



April 2020

# National Rental Affordability Scheme Investor Protections

## Investor protections in the Regulations

In November 2017, the Government introduced investor protections to the National Rental Affordability Scheme (NRAS or the Scheme) through amendments to the National Rental Affordability Scheme Regulations 2008 (the previous regulations). These amendments included the right for investors to request a transfer of the allocation associated with their NRAS rental dwelling to another approved participant under certain circumstances.

Investor protections found in the previous regulations are preserved in the National Rental Affordability Scheme Regulations 2020 (the Regulations), which commenced on 1 April 2020. The Regulations extend the obligations of approved participants in relation to investors and provide the Secretary of the Department of Social Services (the Secretary, the department) with additional powers to assist investors when an allocation is transferred from one approved participant to another.

## Approved participants obligations to investors

Under section 63 of the Regulations, an approved participant has an obligation to pass on a Commonwealth incentive (incentive) or State or Territory contribution under the Scheme to an investor if, at the time when the incentive or contribution is given to the approved participant, the approved participant has a legal obligation to do so.

Under section 64 of the Regulations, an approved participant must pass on an incentive or State or Territory contribution to an investor within a timely manner on receipt of payment, being the earliest of the following:

- if a legal obligation requires the incentive or contribution to be passed on within a particular period – the end of that period; or
- 90 days after the approved participant is given the incentive or contribution.

Section 65 of the Regulations requires an approved participant to pass on all or part of an incentive or state or territory contribution to an investor under an arrangement even if the arrangement requires the investor to use a tenancy management service (or similar service) and the investor fails or refuses to use this service. Under section 65 of the Regulations, an approved participant must not terminate the arrangement only because the investor fails, or refuses, to use the service.

Section 66 of the Regulations requires the approved participant to pass on an incentive or state or territory contribution to an investor under an arrangement where that arrangement purports to make the investor use a particular service (e.g. property management service) or else be subject to payment of a monetary bond. Under section 66, the approved participant must not terminate the arrangement only because the investor uses an alternative service without paying the bond. This provides protections to investors in circumstances where an approved participant would otherwise have superior bargaining powers to force investors to pay excessive fees or charges if they do not purchase certain services from specified providers before receiving an incentive or state or territory contribution.

Section 67 of the Regulations requires the approved participant to give an investor a summary of the approved participants code of conduct (the code of conduct) within 28 days of the investor becoming the legal or beneficial owner of an NRAS rental dwelling. The [code of conduct](#) is set out at subsection 27(2) of the Regulations.

An approved participant's failure to comply with any of its obligations to an investor may constitute a breach under the code of conduct under paragraphs 27(2)(a) and 27(2)(b) of the Regulations.

## Associated party

Some approved participants have commercial arrangements where another legal entity, other than the approved participant, enters into a contract with the investor in relation to the investor's NRAS rental dwelling (e.g. a property manager). Section 5 of the Regulations provides a definition of 'associated party'.

An associated party, for a NRAS rental dwelling covered by an allocation, means a person, other than the approved participant or a tenant, who is a party to an arrangement that relates to the dwelling; and under the arrangement, is required to pass on any payment or benefit (including rent) relating to the dwelling. Paragraphs 27(2)(l) and 27(2)(m) of the Regulations set out the obligations of an approved participant when there are arrangements between an associated party and an investor.

The Regulations extend investor protections by holding an approved participant accountable for an associated party's obligations to the investor of a NRAS rental dwelling. If an associated party does not meet its requirements to an investor,

the Secretary may determine a breach of the code of conduct against the approved participant under paragraphs 27(2)(l) and 27(2)(m) of the Regulations.

## Investors to request a transfer to another approved participant because of breach

Section 29 of the Regulations allows an investor to make a written request to the Secretary to transfer the allocation covering their NRAS rental dwelling to another approved participant, if the investor believes the approved participant or an associated party has breached the Regulations, including the code of conduct. The transfer request must be in a form approved by the Secretary, must include details of the alleged breach and must include proof of ownership and investor identification.

An investor must not make a transfer request unless all of the following things have happened:

- the investor has given the approved participant written notice of the alleged breach; and
- 90 days have passed since the notice was given; and
- the investor is satisfied that the approved participant has not taken appropriate action in relation to the alleged breach.

However, the investor does not have to comply with the usual requirements of a transfer request, if:

- the approved participant is allegedly the subject of an insolvency event; or
- a determination of a breach has already been made.

## Transfer because of breach

Under section 32 of the Regulations a transfer of an allocation covering an investor's NRAS rental dwelling cannot occur until a breach determination has been made.

A determination comes into effect after the earlier of the following:

- if an application for review of the Secretary's determination is made to the Administrative Appeals Tribunal (AAT), after the AAT has confirmed the determination; or
- if there is no application for review made, at the end of the 28-day period for making an application for review.

The Regulations include three breach types with graduated consequences according to the seriousness of the breach: individual or compliance breaches, serious breaches, or disqualifying breaches. The requirements for the Secretary making a determination of a breach are set out at sections 24 to 26 of the Regulations.

Under section 30 of the Regulations, prior to determining that an approved participant committed a breach, the Secretary must give written notice of the

proposed determination to the approved participant, and where an investor has made a written request – the investor. The notice must state that the Secretary proposes to determine that the approved participant has committed the breach and invite the approved participant (and the investor as the case requires) to make a written submission to the Secretary about the proposed determination no later than 14 days after the day the Secretary gives the notice. The Secretary must have regard to any submissions made and the interests of investors, including the need to ensure that investors maintain confidence in the Scheme.

### ***Individual breach (section 24 of the Regulations)***

The Secretary may determine an approved participant for a NRAS rental dwelling covered by an allocation has committed an individual breach if the approved participant is subject to of an insolvency event, if they have breached the code of conduct in relation to the dwelling or if they have committed a compliance breach in relation to the dwelling. A compliance breach is defined by subsection 24(3) of the Regulations. A compliance breach occurs if an approved participant fails to comply with the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the Regulations (other than the approved participants code of conduct), or if an approved participant contravenes a condition of the allocation for the dwelling.

Under subsections 32(2) and 32(3) of the Regulations, where an individual breach determination is made against an approved participant, the allocations which relate to the breach can be transferred.

Subsection 32(2) of the Regulations provides that the Secretary must transfer or revoke an allocation covering the affected dwelling to another person if an individual breach determination has been made and an investor for the related dwelling has requested a transfer (unless the request is withdrawn).

However, under subsection 32(3) of the Regulations, if the individual breach determination was made on the Secretary's own initiative (that is, where the investor has not made a transfer request or has withdrawn the transfer request) the Secretary may transfer or revoke an allocation covering the affected dwelling to another person but is not required to do so.

### ***Serious breach (section 25 of the Regulations)***

The Secretary may determine an approved participant for a NRAS rental dwelling covered by an allocation has committed a serious breach if the approved participant:

- a) has breached the code of conduct in relation to three or more investors within a period of six months; or
- b) has committed a compliance breach that involves one or more of the following:
  - (i) providing false or misleading information to the Secretary or the Department in relation to the Scheme;

- (ii) failing to comply with the law of the Commonwealth or a state or territory in relation to the dwelling or any other aspect of the Scheme;
- (iii) claiming a tax offset that the approved participant is not entitled to claim;
- (iv) passing on a tax offset to a person who is not entitled to claim the tax offset; or
- c) has breached the approved participants code of conduct or committed a compliance breach and has failed to take action within 28 days of receiving written notification from the Secretary which required remedial action to be taken in relation to that breach; or
- d) has breached the approved participants code of conduct or committed a compliance breach, the Secretary has given the approved participant written notice in relation to the breach and within 12 months after being given the warning, commits a similar breach (whether in relation to the same or another allocation).

Under section 31 of the Regulations, where a serious breach determination is made, the Secretary may publish notice of the breach on the department's website.

The purpose of this is to alert affected investors who may have a NRAS rental dwelling covered by an allocation held by the approved participant to submit a transfer request to have the allocation transferred to another approved participant.

Under subsections 32(4) and 32(5) of the Regulations, where a serious breach determination is made against an approved participant, any allocation held by that approved participant can be transferred, regardless of whether or not the allocation/s being transferred was the subject of the breach determination. As with individual breaches, however, if an investor has previously requested a transfer of an allocation, this will be relevant to any subsequent transfer decision.

Subsection 32(4) of the Regulations provides that the Secretary must transfer or revoke an allocation to another person if a serious breach determination has been made and an investor has requested a transfer (unless the request was withdrawn).

However, subsection 32(5) of the Regulations provides that the Secretary may transfer or revoke an allocation to another person if a serious breach determination has been made and the determination was made on the Secretary's own initiative (where the investor has not made a request or has withdrawn the request).

***Disqualifying breach (section 26 of the Regulations)***

The Secretary may determine that an approved participant committed a disqualifying breach if:

- a) the Secretary is satisfied that the approved participant is subject to an insolvency event; or

- b) a serious breach determination has been made against the approved participant and the Secretary is satisfied that, within 12 months after making that determination, the Secretary will be likely be able to determine that the approved participant has committed another serious breach; or
- c) the approved participant, or a director of the approved participant, has been convicted of an offence against the law of the Commonwealth, or of a state or territory, involving fraud, dishonesty, bribery or corruption.

Under subsection 32(6) of the Regulations, where a disqualifying breach determination is made, the Secretary must endeavour to transfer all of the approved participant's allocations to other persons within six months of the determination being made. At the end of the six-month period, any allocations not transferred will automatically be revoked.

For transfers of allocations under sections 21, 22, 23 and 32 of the Regulations, the gaining approved participant cannot be a disqualified person. A 'disqualified person' is defined in the Regulations as an approved participant who is subject to a disqualifying breach determination. This ensures disqualified approved participants cannot receive any further allocations.

Where a disqualifying breach determination is made the Secretary may publish notice of the breach on the Department's website (section 31).

## Redirection of an incentive for current and past NRAS years

Under Division 3 of the Regulations, where the Secretary has decided to transfer an allocation, under certain circumstances the Secretary may 'redirect' the incentive payable for the allocation for the current NRAS year and for a past NRAS year (where the incentive has not already been issued to the original approved participant). Where an incentive is redirected, it is issued to the gaining approved participant (in whole or in part, depending on the circumstances) rather than to the original approved participant, and the gaining approved participant has an obligation to pass on the incentive to the investor.

Before redirecting an incentive, the Secretary must give written notice of the proposed redirection to the original approved participant and the investor under section 61 of the Regulations.

If the Secretary redirects an incentive for an allocation, the gaining approved participant must pass on the incentive or State or Territory contribution for the allocation to the investor before the earliest of the following: (a) if a legal obligation requires the incentive or contribution to be passed on within a particular period – by the end of that timeframe; or (b) within 90 days of the incentive or contribution being given to the approved participant (see sections 58, 63 and 64 of the Regulations).

Under section 62 of the Regulations, the Secretary must take into account the interests of investors in deciding whether to redirect an incentive. This ensures the interests of any investors who may be affected by a redirection decision are considered prior to the Secretary conducting the redirection.

## Legal arrangements do not prevent transfers

Under section 33 of the Regulations, a legal arrangement has no effect to the extent that the arrangement prohibits or prevents an investor from, or penalises an investor for making a transfer request, or assisting or supporting a transfer request. This ensures the interests of any investors who may be affected by a redirection decision are considered prior to the Secretary conducting the redirection.

## Obligations of the original approved participants when allocations are transferred

Under section 34 of the Regulations, where the Secretary transfers an allocation from one approved participant to another approved participant, the original approved participant must provide any information requested by the Secretary and relevant to information relevant to the administration of the Scheme to the gaining approved participant with 21 days. This assists the gaining approved participant to obtain the information necessary for them to properly manage the compliance of the transferred allocation.

## Obligations of gaining approved participants when allocations are transferred

Under section 35 of the Regulations, where the Secretary transfers an allocation for a NRAS rental dwelling from one approved participant to another approved participant, the Secretary may require the gaining approved participant to lodge a statement of compliance for the dwelling that includes statements and details for either (or both of) the current NRAS year and the previous NRAS year.

## Review rights

If the Secretary makes a determination that an approved participant committed an individual breach, a serious breach or a disqualifying breach, the approved participant has a 28-day period in which they may make an appeal to the AAT under paragraph 71(e) of the Regulations. Information about the AAT is available on the AAT's website: [www.aat.gov.au](http://www.aat.gov.au).

## Further information

Further enquiries on investor protection can be sent to [nras@dss.gov.au](mailto:nras@dss.gov.au).