



# **National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019**

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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 07 March 2019

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 2019*.

## 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.	9 March 2019

Note: This table relates only to the provisions of this instrument as originally made.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Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.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 (paragraph (b) of the definition of *approved participant*)**

Omit “21A”, substitute “22BG”.

#### **2 Regulation 4**

Insert:

*approved participants code of conduct* has the meaning given by regulation 22BD(1).

*compliance breach* has the meaning given by subregulation 22BA(4).

*disqualifying breach* has the meaning given by regulation 22BC.

*individual breach* has the meaning given by subregulation 22BA(1).

*insolvency event* has the meaning given by subregulation 22BA(2).

#### **3 Regulation 4 (definition of *redirected*)**

Omit “21D(3)”, substitute “22BH(5)”.

#### **4 Regulation 4 (definition of *relevant approved participant*)**

Repeal the definition.

#### **5 Regulation 4**

Insert:

*serious breach* has the meaning given by subregulation 22BB(1).

*transfer request* has the meaning given by paragraph 22BE(1)(b).

#### **6 Regulation 4 (definition of *unfair conduct*)**

Repeal the definition.

#### **7 Regulation 4 (subparagraph (b)(ii) of the definition of *unfair contract*)**

Omit “the approved participant or an associated party”, substitute “a person other than an investor”.

#### **8 Subregulation 16(6B)**

Omit all the words after “market rent valuation”, substitute:

unless:

- (a) the Secretary is satisfied that the applicant for the approval has a reasonable excuse for not being able to obtain and lodge the valuation within the period mentioned in subparagraph (6)(a)(i) or (b)(i) (as the case requires); or
- (b) both of the following apply:

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- (i) the allocation concerned has been transferred to another dwelling or to another person or entity;
  - (ii) the Secretary is satisfied that, because of the transfer, it is reasonable to extend the period for obtaining and lodging the valuation.

**9 Subregulation 20(1)**

Omit “(1)”.

**10 Subregulation 20(2)**

Repeal the subregulation.

**11 Regulation 21 (heading)**

Omit “**approved participant etc.**”, substitute “**person or entity**”.

**12 Subregulation 21(1)**

After “approved participant” (first occurring), insert “(the *original approved participant*)”.

**13 Subregulation 21(1)**

Omit “another approved participant, or another person or entity”, substitute “or another person or entity (the *gaining approved participant*)”.

**14 Subregulation 21(2)**

Repeal the subregulation, substitute:

*Transfer of incentive*

- (2) If the Secretary transfers that allocation, the Secretary may give an incentive to the gaining approved participant instead of the original approved participant if:
  - (a) the original approved participant requests the Secretary to give the incentive to the gaining approved participant; and
  - (b) the gaining approved participant agrees to accept the incentive.

**15 Subdivision B of Division 1A of Part 3**

Repeal the Subdivision.

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

Repeal the heading, substitute:

**Subdivision B—Revocation generally****17 Subdivision D of Division 1A of Part 3 (heading)**

Repeal the heading.

**18 Regulation 22B (heading)**

Omit “**transfer or**”.

## 19 Regulation 22B

Omit “transfer an allocation under regulation 21A, or to revoke an allocation, made to an approved participant”, substitute “revoke an allocation under this Subdivision”.

## 20 After regulation 22B

Insert:

### Subdivision C—Transfer or revocation because of breach

#### 22BA Individual breach

- (1) The Secretary may determine that the approved participant for an approved rental dwelling has committed an *individual breach* if the Secretary is satisfied that the approved participant:
  - (a) is the subject of an insolvency event; or
  - (b) has breached the approved participants code of conduct in relation to the dwelling; or
  - (c) has committed a compliance breach in relation to the dwelling.
- (2) The approved participant is the subject of an *insolvency event* if the approved participant:
  - (a) dies or ceases to exist; or
  - (b) becomes bankrupt or insolvent; or
  - (c) commences to be wound up.
- (3) The approved participant breaches the approved participants code of conduct if the approved participant fails to comply with the code.
- (4) The approved participant commits a *compliance breach* if:
  - (a) the approved participant fails to comply with the Act or these regulations (other than the approved participants code of conduct); or
  - (b) a condition of the allocation for the dwelling is contravened in circumstances that are within the control of the approved participant.

#### 22BB Serious breach

- (1) The Secretary may determine that the approved participant for an approved rental dwelling has committed a *serious breach* if the Secretary is satisfied that:
  - (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, resulting in material financial detriment to those investors; or
  - (b) has committed a compliance breach that involves one or more of the following:
    - (i) providing false or misleading information to the Secretary or the Department in relation to the National Rental Affordability Scheme;
    - (ii) failing 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;
    - (iii) claiming a tax offset that the approved participant is not entitled to claim;



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- (iv) passing on a tax offset to a person who is not entitled to claim the tax offset; or
  - (c) all of the following apply:
    - (i) the approved participant has breached the approved participants code of conduct or committed a compliance breach;
    - (ii) the Secretary has, by writing, required the approved participant to take remedial action in relation to the breach;
    - (iii) the remedial action is not taken within 28 days after the requirement is given to the approved participant; or
  - (d) all of the following apply:
    - (i) the approved participant has breached the approved participants code of conduct or committed a compliance breach;
    - (ii) the Secretary has given the approved participant a written warning in relation to the breach;
    - (iii) within 12 months after being given the warning, the approved participant commits a similar breach (whether in relation to the same or another allocation).
- (2) If the Secretary determines that the approved participant has committed a serious breach:
- (a) the Secretary may publish notice of the breach on the Department's website; and
  - (b) an investor for any approved rental dwelling (the *investor's dwelling*) for which the allocation is held by the approved participant dwelling may, by writing, request the Secretary to transfer the allocation for the investor's dwelling.

## **22BC Disqualifying breach**

The Secretary may determine that an approved participant for an approved rental dwelling has committed a *disqualifying breach* if:

- (a) the Secretary is satisfied that the approved participant is the subject of an insolvency event; or
- (b) the Secretary:
  - (i) has determined that the approved participant has committed a serious breach; and
  - (ii) is satisfied that the Secretary could, within 12 months, determine that the approved participant has committed another serious breach.

## **22BD Approved participants code of conduct**

- (1) The *approved participants code of conduct* is set out in subsection (2).
- (2) The approved participant for an approved rental dwelling:
  - (a) must comply with legal obligations relating to investors in a timely manner; and
  - (b) must comply with the law of the Commonwealth and the States and Territories in relation to dealings with investors and tenants; and
  - (c) must lodge an annual Statement of Compliance in relation to the dwelling; and

- (d) must respond to a communication from an investor within 30 days, unless the approved participant has a reasonable excuse; and
- (e) must have an internal or external dispute resolution mechanism for use by investors; and
- (f) must not enforce, seek to enforce or threaten to enforce an unfair contract; and
- (g) must not make a misrepresentation to an investor; and
- (h) must not engage in misleading or deceptive conduct in relation to an investor; and
- (i) must not threaten or coerce an investor to take an action the investor is not required to take under contract; and
- (j) must not prevent an investor from entering into a contract with a suitably qualified and experienced person in relation to the dwelling; and
- (k) must not threaten to take action that would result in an investor not receiving incentive to which the investor is entitled under law; and
- (l) must not require an investor to enter into a contract with another person in relation to the dwelling, unless the contract relates to a property management service provider and the approved participant is 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; and
- (m) if the approved participant requires the investor to enter into a contract as mentioned in paragraph (l)—ensures that the property management service provider acts in accordance with subparagraphs (l)(i) to (vii).

**22BE Secretary may determine breach on own initiative or on request by an investor**

- (1) The Secretary may determine that an approved participant for an approved rental dwelling has committed an individual breach, a serious breach or a disqualifying breach:
  - (a) on the Secretary's own initiative; or
  - (b) on a written request (the transfer request) by an investor for the allocation for the dwelling to be transferred because the approved participant has committed an individual breach, a serious breach or a disqualifying breach.
- (2) A transfer request:
  - (a) must:
    - (i) be in a form approved by the Secretary; and
    - (ii) include details of the breach alleged by the investor; but

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- (b) does not need to specify whether the breach is an individual breach, a serious breach or a disqualifying breach.
  - (3) However, an investor must not make a transfer request unless:
    - (a) the investor has given the approved participant written notice of the alleged breach; and
    - (b) 90 days have passed since the notice was given; and
    - (c) the investor is satisfied that the approved participant has not taken appropriate action in relation to the alleged breach.
  - (4) Subsection (3) does not apply in relation to an insolvency event.

## **22BF Secretary must notify proposed determination**

- (1) 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:
  - (a) the approved participant; and
  - (b) if the Secretary proposes to make the determination because an investor made a transfer request—the investor.
- (2) The notice must:
  - (a) state that the Secretary proposes to determine that the approved participant has committed the breach; and
  - (b) invite the approved participant or investor, as the case requires, to make a written submission to the Secretary about the proposed determination no later than 14 days after the day the Secretary gives the notice.
- (3) In deciding whether to make the determination, the Secretary must have regard to any submission so made.
- (4) Subregulation (3) does not limit the matters to which the Secretary may have regard in deciding whether to make the determination.

## **22BG Transfer or revocation because of breach**

- (1) This regulation applies if:
  - (a) 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
  - (b) either:
    - (i) the Administrative Appeals Tribunal has confirmed the Secretary's decision to make the determination; or
    - (ii) the period for making an application to the Administrative Appeals Tribunal for review of the Secretary's decision to make the determination has expired.

### *Individual breach*

- (2) The Secretary must transfer the allocation for the dwelling to another person or entity if:
  - (a) the Secretary has determined that the approved participant committed an individual breach; and

- (b) an investor has requested the transfer.

*Serious breach—investor requested transfer*

- (3) The Secretary must transfer the allocation for the dwelling to another person or entity if:
  - (a) the Secretary has determined that the approved participant committed a serious breach; and
  - (b) an investor has requested the transfer.

Note: The investor may make this request under paragraph 22BB(2)(b) or 22BE(1)(b).

*Serious breach—determined on the Secretary’s own initiative*

- (4) The Secretary may transfer or revoke the allocation for the dwelling to another person or entity if:
  - (a) the Secretary has determined that the approved participant committed a serious breach; and
  - (b) the determination was made on the Secretary’s own initiative under paragraph 22BB(1)(a).

*Disqualifying breach*

- (5) 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 to other persons or entities within 6 months.

*Requirements for transfer*

- (6) The Secretary must not transfer an allocation to a person or entity under this regulation unless:
  - (a) the Secretary is satisfied that the person or entity:
    - (i) has the capacity to properly manage the allocation; and
    - (ii) is a suitable person or entity to whom the allocation may be transferred; and
  - (b) the person or entity has agreed in writing to the transfer.

## **22BH Secretary may redirect incentive**

- (1) This regulation applies if, under this Subdivision, the Secretary transfers an allocation for an approved rental dwelling from an approved participant (the ***original approved participant***) to another person or entity (the ***gaining approved participant***).

*Incentive for year of transfer*

- (2) The Secretary may give an incentive to the gaining approved participant instead of the original approved participant if:
  - (a) the Secretary transfers the allocation during an NRAS year; and
  - (b) apart from the operation of this regulation and any determination in force under subregulation 25(2), the original approved participant:

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- (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*

- (3) The Secretary may give an incentive to the gaining approved participant instead of the original approved participant if:
  - (a) the Secretary transfers an allocation during an NRAS year; and
  - (b) apart from the operation of this regulation and any determination in force under subregulation 25(2), the original 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.

*Redirected incentive to be given to investor*

- (4) If the Secretary gives an incentive to the gaining approved participant:
  - (a) the gaining approved participant must give the incentive to the investor concerned; and
  - (b) to avoid doubt, and despite any agreement to the contrary, the original approved participant is no longer required to pass on all or part of the incentive to the investor.

*Meaning of redirected*

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

*Secretary to notify of proposed redirection*

- (6) Before the Secretary redirects an incentive, the Secretary must give written notice of the proposed redirection to the following:
  - (a) the original approved participant;
  - (b) the investor concerned.
- (7) The notice must invite the original 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.

*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 an original approved participant.

## **22BJ Statement of compliance if allocation is transferred**

If the Secretary transfers an allocation for an approved rental dwelling from an approved participant to another person or entity during an NRAS year, the Secretary may require the gaining approved participant (within the meaning of regulation 22BH) to lodge a Statement of Compliance for the dwelling that includes statements and details for either or both of the following:

- (a) the NRAS year;

(b) the previous NRAS year.

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

## **21 Before regulation 22C**

Insert:

### **Subdivision D—General provisions**

## **22 Subregulation 22D(1)**

Omit “(the *previous approved participant*) to another approved participant”, substitute “(the *original approved participant*) to another person or entity”.

## **23 Subregulation 22D(2)**

Omit “previous”, substitute “original”.

## **24 Paragraphs 25(2)(a) and (c)**

Omit “particular allocation under regulation 21A”, substitute “allocation under regulation 22BE”.

## **25 Subregulation 25(4)**

Omit “a decision”, substitute “an application”.

## **26 Paragraph 25(4)(a)**

Omit “the decision” (second occurring), substitute “application”.

## **27 Subregulation 28(3)**

Repeal the subregulation.

## **28 At the end of regulation 28 (after the examples)**

Add:

### *Internal review*

- (3) If, under this regulation, the Secretary determines a reduction from the amount of an incentive, the Secretary must give the approved participant for the allocation concerned written notice of the determination.
- (4) The following may apply to the Secretary for review of the determination:
  - (a) the approved participant to whom the notice was given;
  - (b) if the allocation is transferred to another person or entity within the period that applies under paragraph (5)(b)—to the gaining approved participant (within the meaning of regulation 22BH).
- (5) The application must be made:
  - (a) in the form approved by the Secretary; and
  - (b) within 60 days after notice of the determination is given under subregulation (3), or within such further period as the Secretary allows.
- (6) If an application for review of the determination is made in accordance with this regulation, the Secretary must:

- (a) review the determination; and
- (b) confirm, revoke or vary the determination; and
- (c) give the applicant notice in writing of the confirmation, revocation or variation (the *review notice*).

(7) If the Secretary has not given the applicant a review notice within 2 months after the applicant applied for the review, the Secretary is taken to have given the applicant a review notice confirming the determination.

### **29 Subregulation 30A(2)**

Omit “contractual arrangement”, substitute “legal obligation”.

### **30 Subregulation 30B(1A)**

Omit “21D”, substitute “22BH”.

### **31 Subregulation 30B(2)**

Omit “within a reasonable time after receiving the incentive”, substitute:

before the earliest of the following:

- (a) if a legal obligation requires the incentive to be passed on within a particular period (however described)—the end of that period;
- (b) 90 days after the approved participant receives the incentive.

### **32 At the end of Division 2 of Part 4**

Add:

#### **30E Approved participant must give summary of code of conduct to investors**

The approved participant for a rental dwelling must give an investor for the dwelling a summary of the approved participants code of conduct on or before the later of the following:

- (a) the day that is 28 days after this regulation commences;
- (b) the day that is 28 days after the investor becomes an investor for the dwelling.

### **33 Regulation 32**

Repeal the regulation, substitute:

#### **32 Sharing and use of information**

- (1) Information (including personal information) obtained by the Secretary for the purposes of the National Rental Affordability Scheme may be used or disclosed by the Secretary for:
  - (a) the purposes of the Scheme; or
  - (b) the purposes of programs to:
    - (i) increase the supply of affordable rental dwellings; or
    - (ii) reduce rental costs for low and moderate income households.
- (2) Without limiting subsection (1), the information may be:
  - (a) disclosed to another agency of the Commonwealth or a State or Territory:

- (i) for the purposes of the operation of the National Rental Affordability Scheme; or
- (ii) for the purposes of developing policy in relation to the National Rental Affordability Scheme; or
- (iii) for the purposes of ensuring compliance with a law of the Commonwealth or a State or Territory; or
- (b) disclosed by the Secretary to approved participants or investors in relation to, or tenants of, rental dwellings for the purposes of administering the National Rental Affordability Scheme; or
- (c) given by the Secretary to a person or entity if the Secretary is satisfied that:
  - (i) the person or entity is a person or entity to whom an allocation for an approved rental dwelling has been transferred or an investor in relation to an approved rental dwelling; and
  - (ii) the information is relevant to the person or entity's interest in an allocation for an approved rental dwelling or an approved rental dwelling.

### **32A Secretary may request other documents and information**

- (1) The approved participant for an approved rental dwelling must give the Secretary any other information or document requested by the Secretary for the purposes of the operation of the National Rental Affordability Scheme.
- (2) The information or document must be given to the Secretary within the period specified by the Secretary, which must be a reasonable period.

### **32B Notice of end of allocation**

- (1) The approved participant for an approved rental dwelling must give tenants of the dwelling written notice of the end of the allocation for the dwelling.
- (2) The notice must be given:
  - (a) in the form approved by the Secretary; and
  - (b) within the time specified in the form.

### **34 Paragraphs 33(1)(aa) and (ab)**

Repeal the paragraphs.

### **35 After paragraph 33(1)(a)**

Insert:

- (aa) under regulation 22BA, 22BB or 22BC to determine that an approved participant has committed an individual breach, a serious breach or a disqualifying breach; or
- (ab) under regulation 22BH to redirect an incentive; or

### **36 Paragraph 33(1)(b)**

Repeal the paragraph, substitute:

- (b) set out in a review notice under regulation 28 that confirms a decision to reduce the amount of an incentive (whether or not the decision set out in the review notice varies the amount of the reduction); or



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**37 At the end of Part 6**

Add:

**Division 5—Amendments made by the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019****40 Definitions**

In this Division:

*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.

**41 Operation of Subdivision C of Division 1A of Part 3**

- (1) Subdivision C of Division 1A of Part 3, as inserted by item 20 of the amending Schedule, applies in relation to conduct engaged in before, on or after the commencement time.
- (2) However, if, before the commencement time, the Secretary gave notice of the proposed transfer of an allocation under regulation 21B, the Secretary may transfer the allocation under regulation 21A as in force immediately before the commencement time.
- (3) If the Secretary transfers an allocation under regulation 21A (whether before or after the commencement time):
  - (a) the Secretary may redirect incentive in relation to the allocation under either of the following:
    - (i) regulation 21D as in force immediately before the commencement time;
    - (ii) regulation 22BH as if the allocation had been transferred under Subdivision C of Division 1A of Part 3; and
  - (b) regulation 21C as in force immediately before the commencement time applies in relation to the transfer; and
  - (c) regulation 22BJ applies in relation to the transfer.
- (4) Subregulations (2) and (3) do not limit subregulation (1).

**42 Internal review of incentive amounts under regulation 28**

Despite the amendments of regulation 28 made by items 27 and 28 of the amending Schedule, subregulation 28(3) as in force immediately before the commencement time, continues to apply in relation to determinations made under regulation 28 before the commencement time.