EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 133

Issued by the authority of the Minister for Housing

National Rental Affordability Scheme Act 2008

National Rental Affordability Scheme Amendment Regulations 2009 (No. 1)

Section 12 of the National Rental Affordability Scheme Act 2008 (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 Act enabled the establishment of the National Rental Affordability Scheme (the Scheme), with details prescribed in regulations, providing conditions for applications, assessment, allocation and eligibility for incentive. The Scheme is intended to encourage the development of affordable rental housing by offering conditional incentives to individuals and entities providing new rental housing to low and moderate income households. The Scheme commenced operation on 1 July 2008.

Purpose

The purpose of the Regulations is to make various amendments to the National Rental Affordability Scheme Regulations 2008 (the Principal Regulations), which have been identified as being necessary or desirable for the continued efficient operation of the Scheme.

The changes in the Regulations include:

- four additional sets of assessment criteria in Schedule 1 to the Principal Regulations, which the Secretary may apply to future calls for applications under the Scheme;
- the introduction of indexation for income limits applying to eligible tenants, as well as a mechanism for calculating income limits where additional adults or children are members of a household;
- providing for independent merits review by the Administrative Appeals Tribunal (AAT) of the Secretary’s decisions under the Principal Regulations to revoke an allocation, determine reductions and vary an incentive amount (where the Secretary determines that an error arose making an incentive);
- amendments to facilitate the issuing of a tax offset certificate in the name of a joint venture, and an associated amendment to provide for replacement certificates, in certain circumstances; and
- amendments to address issues that may arise where an allocation is made with a retrospective date of operation which occurs in a previous National Rental Affordability Scheme year (NRAS year).

Details of the Regulations are outlined in the Attachment.
The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**Retrospectivity**

The Regulations are taken to have commenced on 1 July 2008, the date the Scheme commenced operation. Subsection 12(2) of the Act expressly provides that regulations made before 1 July 2009 may be expressed to take effect from a date before the regulations are registered on the Federal Register of Legislative Instruments.

None of the amendments will result in disadvantage to any person or entity.

**Consultation**

The State and Territory Governments were informed of the proposed amendments to Schedule 1 to include the additional sets of assessment criteria.

The Senate Standing Committee on Regulations and Ordinances was consulted in relation to the proposed amendments to regulations 22, 28 and 30(1) of the Principal Regulations to allow independent merits review by the Administrative Appeals Tribunal (AAT).
Details of the National Rental Affordability Scheme Amendment Regulations 2009 (No. 1)

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the National Rental Affordability Scheme Amendment Regulations 2009 (No. 1).

Regulation 2 – Commencement

This regulation provides for the Regulations to be taken to have commenced on 1 July 2008. This coincides with the date that the Scheme commenced operation. The retrospective commencement of the Regulations will not cause detriment to any person or entity.

Regulation 3 – Amendment of National Rental Affordability Scheme Regulations 2008

This regulation provides that Schedule 1 amends the National Rental Affordability Scheme Regulations 2008 (the Principal Regulations).

Regulation 4 – Revocation of Instrument

This regulation provides for the National Rental Affordability Scheme (Household Types) Determination 2009 to be revoked. This Determination made an amendment to the table in subregulation 19(4) of the Principal Regulations, relating to eligible tenants, that will be superseded by the changes made to regulation 19 by items 5, 6 and 7 of the Regulations.

The Governor-General has power to make regulations under section 12 of the Act. Under subregulation 19 (5) of the Principal Regulations, the Governor-General has partially delegated those powers to the Secretary by giving the Secretary power to make legislative instruments in certain circumstances.

That delegation however, does not prevent the Governor-General from exercising her powers to make further regulations under the Act, including the power to revoke a delegation previously made. In that regard, please see paragraph 34AB(d) of the Acts Interpretation Act 1901.

Schedule 1 – Item 1

This item amends the definition of NRAS incentive index in regulation 4 by omitting the reference to “financial year” and inserting a reference to “NRAS year”. This will enable the relevant indexation amount for the immediately preceding NRAS year, rather than financial year, to be applied to the incentive amounts.

The term NRAS incentive index is used in subregulation 26(2) and subregulation 27(2), to provide for the indexation of incentive amounts that will be provided to approved participants for standard dwellings and subsidiary dwellings, respectively.
The intention is to apply the indexation to the incentive amounts payable for standard and subsidiary dwellings at the beginning of an NRAS year (1 May).

As originally drafted, the definition of NRAS incentive index would apply the amount of indexation as at 1 March for the previous financial year rather than the previous NRAS year. This would mean, for example, that indexation applied at 1 May 2009 would be the amount as at 1 March 2008. The intention is to apply the amount as at 1 March 2009, to ensure the indexation amount being applied is the most relevant and accurate.

Schedule 1 – Item 2

This item amends the definition of NRAS market index in regulation 4 by omitting the reference to “financial year” and inserting a reference to “NRAS year”.

The term NRAS market index is used in subregulation 16(9) to provide that any increase in the amount of rent that applies to an approved rental dwelling, following a review of rent by the approved participant under subregulation 16(7), must not exceed the percentage change of the NRAS market index.

As originally drafted, the definition of NRAS market index would result in the maximum percentage change being based on indexation as at 1 March of the previous financial year, rather than the previous NRAS year. This would mean, for example, that the maximum percentage change at 1 May 2009 would be the amount as at 1 March 2008. The intention is to apply the amount as at 1 March 2009, to ensure the indexation amount being applied is the most relevant and accurate.

The Department intends to update the NRAS market index on an annual basis on its NRAS website, to coincide with the start of the NRAS year.

The amendment would also enable a level of consistency between the two definitions, NRAS incentive index and NRAS market index in the Principal Regulations.

Schedule 1 – Item 3

An additional definition of NRAS tenant income index has been inserted. The NRAS tenant income index is defined as meaning the All Groups component of the Consumer Price Index, Percentage Change from Corresponding Quarter of Previous Year, March quarter, using the all groups weighted average of eight capital cities, as published in the Australian Bureau of Statistics publication Cat. no. 6401.0 — Consumer Price Index, Australia, CPI: Groups, Weighted Average of Eight Capital Cities, Index Numbers and Percentage Changes, rounded to the nearest single decimal point.

The term NRAS tenant income index is used in the amended subregulation 19(5). The specified index will be applied annually on 1 May to the income limits for a household, which income limits are specified in the amended subregulation 19(4).
Schedule 1 – Item 4

This item substitutes regulations 16 and 17 which deal, respectively, with “Conditions of allocation” and “Statement of Compliance”.

The new provisions include amendments relating to the lodgement of Statements of Compliance and the requirements applying to market rent valuations, as well as incorporating a number of technical drafting and other minor amendments.

In particular, for regulation 16, a new subregulation 16(1) is included providing for when Statements of Compliance must be lodged. Originally, the requirement was simply that lodgement must occur by 13 May of the following NRAS year. Now, additional provision is made in new subregulation 17(2) to cover the situation where retrospective allocations may have been made that mean it would not be practicable to comply with the 13 May deadline.

Then, for subregulations 16(4), (5) and (6) relating to market value rent, the provisions clarify the dates that the valuations must relate to and when they must be provided.

For regulation 17, two new subregulations have been added, as well as some changes made to the required matters that must be included in Statements of Compliance.

In particular, new subregulation 17(1) clarifies who must lodge the Statement of Compliance; namely, the person who is the approved participant at the end of the relevant NRAS year. This recognises the fact that there may have been a transfer of the relevant allocation to another person or entity (regulation 21 refers) throughout the course of an NRAS year.

Then, new subregulation 17(2), as well as providing for the usual date that Statements of Compliance must be lodged by, that is, by the following 13 May after the end of an NRAS year, makes provision for what is to occur in the case that an allocation has been made with a retrospective date of operation which occurs in a previous NRAS year. In those cases, Statements of Compliance must be lodged as soon as practicable after the allocation is made.

Further, new subregulation 17(3) includes a new paragraph 17(3)(h) which requires, where applicable, for the name of the joint venture to appear on any tax offset certificate to be included in the Statement of Compliance as well as the legal names of each participant in the joint venture as at the end of the NRAS year. This amendment links in with items 9 and 10 discussed below.

Schedule 1 – Item 5

This item amends paragraph 19(1)(a) by replacing the words “individual or couple” with “person or persons”, consistent with the changes made to regulation 19 by items 6 and 7 below.
Schedule 1 – Item 6

This item substitutes paragraphs 19(1)(d) and (e), with the effect that the definition of the term “child” remains the same, but is moved from paragraph (d) to paragraph (e), the definition of “couple” is omitted, as it is no longer used in the amended regulation 19, and a new definition of the term “adult” is inserted.

For the purposes of regulation 19, the term “adult” now includes a person under 18 years of age living independently outside of the family, who is not financially dependant on an eligible tenant.

Schedule 1 – Item 7

This item substitutes new subregulations 19(2), (3), (4), (5) and (6) for the existing subregulations 19(2) to (5) relating to eligible tenants.

The new subregulations provide for the introduction of indexation for the relevant income limits, and a mechanism for calculating income limits where additional adults or children are members of a household, amongst other changes to the requirements relating to eligible tenants in regulation 19.

In particular, new subregulation 19(2) provides for how tenants of an approved rental dwelling become eligible tenants. The initial income limits that are relevant are set out in subregulation (4) and are indexed according to subregulation 19(5) on 1 May each year, starting from 1 May 2009.

Then, new subregulation 19(3) provides for how eligible tenants cease to be eligible tenants. Rather than specifying upper income limits for particular household types, reference is made to the relevant percentage by which the gross income of eligible tenants exceeds the income limit for their household, namely by 25% or more in 2 consecutive eligibility years.

New subregulation 19(4) provides for the income limits that apply to households. A different, higher income limit applies if a household includes a sole parent. In addition, provision is made for increased income limits to apply depending on the additional numbers of adults and children in the household.

It is desirable to provide a mechanism for the inclusion of additional household types and set appropriate income limits for these households to support a broader range of household composition. For example, several single adults, two couples living together or a couple with adult children still living at home. Providing a mechanism for this recognises the trend towards adult children remaining in the family home for longer and is more inclusive of cultural practices where extended families live together.

New subregulation 19(5) provides for the indexation of the relevant household income amounts mentioned in subregulation 19(4).

New subregulation 19(6) provides the Secretary with the power to make legislative instruments that change from time to time any or all of the income limits mentioned in subregulation 19(4).
Schedule 1 – Item 8

This item makes a technical amendment to subparagraph 29(2)(c)(ii) to accommodate the inclusion of an additional subparagraph in paragraph 29(2)(c) (see item 9).

Schedule 1 – Item 9

This item inserts a new subparagraph 29(2)(c)(iii) to provide for the issuing of a tax offset certificate in the name of a joint venture.

The approved participant will need to notify the Department of the name that should appear on a tax offset certificate.

Originally paragraph 29(2)(c) only provided for issue of certificates to individuals and entities. The *Income Tax Assessment Act 1997* (ITAA 1997) expressly excludes non-entity joint ventures from the definition of entity. The change was therefore necessary to facilitate access to National Rental Affordability Scheme tax offsets under section 380-10 of the ITAA 1997.

Section 380-10 of the ITAA 1997 provides for the circumstances when a party to a non-entity joint venture may claim a relevant tax offset and how the amount of the tax offset is determined.

A “**non-entity joint venture**” is defined under section 995-1 of the ITAA 1997 to mean “an arrangement that the Commissioner is satisfied is a contractual arrangement:

(a) under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties; and
(b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties.”

As the existence of a non-entity joint venture can only be determined by the Commissioner, the regulation seeks details of any joint venture which can then be subject to the Commissioner’s consideration.

Schedule 1 – Item 10

This item inserts a new subregulation 29(3) to provide for the issuing of a replacement tax offset certificate, in the name of the approved participant, if a certificate issued in the name of a joint venture is ineffective for claiming a refundable tax offset.

An approved participant will need to make a written request to the Secretary for a replacement certificate.

This provision is designed to ensure that an incentive can still be provided in relation to approved rental dwellings, in the event that a particular joint venture is not one that the Commissioner is satisfied is a non-entity joint venture within the meaning of the ITAA 1997.
This provision is necessary because the Commissioner may not have made a decision in relation to whether the particular joint venture arrangement meets the relevant requirements for a non-entity joint venture under the ITAA 1997 prior to the issuing of the original tax offset certificate. It is also necessary to ensure that an incentive is provided where all eligibility requirements for the incentive have been met.

**Schedule 1 – Item 11**

This item inserts a new regulation 33 “Review by AAT of decisions by Secretary”.

New regulation 33 provides for independent merits review by the Administrative Appeals Tribunal (AAT) of certain decisions of the Secretary under the Scheme. The relevant decisions are those under regulation 22, to revoke an allocation, regulation 28, to determine reductions and regulation 30(1) to vary an incentive amount (where the Secretary determines that an error arose making an incentive).

These amendments acquit the undertaking given by the Minister for Housing to the Senate Standing Committee on Regulations and Ordinances on 10 March 2009, to amend the Regulations to provide for merits review of the Secretary’s decisions made under regulations 22, 28 and 30(1), following correspondence in relation to the Principal Regulations.

Further, in relation to applications for review under new paragraph 33(1)(b), where the Secretary determined reductions to be made from the amount of an incentive, given that subregulation 28(3) already provides for internal review of such decisions, an appeal to the AAT may only be made after an internal review has been requested and completed, or if the review has not been completed, 2 months after requesting the internal review.

**Schedule 1 – Item 12**

This item makes a technical amendment to Set 1, paragraph (2)(e) to close the brackets around the listed range of people included as tenants with special needs.

**Schedule 1 – Item 13**

This item includes four new sets of assessment criteria in Schedule 1 to the Principal Regulations.

The Secretary has the power to make a call for applications for allocations under the Scheme (regulation 7 refers). Each call for applications must specify the set of assessment criteria in Schedule 1 that will apply to applications in response to the call. Originally, only one such set of assessment criteria, Set 1, was specified.
To facilitate access to NRAS incentives where:

(a) certain public land is released for mixed residential development by the private sector (new Set 3 refers);
(b) a minimum number of 1000 dwellings is proposed (new Set 4 refers); and
(c) the NRAS application contains links with the Social Housing Initiative component of the Nation Building and Economic Stimulus package (new Set 5 refers);

new sets of assessment criteria were required.

In addition, each of the new Sets contains environmental sustainability criteria, requiring applicants to detail or forecast the energy rating of the dwellings and the extent to which the dwellings incorporate efficient lighting, environmentally friendly hot water systems, ventilation and water tanks. Proposals that include high energy ratings for each dwelling, or demonstrate that each dwelling incorporates some or all of the other listed matters may be given priority.

Further, sound proofing has been included as a priority area of interest in each of the new sets of assessment criteria. Proposals that include sound proofing that exceeds the State, Territory or local government requirements, and demonstrate how those requirements are exceeded, may be given priority.

In particular, new Set 2 comprises the same assessment criteria as Set 1, with the exception of the priority area of interest that proposals for rental dwellings will become available for the Scheme between 1 July 2008 and 30 June 2010, as that time limitation is no longer suitable, and with the addition of environmental sustainability criteria (paragraph 1(f) refers) and the priority area of interest of compliance with sound proofing requirements (paragraph (2)(c) refers).

For new Set 3, it is a requirement that the application relates to land that the Commonwealth has agreed with the relevant State or Territory is suitable for mixed residential development.

Some State and Territory Governments are releasing public land for social and affordable housing or re-developing existing public housing estates and are seeking to promote mixed developments that include social housing, private affordable (and higher value) housing and supported affordable housing. It is desired that applications for allocations under NRAS relating to dwellings in such areas should be able to be processed as soon as possible and without unnecessary duplication between the process that the relevant State/Territory has undertaken in relation to developing the land and the NRAS process.

A reduced number of assessment criteria may be applied under this set, given the Commonwealth’s prior approval of the land on which the dwellings are or will be located.

For new Set 4 the priority area of interest that proposals involve 1000 or more rental dwellings has been included (paragraph 2(a) refers).
For new Set 5, the priority area of interest that proposals for which an application for funding under the Social Housing Initiative has been made by 30 June 2009 has been included (paragraph 2(a) refers).

The Nation Building and Economic Stimulus package contains a component directed at improving social housing, namely the Social Housing Initiative. The Social Housing Initiative is seeking applications for capital funding for the development of social housing dwellings. Initial applications for funding under the Social Housing Initiative are received and assessed by the relevant State or Territory, on the basis of guidelines approved by the Commonwealth. States and Territories will then submit their recommendation in relation to the applications to the Commonwealth by 30 June 2009 and the Commonwealth will determine the successful applicants.

The intention is for linkages to be created between the Social Housing Initiative and the NRAS. In particular, it is desired that a development which incorporates both Social Housing Initiative funding and NRAS will be considered as a priority area of interest for the purposes of assessing NRAS applications.

However, a dwelling that is the subject of capital funding under the Social Housing Initiative will not be eligible to receive an NRAS incentive. For example, a development could include 100 dwellings for which NRAS allocations are sought and a further 100 dwellings for which capital funding under the Social Housing Initiatives are sought.

It is not a requirement under Set 5 that an application for Social Housing Initiative funding is successful in order for the NRAS application to be successful. Further, in order for the priority area of interest criterion to be satisfied, it will be sufficient for an applicant to indicate in their NRAS application that they applied for Social Housing Initiative funding by 30 June 2009.