EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 78

Issued by the authority of the Minister for Housing

National Rental Affordability Scheme Act 2008

National Rental Affordability Scheme Amendment Regulations 2010 (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) in regulation, 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 with effect from 1 July 2008.

Purpose

The purpose of the Regulations is to make a number of amendments to the National Rental Affordability Scheme Regulations 2008 (the Principal Regulations) as part of the ongoing management of the Scheme.

The amendments that have been identified as being necessary or desirable for the continued efficient operation of the Scheme include:

- providing endorsed charitable institutions with the option to elect to receive a tax offset certificate rather than a payment;
  - The intention of the Scheme is that the full incentive should be provided to participants in the Scheme who have complied with all relevant requirements.
  - Currently, approved participants which are endorsed charitable institutions are required to receive their incentive as a payment and where they act on behalf of other parties, they may expose those other parties to a tax obligation when they pass on a portion of any incentive payment received.
  - Where an endorsed charitable institution acts on behalf of other parties and wants to pass on the relevant share of the Scheme incentive to those parties without any reduction through the application of tax, this would be more readily achieved by means of a tax offset certificate.
  - Accordingly, providing such approved participants with the option to elect to receive a tax offset certificate rather than a payment is intended to offer an alternative for recipients of incentive to access appropriate National Rental Affordability Scheme Tax Offset provisions in the Income Tax Assessment Act 1997. The amendment will allow a choice of means for passing on an incentive to parties with the aim being, if possible, for those parties to receive a full entitlement that is not reduced through the application of tax.
additional circumstances in which reservations of allocations may be withdrawn, including where there has been associated misleading advertising; and
- Reservations of allocations relate to the situation where dwellings are not yet available for rent; for instance, the dwellings that are the subject of the application have not yet been built.
- Where the Housing Secretary has decided to make an offer of allocation in relation to dwellings that are not yet available for rent, conditions must be specified that must be satisfied before an allocation will be made for the dwelling. In such circumstances, where an applicant accepts an offer in relation to dwellings, the Secretary must reserve an allocation in relation to the dwelling, to be made when the conditions are fulfilled (regulation 14 of the Principal Regulations refers).

introducing two new sets of assessment criteria that may be used for calls for applications under the Scheme and which provide for a staged assessment process.

- The Scheme prescribes a process for a person or entity to make an application for allocations (of incentives). In summary, what must occur is that:
  
  ▪ the Secretary must make a “call for applications” specifying the set of assessment criteria in Schedule 1 to the Principal Regulations that will apply to applications in response to the call (regulation 7 of the Principal Regulations refers);
  ▪ applications must be made in accordance with the Scheme requirements (regulation 8 of the Principal Regulations refers);
  ▪ applications must be assessed in accordance with the Scheme requirements (regulations 10, 11 and 12 of the Principal Regulations refer); and
  ▪ the Secretary makes a decision whether to make an offer of allocation to applicants (regulation 13 of the Principal Regulations refers).

Details of the Regulations are outlined in the Attachment.

The Regulations are a legislative instrument for the purposes of the Legislative Instruments Act 2003.

Consultation

Requests were received from Endorsed Charitable Institutions participating in the Scheme to have an option to receive a tax offset certificate rather than a payment. The Treasury, and through them the Australian Taxation Office, have been consulted on the amendments.
Details of the **National Rental Affordability Scheme Amendment Regulations 2010 (No. 1)**

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *National Rental Affordability Scheme Amendment Regulations 2010 (No. 1)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

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).

Schedule 1 – Item 1 After subregulation 12(1)

This item provides for a new subregulation 12(1A) to be inserted into regulation 12 of the Principal Regulations, relating to the “Assessment of applications”.

In particular, new subregulation 12(1A) allows for different subsets of assessment criteria to be specified. Previously, the Secretary was required to make an assessment against each of the specified criterion in a relevant set before making a decision whether to make offers of allocation in relation to the application.

By introducing subsets of criteria, it is possible for particular key criteria to be identified which must be assessed first and, if the application does not meet any one or more of those, the Secretary is given the flexibility to either:

(i) decide not to make an offer of allocation in relation to the application, without being required to go on and assess the application against any of the remaining criteria; or

(ii) assess the application against any remaining criteria, before making a decision whether to make an offer of allocation.

This change is designed to improve administrative efficiency and ensure that resources are not wasted in assessing applications against each of the criteria where they have already been assessed as not meeting certain key criteria. It is hoped that this will allow decisions to be made, and applicants to be informed of outcomes, quicker than is currently the case. This will also result in the assessment criteria better reflecting the policy priorities underlying the Scheme. It is also intended that forecasting the critical key criteria will allow applicants to better target their applications.
Schedule 1 – Item 2 Subparagraph 13(2)(a)(i)

This item provides for the substitution of subparagraph 13(2)(a)(i) of the Principal Regulations, relating to “Offers of allocation”.

Previously, when making an offer of allocation, the location of each dwelling must have been identified by title reference or street address or, if those details were not available, postcode or other regional reference could be used.

This item provides that for an offer of an allocation, the location of each dwelling must be identified by title reference or street address, but where the offer is for a reservation of allocation, the location of each dwelling by postcode or other regional reference must be used.

The purpose of this change is to provide more flexibility in relation to the identification of dwellings that are the subject of a reservation of an allocation.

Schedule 1 – Item 3 Subregulation 13(5)

This item provides for new subregulations 13(5) to 13(10) to be inserted in regulation 13 in the Principal Regulations, relating to “Offers of allocation”.

In particular, these provisions will expressly allow for internal review of the Secretary’s decision not to make an offer of allocation.

Subregulation 13(5) previously provided that no reasons need be given for not making an offer to an applicant, or in relation to particular dwellings. However, the Department of Families, Community Services and Indigenous Affairs (the Department) has been informally providing feedback to unsuccessful applicants and, following feedback, has also allowed unsuccessful applicants to seek internal review of decisions.

The amendments formalise a process that would allow an applicant who was not made an offer at all, or in relation to particular dwellings, to obtain reasons for the decision. A request for a statement of reasons must be in writing (new subregulation 13(5) refers). The Secretary must provide the reasons within 28 days after receiving the request (new subregulation 13(6) refers).

Following that, the applicant may apply for internal review of the Secretary’s decision (the original decision) (new subregulation 13(7) refers). If the original decision was made by a delegate of the Secretary, the internal review must be conducted by the Secretary or another delegate of the Secretary (new subregulation 13(8) refers). If the Secretary made the original decision, the internal review must be conducted by the Secretary.

The decision which is reached after the internal review is a new decision (new subregulation 13(10) refers).

Schedule 1 – Item 4 Subregulation 14(2)

This item provides for the substitution of subregulation 14(2) of the Principal Regulations, relating to reservations of allocations.
Additional circumstances under which the Secretary may withdraw a reservation of an allocation are provided for. In particular, if an applicant fails to comply with any condition of the reservation, the reservation may be withdrawn (new paragraph 14(2)(c) refers). Further, if any advertisement relating to the reservation is, for instance, likely to mislead or misrepresent the Scheme, amongst other matters, the reservation may be withdrawn (new paragraph 14(2)(d) refers).

Instances of misleading and exaggerated advertising of the Scheme, including the tax outcomes that might be achieved through investment in a property that has a Scheme incentive allocation, have come to the Department’s attention. However, the Department’s efforts to curtail more extravagant advertising, by means of correspondence with the successful applicants, as well as with the party undertaking the advertising has had only limited success to date. Consequently, amendment of the Principal Regulations was sought to allow action to be taken in respect of reservations of allocation where advertising of the Scheme falls within any of the range of circumstances provided under proposed new paragraph 14(2)(d).

Schedule 1 – Item 5 Subregulation 17(1)

This item provides for the words “or entity” to be included in subregulation 17(1) of the Principal Regulations.

Regulation 17 provides for the requirements relating to Statements of Compliance. In particular, subregulation 17(1) previously provided that “A Statement of Compliance for an approved rental dwelling for an NRAS year must be lodged by the person who, at the end of the NRAS year, is the approved participant” (emphasis added). However, it is possible that an approved participant may be an “entity” within the meaning of taxation legislation, rather than a “person” as defined under the Acts Interpretation Act 1901. Therefore, an appropriate amendment is required to ensure that the relevant obligation to provide a Statement of Compliance is placed on all approved participants regardless of whether they are persons or entities.

Schedule 1 – Item 6 Paragraph 17(3)(h)

This item provides for the substitution of paragraph 17(3)(h) of the Principal Regulations, relating to details that must be included in Statements of Compliance.

New paragraph 17(3)(h) no longer requires that the name of the joint venture (if applicable) to appear on any tax offset certificate must be included. This is because it is now known that the joint ventures that might be recognised as non-entity joint ventures by the Commissioner of Taxation for the purposes of Division 380 of the Income Tax Assessment Act 1997 may be found to exist in relation to a contract between two parties relating to one rental dwelling and so are highly unlikely to have a name. That being the case, no name could be required to be supplied under the Principal Regulations, so even seeking a name “if applicable” may be a nonsense.

Schedule 1 – Item 7 Paragraph 19(1)(a)

This item provides for the technical amendment of paragraph 19(1)(a) of the Principal Regulations, relating to eligible tenants, to include the missing word “to”.

Schedule 1 – Item 8 Subregulation 19(2)

This item provides for the amendment of subregulation 19(2) of the Principal Regulations, relating to “Eligible tenants”. In particular, the amendment provides that it is the combined gross income of tenants that is relevant for the purposes of determining initial eligibility in relation to household income limits.

Schedule 1 – Item 9 Paragraph 19(3)(b)

This item provides for the amendment of paragraph 19(3)(b) of the Principal Regulations, relating to “Eligible tenants”. In particular, the amendment provides that it is the combined gross income of tenants that is relevant for the purposes of determining when eligible tenants cease to be eligible tenants.

Schedule 1 – Item 10 After subregulation 19(4)

This item provides for the insertion of a new subregulation 19(4A) in the Principal Regulations, relating to “Eligible tenants”. This new subregulation clarifies that, except in relation to subsidiary dwellings, there can only be one household per approved rental dwelling for the purposes of calculating income limits for a household (paragraph 19(4A)(b) refers).

In relation to subsidiary dwellings, each subsidiary dwelling that forms part of an approved rental dwelling may only include one household (paragraph 19(4A)(a) refers) and the combined gross incomes of the tenants in each subsidiary dwelling must be considered in assessing the household income for that subsidiary dwelling (paragraph 19(4A)(c) refers).

Schedule 1 – Item 11 After regulation 21

This item provides for the inclusion of a new regulation 21A, relating to “Transfer of reservation of allocation”.

An applicant who has accepted an offer of reservation of allocation may apply for change to the location, style, size or special attributes (if any) of a dwelling (new subregulation 21A(1) refers).

Following that, the Secretary may reassess the application using the same criteria as applied to the original application and may either refuse to make the change (in whole or in part) or agree to make the change (in whole or in part) (new subregulation 21A(2) refers).

This item will provide greater flexibility for changes to reservations of allocations to be approved. Program experience and feedback from participants is that during the passage of time between approval and dwelling construction changes may be required or desired.

Schedule 1 – Item 12 Subregulation 22(1)

This item provides for the amendment of subregulation 22(1) relating to the “Revocation of allocation”, to clarify that the Secretary has the discretion to revoke an allocation if any conditions of the allocation are not complied with.
Schedule 1 – Item 13 Regulation 28, example 2

This item provides for the technical amendment of example 2 in regulation 28 of the Principal Regulations, relating to “Reductions from full incentive amount”, to include the missing word “a”.

Schedule 1 – Item 14 After regulation 28

This item provides for a new regulation 28A “Elections” to be included in the Principal Regulations.

The purpose of new regulation 28A is to provide applicants or approved participants that are endorsed charitable institutions the option to elect to receive a tax offset certificate rather than a payment, provided the specified requirements are met.

Regulation 29 “Receipt of incentives” previously provided that the Secretary must, if an approved participant was an endorsed charitable institution, pay the incentive for each allocation and, for other approved participants, issue a tax offset certificate.

However, approved participants that are endorsed charitable institutions and who act on behalf of other parties may want to be issued with a tax offset certificate, rather than receive a payment, to facilitate access to the appropriate National Rental Affordability Scheme Tax Offset provisions in the Income Tax Assessment Act 1997.

There are various circumstances in which the option to elect to receive a tax offset certificate rather than a payment may arise and various provision is made as to when the relevant election must be made, what the requirements are, and once made, how long the election is binding (subregulations 28A(3), (4), (5) and (6) refer).

If no relevant election is made, or the requirements relating to a particular election are not satisfied, then those approved participants that are endorsed charitable institutions will continue to receive a payment in relation to any entitlement they have to receive an incentive.

Schedule 1 – Item 15 Subregulation 29(1)

This item substitutes a new subregulation 29(1), relating to the receipt of incentives, to take account of the proposed amendments in Item 17 above.

Previously, if an approved participant was an endorsed charitable institution, the Secretary must pay the incentive for each allocation (paragraph 29(1)(a) refers), and for other approved participants, the Secretary must issue a tax offset certificate (paragraph 29(1)(b) refers). Appropriate provision was also made to cover those circumstances where there has been a change in status of the approved participant during the course of an NRAS year. That is, where the approved participant was an endorsed charitable institution for part of an NRAS year and an otherwise eligible approved participant for the remainder of the NRAS year (paragraph 29(1)(c) refers).
With the introduction of an option for approved participants which are endorsed charitable institutions to elect to receive a tax offset certificate rather than a payment, where the specified requirements are met, it was necessary for consequential changes to be made to subregulation 29(1) to cover the additional circumstances that may arise, depending upon whether the relevant approved participants choose to exercise the option or not.

**Schedule 1 – Item 16 Paragraph 29(2)(c)**

This item provides for the substitution of paragraph 29(2)(c), relating to the receipt of incentives and the contents of tax offset certificates. The new simplified requirement is that the name and any applicable Australian business number or Australian company number of the approved participant must be included on the tax offset certificate. The inclusion of Australian company number details is necessary because some approved participants that are trustees for trusts may not have an Australian business number but may have an Australian company number.

**Schedule 1 – Item 17 Regulation 29, after Note 2**

This item provides for the inclusion of a new note 3, after Regulation 29. The purpose of Note 3 is to clarify that one tax offset certificate may relate to multiple approved rental dwellings, regardless of whether those dwellings may be associated with different joint ventures to which the approved participant is a party.

**Schedule 1 – Item 18 Subregulation 29(3)**

This item provides for the omission of subregulation 29(3) of the Principal Regulations relating to replacement tax offset certificates. This is a consequential amendment to that made in item 9 above. That is, as the names of joint ventures will no longer be a required inclusion on tax offset certificates, there will no longer be a concern that a certificate will be ineffective as a result of naming such a joint venture and consequently no need to provide for the potential re-issue of certificates in case a certificate issued in the name of a joint venture is ineffective.

**Schedule 1 – Item 19 Schedule 1, after Set 5**

This item provides for the insertion of two new Sets of Assessment Criteria, Set 6 and Set 7 in Schedule 1 to the Principal Regulations.

Under both of these new sets, a staged assessment process is provided for by the inclusion of some criteria (those contained in Subset 1) that must be assessed first and other criteria (those in Subset 2) that may be assessed, depending upon the decision of the Secretary or delegate (item 2 above, and new subregulation 12(1A), refer).

Both new sets are based on existing Set 2, with the following key changes. First, the criterion relating to the role of the relevant state or territory has been broadened, so that the focus is on whether the relevant state or territory supports the proposal, rather than being restricted to a consideration of whether proposals are consistent with state, territory or local government affordable housing priorities.
Second, no separate financial viability criterion is included. However, under the broadened recognition of the relevant State or Territory government role, the financial viability of the proposal can be taken into account by the relevant State or Territory, should they so choose, in arriving at their decision whether to support the proposal or not. Also, under the broadened “capacity and experience” criterion, financial viability could be considered as an element of capacity to deliver.

Third, the previous criterion (d) “the applicant has demonstrated capacity and experience” has been broadened to make it clear that both previous experience and future capacity to deliver should be considered. Further, the assessment is not limited to looking at the applicant’s capacity and experience but also what has been proposed in the application.

Set 6 is identical to Set 7, with the exception that under the first stage of the assessment, the focus is on proposals that involve 20 or more rental dwellings and under the second stage of the assessment, proposals involving 100 or more rental dwellings are preferred.