THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL RENTAL AFFORDABILITY SCHEME BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Housing, the Hon Tanya Plibersek MP)
The National Rental Affordability Scheme Bill 2008 will provide new principal legislation relating to the Australian Government’s new National Rental Affordability Scheme.

The object of the bill is to encourage large-scale investment in housing by offering an incentive to participants in the National Rental Affordability Scheme so as to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.

The Scheme offers incentives to providers of new dwellings on the condition that they are rented to low and moderate income households at 20 per cent below market rates.

The incentive comprises a Commonwealth contribution in the form of a refundable tax offset or payment to the value of $6,000 per dwelling per year and a State or Territory contribution in the form of direct financial support or in-kind contribution to the value of $2,000 per dwelling per year.

The incentive will be provided each year for 10 years to complying participants and will be indexed in line with the rental component of the Consumer Price Index.

Part 1 deals with introductory matters, including the commencement date, object and definitional matters.

Part 2 provides for regulations to prescribe the new National Rental Affordability Scheme. The Scheme will address specified matters such as the approval of participants, approval of rental dwellings and providing incentives to an approved participant if certain conditions are satisfied, amongst other matters.

Part 3 provides for certain miscellaneous matters, such as a delegation power for the Secretary and the power for the Governor-General to make regulations.

The National Rental Affordability Scheme (Consequential Amendments) Bill 2008 will amend the *Income Tax Assessment Act 1997* as a consequence of the substantive provisions in the National Rental Affordability Scheme Bill 2008.
Financial impact statement

The fiscal cost of the National Rental Affordability Scheme package, of which the National Rental Affordability Scheme Bill 2008 and the National Rental Affordability Scheme (Consequential Amendments) Bill 2008 are a part, is estimated at $622.6 million over four years (including administration costs) as follows:

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<th>2008-09</th>
<th>2009-10</th>
<th>2010-11</th>
<th>2011-12</th>
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<tr>
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<td>-$23.5m</td>
<td>-$72.2m</td>
<td>-$170.1m</td>
<td>-$356.8m</td>
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NOTES ON CLAUSES

This explanatory memorandum uses the following abbreviation:

- ‘Scheme’ means the National Rental Affordability Scheme.

Part 1 – Preliminary

Clause 1 sets out how the Act is to be cited, that is, the National Rental Affordability Scheme Act 2008.

Clause 2 provides for the Act to be taken to have commenced on 1 July 2008. This is to allow for eligibility under the Scheme to be recognised from as early as 1 July 2008, in circumstances where the conditions of the Scheme have been complied with. No person’s rights will be adversely affected by this retrospective commencement.

Clause 3 provides for the object of the Act. The object is to encourage large-scale investment in housing by offering an incentive to participants in the Scheme so as to: (a) increase the supply of affordable rental dwellings; and (b) reduce rental costs for low and moderate income households.

These objects are expressly relevant for the purposes of clause 5, which provides that, to further the objects of the Act, the regulations must prescribe the Scheme.

Clause 4 provides definitions for a number of terms used generally in the Act.

**acquisition of property** This term has the same meaning as in paragraph 51(xxii) of the Constitution. The term is used in clause 10, ‘Compensation for acquisition of property’.

**allocation** This term relates to an incentive period (see definition below) and means an allotment to an approved participant of an entitlement to receive an incentive for an approved rental dwelling in relation to an NRAS year (see definition below) that falls within the incentive period if conditions are satisfied in relation to the rental dwelling. The term is used in clause 7 ‘Making allocations’, as well as in clauses 6, 8, 9 and 10.
**incentive**  
This term means: (a) a National Rental Affordability Scheme Tax Offset; or (b) an amount payable for an NRAS year. For provisions relating to claiming the National Rental Affordability Scheme Tax Offset, see Division 380 of the *Income Tax Assessment Act 1997*, as inserted by the National Rental Affordability Scheme (Consequential Amendments) Bill 2008. This term is used throughout the bill.

**incentive period**  
This term means a 10 year period that starts on or after 1 July 2008. This term is used in the definition of ‘allocation’ (above) and clause 7, ‘Making allocations’.

**just terms**  
This term has the same meaning as in paragraph 51(xxxi) of the Constitution.

**National Rental Affordability Scheme**  
This term means the scheme prescribed for the purposes of section 5.

**NRAS year**  
This term is short for National Rental Affordability Scheme year and means: (a) the period beginning on 1 July 2008 and ending on 30 April 2009; and (b) the year beginning on 1 May 2009 and later years beginning on 1 May. As the first NRAS year during the life of the Scheme covers a 10 month period only, a maximum of 5/6 of the annual incentive amount will be available to be claimed in respect of that period.

The term NRAS year is used in the definitions of ‘allocation’ and ‘incentive’ (above) and in numerous places throughout the bill.

The reason behind the first NRAS year ending on 30 April 2009 and subsequent NRAS years starting on 1 May is that approved participants will be required to provide annual statements of compliance relating to the Scheme’s requirements as at 30 April each year. This timing is established to facilitate the issuing of certificates in respect of refundable tax offsets and the making of payments, where possible, before the end of the financial year.

**rental dwelling**  
This term means a dwelling for which rent is payable and includes certain identified categories of dwelling (discussed below) but does not include other identified categories of dwelling (also discussed below).

The identified categories of dwelling that are expressly included in the definition of ‘rental dwelling’ are:
(a) a part of a dwelling or building that is capable of being lived in as a separate residence; and

(b) a unit that is a dwelling (the term ‘unit’ is itself defined, see below); and

(c) any dwelling prescribed by the regulations to be a rental dwelling for the purposes of this definition.

The identified categories of dwelling that are expressly not included in the definition of ‘rental dwelling’ are a caravan, houseboat, another kind of mobile dwelling or any dwelling prescribed by the regulations not to be a rental dwelling for the purposes of this definition. The intention is that this would include emergency or crisis accommodation, temporary structures such as demountables or containers, or an existing dwelling that has been refurbished but does not lead to an overall increase in the number of rental dwellings.

The term ‘rental dwelling’ is used in clause 3, the definition of ‘allocation’ (see above) and clauses 5, 6 and 7.

**Secretary**

This term means the Secretary of the Department. Currently, the Secretary with the responsibility for the National Rental Affordability Scheme is the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs.

This term is used in numerous places throughout the bill, as provision is made for the Secretary to be given a range of responsibilities in relation to the Scheme. It is also used in clause 11, ‘Delegation’.

**unit**

This term means a unit held under a strata title system (or a similar system) established under a law of a State or Territory (however the unit is described for the purpose of that law), together with: (a) any accompanying common property; and (b) any permanent improvement (for example, a garage or storeroom) associated with the unit. This term is used in the definition of ‘rental dwelling’ (see above).
Part 2 – The National Rental Affordability Scheme

In recognition of the increasing number of Australians experiencing housing stress, the Government, as one part of a comprehensive housing affordability package, is establishing the National Rental Affordability Scheme.

The Scheme aims to address the shortage of rental housing. It will stimulate the supply of lower-rent homes by offering an incentive to participants in the Scheme to build new dwellings for rent to low and moderate income households at 20 per cent below market rates.

The Scheme will help create up to 50,000 new rental properties across Australia at a cost of over $620 million in the first four years.

The Scheme aims to encourage long term commitment to the provision of affordable rental housing by offering an incentive for 10 years, provided the Scheme’s requirements continue to be met.

The Scheme is designed to pool significant resources from a range of participants including financial institutions, banks, property trusts, superannuation funds, developers and not for profit organisations.

The two key elements of the Incentive are:

- a Commonwealth Government incentive of $6,000 (indexed) per dwelling per year in the form of a refundable tax offset or payment; and

- a State or Territory Government incentive of $2,000 or more per dwelling per year. State and Territory government assistance will be provided through cash payments or in-kind financial support.

This bill deals with the Commonwealth Government incentive.

The first call for applications for incentives (round one) occurred on 24 July 2008, in advance of the legislation being enacted to establish the Scheme. The legislation is retrospective to allow for eligibility for incentives to date from as early as 1 July 2008. Applicants have been advised that they will be informed if any change is made to the Scheme that could impact on their application. Incentives will be allocated to round one applicants when the legislation is passed and may date from 1 July 2008. There is no adverse effect from this retrospectivity.

Division 1 – Making the National Rental Affordability Scheme

Clause 5 requires regulations to be made that prescribe the Scheme and further the objects of the Act.
The Scheme must prescribe certain matters, namely, approval of participants by the Secretary, the approval of rental dwellings by the Secretary, providing incentives to an approved participant if certain conditions are satisfied, and dealing with matters required or permitted by the Act to be included in the Scheme, as well as dealing with ancillary or incidental matters.

It was desirable to include most of the administrative details of the Scheme’s operation in the regulations rather than in the bill itself to provide the flexibility required to address changing circumstances. In particular, this will allow for greater flexibility for the administration of the Scheme to respond to changes in determining market rent, tenant eligibility criteria, acceptable periods of vacancy and reporting requirements in support of eligibility for incentives.

There are, however, certain mandatory requirements that are provided for in the bill itself (subclause 7(2) refers).

The Scheme will be reviewed in its early years of implementation to test whether or not there is scope for simplification or reduction in the administrative burden, whether there are evolving issues of non-compliance that need to be addressed, and whether the Scheme is adequately focussed on those who would otherwise be in rental stress. The review may indicate a need for improvements to the Scheme.

Clause 6 provides for other matters that may be included in the Scheme, namely, any or all of the following: (a) the application process for an allocation; (b) the assessment criteria for an allocation (which may vary from time to time); (c) the amount of an incentive; and (d) the process for determining market value rent of a rental dwelling for an NRAS year.

In relation to the assessment criteria for an allocation, these are proposed to be criteria such as whether there is a demonstrated need for the proposal, whether accessibility and sustainability outcomes would be delivered, whether the participant has demonstrated capacity and experience and whether the proposal is financially viable, as well as whether the ‘Priority Areas of Interest’ are addressed in the proposal. The Priority Areas of Interest are likely to change to reflect the changing requirements for affordable rental housing. The Priority Areas of Interest already announced for round one of the establishment phase of the Scheme are that proposals: include dwellings that will become available for rent in 2008-09; are for large scale projects with a minimum of 100 dwellings; are consistent with relevant State/Territory/local government affordable housing priorities; include dwellings for tenants with special needs (such as people with disabilities, older Australians and Indigenous people); and maximise long term affordable housing outcomes for tenants.

The amount of an incentive is identified as $6,000 (indexed to the rental component of the Consumer Price Index) per dwelling per year in the form of a refundable tax offset or payment, where there has been compliance with the Scheme’s requirements for a full year.
Where eligibility has not been established for the full 12 months, the amount of the incentive will be reduced proportionally. This will occur in the first NRAS year, as it is a 10 month period. It may otherwise occur where, for example, a dwelling only becomes available for rent part way through an NRAS year or where a tenant become ineligible part way through an NRAS year.

The amount of the incentive to which a participant is entitled may also be affected by such matters as withdrawal from the Scheme before the expiry of the 10 year incentive period.

**Division 2 – Allocation process**

**Clause 7** provides for the Secretary to make an allocation for an incentive period in respect of a rental dwelling.

Such allocations are subject to the conditions: (a) set out in subclause 7(2); and (b) on the condition that an incentive may be offset or recouped in the circumstances provided for by the Scheme; and (c) on any other conditions provided for by the Scheme.

The conditions in subclause 7(2) are mandatory requirements relating to eligible rental dwellings, eligible tenants and the maximum rent that can be charged, as well as the permitted vacancy rates.

In particular, it is a condition of the Scheme that either: (i) the rental dwelling has not been lived in as a residence at any time before the first day of the incentive period (see further below in relation to subclause 7(3)); or (ii) the rental dwelling was unfit for anyone to live in, and since the day on which it has been made fit for living in, it has not been lived in as a residence between that day and the first day of the incentive period. The intention behind this condition is that the rental dwelling must be ‘new’ and increase the overall supply of rental dwellings to be eligible.

To avoid doubt, subclause 7(3) provides that for the purpose of subparagraph (2)(a)(i), if a dwelling or building has been converted to create additional residences, then the part of the dwelling or building that is capable of being lived in as a separate residence must not have been lived in as a separate residence before the first day of the incentive period.

Also, to the extent that the rental dwelling is rented during an NRAS year that falls within the incentive period, both: (i) the rental dwelling is rented to a tenant of a kind prescribed by the regulations; and (ii) the rent that is charged for the rental dwelling; is, at all times during the year, at least 20 per cent less than the market value rent for the dwelling.
Further, in relation to permitted vacancy rates, to the extent that the rental dwelling is not rented during an NRAS year that falls within the incentive period, it is a condition that the dwelling is not vacant: (i) for longer than the period prescribed by the regulations; and (ii) for longer than a continuous period prescribed by the regulations that begins in the previous NRAS year and ends in the first-mentioned NRAS year.

It is intended that a rental dwelling must not be vacant for more than 13 cumulative weeks in an NRAS year or more than 13 consecutive weeks across two NRAS years.

To preserve the integrity of the Scheme, an incentive may be offset or recouped in circumstances provided for by the Scheme. This may occur where an error made in certifying compliance with Scheme requirements resulted in an incorrect issue of refundable tax offset or an incorrect payment.

Clause 8 provides for the Scheme to make provision for the variation, transfer and revocation of allocations.

It is envisaged that circumstances may arise under which an allocation may need to be varied. For example, this provision may be used to substitute a new property for an existing rental dwelling, where the latter dwelling was sold to the tenant, to enable the incentive to continue to be claimed.

It is also envisaged that transfer of an allocation to another approved participant in the Scheme in certain circumstances may be desirable. For example, this could occur in circumstances where a rental dwelling is sold to another approved participant in the Scheme who will continue to provide the property for rent in accordance with the Scheme requirements.

Further, the revocation of an allocation in certain circumstances may be desirable to deal with non-compliance with the Scheme. For example, this could occur in circumstances where dwellings are unable to be completed within an identified time-frame.

**Division 3 – Receiving incentives**

Clause 9 provides for the Scheme to make provision for the Secretary to either: (a) issue a certificate to an approved participant of a kind provided for by the Scheme that states the National Rental Affordability Scheme Tax Offset claimable in relation to an NRAS year; or (b) make a payment to an approved participant of a kind provided for by the Scheme for an NRAS year.

Unless a participant is an endorsed charitable institution, the incentive is to be made available in the form of the refundable tax offset. The National Rental Affordability Scheme (Consequential Amendments) Bill 2008 provides for details relating to claiming the tax offset.
The incentive is claimable or payable (as the case may be) annually in arrears for ten years, on condition that the requirements of the Scheme continue to be met.
Part 3 – Miscellaneous

**Clause 10** reinforces the bill’s adherence to paragraph 51(xxxi) of the Constitution.

If there is an acquisition of property within the meaning of paragraph 51(xxxi) of the Constitution resulting from the operation of the Act, compensation must be provided by the Commonwealth so that the acquisition is on 'just terms' within the meaning of paragraph 51(xxxi) of the Constitution.

If the Commonwealth and the person whose property has been acquired do not agree on the appropriate amount of compensation, the person may institute proceedings in the Federal Court to recover an amount of compensation which the court determines to fulfil the meaning of an acquisition on just terms.

**Clause 11** provides for the Secretary to be given a delegation power.

In relation to the Secretary’s powers to approve a participant in the Scheme, approve a rental dwelling in the Scheme and decide whether to make an allocation under the Scheme, the Secretary may only delegate those powers to a member of the Senior Executive Service in the Department.

In relation to other powers and functions under the Act or the regulations, the Secretary is given the power to delegate to an APS employee in the Department. Given the large number of decisions that may need to be made in relation to the Scheme (that may provide for up to 50,000 incentives) and the frequency at which such decisions may need to be exercised, limiting all delegations only to members of the Senior Executive Service in the Department would be too restrictive for the efficient administration of the Scheme.

In exercising powers or functions under a delegation, the delegate must comply with any directions of the Secretary.

**Clause 12** provides the power for the Governor-General to make regulations which prescribe matters required or permitted by the bill or which are necessary or convenient for giving effect to the bill. For example, regulations will be required for clause 5, in order to prescribe the Scheme. Regulations will also be required under the bill in order to describe various matters, such as the relevant kinds of tenant under clause 7. The regulations must be consistent with the provisions of the bill and will be subject to scrutiny.

Further, subclause 12(2) expressly provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations made before 1 July 2009 for the purposes of the Act may be expressed to take effect from a date before the regulations are registered under the *Legislative Instruments Act 2003*. 
This provision will, beneficially, allow for the regulations to operate to recognise eligibility for an incentive from as early as 1 July 2008 and to ensure that relevant conditions can be applied from that time on.