

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Families and Social Services

National Rental Affordability Scheme Act 2008

National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018

Purpose

The purpose of the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018 (the Regulations)* is to create enhanced 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 Protecting these investors will promote rental housing affordability, by ensuring that such dwellings are not withdrawn from the Scheme.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 to an approved rental dwelling. The incentive is a payment or a tax offset certification 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 rent value.

Issues

The Principal Regulations address the relationship between approved participants and investors, particularly by providing some protection for investors. In particular, the Principal Regulations allow the Secretary to transfer an allocation to a different approved participant, where one or more specified grounds exist. Despite the protections in place, investors continue to face difficulties with approved participants, for example, where the approved participant fails to pass on an incentive payment.

The grounds and considerations in the Principal Regulations for when the Secretary may transfer an allocation establishes a set of expectations and obligations for approved participants in relation to investors. The Regulations introduce new grounds, in particular:

- where the relevant approved participant fails to comply with an obligation to provide certain information to a gaining approved participant when an allocation is transferred to that gaining approved participant;
- where the relevant approved participant engages, or is likely to engage, in unfair conduct in relation to an allocation.

The Regulations also provide the Secretary with the power to redirect an incentive to a gaining approved participant following the transfer of an allocation to that approved participant. The gaining approved participant is then required to pass on the incentive to the investors. The effect is that the gaining approved participant will be responsible for passing on the redirected incentive to the investors, rather than the previous approved participant who may have failed to pass the incentive to the investors previously.

The Regulations also introduce the concept of an ‘associated party’ and apply that to certain obligations imposed on approved participants. This seeks to ensure that an approved participant cannot undermine the objectives of the NRAS by constructing contractual arrangements under which an associated party, not the approved participant, has the obligation to pass on the incentive. The Regulations provide that a contract has no effect if it prevents or prohibits an investor from requesting a transfer of an allocation.

Consultation

The Department of Social Services has undertaken limited consultation on the proposed Regulations with peak bodies representing approved participants. The proposed Regulations were reconsidered in light of the feedback received and modifications were made. The Department also consulted with the Australian Taxation Office. The Australian Taxation Office did not have any concerns about the proposed Regulations.

Regulation Impact Statement (RIS)

Following consultation with the Office of Best Practice Regulation (OBPD), a Regulation Impact Statement (RIS) is not required (OBPR ID 24044).

Commencement

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

Explanation of the provisions

Section 1 – Name

The instrument is titled the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018*.

Section 2 – Commencement

The Regulations commence on the day after they are registered.

Section 3 – Authority

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

Section 4 – Schedules

Schedule 1 amends or repeals the *National Rental Affordability Scheme Regulations 2008 (the Principal Regulations)* in accordance with its terms.

Schedule 1 – Amendments

Item 1 – Regulation 4

This item inserts a new definition of ‘associated party’ in regulation 4. The term ‘associated party’ will be used in a number of provisions of the Principal Regulations that are amended or inserted by this Schedule. ‘Associated party’, in relation to an approved rental dwelling, means a person other than the approved participant or a tenant of an approved rental dwelling who would be a party to an agreement relating to the approved rental dwelling. Under the agreement, the person is required to pass on any payments or benefits relating to the approved rental dwelling to another person who is not the approved participant. In a typical tripartite arrangement, the associated party would be the head lessor.

The tenant refers to the person who is living in the rental dwelling, and can include subtenants. The tenant does not refer to notional tenants, for example, a property manager who has subleased the rental dwelling but does not living in the rental dwelling.

Item 2 – Regulation 4 (definition of *pass on*)

This item is a technical drafting change, which amends the definition of ‘pass on’ in regulation 4 to make it clear that definition applies in relation to an incentive. ‘Pass on’ has the meaning given by subregulation 30A(2) of the Principal Regulations, as amended by item 16 of this Schedule.

Item 3 – Regulation 4

This item inserts three new definitions in regulation 4.

‘Redirected’ has the meaning given by the subregulation 21D(3) (inserted by item 11 of this Schedule). Regulation 21D sets out the circumstances in which the Secretary may give an incentive to which one approved participant would have been entitled, to another approved participant. Where that occurs, the incentive is taken to be ‘redirected’. Generally, the previous approved participant is entitled to the incentive up to the date of transfer, assuming the conditions of allocation are satisfied for that period.

A person engages in ‘unfair conduct’ in relation to an allocation for an approved rental dwelling if the person:

- enforces, or seeks to enforce, an unfair contract (defined in the proposed definition below) in relation to the approved rental dwelling;
- fails to perform contractual obligations owed to an investor in a timely manner;
- coerces, threatens or attempts to coerce, an investor to take, or omit to take action in relation to a contract, to which the investor is a party, that does not require the investor to take, or omit to take such action;
- requires an investor to enter into a contract, including with a particular person;
- requires an investor to obtain particular goods or services, or goods or services from a particular person;
- seeks to prevent an investor from entering into a contract with a suitably qualified person; or
- misrepresents contractual rights or obligations to an investor.

This definition does not need conduct to be illegal in order for it to be considered unfair conduct. This definition is relevant in determining whether the ground for transferring an allocation in paragraph 21A(2)(k) (inserted by item 8 of this Schedule) exists.

‘Unfair contract’ in relation to an approved rental means a contract that:

- results in a significant imbalance in the rights and obligations of the parties to the contract;
- includes a term that is not reasonably necessary to protect the legitimate interests of the approved participant or an associated party and if applied, or relied upon, would cause detriment (whether financial or otherwise) to an investor.

This definition is relevant to determining whether a person has engaged in unfair conduct for the purposes of the ground in paragraph 21A(2)(k) (inserted by item 8 of this Schedule). Subregulation 21(5) (inserted by item 10 of this Schedule) will allow the Secretary to assume that unfair conduct has occurred in certain circumstances.

Item 4 – Subregulation 16(12)

This item amends an existing condition of allocation in subregulation 16(12) to make it clear that the condition applies to matters ‘relating to the Scheme’.

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).

Current subregulation 16(12) provides that a condition of allocation is that an approved participant must, within a time specified by the Secretary, answer any queries for the Secretary, and give the Secretary any information and documents requested by the Secretary, about matters covered by ‘this regulation’. The reference to ‘this regulation’ may only cover the matters mentioned in regulation 16, that is, the other conditions of allocation.

The Principal Regulations provide for a number of matters in addition to the conditions of allocation, including further obligations imposed on approved participants. It is appropriate for approved participants to be required by the Secretary to answer queries, or provide information and documents about matters that are broader than the conditions of allocations. As such, the amendment made by this item will ensure that a condition of allocation is that an approved participant must answer queries from the Secretary, or provide information and documents requested by the Secretary, about matters relating to the Scheme.

Item 5 – Before regulation 20

This item inserts a new Subdivision A in Division 1A in Part 3, entitled ‘Transfer on request’ and consisting of regulations 20-21.

Item 6 – Before regulation 21A

This item inserts a new Subdivision B in Division 1A in Part 3, entitled ‘Transfer because of conduct’ and consisting of regulations 21A-21E.

Item 7 – Subregulation 21A(1)

This item inserts the term ‘(the ***gaining approved participant***)’ when referencing the approved participant to whom an allocation is transferred under regulation 21A. This ensures it is clear throughout the Principal Regulations which approved participant is referenced.

Item 8 – At the end of subregulation 21A(2)

This item inserts new paragraphs 21A(2)(i), (j) and (k) in subregulation 21A(2).

Regulation 21A of the Principal Regulations sets out the Secretary’s power to transfer an allocation to a new approved participant (‘the gaining approved participant’) where the Secretary is satisfied that one or more of the grounds specified in subregulation 21A(2) exist.

The amendments made by this item provides that a ground for transfer in subregulation 21A(2) exists if:

- the relevant approved participant has failed to give a redirected incentive in relation to the allocation to the investors as received by paragraph 21D(7)(a) (inserted by item 11 of this Schedule);
- the relevant approved participant has failed to comply with regulation 22D (inserted by item 14 of this Schedule) in relation to another allocation;
- the relevant approved participant has engaged, or is likely to engage, in unfair conduct.

These grounds provide further protections to investors by recognising additional conduct by, or situations involving, an approved participant that would undermine the objects of the NRAS but are currently not covered in the existing grounds.

Item 9 – Paragraph 21A(3)(b)

This item amends paragraph 21A(3)(b).

Current subregulation 21A(3) makes clear that the Secretary may transfer an allocation under regulation 21A either on the Secretary's own initiative or on the request of each investor. There may be more than one investor in respect of a rental dwelling. This item makes clear that any investor may make a written request to transfer an allocation.

Item 10 – At the end of regulation 21A

This item inserts new subregulation 21A(5).

Paragraph 21A(2)(k) (inserted by item 8 of this Schedule) provides that a specified ground for transfer under regulation 21A is that the approved participant or an associated party has engaged in unfair conduct or is likely to engage in unfair conduct. Subregulation 21A(5) explains certain circumstances where the Secretary will be taken to be satisfied of the matters in proposed paragraph 21A(2)(k). Those matters are where the Secretary is satisfied that the relevant approved participant or an associated party has:

- terminated, or threatened to terminate a contract that relates to an approved rental dwelling to which an investor is a party and has failed to pass on an incentive in relation to the approved rental dwelling; or
- threatened to take action that would result in an investor not receiving payment or benefit (including rent) relating to the approved rental dwelling.

Subregulation 21A(5) requires the approved participant to satisfy the Secretary that the Secretary should not assume unfair conduct has occurred.

It is appropriate for the Secretary to be taken to be satisfied of these matters because a presumption of unfair conduct based on the information provided by the investor, permits the Secretary to collect sufficient information to make an informed decision, given that the Secretary has limited powers to otherwise obtain information under the Scheme. In providing this presumption, the approved participant can then, under the proposed subregulation 21A(5), make available information to the Secretary so that the Secretary can make an informed decision as to whether unfair

conduct occurred and if so, whether the ground for transfer is sufficiently made out to warrant a transfer under regulation 21A.

Item 11 – After regulation 21C

This item inserts new regulations 21D and 21E.

Regulation 21D – Secretary may redirect incentive

This new regulation provides the Secretary with the power to redirect an incentive following the transfer of an allocation under regulation 21A to the gaining approved participant.

An approved participant is entitled to receive an incentive for an NRAS year if the approved participant satisfies the conditions of allocation. Where an allocation is transferred to another approved participant under regulation 21A, the previous approved participant and the gaining approved participant may be entitled to a proportionate amount of the incentive based on the portion of the NRAS year in which they held the allocation. There is a risk that the previous approved participant would not pass on the portion of the incentive they received to the investor given they would no longer hold the allocation and as a result, would no longer be subject to the obligations in the Principal Regulations in relation to that allocation. In such situations, there is effectively no recourse available to the investor should a previously approved participant receive a portion of the incentive and not comply with obligations in the Principal Regulations.

Subregulation 21D(1) provides the Secretary with the power to redirect the incentive from the previous approved participant that, subject to the Regulations, the previous approved participant would be entitled to receive and has an obligation to pass on all, or part of, the incentive to an investor. Subregulation 21D(2) provides the Secretary with the same power, but applies in situations where the previous approved participant would be entitled to receive the redirected incentive for the approved rental dwelling for an earlier NRAS year.

Subregulations 21D(4), 21D(5) and 21D(6) set out the procedural protections and requirements for a decision to redirect an incentive. Before the Secretary redirects the incentive, the Secretary must give written notice of the proposed redirection to the relevant approved participant and the relevant investor. The notice must invite the relevant approved participant or investor to make a written submission to the Secretary about the proposed redirection no later than 14 days after the day the Secretary gives the notice. This notice may be given with a notice under regulation 21B. That regulation requires the Secretary to notify the relevant approved participant and the relevant investor of a proposed decision to transfer an allocation to another approved participant.

If the Secretary redirects the incentive, subregulation 21D(7) sets out the obligations on the gaining approved participant to whom the incentive is redirected. The gaining approved participant is required, within a reasonable time, to give the incentive to each of the investors to which the previous approved participant was required to pass on the incentive. Subregulation 21D(7) also clarifies that the previous approved participant will not be required to pass on the incentive to the investor.

Subregulation 21D(8) clarifies that the Secretary cannot redirect an incentive that has already been given to a relevant approved participant.

Regulation 21E – Statement of compliance if investors are involved

This new regulation provides the Secretary with the discretion to require the gaining approved participant to lodge a Statement of Compliance for an approved rental dwelling (see regulation 17) for the whole NRAS year if the Secretary redirects, or proposes to redirect, an incentive for an approved rental dwelling under regulation 21D.

This regulation addresses the risk that the previous approved participant will not pass on the portion of the incentive they receive to the investor given they would no longer hold the allocation. The gaining approved participant may be required by the Secretary to lodge the Statement of Compliance for the NRAS year, regardless of whether they held the allocation for that whole year. In this situation, the intention is that the gaining participant would be able to collect the redirected incentive, however, the Statement of Compliance is required to be lodged before any such incentive can be paid. If the gaining approved participant requires information to complete the Statement of Compliance for the part of the NRAS year that they did not hold the allocation, the Secretary could require the previous approved participant to provide this information in a request under regulation 22D (inserted by item 16 of this Schedule).

Item 12 – After regulation 21C

This item inserts a new Subdivision C in Division 1A in Part 3, entitled ‘Revocation’ and consisting of regulations 22-22A.

Item 13 – After regulation 22A

This item inserts a new Subdivision D in Division 1A in Part 3, entitled ‘General provisions’ and consisting of regulations 22A-22D.

Item 14 – At the end of Division 1A

This item inserts new regulations 22C and 22D.

Regulation 22C – Contracts do not prevent transfers

Regulation 22C provides that a contract has no effect to the extent that it prohibits or prevents an investor, or penalises an investor, for requesting, or otherwise assisting with a request, to transfer an allocation.

This regulation enables investors to apply for, or assist with, the transfer of an allocation without concerns about how that would affect their contractual obligations. This protects investors from approved participants who are trying to limit the rights of the investor for the benefit of the approved participant. This regulation also seeks to mitigate any power imbalance in the relationships between approved participants and investors.

For example, an approved participant and an investor may enter into a contract that states the investor is either prohibited from seeking a transfer, or must pay the approved participant a fee to exit the contract. The approved participant may fail to pass on the incentive to the investor. The investor would like to request a transfer of the allocation to another approved participant, but does not as the investor either has

a contractual obligation to pay the approved participant an exit fee following a transfer or is expressly prohibited under their current contractual obligations. Under this regulation, this contractual obligation would no longer apply, allowing the investor to request a transfer of the allocation without any concerns of having to pay an exit fee to their detriment.

Regulation 22D – Obligations of approved participants when allocations are transferred

This regulation requires a previous approved participant to give to a gaining approved participant any information requested by the Secretary that is relevant to the Scheme following the transfer of an allocation. The previous approved participant is required to give the gaining approved participant the requested information within 21 days after the request has been made.

Following a transfer of an allocation, the gaining approved participant may have limited information about the allocation and the rental dwelling. Regulation 22D ensures that the gaining approved participant has all the relevant information required to meet their obligations under the Principal Regulations.

Paragraph 21A(2)(j) (inserted by item 8 of this Schedule) provides that it is a ground for transferring another allocation if the previous approved participant does not comply with the obligations under regulation 22D.

For example, a decision to transfer an allocation is made on 1 November 2018. Also on that date, the Secretary makes a request to the previous approved participant to give to the gaining approved participant any information that is relevant to the administration of the allocation. If the previous approved participant fails to provide the requested information to the gaining approved participant by 22 November 2018, then this would be a ground for transferring any or all of the other allocations held by the previous approved participant.

Item 15 – Regulation 25

This item would repeal and substitute regulation 25.

Current regulation 25 provides that an approved participant is entitled to receive an incentive for a dwelling for an NRAS year in which the conditions of allocation are satisfied. Under current regulation 29, the Secretary must give an approved participant an incentive to which the approved participant is entitled.

Currently, the approved participant's entitlement to receive an incentive, and the Secretary's obligation to give an incentive, arises even where an investor makes a request to transfer an allocation. This may create issues, particularly where the transfer request is made on the basis that the approved participant has failed to pass on an incentive within a reasonable time.

This item operates to permit the operation of other provisions such as the proposed regulation 21D (proposed to be inserted by item 11 of this Schedule) prior to the payment of the incentive. The effect of the new regulation 25 would be to ensure that the incentive is not paid to an approved participant in error while decisions either to transfer an allocation to another approved participant or to redirect the incentive are yet to be finally determined.

Subregulation 25(1) provides that an approved participant is entitled to receive an incentive for a dwelling for an NRAS year in which the conditions of allocation are satisfied and a determination under subregulation 25(2) is not in force in relation to the allocation.

Subregulation 25(2) operates so that the Secretary may make a written determination that subregulation 25(1) does not apply in relation to an allocation in situations where:

- an investor has requested the transfer of the allocation under regulation 21A, or the Secretary believes on reasonable grounds that such a request will be made, and the request has not been finally decided; or
- a period of 90 days has not passed since the decision to transfer the particular allocation was finally decided; or
- a redirection of the incentive is made within the 90 days mentioned in paragraph 25(2)(c) and less than 30 days have passed since the redirection of the incentive; or
- an application relating to redirection of the incentive made to the Administrative Appeals Tribunal under proposed paragraph 33(1)(ab) has not been finally determined.

Subregulation 25(3) provides that the Secretary must revoke the determination if the Secretary is satisfied that the grounds on which the determination was made no longer apply and none of the other grounds for making a determination apply.

Subregulation 25(4) operates so that, for the purposes of regulation 25, a request or a decision is finally determined when either:

- the decision is in respect of the request or the decision is not subject to any form of appeal or review; or
- the period within which such an appeal or review could be instituted has ended without an appeal or review having been commenced.

Proposed subregulation 25(5) provides that a determination made under subregulation (2) is not a legislative instrument.

The effect of regulation 25 is to ensure that the incentive is not paid to an approved participant in error following the decision to transfer the allocation. For example, after the Secretary has made a decision to transfer the allocation from the relevant approved participant to the gaining approved participant, the relevant approved participant may seek review of this decision under paragraph 33(1)(aa). This will mean the Secretary cannot consider whether to redirect the incentive or not until the transfer has been finally decided. Regulation 25 would allow for the entitlement to the incentive to be 'on hold' until the Secretary is able to determine which approved participant is entitled to the incentive.

Similarly, after the Secretary redirects the incentive under regulation 21D, the relevant approved participant may seek review of this decision under proposed paragraph 33(1)(ab) (inserted by item 25 of this Schedule). In this example, it would unclear which approved participant is entitled to receive the incentive until a decision

has been made by the review body. Regulation 25 would allow the Secretary to delay payment of the incentive until it is established whether the relevant approved participant or the gaining approved participant is entitled to the incentive.

Item 16 – Subregulation 30A(2)

This item amends subregulation 30A(2).

Subregulation 30A(2) sets out when an approved participant is required to pass on an incentive to an investor for the purposes of Division 2 of Part 4 of the Principal Regulations. That requirement arises where there is a contractual arrangement between the approved participant and the investor where the approved participant is required to make a payment to the investor or otherwise take steps to claim a tax offset. If the approved participant is required to pass on an incentive, then current regulation 30B imposes an obligation on the approved participant to comply with the requirement within a reasonable time.

Some approved participants have entered into tripartite contractual arrangements with the investor and an associated entity of the approved participant. Under those arrangements, the associated entity, not the approved participant, is required to pass on the incentive to the investor. Given this, it is unclear whether there is a relevant contractual arrangement for the purposes of current subregulation 30A(2).

This item amends subregulation 30A(2) to provide that the requirement to pass on an incentive applies where, under a contractual arrangement, an ‘associated party’ of the approved participant is required to make a payment to the investor or otherwise take steps to allow the investor to claim a tax offset. ‘Associated party’ is defined in regulation 4 of the Principal Regulations, as inserted by item 1 of this Schedule.

By including the concept of the associated party, the amendments made by this item would ensure that the approved participant does not undermine the objectives of the NRAS by constructing contractual arrangements under which an associated party, not the approved participant, has the obligation to pass on the incentive.

The amendments made by this item also make clear that an approved participant is required to pass on the incentive if under the contractual arrangement the incentive must be passed on in form of payment or benefit (including rent) to the investor.

New paragraphs 30A(2)(b) and (c) are in the same form as current paragraphs 30A(2)(b) and (c).

Item 17 – After subregulation 30B(1)

This item inserts new subregulation 30B(1A).

In broad terms, current regulation 30B provides that where an approved participant is required to pass on an incentive to an investor, they have an obligation to comply with that requirement within a reasonable time. This amended subregulation 30B(1A) applies that obligation on an approved participant who receives a redirected incentive under proposed regulation 21D (inserted by item 11 of this Schedule). It is not necessary for there to be a contractual obligation requiring an incentive to be passed on before the obligation in proposed subregulation 30B(1A) applies.

Item 18 – At the end of regulation 30B

This item inserts new subregulations 30B(3) and (4).

In broad terms, current regulation 30B provides that where an approved participant is required to pass on an incentive to an investor, they have an obligation to comply with that requirement within a reasonable time. The Principal Regulations do not currently specify what is meant by ‘a reasonable time’.

Subregulation 30B(3) provides that the requirement under regulation 30B would not be met if the approved participant does not pass on the incentive after 90 days of receiving it.

Subregulation 30B(4) makes clear that subregulation 30B(3) does not limit current subregulation 30B(2) in determining a reasonable time. This provides the Secretary with the discretion to determine what is considered ‘reasonable time’ depending on the circumstances surrounding the allocation. In certain circumstances, less than 90 days may be considered ‘reasonable time’.

Item 19 – Paragraph 30C(1)(a)

Item 20 – Paragraph 30C(1)(b)

These items amend regulation 30C so that the language is consistent with the definition of ‘pass on’ in subregulation 30A(2), as amended by item 16 of this Schedule.

Item 21 – Paragraph 30D(1)(a)

Item 22 – Paragraph 30D(1)(b)

These items amend regulation 30D so that the language is consistent with the definition of ‘pass on’ in subregulation 30A(2), as amended by item 16 of this Schedule.

Item 23 – After paragraph 33(1)(aa)

This item inserts paragraph 33(1)(ab).

Current regulation 33 sets out when an application may be made to the Administrative Appeals Tribunal for review of a decision by the Secretary.

The amendments made by this item amend regulation 33 to allow for an application to be made to the Administrative Appeals Tribunal for review of a decision to redirect an incentive under regulation 21D (as inserted by item 11 of this Schedule).

Item 24 – At the end of Part 6

This item inserts a new Division 4 in Part 6, entitled ‘Amendments made by the *National Rental Affordability Scheme Amendment (Investor Protections) Regulations 2018*’ and consisting of regulation 38.

Regulation 38 – Application

This regulation governs the application of the amendments made by this Schedule:

Subregulation 38(1)

Subregulation 38(1) provides that the ground in paragraph 21A(2)(k) (inserted by item 8 of this Schedule) and subregulation 21A(5) (inserted by item 10 of this Schedule) applies:

- in relation to a decision to transfer an allocation under regulation 21A made after the commencement of those provisions, including on a request made before that commencement;
- to conduct engaged in before, on or after the commencement of those provisions.

Paragraph 21A(2)(k) provides that a ground for transferring an allocation is that an approved participant or associated party has engaged in, or is likely to engage in, unfair conduct in relation to the allocation. Subregulation 21A(5) would set out certain circumstances where the Secretary will be taken to be satisfied of the matters in paragraph 21A(2)(k).

Applying paragraph 21A(2)(k) and subregulation 21A(5) to conduct which occurs before this Schedule commences will not give the amendments a retrospective effect. This is because the amendments will only alter rights or entitlements after the commencement of this Schedule when the Secretary exercises his or her power to transfer 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. The intention is not to penalise conduct that may have occurred prior to the commencement of paragraph 21A(2)(k), however, provides another ground for investors who may subsequently request a transfer of an allocation.

It is appropriate to apply paragraph 21A(2)(k) and subregulation 21A(5) to conduct that occurs before this Schedule commences. 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 power in paragraph 21A(2)(k) to ensure that confidence in the Scheme is maintained.

Subregulation 38(2)

Subregulation 38(2) provides that paragraph 21D(1)(a) applies to transfers that occur in an NRAS year beginning on or after 1 May 2018, including transfers that occurred before the commencement of that paragraph. Regulation 21D (inserted by item 11 of this Schedule) provides that the Secretary may redirect an incentive to a gaining approved participant in certain circumstances where an allocation is transferred to that approved participant from another approved participant.

Applying paragraph 21D(1)(a) to transfers that occur before this Schedule commences will not give the amendments a retrospective effect. This is because the amendments will only alter rights or entitlements after the commencement of this Schedule when the Secretary exercises his or her power to redirect an incentive. The power in regulation 21D to redirect an incentive cannot be exercised in respect

of an incentive that has already been paid to an approved participant. Current transfer requests that have been received, but have not been processed, will be processed in accordance with the provisions of the proposed Regulations.

It is appropriate to apply paragraph 21D(1)(a) to transfers that occur before commencement where an incentive has not yet been paid. In some instances, the Secretary has transferred an allocation after the end of the 2017/18 NRAS year where the Secretary has not paid an incentive to the previous approved participant for that NRAS year. In many cases, the allocation was transferred on the ground that the previous approved participant failed to pass on an incentive for an earlier NRAS year. It is appropriate for the Secretary to have the power to redirect the incentive for the 2017/18 NRAS year to the gaining approved participant in circumstances where the Secretary is concerned that the previous approved participant may not pass on the incentive to the investor.

Subregulation 38(3)

Subregulation 38(3) provides that regulation 22C (inserted by item 14 of this Schedule) has effect from the commencement of that regulation but applies in relation to a contract entered into before, on or after that commencement. Given that most investors will already have entered into contracts prior to the commencement of the Regulations coming into effect, regulation 22C provides that a contract has no effect to the extent that it prohibits or prevents an investor, or penalises an investor, for requesting, or otherwise assisting with a request, to transfer an allocation.

Applying regulation 22C to contracts entered into before this Schedule commences will not give that regulation a retrospective effect. This is because that regulation will have effect only after this Schedule commences.

Subregulation 38(4)

Subregulation 38(4) provides that regulation 22D (inserted by item 14 of this Schedule) applies in relation to allocations transferred before, on or after the commencement of that regulation. Regulation 22D requires a previous approved participant to give to a gaining approved participant any information requested by the Secretary that is relevant to the Scheme following the transfer of an allocation.

Applying regulation 22D in this way will not give that regulation a retrospective effect. Any request for the approved participant to provide information will be made by the Secretary after the commencement of this Schedule.

It is important for gaining approved participants to have all of the information relevant to an allocation, including for allocations transferred before the commencement of this Schedule, in order for them to be able to properly manage that allocation in the future.

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 2018

The *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018* (**the 2018 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 Regulations

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

Under the Scheme, 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 given in the form of 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 rental property is leased to a low or moderate income tenant at a rate that is no higher than 80% of the property's market value rent, and that the property is not vacant for more than the prescribed amount of time in each 12 month period. There are currently over 34,000 rental properties in the Scheme.

In many cases, the approved participants in Scheme do not own the rental properties that are attached to allocations. Rather, the rental properties are owned by other entities, such as private individuals and self-managed superannuation funds (collectively, **investors**). Commonly, where a rental property is owned by an investor, there is a contractual arrangement between the investor and the approved participant under which the investor makes the rental property available for rent as part of the Scheme, the approved participant manages compliance with the requirements of the Scheme and the approved participant passes on all or part of the incentive to the investor, to compensate the investor for the lower rent that can be charged for the property.

The *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017* (**the 2017 Regulations**) amended the Principal Regulations to include a mechanism to enable an investor to apply to the Secretary to transfer the allocation associated with their rental property if one or more grounds for transfer exist. The 2017 Regulations were intended to address unsatisfactory conduct by some approved participants that was causing financial detriment to investors. It was necessary to address this unsatisfactory conduct to ensure that investors continued to make their rental properties available to rent as part of the Scheme and that the objectives of the Scheme were met.

The 2018 Regulations add a new ground for transfer that is intended to help protect the rights of investors by giving them capacity to transfer from an approved participant that is behaving unfairly towards them.

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 2018 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 promote the right to an adequate standard of housing for tenants on low to moderate incomes by protecting the interests of investors and promoting investor confidence in the Scheme. This assists to ensure that rental dwellings remain in the Scheme and are available to for low and moderate income tenant to rent at below market rents.

Where an allocation is transferred from one approved participant to another, the 2018 Regulations require the outgoing approved participant, at the request of the Secretary, to provide information relevant to the Scheme to the incoming approved participant, so that the incoming approved participant is able to lodge a Statement of Compliance and claim the incentive for the rental property (if an incentive is due under the Principal Regulations). However this obligation does not adversely affect the right to privacy and reputation. The requirement to provide information does not expose the approved participant to a criminal offence or civil penalty if they fail to comply. The information that is required to be provided is information “relevant to the administration of the Scheme” and the type of information that would generally be provided to the Secretary every 12 months as part of the Statement of Compliance for the allocation.

The 2018 Regulations permit the Secretary to proceed on the basis that the ground for transfer for “unfair conduct” is made out in certain circumstances, such as the termination of an agreement by the approved participant. This is because the approved participant will inevitably have more information about the factual circumstances relevant to the “unfair conduct” ground than the Secretary, who has limited rights under the Scheme to require information to be provided under compulsion. However, the approved participant will have the right under the Scheme to present evidence to the Secretary that the “unfair conduct” ground for transfer does not exist. Establishing the ground of “unfair conduct” does not create an offence or expose the approved participant to a monetary penalty, so these provisions do not engage rights relating to the presumption of innocence, the right to a fair trial or minimum guarantees in criminal proceedings. Rather, establishing the “unfair conduct” ground enables the Secretary to transfer an allocation to another approved participant in certain circumstances. If the Secretary does decide to transfer an allocation, the approved participant may seek merits review of the decision to transfer in the Administrative Appeals Tribunal. The “unfair conduct” ground does not engage the right to a fair hearing.

Conclusion

The 2018 Regulations are compatible with human rights as they do not raise any human rights issues.

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Minister for Families and Social Services