

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

National Rental Affordability Scheme Act 2008

*National Rental Affordability Scheme Amendment (Approved Participant Obligations)
Regulations 2017*

Purpose

The purpose of the *National Rental Affordability Scheme Amendment (Approved Participant Obligations) Regulations 2017* (**the Regulations**) is to place specific obligations on approved participants that will provide additional protections for investors of rental dwellings in the National Rental Affordability Scheme (NRAS) against undue demands from approved participants. Protecting these investors will promote rental housing affordability, by ensuring that dwellings are not withdrawn from the Scheme.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 to 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 rented to ‘eligible tenants’, being low to middle income earners, at a rate no higher than 80% of the dwelling’s market value rent.

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 the incentive on to the investor, usually after deducting a fee.

Approved participants have the legal relationship with the Department of Social Services, giving them superior bargaining power with investors. In some instances, approved participants have used this superior bargaining power to force investors to purchase certain services (such as tenancy management services) from providers specified by the approved participant. The Principal Regulations do not currently impose specific obligations on approved participants in relation to these particular circumstances, although depending on all of the circumstances, the approved participant may have breached other broader obligations.

As a result, there is currently a lack of clarity in relation to the protections or recourse an investor may have when an approved participant forces the investor to purchase certain services. 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.

The Regulations impose new obligations on an approved participant to pass on an incentive to an investor and not to terminate a contractual arrangement with an investor where the contractual arrangement requires investors to use a tenancy management service (or similar other service) specified by the approved participant. The obligations also apply if a contractual arrangement requires an investor to pay a bond to use a tenancy management service (or similar or other service) not specified by the approved participant and the investor uses that service and does not pay that bond. Breaches of these obligations may mean there 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.

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 need for amendments to protect investors 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 23146.

Commencement

The Regulations commence 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 (Approved Participant Obligations) 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 37 of the Principal Regulations, inserted by item 7 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 – Paragraph 17(3)(h)

Item 2 – Paragraphs 21A(2)(b) and 22(1)(aa)

Item 3 – Division 2 of Part 4 (heading)

Item 4 – Regulation 30A (heading)

Item 5 – Subregulation 30A(1)

These items make technical amendments to reflect the fact that Division 2 of Part 4 now contains two new obligations that are imposed on approved participants investors (see item 6).

Item 6 – At the end of Division 2 of Part 4

This item inserts two new regulations, 30C and 30D, into Division 2 of Part 4 of the Principal Regulations. These regulations establish new obligations on approved participants to pass on an incentive to an investor and not to terminate a contractual arrangement with an investor where the contractual arrangement requires investors to use a tenancy management service (or similar or other service) specified by the approved participant and the investor refuses or fails to use that service. The obligations also apply if a contractual arrangement requires an investor to pay a bond to use a tenancy management service (or similar or other service) not specified by the approved participant and the investor uses that service and does not pay the bond.

A failure to comply with these obligations in relation to an allocation may mean there is a ground for the Secretary to transfer the allocation to another approved participant, or revoke the allocation (see paragraphs 21A(2)(b) and 22(1)(aa) of the Principal Regulations).

Explanation of Provisions

Item 6 – At the end of Division 2 of Part 4

Regulation 30C – Incentives not to be withheld or refused if investor fails or refuses to accept other services chosen by approved participant

Regulation 30C applies where there is a contractual arrangement between an approved participant and investor, and that contractual arrangement:

- requires the approved participant to pass on to the investor all or part of any incentive received in relation to the relevant allocation; and
- is expressed to be subject to a term that the investor must use a tenancy management service (or any similar, or other, service) that is provided by the approved participant or another person specified by the approved participant (including where an approved participant has given an investor a choice of specified persons); and
- the investor fails, or refuses, to use the service.

Regulation 30C creates an obligation on the approved participant to pass on any incentive payment received as though the term in relation to using a tenancy management service (or other service) were not included in the contractual arrangement, and a further obligation not to terminate the contractual arrangement only because the investor fails or refuses to use that service. A failure to comply with these obligations may mean that there are grounds for the Secretary to transfer the relevant allocation to another approved participant in accordance with regulation 21A of the Principal Regulations, or revoke the allocation in accordance with paragraph 22(1)(aa) of the Principal Regulations.

The terms of a contractual arrangement include (but are not limited to) terms that are written, oral or implied.

While regulation 30C applies in relation to a contractual arrangement that is in effect, an approved participant must not provide false or misleading information about the Scheme to an investor who is considering entering into a contractual arrangement with the approved participant. An approved participant may provide false or misleading information to an investor if the approved participant suggests the investor must enter into a contractual arrangement that requires the investor use a tenancy management service (or other service) chosen by the approved participant. Providing false or misleading information to an investor is a ground for the Secretary to transfer the relevant allocation to another approved participant in accordance with paragraph 21A(2)(c) of the Principal Regulations, or to revoke the allocation in accordance with paragraph 22(1)(ab) of the Principal Regulations.

Regulation 30D – Incentives not to be withheld or refused if investor fails or refuses to pay bond

Regulation 30D applies where there is a contractual arrangement between an approved participant and investor, and that contractual arrangement:

- requires the approved participant to pass on to the investor all or part of any incentive received in relation to the relevant allocation; and
- is expressed to be subject to a term that the investor or another person must pay to the approved participant a monetary bond (however described) if the investor uses a service (the *alternative service*):

Explanation of Provisions

Item 7 – At the end of Part 6

- that is a tenancy management service (or any similar, or other, service); and
- the alternative service is not provided by the approved participant or a person specified by the approved participant; and
- the investor uses the alternative service and the bond is not paid to the approved participant.

Regulation 30D creates an obligation on the approved participant to pass on any incentive payment received as though the term in relation to paying a monetary bond were not included in the contractual arrangement. There is a further obligation not to terminate the contractual arrangement only because the investor uses an alternative service and the bond is not paid to the approved participant. A failure to comply with these obligations may mean that there are grounds for the Secretary to transfer the allocation to another approved participant in accordance with regulation 21A of the Principal Regulations, or revoke the allocation in accordance with paragraph 22(1)(aa) of the Principal Regulations.

The terms of a contractual arrangement include (but are not limited to) terms that are written, oral or implied.

While regulation 30D applies in relation to a contractual arrangement that is in effect, an approved participant must not provide false or misleading information about the Scheme to an investor who is considering entering into a contractual arrangement with the approved participant. An approved participant may provide false or misleading information to an investor if the approved participant suggests the investor or another person must pay a monetary bond the investor uses a tenancy management service (or other service) that is not chosen by the approved participant. Providing false or misleading information to an investor is a ground for the Secretary to transfer the relevant allocation to another approved participant in accordance with paragraph 21A(2)(c) of the Principal Regulations, or to revoke the allocation in accordance with paragraph 22(1)(ab) of the Principal Regulations.

Item 7 – At the end of Part 6

This item inserts a new Division 3 of Part 6 into the Principal Regulations, entitled ‘Amendments made by the National Rental Affordability Scheme Amendment (Approved Participant Obligations) Regulations 2017’, consisting of new regulation 37.

Regulation 37 – Application

Regulation 37 governs the application of the amendments made by these Regulations. The new obligations contained in regulations 30C and 30D inserted by item 6 apply in relation to an approved participant who enters into a contractual arrangement with an investor on or after the commencement of item 6. The Regulations do not have a retrospective effect.

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 (Approved Participant Obligations) 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 (Approved Participant Obligations) Regulations 2017* (**the Regulations**) is to address the superior bargaining position that approved participants have in relation to investors in rental dwellings that are part of the National Rental Affordability Scheme (**NRAS**).

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

Under 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.

NRAS 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 NRAS regulatory requirements and passes on all or part of the incentive to the investor.

The Regulations will create additional protections for investors in NRAS by imposing an obligation on approved participants to pass on an incentive to an investor and not to terminate a contractual arrangement with an investor where the contractual arrangement requires investors to use a tenancy management service (or similar other service) specified by the approved participant. The obligations also apply if a contractual arrangement requires an investor to pay a bond to use a tenancy management service (or similar or other service) not specified by the approved participant and the investor uses that service and does not pay that bond.

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])).

Statement of Compatibility with Human Rights

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