



National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 02 November 2018

Peter Cosgrove
Governor-General

By His Excellency's Command

Paul Fletcher
Minister for Families and Social Services

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1 Name

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

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	7 November 2018

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *National Rental Affordability Scheme Act 2008*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

National Rental Affordability Scheme Regulations 2008

1 Regulation 4

Insert:

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:

- (a) is a party to an agreement that relates to the approved rental dwelling; and
- (b) under the agreement, is required to pass on to another person who is not the approved participant any payment or benefit (including rent) relating to the approved rental dwelling.

2 Regulation 4 (definition of *pass on*)

After “*pass on*”, insert “, in relation to an incentive,”.

3 Regulation 4

Insert:

redirected, in relation to an incentive, has the meaning given by subregulation 21D(3).

unfair conduct: a person engages in *unfair conduct* in relation to an allocation for an approved rental dwelling if the person:

- (a) enforces, or seeks to enforce, an unfair contract in relation to the approved rental dwelling; or
- (b) fails to perform contractual obligations owed to an investor in a timely manner; or
- (c) coerces, threatens or attempts to coerce, an investor to take, or omit to take, action:
 - (i) in relation to a contract to which the investor is a party; and
 - (ii) that the investor is not required, under the contract, to take, or omit to take; or
- (d) requires an investor to enter into a contract, including with a particular person; or
- (e) requires an investor to obtain:
 - (i) particular goods or services; or
 - (ii) goods or services from a particular person; or
- (f) seeks to prevent an investor from entering into a contract with a suitably qualified person; or
- (g) misrepresents contractual rights or obligations to an investor.

unfair contract, in relation to an approved rental dwelling, means a contract that:

- (a) relates to the approved rental dwelling; and
- (b) includes a term that:
 - (i) results in a significant imbalance in the rights and obligations of the parties to the contract; and

- (ii) is not reasonably necessary to protect the legitimate interests of the approved participant or an associated party; and
- (iii) if applied, or relied upon, would cause detriment (whether financial or otherwise) to an investor.

4 Subregulation 16(12)

Omit “covered by this regulation”, substitute “relating to the Scheme”.

5 Before regulation 20

Insert:

Subdivision A—Transfer on request

6 Before regulation 21A

Insert:

Subdivision B—Transfer because of conduct

7 Subregulation 21A(1)

After “another approved participant”, insert “(the *gaining approved participant*)”.

8 At the end of subregulation 21A(2)

Add:

- ; (i) the relevant approved participant has failed (as a gaining approved participant) to comply with paragraph 21D(7)(a) (obligation of gaining approved participants when Secretary has redirected incentive) in relation to the allocation;
- (j) the relevant approved participant has failed to comply with regulation 22D (obligations of approved participants when allocations are transferred) in relation to another allocation;
- (k) the relevant approved participant or an associated party:
 - (i) has engaged in unfair conduct in relation to the allocation; or
 - (ii) is likely to engage in unfair conduct in relation to the allocation.

9 Paragraph 21A(3)(b)

Omit “each”, substitute “an”.

10 At the end of regulation 21A

Add:

Secretary may assume unfair conduct in certain circumstances

- (5) Unless the relevant approved participant satisfies the Secretary otherwise, the Secretary is taken to be satisfied of the matters in paragraph (2)(k) (unfair conduct) if the Secretary is satisfied that the relevant approved participant or associated party has:
 - (a) terminated, or threatened to terminate, a contract:
 - (i) that relates to the approved rental dwelling; and
 - (ii) to which an investor is a party; or

- (b) failed to pass on an incentive in relation to the approved rental dwelling to an investor; or
- (c) threatened to take action that would result in an investor not receiving a payment or benefit (including rent) relating to the approved rental dwelling.

11 After regulation 21C

Insert:

21D Secretary may redirect incentive

Incentive for year of transfer

- (1) The Secretary may give an incentive to a gaining approved participant instead of a relevant approved participant if:
 - (a) the Secretary transfers an allocation from the relevant approved participant to the gaining approved participant under regulation 21A during an NRAS year; and
 - (b) apart from the operation of this regulation and any determination in force under subregulation 25(2), the relevant approved participant:
 - (i) would be entitled to receive the incentive for the approved rental dwelling for the NRAS year; and
 - (ii) would be required to pass on all or part of the incentive to an investor.

Incentive for an earlier year

- (2) The Secretary may give an incentive to a gaining approved participant instead of a relevant approved participant if:
 - (a) the Secretary transfers an allocation from the relevant approved participant to the gaining approved participant under regulation 21A during an NRAS year; and
 - (b) apart from the operation of this regulation and any determination in force under subregulation 25(2), the relevant approved participant:
 - (i) would be entitled to receive the incentive for the approved rental dwelling for an earlier NRAS year; and
 - (ii) would be required to pass on all or part of the incentive to an investor.

*Meaning of **redirected***

- (3) An incentive given to a gaining approved participant under this regulation is **redirected**.

Secretary to notify of proposed redirection

- (4) Before the Secretary redirects an incentive for an approved rental dwelling, the Secretary must give written notice of the proposed redirection to the following:
 - (a) the relevant approved participant;
 - (b) the investor to whom the relevant approved participant is required to pass on the incentive.

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- (5) The notice must invite the relevant approved participant or investor, as the case requires, 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.
 - (6) The notice may be given with a notice under regulation 21B (Secretary to notify of proposed transfer).

Redirected incentive to be given to investor

- (7) If the Secretary redirects an incentive:
 - (a) the gaining approved participant must give the incentive to the investor to whom the relevant approved participant is required to pass on the incentive; and
 - (b) to avoid doubt, and despite any agreement to the contrary, the relevant approved participant is not required to pass on all or part of the incentive to an investor.

Incentive that has been given cannot be redirected

- (8) To avoid doubt, this regulation does not apply to allow the Secretary to redirect an incentive that has already been given to a relevant approved participant.

21E Statement of compliance if incentive is redirected

If the Secretary redirects, or proposes to redirect, an incentive for an approved rental dwelling for an NRAS year under regulation 21D, the Secretary may require the gaining approved participant to lodge a Statement of Compliance for the dwelling that includes statements and details covering the whole NRAS year.

Note: For access to information held by the relevant approved participant, see regulation 22D.

12 Before regulation 22

Insert:

Subdivision C—Revocation

13 After regulation 22A

Insert:

Subdivision D—General provisions

14 At the end of Division 1A

Add:

22C Contracts do not prevent transfers

A contract has no effect to the extent that the contract prohibits or prevents an investor from, or penalises an investor for:

- (a) requesting the transfer of an allocation; or
- (b) assisting with, or supporting in any way, a request for the transfer of an allocation.

22D Obligations of approved participants when allocations are transferred

- (1) This regulation applies if an allocation is transferred from an approved participant (the *previous approved participant*) to another approved participant (the *gaining approved participant*).
- (2) The previous approved participant must give to the gaining approved participant any information that is:
 - (a) requested by the Secretary; and
 - (b) relevant to the administration of the Scheme.
- (3) The information must be given within 21 days after the request is made.

15 Regulation 25

Repeal the regulation, substitute:

25 Entitlement to receive incentives

- (1) An approved participant for an approved rental dwelling is entitled to receive an incentive, under this Division, for the dwelling for the NRAS year, if:
 - (a) the conditions of an allocation in relation to the approved rental dwelling are satisfied for the NRAS year; and
 - (b) a determination under subregulation (2) is not in force in relation to the allocation.
- (2) The Secretary may, in accordance with this regulation, make a written determination that subregulation (1) does not apply in relation to a particular allocation if:
 - (a) an investor has requested the transfer of the particular allocation under regulation 21A and the request has not been finally determined; or
 - (b) the Secretary believes on reasonable grounds that such a request will be made; or
 - (c) less than 90 days have passed since a request to transfer the particular allocation under regulation 21A was finally determined; or
 - (d) a redirection of the incentive is made within the 90 days mentioned in paragraph (c) and less than 30 days have passed since the redirection of the incentive; or
 - (e) an application relating to redirection of the incentive made to the Administrative Appeals Tribunal under paragraph 33(1)(ab) has not been finally determined.
- (3) 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.
- (4) For the purposes of this regulation, a request or a decision is finally determined when either:
 - (a) the decision made in respect of the request or the decision is not subject to any form of appeal or review; or
 - (b) the period within which such an appeal or review could be instituted has ended without an appeal or review having been instituted.
- (5) A determination made under subregulation (2) is not a legislative instrument.

16 Subregulation 30A(2)

Repeal the subregulation, substitute:

- (2) An approved participant is required to *pass on* an incentive to an investor if, under a contractual arrangement, the approved participant or an associated party is required:
- (a) to pass on to the investor any payment or benefit (including rent) relating to the approved rental dwelling; or
 - (b) to take steps to enable the investor to claim a tax offset to which the investor is entitled under Division 380 of the *Income Tax Assessment Act 1997* in relation to the incentive; or
 - (c) to make an election under section 380-11 or 380-16 of the *Income Tax Assessment Act 1997* in relation to the incentive.

17 After subregulation 30B(1)

Insert:

- (1A) This regulation also applies if an approved participant is required, under regulation 21D, to give an investor all or part of a redirected incentive.

18 At the end of regulation 30B

Add:

- (3) If the approved participant does not comply with the requirement within 90 days after the approved participant receives the incentive, the approved participant is taken not to have complied with the requirement within a reasonable time.
- (4) Subregulation (3) does not limit subregulation (2).

19 Paragraph 30C(1)(a)

Repeal the paragraph, substitute:

- (a) an approved participant is required to pass on an incentive to an investor;
and

20 Paragraph 30C(1)(b)

After “contractual arrangement”, insert “concerned”.

21 Paragraph 30D(1)(a)

Repeal the paragraph, substitute:

- (a) an approved participant is required to pass on an incentive to an investor;
and

22 Paragraph 30D(1)(b)

After “contractual arrangement”, insert “concerned”.

23 After paragraph 33(1)(aa)

Insert:

- (ab) under regulation 21D to redirect an incentive; or

24 At the end of Part 6

Add:

Division 4—Amendments made by the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018

38 Application

- (1) Paragraph 21A(2)(k) and subregulation 21A(5), as inserted by items 8 and 10 of Schedule 1 to the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018*, apply:
 - (a) 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; and
 - (b) in relation to conduct engaged in before, on or after that commencement.
- (2) Paragraphs 21D(1)(a) and (2)(a), as inserted by item 11 of Schedule 1 to the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018*, apply in relation to transfers that occur in an NRAS year beginning on or after 1 May 2018, including transfers that occurred before the commencement of those paragraphs.
- (3) Regulation 22C, as inserted by item 14 of Schedule 1 to the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018*:
 - (a) has effect from the commencement of that regulation; but
 - (b) applies in relation to a contract entered into before, on or after that commencement.
- (4) Regulation 22D, as inserted by item 14 of Schedule 1 to the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018* applies in relation to allocations transferred before, on or after the commencement of that regulation.