tax offset rather than as a monetary payment. There are essentially three such circumstances:

- Applicants to the Scheme which are endorsed charitable institutions may make an election at the time an offer of allocation or reservation of allocation is accepted by the applicant (paragraph 28A(1)(a) and subregulation 28A(3) of the Principal Regulations);
- An approved participant (subject to allocations) that changes in status to become an endorsed charitable institution part way through a NRAS year (running from 1 May to 30 April) may make an election by 13 May in the year after than NRAS year in which the change in status occurred (paragraph 28A(1)(b) and subregulation 28A(4));
- Applicants which, before 13 May 2011, had already accepted an offer of a reserved allocation or approved participants which, before 13 May 2011, had been made an allocation were able to make an election prior to 13 May 2011 (subregulations 28A(2) and (5)).

Prior to this Regulation, if an endorsed charitable institution did not make an election at the time that it accepted an offer of allocation or reservation of allocation, or if an existing approved participant that became an endorsed charitable institution did not make an election by 13 May in the NRAS year following that change in status, such entities had no further ability to make an election at all after 13 May 2011.

The purpose of this Regulation is to introduce more flexibility into the Scheme by allowing applicants which have already been made offers of reservation of allocation, and existing approved participants which hold allocations, to be able to make an election under regulation 28A up until 1 October 2013 (inclusive of that date). This enables existing applicants and approved participants that wish to receive their incentives in the form of a tax offset, but did not elect to do so at the required time, an opportunity to make an election. The Regulation sets a fixed date by which elections must be made, rather than extending the ability to make an election indefinitely into the future, in order to avoid undesirable budgetary uncertainty which could arise if the form of incentives is permanently variable.

The Regulation also repeals subregulation 28A(6), which provides that an election made after 30 May 2010 may not be effective for the NRAS year commencing on 1 May 2009. An election made under the amended paragraph 28A(5)(b) is intended to apply to all subsequently issued incentives, regardless of the NRAS year to which they relate. Subregulation 28A(6) is being repealed so that, in the event that an incentive for any NRAS year from 1 July 2008 has not yet been issued, it is clear that an election made under the amended paragraph 28A(5)(b) will allow that incentive to be issued as a tax offset certificate in accordance with the election.

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

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Commencement

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

Consultation

The Department of Families, Housing, Community Services and Indigenous Affairs has received numerous requests from applicants and approved participants that are endorsed charitable institutions, and which are currently unable to make an election under regulation 28A, for the opportunity to make an election to receive the incentive as a tax offset certificate rather than as a monetary payment. Further consultation with applicants and approved participants was not considered necessary, as the amendment benefits applicants and approved participants by providing them with the opportunity to make an election which they otherwise would not have had. The Department of Prime Minister and Cabinet, the Treasury, the Australian Taxation Office, and the Department of Finance and Deregulation have been consulted with regard to the amendments.

The Department of Families, Housing, Community Services and Indigenous Affairs consulted with the Office of Best Practice Regulation, which has advised (reference number 15031) that as the Regulation is minor in nature, a Regulation Impact Statement is not required.

Detailed Description of Amendments

Regulation 1 – Name of regulation

This regulation provides that the name of the Regulation is the *National Rental Affordability Scheme Amendment (Incentive Election) Regulation 2013*.

Regulation 2 – Commencement

This regulation provides for the Regulation to commence on the day after it is registered on the Federal Register of Legislative Instruments.

Regulation 3 – Authority

This regulation provides that the Regulation is made under the authority of the *National Rental Affordability Scheme Act 2008*.

Regulation 4 – Schedule(s)

This regulation provides that the Principal Regulations are amended as set out in Schedule 1 to the Regulation.

Schedule 1 – Item 1 Paragraph 28A(5)(b)

This item provides for the date by which an endorsed charitable institution must make an election under paragraph 28A(5)(b) to be changed from 13 May 2011 to 1 October 2013. This will allow existing applicants and approved participants which are endorsed charitable institutions the opportunity to make an election to receive incentives in the form of a tax offset, if they do so prior to 1 October 2013, and meet the other existing requirements set out in subregulation 28A(5).

Subregulation 28A(5) lists the requirements for making an election under subregulation 28A(2), which requires the Secretary to give an endorsed charitable institution the option to elect to receive the incentive as a tax offset certificate if the endorsed charitable institution is an existing applicant who has accepted an offer of a reservation of allocation, or an existing approved participant who has been made an allocation.

Schedule 1 – Item 2 Subregulation 28A(6)

This item repeals subregulation 28A(6), which provides that an election made after 30 May 2010 may not be effective for the NRAS year commencing on 1 May 2009. This limitation on the effectiveness of elections will no longer apply. This change is made to enable an election made under the amended subregulation 28A(5) to apply prospectively to the issuing of incentives for all NRAS years, including for entitlement relevant to past years, extending back to 1 July 2008.

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 (Incentive Election) Regulation 2013

This Legislative Instrument is 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 legislative instrument provides applicants and approved participants under the National Rental Affordability Scheme (“the Scheme”) that are endorsed charitable institutions with greater flexibility in terms of when they are able to make an election to receive incentives under the Scheme in the form of a tax offset certificate, instead of as a monetary payment.

Human rights implications

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Of the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, this legislative instrument engages 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)).

This legislative instrument furthers the right to adequate housing, as it is a beneficial measure to allow approved participants in the Scheme improved flexibility to elect to receive incentives in a form which best enables them continue to deliver more affordable rental accommodation to tenants.

Conclusion

The legislative instrument is compatible with human rights because it advances the protection of the right to adequate housing.

The Hon. Mark Butler MP, Minister for Housing and Homelessness