

## **SUPPLEMENTARY EXPLANATORY STATEMENT**

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

*National Rental Affordability Scheme Act 2008*

*National Rental Affordability Scheme Regulations 2020*

### **Background**

The National Rental Affordability Scheme Regulations 2020 (the **Regulations**) which came into force on 1 April 2020, prescribe the National Rental Affordability Scheme (**NRAS**, the **Scheme**) for the purposes of the *National Rental Affordability Scheme Act 2008* (the **Act**). The Regulations repealed and replaced the National Rental Affordability Scheme Regulations 2008 (the **2008 Regulations**).

### **Purpose**

The purpose of this Supplementary Explanatory Statement which should be read in conjunction with the current Explanatory Statement to the Regulations, is to provide additional information on the availability of independent merit review for various decisions and protections of privacy.

### **Notes on sections of the National Rental Affordability Scheme Regulations 2020**

Further to the explanation of '**Division 4 – Transfer or revocation generally not because of breach**', relating to Part 2, the following explanation is provided:

#### **Availability of independent merit review**

Sections 20, 21 and 23 of the Regulations enable the Secretary of the Department of Social Services ('the Secretary') to make decisions in relation to an approved participant in response to an application by the approved participant once certain requirements are met.

The Secretary's decision under either section 20 or 21 is made following extensive consultation to ensure affected stakeholders, including gaining and original approved participants, investors, tenants and state and territory governments, are agreeable to the proposed action. Under these sections, when an approved participant requests the transfer of allocations they hold under the Scheme, they must also provide supporting evidence to establish they have undertaken the extensive administrative and consultation processes required under the Regulations. The Secretary will undertake the action requested by the approved participant if these requirements have been met and affected stakeholders are agreeable to the requested action.

Decisions under sections 20 and 21 of the Regulations require extensive administrative and consultation processes to be undertaken to determine the applicant has met the regulatory requirements and all affected parties agree to the proposed action. According to paragraph 4.53 of the Administrative Review Council's paper 'What decisions should be subject to merit review' (1999) ('ARC paper'), these

decisions justify exclusion from merit review because they “are the product of processes that would be time consuming and costly to repeat on review”.

Other than in exceptional circumstances, an application under section 20 or 21 of the Regulations where the statutory requirements for a transfer are met will be approved by the Secretary, because a transfer would be consistent with the objective to maximise the number of dwellings available for rent under the Scheme.

Additionally, both sections 20 and 21 permit the Secretary to impose additional special conditions on the allocation, provided the approved participant (in the case of a transfer under section 20) or the gaining approved participant (in the case of a transfer under section 21) agrees to the special conditions before the transfer takes effect. The need for, and the content of, such special conditions, would arise from consultations with stakeholders who would not be a party to the merits review process and, in the case of a transfer under section 21, would require negotiation with a commercial entity who is not party to the merits review process.

These discretionary decisions are more accurately characterised as automatic decisions as in practice they operate as an endorsement by the Secretary that all regulatory requirements have been met and affected parties agree to the proposed action. According to paragraph 3.8 of the ARC paper, these decisions are unsuitable for merit review because “there is a statutory obligation [for the Secretary] to act in a certain way upon the occurrence of a specified set of circumstances”.

NRAS allocations are a valuable right which permits approved participants to receive incentives under the Scheme if particular conditions are met. The sanction for not complying with the conditions of allocation is not incentives are payable in respect of the allocation, so if the approved participant is not willing or able to comply with the conditions of allocation, the approved participant may decide to give up the allocation by making a request to the Secretary under section 23 of the Regulations. Alternatively, the approved participant could simply not meet the conditions of allocation and receive no incentive each year.

If an approved participant applies to the Secretary to revoke an allocation and the application is in the approved form, the Secretary would, as a matter of course either revoke the allocation or transfer the allocation to another approved participant under subsection 23(4) of the Regulations. The effect for the original approved participant is the same whether the Secretary decides to revoke or transfer the allocation under section 23.

Accordingly, from the perspective of the approved participant, section 23 operates as an automatic or mandatory decision triggered by a set of circumstances, namely the request by the approved participant to revoke the allocation, made in the approved form. Once such a request is made, the Secretary will either revoke or transfer the allocation and the decision whether to revoke or transfer does not affect the interests of the approved participant requesting the revocation.

Further to the explanation of **Section 39 – Secretary may extend time for giving valuations** and **Section 42 – Statement of compliance required for each NRAS year**

These discretionary decisions justify exclusion from merit review according to paragraphs 4.3-4.5 of the ARC paper, because they are preliminary decisions that lead to the making of substantive decisions relating to the eligibility to an incentive which are subject to merit review.

Such decisions will always flow to those substantive decisions about the reduction of incentives found under section 13 (incentive is not available for any period where documents or information remain outstanding), 51 (reductions of incentive) and 56 (variation of incentive amounts) of the Regulations.

Decisions under subsection 39(1) and 42(4) regarding extensions of time are preliminary decisions and to offer merit review of these decisions would be impracticable as they directly relate to those substantive decisions under sections 13, 51 or 56 which are subject to merit review.

If the Secretary does not grant an extension under subsections 39(1) or 42(4), the approved participant has the option of seeking a determination under subsection 13(9) of the Regulations. This provision enables the Secretary to waive the no incentive rule for outstanding documents in subsection 13(2) of the Regulations if the approved participant has a reasonable excuse for not complying with the requirement to provide the documents on time. A refusal to make a determination under subsection 13(9) is reviewable by the Administrative Appeals Tribunal. Similarly, if the Secretary makes a decision to reduce an incentive under section 51 or 56 of the Regulations, these decisions are subject to merit review.

In the interests of ensuring the timely administration of the Scheme, it is the related substantive decisions that may be made under sections 13, 51 or 56 that are subject to merit review. Decisions under subsections 39(1) or 42(4) may be effectively overridden by a decision to provide incentives (as a result of a decision under subsection 13(9) or as a result of merit review under sections 51 or 56) despite timeframes not being met.

## **Privacy**

Further to the explanation of **Section 31 – Publishing notice of certain breaches:**

Section 31 does not authorise the disclosure of any personal information other than the name of the approved participant and the fact of the breach. It is established departmental practice to only publish the name of the approved participant that is the subject of the serious or disqualifying breach and the basis of the breach in the Regulations. Publication of breach notices and the details of serious and disqualifying breaches under section 31 of the Regulations, is an essential component of the Scheme's compliance framework, and is vital for investors who may have a right to request a transfer as a result of the publicised breach. The names of all approved participants are already publically available, which has been the case since the Scheme commenced.