



21 May 2020

Senator the Hon Anne Ruston
Minister for Social Services
Parliament House
CANBERRA ACT 2600

Via email: Senator.Ruston@aph.gov.au

CC: dlos@dss.gov.au

Dear Minister,

National Rental Affordability Scheme Regulations 2020 [F2020L00282]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Availability of independent review

Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

The instrument permits the Secretary of the Department of Social Services (the Secretary) to make a number of discretionary decisions relating to the administration of the National Rental Affordability Scheme (NRAS). Several of these decisions are subject to review by the Administrative Appeals Tribunal (AAT), in accordance with section 71 of the instrument. It appears that the remainder of the decisions under the instrument would not be subject to independent merits review.

A number of the decisions that are not reviewable appear to be preliminary or procedural. In this regard, the decisions appear to lead to or follow from more substantive decisions, which are subject to AAT review. The committee notes that the Administrative Review Council guidance document, *What decisions should be subject to merit review?* (ARC Guide), indicates that such decisions are unsuitable for merits review.

However, in relation to decisions under sections 20, 21 and 23 of the instrument, it does not appear that such decisions are preliminary or procedural in nature, nor are they automatic or mandatory. Rather, those decisions appear to be substantive decisions involving the consideration of particular factors (see subsection 20(3)), or being satisfied of

particular things (see subsections 21(3) and 23(5)). It is therefore unclear why these decisions, which may affect the interests of participants, are not subject to independent merits review.

In addition, certain decisions that are not subject to independent merits review appear to relate to extensions of time for compliance with requirements set out in the instrument. These include decisions made under subsections 39(1) and 42(4). The committee notes that the ARC Guide indicates that decisions relating to the extension of time should be subject to independent merits review, as such decisions may have a substantive effect.

The committee therefore requests your advice as to why the following decisions are not subject to independent merits review, by reference to the established grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*

- **decisions under sections 20, 21 and 23 of the instrument, relating to the transfer and revocation of allocations; and**
- **decisions under subsections 39 and 42 of the instrument, relating to the extension of time for compliance with statutory requirements.**

Privacy

Senate standing order 23(3)(h) requires the committee to consider whether an instrument trespasses unduly on personal rights and liberties, including the right to privacy.

Section 31 of the instrument provides that, if the Secretary makes a determination that an approved participant has committed a serious breach or a disqualifying breach, the secretary may publish notice of the determination on the department's website. It is unclear from the instrument and the explanatory statement whether this notice would contain personal or sensitive information.

The committee understands that it is intended that the only information that would be disclosed in a notice of serious or disqualifying breach would be the name of the approved participant and the basis of the breach determination. This would only constitute personal information if it related to a natural person, as opposed to a business entity. In this regard, the committee understands that currently of the 122 participants in the NRAS, only one is a natural person.

However, the committee is concerned that there does not appear to be anything on the face of the instrument that would restrict the type of personal information included in a notice of serious or disqualifying breach. In addition, while the committee appreciates that there is currently only one NRAS participant who is a natural person, there is no guarantee that more individuals will not participate in the scheme in the future.

The committee therefore requests your advice as to:

- **any safeguards in place to ensure that personal information is not disclosed in a notice published under section 31 of the instrument; and**
- **the appropriateness of amending the instrument to specify that personal information relating to a natural person must not be included in a published notice of serious or disqualifying breach or, at a minimum, that the only**

information relating to a natural person that may be published is the name of the participant and the basis of the breach determination.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

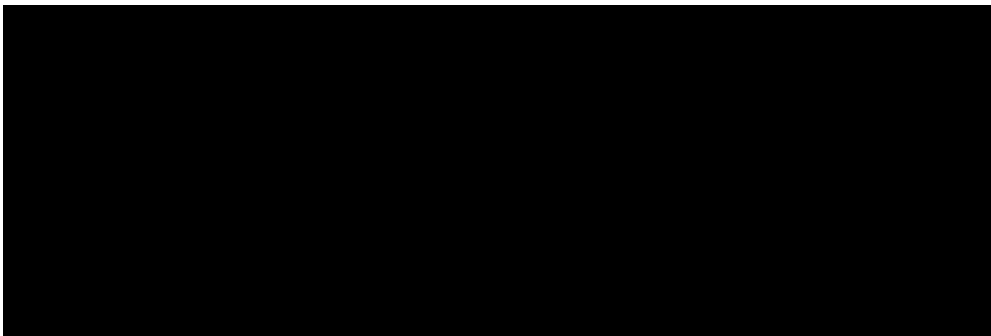
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **4 June 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



Senator the Hon Anne Ruston

**Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate**

Ref: MB20-000542

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny
of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Fierravanti-Wells~~

Thank you for your letter of 21 May 2020 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) concerning the National Rental Affordability Scheme Regulations 2020 (the Regulations). The Committee has asked for advice on the following two matters:

- Availability of independent merit review:
 - why decisions under sections 20, 21 and 23 of the Regulations relating to the transfer and revocation of allocations, and decisions under subsections 39(1) and 42(4) of the Regulations relating to the extension of time for compliance with statutory requirements, are not subject to independent merits review, by reference to the established grounds for excluding merits review set out in the Administrative Review Council's guidance document, 'What decisions should be subject to merit review'
- Privacy:
 - what safeguards are in place to ensure personal information is not disclosed in a notice published under section 31 of the Regulations
 - the appropriateness of amending the Regulations to specify personal information relating to a natural person must not be included in a published notice of serious or disqualifying breach or, at a minimum, the only information relating to a natural person that may be published is the name of the participant and the basis of the breach determination.

Availability of independent merit review

Sections 20, 21 and 23 of the Regulations enable the Secretary of the Department of Social Services (the Secretary) to make decisions in relation to an approved participant in response to an application by the approved participant once certain requirements are met.

The Secretary's decisions under sections 20 and 21 are made following extensive consultation to ensure affected stakeholders, including gaining and original approved participants, investors, tenants and state and territory governments, are agreeable to the proposed action. Under these sections, when an approved participant requests the transfer of allocations they hold under the National Rental Affordability Scheme (NRAS, the Scheme), it must also provide supporting evidence to establish they have undertaken the extensive administrative and consultation processes required under the Regulations. The Secretary will undertake the action requested by the approved participant if these requirements have been met and affected stakeholders are agreeable to the requested action. Advice relating to the operation of the specific provisions are detailed below.

Section 20 of the Regulations gives the Secretary the power to transfer an allocation between rental dwellings at the request of the original approved participant, which aims to ensure an allocation can remain in the Scheme where the original dwelling cannot be tenanted. In making a decision to transfer an allocation under section 20, the Secretary must have regard to the views of the state or territory in which the new dwelling is located, whether affected investors have agreed to the transfer, and whether the approved participant has complied with their obligations to investors.

Section 21 of the Regulations gives the Secretary the power to transfer allocations between approved participants at the request of the original approved participant, which aims to ensure an allocation can remain in the Scheme where the original approved participant is no longer willing or able to manage the allocation. In the case of section 21 transfers, the gaining approved participant must agree to the transfer (signed agreement is required in the application form) and the Department of Social Services (the department) will carry out assurance checks on the gaining approved participant to confirm its capacity and suitability to manage the transferring allocations. This includes checks to ensure the approved participant is not subject to a disqualifying breach or any other significant compliance action.

Decisions under sections 20 and 21 of the Regulations require extensive administrative and consultation processes to be undertaken to determine the applicant has met the regulatory requirements and all affected parties agree to the proposed action. According to paragraph 4.53 of the ARC paper, these decisions justify exclusion from merit review because they "are the product of processes that would be time consuming and costly to repeat on review".

Other than in exceptional circumstances, an application under section 20 or 21 of the Regulations where the statutory requirements for a transfer are met will be approved by the Secretary, because a transfer would be consistent with the objective to maximise the number of dwellings available for rent under the Scheme.

Additionally, both sections 20 and 21 permit the Secretary to impose additional special conditions on the allocation, provided the approved participant (in the case of a transfer under section 20) or the gaining approved participant (in the case of a transfer under section 21) agrees to the special conditions before the transfer takes effect. The need for, and the content of, such special conditions, would arise from consultations with stakeholders who would not be a party to the merits review process and, in the case of a transfer under section 21, would require negotiation with a commercial entity who is not party to the merits review process.

Section 23 gives the Secretary power to revoke an allocation for a dwelling at the request of an approved participant for the dwelling. Typically, approved participants make such requests where they are no longer able to manage an allocation. For example this may arise where a dwelling has been sold and the new owner does not wish to participate in the Scheme, or the dwelling has been severely damaged as a result of a natural disaster.

These discretionary decisions are more accurately characterised as automatic decisions as in practice they operate as an endorsement by the Secretary that all regulatory requirements have been met and affected parties agree to the proposed action. According to paragraph 3.8 of the ARC paper, these decisions are unsuitable for merit review because “there is a statutory obligation [for the Secretary] to act in a certain way upon the occurrence of a specified set of circumstances”.

NRAS allocations are a valuable right which permits approved participants to receive incentives under the Scheme if particular conditions are met. The sanction for not complying with the conditions of allocation is no incentives are payable in respect of the allocation, so if the approved participant is not willing or able to comply with the conditions of allocation, the approved participant may decide to give up the allocation by making a request to the Secretary under section 23 of the Regulations. Alternatively, the approved participant could simply not meet the conditions of allocation and receive no incentive each year.

If an approved participant applies to the Secretary to revoke an allocation and the application is in the approved form, the Secretary would, as a matter of course either revoke the allocation or transfer the allocation to another approved participant under subsection 23(4) of the Regulations. The effect for the original approved participant is the same whether the Secretary decides to revoke or transfer the allocation under section 23.

Accordingly, from the perspective of the approved participant, section 23 operates as an automatic or mandatory decision triggered by a set of circumstances, namely the request by the approved participant to revoke the allocation, made in the approved form. Once such a request is made, the Secretary will either revoke or transfer the allocation and the decision whether to revoke or transfer does not affect the interests of the approved participant requesting the revocation.

Subsections 39(1) and 42(4) of the Regulations give the Secretary discretion to extend the time available for an approved participant to give the Secretary the required documentation to show a dwelling is compliant under the Scheme and therefore entitled to the full incentive. The Scheme provides an annual incentive payment in relation to a rental dwelling for 10 years if certain conditions are satisfied.

These discretionary decisions justify exclusion from merit review according to paragraphs 4.3-4.5 of the ARC paper, because they are preliminary decisions that lead to the making of substantive decisions relating to the eligibility to an incentive which are subject to merit review.

In order to grant an extension of time under subsection 39(1), the Secretary must be satisfied the approved participant has a reasonable excuse for not being able to provide the valuation on time, or be satisfied it is reasonable to grant an extension because of a transfer. Similarly, subsections 42(3) and 42(4) of the Regulations give the Secretary discretion to approve a later date for an approved participant to give a statement of compliance in specified circumstances on the Secretary's own initiative or on application by the approved participant. Such decisions will always flow to those substantive decisions about the reduction of incentives found under sections 13 (incentive is not available for any period where documents or information remain outstanding), 51 (reductions of incentive) and 56 (variation of incentive amounts) of the Regulations.

Decisions under subsection 39(1) and 42(4) regarding extensions of time are preliminary decisions and to offer merit review on these decisions would be impracticable as they directly relate to those substantive decisions under sections 13, 51 or 56 which are subject to merit review.

If the Secretary does not grant an extension under subsections 39(1) or 42(4), the approved participant has the option of seeking a determination under subsection 13(9) of the Regulations. This provision enables the Secretary to waive the no incentive rule for outstanding documents in subsection 13(2) of the Regulations if the approved participant has a reasonable excuse for not complying with the requirement to provide the documents on time. A refusal to make a determination under subsection 13(9) is reviewable by the Administrative Appeals Tribunal. Similarly, if the Secretary makes a decision to reduce an incentive under sections 51 or 56 of the Regulations, these decisions are subject to merit review.

In the interests of ensuring the timely administration of the Scheme, it is the related substantive decisions that may be made under sections 13, 51 or 56 that are subject to merit review. Decisions under subsections 39(1) or 42(4) may be effectively overridden by a decision to provide incentives (as a result of a decision under subsection 13(9)) or as a result of merit review under sections 51 or 56) despite timeframes not being met.

Privacy

Section 31 does not authorise the disclosure of any personal information other than the name of the approved participant and the fact of the breach. It is established departmental practice to only publish the name of the approved participant that is the subject of the serious or disqualifying breach and the basis of the breach in the Regulations. Publication of breach notices under section 31 of the Regulations is an essential component of the Scheme's compliance framework, as is the case in many other regulatory regimes.

Noting at the time of writing, there is only one approved participant who is an individual (the other 121 approved participants are companies), any notice under section 31 in relation to this individual would publish a very limited amount of personal information (only the individual's name and the fact of the breach).

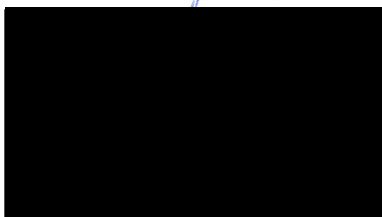
The disclosure of the details of serious and disqualifying breaches under section 31 is an important aspect of the compliance framework, and is vital for investors who may have a right to request a transfer as a result of the publicised breach.

Also I note the names of all approved participants are already publically available, which has been the case since the Scheme commenced.

Accordingly, I do not consider it necessary to make any amendments to section 31 of the Regulations.

I trust this information addresses the Committee's concerns.

Yours sincerely



Anne Ruston

29/5 / 2020



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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18 June 2020

Senator the Hon Anne Ruston
Minister for Social Services
Parliament House
CANBERRA ACT 2600

Via email: Senator.Ruston@aph.gov.au

CC: dlos@dss.gov.au



Dear Minister,

National Rental Affordability Scheme Regulations 2020 [F2020L00282]

Thank you for your response of 2 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.


The committee considered your response at its private meeting on 17 April 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

While the committee has concluded its examination of this instrument, the committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement to the instrument, noting the importance of that document as a point of access to understanding the law and, if necessary, as extrinsic material to assist with interpretation.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation