

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 2019

Purpose

The purpose of the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019 (the Regulations)* is to create enhanced protections for investors of rental dwellings in the National Rental Affordability Scheme (**NRAS**). Protecting investors will promote rental housing affordability, by ensuring that dwellings are not withdrawn from the Scheme. The Regulations also make some technical changes to improve the operation of 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. The matters include 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 an approved participant and 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 must be 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 currently provide protection for investors. However, investors continue to face difficulties with approved participants, for example, approved participants failing to pass on incentive payments.

These Regulations introduce a new compliance framework, which replaces the grounds of transfer that investors were previously able to use when they faced difficulties with an approved participant. The compliance framework applies to all approved participants and is intended to ensure that the integrity of the Scheme is maintained and the interests of investors are protected. The framework will establish a set of expectations and obligations for approved participants in relation to investors, by way of a code of conduct. Approved participants must comply with the requirements of the framework as a failure to comply could lead to a determination of

breach by the Secretary. Consequences that follow a determination of breach include transferring an allocation to another approved participant and revoking an allocation.

The code of conduct and related transfer provisions have five key benefits compared to the previous regulation 21A.

First, the code of conduct is drafted in a simpler manner. This is important, given that many investors are not sophisticated commercial parties and the code of conduct is largely for the benefit of investors.

Secondly, the amendments deal with the insolvency of an approved participant more comprehensively.

Thirdly, the amendments require investors to attempt to resolve any differences they may have with an approved participant before seeking a transfer. Under the code of conduct, there is a requirement for approved participants to have dispute resolution mechanisms in place. The new requirement for approved participants to provide a summary of the code of conduct to investors ensures that investors will be fully informed when participating in dispute resolution processes.

Fourthly, the amendments allow for a graduated enforcement approach. Specifically, the Secretary may make decisions about an “individual breach”, a “serious breach” and a “disqualifying breach”, depending on the approved participant’s conduct. The Secretary may also issue warning notices and remediation notices. This contrasts with the regime under regulation 21A, where the Secretary’s only possible response to poor conduct was to transfer an allocation. This made it difficult to deal appropriately with different patterns of poor behaviour by approved participants.

Finally, under regulation 21A, where an approved participant sought Administrative Appeals Tribunal (AAT) review of a transfer decision, there was a period of uncertainty for the investor about the status of the transfer. This occurred because the investor could not be certain that the transfer was effective until the AAT heard the matter and made its decision. This was problematic for investors because they needed to enter into a contract with an approved participant in order to receive incentives. Investors also had (unrecoverable) legal and other costs of being involved in AAT proceedings. Under the amended provisions, any AAT proceedings between an approved participant and the Department in relation to an “individual breach”, a “serious breach” or a “disqualifying breach” will be resolved before an investor transfer takes place. This will give certainty to an investor that a transfer is effective and will not be unwound by the AAT.

Consultation

The Department of Social Services has undertaken consultation on the Regulations with peak bodies representing approved participants. The Regulations were reconsidered in light of the feedback received and modifications were made. The Department also consulted with the Australian Taxation Office.

Regulation Impact Statement (RIS)

Following consultation with the Office of Best Practice Regulation (OBPR), a Regulation Impact Statement (RIS) is not required (OBPR ID 24549).

Commencement

The Regulations commence 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 2019*.

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 (subregulation (b) of the definition of *approved participant*)

This item amends subregulation 4(b) of the definition of approved participant to reflect the changes in the numbering of the Regulations.

Item 2 – Regulation 4

This item inserts new definitions in regulation 4 to reflect the new compliance framework.

‘approved participants code of conduct’ has the meaning given by regulation 22BD(2) (as inserted by item 20 of this Schedule). This code of conduct sets out the relevant obligations that an approved participant must comply with.

‘compliance breach’ has the meaning given by subregulation 22BA(4) as inserted by item 18 of this Schedule. A compliance breach occurs if the approved participant fails to comply with the NRAS legislative framework; or has contravened a condition of allocation for the dwelling in circumstances that are within the control of the approved participant.

'disqualifying breach' has the meaning given by regulation 22BC as inserted by item 20 of this Schedule. This definition is further expanded below, however, the Secretary may make a determination that there has been a disqualifying breach if the approved participant is the subject of an insolvency event; or the Secretary has determined that the approved participant has committed a serious breach and within 12 months the approved participant has committed another serious breach.

'individual breach' has the meaning given by subregulation 22BA(1) as inserted by item 20 of this Schedule. The Secretary may determine that an approved participant has committed an 'individual breach' if the Secretary is satisfied that the approved participant is the subject of an insolvency event; or has breached the approved participants code of conduct in relation to the dwelling; or has committed a compliance breach in relation to the dwelling.

'insolvency event' has the meaning given by subregulation 22BA(2) as inserted by item 20 of this Schedule. An 'insolvency event' occurs if the approved participant dies or ceases to exist; or has become bankrupt or insolvent; or commences to be wound up.

Item 3 – Regulation 4 (definition of *redirected*)

This item amends the definition of 'redirected' to reflect the changes in the numbering of the Regulations.

Item 4 – Regulation 4 (definition of *relevant approved participant*)

This item repeals the definition of 'relevant approved participant'. This definition is repealed as all references to 'approved participant' distinguish between 'original approved participant' and 'gaining approved participant'.

Item 5 – Regulation 4

This item inserts the following new definitions:

'serious breach' has the meaning given by subregulation 22BB(1) as inserted by item 20 of this Schedule.

'transfer request' has the meaning given by subregulation 22BE(1)(b) as inserted by item 20 of this Schedule.

Item 6 – Regulation 4 (definition of *unfair conduct*)

This item repeals the definition of 'unfair conduct' as it is no longer referenced in the Regulations, and elements of the 'unfair conduct' definition are now reflected in the code of conduct.

Item 7 – Regulation 4 (subregulation (b)(ii) of the definition of *unfair contract*)

This item amends the definition of unfair contract to substitute the reference to "the approved participant or an associated party" with "a person other than an investor". The purpose of this amendment is to ensure that approved participants and

associated parties, as well as property management service providers, do not enforce, seek to enforce or threaten to enforce an unfair contract, in accordance with subregulation 22BD(2)(l)(iv).

Item 8 – Subregulation 16(6B)

This item provides the Secretary with the discretion to grant an extension of time for an approved participant to obtain and lodge a market rent valuation. Under the previous Regulations, an investor could not receive incentives if their approved participant had failed to obtain and lodge a market rent valuation within the required timeframe. Where there has been a transfer of allocation, this amendment allows the Secretary to grant an extension of time so that the gaining approved participant may obtain and lodge the market rent valuation where the original approved participant failed to do so.

Item 9 – Subregulation 20(1)

This item removes “(1)” as it is no longer required. Given subregulation 20(2) is removed, it is not necessary to provide numbering for the remaining one paragraph.

Item 10 – Subregulation 20(2)

This item repeals subregulation 20(2). Previously subregulation 20(2) stated that the Secretary must not transfer a provisional allocation to a different rental dwelling, which meant that if the conditions of a provisional allocation were not complied with, the Secretary could revoke the allocation. This reduced the amount of affordable housing for low to moderate income households. This item provides the Secretary the discretion to transfer a provisional allocation to a different rental dwelling. Provisional allocations have a 10-year incentive period and therefore it is important that they are used to provide affordable housing. Allowing the Secretary to transfer provisional allocations allows allocations to be used consistently with the object of the Scheme, before the 10-year period ends.

Item 11 – Regulation 21 (heading)

This item omits “approved participant etc.” and substitutes it with “person or entity”. An allocation may be transferred to another person or entity, and once they have received that allocation, they will be the “gaining approved participant”.

Item 12 – Subregulation 21(1)

This item clarifies the references to approved participants. It inserts “(the original approved participant)” after the first occurring reference to “approved participant”.

Item 13 – Subregulation 21(1)

This item specifies that the reference to “another approved participant, or another person or entity” is a reference to “another person or entity (the gaining approved participant)”. Therefore, the Secretary may transfer an allocation from one approved participant to a gaining approved participant at the original approved participant’s request.

Item 14 – Subregulation 21(2)

This item repeals subregulation 21(2) so that it is possible for the Secretary to transfer a provisional allocation to another approved participant.

This item also inserts new subregulation 21(2) to explain what will happen to an incentive where there has been a transfer of an allocation to another approved participant. Subregulation 21(2) clarifies that if the Secretary transfers an allocation, the Secretary may give an incentive to the gaining approved participant instead of the original approved participant if both the original approved participant requests the Secretary to give the incentive to the gaining approved participant; and the gaining approved participant agrees to accept the incentive.

Item 15 – Subdivision B of Division 1A of Part 3

This item repeals the whole of Subdivision B of Division 1A of Part 3. Subdivision B previously set out the process of transfer due to an approved participant's conduct. This whole subdivision is replaced by the compliance framework (as inserted by item 20 of this Schedule). The compliance framework sets out the obligations of approved participants more clearly.

Item 16 – Subdivision C of Division 1A of Part 3 (heading)

This item repeals the heading of Subdivision C and instead substitutes it with 'Subdivision B – Revocation generally'. This is because the subdivisions have been renumbered. The provisions following the new heading are about revocations generally.

Item 17 – Subdivision D of Division 1A of Part 3 (heading)

This item repeals the heading of Subdivision D as there has been a renumbering of headings and the heading for Subdivision D is no longer required.

Item 18 – Regulation 22B (heading)

This item amends the heading of regulation 22B to "Matters that may be taken into account by Secretary in deciding to revoke an allocation". This is because matters that may be taken into account by the Secretary in deciding to transfer an allocation are wholly set out in the compliance framework as inserted by item 20 of this Schedule

Item 19 – Regulation 22B

This item omits the words "transfer an allocation under regulation 21A, or to revoke an allocation, made to an approved participant" and substitutes it with "revoke an allocation under this Subdivision". This is because regulation 21A is repealed by these Regulations and transfers of allocations will occur under the compliance framework.

Item 20 – After regulation 22B

This item inserts a new subdivision about transfer or revocation because of breach, and introduces a compliance framework. This compliance framework is intended to apply to all approved participants to ensure that the integrity of the Scheme is maintained and the interests of investors are protected.

It should be noted that the compliance framework does not change the existing rights and obligations of approved participants, rather their obligations under the Scheme are restructured and further clarified.

1. There are four main steps involved in the compliance framework:
 - I. There must have been a ‘breach’, defined as either an “individual breach”, “serious breach” or “disqualifying breach”.
 - II. An investor must have applied to the Department to request transfer of allocation; or the Secretary must decide to investigate on his or her own motion. If an investor considers that an approved participant has committed a breach, other than an insolvency event, the investor must first raise the complaint with the approved participant . If the complaint to the approved participant is not resolved within 90 days, the investor may apply to the Secretary to request a transfer. Where a dispute between an investor and an approved participant is capable of remedy, it is preferable for the dispute to be resolved by the parties, without transfer, if possible. The code of conduct includes a requirement for approved participants to offer a dispute resolution process.
 - III. At this point, the Secretary may make a determination of one of three types of breach:
 - a. an individual breach;
 - b. a serious breach; or
 - c. a disqualifying breach.

This determination is subject to procedural fairness requirements and requires the Secretary to take into consideration any submissions provided by the investor and the approved participant, without limiting the matters that the Secretary may have regard to in deciding that there has been a breach.

The breach determination is AAT reviewable. The approved participant has review rights in relation to whether the conduct breaches the code of conduct. The amendments enable the review process to be completed by the time the transfer occurs, which provides greater certainty for investors.

- IV. The Secretary may only make a determination to transfer or revoke an allocation once a determination of breach has been finally determined

(once the AAT review period has lapsed or the review rights have been exercised and finalised). The review rights for each category of breach are as follows:

- a. for an individual breach the Secretary must transfer the allocation if the investor requests a transfer. This decision is not AAT reviewable.
- b. for a serious breach that is:
 - i. investor requested the Secretary must transfer. This decision is not AAT reviewable.
 - ii. on the Secretary's own motion, the Secretary may revoke or transfer. This decision is AAT reviewable.
- c. for a disqualifying breach, the Secretary must revoke or transfer each or all of the allocations held by the approved participant within 6 months of determination. This decision is not AAT reviewable.

Subdivision C sets out the provisions about transfer or revocation of an allocation due to a breach.

A new regulation '22BA Individual breach' is inserted.

Subregulation 22BA(1) provides the Secretary with the discretion to determine that an approved participant has committed an 'individual breach'. Subregulation 22BA(1) explains that an 'individual breach' occurs when the Secretary is satisfied that the approved participant for an approved rental dwelling meets the criteria of either: being the subject of an insolvency event; has breached the approved participants code of conduct; or has committed a compliance breach.

Subregulation 22BA(2) stipulates the circumstances in which an approved participant is subject to an insolvency event. An insolvency event occurs if the approved participant dies or ceases to exist; becomes bankrupt or insolvent; or commences to be wound up.

Subregulation 22BA(3) provides that a failure to comply with the approved participants code of conduct constitutes a breach of the approved participants code of conduct.

Subregulation 22BA(4) defines a 'compliance breach' as having occurred when an approved participant fails to comply with the NRAS Act or these Regulations (other than the approved participants code of conduct); or if the approved participant contravenes a condition of the allocation for the dwelling in circumstances that are within the control of the approved participant.

A new regulation '22BB Serious breach' is inserted.

Subregulation 22BB(1) provides the Secretary with the discretion to determine that an approved participant has committed a 'serious breach' if satisfied that the following circumstances have occurred:

- (a) the approved participant has breached the approved participants code of conduct in relation to 3 or more investors within a period of 6 months and these breaches have resulted in material financial detriment to those investors; or
- (b) the approved participant has committed a compliance breach if one or more of the following has occurred:
 - (i) the approved participant has provided false or misleading information to the Secretary or the Department in relation to the National Rental Affordability Scheme;
 - (ii) the approved participant has failed to comply with the law of the Commonwealth or a State or Territory in relation to the dwelling or any other aspect of the National Rental Affordability Scheme. The reference to law of the Commonwealth includes the NRAS Act and Regulations, as well as the Australian Consumer Law in the *Competition and Consumer Act 2010*;
 - (iii) the approved participant has claimed a tax offset that the approved participant is not entitled to claim;
 - (iv) the approved participant has passed on a tax offset to a person who is not entitled to claim the tax offset.

Subregulation 22BB(1)(c) also provides that an approved participant has committed a serious breach if the approved participant has breached the approved participants code of conduct or committed a compliance breach; the Secretary has, by writing, required the approved participant to take remedial action in relation the breach; and the remedial action is not taken within 28 days after the requirement is given to the approved participant.

Subregulation 22BB(2) sets out notice requirements for when the Secretary determines that the approved participant has committed a serious breach. Once the Secretary has determined that there has been a serious breach, the Department may publicise the breach on its Departmental website; and any investor of the approved participant who has committed the serious breach may, by writing, request the Secretary to transfer the allocation for their dwelling as stipulated under subregulation 22BE(1)(b) (as inserted by item 18 of this Schedule).

Item 20 also inserts a new regulation '22BC Disqualifying breach'.

Regulation 22BC provides the Secretary with the discretion to determine that an approved participant for an approved rental dwelling has committed a 'disqualifying breach' if the Secretary is satisfied that the approved participant is the subject of an insolvency event; or the Secretary has determined that the approved participant has committed a serious breach and is satisfied that the Secretary could, within 12 months, determine that the approved participant has committed another serious breach.

A new regulation '22BD Approved participants code of conduct' is inserted to set out the approved participants code of conduct. The code of conduct replaces the grounds of transfer formerly in regulation 21A and the definition of "unfair conduct" in the previous Regulations, prior to their repeal by items 6 and 15 of this Schedule.

All approved participants must comply with this code, as well as provide a copy that is easily accessible for investors. This code of conduct clearly sets out the obligations that approved participants must comply with. The code of conduct ensures that investors are aware of their rights under the Scheme and that their interests are also protected.

Paragraph 22BD(2)(a) provides that the approved participant for an approved rental dwelling must comply with legal obligations relating to investors in a timely manner. This is to ensure that investor rights and interests are protected and approved participants do not delay complying with their legal obligations.

Paragraph 22BD(2)(b) provides that an approved participant must comply with the law of the Commonwealth and the States and Territories in relation to dealings with investors and tenants. For clarity, the reference to law of the Commonwealth includes the NRAS Act and Regulations, as well as the Australian Consumer Law under the *Competition and Consumer Act 2010*. As a summary of this code of conduct will be provided to investors, this ensures that investors clearly understand their rights under relevant legislation.

Paragraph 22BD(2)(c) stipulates that an approved participant must lodge an annual Statement of Compliance in relation to the dwelling. The reference to approved participant includes gaining approved participants. This ensures that the investor will get the full amount of incentive even though there may have been a transfer of allocation to another approved participant part way through the NRAS year.

Paragraph 22BD(2)(d) specifies that the approved participant must respond to a communication from an investor within 30 days unless they have a reasonable excuse. A reasonable excuse could include circumstances where an investor has been frivolous or aggressive; where the approved participant had previously provided the requested information; or if the communication was not received due to incorrect contact details. This requirement ensures that the approved participant regularly communicates with the investor and does not leave an investor with no response for 30 days or more.

Paragraph 22BD(2)(e) provides that the approved participant must have an internal or external dispute resolution mechanism for use by investors. This allows investors to seek review of decisions made by approved participants if they are unsatisfied by a decision. This would also allow investors to make use of an external dispute resolution mechanism, as an opportunity to resolve their concerns before they make an application to the Department for a transfer of allocation. An internal review and/or external dispute resolution mechanism between investors and approved participants is likely to reduce administrative burden on the Department.

Paragraph 22BD(2)(f) specifies that an approved participant must not enforce, seek to enforce or threaten to enforce an unfair contract. 'Unfair contract' is a term already defined in regulation 4 of the Regulations. This provision has the same effect as the

'unfair conduct' provision in the previous Regulations, which provides further protection for investors.

Paragraph 22BD(2)(g) prohibits an approved participant from making a misrepresentation to an investor.

Paragraph 22BD(2)(h) prohibits an approved participant from engaging in misleading or deceptive conduct in relation to an investor. Although this would be covered by the Australian Consumer Law, having this protection clearly set out in the code of conduct makes it clear to investors.

Paragraph 22BD(2)(i) states that an approved participant must not threaten or coerce an investor to take an action the investor is not required to take under contract. This provision makes it clear to investors that an approved participant cannot threaten or coerce investors to undertake something they had not previously agreed to. It is not a breach of the code of conduct to require an investor to comply with an investor's obligations under a contract – unless contract falls within definition of unfair contract.

Paragraph 22BD(2)(j) explains that an approved participant must not prevent an investor from entering into a contract with a suitably qualified and experienced person in relation to the dwelling. This provision is intended to cover circumstances where an approved participant threatens to terminate their contract with an investor because the investor has decided to use a property management services provider, other than the approved participant's preferred provider or where the approved participant will not approve the investor's choice of property management agent

Paragraph 22BD(2)(k) provides that an approved participant must not threaten to take action that would result in an investor not receiving incentive that the investor is entitled to under law. This ensures that if an investor has complied with the relevant requirements under the NRAS legislative framework and is eligible to receive incentives, then the approved participant must pass on such incentive, and not threaten to withhold the incentive. For clarity, the reference to 'law' includes all obligations arising under law, such as contracts and deeds.

The previous definition of 'unfair conduct' in subregulation 4(d) prior to its repeal, stated that 'a person engages in unfair conduct in relation to an allocation for an approved rental dwelling if the person requires an investor to enter into a contract, including with a particular person'. This obligation has been amended, in paragraph 22BD(2)(l) so that rather than prohibiting an investor from entering into a contract with another person overall, it allows an approved participant to require an investor to enter into a contract with a related property management service provider. However, the approved participant should be able to ensure that the property management service provider behaves appropriately towards investors such that investors are not disadvantaged. A property management service provider may provide a range of services such as managing tenants or property maintenance.

The approved participant should be able to ensure that the provider:

- (i) complies with the contract between the provider and the investor; and

- (ii) complies with legal obligations relating to the investor in a timely manner; and
- (iii) complies with the laws of the Commonwealth and the States and Territories in relation to dealings with investors and tenants; and
- (iv) does not enforce, seek to enforce or threaten to enforce an unfair contract with an investor; and
- (v) does not make a misrepresentation to an investor; and
- (vi) does not engage in misleading or deceptive conduct in relation to an investor; and
- (vii) does not threaten or coerce an investor to take action the investor is not required to take under contract.

Paragraph 22BD(2)(m) makes clear that if the approved participant requires an investor to enter into a contract as mentioned in paragraph 22BD(2)(l) then the approved participant should also ensure that the property management service provider acts in accordance with the requirements in paragraph 22BD(2)(l). If they are not able to ensure the property management service provider would comply with subparagraphs 22BD(2)(l)(i) to (vii), then the approved participant should not require an investor to enter into such a contract.

In certain circumstances, an investor may also appoint an approved participant as the investor's attorney under a Power of Attorney to facilitate property management services, and this would not violate the code of conduct.

A new regulation 22BE 'Secretary may determine breach on own initiative or on request by an investor' is inserted.

This regulation outlines the process for when the Secretary may make a determination of breach either on the Secretary's own initiative; or on a written request by an investor for the allocation for the dwelling, in a form as approved by the Secretary.

Subregulation 22BE(2) specifies that the transfer request by the investor must be in a form approved by the Secretary and include details of the breach alleged by the investor but the investor does not need to specify whether the breach is an individual breach, serious breach or a disqualifying breach.

Subregulation 22BE(3) explains that an investor may only make a transfer request once the investor has given the approved participant written notice of the alleged breach, 90 days have passed since the notice was given, and the investor is satisfied that the approved participant has not taken appropriate action in relation to the alleged breach.

Subregulation 22BE(4) clarifies that subregulation 22BE(3) does not apply in relation to an insolvency event. This subregulation makes clear that an investor may make a transfer request upon knowledge of an insolvency event as the event may not be able to be rectified within 90 days of written notice. If an investor is able to resolve an issue with an approved participant there may be no need for the investor to request a transfer. In addition, approved participants are required to have a dispute resolution process.

Item 20 also inserts a new regulation '22BF Secretary must notify proposed determination' which sets out the notice requirements for the Secretary in making a proposed determination of breach.

Subregulation 22BF(1) states that before determining that the approved participant for an approved rental dwelling has committed an individual breach, a serious breach or a disqualifying breach, the Secretary must give written notice of the proposed determination to both the approved participant; and the investor who requested the transfer.

Subregulation 22BF(2) specifies that the notice must state that the Secretary proposes to determine that the approved participant has committed the breach; and provide an opportunity for the approved participant and investor to make a written submission to the Secretary about the proposed determination within 14 days after the Secretary gives the notice.

Subregulation 22BF(3) provides that in deciding whether to make the determination, the Secretary must have regard to any submissions made by the approved participant and/or the investor.

Subregulation 22BF(4) provides that subregulation (3) does not limit the matters to which the Secretary may have regard in deciding whether to make the determination. This subregulation provides that the Secretary may have regard to matters other than solely relying on submissions made by the approved participant and/or investor.

Item 20 also inserts regulation '22BG Transfer or revocation because of breach'. This regulation outlines when a transfer or revocation due to a breach may occur.

This regulation provides the Secretary with the power to transfer the allocation for the dwelling to another person or entity if the Secretary has determined that an approved participant for an approved rental dwelling has committed an individual breach, a serious breach or a disqualifying breach; and either the AAT has confirmed the Secretary's decision to make the determination; or the period for making an application to the AAT for review of the Secretary's decision to make the determination has expired.

Subregulation 22BG(2) sets out that where the Secretary has made a determination of an 'individual breach' by the approved participant and the investor had requested the transfer, then the Secretary must transfer the allocation for the dwelling.

Subregulation 22BG(3) outlines that where there has been a determination of 'serious breach' after the investor has requested the transfer, the Secretary must transfer the allocation for the dwelling. The note below the subregulation clarifies that an investor may make a request to transfer under subregulation 22BB(2)(b) or 22BE(1)(b).

Subregulation 22BG(4) provides for the scenario where the Secretary had investigated a breach on the Secretary's own initiative under subregulation 22BB(1)(a). If the Secretary has determined that the approved participant committed a serious breach, then the Secretary has the discretion to transfer or revoke the allocation for the dwelling in those circumstances.

Subregulation 22BG(5) specifies that if the Secretary determines that the approved participant committed a disqualifying breach, the Secretary must transfer or revoke all of the approved participant's allocations for approved rental dwellings within six months. This subregulation makes clear that it is irrelevant whether the request was made by an investor or on the Secretary's own initiative, and the Secretary does not have discretion, but the Regulations require transfer or revocation of the allocation. The period of six months is intended to provide sufficient time for the Secretary to determine a suitable approved participant to whom the allocation could be transferred.

Subregulation 22BG(6) sets out the requirements for transferring an allocation. It specifies that the Secretary must not transfer an allocation to a person or entity under this regulation unless the Secretary is satisfied that the person or entity has the capacity to properly manage the allocation; and the person or entity is a suitable person or entity to whom the allocation may be transferred; and the person or entity has agreed in writing to the transfer.

Item 20 also inserts a new regulation '22BH Secretary may redirect incentive' which is largely similar to the previous regulation on redirection of incentive which has been repealed by item 15 of this Schedule.

Regulation 22BH provides the Secretary with the power to redirect an incentive following the transfer of allocation for an approved rental dwelling from the original approved participant 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 the compliance framework, the original 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 original 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 22BH(2) provides the Secretary with the power to redirect the incentive from the original approved participant that, subject to the Regulations, the original approved participant would have been entitled to receive and would have had an obligation to pass on to an investor (fully or in part).

Subregulation 22BH(3) provides the Secretary with the same power as above, but applies in situations where the original approved participant would have been entitled to receive the redirected incentive for the approved rental dwelling for an earlier NRAS year.

If the Secretary redirects the incentive, subregulation 22BH(4) 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 original approved participant was required to pass on the incentive. Subregulation 22BH(4) also clarifies that the original approved participant will not be required to pass on the incentive to the investor.

Subregulations 22BH(5), 22BH(6) and 22BH(7) set out the procedural protections and requirements for a decision to redirect an incentive. Before the Secretary redirects an incentive, the Secretary must give written notice of the proposed redirection to the original approved participant and the relevant investor. The notice must invite the original 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.

Subregulation 22BH(8) clarifies that the Secretary cannot redirect an incentive that has already been given to a relevant approved participant.

New regulation 22BJ sets out when a Statement of Compliance will be required following the transfer of an allocation from an approved participant to another person or entity. This regulation is similar to a regulation that had been repealed by item 15 of this Schedule.

Regulation 22BJ provides the Secretary with the discretion to require the gaining approved participant to lodge a Statement of Compliance for an approved rental dwelling for the NRAS year if the Secretary transfers an allocation for an approved rental dwelling during an NRAS year or the previous NRAS year, or both.

This regulation addresses the risk that the original approved participant will not pass on the portion of the incentive they receive to the investor given they no longer hold the allocation and there is no longer an ongoing relationship with the investor. Under this provision, the Secretary can request the gaining approved participant 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 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.

Item 21 - Before regulation 22C

This item inserts a new subdivision D: 'Subdivision D – General provisions' to account by the renumbering and restructuring by amendments in this Schedule.

Item 22 – Subregulation 22D(1)

This item omits "(the previous approved participant) to another approved participant" and substitutes "(the original approved participant) to another person or entity". This amendment makes clear that regulation 22D applies when there has been a transfer

of allocation from the original approved participant to another person (the gaining approved participant).

Item 23 – Subregulation 22D(2)

This item omits “previous” and substitutes “original”. This is a technical drafting amendment to change the terminology to make clear who the approved participant is at any given time.

Item 24 – Paragraphs 25(2)(a) and (c)

This item omits “particular allocation under regulation 21A” and substitutes “allocation under regulation 22BE”. This is a technical drafting amendment to account for the renumbering of provisions due to the amendments made by items in this Schedule.

Item 25 – Subregulation 25(4)

This item omits “a decision” and substitutes it with “an application”. This is a technical drafting amendment to make the reference consistent with paragraph 25(2)(e) the application relating to redirection of the incentive made to the AAT

Item 26 – Subregulation 25(4)(a)

This item omits “a decision” and substitutes it with “an application”. This is a technical drafting amendment to make the reference consistent with paragraph 25(2)(e) the application relating to redirection of the incentive made to the AAT.

Item 27 – Subregulation 28(3)

This item repeals subregulation 28(3). Subregulation 28(3) previously set out that an approved participant may request a review by the Secretary of the amount of incentive in accordance with guidelines issued by the Department. There will be a new internal review regulation inserted by item 28 of this Schedule and therefore subregulation 28(3) is no longer required.

Item 28 – At the end of regulation 28

This item adds subregulations on internal review into regulation 28.

This regulation makes clear that internal review is available to an approved participant who is affected by a decision of the Secretary or Secretary’s delegate to reduce the amount of an incentive. The reference to ‘approved participant’ here includes a gaining approved participant where there has been a transfer or redirection.

The decision-maker must give written notice of the reviewable decision to the approved participant as part of the original decision. The approved participant must request the decision-maker to review the decision within 60 days after being notified in writing of the original or remade decision to reduce the incentive amount. This imposes a time limit on seeking internal review; this limit did not previously exist in the Regulations.

If an internal review has not been completed after two months of requesting the review, a person may apply for review to the AAT.

Item 29 – Subregulation 30A(2)

This item omits the reference to “contractual arrangement” and substitutes it to “legal obligation”. An approved participant must pass on an incentive to an investor in accordance with any legal obligation, whether this obligation arises under a contract, deed or otherwise.

Item 30 – Subregulation 30B(1A)

This item omits “21D” and substitutes it with “22BH”. This is a technical drafting amendment to account for the renumbering of provisions due to the amendments made by items in this Schedule.

Item 31 – Subregulation 30B(2)

This item omits “within a reasonable time after receiving the incentive” and inserts new provisions into subregulation 30B

Previously, subregulation 30B(3) stated that if the approved participant does not comply with the requirement to pass on incentives within 90 days after the approved participant receives the incentives, the approved participant is taken not to have complied with the requirement within a reasonable time. However, there may be different contractual arrangements between approved participants and investors to pass on incentives in less than 90 days. To account for this, subregulation 30B(2) clarifies that if the contract specifies a timeframe for passing on the incentive, the approved participant must comply with that requirement (provided it is no more than 90 days). If the contract does not specify a timeframe, then the approved participant must pass on incentives within 90 days.

Item 32 – At the end of Division 2 of Part 4

This item inserts a new regulation 30E that requires approved participants to give a summary of the approved participants code of conduct to their investors on or before the later of 28 days after the Regulations commence; or 28 days after the investor becomes an investor for the dwelling. This ensures that investors are fully aware of their rights under the Scheme.

Item 33 - Regulation 32

This item repeals the previous regulation 32 and substitutes it with a new regulation 32 on ‘Sharing and use of information’. Regulation 32 provides that information (including personal information) obtained by the Secretary for the purposes of the Scheme may be used or disclosed by the Secretary for the purposes of the Scheme or for the purpose of programs that are consistent with the object of the *National Rental Affordability Scheme Act 2008*. Regulation 32 further sets out what the information may be disclosed for, and to whom.

This item also inserts a new regulation 32A which provides the Secretary with the power to request other information or document required for the purposes of the

operation of the National Rental Affordability Scheme. The information or document is to be provided within a reasonable period as specified by the Secretary. This provision is similar to subregulation 16(12) in the previous Regulations, however including this provision as a standalone regulation, rather than a condition of allocation may result in a potential finding of a serious breach, rather than a compliance breach.

Item 32 also inserts new regulation 32B which sets out a new requirement for approved participants. Approved participants must provide a written notice to tenants regarding the expiration of the allocation for the dwelling. This notice must be in a form approved by the Secretary and must be provided to the tenants within a timeframe as specified in the form. It is important for tenants to know when the allocation is ending so they have time to consider their options and ascertain whether their rent will increase.

Item 34 – Paragraphs 33(1)(aa) and (ab)

This item repeals paragraphs 33(1)(aa) and 33(1)(ab) as they reference the grounds of transfer regulation which has been repealed and replaced by the compliance framework.

Item 35 – After subregulation 33(1)(a)

This item inserts two paragraphs after subregulation 33(1)(a) to provide that an application may be made to the AAT for review of a decision of the Secretary if under regulation 22BA, 22BB or 22BC the Secretary has determined that an approved participant has committed an individual breach, a serious breach or a disqualifying breach; or the Secretary has made a decision under regulation 22BH to redirect an incentive.

Item 36 – Subregulation 33(1)(b)

This item repeals the previous subregulation 33(1)(b) and substitutes it with wording to specify that a determination to reduce the amount of an incentive, set out in a review notice under regulation 28, is reviewable by the AAT.

Item 37 – At the end of Part 6

This item adds 'Division 5 – Amendments made by the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019'.

This item provides transitional and application provisions for the amendments.

Item 37 inserts a new section 40 Definitions which defines terms for the purpose of Division 5:

'amending Schedule' means Schedule 1 to the *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019*.

'commencement time' means the time when the amending Schedule commences.

Item 37 also inserts a new regulation 41 'Operation of Subdivision C of Division 1A of Part 3'. This regulation outlines that Subdivision C, which is the subdivision on the Compliance Framework applies in relation to conduct engaged in before, on or after the commencement of the Amending Regulations.

However, if before the commencement of the amendments, the Secretary had given notice regarding a proposed transfer of an allocation under regulation 21B, the Secretary may continue to transfer the allocation in accordance with regulation 21A as had been in force prior to the commencement of the amendments.

Following a transfer of an allocation under regulation 21A (whether before or after commencement time), the Secretary may redirect incentive in relation to the allocation under regulation 21D of the previous Regulations or regulation 22BH of the amending Regulations. The redirection provisions have not been amended in these Regulations, other than a renumbering and relocation.

This provision also makes clear that before the Secretary transfers an allocation under regulation 21A, the Secretary must be satisfied that the proposed transferee has the capacity to properly manage the allocation, is a suitable person or entity to whom the allocation may be transferred, and the proposed transferee has in writing agreed to the proposed transfer.

Additionally, regulation 22BJ also applies so that the Secretary may require the gaining approved participant to lodge a Statement of Compliance for the transferred dwelling for the NRAS year or the previous NRAS year.

Regulation 42 outlines the operation of 'Internal review of incentive amounts under regulation 28'. This regulation sets out that if a decision to reduce incentive had been made under regulation 28 prior to the commencement of these amendments, then the previous subregulation 28(3) will continue to apply. Decisions to reduce incentives that are made after the amendments commence will be subject to the new internal review provisions.

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 2019

The *National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019* (**the 2019 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 previously 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 2019* (the Amending Regulations) aim to address the previous inadequacies of the Principal Regulations in three key ways. First, by introducing key machinery clauses the Amending Regulations will improve the Department’s ability to monitor approved participant compliance under the Scheme. Secondly, by reformulating the Scheme’s compliance framework to include a code of conduct for approved participants the Amending Regulations will simplify provisions in the previous Regulations that set out how an approved participant must conduct themselves under the Scheme and the consequences of any misbehaviour. Finally, by relocating certain key provisions and relocating certain key provisions and introducing some important technical changes the Amending Regulations will

increase the Department's administrative functions and will improve the effectiveness of the Scheme, generally.

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 2019 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.

The compliance framework in the Amending Regulations will replace provisions in the previous Regulations that allow investors to request transfers to another approved participant. It is not anticipated that these changes will negatively impact the rights of stakeholders under the Scheme.

Reformulating the compliance framework in the previous Regulations still allows both the investor requesting the transfer and the relevant approved participant to state their case to the Secretary before a decision to transfer or revoke an allocation is made. Establishing the breach 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 a breach enables the Secretary to transfer or revoke an allocation to another approved participant in certain circumstances.

Where an allocation is transferred from one approved participant to another, the Amending 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). This obligation does not adversely affect any persons' right to privacy and reputation (as provided under Article 17 of the International Covenant on Civil and Personal Rights) as only a limited amount of personal information is collected and it is collected with the consent of relevant stakeholders.

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 information sharing provisions do not adversely affect individuals' right to privacy and reputation as they are strictly to be used if the information provided is relevant to a person's interest in a rental dwelling covered by an NRAS allocation, for programs

which are related to the purpose of the Scheme or for another Commonwealth or State or Territory agency for the purposes of the operation of the Scheme.

Where an allocation is transferred from one approved participant to another, the Amending Regulations will maintain the power under the previous Regulations for the Secretary to 'redirect' incentives to the incoming approved participant. This provision will only affect approved participants who consent to the redirection and therefore will not have any negative impact on the rights of approved participants under the Scheme.

The introduction of a provision that states approved participants must give notice to tenants when the NRAS dwelling they are renting is going to exit the Scheme has been included to ensure the integrity of the Scheme and protect the rights of both investors and tenants as this information effects the management of the dwelling and the incentives paid.

Conclusion

The 2019 Regulations are compatible with human rights as they do not raise any human rights issues.

The Hon. Paul Fletcher MP

Minister for Families and Social Services