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

Purpose

The purpose of the National Rental Affordability Scheme Amendment Regulations 2020 (the **Regulations**) is to prescribe the National Rental Affordability Scheme (**NRAS**, the **Scheme**) for the purposes of the *National Rental Affordability Scheme Act 2008* (the **Act**). NRAS commenced in 2008 with the aim of increasing the supply of affordable rental dwellings to low and moderate-income households by offering an incentive to complying participants who provide approved rental dwellings to low and moderate-income households at 20 per cent below market value rent. The Regulations will repeal and replace the National Rental Affordability Scheme Regulations 2008 (the **2008 Regulations**) which will otherwise sunset under the *Legislation Act 2003* on 1 April 2020.

Background

Section 5 of the Act provides that, to further the objects of the Act, the regulations must prescribe the following details of the Scheme: the approval of participants (**approved participants**) by the Secretary of the Department of Social Services (the **Secretary**, the **Department**); the approval of rental dwellings by the Secretary; providing incentives to an approved participant if certain conditions are satisfied; and, other ancillary or incidental matters required or permitted by the Act to be included in the Scheme.

Further, section 6 of the Act provides that the Scheme may provide for any or all of the following matters, among others: the application process for an allocation; the assessment criteria for an allocation (which may vary from time to time); the amount of an incentive; and, how the market value rent of a rental dwelling for a National Rental Affordability Scheme year (**NRAS year**) is to be determined.

Section 12 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the Regulations is to prescribe the necessary details of the Scheme such as those relating to applications, allocations, receiving incentives, investor protections and ancillary matters.

The 2008 Regulations are due to cease operating on 1 April 2020 under the sunsetting provisions in the *Legislation Act 2003*. To ensure that the Scheme can continue until its expected natural conclusion, the Regulations will repeal and replace the 2008 Regulations on 1 April 2020.

The Regulations include new provisions to clarify definitions of terms used in the Scheme, as well as provisions to clarify aspects of the 2008 Regulations made under the *National Rental Affordability Scheme (Investor Protection) Amendment Regulations 2019* to provide additional protections to tenants and investors under the Scheme.

The primary purpose of the Regulations is to remake the 2008 Regulations in their entirety to allow the Government to continue operating the Scheme. In developing the Regulations to replace the 2008 Regulations an effort has been made to modernise the legislative framework for the Scheme while improving outcomes for its various stakeholders. The Regulations also take into account changes made to the Act by the *National Rental Affordability Scheme Amendment Act 2019* (**Amendment Act**) requiring that approved participants to pass on the State and Territory Government component of the NRAS incentive to investors and allowing for some flexibility in relation to inadvertent overcharges of rent for approved rental dwellings in certain circumstances.

The Regulations will ensure that the legislative framework of NRAS is set out clearly, that low to moderate-income households continue to have access to affordable rental dwellings, and maintain investor their confidence in the Scheme.

Further details of the Regulations are set out below.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

Sections 1 to 74, 76, 77 and 79, and Schedule 1 to the Regulations commence on 1 April 2020. Section 78 commences on 1 May 2018. Section 75 commences on 1 May 2017. Despite their retrospective commencement, sections 75 and 78 will not operate to disadvantage the rights of any persons. Rather, these sections will have a beneficial impact on approved participants (and any associated investors) who may otherwise receive no incentive because of inadvertent overcharges of rent (that occurred on or after 1 May 2017), or because of a failure to meet the requirements for redirection under the previous regulations.

Consultation

The Department has consulted on the key policy and administrative changes brought about by the Regulations with approved participants and the peak bodies representing them such as the Community Housing Industry Association and National Affordable Housing Providers Limited. The Regulations were prepared taking into account the feedback received. The Department also consulted with appropriate agencies including the Department of the Prime Minister and Cabinet, the Australian Competition and Consumer Commission and the Australian Tax Office.

Regulation Impact Statement (RIS)

The Department has certified to the Office of Best Practice Regulation (OBPR) that the 2008 Regulations have been operating effectively and efficiently, and are being remade without significant amendment. OPBR have confirmed that a Regulation Impact Statement is not required (OBPR ID 29535).

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

Part 1- Preliminary

Section 1 – Name

Section 1 provides that the name of the instrument is the *National Rental Affordability Scheme Regulations 2020* (the **Regulations**).

Section 2 – Commencement

Section 2 provides that sections 1 to 74, 76, 77 and 79 and Schedule 1 to the Regulations commence on 1 April 2020, sections 78 commences on 1 May 2018, and section 75 commences on 1 May 2017.

Section 3 – Authority

Section 3 cites the authority for the making of the Regulations, which is the *National Rental Affordability Scheme Act 2008* (the **Act**) and states that the Regulations prescribe the National Rental Affordability Scheme for the purposes of section 5 of the Act.

Section 4 – Schedules

Section 4 provides that each instrument specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulations has effect according to its terms. Schedule 1 to the Regulations repeals the *National Rental Affordability Scheme Regulations 2008* (the **2008 Regulations**) in their entirety.

Section 5 – Definitions

Section 5 defines the terms used in the Regulations. A note provides that a number of expressions used in the Regulations are defined in the Act, including 'allocation', 'incentive', 'incentive period', 'investor', 'NRAS year' and 'rental dwelling'.

Part 2 - Allocations

Division 1 – No new allocations

Section 6 – No new allocations

Section 6 provides that after the commencement of the Regulations no further allocations are available under the Scheme.

The incentive period for an allocation is 10 years. There have not been any new allocations made under the Scheme since 30 June 2016. It is therefore likely that the Scheme will cease to operate in 2026.

Section 6 also provides that an allocation made under the 2008 Regulations will remain in force and be dealt with as if it had been made under the Regulations.

Division 2 – General conditions

Section 7 – General conditions

Section 7 provides that Division 2 sets out the general conditions of an allocation for a rental dwelling.

Section 8 – Initial status of dwelling

Section 8 specifies that a rental dwelling can only attract an incentive if, before the incentive period for the allocation, it was not lived in as a residence (for example, a new building) or has been renovated so it is suitable for habitation (having been previously unfit for living in). It also provides that the dwelling must have a certificate of occupancy before it is first rented under the Scheme. This is to support the objective of the Scheme to increase the supply of affordable rental dwellings.

Section 9 – Initial vacancy

Section 9 provides that no incentive is available for any period before the dwelling is first rented under the Scheme. This section clarifies that entitlement to an incentive is only triggered when the dwelling is tenanted in accordance with the Scheme requirements, not simply by making an allocation.

Section 10 – Other vacancies

Subsection 10(1) provides that no incentive is available for an NRAS year ('the current NRAS year') if the dwelling is vacant for more than 26 weeks (whether continuous or not) during the year or for a continuous period of more than 26 weeks if that period commenced in the previous NRAS year. For example, no incentive would be available for 2020-21 NRAS year if the dwelling was vacant from 1 December 2019 to 30 June 2020 even though the dwelling was only vacant for 8 weeks of the 2020-21 NRAS year.

Subsection 10(2) provides an exception to subsection 10(1) to allow an approved participant to claim an incentive for an allocation that was transferred between rental dwellings ('a substitution') under section 20 during an NRAS year. This ensures that the owner of a substituted dwelling is not disadvantaged by periods of long vacancy that may have occurred prior to their dwelling entering the Scheme.

Subsection 10(3) provides that no incentive is available for an allocation covering a dwelling for so much of a period in an NRAS year that exceeds 13 weeks, so long as the dwelling is vacant for less than 26 weeks (whether continuous or not) if that period commenced in the previous NRAS year. For example, if the dwelling was vacant from 3 September 2019 to 24 December 2019, being 16 weeks, no incentive would be available for three weeks of the 2019-20 NRAS year. The purpose of this

subsection is twofold. One purpose of this subsection is to provide some reasonable allowance of short vacancy periods in NRAS dwellings to ensure that approved participants and investors are not dis-incentivised from their continued engagement with the Scheme. Another purpose of this subsection is to discourage approved participants from allowing periods of vacancy in NRAS dwellings to continue for longer than 26 weeks whilst still attracting an incentive.

Subsections 10(4) and 10(5) are application provisions only. Subsection 10(4) clarifies for the avoidance of doubt that section 10 applies whether or not the vacancy is beyond the control of the approved participant. This ensures that no incentive is available for an allocation that covers a dwelling that had been vacant for over 26 weeks, regardless of whether the vacancy resulted from circumstances out of the control of the approved participant. Subsection 10(5) clarifies for the avoidance of doubt that section 10 does not apply to provisional allocations.

These provisions promote the continuity of affordable dwelling stock and security for tenants of NRAS dwellings.

Section 11 – Eligible tenants

Section 11 provides that no incentive is available for any period during which the dwelling is rented to a tenant who is not an eligible tenant under the Scheme. The relevant criteria for tenant eligibility are set out by section 41 (Eligible tenants).

Section 12 – Maximum rent

Section 12 provides for the maximum rent that a tenant can be charged for an NRAS rental dwelling in order for the allocation covering the dwelling to remain eligible to attract an incentive.

Subsection 12(1) provides that an incentive is not available for any period where the rent charged for the dwelling is not at least 20% less than the market value rent for the dwelling. That is, in order to attract an incentive, the rent charged for the dwelling must be at least 20% less than the market value rent for the dwelling. Market value rent is set out at section 36.

Subsection 12(2) provides an exception to subsection 12(1) if the Secretary is satisfied that an overcharge of rent was made due to inadvertence or error by the approved participant, investor and/or their agents, that the tenant has been compensated for the overcharge, that reasonable processes have been put in place to ensure the correct charge of rent, and that reasonable steps have been taken to ensure that the error does not re-occur.

The Secretary may determine in writing that this exception applies. Subsection 12(3) provides that the approved participant may apply, in the approved form, for a determination that subsection 12(1) does not apply for the reasons set out in subsection 12(2).

Section 13 – Documents and information

Section 13 sets out the documents and information that approved participants are required to provide the Secretary to meet their obligations under the Scheme.

Subsection 13(1) provides that no incentive is available for a period unless the approved participant has given the Secretary a statement of compliance for the dwelling for the period.

Subsections 13(2) to (4) set out the impact on eligibility for incentives if documents and information are outstanding, while subsections 13(5) and (6) set out the impact on incentives where false or misleading documents and information are given to the Secretary.

Subsection 13(7) sets out the types of documents and information to which section 13 applies.

Subsection 13(8) provides that no incentive is available for any period during which the approved participant fails to comply with record-keeping requirements at section 49.

Subsection 13(9) provides that the Secretary may determine in writing that subsections 13(2), (5) or (8) do not apply if the Secretary is satisfied that the approved participant has a reasonable excuse for not complying with the requirement. A note at subsection 13(9) provides that a decision not to make a determination is reviewable in the Administrative Appeals Tribunal. Under subsection 13(10), the approved participant may apply, in the approved form, for a determination under subsection 13(9).

The consequences for non-compliance with the requirements in section 13, together with the specific types of documents and information that may be required and the record keeping responsibilities at section 49 seek to ensure that the Secretary is provided with all the required and relevant information to be able to undertake a robust assessment of compliance with the conditions of the relevant allocation.

Section 14 – Compliance with relevant laws

Section 14 provides that no incentive is available for any period where the dwelling, or the approved participant (or an associated party or manager of the dwelling) fails to comply with other relevant laws of the state or territory and local government area in which the dwelling is located. This is to ensure NRAS dwellings are compliant not only with the Scheme but all relevant landlord-tenant, building and health and safety laws.

Section 15 – Compliance with special conditions

Section 15 provides that an approved participant must meet, and continue to meet, any special conditions that have been imposed on an allocation in order to be entitled to receive an incentive for that allocation.

Subsection 15(2) provides that the Secretary may determine in writing that subsection 15(1) does not apply if the Secretary is satisfied that the approved participant has a reasonable excuse for not meeting the special condition. A note at subsection 15(2) provides that a decision not to make a determination is reviewable in the Administrative Appeals Tribunal. Under subsection 15(3), the approved

participant may apply, in the approved form, for a determination under subsection 15(2).

Section 16 – If allocation is revoked

Section 16 provides that if an allocation has been revoked during an NRAS year, no incentive is available for the dwelling for the remainder of the NRAS year after the revocation takes effect, and any subsequent NRAS years.

Section 16 introduces a key policy change under the Scheme by allowing the approved participant to claim incentives for compliant periods up to the point of revocation.

This approach aligns with section 23 of the Regulations, which enables the Secretary to transfer an allocation if an approved participant applies for revocation. Accordingly, revocation of an allocation is intended as a last resort.

A note at section 16 provides that an allocation may be revoked under section 23 or 32.

Section 17 – Conditions of the reservation of existing provisional allocations

Subsection 17(1) provides that no incentive will be available for a provisional allocation for any period during which a condition of the reservation of the provisional allocation is not met. Subsection 17(2) provides that a condition relating to the agreed rental availability date can be disregarded for the purposes of subsection 17(1).

Division 3 –Varying, removing, or imposing special conditions

Section 18 – Varying or removing special conditions by agreement

Subsection 18(1) provides that the Secretary may, at any time and with the agreement of the approved participant, vary or remove a special condition of an allocation, or a condition of the reservation of a provisional allocation for a dwelling that relates to the size of the dwelling.

Subsections 18(2) provides that an approved participant may apply to the Secretary, in the approved form, to request such a variation or removal.

Section 18 ensures approved participants are able to request changes or removal of special conditions, or conditions relating to the size of a dwelling under a provisional allocation, for example where the conditions have been met or are no longer relevant.

Section 19 – Secretary may vary, remove or impose special conditions

Subsection 19(1) provides that the Secretary may decide to vary or remove a special condition of an allocation for a rental dwelling, decide not to vary or remove such a special condition, or decide to impose an additional special condition on an allocation for a rental dwelling, if such a decision would assist in meeting the object of the Act. This aims to ensure that any special conditions of an allocation continue to align with

the objectives of the Act. A note at subsection 19(1) provides that a decision under that subsection (i.e. a decision about a special condition, or a decision to impose a special condition) is reviewable in the Administrative Appeals Tribunal.

Subsection 19(2) stipulates that before the Secretary varies or imposes a special condition, the Secretary must notify the approved participant, invite the approved participant to make a written submission to the Secretary, within 14 days, about the proposed variation or imposition and take into account any submission so provided. This ensures procedural fairness before any variation or imposition occurs.

Subsection 19(3) requires the Secretary to give written notice to the approved participant of the decision whether to make the variation or imposition following the process at subsection 19(2).

Subsection 19(4) ensures that provisions of the Regulations that regulate the variation and imposition of general conditions (Division 2) and the provisions of the Regulations that regulate the variation and imposition of special conditions (Division 3) can work in conjunction with one another.

The provisions set out by section 19 provide greater flexibility for the Secretary in ensuring the maximum efficacy of the Scheme in its delivery of affordable rental dwellings.

Division 4 – Transfer or revocation generally not because of breach

Section 20 – Transfer to another dwelling

Section 20 provides that the Secretary may, on application in the approved form, transfer an approved participant's allocation between two rental dwellings, provided the replacement dwelling was not lived in as a residence before the incentive period for the allocation began. This allows otherwise inactive allocations (for example where an investor sells their dwelling to owners who do not participate in the Scheme) to be transferred to dwellings that remain in the Scheme, maintaining the current stock of affordable housing.

This section formalises current administrative practice regarding what the Secretary takes into account when deciding to transfer an allocation, particularly in relation to protecting the interests of the investors concerned. Under subsection 20(3), the Secretary must take into account the views of the relevant state or territory government regarding the characteristics and location of replacement dwelling compared the original dwelling, as well as whether any investors have agreed to the transfer, and whether the approved participant has complied with its obligations to investors.

Subsection 20(4) sets out the requirements where the Secretary decides to transfer the allocation. The Secretary must give the approved participant written notice of the transfer, state the date of effect of the transfer (which must be on or after the date of the request), and may impose additional special conditions on the allocation with the prior agreement of the approved participant. In certain circumstances, this provision enables the date of effect of a transfer to be backdated to the date of application, which would enable any processing time for the transfer request to be disregarded.

The purpose of paragraph 20(4)(c) is to ensure that the Secretary and the approved participant can agree to tailor any special conditions of the allocation for the new dwelling, if necessary. For example, where specific cohorts of potential eligible tenants were targeted by the exiting dwelling (such as older women), this provision could be used to ensure that the replacement dwelling also targets these cohorts as a condition of its allocation.

Section 21 – Transfer to another person on application by approved participant

Section 21 gives the Secretary the power to transfer allocations between approved participants at the request of the original approved participant. This ensures an allocation can remain active in the Scheme where the original approved participant is no longer able or willing to manage the allocation. The original approved participant may apply under subsection 21(1), in the approved form, for the Secretary to transfer the allocation for a rental dwelling to another person.

Subsection 21(3) requires the Secretary to ensure that the person receiving the transferred allocations (the gaining approved participant) has not been previously disqualified under the Regulations or the 2008 Regulations (as disqualified persons are ineligible to receive transferred allocations) and that person is suitable and has capacity to properly manage the allocation and has agreed in writing.

Under paragraph 21(4)(a), if the Secretary transfers the allocation the Secretary must give written notice to the original and gaining approved participants. This ensures that both original and gaining approved participants are informed of the status of any allocations they hold and may inform investors and associated parties of any changes in circumstances as required.

Under paragraph 21(4)(b) the Secretary must specify the date of effect of the transfer in the notice. The date of effect must be on or after the date of the application requesting the transfer. In certain circumstances, this provision enables the date of effect of a transfer to be backdated to the date of application, which would enable any processing time for the transfer request to be disregarded.

Under paragraph 21(4)(c), the Secretary may impose additional special conditions on the allocation, so long as the gaining approved participant agreed to the imposition of the additional special conditions before the allocation was transferred. The purpose of paragraph 21(4)(c) is to ensure that the Secretary and the approved participant can agree to tailor any conditions of the allocation for the new dwelling, if necessary. For example, where the tenants for a dwelling being transferred are guaranteed rent at a rate that may be lower than 80 per cent of market value (e.g. 25 per cent of their income), this provision could be used to ensure that the new approved participant for the allocation carries these protections forward.

Paragraph 21(4)(d) provides that the Secretary may give to the gaining approved participant the incentive for the transferred allocation that otherwise would have been given to the original approved participant. This provision is only available at the request of either one of the approved participants, and with the agreement of the both approved participants. This supports the objects of the Act by ensuring that investors are able to receive an incentive for an allocation attached to their rental dwelling while it remains in the Scheme, even in circumstances where the original

approved participant is no longer able to manage the allocation or their agreement has ceased. This ensures that the supply of affordable rental dwellings under the Scheme is not diminished.

Section 22 – Transfer of provisional allocation on Secretary's own initiative

Section 22 enhances the operation of the Scheme by providing an alternative to the revocation of provisional allocations as it ensures that the provisional allocations previously approved under the Scheme can be utilised to deliver affordable rental dwellings in areas of need.

Subsection 22(1) gives the Secretary the power to transfer a provisional allocation for a rental dwelling, on the Secretary's own initiative, to another approved participant. Provisional allocations are allocations that have never been tenanted under the Scheme for various reasons, for example where the proposed rental dwelling for the allocation has not been built in the agreed location. The ability of the Secretary to transfer provisional allocations is important as it allows increases the supply of affordable rental accommodation made available under the Scheme. This section allows the relevant approved participant and investor to claim the full value of any incentive attached to the allocation, subject to the other conditions of the allocation being met. A note at subsection 22(1) provides that a decision under that subsection to transfer a provisional allocation is reviewable in the Administrative Appeals Tribunal.

Under paragraphs 22(2)(a) to (d), the Secretary must be satisfied that the dwelling is not actively rented under the Scheme, has notified the original approved participant of the intention to transfer and invited them to provide a written submission within 28 days and take into account any submissions made. This ensures there is procedural fairness regarding the proposed transfer of provisional allocations.

Under paragraph 22(2)(e) the Secretary must be satisfied that the gaining approved participant is not a disqualified person, is suitable to hold the allocation and has the capacity to properly manage the allocation, and has agreed in writing to the transfer.

Under paragraph 22(3)(a), if the Secretary transfers the allocation the Secretary must give written notice to the original and gaining approved participants. This ensures that both original and gaining approved participants are informed of the status of any allocations they hold and may inform investors and associated parties of any changes in circumstances as required.

Under paragraph 22(3)(b) the Secretary must specify the date of effect of the transfer in the notice. The date of effect must be on or after the date on which the notice is prepared.

Paragraph 22(3)(c) sets out that the Secretary may impose additional special conditions on the allocation, so long as the gaining approved participant agreed to the imposition of the additional special conditions before the allocation was transferred. The purpose of this is to ensure that the Secretary and the approved participant can agree to tailor any conditions of the allocation for the new dwelling, if necessary.

Section 23 – Revocation on application by approved participant etc.

Section 23 gives the Secretary discretion to revoke an allocation for a rental dwelling upon application by an approved participant in the approved from. The purpose of the new provisions introduced by section 23 is to provide the Secretary with the power to remove allocations from the Scheme where the approved participant is no longer willing or able to manage the allocation. This ensures that the Commonwealth can acquit the incentive attached to the allocation if it is no longer able to be claimed.

Subsection 23(3) provides that if the Secretary revokes the allocation, the Secretary must give the approved participant written notice of the revocation. This ensures that the approved participant whose allocation is revoked is adequately informed of any changes in circumstances so that they may in turn inform any associated parties of important details if necessary. The notice must also state the date of effect of the revocation, which must be on or after the date on which the notice is prepared.

Subsection 23(4) enables the Secretary to transfer the allocations instead of revoking if the Secretary is satisfied under subsection 23(5) that the gaining approved participant is not a disqualified person, is suitable to hold the allocation and has the capacity to properly manage the allocation, and has agreed in writing to the transfer.

Under paragraphs 23(6)(a) and (b), if the Secretary transfers the allocation, the Secretary must give written notice to the original and gaining approved participants, and the notice must state the date of effect of the transfer (which must be on or after the date on which the notice is prepared).

Under paragraph 23(6)(c), the Secretary may impose additional special conditions on the allocation, so long as the gaining approved participant agreed to the imposition of the additional special conditions before the allocation was transferred. The purpose of this is to ensure that the Secretary and the approved participant can agree to tailor any conditions of the allocation for the new dwelling, if necessary

Division 5 – Transfer or revocation because of breach

Subdivision A – Determination of breach

Section 24 – Individual breach

Section 24 gives the Secretary discretion to determine in writing that an approved participant for a rental dwelling has committed an individual breach.

Section 24 forms a critical component of the Scheme's graduated compliance framework. The graduated compliance framework of the Scheme, with individual breaches constituting the least serious of the 'breach determination' options available to the Secretary under the Regulations, bolsters the integrity of the Scheme by reassuring stakeholders that failures to comply with the Regulations will be appropriately dealt with by the Secretary and investors will be adequately remedied where appropriate. The purpose of section 24 is to provide the Secretary with the power to take positive action against an approved participant for a rental dwelling where the approved participant has failed to comply with their obligations in relation

to an *individual* allocation. Subsections 32(2) and 32(3) set out the actions that can be taken in the event of an individual breach.

Subsection 24(1) sets out the conditions that must be satisfied before the Secretary may make a determination, in writing, that an approved participant for a rental dwelling has committed an individual breach. Subsection 24(1) states that the Secretary can determine a that an approved participant has committed an individual breach if the Secretary is satisfied that the approved participant for a rental dwelling 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' is defined in section 5 (definitions). A note at subsection 24(1) provides that a decision under that subsection to determine that an approved participant has committed an individual breach is reviewable by the Administrative Appeals Tribunal.

Subsection 24(2) provides that a failure to comply with the approved participants code of conduct amounts to a breach of the approved participants code of conduct.

Subsection 24(3) provides a definition of the expression 'compliance breach'. Under paragraph 24(4)(a) an approved participant has committed a compliance breach if they fail to comply with the Act or Regulations, other than the approved participants code of conduct. Under paragraph 24(4)(b) an approved participant for a rental dwelling has committed a compliance breach if they contravene a condition of the allocation for the dwelling. The conditions of allocation for a dwelling are set out at Divisions 2 and 3 of Part 2 of the Regulations.

Section 25 – Serious breach

Subsection 25(1) gives the Secretary discretion to determine in writing that an approved participant has committed a serious breach.

Section 25 makes up a key part of the Scheme's graduated compliance framework. Like section 24, the purpose of section 25 is to give the Secretary power to take positive action against an approved participant for a rental dwelling that is commensurate with the approved participant's repeated or systematic failure to comply with their obligations in relation to one or more allocations.

Subsections 32(4) and 32(5) set out the actions that can be taken in the event of a serious breach.

Under paragraph 25(a), the Secretary may determine that an approved participant has committed a serious breach if the approved participant has breached the approved participants code of conduct in relation to three or more investors within a period of six months, resulting in material financial detriment to those investors.

Under paragraph 25(b), the Secretary may determine that an approved participant has committed a serious breach if the approved participant has committed a compliance breach that involves one or more of the following:

i. the approved participant has provided false or misleading information to the Secretary or the department in relation to the Scheme;
ii. the approved participant 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.
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 an incentive or a State or Territory contribution to a person to whom the approved participant is not required to do so by section 63 of the Regulations.

Under paragraph 25(c), the Secretary may determine that an approved participant has committed a serious breach if all of the following have occurred:

i. the approved participant has breached the approved participants code of conduct or committed a compliance breach; and
ii. the Secretary has, in writing, required the approved participant to take remedial action in relation to the breach; and
iii. the remedial action is not taken within 28 days after the requirement is given to the approved participant.

Under paragraph 25(d), the Secretary may determine that an approved participant has committed a serious breach if all of the following have occurred:

i. the approved participant has breached the approved participants code of conduct or committed a compliance breach; and
ii. the Secretary has given the approved participant a written warning in relation to the breach; and
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).

A note at section 25 provides that a decision under that section that an approved participant has committed a serious breach is reviewable by the Administrative Appeals Tribunal.

Section 26 – Disqualifying breach

Section 26 gives the Secretary discretion to determine in writing that an approved participant has committed a disqualifying breach.

Section 26 is the most serious aspect of the Scheme's graduated compliance framework. Like sections 24 and 25, the purpose of section 26 is to give the Secretary power to take positive action against an approved participant for a rental dwelling commensurate with the approved participant's failure to comply with their obligations in relation to one or more allocations. Section 26 allows the Secretary to disqualify an approved participant from the Scheme entirely where the relevant conditions are met. This supports the objects of the Act by ensuring the integrity of the approved participants who hold and manage allocations.

Paragraph 26(a) gives the Secretary discretion to make a determination that an approved participant has committed a disqualifying breach, if the Secretary is satisfied that the approved participant is the subject of an insolvency event.

Paragraph 26(b) gives the Secretary discretion to make a determination that an approved participant has committed a disqualifying breach, if the Secretary has determined that a serious breach has been committed by the approved participant; and is satisfied that, within 12 months, the Secretary would be likely to be able to determine that the approved participant has committed another serious breach.

Paragraph 26(c) gives the Secretary discretion to make a determination that an approved participant has committed a disqualifying breach, where the approved participant or director of the approved participant has been has been convicted of an offence against a law of the Commonwealth, or of a State or Territory, involving fraud, dishonesty, bribery or corruption. This is a new provision to the Scheme, which is intended to dissuade NRAS approved participants from the election or ongoing engagement of individuals previously convicted of such offences, in order to maintain public confidence in the integrity of the Scheme.

Note 1 at section 26 provides that Part VIIC of the *Crimes Act 1914* includes provisions that may relieve persons from the requirement to disclose spent convictions and require person aware of such conviction to disregard them.

Note 2 at section 26 confirms that paragraph 26(c) covers the approved participant and its current directors, irrespective of when the conviction occurred.

Note 3 at section 26 provides that a decision under that section that an approved participant has committed a disqualifying breach is reviewable by the Administrative Appeals Tribunal.

Subsection 32(6) sets out the consequences of a disqualifying breach determination.

Section 27 – Approved participants code of conduct

Section 27 sets out the approved participants code of conduct (**the code**). Non-compliance with the code can amount to a breach determination under section 24

Paragraph 27(2)(a) provides that the approved participant for a rental dwelling must comply with legal obligations relating to the investors in a timely manner. This is to ensure that investors' interests and rights are protected and ensures an approved participant does not delay complying with their legal obligations under external arrangements not otherwise governed by the Regulations.

Paragraph 27(2)(b) provides that an approved participant must comply with the Scheme, and any other law of the Commonwealth, and of the States and Territories in relation to dealings with investors and tenants.

Paragraph 27(2)(c) provides that an approved participant must lodge an annual Statement of Compliance in relation to the dwelling. This ensures that the investor will receive 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

(except in cases where the approved participant is expressly not required to submit an annual statement of compliance following a transfer).

Paragraph 27(2)(d) provides that an approved participant must respond to a communication from an investor within 30 days, unless the approved participant has a reasonable excuse. A reasonable excuse may include 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 will ensure that the approved participant communicates promptly with the investor and does not leave the investor without a response for 30 days or more.

Paragraph 27(2)(e) provides that an approved participant must have an internal or external dispute resolution mechanism available for use by investors. The purpose of this paragraph is to ensure investors, if unsatisfied with a decision of the approved participant, have a means by which to seek review of that decision and attempt to resolve their dispute directly with the approved participant. An external review process (for example, with the involvement of a third party) encourages matters to be resolved prior to an application being made to the Department for a transfer of allocation and avoid unnecessary involvement by the Secretary until private avenues have been exhausted.

Paragraph 27(2)(f) provides that an approved participant must not enforce, seek to enforce or threaten to enforce an unfair arrangement. The term ‘unfair arrangement’ is defined in section 5 of the Regulations.

Paragraph 27(2)(g) provides an approved participant must not make a misrepresentation to an investor.

Paragraph 27(2)(h) provides that an approved participant must not engage in misleading or deceptive conduct in relation to an investor. The purpose of this paragraph is to protect investors from approved participants conducting themselves in a misleading or deceptive way towards them under the Scheme. This is already set out in the Australian Consumer Law, however, having this stated in the code serves as a reminder of the approved participants’ obligations to act honestly and fairly in their dealings with investors.

Paragraph 27(2)(i) provides that an approved participant must not threaten or coerce an investor to take action the investor is not required to take under an arrangement. This provision provides that an approved participant cannot coerce or threaten to enforce an investor to take action that has not been previously agreed. It is not a breach of the code for an approved participant to enforce a term in their arrangement with the investor, unless the arrangement is considered to be an ‘unfair arrangement’.

Paragraph 27(2)(j) provides that an approved participant must not prevent an investor from entering into an arrangement 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 a contract with their investor because they do not enter into a contract with the approved participant’s preferred

property services provider or where an approved participant seeks to prevent the investor entering into a contract with a particular property services provider.

Paragraph 27(2)(k) provides that an approved participant must not threaten to take action that would result in an investor nor recovering incentive to which the investor is entitled under law. This ensures that the investor receives the maximum value of the incentive available to them, to the extent that their rental dwelling has complied with the requirements of the Scheme and they are otherwise eligible to receive the incentive. In these circumstances, the approved participant must pass on the incentive to the investor and must not threaten to withhold the incentive.

Paragraph 27(2)(l) provides that an approved participant must not require an investor to enter into an arrangement with a property management service provider, unless the approved participant can ensure that the property management service provider can comply with subparagraphs 27(2)(l)(i) to (vii) of the Regulations. The requirements at subparagraphs 27(2)(l)(i) to (vii) mirror many of the approved participant's obligations under the code.

Paragraph 27(2)(m) provides that if an approved participant *does* require the investor to enter into an arrangement as mentioned in paragraph 27(2)(l), the approved participant must ensure that the property management service provider acts in accordance with subparagraphs 27(l)(i) to (vii).

The purpose of paragraphs 27(2)(l) and 27(2)(m) is to ensure that where an approved participant provides an investor with related property management services that the provider behaves appropriately towards the investor. This recognises that some approved participants in the Scheme have direct responsibility for the conduct of the property management service provider who then deals directly with the investor. This provision covers a range of business models and services, such as providers that primarily focus on managing tenants or those that only conduct property maintenance. This aims to bolster the integrity of the Scheme by ensuring that all key stakeholders and associated parties act in the best interests of tenants and investors.

Subdivision B – Procedures for making determinations of breach

Section 28 – Secretary may determine breach on own initiative or on request by an investor

Section 28 establishes the process for making a breach determination. The Secretary may make a determination that an approved participant for a rental dwelling has committed an individual breach, a serious breach or a disqualifying breach on the Secretary's own initiative, or where an investor makes a request to transfer an allocation for a dwelling because of the breach. The purpose of this provision is to ensure that the Secretary is empowered to take positive and decisive action to protect investors in instances where an approved participant fails to comply with the Regulations, the Act, or another law of the Commonwealth or of the State and Territories.

Section 29 – Transfer requests

Subsection 29(1) creates a mechanism by which an investor may make a request to the Secretary to transfer an allocation on the basis of an alleged or actual breach by the approved participant for their rental dwelling. The request may be made before or after the Secretary makes a determination of the breach.

Subsection 29(2) provides that the transfer request must be in a form that is approved by the Secretary and include details of the breach alleged by the investor, but does not need to specify whether the alleged breach is an individual, serious or disqualifying breach.

Subsection 29(3) provides that an investor may only make a transfer request if the investor has given the approved participant written notice of the alleged breach; 90 days have passed since that notice was given; and the investor is satisfied the approved participant has not taken appropriate action in relation to the breach. This subsection creates protections for approved participants by ensuring that investors are required to take reasonable steps to remedy their concerns directly with the approved participant for their rental dwelling before making a request to the Secretary to have the allocation transferred.

Subsection 29(4) provides that subsection 29(3), and the requirement at paragraph 29(2)(a) (for the request to be in the approved form and include details of the alleged breach), do not apply where the approved participant is allegedly the subject of an insolvency event, or where the Secretary has already made a determination of the breach. This subsection is to ensure that an investor may make a transfer request without having to unnecessarily comply with the administrative requirements in subsections 29(2) and 29(3).

Section 30 – Requirements for determinations of breach

Section 30 outlines the administrative requirements for the Secretary to make a determination that an approved participant has committed an individual, serious or disqualifying breach. The purpose of section 30 is to provide procedural fairness protections to approved participants by setting out notice requirements the Secretary must satisfy before making a final decision that a breach has occurred, and by requiring the Secretary to have regard to any submissions made by the approved participant in response to a notice of a proposed determination.

Subsection 30(1) provides that before determining an approved participant has committed breach of any kind, the Secretary must give written notice of the proposed determination to the approved participant and, if the Secretary proposes to make the determination because an investor made a transfer request, to the investor.

Subsection 30(2) provides that a notice of proposed determination must state that the Secretary proposes to determine that the approved participant has committed a breach, and must invite the approved participant to make written submissions in response to the proposed determination to the Secretary within 14 days after the Secretary gives the approved participant the notice.

Subsection 30(3) stipulates that in making a determination of breach the Secretary must have regard to any submissions made in accordance with paragraph 30(2)(b); and must have regard to the interests of investors, including the need to ensure that investors maintain confidence in the Scheme. Together, paragraphs 30(3)(a) and 30(3)(b) aim to ensure that approved participants that may be the subject of a breach determination are afforded adequate procedural fairness, and that the interests of any investors who may be affected by a breach are duly considered before the Secretary makes a final determination.

Subsection 30(4) gives the Secretary discretion to consider matters other than the written submissions made by the approved participant and the interests of investors. This is important because there may be other factors that directly inform the Secretary's decision, such as that approved participant's history of compliance with its obligations under the Scheme.

Subsection 30(5) provides that if the Secretary gives notice of a proposed determination to an approved participant or investor under subsection 30(1) the Secretary must also give written notice of the final decision whether to make the determination to the approved participant or the investor, as the case requires.

Section 31 – Publishing notice of certain breaches

Section 31 provides that if the Secretary makes a determination that an approved participant has committed a serious breach or a disqualifying breach, the Secretary may then publish notice of the determination on the Department's website. This ensures that investors who may be affected by the determination are adequately informed of the Department's compliance action, which promotes investor confidence in the Scheme and allows investors to consider whether, in light of the determination, they would like to make a transfer request.

This provision enhances the operation of the Scheme as compared with the 2008 Regulations by expanding the Secretary's discretion to also cover the publication of notices regarding disqualifying breach determinations, in addition to serious breach determinations. This allows for greater transparency in relation to disqualifying breach determinations, given their serious nature and impact on investors.

Subdivision C – Transfer or revocation because of breach

Section 32 – Transfer or revocation because of breach

Section 32 prescribes the Secretary's powers and obligations to as they relate to the transfer or revocation of an allocation for a rental dwelling, in cases where the Secretary has determined that an approved participant for a rental dwelling has committed an individual, serious or disqualifying breach under Division 5, Subdivision A. This enables the Secretary, where there has been a final breach determination against an approved participant, to transfer an allocation to another suitable person. This protects the interests of investors by allowing them to remain in the Scheme and prevents the ongoing management of NRAS allocations by approved participants who have proven themselves unfit to manage allocations.

Subsection 32(1) sets out that, before the transfer of revocation of an allocation can occur as a result of an individual, serious or disqualifying breach determination, the following conditions must first be met:

a) the Secretary has determined under Subdivision A that the approved participant for a rental dwelling has committed an individual breach, a serious breach or a disqualifying breach (whether or not the breach relates to the dwelling); and
b) either:
    a. the Administrative Appeals Tribunal has confirmed the Secretary's decision to make the determination; or
    b. the period for making an application to the Administrative Appeals Tribunal for review of the Secretary's decision to make the determination has expired.

Subsection 32(1) aims to ensure that an approved participant that is the subject of a breach determination is afforded adequate procedural fairness before the Secretary may transfer or revoke any related allocations from the approved participant.

For clarity, in the event that an approved participant makes an application to the Administrative Appeals Tribunal for the review of a Secretary's breach determination (within the required timeframes), no transfer or revocation can occur as a result of that breach determination until that application has been finally determined. This creates certainty for both approved participants and for investors, because if the Secretary's decision to make a breach determination is overturned in the Administrative Appeals Tribunal, the power to transfer or revoke the relevant allocations will not be enlivened.

Individual breach – investor requested transfer

Subsection 32(2) provides that where the Secretary has determined an approved participant has committed an individual breach in relation to a dwelling and an investor has requested a transfer of that dwelling or because the approved participant was the subject of an insolvency event, the Secretary must transfer the allocation covering the dwelling to another person if the investor's transfer request has not been withdrawn.

Individual breach – determined on Secretary's own initiative

Subsection 32(3) provides that where the Secretary has determined an approved participant has committed an individual breach in relation to a dwelling, the Secretary may transfer the allocation covering the dwelling to another person if the Secretary initiated the determination (even in the case of an investor transfer request that has been withdrawn), or if the individual breach arose because the Secretary was satisfied that the approved participant was the subject of an insolvency event..

Serious breach – investor requested transfer

Subsection 32(4) provides that where the Secretary has determined a serious breach has occurred by an approved participant, the Secretary must transfer the

allocation if an investor has requested it whether or not the breach related to the dwelling and if the request has not been withdrawn.

Serious breach – determined on Secretary's own initiative

Subsection 32(5) provides that where the Secretary has determined that an approved participant has committed a serious breach and the determination was made on the Secretary's own initiative under Division 6, Subdivision A the Secretary may transfer the allocation to another person or revoke the allocation.

Disqualifying breach

Subsection 32(6) specifies that if the Secretary determines that an approved participant has committed a disqualifying breach, the Secretary must endeavour to transfer all of the approved participants' allocations within six months of the determination being made. Any remaining allocations at the end of the six months will be revoked by force of this subsection.

This subsection empowers the Secretary to take positive compliance action against an approved participant in circumstances where the participant has committed a disqualifying breach, irrespective of whether any transfer request was made by an investor. The automatic revocation after six months provides certainty regarding the outcome of the disqualifying breach, namely that the approved participant will no longer hold any allocations after six months of the determination taking effect.

Requirements for transfer

Subsection 32(7) prescribes a list of conditions that a gaining approved participant must meet in order to receive an allocation transferred using the transfer provisions set out by section 32.

Under subsection 32(7) the Secretary must not transfer the allocation unless they are satisfied that the gaining approved participant is not a disqualified person, is suitable to hold the allocation and has the capacity to properly manage the allocation, and has agreed in writing to the transfer.

The purpose of subsection 32(7) is to ensure that when transferring allocations from an approved participant who has committed a breach to another person or entity, the interests the Scheme and of any affected investors are adequately protected following the transfer.

Notice of transfer and imposition of conditions

Under paragraph 32(8)(a) if the Secretary transfers the allocation the Secretary must give written notice to the original and gaining approved participants and any investors who are covered by the allocation. This ensures all parties are informed of the transfer.

Under paragraph 32(8)(b) notice must state the date of effect of the transfer which must be on or after the date the notice was prepared, or on or after the date an investor requested the transfer, or on or after the date of an identical transfer application under section 21 before a breach occurred (whichever is the earliest). In

certain circumstances, this provision would enable the date of effect of a transfer to be backdated to the date of the relevant application, which would enable any processing time for the transfer request to be disregarded and could accommodate contractual arrangements between approved participants as well as those between the gaining approved participant and investors.

Under paragraph 32(8)(c) the Secretary may impose additional special conditions on the allocations, so long as the gaining approved participant agreed to the imposition of the additional special conditions before the allocation was transferred.

These administrative requirements have been introduced to ensure administrative transparency around decisions that have a direct impact on approved participants and investors.

Notice of revocation

Subsection 32(9) provides that if an allocation is revoked by or under section 32 that the Secretary must give the approved participant notice of the revocation, and state the date of effect of the revocation, which must be on or after the date of the notice. This ensures that approved participants are informed of the details and status of any allocations they hold to be able to tell any investors and associated parties concerned about any changes in circumstances as required.

A note at subsection 32(9) directs the reader to section 16, which addresses how incentives are handled following revocation of an allocation, and section 51, which deals with the amount of an incentive to be given

These administrative requirements have been introduced to ensure administrative transparency around decisions that have a direct impact on approved participants and investors.

Division 7 – General rules for transfers

Section 33 – Legal arrangements do not prevent transfers

Section 33 provides that any arrangement is void to the extent that the arrangement aims to prevent an investor from applying for a transfer or penalise an investor for assisting with, or supporting in any way the application for the transfer of an allocation.

The purpose of section 33 is to protect the rights of investors to seek a transfer of an allocation for their rental dwelling regardless of any legal arrangement the investor has entered into with the approved participant.

Section 34 – Obligations of approved participants when allocations are transferred

Section 34 places obligations upon approved participants when allocations are transferred from one approved participant to another. Subsection 34(2) requires the original approved participant to provide information relevant to the administration of the Scheme to the gaining approved participant, on request by the Secretary. This enables the allocation to continue to be properly managed, and the interests of any

investor affected by the transfer are protected once the allocation is being managed by another person.

Subsection 34(3) provides that the information must be given within 21 days of the request. Subsection 34(4) requires the original approved participant, within 49 days after the request is made, to notify the Secretary in writing whether the original approved participant has complied with subsections 34(2) and (3).

Section 35 – Statement of compliance if allocation is transferred

Section 35 stipulates that if the Secretary transfers an allocation for a rental dwelling from an approved participant to another person during an NRAS year, the Secretary may require the gaining approved participant to lodge a statement of compliance for the NRAS year of the transfer and/or the previous NRAS year.

The purpose of section 35 is to require the gaining approved participant to submit a statement of compliance where the previous approved participant has not submitted, or is not expected to submit, a statement of compliance for that allocation. Together with the information sharing obligations at section 34, this ensures the approved participant currently responsible for the allocation has the necessary autonomy to provide information to the Secretary demonstrating compliance with the Regulations.

Part 3 – Market value rent

Section 36 – Meaning of *market value rent*

Section 36 defines the expressions ‘market value rent’, ‘incentive year’ and ‘initial rental period’ at subsections 36(1) to (3) respectively.

For the initial rental period for a rental dwelling covered by an allocation, or for the fifth or eighth incentive year for the allocation, the ‘market value rent’ is as assessed by a valuer under section 37. The ‘initial rental period’ is the period beginning on the day the dwelling is first available for rent under the Scheme, and ending at the end of the incentive year for the allocation that includes that day. The ‘incentive year’ for an allocation is a 12-month period that is in the incentive period for the allocation and begins on the first day of that incentive period or on an anniversary of that day.

For any other year (the ‘indexed year’) after that initial rental period, the market value rent for a rental dwelling covered by an allocation is the market value rent for the previous incentive year (or, if that initial rental period ends just before the indexed year – then the market value for that initial rental period) indexed in accordance with the NRAS market index for the dwelling for the NRAS year in which the indexed year begins, rounded to the next whole dollar.

Note that the ‘NRAS market index’ for a dwelling is defined in section 5 (Definitions).

For example, for the first year in the incentive period, the market value rent will be determined in accordance with the valuation obtained in accordance with section 41. For the second year, the market value rent will be determined by applying the current NRAS market index to the first year market value rent. For the third year, the NRAS market index will be applied to the second year market value rent, and so on.

Section 37 - Valuations

Section 37 sets out the requirements for valuations for allocations for rental dwellings under the Scheme.

Subsection 37(1) provides that the market value rent for a period or incentive year referred to in paragraph 36(1)(a) is the market rent for the dwelling as assessed by a valuer for a day during the 13 weeks immediately before the beginning of the period or year. This means that the valuation must be obtained prior to the initial rental period or in the final 13 weeks at the end of the fourth or seventh year of the incentive period.

Subsection 37(2) provides that market rent valuations must be in the approved form and sets out the requirements and professional standards that apply to the individual conducting the valuation, not the valuer's business or employer. This subsection aims to ensure the independence and impartiality of a valuer when undertaking the market rent valuation to ensure valuations are accurate and of a reasonable standard.

Subsection 37(3) outlines what a valuer must assess and what must not be taken into account when undertaking a market rent valuation for a dwelling. The valuer must assess the market rent of the dwelling based on the condition in which the dwelling is to be rented, including whether the dwelling is to be rented furnished or unfurnished, or whether any car parking spaces are included with the dwelling. This provision also prescribes the matters that the valuer must not take into account when conducting the market rent valuation, namely any optional car spaces or any amenities, utilities, inclusions, allowances or services provided in connection with the dwelling.

Subsection 37(4) provides that in preparing the valuation for the initial rental period the valuer must physically attend and inspect the dwelling. This ensures the accuracy of market rent valuations provided to the Department. A note at subsection 37(4) provides that later valuations may be undertaken as 'desktop' valuations (that is, without physically attending and inspecting the dwelling).

Subsection 37(5) provides that if the fifth or eighth year of the incentive period for the allocation begins within 13 weeks after the beginning of the initial rental period, the market value rent for the initial rental period is also the market value for that fifth or eighth year.

For example, following the transfer of an allocation from one rental dwelling to another rental dwelling under section 20 of the Regulations, the approved participant must lodge a market rent valuation for the initial rental period for the new rental dwelling. If the beginning of the initial rental period for the original dwelling was 20 March 2015, the anniversary of the incentive period will be 20 March. If the allocation was transferred on 1 February 2019, the beginning of the initial rental period for the new rental dwelling will be 1 February 2019 but the anniversary of the incentive period will continue to be 20 March. This would mean that the initial rental period valuation for the new dwelling will determine the market value rent for the period of 1 February 2019 to 19 March 2019. Subsection 37(5) would have the effect that, as 1 February 2019 falls within the last 13 weeks of the fourth year of the incentive period,

the initial rental period valuation will also serve as the fourth year valuation, which determines the market value rent for the fifth year of the incentive period – 20 March 2019 to 19 March 2020.

Section 38 – Giving valuations

Section 38 sets out the requirement for an approved participant to provide market rent valuations to the Secretary before the beginning of the initial rental period or the fifth or eighth year of an incentive period.

Subsection 38(2) provides that the Secretary may require an approved participant to provide further evidence in relation to matters in the valuation and to do so within the period and in the manner specified by the Secretary.

Subsection 38(3) provides that an approved participant must not submit further valuations for a period or year where the Secretary has accepted a valuation for that dwelling or accepted a valuation subject to an error being corrected.

Section 39 – Secretary may extend time for giving valuations

Section 39 gives the Secretary discretion to extend the time available for an approved participant to give the Secretary a market rent valuation where an approved participant has made an application in the approved form. In order to grant an extension of time, the Secretary must be satisfied that the approved participant has a reasonable excuse for not being able to provide the valuation on time, or be satisfied that because of a transfer of an allocation, it is reasonable to grant an extension. For example, where the valuer was unable to attend the dwelling to conduct a valuation because the dwelling was inaccessible, it may be open to the Secretary to extend the period for providing a valuation.

Subsection 39(3) provides that if the Secretary approves an extension of time for giving valuations, the Secretary may in writing determining that subsection 13(2) (outstanding documents or information) does not apply in relation to the valuation for the period specified in the determination. The purpose of this subsection is to provide some leniency for approved participants in relation to the requirements at section 13 in circumstances where the Secretary has deemed it reasonable to grant an extension of time for giving valuations.

Subsection 39(4) provides that the Secretary must not make a determination under subsection 12(2) in relation to a particular charge of rent for the dwelling if the charge was more than 20% of the market value rent for the dwelling because a valuation was not available by a particular time. This ensures that the market rent valuation for a rental dwelling, and the availability of an incentive, will be determined once a valuation has been provided and meets the market rent value.

Section 40 – Valuations – other matters

Subsection 40 provides the Secretary with the power to require the approved participant, within a specified timeframe, to give the Secretary a valuation from a different valuer in replacement of the first valuation where the Secretary reasonably

believes that the first valuation is not accurate. This section applies whether or not the Secretary accepted the first valuation.

Subsection 40(2) provides that valuations under Part 3 will be undertaken at the expense of the approved participant. This provides greater flexibility to the Secretary to review a valuation if it appears incorrect or unreasonable.

These provisions have been included to create stronger protections for the Commonwealth against the risk to the Scheme of collusion between approved participants and valuers.

Part 4 – Eligible tenants

Section 41 – Eligible tenants

Section 41 sets out the requirements that persons must meet in order to qualify as eligible to rent a rental dwelling under Scheme, including prescribing the income limits for households that include a sole parent and households that do not include a sole parent. The purpose of this section is to create a category of 'eligible tenants', being persons who by virtue of earning a low to moderate annual income based on the income test set out in subsection 41(5) are eligible to rent a dwelling under the Scheme. A note at subsection 41 directs the reader to subsections 41(5) to (8) for working out the relevant income limits.

Subsection 41(3) prescribes the circumstances where tenants cease to be 'eligible tenants'. This includes where eligible tenants cease to be tenants of a dwelling covered by an allocation, or the tenants' combined gross income exceeds the income limit by 25% or more in two consecutive years, or a person other than the eligible tenants joins the household and that person does not meet the income test. This is to ensure the Scheme continues to be directed at the persons it is designed to benefit.

Subsection 41(4) provides an exception to subsection 41(3) so a tenant does not cease to be an eligible tenant if the tenant has moved from one rental dwelling covered by an allocation to another rental dwelling covered by an allocation, and where the tenant has had to move because of unexpected or exceptional circumstances. For example, the progression of a serious illness might mean that they need to relocate to a dwelling closer to health services. The purpose of this subsection is to ensure that a person's status as an eligible tenant is not be tied to a particular rental dwelling, so that in certain circumstances a tenant may be permitted to move between NRAS dwellings without having to re-satisfy the income limits for a household in subsection 41(3).

Subsection 41(5) prescribes the income limits for a household for the NRAS year beginning on 1 May 2019. The income limit established by subsection 41(5) is not measured on a tenant-by-tenant basis but rather the whole household.

Subsection 41(6) clarifies that a rental dwelling may only contain one household, for the purposes of section 41.

Subsection 41(7) provides that the income limits at subsection 41(5), for a household for each subsequent NRAS year, are the amounts for the previous NRAS year indexed in accordance with the NRAS tenant income index (defined at section 5) for that subsequent NRAS year, rounded to the next whole dollar.

Subsection 41(8) enables the Secretary to change any or all of the income limits mentioned in subsection 41(5) by legislative instrument from time to time.

Part 5 – Demonstrating compliance

Section 42 – Statement of compliance required for each NRAS year

Section 42 prescribes requirements about the statement of compliance that the approved participant must provide the Secretary for a rental dwelling each NRAS year.

The requirement to provide the statement of compliance is at subsection 42(1). Subsection 42(2) provides that it must be in the approved form, and include the information required by the form for the purposes of the Scheme. A note at subsection 42(2) directs the reader to provisions of the *Criminal Code* regarding false or misleading information or documents.

Subsection 42(3) sets out the timeframes for providing the statement of compliance to the Secretary. A note at subsection 42(3) directs the reader to subsection 13(2), which is about incentives not being available where a statement of compliance is outstanding. Subsection 42(4) gives the Secretary discretion to approve a later date for providing the statement of compliance in specified circumstances on the Secretary's own initiative or on application by the approved participant in the approved form. Subsections 42(5) and (6) set out the administrative requirements where the Secretary approves a later date.

Subsection 42(7) provides that if there is more than one approved participant for a dwelling for an NRAS year because there was a transfer of an allocation, then each approved participant must provide a statement of compliance covering the respective period for which the approved participant held the allocation. This ensures that the Secretary receives all information relevant to establish the compliance of any affected dwelling for the entire NRAS year in which the transfer occurred. However, subsection 42(8) provides that because of the operation of section 35 the Secretary may require an approved participant to submit a statement of compliance for both the NRAS year in which the approved participant had an allocation transferred to them, and the prior NRAS year.

Section 43 – Contents of statement of compliance

Section 43 prescribes the contents of a statement of compliance for a rental dwelling for an NRAS year. This is to provide approved participants with clear guidance about what information and documents are to be provided to the Secretary in the statement of compliance, including details of the rent charged during the year, and details of any period during the year when the dwelling was vacant during the year.

Subsection 43(2) provides that a statement of compliance may also require approved participants to include other information relevant to the operation of the Scheme.

Section 44 – Tenant consent form

Section 44 sets out the Scheme requirements in relation to the provision of tenant consent forms by approved participants for each tenant of a rental dwelling. The purpose of these forms is to obtain tenant consent to participate in the Scheme and to assess the tenant eligibility based on demographic and income information provided by tenants of NRAS properties.

Subsection 44(1) sets out the requirement for the approved participant to give the Secretary a tenant consent form for each tenant of the dwelling. Subsection 44(2) states that the form must be in the approved form, include information about the tenant required by the form for the purposes of the Scheme, and be signed by the tenant. Subsection 44(3) provides that the form must be given to the Secretary before the next statement of compliance is given to the Secretary.

Section 44 has been included to formalise administrative practice in relation to the collection of tenant information and evidence.

Section 45 – Lease agreement

Section 45 prescribes the requirement for approved participants to give the Secretary evidence of a current lease agreement for each allocation for a rental dwelling prior to the next statement of compliance being given to the Secretary.

Section 45 has been included to formalise administrative practice in relation to the collection of occupancy information and evidence.

Section 46 – Secretary may request other documents and information

Section 46 provides the Secretary with the discretion to request other documents and information from an approved participant for the purposes of the operation of the Scheme. Subsection 46(2) stipulates that the additional information or documentation requested must be provided to the Secretary within the timeframe specified by the Secretary, which must be a reasonable period.

The purpose of this section is to provide the Secretary with the power to request additional information from approved participants that may be relevant to the operation of the Scheme, such as supplementary evidence required for the purposes of determining tenant income, for example a statutory declaration where no other evidence is available.

Section 47 – Changes to approved participant's details

Section 47 prescribes the circumstances in which an approved participant for a rental dwelling must notify the Secretary of changes to the approved participant's details including contact details, address for service, business address, officers and authorised persons to act on behalf of the approved participant. The new information

must be notified to the Secretary within 28 days of the change and may include details that have been notified under subsection 79(1) of the Regulations.

Subsection 47(3) provides that the Secretary is taken to have given the approved participant a notice or other document if the Secretary uses the contact details most recently notified to the Secretary. Note 1 at subsection 47(3) provides that the Secretary can rely on the most recently notified contact details even if they have changed, and the approved participant has not yet notified the Secretary of the change. Note 2 provides that the Secretary could give a notice using an email address notified under subsection 47(1) or (2).

This section is intended to ensure the Secretary has the approved participant's most up-to-date contact details, which is particularly important to ensure authorised individuals are making decisions on behalf of the approved participant and the correct address is used for giving of notices for the purposes of the Scheme.

Section 48 – Changes to investor's details

Section 48 provides that when an approved participant for a rental dwelling becomes aware of an investor change for the dwelling, the approved participant must notify the Secretary of the new investor details within 28 days of becoming aware of the change. It also sets out what information must be provided, namely the name and contact details of the new investor and the date on which the person became an investor. A note at subsection 48(1) directs the reader to a similar provision at subsection 79(1). A note at subsection 48(2) serves to remind the reader that under subsections 13(2) to (4) no incentive is available for any period during which the approved participant fails to comply with this section, noting that subsection 13(7) provides the Secretary with the necessary discretion to determine that these subsections do not apply.

This section aims to ensure the interests of those investors are protected, and that the Secretary has visibility to situations where there are multiple changes in investor details over the course of a single NRAS year.

Section 49 – Record keeping

Section 49 prescribes the records an approved participant must maintain for five years. This section makes it clear that it is the responsibility of approved participants to ensure that records relating to the Scheme are up-to-date and complete. The purpose of this section is to promote the effective and efficient operation of the Scheme. A note at subsection 49(1) directs the reader to subsections 13(8) and (9) about the availability of incentives where this section is not complied with.

Section 49 expands upon previous requirements under the Scheme. Importantly, this provision includes a useful list of the types of records that must be kept by approved participants in order to maintain compliance with their obligations.

Subsection 49(2) provides that the records that must be maintained by an approved participant in relation to passing on an incentive under Part 7, giving a summary under section 67, and giving a notice of end of allocation under section 70 must be sufficient to show how and when the approved participant satisfied the relevant

requirement. For example, where an approved participant has provided a summary of the code of conduct to an investor under section 67, the approved participant must maintain records that show what date this happened and what method of service was used to provide the summary to the investors.

Part 6 – Incentives

Division 1 – Entitlement to incentive

Section 50 – Entitlement to incentive

Section 50 provides that an approved participant is entitled to receive an incentive for a rental dwelling covered by an allocation for each NRAS year, or part of an NRAS year, unless a determination under subsection 50(2) or (4) is in force.

The purpose of this section is to provide for the payment of incentives except where the Secretary makes a determination which effectively suspends an incentive, in circumstances where there is likely to be a breach determination process which might result in the redirection of the relevant incentive to another approved participant.

Section 50 ensures that an incentive is not paid prematurely to an approved participant where there is likely to be a transfer and/or redirection of the incentive to another approved participant. The section has clear timeframes for when steps need to be taken for a breach determination or redirection decision in order for the suspension on the incentive to remain in force, which ensures an approved participant is not disadvantaged if the basis for the pause is no longer relevant or resolved.

For example, if the Secretary becomes aware of circumstances that support a reasonable belief that the approved participant has committed a breach, the Secretary can make a determination under subsection 50(2) to suspend the incentive. If the Secretary makes a proposed breach determination within 180 days, the suspension will continue provided a breach determination is made within 120 days. However, if the Secretary does not make a proposed breach determination within the 180-day timeframe, the suspension is lifted and the approved participant will be entitled to the incentive. Similarly, the Secretary can make a determination under subsection 50(4) to suspend an incentive where the Secretary proposes to redirect an incentive. Subsections 50(3) and (5) set out when the determinations at subsections 50(2) and (4) respectively cease to be in force. A note at subsection 50(5) provides that the Administrative Appeals Tribunal could set aside a decision to redirect incentives and this would have a result that the redirection ceases to have effect for the purposes of paragraph 50(5)(b).

Section 51 – Amount of incentive and reductions by Secretary

Section 51 provides for the amount of the incentive and outlines how the Secretary may reduce the amount of the incentive for the allocation, when the Secretary is satisfied that the incentive was not available or conditions of the allocations have not been met for one or more days in an NRAS year. The reduction is to be calculated on a pro-rata basis (for example, when apportioned between two approved

participants) and can be reduced to nil. Subsections 51(1) to (4) set out how the incentive amount may be reduced.

The Secretary must provide written notice of a decision to reduce an incentive and this decision is subject to internal review on application by the approved participant. Subsections 51(5) to (8) set out the administrative requirements surrounding an internal review of a decision to reduce the amount of an incentive. An internal review application must be made within 60 days after the notice of a decision is given, or within such further period as the Secretary allows, and must be made in the approved form. A note at subsection 51(8) provides that a decision that confirms or varies a decision under subsection 51(2), or a decision that is taken to have been made because of subsection 51(9), is reviewable by the Administrative Appeals Tribunal.

Subsection 51(9) provides that if the Secretary does not provide the applicant with a review notice within two months after the applicant applied for the review, the Secretary is taken to give notice confirming the decision to reduce the incentive. This ensures that delays in undertaking an internal review do not hamper the approved participant in seeking review of this decision by the Administrative Appeals Tribunal.

Section 52 – Full amount of incentive

Section 52 specifies the base maximum incentive amount as it relates to the year beginning on 1 May 2019 and for each later year the relevant NRAS incentive index is applied.

Note that the NRAS incentive index is defined at section 5.

Section 53 – Incentive amounts when approved participant changes

Section 53 allows the Secretary to apportion the full value for an incentive on a pro-rata basis for an allocation between different approved participants when the allocation has been held by more than one approved participant during a particular period and each of those approved participants is entitled to an incentive. Subsection 53(2) provides that the amount is apportioned according to how many days in the period each approved participant held the allocation and was entitled to the incentive.

Note 1 at subsection 53(1) directs the reader to subsection 50(1) for when an entitlement arises. Note 2 provides for when this section will not apply due to a redirection or an agreed transfer. A note at subsection 53(2) clarifies that the apportioned amount may be reduced in some circumstances.

This provision aims to create clarity to formalise existing administrative practice in situations where an allocation has been transferred between approved participants but the associated incentive has not been redirected.

Division 2 – Form and giving of incentives

Section 54 – Form of incentive

Section 54 prescribes that an approved participant who is an endorsed charitable institution will receive the incentive as a payment unless they elect under section 55 to receive the incentive as a tax offset certificate. If the approved participant is not an endorsed charitable institution the form of an incentive can only be tax offset certificate.

The requirements that must be contained in the tax offset certificate are prescribed in subsection 54(2), including an identifying number and a listing of each rental dwelling covered by the certificate.

Note 1 at subsection 54(2) directs the reader so sections 51, 53, 55 and 56 for information about apportionment, variation and offset of incentive. Note 2 provides that once certificate may relate to multiple rental dwelling s and those dwellings may be associated with different joint ventures to which the approved participant is a party.

Section 55 – Elections by endorsed charitable institutions

Section 55 enables approved participants that are endorsed charitable institutions to elect to receive an incentive as a tax offset certificate rather than a payment. An election to receive a tax offset certificate may be made, for example, when the dwellings associated with an endorsed charitable institution's NRAS allocations are owned by private investors. Under subsection 55(3), the election applies for the purposes of all following NRAS years unless it is withdrawn, and under subsection 55(4) the election must be made before 31 December in an NRAS year to have effect for that NRAS year.

Subsection 55(5) provides that an approved participant must notify the Secretary within 28 days if it ceases to be an endorsed charitable institution. As a result it becomes ineligible to receive any NRAS incentive as a cash payment.

Section 56 – Variation of incentive amount

Section 56 gives the Secretary discretion to vary the amount of an incentive to be given to an approved participant for the allocation if an error was made in calculating or providing the amount, or if the calculation was based on false or misleading information. The purpose of this section is to allow the Secretary to make corrections to the amount of an incentive to be given to an approved participant through issuing an amended tax offset certificate, adding or offsetting the amount to an incentive for a future NRAS year or making a payment or through debt recovery.

A note at subsection 56(1) provides that a decision under that subsection about the amount of an incentive is reviewable by the Administrative Appeals Tribunal.

Division 3 – Redirecting incentives

Section 57 – Application of this Division

Section 57 provides that Division 3 applies where an allocation has been transferred, because of breach, during an NRAS year and the original approved participant had obligations to pass on an incentive to an investor for an NRAS year. Division 3 provides the Secretary with the power to redirect an incentive for an allocation for a rental dwelling following the transfer of the allocation to a gaining approved participant. Following the transfer of an allocation, there is a risk that an original approved participant will not pass on any amount of the incentive they have received to the investor as they no longer hold the allocation.

Division 3 aims to reduce this risk, as there is no recourse available to the investor should the original approved participant receive a portion of the incentive and not comply with their obligations in the Regulations. This division is critical to the proper administration of the Scheme as it ensures that incentives are given to the approved participant that is entitled to receive the incentive.

Section 58 – Incentive for year of transfer

Section 58 gives the Secretary discretion to give to the gaining approved participant an incentive for an allocation for the NRAS year during which the allocation was transferred that would otherwise have been given to the original approved participant for the dwelling. Section 58 provides that if the incentive is provided to the gaining approved participant, the gaining approved participant now has the obligation to pass on the incentive to the investor, rather than the original approved participant.

A note at subsection 58(1) provides that a decision under that subsection to redirect an incentive is reviewable by the Administrative Appeals Tribunal.

Subsection 58(2) provides that an incentive cannot be redirected if the incentive for the NRAS year has already been given to the original approved participant. This ensures that an incentive cannot be given twice for the same period and allocation.

Section 59– Incentive for an earlier year

Section 59 gives the Secretary discretion to give to the gaining approved participant an incentive for an allocation for an NRAS year earlier than the NRAS year during which the allocation was transferred, that would otherwise have been given to the original approved participant for the dwelling. This section could be utilised where the original approved participant did not receive the incentive for an earlier NRAS year (for example because the incentive was paused) but would have otherwise been entitled to receive it. If the Secretary does this, section 63 applies to the gaining approved participant and the investor, and the original approved participant is not entitled to receive the incentive for the earlier NRAS year, nor required to pass on the incentive for that year to the investor.

A note at subsection 59(1) provides that a decision under that subsection to redirect an incentive is reviewable by the Administrative Appeals Tribunal.

Subsection 59(2) provides that an incentive cannot be redirected if the incentive for the earlier NRAS year has already been given to the original approved participant.

Section 60 – Meaning of *redirects*

Section 60 defines the term 'redirects' for the purposes of Division 3 of Part 6. If the Secretary decides to give an incentive to a gaining approved participant under this subsection 58(1) or 59(1), the Secretary 'redirects' the incentive.

Section 61 – Secretary must notify proposed redirection

Section 61 provides that before the Secretary redirects an incentive the Secretary must give written notice of the proposed redirection and the decision to redirect to the original approved participant and to the relevant investor.

Subsection 61(2) provides that the notice of proposed redirection 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.

Subsection 61(3) provides that the written notice of the proposed redirection may be given with a notice under section 32(8). Section 32(8) requires the Secretary to notify the original approved participant and the gaining approved participant of a proposed transfer of allocation because of breach.

Subsection 61(4) provides that if the Secretary gives a notice under subsection 61(1), the Secretary must give the original approved participant and the investor written notice of the decision whether to redirect the incentive.

Section 62 – Secretary must take interests of investors into account

Section 62 provides that, in deciding whether to redirect an incentive under this Division, the Secretary must take into account the interests of investors, including the need to ensure that investors maintain confidence in the Scheme. This is to ensure that the interests of any investors who may be affected by a redirection decision are considered prior to the Secretary conducting the redirection.

Part 7 – Obligations to investors

Part 7 creates a range of obligations that an approved participant for a rental dwelling must meet in relation to any investors for the dwelling.

Section 63 - Approved participant's obligations to investors

Section 63 provides that the approved participant for a dwelling is required to 'pass on' an incentive or a State or Territory contribution to an investor if, at the time when the incentive or State or Territory contribution is received by the approved participant, the approved participant or an associated party, had a legal obligation to do so. The term 'state or territory contribution' is defined at section 5 of the Regulations.

The expression ‘pass on’ means that the approved participant for a rental dwelling must take the requisite steps to ensure any investor for the dwelling receives the relevant incentive (and or state or territory contribution, if any) if there is a legal obligation for the approved participant to do so. The legal obligation might be to pass on any payment or benefit relating to the dwelling, to take steps to enable the investor to claim a tax offset in relation to the incentive, or to make an election under section 380-11 or 380-16 of the *Income Tax Assessment Act 1997* in relation to the incentive.

Section 63 provides that the requirement for an approved participant to pass on an incentive or State or Territory contribution to an investor extends to an associated party of the approved participant. The expression ‘associated party’ is defined at section 5. By including the concept of the associated party, section 63 ensures that the approved participant does not undermine the objectives of the NRAS by constructing contractual arrangements under which an associated party, not the approved participant, has the legal obligation to pass on the incentive or any State or Territory contribution.

Section 64 – Obligations to pass on incentives in timely manner

Section 64 provides that an approved participant or gaining approved participant must comply with the requirement to pass on incentives or State or Territory contributions within a timely manner, specifically before the end of any period attaching to a legal obligation that requires the incentive or State or Territory contribution to be passed on, or within 90 days after being given the incentive or State or Territory contribution, whichever is earlier.

Section 65 – Incentives not to be withheld or refused if investor fails or refuses to accept other services

Section 65 provides protections to investors in circumstances where an approved participant would have superior bargaining powers to force those investors to purchase certain services from providers specified by the approved participant before receiving an incentive or State or Territory contribution. This aims to protect the interests of investors and promote the integrity of the Scheme. It requires the approved participant to comply with a requirement to pass on an incentive or any or State or Territory contribution and not terminate an arrangement only because an investor fails or refuses to use a tenancy management (or similar) service that is required to be used under the arrangement.

Section 66 – Incentives not to be withheld or refused if bond not paid

Section 66 provides protections to investors in circumstances where an approved participant would have superior bargaining powers to force investors to pay excessive fees or charges if they do not purchase certain services from providers specified by the approved participant before receiving an incentive or State or Territory contribution. It requires the approved participant to comply with a requirement to pass on an incentive or State or Territory contribution and not terminate an arrangement only because an investor uses an alternative service and does not pay a bond to the approved participant.

Section 67 – Approved participant must give summary of code of conduct to investors

Section 67 provides that an approved participant for a rental dwelling must give any investor(s) for the dwelling a summary of the approved participants code of conduct. This summary must be provided on or before the day that is 28 days after the investor becomes an investor for the dwelling. This aims to ensure that investors are informed of the safeguards afforded to them under the Scheme within a reasonable time after the investors have entered the Scheme.

Part 8 – Other matters

Section 68 – Secretary may approve forms

Subsection 68(1) provides that the Secretary may approve a form in which a document, information or response must be given to the Secretary for the purpose of the Scheme, and specify the manner in which the form is to be given. This section supports the Secretary and the Department to properly administer the Scheme.

Subsection 68(2) provides that if the Secretary approves a form, the Secretary must publish the form online, include any specified manner for giving the form, and take reasonable steps to direct approved participants and investors to the website. This ensures forms will be readily available and accessible to approved participants and investors.

Section 69 – Sharing and use of information

Subsection 69(1) 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 the purposes of programs that are consistent with the object of the Act, specifically, programs to increase the supply of affordable rental dwellings, or reduce rental costs for low and moderate income households. This provision is critical to the proper operation of the Scheme, especially in respect of the disclosure of information about possible breaches of the law to regulators, and disclosures to people involved in NRAS where allocations may be or have been transferred.

Subsection 69(2) gives a non-exhaustive list of persons and entities to whom information may be given under subsection 69(1).

These provisions will not adversely affect individuals' rights 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, State or Territory agency for the purposes of the operation of the Scheme.

Section 70 – Notice of end of allocation

Section 70 provides that an approved participant for a rental dwelling must give the tenants of the dwelling written notice at the end of the allocation for the dwelling. The purpose of this section is to protect the interests of tenants by requiring approved participants to inform the tenants of a rental dwelling covered by an allocation that is

coming to the end of the relevant incentive period. It is important for tenants to know when the incentive period for the allocation is ending so they may ascertain whether their rent will increase and have time consider their options.

Notice must be given in the approved form and within the time specified in the form.

Section 71 – Review of decisions by AAT

Section 71 sets out when an application may be made to the Administrative Appeals Tribunal for review of a decision by the Secretary. Paragraphs 71(a) to (h) list the decisions under the Regulations that are reviewable in the Administrative Appeals Tribunal. Those reviews will be handled in accordance with the *Administrative Appeals Tribunal Act 1975*.

Section 72 – When incentive cannot be redirected

Section 72 provides that Division 3 of Part 6 (redirecting incentives) and section 78 (redirections for certain earlier transfers) have no effect to the extent that their operation would result in the acquisition of property other than on just terms. This prevents unjust action being taken by the Secretary that may disadvantage an approved participant for a rental dwelling where the incentive for the allocation has already been given.

Section 72 is intended to create additional protections for approved participants that are the subject of redirection decisions.

Part 9 – Application and transitional provisions

Section 73– Things done under the previous regulations

Section 73 is a general transitional provision to promote efficient administration of the Scheme during the transitional period from the 2008 Regulations.

Subsection 73(1) provides that any thing that was or could be done, or any thing that arose or could arise, under the 2008 Regulations will continue to have effect, as if it had been done or had arisen under the Regulations.

Subsection 73(2) clarifies a 'thing being done' or arising, includes a reference to an entitlement to an incentive, a request for an allocation to be transferred, a determination of breach, a decision, payment, incentive, notice, application or other instrument being given or made.

Notes 1 to 3 at subsection 73(2) clarify the application of section 73 in relation to allocations made under the 2008 Regulations, and provide examples of how section 73 operates in practice. These notes provide clear examples of things that could be done, on which the Regulations can rely under section 73. These include applications made under the 2008 Regulations in the approved form, where the requirements under the Regulations may have changed slightly, such as an investor request to transfer an allocation to another approved participant.

Subsection 73(3) is a transitional provision in relation to special conditions imposed on an allocation under paragraph 13(2)(b) of the 2008 Regulations. A note at this

subsection clarifies that because the Regulations do not provide for the making of new allocations, subsection 73(3) is required in addition to subsection 73(1).

Subsection 73(4) is a transitional provision in relation to an incentive period arising for an allocation under the 2008 Regulations. A note at this subsection clarifies that because the Regulations do not provide for the making of new allocations, subsection 73(4) is required in addition to subsection 73(1).

Section 74 – General conditions of allocation existing at commencement

This section repeals the general conditions of allocation under the 2008 Regulations ('old general conditions'), for each allocation.

Note 1 in section 74 is intended to clarify the effect of this section by confirming that, at the commencement of the Regulations, the old general conditions of an existing allocation are replaced by the conditions set out in Division 2 of Part 2 of the Regulations. Note 2 in section 74 provides that, in contrast, any special conditions imposed before the commencement of the Regulations will continue after the day that the Regulations commence (see subsections 73(2) and (3)).

Note 3 provides that the Regulations can apply to a contravention of an old general condition before the commencement of the Regulations by virtue of section 77.

Section 75 – Determination relating to maximum rent

Section 75 clarifies a determination by the Secretary under subsections 12(2) or 12(3) in relation to maximum rent applies in relation to a particular charge of rent for a period during an NRAS year beginning on or after 1 May 2017.

Section 75 has the practical effect that an incentive will be available where previously none was available because there was an 'overcharging' of rent during a past period that occurred on or after 1 May 2017, if the Secretary could be satisfied of the matters set out in subsection 12(2) in respect of the overcharging.

For example, if an approved participant was responsible for an administrative error that resulted in dwellings being rented out at two cents over 80 per cent market value rent, section 75 will allow them to apply to the Secretary for a determination that the usual reductions in incentives do not apply if the tenant has been compensated for the overcharging and the other matters set out in subsection 12(2) can also be established.

Despite its retrospective commencement, this provision will not operate to disadvantage the rights of any persons. Rather, this section will have a beneficial impact on approved participants whose allocations were negatively impacted by administrative errors that resulted in overcharges of rent to request that the Secretary dispense with the usual reductions in incentives for overcharges of rent.

Section 76 – Eligible tenants moving rental dwellings

This transitional provision clarifies that subsection 41(4) applies in relation to a move by an eligible tenant from one rental dwelling to another rental dwelling on or the day after the day that the Regulations commence.

Section 77 – References to breaches etc.

This transitional provision is intended to ensure that a reference to circumstances giving rise to and references to a breach or suspected breach apply to the breach, suspected breach or circumstances whether happening before, on or after the commencement of the Regulations.

Section 78 – Redirecting incentives for certain earlier transfers

Section 78 is a transitional provision that gives the Secretary discretion to redirect an incentive for an allocation that was transferred under subsection 21A(1) of the regulations as in force immediately before 9 March 2019 (the previous regulations). This provision only applies if the incentive for that allocation was not redirected as described in subsection 41(3) of the previous regulations and if the Secretary has not received a written request from the original approved participant for the incentive.

Despite its retrospective commencement, in practice section 78 will not disadvantage the rights of any persons as it merely empowers the Secretary to make a *prospective* payment, based upon certain past facts; namely, the fact of an allocation being transferred under section 21A and the fact of the incentive for the allocation not having been redirected because of an inability to meet the requirements of subparagraph 21D(1)(b)(ii) or subparagraph 22BH(2)(b)(ii) of the previous regulations. Section 78 will not affect a change to the entitlement of the original approved participant (and through them, the relevant investor), because their entitlement to an incentive was never enlivened by virtue of them not completing a statement of compliance for the transferred allocation for the relevant period.

For the cohort of transfers to be benefited by the application of this provision, the investors were not able to receive the incentives for NRAS year beginning on 1 May 2018 from either the original approved participant or the gaining approved participant because it was not possible to backdate a transfer decision to the date of the application. Accordingly, this transitional provision allows the Secretary to invite the relevant gaining approved participant to lodge a statement of compliance within three months of the notice for the rental dwelling covered by the allocation for the relevant NRAS year. This will enable the Secretary to provide the incentives to the gaining approved participant who is required to pass on the incentives to the relevant investors.

For this cohort of transfers, none of the original approved participants have any entitlement to incentives for the 2017-18 NRAS year because none lodged a statement of compliance in relation to any transferred allocations for that period. Accordingly, there are no original approved participants that this provision will disadvantage, as the original approved participant are now out-of-time to lodge statements of compliance for the transferred allocations.

A note at subsection 78(4) provides that a decision under subsection 78(3) to redirect an incentive is reviewable by the Administrative Appeals Tribunal.

Section 79 – Details of approved participants and investors

Section 79 is an application provision that relates to section 47 (Changes to approved participant's details) and section 48 (Changes relating to investors). This section provides approved participants 28 days from the day the Regulations commence to comply with their obligations under sections 47 and 48 of the Regulations. This is to ensure approved participants are afforded a reasonable time after the commencement of Regulations to meet the new requirements of the Scheme to notify the Secretary of changes to key details of approved participants or investors within 28 days of being notified of the change.

Schedule 1 – Repeals

Schedule 1, item 1 provides that the 2008 Regulations are to be repealed. This is because the Regulations will replace the National Rental Affordability Scheme 2008 Regulations that will otherwise cease to operate on 1 April 2020 under the sunsetting provisions of the *Legislation Act 2003*.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

NATIONAL RENTAL AFFORDABILITY SCHEME REGULATIONS 2020

The 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 purpose of the *National Rental Affordability Scheme Regulations 2020* (**the Regulations**) is to repeal and replace the *National Rental Affordability Scheme Regulations 2008* (the **2008 Regulations**), which are due to sunset on 1 April 2019 and therefore would otherwise cease to operate on that date. The Regulations prescribe the National Rental Affordability Scheme (**NRAS** or **the Scheme**).

The Scheme commenced in 2008 with the aim of increasing the supply of affordable rental dwellings to low and moderate-income households by offering an incentive to complying participants (**approved participants**) who provide approved rental dwellings to low and moderate-income households at 20 per cent below market value rent. The Regulations will remake the 2008 Regulations in their entirety to allow the Government to continue operating the Scheme, whilst modernising the legislative framework for the Scheme and improving outcomes for its various stakeholders.

Under the Scheme, the Secretary of the Department of Social Services (the **Department**) 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 lodge certain information with the Department to prove its compliance with certain 'conditions of allocation' (**statements of compliance**). Under the Scheme, the key conditions that an approved participant must comply with include that the rental property (**approved rental dwelling** or **dwelling**) is leased to a low or moderate income tenant (**eligible tenant**) at a rate that is no higher than 80 per cent of the property's market value rent, and that the dwelling is not vacant for more than the prescribed amount of time in each 12 month period. There are currently over 33,000 rental properties in the Scheme.

In many cases, the approved participants in the Scheme do not own the approved rental dwellings that are attached to allocations. Rather, the dwellings are owned by other entities, such as private individuals or self-managed superannuation funds (collectively, **investors**). Commonly, where an approved rental dwelling is owned by an investor, there is an arrangement between the investor and the approved participant under which the investor makes the dwelling 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 Regulations provide greater protections for investors under the Scheme, including by ensuring investor interests must be taken into account when making decisions that impact them and reinforcing approved participant obligations to pass on state or territory contributions in relation to the Scheme.

The Regulations also enable discretion for the Secretary in specific circumstances to waive reduction or non-availability of incentives. This ensures that investors and approved participants are not disproportionately penalised for non-compliance where mitigating circumstances apply. This promotes investor and approved participant confidence in the Scheme.

The Regulations also enable the Secretary to transfer provisional allocations on the Secretary's own initiative to enable maximum utilisation of allocations in the Scheme, and accordingly increasing availability of affordable housing, where the allocations have not been delivered.

The Regulations also strengthen compliance including by providing a mechanism to disqualify an approved participant if the approved participant or its director has been convicted of an offence involving fraud, dishonesty, bribery or corruptions against the Commonwealth or a state or territory government. This supports the objects of the Scheme by ensuring the integrity of the approved participants who hold and manage allocations.

Human rights implications

Under the definition of human rights set out in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the 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 encouraging investment in the affordable housing market and retention of dwellings within the Scheme.

The Regulations further promote the objects of the Scheme to increase the supply of affordable rental dwellings and promote public confidence in the operation of the Scheme. This is facilitated through greater flexibility, discretion regarding the availability of incentives and utilising provisional allocations and stronger compliance mechanisms. The Regulations also improve and strengthen investor protections in the Scheme, which consequently promotes increased housing security for tenants.

All retrospective provisions have a positive impact on affected stakeholders and do not disadvantage any person's rights or impose any liabilities.

All decisions made under the Regulations that affect rights and obligations of approved participants and investors must be provided in writing and are subject to merits review.

Conclusion

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

The Hon. Anne Ruston MP

Minister for Families and Social Services