

Chapter 3

Schedule 3—Amendments to the National Rental Affordability Scheme

3.1 This chapter discusses Schedule 3 of the Social Services Legislation Amendment (Housing Affordability) Bill 2017 (bill), which proposes amendments to the *National Rental Affordability Scheme Act 2008* (NRAS Act). The view of the Senate Community Affairs Legislation Committee (committee) is provided at the end of the chapter.

Background

3.2 The National Rental Affordability Scheme (NRAS) was introduced in 2008, via the NRAS Act, to encourage large-scale investment in housing to address housing affordability issues by both increasing the supply of affordable rental housing and to reduce rental costs for low and moderate income households. To achieve this, the scheme provides approved participants with a financial incentive for a period of 10 years to rent dwellings to eligible tenants at a rate of at least 20 per cent below the market rate.¹

3.3 The scheme has been the subject of a number of reviews. The Australian National Audit Office (ANAO) reviewed the scheme in 2015 and again in 2016.² The 2015 ANAO report highlighted the need for 'effective planning and sound administration if Government programs are to be successfully implemented and are to achieve their objectives and expected outcomes.'³ The 2016 ANAO report further examined the effectiveness of the administration of certain aspects of the NRAS by the Department of Social Services (DSS), and concluded:

The regulatory framework governing the administration of the National Rental Affordability Scheme could be reviewed to clarify the operation of aspects of the Regulations.⁴

3.4 In 2016, DSS initiated a consultation process to 'explore how the NRAS Regulations and administrative practices could be further improved while continuing to promote rental affordability policy outcomes.'⁵

1 Explanatory Memorandum (EM), p. [17].

2 Australian National Audit Office (ANAO), *ANAO Report No. 8 2015–16, 2015, Administration of the National Rental Affordability Scheme (ANAO Report No. 8 2015-2016)*, ANAO, (*ANAO Report No. 23 2016–17, 2016*), *National Rental Affordability Scheme - Administration of Allocations and Incentives (ANAO Report No. 23 2016–17, 2016)*.

3 *ANAO Report No. 8 2015-16*, quoted in *ANAO, Report No. 23 2016-17*, p. 7.

4 *ANAO Report No. 23 2016–17, 2016*.

5 Department of Social Services (DSS), *Improving the National Rental Affordability Scheme Consultation Paper*, 2016, p. 1.

3.5 In his second reading speech for the bill, the Hon. Christian Porter MP, Minister for Social Services (Minister), noted that over 30 submissions were received to the DSS' NRAS consultation, including a submission from the Commonwealth Ombudsman which noted 'the need to improve transparency for investors in the scheme' and made 'recommendations on measures to strengthen the integrity and compliance of the scheme.'⁶ Following the consultation, DSS 'commenced a review of the scheme to address the concerns raised by the ANAO, the Ombudsman and NRAS stakeholders' which resulted in some regulatory amendments being made in January 2017.⁷

3.6 In introducing the bill, the Minister stated:

The amendments introduced in this bill clarify what were ambiguous provisions in the NRAS Act and lay the foundation to strengthen and simplify the future operation and administration of the scheme.⁸

Proposed amendments

3.7 Schedule 3 introduces four key changes to the NRAS Act, to address existing provisions which 'have been identified that are ambiguous in their application'.⁹ Amendments in Schedule 3 seek to address this ambiguity to 'provide clarity to approved participants and other relevant stakeholders.'¹⁰ The proposed changes impact: the rent being charged; the transfer of NRAS allocations between dwellings; allocation vacancy periods; and, conditions of NRAS allocations.¹¹

3.8 Submitters expressed support for the proposed amendments to the NRAS Act and welcomed the intent of the amendments to remove ambiguous elements and improve existing operations of NRAS. For example, Darebin City Council submitted its strong support for the 'removal of current ambiguous provisions' regarding NRAS rent charged and the transfer of NRAS allocations to other dwellings. Darebin City Council observed that these amendments 'directly meet the bill's stated objectives.'¹²

Rent charged

3.9 A key objective of the NRAS is to reduce rental costs for low and moderate income households by requiring that rents charged for NRAS allocated dwellings are at least 20 percent lower than the market value rent for the dwelling.¹³ There is some

6 The Hon. Mr Christian Porter, Minister for Social Services (Minister), *House of Representatives Hansard*, 14 September 2017, p. 10420.

7 Minister, *House of Representatives Hansard*, 14 September 2017, p. 10420.

8 Minister, *House of Representatives Hansard*, 14 September 2017, p. 10420.

9 EM, p. [17].

10 EM, p. [17].

11 EM, pp. [17-19].

12 Darebin City Council, *Submission 10*, pp. [2-3].

13 DSS, *Submission 1*, p. 3.

ambiguity in the current provisions, in that the below market rate could be determined by averaging rents over the course of the whole year.¹⁴

3.10 The proposed amendment requires that every time rent is charged, whether that is weekly, fortnightly, monthly or on any other basis, that rent must be at least 20 per cent below the market value rent.¹⁵

3.11 DSS explained that the proposal would 'protect eligible tenants from being subject to a higher rent at any time during the year by preventing the approved participant from charging a higher rent for part of the year, and then a lower rent for other parts of the year to compensate.'¹⁶

3.12 National Affordable Housing Providers Ltd. (NAHP) expressed support for affordable housing rent charged at below market rent, however, contended that the amendment did not go far enough in clarifying the ambiguity of the 20 per cent below market rate provision. NAHP suggested that ambiguity still exists for affordable housing providers calculating rent at 20 per cent below market rate and outlined examples of instances where approved participants could fall afoul of the rule.¹⁷

3.13 The Housing Industry Association (HIA) expressed support for the clarification of rental discount and emphasised:

[I]t would be entirely counter to the objective of NRAS to provide affordable housing to those otherwise in housing stress if the provider were able to charge above the rental discount level at any stage during the year.¹⁸

Transfer of allocations to other dwellings

3.14 The EM outlines that from the inception of the NRAS it was predicted that NRAS allocations may need to be transferred from one dwelling to another, in order to address situations where an NRAS allocated dwelling was sold and the new owner did not wish to participate in NRAS. Without the ability to transfer allocations, such cases would lead to a significant reduction in the stock of affordable housing provided under NRAS. The EM outlines the proposed change would provide 'express legislative authority for the NRAS Regulations to provide for the transfer of an allocation to another rental dwelling in certain circumstances.'¹⁹

3.15 DSS submitted this proposed measure 'will provide clarity by giving express legislative authority for the NRAS Regulations to provide for the transfer of an allocation from one rental dwelling to another' and is 'crucial to achieving the objects of the Scheme.'²⁰

14 EM, pp. [17-18].

15 EM, p. [19].

16 DSS, *Submission 1*, p. 4.

17 National Affordable Housing Providers (NAHP), *Submission 4*, p. 3–5.

18 Housing Industry Association (HIA), *Submission 5*, p. [1].

19 EM, p. [18].

20 DSS, *Submission 1*, p. 3.

3.16 In introducing the bill, the Minister stated:

The ability to substitute dwellings is crucial to achieving the object of the scheme, being to increase the supply of affordable rental dwellings. As investors exit the scheme, the ability to substitute a like-for-like dwelling ensures the level of NRAS housing stock is maintained.²¹

3.17 Submitters to the inquiry emphasised the importance of being able to transfer allocations. NAHP informed the committee that 'it is essential to have a clear transfer policy in place to retain the maximum number of dwellings in [NRAS]' and noted the result of a recent survey it conducted suggest that 28 per cent of respondents were planning to, or considering, leaving NRAS prior to their incentive ending. NAHP called for clarification of the transfer allocation provisions to ensure the maximum number of allocations remain within the NRAS.²²

3.18 New South Wales Federation of Housing Associations (NSWFHA) suggested a clear transfer policy was essential to 'retain the maximum number of dwelling in the Scheme [NRAS] and continue to provide affordable housing homes for eligible households.'²³

3.19 HIA submitted it was 'particularly pleased' with the proposed amendment to enable the transfer of allocations to other dwellings. HIA observed:

This measure will ensure that the Scheme can meet its maximum capacity to deliver affordable housing solutions over the intended lifetime of the program.²⁴

Vacancy periods

3.20 The current vacancy period provisions of the NRAS prescribe two types of maximum vacancy periods. The first period covers one year and the second covers a continuous period that crosses two years. The EM states the existing vacancy period 'limits the Scheme's ability to adapt and develop in response to emerging issues and demands and is contrary to the initial intent in relation to how the Scheme should be administered.'²⁵

3.21 The Minister stated the proposed change would 'assist in the future administration of the scheme should changes be required on how the maximum vacancy periods are to operate.'²⁶

3.22 The issue of the vacancy period was raised during the 2016 NRAS consultations undertaken by DSS. NAHP and NSWFHA submitted to DSS that approved providers were unduly disadvantaged when a vacancy period spanned two

21 Minister, *House of Representatives Hansard*, 14 September 2017, p. 10421.

22 NAHP, *Submission 4*, p. 2.

23 New South Wales Federation of Housing Associations (NSWFHA), *Submission 24*, p. 9.

24 HIA, *Submission 5*, p. 1.

25 EM, p. [19].

26 Minister, *House of Representatives Hansard*, 14 September 2017, p. 10421.

NRAS years, because even if there was a minimal crossover of the vacancy period to the second NRAS year, the approved provider would receive nil incentive payment for both years.²⁷

3.23 Both NSWFA and NAHP expressed support for the amendment proposed in Schedule 3 to the bill.²⁸ NAHP submitted to the committee that this amendment is a positive step to reduce the prescriptiveness of the current provisions and to enable a more flexible approach vacancy periods.²⁹ Ms Carol Croce, Policy Officer, NAHP, explained:

We feel that this stops penalising approved participants for a timing quirk of when the vacancy occurs and it appropriately addresses the situation, particularly in rapidly changing rental markets such as some of the former mining communities.³⁰

Conditions of allocation

3.24 As outlined in the EM, proposed paragraph 8(ba) seeks to provide clarity that amendments to the conditions of allocation can be made by NRAS Regulations. The proposed amendment would provide a clear legislative authority to vary conditions of allocation that are prescribed by the NRAS Regulations 'to enable the Scheme to continue to respond to emerging issues that arise from time to time.'³¹

3.25 The EM further outlines two key aspects of the proposed change:

- the power to vary conditions of allocations cannot be used to vary the conditions specifically provided for under the NRAS Act, to ensure the NRAS Regulations cannot override the operation of the NRAS Act, and
- a condition provided for by the Scheme may be imposed on an allocation after it is made, to address emerging issues such as a safety requirement to use certain non-flammable materials, or replace existing dangerous materials.³²

3.26 NAHP argued that the amendment to the conditions of allocation give DSS a 'wide ranging power to significantly change the conditions of the allocation' and recommended that parameters be included in the bill to indicate where it is appropriate for DSS to significantly amend the conditions of allocation. NAHP remarked of the amendment:

[T]his broad authority will result in investor uncertainty and distress if there is an ongoing possibility that the conditions of allocation can be varied and imposed at any time. Compliance with the new conditions of allocation

27 NHAP and NSWFA, *Submission to the 2016' DSS consultation on improving the National Rental Affordability Scheme*, p. 7.

28 NSWFA, *Submission 24*, p. 9; NAHP, *Submission 4*, p. 5.

29 NAHP, *Submission 4*, p. 5.

30 Ms Carol Croce, Policy Officer, NAHP, *Committee Hansard*, 14 November 2017, p. 11.

31 EM, p. [19].

32 EM, p. [20].

could result in unanticipated costs and possibly a partial loss of the incentive if it proves difficult to comply with the new conditions in a timely manner.³³

3.27 DSS submitted that these new provisions will 'reduce the risk to the Commonwealth when varying or imposing new conditions on allocations, such as provisions to protect NRAS investors for the first time.'³⁴

3.28 HIA expressed its support for the amendments to the conditions of allocation and considered:

With the program [NRAS] extending for ten years it is desirable to be able to adjust the scheme promptly to address unforeseen changing market conditions.³⁵

Investor safeguards

3.29 Whilst not directly related to a provision in the bill, the committee received evidence from Mr Paul Donovan, Director, MDS Legal, and Mr Neil Henson, Director, Henson Property Management Pty Ltd, concerning the conduct of some NRAS approved participants.³⁶

3.30 The committee notes that on 18 November 2017, the NRAS Regulations were amended to specifically require an approved participant to pass on incentives to an investor in a timely manner.³⁷ The amendments to the NRAS Regulations enable investors to request the Secretary transfer their allocation from the relevant approved participant to another approved participant if the Secretary is satisfied on several stated grounds, including when the relevant approved participant has:

- failed to pass on an incentive to an investor;³⁸
- provided false or misleading information regarding NRAS to the investor;³⁹ and
- acted in such a way in relation to the allocation as to contravene consumer protection law.⁴⁰

33 NAHP, *Submission 5*, p. 3–5.

34 DSS, *Submission 1*, p. 4.

35 HIA, *Submission 5*, p. 1.

36 See: Mr Paul Donovan, Director, MDS Legal, *Committee Hansard*, 14 November 2017, pp. 14–16; Mr Neil Henson, Director, Henson Property Management Pty Ltd, *Committee Hansard*, 14 November 2017, pp. 17–18; MDS Legal, *Submission 30*, pp. 2–7; Henson Property Management Pty Ltd, *Submission 29*, pp. [1–2].

37 National Rental Affordability Scheme Regulations 2008 (NRAS Regulations), Division 2.

38 NRAS Regulations, para. 21A(2)(b).

39 NRAS Regulations, para. 21A(2)(c).

40 NRAS Regulations, para. 21A(2)(d).

Committee view

3.31 The committee notes the government's commitment to improving the supply of affordable housing. The committee welcomes the measures proposed in Schedule 3 of the bill.

3.32 Submitters to the inquiry supported the bill's proposed amendments to the NRAS Act and noted the amendments seek to address ambiguous elements of NRAS and support the bill's stated objectives. The committee notes some submitters called for more flexibility in the application of the NRAS '20 per cent below market rate' provision, and the committee would support further consideration of this provision by DSS. The committee also recognises some submitters raised concerns regarding the proposed amendment to 'conditions of allocation' via the NRAS Regulations; however, the committee is satisfied the amendment proposes an appropriate mechanism for the government to ensure NRAS operates as intended.

3.33 The committee was concerned to receive evidence from some submitters regarding some NRAS approved participants potentially acting contrary to the intent of NRAS, and to the detriment of NRAS investors and their property managers. The committee would support consideration of the use of 'fit and proper person' criteria in the assessment of applications for allocations. However, the committee anticipates that the recent amendments to the NRAS Regulations will provide effective safeguards for the concerns raised by submitters. The committee welcomes the amendments to the NRAS Regulations and considers that NRAS now provides more equitable protections for investors.

3.34 Reviewing, consulting on and amending the NRAS regulatory framework in response to emerging market conditions and stakeholder feedback is an example of good public administration. The committee anticipates NRAS will operate more effectively as a result of the bill's proposed amendments.

Recommendation 5

3.35 The committee recommends that the bill be passed.

Senator Slade Brockman

Chair

