

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

*National Rental Affordability Scheme Act 2008*

*National Rental Affordability Scheme Amendment (Administrative Processes) Regulations  
2017*

### **Purpose**

The purpose of the *National Rental Affordability Scheme Amendment (Administrative Processes) Regulations 2017* (**the Regulations**) is to address concerns that have been identified in the administration of the National Rental Affordability Scheme (**NRAS** or **the Scheme**). The Regulations are designed to remove unfair and disproportionate consequences for non-compliance with certain provisions.

### **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” to deal with certain matters listed in that provision including: providing incentives to an approved participant if certain conditions are satisfied; and a matter required or permitted by the Act to be included in the Scheme.

Subsection 7(1) of the Act provides that the Scheme must provide for the Secretary to make an allocation for an incentive period in respect of a rental dwelling on certain conditions set out in that subsection. This relevantly includes the conditions set out in subsection 7(2) (see paragraph 7(1)(a)) and on “any other conditions provided for by the Scheme” (see paragraph 7(1)(c)). A condition in paragraph 7(2)(c) is that to the extent that the rental dwelling is not rented during an NRAS year that falls within the incentive period, the dwelling is not vacant:

- for longer than the period prescribed by the regulations; and
- for longer than a continuous period prescribed by the regulations that starts in one NRAS year and ends in the following NRAS year.

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

The object of the Scheme is to increase the supply of affordable rental dwellings for low to moderate income households. For this purpose, the Principal Regulations provides for applications, assessment, allocation and eligibility for payment of an incentive to entities (referred to in the Principal Regulations and the Act as ‘approved participants’).

Where an offer of an allocation is accepted by an entity, the Secretary must either make an allocation or reserve an allocation in relation to the dwelling. The concept of “provisional allocations” was introduced in 2014. Where dwellings were subject to a reservation of an allocation, but were not completed and available for rent by a certain date, a “provisional allocation” was made. When a provisional allocation is made, the 10-year incentive period begins. Once a provisional allocation has been made, all conditions of a reservation of an allocation must be met in order for an approved participant to receive an incentive payment. The Secretary has no discretion to vary the conditions of a reservation once a provisional allocation has been made.

The Scheme offers incentive payments for an NRAS year (1 May to 30 April) to approved participants who meet certain conditions, including that: the dwelling is rented to eligible tenants at a rate that is at least 20% below the market value rent; and that the dwelling is not vacant for more than a periods of time set out in the Principal Regulations. Other conditions may also be attached to a dwelling which an approved participant must meet in order to be eligible for an incentive payment in an NRAS year.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

## **Issues**

### *Bedroom Size*

One of the conditions of a reservation of an allocation is the size of (or number of bedrooms in) a dwelling. Where dwellings are delivered with a different number of bedrooms than those set out in the conditions of reservation, the approved participant is not eligible to receive an incentive payment in respect of that dwelling, and thereby has no motivation to participate in the Scheme. This is a disproportionate consequence when the dwelling is otherwise eligible to enter into the Scheme.

This has resulted in numerous dwellings being “withdrawn” or revoked from the Scheme. The amendments made by the Regulations give the Secretary the discretion to vary the conditions of a reservation in relation to the size of the dwelling, after a provisional allocation has been made.

### *Vacancy Periods*

One of the conditions that must be satisfied in order to receive an incentive payment for an NRAS year is that a dwelling is not vacant for longer than a prescribed time period. There are currently disproportionate consequences where a dwelling is vacant for a continuous period of at least 26 weeks in one NRAS year and that period then continues for a short period into the next NRAS year. Currently, approved participants can be ineligible to receive an incentive payment for both NRAS years, even if the dwelling is only vacant for a short period of time in the second NRAS year. This is a disproportionate penalty where approved participants are essentially penalised twice for one instance of non-compliance. This outcome is contrary to the objects of the Scheme.

The amendments made by the Regulations will reduce the severity of the consequences of a continuous vacancy period under certain circumstances.

## **Consultation**

These amendments are informed by an audit report released in November 2016 by the Australian National Audit Office (ANAO).

Following the release of the ANAO Audit report, the Department of Social Services released a consultation paper in November 2016 calling for submissions from key stakeholders. A total of 34 submissions were received in response to the consultation paper, including from approved participants, investors, tenants, government entities, a peak body and a builder. The amendments made by the Regulations address some of the issues considered in those submissions.

## **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 21971.

## **Commencement**

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

## **Explanation of the provisions**

### **Section 1 – Name of Regulation**

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

### **Section 2 - Commencement**

The Regulations commences on the day after they are registered, noting that there are application provisions in item 5.

### **Section 3 – Authority**

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

### **Regulation 4 – Schedules**

This section provides that each instrument specified in each Schedule to the instrument is amended or repealed as set out in the applicable items of the Schedule.

## **Schedule 1 – Amendments**

Schedule 1 amends the *National Rental Affordability Scheme Regulations 2008* (**the Primary Regulations**).

### **Item 1 – Subregulation 16(1D)**

This item repeals subregulation 16(1D) of the Primary Regulations and substitutes a new subregulation.

Regulation 16 provides for the conditions of allocation. An approved participant must satisfy the conditions of allocation in order to be eligible for an incentive payment in an NRAS year.

Repealed subregulation 16(1D) provided that a condition of allocation was that to the extent that a rental dwelling is not rented during an NRAS year, the dwelling must not be vacant for:

- longer than 26 weeks; and
- for longer than a continuous period of 26 weeks that begins in an NRAS year and ends in the next NRAS year.

The effect of repealed subregulation 16(1D) was that an approved participant was ineligible for an incentive payment in both NRAS years if a vacancy period extends for 26 weeks or longer in one NRAS year and continues for any time period in the next NRAS year.

New subregulation 16(1D) has the effect of ensuring that:

- if the continuous vacancy period runs for 26 weeks or more in the first NRAS year and that period extends into the next NRAS year, the approved participant will not be eligible for an incentive payment in the first NRAS year, but will be eligible for a (proportionately reduced) incentive payment in the second NRAS year (unless the dwelling is also vacant for 26 weeks or more in the second NRAS year), provided the other conditions of allocation are satisfied for that second year;
- if the continuous vacancy period runs for less than 26 weeks in the first NRAS year and continues on into the second NRAS year, the approved participant will be eligible to receive a (proportionately reduced) incentive payment in the first NRAS year, but will not be eligible to receive any incentive payment in the second NRAS year (regardless of the length of time that the dwelling is vacant in the second NRAS year).

Extended vacancy periods are not in keeping with the objects of the Scheme. New subregulation 16(1D) continues to ensure that an incentive is not payable for extended vacancy periods, however an approved participant will not always be penalised twice as a result of one vacancy period.

### **Item 2 – Regulation 23 (heading)**

This item is a technical amendment. It amends the heading of regulation 23 of the Primary Regulations to reflect the new content of the regulation, inserted by item 4.

### **Item 3 – Regulation 23**

This item is a technical amendment. It creates new subregulations in regulation 23 of the Primary Regulations. This is necessary as item 4 adds a second subregulation to regulation 23.

#### **Item 4 – At the end of regulation 23**

This item inserts new subregulation (2) into regulation 23 of the Primary Regulations.

New subregulation 23(2) gives the Secretary discretion to vary a condition of the reservation of an allocation that relates to the size of the dwelling. The Secretary may only vary the condition with the agreement of the approved participant.

Once a provisional allocation has been made, all conditions of a reservation of an allocation must be met in order for an approved participant to receive an incentive payment. Before the amendments made by this item, there was no capacity for the Secretary to vary such conditions once a provisional allocation was made.

If the Secretary varies the condition of reservation under new subregulation 23(2), dwellings that are otherwise eligible to enter the Scheme can be accepted even where the size of the dwelling does not meet the original condition of the reservation of the allocation.

This removes the disproportionate consequence for delivering a dwelling of a different size to that set out in the conditions of reservation. It also ensures that approved participants will be eligible to receive incentives for rental dwellings that otherwise would not form part of the Scheme.

#### **Item 5 – In the appropriate position in Part 6**

This item inserts application provisions setting out how subregulation 16(1D), which is repealed and substituted by item 1, and new subregulation 23(2), which is inserted by item 4, will apply.

New regulation 34 of the Principal Regulations provides that subregulation 16(1D), as inserted by item 1, applies in relation to the NRAS year that commenced on 1 May 2016, and each later NRAS year. This means that an approved participant's entitlement to receive an incentive payment for the NRAS year commencing 1 May 2016 will be considered having regard to new subregulation 16(1D) (and the other conditions of allocation in regulation 16).

This retrospective application of subregulation 16(1D) will be beneficial to approved participants. Where a dwelling is vacant for a continuous period of 26 weeks or more in the 2015/16 NRAS year and that period extends into the 2016/17 NRAS year for a period of less than 26 weeks, the approved participant would satisfy the conditions of allocation in new subregulation 16(1D) for the 2016/17 NRAS year. In these circumstances, the approved participant would be entitled to an incentive payment in the 2016/17 NRAS year if the other conditions of allocation are satisfied. Under repealed subregulation 16(1D), the approved participant would not have been entitled to an incentive payment in these circumstances for the 2016/17 NRAS year. The retrospective application of new subregulation 16(1D) will not

affect any person's rights, other than the Commonwealth, so as to disadvantage them or impose liabilities.

New regulation 35 provides that subregulation 23(2) of the Principal Regulations, as inserted by item 4, applies in relation to a reservation of an allocation made before the commencement of new regulation 35.

The effect of new regulation 35 is that the Secretary will be able to vary the conditions of a reservation of an allocation made before the commencement of subregulation 23(2). Where the Secretary varies this condition, dwellings can be accepted into the Scheme where the size of the dwelling does not meet the original condition of the reservation of the allocation. New subregulation 23(2) will not apply where a decision has already been made by the Secretary or his delegate to revoke an allocation. The provision will only apply where an allocation has not been revoked.

The application of new subregulation 23(2) will be beneficial to approved participants as it will allow dwellings into the Scheme which would otherwise have been excluded. The application will not affect any person's rights, other than the Commonwealth, so as to disadvantage them or impose liabilities.

## **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 (Administrative Processes) 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 these Regulations is to remove excessive and unfair penalties for non-compliance with certain provisions of the *National Rental Affordability Regulations 2008*. These Regulations provide the Secretary of the Department of Social Services with the discretion to vary certain conditions of a reservation of allocation which will allow for more dwellings to enter into the National Rental Affordability Scheme (the Scheme). The Regulations will also remove disproportionate penalties for periods of vacancy of approved rental dwellings.

#### **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*, 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 is consistent with furthering the right to an adequate standard of living, including housing, as it aims to remove barriers to participation in the Scheme, and clarifies certain aspects of the administration of the Scheme, therefore supporting efficient delivery of affordable rental dwellings available to rent for low and moderate income households.

#### **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**