



Australian Government
Department of Social Services

Ref 2018/4/734

MINUTE

SECRETARY

Through: Roxanne Kelley, Chief Operating Officer
Cath Halbert, Acting Deputy Secretary, Families and Communities

cc: Stewart Thomas, Acting Group Manager, Families & Communities Policy and Programs

NATIONAL RENTAL AFFORDABILITY SCHEME (NRAS) – APPLICATION TO TRANSFER INCENTIVES FROM ETHAN AFFORDABLE HOUSING TO QUANTUM HOUSING GROUP

Critical Date: As soon as practicable

<p>Recommendations:</p> <p>1. That you note the issues and background set out below.</p> <p>NOTED / PLEASE DISCUSS</p> <p>2. That you sign the letter to Ethan Affordable Housing Ltd at Attachment B.</p> <p>SIGNED / NOT SIGNED</p> <p style="text-align: right;">Secretary:..... / /</p>
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Issues:

On 22 November 2017, Ethan Affordable Housing Ltd (Ethan) made an application to transfer ^{s47G} allocations to Quantum Housing Group Pty Ltd (Quantum). The supporting material to the application included a declaration from Quantum requesting the transfer have effect from 1 May 2017 (the beginning of the 2017/18 NRAS year).

On 15 January 2018, Ethan submitted an amendment to the transfer application revising the number of allocations to ^{s47G} allocations.

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Next steps:

We anticipate that Ethan will confirm that they intend to continue with the transfer application for the 2018/19 NRAS year. To progress the transfer application, two issues arise for determination in accordance with the *National Rental Affordability Scheme Regulations 2008* including:

1. **Whether to transfer certain allocations from Ethan to other approved participants at the request of investors under regulation 21A.** The Department has received ^{s47G} requests to transfer incentives from investors, ^{s47G} to Ethan and ^{s47G} to Quantum. Of these requests, ^{s47G} also the subject of Ethan's transfer application. The decision maker is required to consider each of these applications on their merits. ^{s47G}

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^{s47G} providing the decision maker affords procedural fairness to the investors and approved participants (Ethan and Quantum). ^{s42}

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2. **Whether to transfer the remaining allocations that are subject of Ethan's request to Quantum in the 2018-19 NRAS year under regulation 21.** ^{s42}

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Background:

Ethan is an approved participant in NRAS with ^{s47G} allocations and ^{s47G} provisional allocations. Quantum is an existing approved participant, with ^{s47G} allocations and ^{s47G} provisional allocations. Ethan has indicated it intends to transfer all its allocations to Quantum and the ^{s47G} in the transfer application represents the first tranche.

The *National Rental Affordability Scheme Act 2008*, the *NRAS Regulations* and Division 380 of the *Income Tax Assessment Act* establish NRAS. Broadly put, NRAS allows the Secretary to make an 'allocation' to 'approved participants' of an entitlement to receive an annual 'incentive' (either a payment or a tax offset) in relation to an 'approved rental dwelling' provided the approved participant complies with certain 'conditions of allocation'. The key conditions of allocation are that the approved rental dwelling is rented to 'eligible tenants' (households below a specific income level) at or below 80% of the market value rent for the dwelling.

The Department has received complaints from investors regarding Ethan's conduct as an approved participant. ^{s47G}

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The Department has contacted ^{s47G} investors whose dwellings are subject to the transfer application. ^{s47G} of these investors have responded and of these ^{s47G} raised concerns about Ethan and ^{s47G} indicated incentive payments payable to them by Ethan are overdue.

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Review of decisions

Under regulation 33 of the *National Rental Affordability Scheme Regulations 2008*, a decision of the Secretary under regulation 21 A to transfer allocations from Ethan at the request of investors is subject to merits review by the Administrative Appeals Tribunal (AAT).

A decision to transfer an incentive on the application of an approved participant under regulation 21 is not subject to review by the AAT, although it will be subject to judicial review by the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977*.

Summary of Attachments:

A – ^{s42}

B – DRAFT Letter to Ethan Affordable Housing Ltd.

C – ^{s47E(d)}

Consultation: Housing Programs and Homelessness Branch.

Janean Richards
Chief Legal Counsel and Group Manager
Chief Counsel Group

19 April 2018



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Australian Government
Department of Social Services

Kathryn Campbell CSC
Secretary

Mr Ashley Fenn
Managing Director
Ethan Affordable Housing
PO Box 6154
SOUTH YARRA VIC 3141

s47G

Dear Mr Fenn

National Rental Affordability Scheme: Application to Transfer an Allocation to another Approved Participant

Approved participant: Ethan Affordable Housing Ltd (NRAS Registration ID 1-C539LN) (Ethan)

Proposed transfer: Quantum Housing Group Pty Ltd ATF The Quantum Affordable Housing Unit Trust (NRAS Registration ID 1-GVQ09B) (Quantum)

I refer to your applications under regulation 21 of the *National Rental Affordability Scheme Regulations 2008* (the regulations) to transfer ^{s47G} allocations to Quantum (the Transfer Application) dated 22 November 2017 and your revised application of 15 January 2018 to transfer ^{s47G} allocations to Quantum. The supporting documentation to the application included a declaration from ^{s47G} Director, Quantum, requesting the transfer have effect from 1 May 2017.

I have decided not to approve the application to transfer ^{s47G} NRAS allocations from Ethan to Quantum in the 2017-18 NRAS year.

On 6 December 2017, Mr Stewart Thomas, Branch Manager, Housing Programs and Homelessness, acknowledged receipt of the transfer application and requested that Ethan provide information to the Department, including:

- Contact details for each investor attached to the ^{s47G} allocations you are seeking to transfer to Quantum;
- Evidence that Ethan has passed on NRAS incentives to those investors and that there were no outstanding payments owed to them; and
- Assurance that each investor was aware of and had agreed to the transfer allocation.

On 14 December 2017, you proposed to satisfy the Department's request for the contact details of the *investors* by providing contact details of the entity that is entitled to have the NRAS incentive passed on to them. On 20 December 2017, Mr Thomas advised that this would be acceptable.

On 15 January 2018, you advised the Department you were revising the number of allocations subject to the transfer request to ^{s47G} and provided information regarding the entities entitled to have an incentive passed on to them. This included the details for ^{s47G} investors of residential dwellings, and your advice that an entity named Ethan Residential Pty Ltd (Ethan Residential) was entitled to receive the incentive in relation to ^{s47G} of the allocations.

I note that the definition of an "*investor*" in the regulations provides that an investor, in relation to an approved rental dwelling, means a person:

- (a) Who is the legal or beneficial owner of the rental dwelling; and
- (b) Who is not an approved participant in relation to the dwelling.

On 8 February 2018, Mr Thomas wrote to you requesting further information on the arrangements involving Ethan Residential and a statement from you that the owners of properties in these cases would not be negatively affected or disadvantaged in any way as a result of the Transfer Application.

On 1 March 2018, you provided further advice to the Department that Ethan Residential is an entity that does not own any property in its own right, but leases properties under a head lease arrangement with the owners of the properties, some of which are entities within the Ethan Group of companies, while others are independent. In other words, Ethan Residential is not an investor for the purpose of the regulations. Accordingly, the Department has not been provided with details of *investors* for the remaining ^{s47G} allocations subject to the transfer application.

Although you have represented that no investor would be negatively affected or disadvantaged by the transfer application, I am not satisfied that sufficient information has been provided to the Department to demonstrate whether investors have been consulted about or consented to the Transfer Application. I cannot be satisfied that the interests of those investors will not be detrimentally affected by the transfer.

As I have decided not to approve the application to transfer ^{s47G} NRAS allocations from Ethan to Quantum in the 2017-18 NRAS year, Ethan must comply with its obligations as an approved participant in relation to these allocations, which includes the responsibility to submit Statements of Compliance in respect of each approved rental dwelling under regulation 17 by 30 June 2018.

Yours sincerely

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Kathryn Campbell

30 April 2018

National Rental Affordability Regulations 2008 – Ethan and Quantum - decisions to be made

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Australian Government
Department of Social Services

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19 DEC 2018

Ref: EC18-001583

MINUTE s22

/ / /

SECRETARY

Through:

Liz Hefren-Webb
Deputy Secretary

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Lisa Foreman *cleared.* 19/12/18
Group Manager, Families and Communities Group

NATIONAL RENTAL AFFORDABILITY SCHEME (NRAS) – TRANSFER OF NRAS ALLOCATIONS FROM ETHAN AFFORDABLE HOUSING LIMITED TO QUESTUS FUNDS MANAGEMENT LIMITED

Recommendations:

1. That you **note**, following your “in principle” decision in EC18-001448 (copy at **Attachment A**) to transfer NRAS allocations from Ethan Affordable Housing Limited (Ethan) to Questus Funds Management Limited (Questus), Ethan and Questus have provided signed deeds to the department to protect the interests of investors.

NOTED / ~~PLEASE DISCUSS~~

2. That you **note** that the Minister for Families and Social Services has been briefed about your “in principle” decision (MS18-002042, copy at **Attachment B**) and that the Minister has noted the brief.

NOTED / ~~PLEASE DISCUSS~~

3. That you **note** that the department has not yet communicated your “in principle” decision to any of Ethan’s investors and that, accordingly, Ethan investors who have lodged transfer requests with the department under Regulation 21A of the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) that have not been finalised have not been invited to decide whether to have the allocation associated with their rental property transferred to Questus or to remain with Ethan.

NOTED / ~~PLEASE DISCUSS~~

4. That you **agree** to transfer the NRAS allocations listed in **Attachment C** from Ethan to Questus under Regulation 21 of the NRAS Regulations, with immediate effect.

AGREED / ~~NOT AGREED~~

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5. That you **sign** the draft letter to Ethan at **Attachment D** and the draft letter to Questus at **Attachment E**, to notify both companies of your decision.

SIGNED / ~~NOT SIGNED~~ s22

Secretary:.....

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Issues:

1. Questus and Ethan were notified by the department on 18 December 2018 of your “in principle” decision to transfer Ethan’s allocations to Questus. Questus provided the department with signed deeds (in the form previously agreed with the department) on the same day.
2. Ethan has also provided the department with a signed deed, purportedly in the agreed form. However, the Schedule of the deed was amended by Ethan in some respects. While this is not appropriate conduct by Ethan, the amendments do not significantly alter the protections provided to investors. The department is able to rely upon the deed provided by Ethan to complete the transfer.
3. If you decide to transfer the allocations:
 - a. the Minister proposes to issue a media release;
 - b. the department will advise all Ethan investors by a mix of email, SMS and telephone (the department does not hold email addresses for all investors);
 - c. Ethan and Questus will communicate with Ethan investors (these communications have been reviewed by the department);
 - d. the department will advise state and territory government housing departments and the Australian Taxation Office;
 - e. the department will include some general information about the transfer on the department’s web site; and
 - f. s45
4. The department will continue to hold Ethan’s incentives for the 2017-18 NRAS year for those allocations that you have previously transferred to another approved participant under Regulation 21A of the NRAS Regulations. The Taskforce will submit minutes to you seeking decisions to “redirect” these incentives to the gaining approved participants under the new provisions in the NRAS Regulations that commenced on 7 November 2018.

For Official Use Only**Background:**

5. Under Regulation 21 of the NRAS Regulations, an approved participant may request you to transfer an NRAS allocation it holds to another approved participant. There are no express statutory criteria governing your decision to transfer, but you should take the interests of investors into account.
6. You may not transfer provisional allocations under Regulation 21 of the NRAS Regulations. However, none of Ethan's allocations are provisional.
7. A transfer decision under Regulation 21 of the NRAS Regulations is not subject to review by the Administrative Appeals Tribunal.
8. There is no legal requirement for the department to consult with investors who have lodged transfer requests under Regulation 21A of the NRAS Regulations before transferring allocations under Regulation 21. Once Ethan's allocations are transferred under Regulation 21, the Regulation 21A transfer requests become otiose and the department will take no further action in relation to these requests.

Consultation:

9. There has been internal consultation with the ^{s42} the Housing Programs and the Financial Wellbeing Branch and the Communication Services Branch. There has been external consultation with ^{s42} the Australian Taxation Office, Questus and Ethan.

Summary of Attachments:

- A – Copy of EC18-001448
- B – Copy of MS18-002042
- C – List of all NRAS allocations held by Ethan
- D – Draft letter to Ethan
- E – Draft letter to Questus.

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Paul Menzies-McVey
Branch Manager
NRAS Taskforce
19 December 2018

Ref: EC18-001448

MINUTE**SECRETARY****Through:**

Liz Hefren-Webb
Deputy Secretary

cc: Lisa Foreman
Group Manager, Families and Communities

NATIONAL RENTAL AFFORDABILITY SCHEME (NRAS) – TRANSFER OF ALLOCATIONS FROM ETHAN AFFORDABLE HOUSING PTY LTD (ETHAN) TO QUESTUS FUNDS MANAGEMENT LIMITED (QUESTUS)

Recommendations:

1. That you **note** that Ethan has requested that you transfer all of its NRAS allocations (Ethan allocations) to Questus under Regulation 21 of the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations).

NOTED / PLEASE DISCUSS

2. That you **note** that Questus has agreed to execute the draft deeds at **Attachments A1** and **A2** and Ethan has agreed to execute the deed at **Attachment A3** to protect the interests of investors.

NOTED / PLEASE DISCUSS

3. That you **agree in principle** to transfer the Ethan allocations to Questus under Regulation 21 of the NRAS Regulations, on the basis that Questus must sign the deeds at **Attachments A1** and **A2**, Ethan must sign the deed at **Attachment A3** and the communication with investors described in Part 1 of **Attachment B** must be completed, before you make a final decision to transfer.

AGREED / NOT AGREED

4. That you **note** that, if you agree in principle to transfer the Ethan allocations to Questus, the department will communicate your in principle decision to Ethan, Questus, Ethan investors and state and territory governments, as outlined in **Attachment B**.

NOTED / PLEASE DISCUSS

5. That you **note** that, if you agree in principle to transfer the Ethan allocations, a minute seeking your final decision on the transfer will be provided to you no later than 18 December 2018.

NOTED / PLEASE DISCUSS

6. That you **note** that, if you make a final decision to transfer the Ethan allocations, you will ^{s45}

NOTED / PLEASE DISCUSS

Secretary:..... / /

Issues:

1. On 8 August 2018, Ethan lodged a request with the department for you to transfer ^{s47G} of its ^{s47G} NRAS allocations to Questus under Regulation 21 of the NRAS Regulations. On 28 November 2018, Ethan amended the request to cover all of its current NRAS allocations.
2. To support the transfer, Mr Ashley Fenn, Ethan and two other companies associated with Mr Fenn have agreed to sign a deed at **Attachment A3**. Questus has agreed to sign two deeds at **Attachments A1** and **A2**. One of the Questus deeds is intended to be provided to Ethan investors and the other will be a confidential deed in favour of the department.
3. The management of risks for Ethan investors arising from the transfer is complex, because Ethan has a number of different contractual arrangements in place with investors, and each arrangement raises different issues. A further complication is that the relationship between approved participants and investors in NRAS is governed by contract, but it is impractical for Questus to negotiate new contractual arrangements with the very large number of Ethan investors before or shortly after the transfer. It is not possible for Ethan to assign its current contractual arrangements to Questus because, under Australian contract law, it is not possible to assign contractual obligations. The agreements could be novated. However, this would require the participation of each individual investor, which is impractical.
4. Some of the current contracts between Ethan and investors involve a third entity, acting as the trustee of a trust. ^{s45}
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Risks that will be adequately managed:

5. If the transfer of Ethan allocations to Questus occurs, the three deeds at **Attachments A1**, **A2** and **A3** will operate together to provide an adequate level of protection for Ethan investors in relation to the matters set out below.

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Incentives for the 2018-19 NRAS year from 1 May 2018 up to the date of transfer

9. Ethan is entitled to the incentives for the Ethan allocations for the period from 1 May 2018 to the date of transfer to Questus. Ethan is also entitled to the state and territory payments for the Ethan allocations for this period. Neither the incentives nor the state and territory payments will be issued or paid until June or July 2019.

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Incentives for the 2017-18 NRAS year

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13. As is the case with incentives for 2018-19 NRAS year discussed above, ^{s45}

Unpaid incentives and state and territory payments for 2016-17 NRAS year

14. If Ethan was required to pass on a refundable tax certificate to an investor for the 2016-17 NRAS year, or an earlier year and Ethan failed to do so, the deeds at **Attachments A1** and **A2** will require Questus to pass the certificates on to investors. Questus will have access to Ethan's business records and should be able to identify instances where certificates have not been passed on by Ethan.

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Property management

17. Ethan has represented to the department that Ethan Residential Pty Ltd no longer conducts a property management business for NRAS investors. However, in case this representation is not accurate, the deed in **Attachment A3** requires Ethan Residential to allow investors to terminate any existing property management agreements on 90 days' notice without penalty (irrespective of the terms of the property management agreements).

Other matters

18. If the transfer of Ethan allocations occurs and the deeds at **Attachments A1**, **A2** and **A3** have effect, no investor will be worse off in any respect. If an investor currently has a right to take legal proceedings against Ethan for a failure to pass on incentives or for any reason, they will continue to have that right.
19. Tenants of NRAS rental properties should not be adversely affected. Where the tenant has a lease directly with an investor, the transfer of Ethan allocations to Questus will not affect the tenant-investor relationship. Where there is a tri-partite contract, the tenant has a relationship with the trustee of a trust. ^{s45}
20. Under the deed at **Attachment A1**, the department has information gathering and audit rights in relation all activities required under either Questus deed and Questus has ongoing reporting obligations to the department.

Residual risks and issues:

21. There are six risks with the transfer of the Ethan allocations to Questus that are not fully mitigated by the deeds at **Attachments A1**, **A2** and **A3**.

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28. Questus is a solvent company and its Chairman is well regarded in the affordable housing sector. There is no reason for the department to believe that Questus will not honour its legal obligations under the deeds at **Attachments A1** and **A2**. Further information about Questus' solvency and the background of its directors is included in paragraph 52 below.

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Investors with current Regulation 21A transfer requests:

37. The department is currently holding ^{s47G} requests from Ethan investors to transfer allocations under Regulation 21A of the NRAS Regulations. If you agree in principle to the transfer of Ethan allocations to Questus, the department will email those investors as soon as possible to ask whether they wish the department to continue to consider the Regulation 21A request (in which case the relevant allocation or allocations will be excluded from the final transfer to Questus) or whether the investor wishes the relevant allocation or allocations to be transferred to Questus (in which case the Regulation 21A transfer requests will be paused until you make a final decision on the transfer to Questus, and then formally closed).
38. The department's email to investors will explain the risks of a decision to ask the department to continue to process their Regulation 21A request (including the risks that the department may not decide to make the transfer because there are no grounds for the transfer, the risk that Ethan may seek AAT review of Regulation 21A transfer decisions, the inability of the Regulation 21B transfer process to assist with the recovery of unpaid state or territory payments) and the need, in some cases, to reissue notices under Regulation 21B to take advantage of recent changes to the NRAS Regulations.
39. The department's email will allow investors a week to respond and will make it clear that a failure to respond will result in the relevant allocation or allocations being included in the group of Ethan allocations being transferred to Questus, if you decide to make that transfer.
40. Both Questus and Ethan are aware of, and agree with, this strategy. ^{s42}

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Implementation activities:

46. If you agree in principle to transfer the Ethan allocations to Questus, **Attachment B** summarises the activities that will occur before and after you make a final transfer decision.

Background:

47. Under Regulation 21 of the NRAS Regulations, an approved participant may request you to transfer an NRAS allocation it holds to another approved participant. There are no express statutory criteria governing your decision to transfer. It is important, however, that you consider the likely impact of the transfer on investors because there is no mechanism for investors to be consulted on, or to opt out of, the transfer and investors are likely to be disadvantaged by a transfer unless separate arrangements are made to ensure that the incoming approved participant is required to pass on incentives to the investors of the transferred allocations.
48. Regulation 21 of the NRAS Regulations does not permit you to transfer provisional allocations. However, Ethan does not hold and has not requested you to transfer any provisional allocations.
49. A transfer decision under Regulation 21 of the NRAS Regulations is not subject to AAT review by any person.

50. On 11 October 2018, you agreed in EC18-001083 (copy attached at **Attachment C**) that the department should continue to work with Questus and Ethan to develop a detailed proposal covering the proposed transfer. Following discussions with the NRAS Taskforce, on 24 October 2018 Questus provided an initial proposal to the department. Since that time, the NRAS Taskforce has engaged in regular discussions with Questus to refine the proposal (including during a full day face-to-face meeting on 20 November 2018). The NRAS Taskforce has also had email communications with Ethan.
51. ^{s42}
52. The department has not received any complaints or transfer requests from investors relating to Questus. The department has undertaken solvency checks of Questus and these checks confirm that Questus does not have solvency issues. The Chairman of Questus, Mr David Somerville, is also Chairman of National Affordable Housing Providers Ltd, one of the two peak bodies for approved participants. However, Mr Somerville and the other two directors of Questus were previously involved in a failed business and were made bankrupt. All three were discharged from bankruptcy in 2016.
53. If the transfer of Ethan allocations to Questus occurs and no Ethan investors with a current Regulation 21A transfer request opt-out of the transfer, the NRAS Taskforce will only have ^{s47}_G unresolved transfer requests under Regulation 21A. Of these, ^{s47}_G relate to Quantum. As all of these matters have the same facts, they may be able to be progressed through the procedural fairness and decision-making processes as one large bundle.

Consultation:

54. There has been internal consultation with ^{s42} Housing Programs and Financial Wellbeing Branch and Communication Services Branch. There has been external consultation with ^{s42} the Australian Taxation Office, Questus and Ethan.

Summary of Attachments:

- A1** - Draft deed to be signed by Questus for the benefit of the department
- A2** - Draft deed to be signed by Questus for the benefit of investors
- A3** - Draft deed to be signed by Mr Fenn and Ethan companies for the benefit of the department and Questus
- B** - Implementation activities
- C** - EC18-001083

Paul Menzies-McVey
Branch Manager
NRAS Taskforce
3 December 2018

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Attachment B – Implementation Activities

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10 OCT 2018



Australian Government
Department of Social Services

Ref: EC18-001083

MINUTE

SECRETARY ^{s22}

Through:

Liz Hefren-Webb
Deputy Secretary

9/10/18 for Kathryn - the motivations for Questus are, as far as we can tell, financial. s22

cc:

Cath Halbert
Group Manager, Families and Communities

NATIONAL RENTAL AFFORDABILITY SCHEME (NRAS) – REQUEST BY ETHAN AFFORDABLE HOUSING PTY LTD (ETHAN) TO TRANSFER NRAS ALLOCATIONS TO QUESTUS LIMITED (QUESTUS)

Recommendation:

1. That you **agree** that the department should continue to work with Questus to enable Questus and Ethan to submit a detailed proposal to you requesting the transfer of Ethan’s NRAS allocations to Questus.

AGREED / ~~NOT AGREED~~ ^{s22}

Secretary:..... *11 Oct 18* /2018

Issues:

Ethan has lodged an application with the department in the approved form to request the transfer of ^{s47G} NRAS allocations to Questus. Questus currently holds seven allocations that receive incentives, ^{s47G} ‘pending’ allocations (that will shortly become eligible to receive incentives) and 907 provisional allocations.

The department has not received any complaints or transfer requests from investors relating to Questus. However, Questus typically transfers its NRAS allocations immediately after a rental property has been built, so it has had limited ongoing contact with NRAS investors. If the proposed transfer goes ahead, Questus has advised that it will manage the transfer of the NRAS allocations and have responsibility for passing on incentives to investors.

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~~---Sensitive: Legal---~~

The Chairman of Questus, Mr David Somerville, is also the Chairman of National Affordable Housing Providers Limited, one of two peak bodies for approval participants. The NRAS Taskforce held several discussions with Mr Somerville about the proposed transfer during September 2018 and had a further discussion with him on 5 October 2018. The discussions have focused on how the interests of investors will be protected. A further meeting with Questus' lawyers is scheduled for 10 October 2018. At this stage, the NRAS Taskforce has not met with Ethan about the proposed transfer.

Questus has advised that it would be impractical for it to enter into new contractual arrangements with the investors for all of the ^{s47G} allocations before the transfer takes effect. However, it has agreed that, if the transfer proceeds, it will sign a Deed Poll in favour of the investors for the NRAS allocations being transferred that will oblige Questus to pass on incentives to investors on an ongoing basis. The Deed Poll will also give investors a right to enter into a standard NRAS agreement with Questus (the form of the NRAS agreement would be attached to the Deed Poll). The Deed Poll (including the standard NRAS agreement) will be reviewed by the NRAS Taskforce before it is signed to ensure there are sufficient protections for investors, including in relation to issues such as the selection of property management agents. Following the transfer, investors would not be tied to Tebter, the property management company associated with Ethan.

If the transfer proceeds, Ethan would give the department an irrevocable direction to issue all of Ethan's Commonwealth incentives for the 2017-18 NRAS year to Questus, who in turn would pass these incentives to the relevant investors. A similar arrangement would apply to Ethan's state and territory incentives for the 2017-18 NRAS year. ^{s45}

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~~Sensitive: Legal~~*Timeline and next steps*

Questus and Ethan are working to provide you with a proposal by mid-October 2018, setting out detailed arrangements for the protection of investors. The NRAS Taskforce is recommending topics that should be covered in the proposal to ensure investors are sufficiently protected. If this proposal is satisfactory, and you consider that the interests of investors will be sufficiently protected, you could make an “in principle” decision to transfer the allocations, subject to the receipt of appropriate documentation (such as the signed Deed Poll from Questus). At this point, investors could be informed about the proposed transfer. Once all of the required documentation is provided by Questus and Ethan, you could make a final transfer decision. This decision would likely have effect by mid-December 2018.

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Background:

Under Regulation 21 of the NRAS Regulations, at the request of an approved participant, you may transfer an allocation (other than a provisional allocation) to another approved participant or another person or entity. There are no express statutory criteria governing your decision. However, when you make a transfer decision under Regulation 21, you may take the likely impact of the transfer on investors into account. It is important that you do this because a transfer significantly affects investors but there is no mechanism for investors to be consulted on, or to opt out of, the transfer.

Consultation:

There has been internal consultation with Housing Programs and Financial Wellbeing Branch and ^{s42} Office and ^{s42} ^{s22} There has been external consultation with the Australian Taxation

Paul Menzies-McVey
Branch Manager
NRAS Taskforce
7 October 2018

~~Sensitive: Legal~~

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 <p>Australian Government Department of Social Services</p>	<p style="text-align: right;">General Brief MS18-002042</p>
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To: **Minister for Families and Social Services, the Hon Paul Fletcher MP** (for information)

Subject: National Rental Affordability Scheme - Transfer of allocations from Ethan Affordable Housing Limited to Questus Funds Management Limited

Critical Date: Please action by 12 December 2018 to enable the transfer to be finalised before the end of 2018. We have been liaising closely with ^{s22} from your Office on this matter.

Recommendation for Minister Fletcher: That you

<p>1. Note the information provided in this Brief.</p> <p>Minister's Signature:.....</p>	<p>Noted / Please Discuss</p> <p>Date:...../...../ 2018</p>
<p style="text-align: center;">Minister's Comments</p>	<p style="text-align: center;">Quality Rating</p>
	<p>1. Very Poor 2. Poor 3. Satisfactory 4. Good 5. Excellent</p>

Purpose:

1. To inform you about the "in principle" decision of the Secretary of the Department to transfer all of Ethan Affordable Housing Limited's (Ethan's) National Rental Affordable Scheme (NRAS) allocations to Questus Funds Management Limited (Questus) under regulation 21 of the *National Rental Affordability Scheme Regulations 2008* (NRAS Regulations).

Key Issues:

2. The Secretary has power under regulation 21 of the NRAS Regulations to transfer NRAS allocations from one approved participant to another, at the request of the outgoing approved participant. There are no express statutory criteria for this decision but, practically, the Secretary needs to take account of the interests of investors affected by the transfer.

3. Ethan has decided to leave the NRAS sector and has reached a commercial arrangement with Questus to transfer all of Ethan's NRAS allocations to Questus, subject to the Secretary's approval of the transfer. Ethan currently holds ^{s47G} allocations. Questus is an existing approved participant. The transfer will be in the interests of investors because Ethan is responsible for the majority of investor complaints about approved participants (to date, ^{s47G} of ^{s47G} investor transfer requests received by the Department relate to Ethan). The Department has not received any complaints about Questus.

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4. The Department has been having discussions with Ethan and Questus to ensure that investors are protected. If the transfer goes ahead:
- a. Questus will offer to enter into a new NRAS agreement with all affected investors;
 - b. ^{s45}
 - c.
 - d.
 - e. Questus will pass on any Commonwealth incentives to investors for the 2016-17 NRAS year, or an earlier NRAS year, where these have not previously been passed on by Ethan.
5. The obligations on Ethan and Questus will be set out in a series of formal deeds (Deeds) that will be enforceable by the Department, if necessary. The terms of the Deeds have been agreed.
6. The Department proposes to write to the ^{s47G} investors who have an unresolved investor transfer request with the Department to ask them whether they would prefer to be part of the bulk transfer to Questus or to remain with Ethan and have their individual transfer request resolved. The Department will explain that there are risks of deciding to continue to pursue individual transfer requests and will encourage this group of investors to be part of the bulk transfer to Questus. Investors will be given one week to respond.
7. The Secretary made an “in principle” decision on 8 December 2018 to transfer the allocations from Ethan to Questus. However, the Secretary asked that you be informed about this “in principle” decision before the Department communicates the decision to any other person. If you note this Brief, the Department will inform Ethan and Questus of the “in principle” decision and ask that the Deeds be signed and returned to the Department. The Department will also inform investors of the “in principle” decision. If you note this Brief by the critical date, it should be possible for the Secretary to transfer the allocations formally and to issue Ethan’s incentives for the 2017-18 NRAS year to Questus before the end of 2018.

Sensitivity:

8. Investors may complain they were not consulted about the transfer to Questus.

Risk Management:

9. The Deeds require Questus to report to the Department on implementation of the arrangements mentioned in paragraph 4 above and give the Department powers to investigate and audit Questus. The Department has conducted standard business solvency checks on Questus. ^{s45}

Media Release:

10. Communication Services Branch will be providing your Office with talking points in relation to the proposed transfer. You may wish to issue a media release once the transfer has been finalised.

Consultation:

11. There has been consultation with the Communication Services Branch, ^{s42} and the Australian Taxation Office. There has also been consultation about the form of the Deeds with Ethan and Questus.

For Official Use Only

Contact Officer: Paul Menzies-McVey
Position: Branch Manager
Branch: NRAS Taskforce
Phone/Mobile: (02) 6146 0365 / s22

Cleared by: Lisa Foreman
Position: Group Manager, Families and Communities Group
Phone/Mobile: (02) 6146 5017 / s22

Signature: _____

Date: 10 / 12 / 18

Cleared by: Liz Hefren-Webb
Position: Deputy Secretary
Phone/Mobile: (02) 6146 0070 / s22

Signature: _____

Date: 11 / 12 / 18



Australian Government
Department of Social Services

Kathryn Campbell CSC
Secretary

Ref: EC18-001853

Mr Ashley Fenn
Managing Director
Ethan Affordable Housing Limited
PO Box 6154
SOUTH YARRA VIC 3141
s47G

Dear Mr Fenn

Transfer of allocations under the National Rental Affordability Scheme (NRAS)

I refer to Ethan Affordable Housing Limited's request to transfer all of its s47G NRAS allocations to Questus Funds Management Limited (Questus) under Regulation 21 of the National Rental Affordability Scheme Regulations 2008.

I have transferred these allocations to Questus.

Please provide all NRAS compliance information for these allocations to Questus.

Yours sincerely

s22

Kathryn Campbell
19 December 2018



Australian Government
Department of Social Services

Kathryn Campbell CSC
Secretary

Ref: EC18-001853

Mr David Somerville
Chairman
Questus Funds Management Ltd
1/5 Bramall Street
EAST PERTH WA 6004

s47G

Dear Mr Somerville

Transfer of allocations under the National Rental Affordability Scheme (NRAS)

I refer to a request to me from Ethan Affordable Housing Limited to transfer all of its^{s47G} NRAS allocations to Questus Funds Management Limited (Questus) under Regulation 21 of the National Rental Affordability Scheme Regulations 2008.

I have transferred these allocations to Questus. A list of the transferred allocations is at Attachment A. The NRAS Portal will be updated accordingly.

Yours sincerely

s22

Kathryn Campbell
19 December 2018

Report | ^{s47F}

NRAS Regulation 21A | Application to Transfer

Department of Social Services

22 March 2018
Private and Confidential

22 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report |s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed two applications to transfer a National Rental Affordability Scheme allocation made by an investor s47F) under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G

Yours sincerely

s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-HGI-607
002	Application to transfer for 1-HGI-730
003	Extract from FY2015-16 NRAS incentive report
004	Extract from FY2016-17 NRAS incentive report
005	Processing data for Territory incentive payments
006	Contract between s47F and Ethan Affordable Housing Pty Ltd for 1-HGI-607
007	Contract between s47F and Ethan Affordable Housing Pty Ltd for 1-HGI-730
008	Default notices from Ethan Affordable Housing Pty Ltd for 1-HGI-607 and 1-HGI-730
009	Termination notice from Ethan Affordable Housing Pty Ltd for 1-HGI-607
010	Termination notice from Ethan Affordable Housing Pty Ltd for 1-HGI-730
011	FY2015-16 Commonwealth refundable tax offset certificate for 1-HGI-607
012	Email statement from investor dated 23 February 2018
013	FY2015-16 Commonwealth refundable tax offset certificate for 1-HGI-730
014	FY2014-15 Territory cheque letter for 1-HGI-607
015	FY2015-16 Territory cheque letter for 1-HGI-607
016	FY2014-15 Territory cheque letter for 1-HGI-730
017	FY2015-16 Territory cheque letter for 1-HGI-730
018	Correspondence from Ethan Affordable Housing Pty Ltd to s47F dated 22 March 2017
019	Correspondence from Ethan Affordable Housing Pty Ltd to s47F dated 22 May 2017

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-607	s47F
1-HGI-730	
ASIC	Australian Securities and Investments Commission
Department	Department of Social Services
DSS	Department of Social Services
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A, an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the applications to transfer an allocation made by s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the following NRAS dwellings:

Table 1 – NRAS Dwellings

Address	NRAS Dwelling ID
s47F	1-HGI-607
	1-HGI-730

- 1.9 The investor’s applications identified **four** potential Regulation 21A grounds for transfer. From our assessment of the information provided by the investor in support of their applications, we **did not** identify any additional Regulation 21A grounds for transfer.
- 1.10 From our assessment of information provided by the investor and the Northern Territory Government, there is sufficient information to support **one** Regulation 21A ground for transfer for each property:

Table 2 – Grounds for Transfer

Ground	Identification	Support
1-HGI-607		
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investor's application to transfer	Sufficient Information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investor's application to transfer	Insufficient Information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investor's application to transfer	Insufficient Information
Deregistration⁴ ASIC has published a notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	Investor's application to transfer	Insufficient information
1-HGI-730		
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investor's application to transfer	Sufficient Information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investor's application to transfer	Insufficient Information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investor's application to transfer	Insufficient Information
Deregistration⁴ ASIC has published a notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	Investor's application to transfer	Insufficient information

Methodology

- 1.11 We reviewed the investor's applications to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the applications.

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ NRAS Regulation 21A(2)(c).

⁴ NRAS Regulation 21A (2)(f).

- 1.12 We requested and reviewed additional information in support of the investor's applications through correspondence with the investor and the Northern Territory Government.
- 1.13 We have not been provided with information from, or provided an opportunity for the approved participant to respond to these applications. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.14 We analysed information provided by the investor and the Northern Territory Government in support of the applications to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁵ – for each potential Regulation 21A ground for transfer.

Findings

- 1.15 From our assessment of information provided by the investor and the Northern Territory Government, **four** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **one** Regulation 21A ground for transfer for both properties.

Failure to Pass on Incentive

- 1.16 From our assessment of information provided by the investor and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for both properties (1-HGI-607 and 1-HGI-730) because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive (noting that the approved participant generally acted in a manner consistent with an agreement, such as providing default and termination notices to the investor)
 - For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2015-16 financial year, and
 - For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 financial year (289 days taken to pass on the incentive) and has not received the incentive for the 2016-17 financial year, despite receiving the incentive for the 2014-15 financial year.

Contravention of Consumer Protection Law

- 1.17 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer for both properties (1-HGI-607 and 1-HGI-730).
- 1.18 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁶ However, as this ground for transfer was identified by the investor in their applications, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.
- 1.19 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing

⁵ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

⁶ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.⁷

- 1.20 While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Provision of False or Misleading Information to Investor

- 1.21 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer for both properties (1-HGI-607 and 1-HGI-730) because the investor did not identify or provide us with any representations from the approved participant that the investor considered to be false or misleading.

Deregistration

- 1.22 From our assessment of information provided by the investors and ASIC's database of published notices, there is **insufficient information** to support this ground for transfer for both properties (1-HGI-607 and 1-HGI-730) because we are unable to establish that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

⁷ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, buy or lease housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
 - The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist:

Table 3 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the applications to transfer an allocation made by s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the following NRAS dwellings:

Table 4 – NRAS Dwellings

Address	NRAS Dwelling ID
s47F	1-HGI-607
	1-HGI-730

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investor's applications to transfer (refer to Exhibit 001 and Exhibit 002) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the applications.
- 3.2 We contacted the investor on the following dates to discuss their applications to transfer, and source additional information in support of their applications.

Table 5 – Contact with Investor

Date	Contact Method
13 February 2018	Phone call
13 February 2018	Email
20 February 2018	Phone call
21 February 2018	Phone call
21 February 2018	Email

- 3.3 We received additional information in support of the investor's applications on the following dates:

Table 6 – Information from Investor

Date	Information Provided
20 February 2018	Contract with approved participant Correspondence with approved participant Incentive cheques from approved participant
22 February 2018	Refundable tax offset certificates from approved participant Incentive statements from approved participant
23 February 2018	Statement from investor regarding incentive payments

Obtaining Information (Northern Territory Government)

- 3.4 The Department requested and received additional information in support of the investor's applications from the Northern Territory Government on our behalf on the following date:

Table 7 – Information from Department

Date	Information Provided
12 March 2018	Payment information for 2014-15, 2015-16 and 2016-17 Territory incentive payments to the approved participant

Obtaining Information (Approved Participant)

- 3.5 We have not been provided with information from, or provided an opportunity for the approved participant to respond to these applications. We understand the Department will provide the approved

participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

3.6 We analysed information provided by the investor and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁸ – for each potential Regulation 21A ground for transfer.

3.7 This process involved:

- Analysing information provided by the investor and the Northern Territory Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investor where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁸ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department⁹
 - There is a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor¹⁰, and
 - The investor did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.¹¹
- 4.2 The investor's applications to transfer identified this ground for transfer, stating "I have not received the State NRAS incentive portion for FY16/17. I did not receive the Federal and State NRAS incentive for FY15/16 until Aug 2017" (refer to Exhibit 001 and Exhibit 002).

Analysis

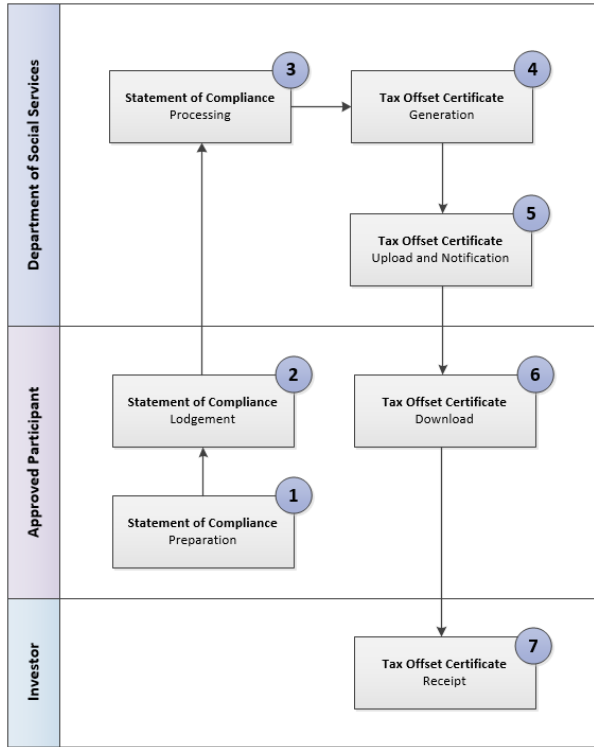
- 4.3 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.4 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investor through the following process for both properties (1-HGI-607 and 1-HGI-730) for all relevant financial years:

⁹ NRAS Regulation 30B(1)(a).

¹⁰ NRAS Regulations 30A(2) and 30B(1)(b).

¹¹ NRAS Regulation 30B(2).

Figure 1 – Provision of Incentive to Investor

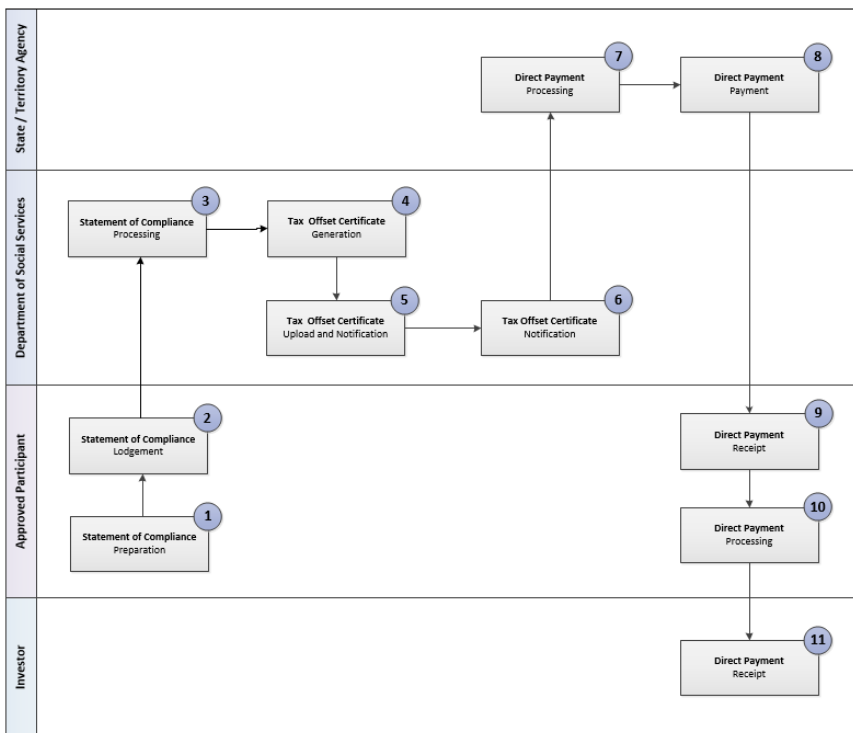


Legend

- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
- 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
- 3 The Department processes the incentive for the dwelling.
- 4 The Department generates a tax offset certificate for the dwelling.
- 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
- 6 The approved participant downloads the tax offset certificate, and provides the tax offset certificate (with a covering letter) to the investor.
- 7 The investor receives the tax offset certificate from the approved participant.

4.5 For the Territory portion of the incentive, we have identified incentives were provided to the investor through the following process for both properties (1-HGI-607 and 1-HGI-730) for all relevant financial years:

Figure 2 – Provision of Territory Incentive to Investor



Legend

- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
- 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
- 3 The Department processes the incentive for the dwelling.
- 4 The Department generates a tax offset certificate for the dwelling.
- 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
- 6 The Department notifies State and Territory agencies that the Commonwealth component of the incentive has been provided (on a fortnightly basis).
- 7 The State / Territory agency processes the State / Territory component of the incentive.
- 8 The State / Territory makes a direct payment of the incentive to the approved participant.
- 9 The approved participant receives the direct payment.
- 10 The approved participant processes the direct payment in preparation for transfer to the investor (which may include the deduction of administration fees etc.)
- 11 The investor receives the cash incentive in relation to the NRAS allocation (which will generally be the amount of the direct payment minus administration fees).

Element 1 | Receipt of Incentive by Approved Participant

- 4.6 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling from the Department and State and/or Territory agencies.
- 4.7 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwellings in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 8 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹²	Date of Processing	Exhibit
1-HGI-607		
2015-16	14 September 2016	Exhibit 003
2016-17	13 June 2017	Exhibit 004
1-HGI-730		
2015-16	14 September 2016	Exhibit 003
2016-17	13 June 2017	Exhibit 004

- 4.8 For the Territory portion of the incentive, the approved participant received the incentive for the dwellings as a direct payment.

Table 9 – Receipt of Territory Incentive by Approved Participant

Financial Year ¹²	Date of Payment	Exhibit
1-HGI-607		
2014-15	14 September 2016	Exhibit 005
2015-16	17 October 2016	Exhibit 005
2016-17	1 August 2017	Exhibit 005
1-HGI-730		
2014-15	14 September 2016	Exhibit 005
2015-16	17 October 2016	Exhibit 005
2016-17	1 August 2017	Exhibit 005

Element 2 | Contractual Agreement between Approved Participant and Investor

- 4.9 The second element for this ground for transfer is the existence of a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor. There is a requirement to pass on an incentive where, under a contractual agreement with the investor, the approved participant is required to¹³:
- Make a payment to the investor in relation to the incentive

¹² Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

¹³ NRAS Regulation 30A(2).

- Take steps to enable the investor to claim a tax offset to which the investor is entitled in relation to the incentive, or
- To make an election in relation to the incentive.

4.10 The investor provided contractual agreements with the approved participant for both properties subject of the applications to transfer that have been **signed by the investor but have not been signed by the approved participant**:

Table 10 – Contractual Agreements

Property	Contract Date	Exhibit
1-HGI-607	12 March 2015	Exhibit 006
1-HGI-730	12 March 2015	Exhibit 007

4.11 The contractual agreements state at Clause 1(vii) that "Ethan agrees to ensure the NRAS incentives issued by the Government are passed on to the investor" and at Clause 1(viii) that "Ethan agrees to undertake all actions necessary to complete the tasks set out above".

4.12 We note the contractual agreements provided by the investor was not signed by the approved participant, but it appears the approved participant generally acted in a manner consistent with an agreement for both properties. For example, the approved participant issued default and termination notices for both properties, which referred to the agreement between the investor and the approved participant (refer to Exhibit 008, Exhibit 009 and Exhibit 010).

4.13 We also note the contractual agreements between the investor and the approved participant does not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

4.14 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwelling to the investor within a reasonable time after receiving the incentive.

4.15 For the Commonwealth portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 11 – Receipt of Commonwealth Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
1-HGI-607				
2015-16	14 September 2016	23 February 2017	Exhibit 011	162 Days
2016-17	13 June 2017	Not Received	Exhibit 012	225 Days ¹⁴
1-HGI-730				
2015-16	14 September 2016	24 February 2017	Exhibit 013	163 Days
2016-17	13 June 2017	Not Received	Exhibit 012	225 Days ¹⁵

¹⁴ As of the date of statement (23 February 2018) from the investor that they have not received the Commonwealth incentive for this financial year (refer to Exhibit 012).

- 4.16 For the Territory portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 12 – Receipt of Territory Incentive by Investor

Financial Year	Date of Payment	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
1-HGI-607				
2014-15	14 September 2016	13 October 2016	Exhibit 014	29 Days
2015-16	17 October 2016	2 August 2017	Exhibit 015	289 Days
2016-17	1 August 2017	Not Received	Exhibit 001	126 Days ¹⁵
1-HGI-730				
2014-15	14 September 2016	13 October 2016	Exhibit 016	29 Days
2015-16	17 October 2016	2 August 2017	Exhibit 017	289 Days
2016-17	1 August 2017	Not Received	Exhibit 002	126 Days ¹⁶

- 4.17 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 states "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive".¹⁷

Analysis | 1-HGI-607

- 4.18 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the failure to pass on the incentive for the 2016-17 financial year. In particular, we note the contrast between the time to pass on the incentive for the 2015-16 (162 days to pass on the incentive) financial year, and the failure to pass on the incentive for the 2016-17 financial year.
- 4.19 This supports a finding that the failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investor received the incentive in the same manner (as a refundable tax offset certificate) from the approved participant for the 2015-16 financial year.
- 4.20 For the **Territory** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 financial year (289 days) and the failure to pass on the incentive for the 2016-17 financial year. In particular, we note the contrast between the time to pass on the incentive (and failure to pass on the incentive) for these financial years and the 2014-15 financial year (29 days to pass on the incentive).
- 4.21 This supports a finding that the delay in passage of the incentive for the 2015-16 financial year and failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investor received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.

¹⁵ As of the date of application to transfer (23 February 2018) from the investor, they had not yet received the Territory incentive for this financial year (refer to Exhibit 001).

¹⁶ As of the date of application to transfer (23 February 2018) from the investor, they had not yet received the Territory incentive for this financial year (refer to Exhibit 002).

¹⁷ Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

Analysis | 1-HGI-730

- 4.22 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the failure to pass on the incentive for the 2016-17 financial year. In particular, we note the contrast between the time to pass on the incentive for the 2015-16 (163 days to pass on the incentive) financial year, and the failure to pass on the incentive for the 2016-17 financial year.
- 4.23 This supports a finding that the failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investor received the incentive in the same manner (as a refundable tax offset certificate) from the approved participant for the 2015-16 financial year.
- 4.24 For the **Territory** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 financial year (289 days) and the failure to pass on the incentive for the 2016-17 financial year. In particular, we note the contrast between the time to pass on the incentive (and failure to pass on the incentive) for these financial years and the 2014-15 financial year (29 days to pass on the incentive).
- 4.25 This supports a finding that the delay in passage of the incentive for the 2015-16 financial year and failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investor received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.

Finding

- 4.26 From our assessment of information provided by the investor and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for both properties (1-HGI-607 and 1-HGI-730) because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive (noting that the approved participant generally acted in a manner consistent with an agreement, such as providing default and termination notices to the investor)
 - For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2015-16 financial year, and
 - For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 financial year (289 days taken to pass on the incentive) and has not received the incentive for the 2016-17 financial year, despite receiving the incentive for the 2014-15 financial year.
- 4.27 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.28 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for both the delay and failure to pass on the incentive.

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investor's applications to transfer identified this ground for transfer, stating "I was coerced into signing a contract with them and having Ethan as my Property Manager. If I did not, they would terminate my NRAS payments and make application to DSS to have my allocation transferred to another dwelling" (refer to Exhibit 001 and Exhibit 002).

Analysis

- 5.3 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹⁸
- 5.4 However, as this ground for transfer was identified by the investor in their applications, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹⁹
- 5.5 In the context of the NRAS and the investor's applications to transfer, this ground for transfer is constituted by the following elements:
- The approved participant refuses to supply services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investor²⁰
 - The approved participant has refused to supply these services because the investor has not used (or agreed to use) services (such as tenancy management services) from a third party²¹, and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.²²

¹⁸ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹⁹ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

²⁰ *Competition and Consumer Act 2010* s47(7)(a).

²¹ *Competition and Consumer Act 2010* s47(7).

²² *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

Element 1 | Refusal to Supply Services

- 5.6 The first element for this ground for transfer is the approved participant's refusal to supply services to the investor.
- 5.7 In correspondence from the approved participant to the investor relating to both properties dated 22 March 2017, the approved participant identifies that the investor's incumbent property manager ^{s47F} was no longer approved by the approved participant and the investor would need to change to a new property manager (refer to Exhibit 018).
- 5.8 The correspondence states "Your current property manager was recently informed that their services are no longer required or approved as property managers for any existing properties that are operating in the Ethan NRAS program... This will mean that your NRAS property that has been managed by ^{s47F} will need to roll across to a new agency that is approved by Ethan".

Element 2 | Refusal to Supply Because of Failure to Use Third Party

- 5.9 The second element for this ground for transfer is that the approved participant has refused to supply services to the investor because the investor has not used services from a third party.
- 5.10 In correspondence from the approved participant to the investor relating to both properties subject of the applications to transfer dated 22 May 2017, the approved participant identifies that the investor was in breach of their agreement with the approved participant as they had failed to appoint a property manager approved by the approved participant (Refer to Exhibit 019).
- 5.11 The correspondence states "As your NRAS agreement with Ethan requires you to appoint a property manager approved by Ethan, you are currently in breach of this agreement and may be at risk of being ineligible to receive the annual NRAS incentive that is allocated to your ^{s47F} property".
- 5.12 The correspondence attached default notices dated 20 April 2017²³ which state "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan" (refer to Exhibit 008).
- 5.13 Following this, the approved participant issued the investor with termination notices dated 9 June 2017. The termination notices state "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan... This is official notification of termination of your agreement Ethan Affordable Housing Ltd" (Refer to Exhibit 009 and Exhibit 010).

Element 3 | Substantial Lessening of Competition

- 5.14 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.15 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.²⁴ As the investor had acquired tenancy management services from ^{s47F} this would include the market for tenancy management services.
- 5.16 From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

²³ The Default Notices dated 20 April 2017 were attached to an email sent from the approved participant to the investor dated 22 May 2017 (refer to Exhibit 19).

²⁴ *Competition and Consumer Act 2010* s47(13)(b).

Finding

- 5.17 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer for both properties (1-HGI-607 and 1-HGI-730). While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.
- 5.18 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

6 Ground 3 | Provision of False or Misleading Information to Investor

Overview

- 6.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:
- The approved participant provides information about the NRAS to the investor (such as a representation made by an email or letter), and
 - The information provided to the investor is false or misleading.
- 6.2 The investor's applications to transfer identified this ground for transfer, but did not expressly identify any representations from the approved participant that the investor considered to be false or misleading (refer to Exhibit 001 and Exhibit 002).

Finding

- 6.3 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer for both properties (1-HGI-607 and 1-HGI-730) because the investor did not identify or provide us with any representations from the approved participant that the investor considered to be false or misleading.
- 6.4 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

7 Ground 4 | Deregistration

Overview

- 7.1 NRAS Regulation 21A(2)(f) identifies the Secretary may transfer an allocation where the approved participant is a company and ASIC has published a notice of proposed deregistration of the approved participant or a court has ordered the deregistration of the approved participant by ASIC.
- 7.2 The investor's applications to transfer identified this ground for transfer, but did not expressly identify any information indicating the approved participant is subject to a notice of proposed reregistration or has been deregistered (refer to Exhibit 001 and Exhibit 002).

Analysis

- 7.3 From review of ASIC's database of published notices²⁵ (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) as at 22 March 2018, we have not identified that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

Finding

- 7.4 From our assessment of information provided by the investors and ASIC's database of published notices, there is **insufficient information** to support this ground for transfer for both properties (1-HGI-607 and 1-HGI-730) because we are unable to establish that the approved participant is subject to a notice of proposed reregistration or has been deregistered.
- 7.5 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²⁵ <https://insolvencyntices.asic.gov.au/> (Accessed 16 March 2018).

8 Limitations

- 8.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 8.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 8.3 This report has been prepared based on work completed as at 22 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 8.4 As at 22 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 8.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 8.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 8.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 8.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 8.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 8.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | ^{s47F}

NRAS Regulation 21A | Application to Transfer

Department of Social Services

28 March 2018
Private and Confidential

28 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report | s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed an application to transfer a National Rental Affordability Scheme allocation made by joint investors s47F under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G

Yours sincerely

s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-HGI-494
002	Processing data for Commonwealth incentive payments
003	Extract from FY2014-15 NRAS incentive report
004	Extract from FY2015-16 NRAS incentive report
005	Extract from FY2016-17 NRAS incentive report
006	Processing data for Territory incentive payments
007	Contract between investors and Ethan Affordable Housing Pty Ltd for 1-HGI-494
008	FY2013-14 Commonwealth cheque letter for 1-HGI-494
009	FY2014-15 Commonwealth cheque letter for 1-HGI-494
010	FY2016-17 Commonwealth tax offset certificate for 1-HGI-494
011	FY2013-14 Territory cheque letter for 1-HGI-494
012	FY2014-15 Territory cheque letter for 1-HGI-494
013	Correspondence from Ethan Affordable Housing Pty Ltd to investors dated 1 June 2016
014	Correspondence from Tebter Property to investors dated 2 August 2017
015	Correspondence from Tebter Property to investors dated 4 August 2017
016	Correspondence from Tebter Property to investors dated 4 September 2017

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-494	^{s47F}
AP	Approved Participant
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Department	Department of Social Services
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the application to transfer an allocation made by the joint investors [s47F](#) in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at [s47F](#) (NRAS identification **1-HGI-494**).
- 1.9 The investor’s application identified **four** potential Regulation 21A grounds for transfer. From our assessment of the information provided by the investors in support of their application, we **did not** identify any additional Regulation 21A grounds for transfer.
- 1.10 From our assessment of information provided by the investors, the Department and the Northern Territory Government, there is sufficient information to support **one** Regulation 21A ground for transfer (refer to Table 1 – Grounds for Transfer):

Table 1 – Grounds for Transfer

Ground	Identification	Support
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investors within a reasonable time after receiving the incentive	Investors' application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investors' application to transfer	Insufficient information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investors	Investors' application to transfer	Insufficient information
Deregistration⁴ ASIC has published a notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	Investors' application to transfer	Insufficient information

Methodology

- 1.11 We reviewed the investors' application to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 1.12 We requested and reviewed additional information in support of the investors' application through correspondence with the investors, the Department and the Northern Territory Government.
- 1.13 We have not been provided with information from the Australian Taxation Office (ATO) relating to the processing of payments or release of funds in relation to this application.
- 1.14 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.15 We analysed information provided by the investors, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁵ – for each potential Regulation 21A ground for transfer.

Findings

- 1.16 From our assessment of information provided by the investors, the Department and the Northern Territory Government, **four** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **one** Regulation 21A grounds for transfer.

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ NRAS Regulation 21A(2)(c).

⁴ NRAS Regulation 21A (2)(f).

⁵ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

Failure to Pass on Incentive

1.17 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:

- The approved participant has received incentives for the approved rental dwelling
- There was a contractual agreement dated 15 September 2011 between the investors and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investors did not receive the incentive from the approved participant within a reasonable time for the 2014-15 (298 days taken to pass on the incentive) and 2015-16 (413 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, the investors did not receive the incentive from the approved participant within a reasonable time for the 2014-15 (267 days taken to pass on the incentive) and 2015-16 (288 days taken to pass on the incentive) financial years.

Contravention of Consumer Protection Law

1.18 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer.

1.19 We have not assessed the legal interpretation of “contravention” – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁶ However, as this ground for transfer was identified by the investors in their application, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.

1.20 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(6) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other’s freedom to choose with whom, in what, or where they deal.⁷

1.21 From information provided by the investor, we are unable to establish whether:

- The approved participant supplied services to the investors on the condition the investor acquires services from a third party, and
- The alleged conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Provision of False or Misleading Information to Investor

1.22 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer because:

- The representations concerning the date of payment of incentives identified as false or misleading by the investors may not have been made by the approved participant, and
- Even where these representations were made on behalf of the approved participant, they do not identify a specific timeframe for the payment of the incentives and we have not been

⁶ See, e.g., Australian Competition and Consumer Commission’s Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

⁷ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

provided with information from the ATO relating to the processing of payments or release of funds that could be assessed against these representations.

Deregistration

- 1.23 From our assessment of information provided by the investors and ASIC's database of published notices, there is **insufficient information** to support this ground for transfer because we are unable to establish that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
 - The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist:

Table 2 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the application to transfer an allocation made by s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-HGI-494**).

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investors’ application to transfer (refer to Exhibit 001) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 3.2 We contacted the investors on the following dates to discuss their application to transfer, and source additional information in support of their application.

Table 3 – Contact with Investors

Date	Contact Method
13 February 2018	Phone call
13 February 2018	Email
23 February 2018	Phone call
23 February 2018	Email
26 February 2018	Email
1 March 2018	Phone call
1 March 2018	Email

- 3.3 We received additional information in support of the investors’ application on the following dates:

Table 4 – Information from Investors

Date	Information Provided
24 February 2018	Correspondence with approved participant Incentive statement from approved participant Cheque letters from approved participant
5 March 2018	Incentive statement from approved participant Refundable tax offset certificate from approved participant

Obtaining Information (Department)

- 3.4 We requested and received additional information in support to the investors’ application from the Department on the following date:

Table 5 – Information from Department

Date	Information Provided
1 March 2018	Processing data for FY2013-14 incentive payment

Obtaining Information (Northern Territory Government)

3.5 The Department requested and received additional information in support of the investors' application from the Northern Territory Government on our behalf on the following date:

Table 6 – Information from Northern Territory Government

Date	Information Provided
13 March 2018	Payment information for 2013-14, 2014-15 and 2015-16 Territory incentive payments to the approved participant

Obtaining Information (Australian Taxation Office)

3.6 We have not been provided with information from the Australian Taxation Office (ATO) relating to the processing of payments or release of funds in relation to this application.

Obtaining Information (Approved Participant)

3.7 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

3.8 We analysed information provided by the investors, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁸ – for each potential Regulation 21A ground for transfer.

3.9 This process involved:

- Analysing information provided by the investors, the Department and the Northern Territory Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investors where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁸ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department⁹
 - There is a contractual agreement between the investors and the approved participant that requires the approved participant to pass on the incentive to the investors¹⁰, and
 - The investors did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.¹¹
- 4.2 The investors' application to transfer identified this ground for transfer, stating "I have consistently received my payments well after they should have been paid. I have received the State NRAS Incentive for FY 15/16 in August 2017 and the Federal portion only last week in late November 2017. I have not yet received the State and Federal NRAS incentive for FY 16/17" (refer to Exhibit 001).
- 4.3 The investors' application to transfer did not identify other instances where the approved participant failed to pass on the incentive. However, from review of information provided by the investor, the Department and the Northern Territory Government, we have identified other instances where the approved participant did not pass on the incentive within a reasonable time.

Analysis

- 4.4 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.5 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investors as **both** a direct payment (for the 2013-14, 2014-15 and 2015-16 financial years) and as a refundable tax offset certificate (for the 2016-17 financial year):

⁹ NRAS Regulation 30B(1)(a).

¹⁰ NRAS Regulations 30A(2) and 30B(1)(b).

¹¹ NRAS Regulation 30B(2).

Figure 1 – Provision of Commonwealth Incentive to Investors for 2013-14, 2014-15 and 2015-16

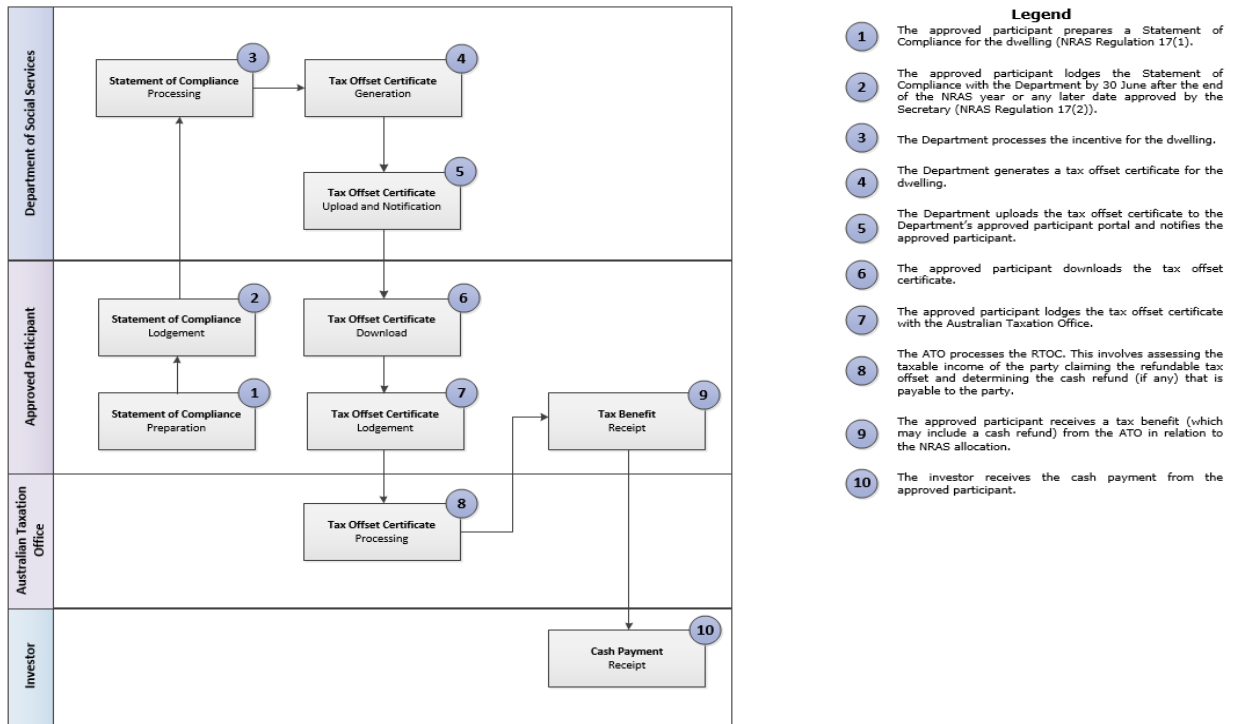
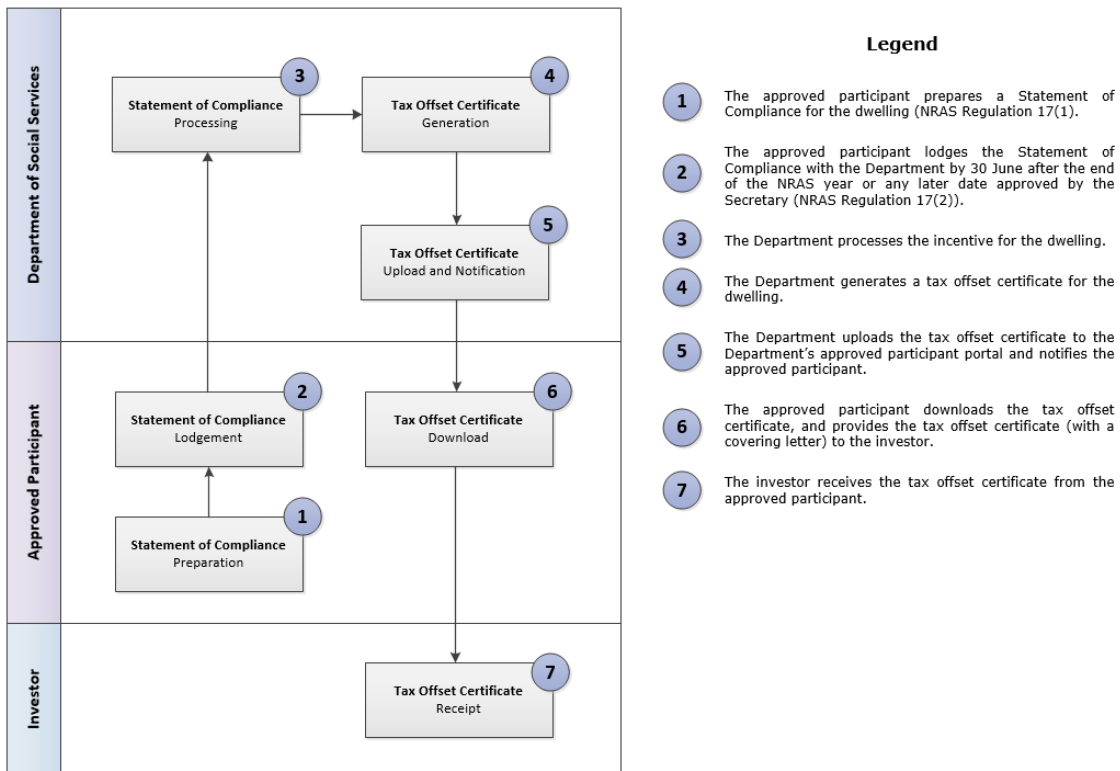
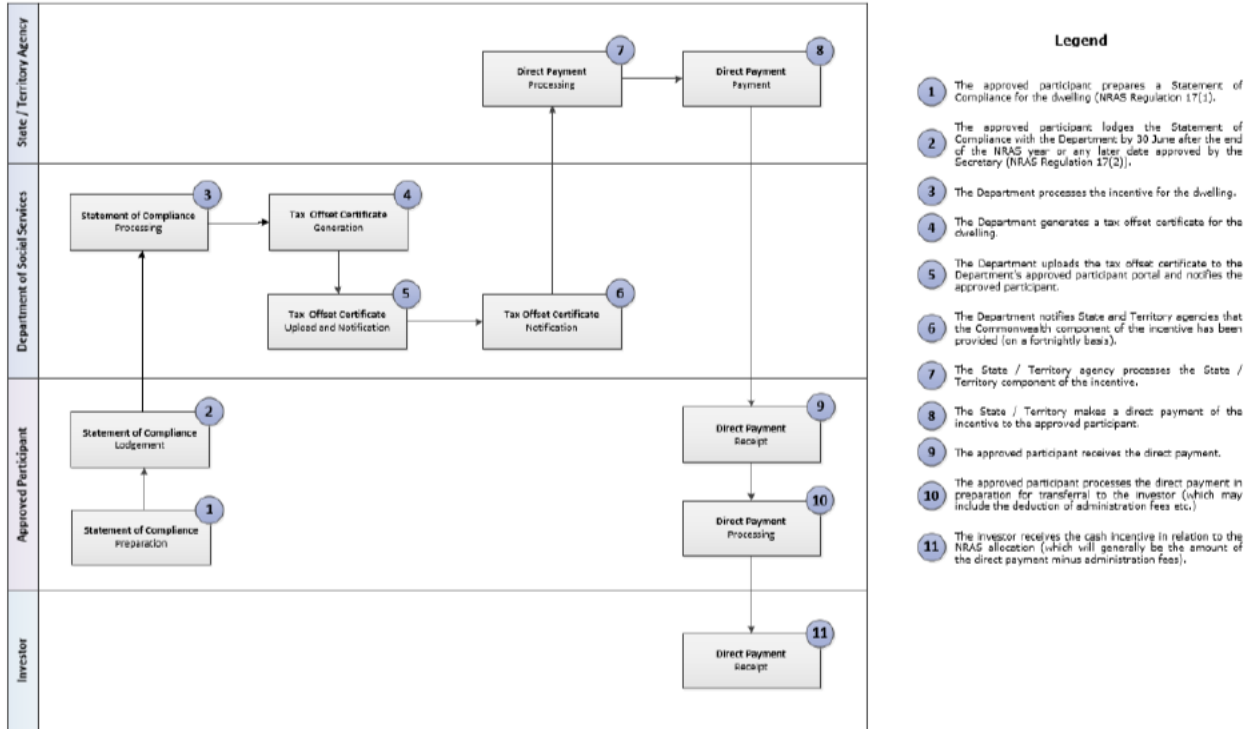


Figure 2 – Provision of Commonwealth Incentive to Investors for 2016-17



4.6 For the Territory portion of the incentive, we have identified incentives were provided to the investors through the following process for all relevant financial years:

Figure 3 – Provision of Territory Incentive to Investors



Element 1 | Receipt of Incentive by Approved Participant

4.7 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling from the Department and State and/or Territory agencies.

4.8 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwelling in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 7 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹²	Date of Processing	Exhibit
2013-14	30 March 2015	Exhibit 002
2014-15	14 December 2015	Exhibit 003
2015-16	14 September 2016	Exhibit 004
2016-17	1 November 2017	Exhibit 005

¹² Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

- 4.9 For the Territory portion of the incentive, the approved participant received the incentive for the dwelling as a direct payment.

Table 8 – Receipt of Territory Incentive by Approved Participant

Financial Year ¹³	Date of Payment	Exhibit
2013-14	17 April 2015	Exhibit 006
2014-15	14 January 2016	Exhibit 006
2015-16	17 October 2016	Exhibit 006

Element 2 | Contractual Agreement between Approved Participant and Investor

- 4.10 The second element for this ground for transfer is the existence of a contractual agreement between the investors and the approved participant that requires the approved participant to pass on the incentive to the investors. There is a requirement to pass on an incentive where, under a contractual agreement with the investors, the approved participant is required to¹⁴:

- Make a payment to the investors in relation to the incentive
- Take steps to enable the investors to claim a tax offset to which the investor is entitled in relation to the incentive, or
- To make an election in relation to the incentive.

- 4.11 The investors provided a contractual agreement with the approved participant dated 15 September 2011 (refer to Exhibit 007). The contractual agreement states at Clause 1(vii) that "Ethan agrees to ensure the NRAS incentives issued by the Government are passed on to the investor" and at Clause 1(viii) that "Ethan agrees to undertake all actions necessary to complete the tasks set out above".

- 4.12 We note the contractual agreement between the investors and the approved participant does not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

- 4.13 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwelling to the investors within a reasonable time after receiving the incentive.

- 4.14 For the Commonwealth portion of the incentive, the investors provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 9 – Receipt of Commonwealth Incentive by Investors

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2013-14	30 March 2015	30 April 2015	Exhibit 008	31 Days
2014-15	14 December 2015	7 October 2016	Exhibit 009	298 Days

¹³ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

¹⁴ NRAS Regulation 30A(2).

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2015-16	14 September 2016	1 November 2017 ¹⁵	Exhibit 001	413 Days
2016-17	1 November 2017	20 November 2017	Exhibit 010	19 Days

- 4.15 For the Territory portion of the incentive, the investors provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 10 – Receipt of Territory Incentive by Investors

Financial Year	Date of Payment	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2013-14	17 April 2015	21 April 2015	Exhibit 011	4 Days
2014-15	14 January 2016	7 October 2016	Exhibit 012	267 Days
2015-16	17 October 2016	1 August 2017 ¹⁶	Exhibit 001	288 Days

- 4.16 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 states "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive".¹⁷
- 4.17 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2014-15 and 2015-16 financial years. In particular, we note the contrast between the time taken to pass on the incentive for the 2013-14 (31 days taken to pass on the incentive), and the delay in passage of the incentive for the 2014-15 and 2015-16 financial years. We note the incentive for the 2016-17 financial year was provided as a tax offset certificate, so is not directly comparable to other financial years.
- 4.18 This supports a finding that the delay in passage of the incentive for the 2014-15 and 2015-16 financial years was not reasonable, considering the investors received the incentive in the same manner (as a direct payment) from the approved participant for the 2013-14 financial year.
- 4.19 For the **Territory** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2014-15 and 2015-16 financial years. In particular, we note the contrast between the time taken to pass on the incentive for the 2013-14 financial year (4 days taken to pass on the incentive), and the delay in passage of the incentive for the 2014-15 (267 days taken to pass on the incentive) and 2015-16 (288 days taken to pass on the incentive) financial years.
- 4.20 This supports a finding that the delay in passage of the incentive for the 2014-15 and 2015-16 financial years was not reasonable, considering the investor received the incentive in the same manner (as a direct payment) from the approved participant for the 2013-14 financial year.

¹⁵ The investors' application to transfer variously identifies receipt of the 2015-16 Commonwealth incentive in "late November 2017" and "November 2017" (refer to Exhibit 001). As no specific date was identified in the application or information provided by the investors, we have calculated the time to pass on the incentive from 1 November 2017.

¹⁶ The investors' application to transfer identifies receipt of the 2015-16 Territory incentive in "August 2017" (refer to Exhibit 001). As no specific date was identified in the application or information provided by the investors, we have calculated the time to pass on the incentive from 1 August 2017.

¹⁷ Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

Finding

- 4.21 From our assessment of information provided by the investors, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement dated 15 September 2011 between the investors and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investors did not receive the incentive from the approved participant within a reasonable time for the 2014-15 (298 days taken to pass on the incentive) and 2015-16 (413 days taken to pass on the incentive) financial years, and
 - For the **Territory** portion of the incentive, the investors did not receive the incentive from the approved participant within a reasonable time for the 2014-15 (267 days taken to pass on the incentive) and 2015-16 (288 days taken to pass on the incentive) financial years.
- 4.22 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.23 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for the delay in passing on the incentive.

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investors' application to transfer identified this ground for transfer, stating "I was coerced into changing to them as a Property Manager for my property under threat of losing [sic] my incentive. After switching they have continued to provide substandard property management however I am unable to choose another property manager" (refer to Exhibit 001).

Analysis

- 5.3 This ground for transfer requires the conduct of the approved participant to have "contravened" a consumer protection law. We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹⁸
- 5.4 However, as this ground for transfer was identified by the investor in their application, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(6) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹⁹
- 5.5 In the context of the NRAS and the investors' application to transfer, this ground for transfer is constituted by the following elements:
- An approved participant supplies, or offers to supply goods or services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investors²⁰
 - The approved participant supplies these services on the condition that the investors will acquire services (such as tenancy management services) directly or indirectly from a third party that is not related to the approved participant²¹, and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.²²

¹⁸ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹⁹ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

²⁰ *Competition and Consumer Act 2010* s47(6)(a).

²¹ *Competition and Consumer Act 2010* s47(6).

²² *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

Element 1 | Supply of Services

- 5.6 The first element for this ground for transfer is the supply of services by the approved participant to the investors.
- 5.7 The investors provided a signed contractual agreement with the approved participant dated 15 September 2011 (refer to Exhibit 007). The contractual agreement identifies the approved participant will provide a range of services to the investors – including at Clause 1(iii) to provide tenancy management services and related work in conjunction with the appointed property manager.

Element 2 | Condition of Supply

- 5.8 The second element for this ground for transfer is that the approved participant supplies these services on the condition the investor acquires services from a third party that is not related to the approved participant.
- 5.9 In correspondence from the approved participant to the investor dated 1 June 2016, the approved participant identifies that the investors were in breach of their agreement with the approved participant as they had failed to appoint a property manager approved by the approved participant (Refer to Exhibit 013).
- 5.10 The correspondence states “You may choose to retain s47F as your property manager. You are completely entitled to do this, however, this means that you will no longer be compliant with Ethan’s contract requirements and Ethan will seek to terminate the agreement with you” (refer to Exhibit 013).
- 5.11 However, we note this correspondence also states “You may choose to terminate your appointment of s47F and then appoint another property manager who will manage your property instead. You will then continue to be compliant with Ethan’s contract... Attached are the of guidelines that any manager that you wish to use will need to use and comply with. In essence, these guidelines enable you to choose any licensed property manager in the Northern Territory, with the exception of s47F s47F The supplied guidelines are used to protect the NRAS incentive to ensure investors are not exposed to any mismanagement” (refer to Exhibit 013). The investor has not provided information to suggest their incumbent property manager sought to become an approved property manager with the approved participant.
- 5.12 We note this representation from the approved participant does not require the investors to acquire property management services from a particular third party. No further information was provided by the investors to indicate the approved participant has supplied services on the condition the investors acquire services from a third party.

Element 3 | Substantial Lessening of Competition

- 5.13 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.14 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.²³ As the investors had acquired tenancy management services from s47F s47F this would include the market for tenancy management services.
- 5.15 From information provided by the investors, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

²³ *Competition and Consumer Act 2010* s47(13)(b).

Finding

- 5.16 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer because:
- We are unable to establish whether the approved participant supplied services to the investors on the condition the investor acquires services from a third party, and
 - We are unable to establish whether the alleged conduct of the approved participant substantially lessened competition in the market for tenancy management services.
- 5.17 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

6 Ground 3 | Provision of False or Misleading Information to Investor

Overview

6.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:

- The approved participant provides information about the NRAS to the investor (such as a representation made by an email or letter), and
- The information provided to the investor is false or misleading.

6.2 The investors' application to transfer identified this ground for transfer, stating "I made numerous phone calls and sent many emails to Ethan to find out the status of my FY 15/16 incentive. I was initially told that I could expect it in June 17 and continually told words to the effect of 'a few more weeks', month after month until I finally received the full incentive in November 17" (Exhibit 001).

Analysis

6.3 In connection with this ground for transfer, the investors have provided correspondence from **Tebter Property**. From a series of ASIC searches, we note Tebter Property (which was known as Ethan Residential Pty Ltd prior to 9 May 2017) shares a common director with the approved participant, but is not the approved participant.

Figure 4 – Relationship between Tebter Property and Ethan Affordable Housing Pty Ltd



- 6.4 Correspondence from Tebter Property to the investors dated 2 August 2017 states "We do anticipate that the payments will be paid within the next couple of weeks" (refer to Exhibit 014).
- 6.5 Further correspondence from Tebter Property to the investors dated 4 August 2017 states "The cheques for the State portion of the NRAS Incentive payment have been sent. I am told the payment for the Federal portion will be made between 19th and 31st August" (Exhibit 015).
- 6.6 Further correspondence from Tebter Property to the investors dated 4 September 2017 states "Cheques have been raised on 21/8/17 & and are ready to be posted, we are just awaiting the release of funds from the ATO portal, which we were told would be released between 19th and 31st August. Currently to date this has not taken place" (refer to Exhibit 016).
- 6.7 A representation to the investors as to the date of payment for incentives may be characterised as false or misleading information about the NRAS depending on the context of the representation. However, in respect of these representations to the investors, we note:
- The correspondence received by the investors was not provided by the approved participant, but from Tebter Property
 - Even where Tebter Property was providing these representations on behalf of the approved participant, the correspondence received by the investors does not identify a specific timeframe for the payment of the incentives. The correspondence instead prefaces the expected date of payment with wording such as "I am told" or "we do anticipate", and
 - We have not been provided with information from the ATO relating to the processing of payments or release of funds that could be assessed against these representations.

Finding

- 6.8 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer because:
- The representations concerning the date of payment of incentives identified as false or misleading by the investors may not have been made by the approved participant, and
 - Even where these representations were made on behalf of the approved participant, they do not identify a specific timeframe for the payment of the incentives and we have not been provided with information from the ATO relating to the processing of payments or release of funds that could be assessed against these representations.
- 6.9 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

7 Ground 4 | Deregistration

Overview

- 7.1 NRAS Regulation 21A(2)(f) identifies the Secretary may transfer an allocation where the approved participant is a company and ASIC has published a notice of proposed deregistration of the approved participant or a court has ordered the deregistration of the approved participant by ASIC.
- 7.2 The investors' application to transfer identified this ground for transfer, and stated "Whilst I am unaware that Ethan is likely to be de-registered as a company by ASIC, it concerns me that Ethan has had its Charitable status removed for a serious offence and since changed its name and branding" (refer to Exhibit 001).

Analysis

- 7.3 From review of ASIC's database of published notices²⁴ (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) as at 21 March 2018, we have not identified that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

Finding

- 7.4 From our assessment of information provided by the investor and ASIC's database of published notices, there is **insufficient information** to support this ground for transfer because we are unable to establish that the approved participant is subject to a notice of proposed reregistration or has been deregistered.
- 7.5 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²⁴ <https://insolvencyntices.asic.gov.au/> (Accessed 21 March 2018).

8 Limitations

- 8.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 8.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 8.3 This report has been prepared based on work completed as at 28 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 8.4 As at 28 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 8.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 8.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 8.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 8.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 8.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 8.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | ^{s47F}

NRAS Regulation 21A | Application to Transfer

Department of Social Services

29 March 2018
Private and Confidential

29 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report | s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed an application to transfer a National Rental Affordability Scheme allocation made by an investor s47F under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G

Yours sincerely
s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to Transfer for 1-HGI-747
002	Extract from FY2014-15 NRAS incentive report
003	Extract from FY2015-16 NRAS incentive report
004	Extract from FY2016-17 NRAS incentive report
005	Correspondence from the investor to Ethan Affordable Housing Pty Ltd dated 19 September 2017
006	Termination notice from Ethan Affordable Housing Pty Ltd for 1-HGI-747 dated 22 May 2017

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-747	s47F
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Department	Department of Social Services
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the application to transfer an allocation made by the investors^{s47F} in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at ^{s47F} (NRAS identification **1-HGI-747**).
- 1.9 The investor’s application identified **three** potential Regulation 21A grounds for transfer. From our assessment of the information provided by the investor in support of their application, we **did not** identify any additional Regulation 21A grounds for transfer.
- 1.10 From our assessment of information provided by the investor, we **did not** identify sufficient information to support any Regulation 21A ground for transfer (refer to Table 1 – Grounds for Transfer):

Table 1 – Grounds for Transfer

Ground	Identification	Support
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investor's application to transfer	Insufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investor's application to transfer	Insufficient information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investor's application to transfer	Insufficient information

Methodology

- 1.11 We reviewed the investor's application to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 1.12 We requested additional information in support of the investor's application through correspondence with the investor.
- 1.13 We have not been provided with information from the Australian Taxation Office (ATO) relating to the processing of payments or release of funds in relation to this application.
- 1.14 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.15 We analysed information provided by the investor in support their application to transfer to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁴ – for each potential Regulation 21A ground for transfer.

Findings

- 1.16 From our assessment of information provided by the investor, **three** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is **insufficient information** to support any Regulation 21A grounds for transfer.

Failure to Pass on Incentive

- 1.17 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer.
- 1.18 Whilst we note the investor has stated they have not received the Commonwealth portion of the incentive from the approved participant for the 2014-15, 2015-16 and 2016-17 financial years:

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ NRAS Regulation 21A(2)(c).

⁴ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

- The **investor has not provided a contractual agreement** between the investor and the approved participant, and has not provided any information identifying the content of any agreement (including as to whether any agreement required the approved participant to pass on the incentive to the investor), and
- The investor has not provided any information on the receipt (or non-receipt) of the **Territory** portion of the incentive.

Contravention of Consumer Protection Law

- 1.19 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer.
- 1.20 The investor's application to transfer identified this ground for transfer, stating that "Ethan have attempted to blackmail in writing me by threatening to cancel my NRAS contract with them unless I also transferred my tenancy management to them. When Ethan were unable to take over the tenancy management of my residence due to body corporate by laws they issued me an NRAS termination notice in writing on 22/05/17".
- 1.21 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁵ However, as this ground for transfer was identified by the investor in their application, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.
- 1.22 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.⁶
- 1.23 A required element in exclusive dealing is that the conduct of a person has the purpose, or is likely to have the effect, of substantially lessening competition. From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Provision of False or Misleading Information to Investor

- 1.24 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer because:
- The investor has not provided correspondence from the approved participant in support of the alleged representations identified in the investor's application to transfer, and
 - We have not been provided with information from the ATO relating to the processing of payments or release of funds that could be assessed against this alleged representation.

⁵ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

⁶ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
- The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist:

Table 2 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the application to transfer an allocation made by the investor s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-HGI-747**).

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investor's application to transfer (refer to Exhibit 001) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 3.2 We attempted to contact the investor on the following dates. As at 29 March 2018, we have not received any additional information from the investor to support their application to transfer.

Table 3 – Contact with Investor

Date	Contact Method
13 February 2018	Voicemail
14 February 2018	Voicemail
14 February 2018	Email
20 February 2018	Voicemail
20 February 2018	Email
22 February 2018	Phone call
26 February 2018	Voicemail
26 February 2018	Email
5 March 2018	Voicemail
7 March 2018	Voicemail

Obtaining Information (Approved Participant)

- 3.3 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Obtaining Information (Australian Taxation Office)

- 3.4 We have not been provided with information from the Australian Taxation Office (ATO) relating to the processing of payments or release of funds in relation to this application.

Review of Evidence

- 3.5 We analysed information provided by the investor to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁷ – for each potential Regulation 21A ground for transfer.
- 3.6 This process involved:

⁷ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

- Analysing information provided by the investor to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department⁸
 - There is a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor⁹, and
 - The investor did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.¹⁰
- 4.2 The investor’s application to transfer identified this ground for transfer, stating “Ethan have failed to pass on my 15/16 and 16/17 NRAS incentives to me” (refer to Exhibit 001).

Analysis

- 4.3 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.4 The investor has not provided any information indicating how Commonwealth incentive payments were made to the investor, and has not provided any information in relation to the Territory portion of the incentive.

Element 1 | Receipt of Incentive by Approved Participant

- 4.5 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling from the Department.
- 4.6 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwelling in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 4 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹¹	Date of Processing	Exhibit
2014-15	4 April 2016	Exhibit 002
2015-16	14 September 2016	Exhibit 003
2016-17	13 June 2017	Exhibit 004

⁸ NRAS Regulation 30B(1)(a).

⁹ NRAS Regulations 30A(2) and 30B(1)(b).

¹⁰ NRAS Regulation 30B(2).

¹¹ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth incentive payments for other financial years.

Element 2 | Contractual Agreement between Approved Participant and Investor

4.7 The second element for this ground for transfer is the existence of a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor. There is a requirement to pass on an incentive where, under a contractual agreement with the investor, the approved participant is required to¹²:

- Make a payment to the investor in relation to the incentive
- Take steps to enable the investor to claim a tax offset to which the investor is entitled in relation to the incentive, or
- To make an election in relation to the incentive.

4.8 The investor's application to transfer states "Ethan has a contractual obligation to pass the NRAS incentive from DSS onto myself within a reasonable time frame" (refer to Exhibit 001). However, the investor has not provided a contractual agreement between the investor and the approved participant, and has not provided any information identifying the content of any agreement (including as to whether any agreement required the approved participant to pass on the incentive to the investor).

Element 3 | Passing on Incentive within Reasonable Time

4.9 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwelling to the investor within a reasonable time after receiving the incentive.

4.10 For the Commonwealth portion of the incentive, the investor's application to transfer and correspondence with the approved participant provided as part of the application to transfer identifies the investor has not received incentive payments for the following financial years:

Table 5 – Receipt of Commonwealth Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2014-15	4 April 2016	Not Received	Exhibit 005	533 Days ¹³
2015-16	14 September 2016	Not Received	Exhibit 001	436 Days ¹⁴
2016-17	13 June 2017	Not Received	Exhibit 001	164 Days ¹⁴

4.11 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 states "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive".¹⁵

4.12 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the failure to pass on the incentive for the 2014-15 (533 days as at the date of the investor's correspondence with the approved participant), 2015-16 (436 days as at the date of the investor's

¹² NRAS Regulation 30A(2).

¹³ As of the date of correspondence (19 September 2017) between the investor and the approved participant indicating the investor has not received the Commonwealth incentive for this financial year (refer to Exhibit 005).

¹⁴ As of the date of application to transfer (24 November 2017) from the investor that they have not received the Commonwealth incentive for these financial years (refer to Exhibit 001).

¹⁵ Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

application to transfer) and 2016-17 (164 days as at the date of the investor's application to transfer) financial years.

Finding

- 4.13 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer.
- 4.14 Whilst we note the investor has stated they have not received the Commonwealth portion of the incentive from the approved participant for the 2014-15, 2015-16 and 2016-17 financial years:
- The **investor has not provided a contractual agreement** between the investor and the approved participant, and has not provided any information identifying the content of any agreement (including as to whether any agreement required the approved participant to pass on the incentive to the investor), and
 - The investor has not provided any information on the receipt (or non-receipt) of the **Territory** portion of the incentive.
- 4.15 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.16 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for any failure to pass on the incentive.

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investor's application to transfer identified this ground for transfer, stating that "Ethan have attempted to blackmail in writing me by threatening to cancel my NRAS contract with them unless I also transferred my tenancy management to them. When Ethan were unable to take over the tenancy management of my residence due to body corporate by laws they issued me an NRAS termination notice in writing on 22/05/17" (refer to Exhibit 001).

Analysis

- 5.3 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹⁶
- 5.4 However, as this ground for transfer was identified by the investor in their application, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹⁷
- 5.5 In the context of the NRAS and the investor's application to transfer, this ground for transfer is constituted by the following elements:
- The approved participant refuses to supply services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investor¹⁸
 - The approved participant has refused to supply these services because the investor has not used (or agreed to use) services (such as tenancy management services) from a third party¹⁹, and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.²⁰

¹⁶ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹⁷ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

¹⁸ *Competition and Consumer Act 2010* s47(7)(a).

¹⁹ *Competition and Consumer Act 2010* s47(7).

²⁰ *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

Element 1 | Refusal to Supply Services

- 5.6 The first element for this ground for transfer is the approved participant's refusal to supply services to the investor.
- 5.7 In correspondence from the investor to the approved participant dated 19 September 2017, the investor states "I received a default notice from Ethan saying that Ethan was electing to terminate my NRAS contract" (refer to Exhibit 005). This is supported by a Termination Notice from the approved participant to the investor dated 22 May 2017, which states "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan" (refer to Exhibit 006).

Element 2 | Refusal to Supply Because of Failure to Use Third Party

- 5.8 The second element for this ground for transfer is that the approved participant has refused to supply services to the investor because the investor has not used services from a third party.
- 5.9 The approved participant issued the investor with a Termination Notice dated 22 May 2017. The Termination Notice states "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan" (refer to Exhibit 006).

Element 3 | Substantial Lessening of Competition

- 5.10 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.11 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.²¹ As the investor had acquired tenancy management services for their property, this would include the market for tenancy management services.
- 5.12 From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Finding

- 5.13 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer. While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.
- 5.14 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²¹ *Competition and Consumer Act 2010* s47(13)(b).

6 Ground 3 | Provision of False or Misleading Information to Investor

Overview

- 6.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:
- The approved participant provides information about the NRAS to the investor (such as a representation made by an email or letter), and
 - The information provided to the investor is false or misleading.
- 6.2 The investor's application to transfer identified this ground for transfer, stating "Ethan have previously deliberately mislead [sic] me as to the status of my NRAS incentives and why they were late. Ethan claimed that they had contacted the ATO on my behalf and that the ATO wished to pass on that it was their fault that the incentives were late as they had not processed them. On contacting that the ATO directly myself I was informed by the ATO that the claims made by Ethan were fabricated, and that the ATO had processed my latest incentive more than 9 months ago" (refer to Exhibit 001).

Analysis

- 6.3 The investor's application to transfer has identified representations made by the approved participant concerning the processing of NRAS incentives by the Australian Taxation Office (ATO). However, no further information was provided by the investor to support the assertion that the approved participant had made these representations to the investor.
- 6.4 A representation to the investor that the ATO is processing incentive payments for the approved participant, when the ATO has already processed these payments, may be characterised as false or misleading information depending on the context of the representation.
- 6.5 However, in respect of the alleged representation made by the approved participant to the investor, we note the investor has not provided correspondence from the approved participant in support of the alleged representations identified in the investor's application to transfer. We also note we have not been provided with information from the ATO relating to the processing of payments or release of funds that could be assessed against this alleged representation.

Finding

- 6.6 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer because:
- The investor has not provided correspondence from the approved participant in support of the alleged representations identified in the investor's application to transfer, and
 - We have not been provided with information from the ATO relating to the processing of payments or release of funds that could be assessed against this alleged representation.
- 6.7 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

7 Limitations

- 7.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 7.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 7.3 This report has been prepared based on work completed as at 29 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 7.4 As at 29 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 7.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 7.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 7.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 7.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 7.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 7.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | ^{s47F}

NRAS Regulation 21A | Application to Transfer

Department of Social Services

26 March 2018
Private and Confidential

26 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report |s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed an application to transfer a National Rental Affordability Scheme allocation made by joint investors s47F under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G

Yours sincerely

s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-H59-2141
002	Processing data for Commonwealth incentive payments
003	Extract from FY2014-15 NRAS incentive report
004	Extract from FY2015-16 NRAS incentive report
005	Extract from FY2016-17 NRAS incentive report
006	Processing data for State incentive payments
007	Contract between investors and Ethan Affordable Housing Pty Ltd for 1-H59-2141
008	FY2013-14 Commonwealth refundable tax offset certificate for 1-H59-2141
009	FY2014-15 Commonwealth refundable tax offset certificate for 1-H59-2141
010	FY2015-16 Commonwealth refundable tax offset certificate for 1-H59-2141
011	FY2016-17 Commonwealth refundable tax offset certificate for 1-H59-2141
012	FY2013-14 State cheque letter for 1-H59-2141
013	FY2014-15 State cheque letter for 1-H59-2141
014	FY2015-16 State cheque letter for 1-H59-2141
015	Email statement from investors dated 23 February 2018
016	Correspondence from Ethan Affordable Housing Pty Ltd to investors dated 25 October 2017
017	Default notice from Ethan Affordable Housing Pty Ltd for 1-H59-2141
018	Termination notice from Ethan Affordable Housing Pty Ltd for 1-H59-2141

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-H59-2141	s47F
ASIC	Australian Securities and Investments Commission
Department	Department of Social Services
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the application to transfer an allocation made by joint investors s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-H59-2141**).
- 1.9 The investors’ application identified **one** potential Regulation 21A ground for transfer. From our assessment of the information provided by the investors in support of their application, we also identified **one** additional Regulation 21A ground for transfer.
- 1.10 From our assessment of information provided by the investors, the Department and the Victorian Government, there is sufficient information to support **one** Regulation 21A ground for transfer (refer to Table 1 – Grounds for Transfer):

Table 1 – Grounds for Transfer

Ground	Identification	Support
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investors within a reasonable time after receiving the incentive	Additional information provided by investors	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investors' application to transfer	Insufficient information

Methodology

- 1.11 We reviewed the investors' application to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 1.12 We requested and reviewed additional information in support of the investors' application through correspondence with the investor, the Department and the Victorian Government.
- 1.13 This included identifying potential Regulation 21A grounds for transfer that were not identified by the investors in their application, but could be supported through the information provided by the investors, the Department and/or the Victorian Government.
- 1.14 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.15 We analysed information provided by the investors, the Department and the Victorian Government to transfer to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact³ – for each potential Regulation 21A ground for transfer.

Findings

- 1.16 From our assessment of information provided by the investors, the Department and the Victorian Government, **two** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **one** Regulation 21A grounds for transfer.

Failure to Pass on Incentive

- 1.17 From our assessment of information provided by the investors, the Department and the Victorian Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement dated 23 September 2013 between the investors and the approved participant that required the approved participant to pass on the incentive

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

- For the **Commonwealth** portion of the incentive, the investors did not receive the incentive from the approved participant within a reasonable time for the 2015-16 and 2016-17 financial years, and
- For the **State** portion of the incentive, the investors did not receive the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2013-4, 2014-15 and 2015-16 financial years.

Contravention of Consumer Protection Law

- 1.18 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer.
- 1.19 We have not assessed the legal interpretation of “contravention” – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁴ However, as this ground for transfer was identified by the investors in their application, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.
- 1.20 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other’s freedom to choose with whom, in what, or where they deal.⁵
- 1.21 A required element in exclusive dealing is that the conduct of a person has the purpose, or is likely to have the effect, of substantially lessening competition. From information provided by the investors, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.
- 1.22 While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct of the approved participant in requiring the investors to use the services of Ethan Affordable Housing Limited substantially lessened competition in the market for tenancy management services.

⁴ See, e.g., Australian Competition and Consumer Commission’s Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

⁵ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
- The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist:

Table 2 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the application to transfer an allocation made by joint investors [s47F](#) in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at [s47F](#) (NRAS identification **1-H59-2141**).

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investors’ application to transfer (refer to Exhibit 001) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 3.2 We contacted the investors on the following dates to discuss their application to transfer, and source additional information in support of their application.

Table 3 – Contact with Investors

Date	Contact Method
14 February 2018	Phone call
14 February 2018	Email
23 February 2018	Phone call
23 February 2018	Email
27 February 2018	Phone call
27 February 2018	Email

- 3.3 We received additional information in support of the investors’ application on the following dates:

Table 4 – Information from Investor

Date	Information Provided
14 February 2018	Correspondence with approved participant Default notice from approved participant Termination notice from approved participant
27 February 2018	Incentive statements from approved participant incentive cheque letters from approved participant Refundable tax offset certificates from approved participant Statement from investors regarding incentive payments

Obtaining Information (Department)

- 3.4 We requested and received additional information in support to the investors’ application from the Department on the following date:

Table 5 – Information from Department

Date	Information Provided
1 March 2018	FY2013-14 Department processing data

Obtaining Information (Victorian Government)

- 3.5 The Department requested and received additional information in support of the investors' application from the Victorian Government on our behalf on the following date:

Table 6 – Information from Victorian Government

Date	Information Provided
9 March 2018	Payment information for 2013-14, 2014-15, 2015-16 and 2016-17 State incentive payments to the approved participant

Obtaining Information (Approved Participant)

- 3.6 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

- 3.7 We analysed information provided by the investors, the Department and the Victorian Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁶ – for each potential Regulation 21A ground for transfer.
- 3.8 This process involved:
- Analysing information provided by the investors, the Department and the Victorian Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
 - Requesting additional evidence from the investors where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
 - Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁶ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department⁷
 - There is a contractual agreement between the investors and the approved participant that requires the approved participant to pass on the incentive to the investors⁸, and
 - The investors did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.⁹
- 4.2 The investors application to transfer did not identify this ground for transfer. However, from our assessment of information provided by the investors, the Department and the Victorian Government, we have identified that the approved participant has failed to pass on an incentive to the investors within a reasonable time after receiving the incentive.

Analysis

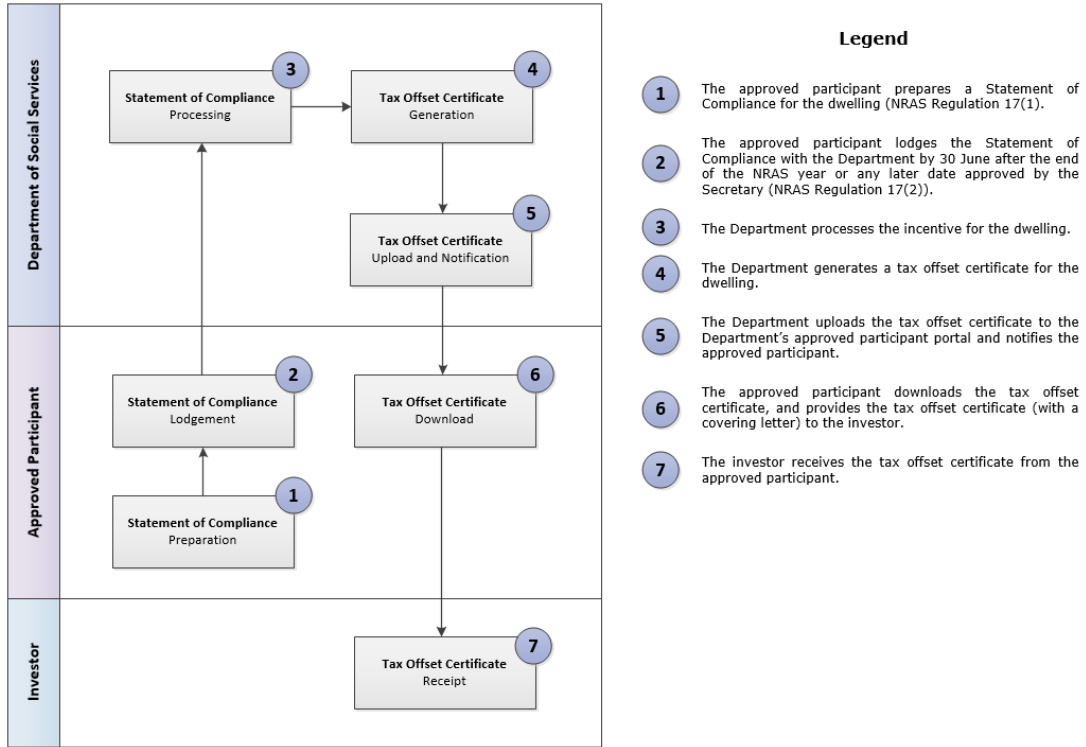
- 4.3 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.4 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investors through the following process for all relevant financial years:

⁷ NRAS Regulation 30B(1)(a).

⁸ NRAS Regulations 30A(2) and 30B(1)(b).

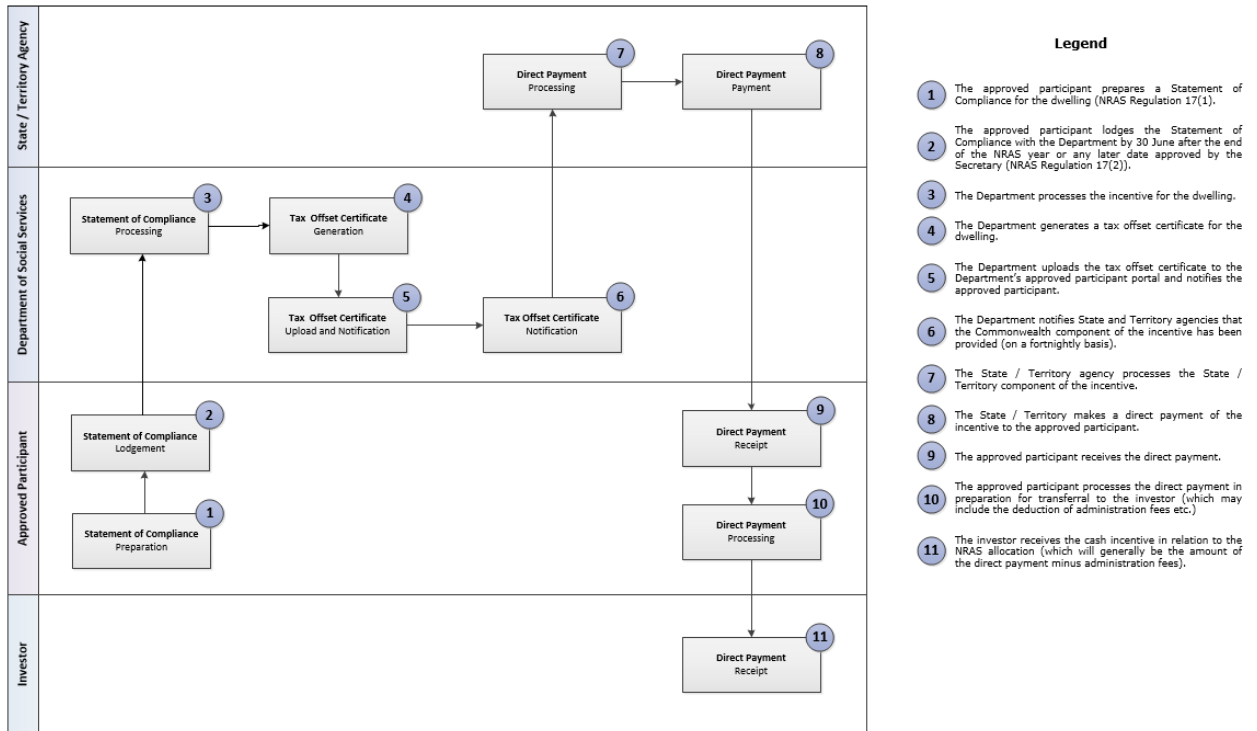
⁹ NRAS Regulation 30B(2).

Figure 1 – Provision of Commonwealth Incentive to Investor



4.5 For the State portion of the incentive, we have identified incentives were provided to the investors through the following process for all relevant financial years:

Figure 2 – Provision of State Incentive to Investor



Element 1 | Receipt of Incentive by Approved Participant

- 4.6 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling from the Department and State and/or Territory agencies.
- 4.7 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwelling in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 7 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹⁰	Date of Processing	Exhibit
2013-14	30 March 2015	Exhibit 002
2014-15	14 December 2015	Exhibit 003
2015-16	14 September 2016	Exhibit 004
2016-17	13 June 2017	Exhibit 005

- 4.8 For the State portion of the incentive, the approved participant received the incentive for the dwelling as a direct payment.

Table 8 – Receipt of State Incentive by Approved Participant

Financial Year ¹⁰	Date of Payment	Exhibit
2013-14	19 April 2015	Exhibit 006
2014-15	30 January 2016	Exhibit 006
2015-16	29 October 2016	Exhibit 006
2016-17	29 July 2017	Exhibit 006

Element 2 | Contractual Agreement between Approved Participant and Investor

- 4.9 The second element for this ground for transfer is the existence of a contractual agreement between the investors and the approved participant that requires the approved participant to pass on the incentive to the investors. There is a requirement to pass on an incentive where, under a contractual agreement with the investors, the approved participant is required to¹¹:
 - Make a payment to the investors in relation to the incentive
 - Take steps to enable the investors to claim a tax offset to which the investors are entitled in relation to the incentive, or
 - To make an election in relation to the incentive.

- 4.10 The investors provided a contractual agreement with the approved participant dated 23 September 2013 (refer to Exhibit 007). The contractual agreement states at Clause 1(vi) that "Ethan agrees to

¹⁰ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or State incentive payments for other financial years.

¹¹ NRAS Regulation 30A(2).

ensure the NRAS incentives issued by the Government are passed on to the investor” and at Clause 1(vii) that “Ethan agrees to undertake all actions necessary to complete the tasks set out above”.

- 4.11 We note the contractual agreement between the investors and the approved participant does not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

- 4.12 The third element for this ground for transfer is the approved participant’s failure to pass on the incentive for the dwelling to the investors within a reasonable time after receiving the incentive.

- 4.13 For the Commonwealth portion of the incentive, the investors provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 9 – Receipt of Commonwealth Incentive by Investors

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2013-14	30 March 2015	31 March 2015	Exhibit 008	1 Day
2014-15	14 December 2015	16 December 2015	Exhibit 009	2 Days
2015-16	14 September 2016	24 October 2016	Exhibit 010	40 Days
2016-17	13 June 2017	31 July 2017	Exhibit 011	48 Days

- 4.14 For the State portion of the incentive, the investors provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 10 – Receipt of State Incentive by Investors

Financial Year	Date of Payment	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2013-14	19 April 2015	22 April 2015	Exhibit 012	3 Days
2014-15	30 January 2016	2 February 2016	Exhibit 013	3 Days
2015-16	29 October 2016	21 November 2016	Exhibit 014	23 Days
2016-17	29 July 2017	Not Received	Exhibit 015	213 Days ¹²

- 4.15 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 states “What is a ‘reasonable time’ would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant’s business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive”,¹³

- 4.16 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 (40 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years.

¹² As of the date of statement (27 February 2018) from the investors that they have not received the State incentive for this financial year (refer to Exhibit 015).

¹³ Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

- 4.17 In particular, we note the contrast between the time to pass on the incentive for these financial years compared to the 2013-14 (1 day to pass on the incentive) and the 2014-15 (2 days to pass on the incentive) financial years.
- 4.18 This supports a finding that the delay in passage of the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investors received the incentive in the same manner (as a refundable tax offset certificate) from the approved participant for all relevant financial years.
- 4.19 For the **State** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investors for the 2016-17 financial year.
- 4.20 In particular, we note the contrast between the time taken to pass on the incentive for the 2013-14 (3 days taken to pass on the incentive), 2014-15 (3 days taken to pass on the incentive) and 2015-16 (23 taken days to pass on the incentive) financial years, and the failure to pass on the incentive for the 2016-17 financial year.
- 4.21 This supports a finding that the failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investors received the incentive in the same manner (as a direct payment) from the approved participant for all relevant financial years.

Finding

- 4.22 From our assessment of information provided by the investors, the Department and the Victorian Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement dated 23 September 2013 between the investors and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investors did not receive the incentive from the approved participant within a reasonable time for the 2015-16 and 2016-17 financial years, and
 - For the **State** portion of the incentive, the investors did not receive the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2013-4, 2014-15 and 2015-16 financial years.
- 4.23 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.24 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for the delay in providing Commonwealth incentives and failure to pass on the State incentive.

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investors' application to transfer identified this ground for transfer, stating the approved participant "are now claiming we are in default of our agreement because they want to manage our property along with all the other properties they hold NRAS agreements to. They have attempted to transfer our NRAS agreement to another firm that we were not aware of" (refer to Exhibit 001).
- 5.3 The investors' application to transfer further states "We disagree with the fact that we are in default of the agreement as we had been given guidelines for Approved Property Managers and our Property Manager s47F has met all these. When we asked Ethan what area s47F has not met in the guidelines we get not [sic] reply but to say that they were advised this was going to happen".

Analysis

- 5.4 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹⁴
- 5.5 However, as this ground for transfer was identified by the investors in their application, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹⁵
- 5.6 In the context of the NRAS and the investors' application to transfer, this ground for transfer is constituted by the following elements:
- The approved participant refuses to supply services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investors¹⁶
 - The approved participant has refused to supply these services because the investors have not used (or agreed to use) services (such as tenancy management services) from a third party¹⁷, and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.¹⁸

¹⁴ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹⁵ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

¹⁶ *Competition and Consumer Act 2010* s47(7)(a).

¹⁷ *Competition and Consumer Act 2010* s47(7).

¹⁸ *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

Element 1 | Refusal to Supply Services

- 5.7 The first element for this ground for transfer is the approved participant's refusal to supply services to the investors.
- 5.8 In correspondence from the approved participant to the investors dated 25 October 2017, the approved participant identifies that the investors' incumbent property manager ^{s47F} was no longer approved as a property manager by the approved participant and the investors would need to change to a new property manager that is approved by the approved participant (refer to Exhibit 016).
- 5.9 The correspondence states "As ^{s47F} are no longer an approved agency within our program, it is imperative that you appoint an agency that will comply with the attached guidelines to remain compliant with your NRAS agreement with Ethan" (refer to Exhibit 016).

Element 2 | Refusal to Supply Because of Failure to Use Third Party

- 5.10 The second element for this ground for transfer is that the approved participant has refused to supply services to the investors because the investors have not used services from a third party.
- 5.11 In correspondence from the approved participant to the investors dated 25 October 2017, the approved participant states "A recent audit shows that property management for the above NRAS property is still being undertaken by an agency that is not approved in accordance with your Ethan NRAS agreement. This means you are currently in default of that agreement (notice attached)" (refer to Exhibit 016).
- 5.12 The correspondence also included a Default Notice dated 25 October 2017 which states "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan" (refer to Exhibit 017).
- 5.13 The approved participant also issued the investors with a Termination Notice dated 20 December 2017. The Termination Notice states "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan... This is official notification of termination of your agreement Ethan Affordable Housing Ltd" (refer to Exhibit 018).

Element 3 | Substantial Lessening of Competition

- 5.14 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.15 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investors supplies or acquires (or is likely to supply or acquire) goods or services.¹⁹ As the investors had acquired tenancy management services from Century 21, this would include the market for tenancy management services.
- 5.16 From information provided by the investors, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Finding

- 5.17 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer. While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

¹⁹ *Competition and Consumer Act 2010* s47(13)(b).

5.18 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

6 Limitations

- 6.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 6.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 6.3 This report has been prepared based on work completed as at 26 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 6.4 As at 26 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 6.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 6.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 6.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 6.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 6.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 6.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | ^{s47F}

NRAS Regulation 21A | Application to Transfer

Department of Social Services

13 March 2018
Private and Confidential

13 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report |s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed an application to transfer a National Rental Affordability Scheme allocation made by an investor (s47F) under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G

Yours sincerely
s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-HGI-500
002	Processing data for 2013-14 Commonwealth incentive payment
003	Extract from FY2014-15 NRAS incentive claim report
004	Extract from FY2015-16 NRAS incentive claim report
005	Extract from FY2016-17 NRAS incentive claim report
006	Processing data for Territory incentive payments
007	Contract between s47F and Ethan Affordable Housing Pty Ltd for 1-HGI-500
008	FY2013-14 annual NRAS incentive statement for 1-HGI-500
009	FY2014-15 refundable tax offset certificate for 1-HGI-500
010	FY2015-16 refundable tax offset certificate for 1-HGI-500
011	FY2016-17 annual NRAS incentive statement for 1-HGI-500
012	FY2012-13 annual NRAS incentive statement for 1-HGI-500
013	FY2014-15 annual NRAS incentive statement for 1-HGI-500
014	FY2015-16 annual NRAS incentive statement for 1-HGI-500
015	Correspondence from Ethan Affordable Housing Pty Ltd to s47F dated 18 March 2016
016	Extract from FY2014-15 Statement of Compliance for 1-HGI-500

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-500	s47F
ACCC	Australian Competition and Consumer Commission
AP	Approved Participant
ASIC	Australian Securities and Investments Commission
Department	Department of Social Services
FY	Financial Year
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A, an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the application to transfer an allocation made by the investor s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-HGI-500**).
- 1.9 The investor’s application identified **two** potential Regulation 21A grounds for transfer. From our assessment of information provided by the investor in support of their application, we also identified **one** additional Regulation 21A ground for transfer.
- 1.10 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is sufficient information to support **two** Regulation 21A grounds for transfer (refer to Table 1 – Grounds for Transfer):

Table 1 – Grounds for Transfer

Ground	Source	Support
<p>Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive</p>	Investor’s application to transfer	Sufficient information
<p>Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law</p>	Investor’s application to transfer	Insufficient information
<p>False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor</p>	Additional information provided by investor	Sufficient information

Methodology

- 1.11 We reviewed the investor’s application to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 1.12 We requested and reviewed additional information in support of the investor’s application through correspondence with the investor, the Department and the Northern Territory Government.
- 1.13 This included identifying potential Regulation 21A grounds for transfer that were not identified by the investor in their application, but could be supported through the information provided by the investor, the Department and/or the Northern Territory Government.
- 1.14 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.15 We analysed information provided by the investor, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁴ – for each potential Regulation 21A ground for transfer.

Findings

- 1.16 From our assessment of information provided by the investor, the Department and the Northern Territory Government, **three** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **two** Regulation 21A grounds for transfer.

Failure to Pass on Incentive

- 1.17 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ NRAS Regulation 21A(2)(c).

⁴ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

- There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (40 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2013-14 (368 days taken to pass on the incentive), 2015-16 (35 days taken to pass on the incentive) and 2016-17 (118 days taken to pass on the incentive) financial years.

Contravention of Consumer Protection Law

1.18 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer because we are unable to establish whether the conduct of the approved participant contravened a consumer protection law for two reasons.

1.19 Firstly, this ground for transfer requires the conduct of the approved participant to have “contravened” a consumer protection law. We have not assessed the legal interpretation of “contravention” – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁵ However, as this ground for transfer was identified by the investor in their application, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.

1.20 Secondly, we were unable to establish whether the conduct of the approved participant in requiring the investor to use the services of Ethan Affordable Housing Limited constituted exclusive dealing in contravention of section 47(6) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other’s freedom to choose with whom, in what, or where they deal.⁶

1.21 A required element in exclusive dealing is that the conduct of a person has the purpose, or is likely to have the effect, of substantially lessening competition. From information provided by the investor, we are unable to establish whether the conduct of the approved participant in requiring the investor to use the services of Ethan Affordable Housing Limited substantially lessened competition in the market for tenancy management services.

Provision of False or Misleading Information to Investor

1.22 From our assessment of information provided by the investor and the Department, there is **sufficient information** to support this ground for transfer because:

- The approved participant provided information about the NRAS to the investor
- The representation on 18 March 2015 that “Currently your property is considered non-compliant” can be characterised as false or misleading because the approved participant did not identify any instances of non-compliance for the investor’s property in their FY2014-15 Statement of Compliance, and
- The approved participant’s representation on 18 March 2015 that “Ethan may then... withdraw the NRAS allocation from your property” can be characterised as false or misleading because the investor may infer that the approved participant can unilaterally withdraw or transfer the allocation despite the power to transfer or revoke allocations being vested in the Secretary.

⁵ See, e.g., Australian Competition and Consumer Commission’s Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

⁶ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
- The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist.

Table 2 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the application to transfer an allocation made by s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F NRAS identification **1-HGI-500**).

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investor's application to transfer (refer to Exhibit 001) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 3.2 We contacted the investor on the following dates to discuss their application to transfer, and source additional information in support of their application. This included identifying potential Regulation 21A grounds for transfer that were not identified by the investor in their application, but could be supported through the information provided by the investor.

Table 3 – Contact with Investor

Date	Contact Method
13 February 2018	Phone call
13 February 2018	Email
21 February 2018	Phone call
21 February 2018	Email

- 3.3 We received additional information in support of the investor's application on the following dates:

Table 4 – Information from Investor

Date	Information Provided
15 February 2018	Contract with approved participant Correspondence with approved participant Incentive statements from approved participant Termination notice from approved participant
22 February 2018	Refundable tax offset certificates from approved participant

Obtaining Information (Department)

- 3.4 We requested and received additional information in support of the investor's application from the Department on the following dates:

Table 5 – Information from Department

Date	Information Provided
1 March 2018	Processing data for FY2013-14 incentive payments
13 March 2018	FY2014-15 Statement of Compliance

Obtaining Information (Northern Territory Government)

- 3.5 The Department requested and received additional information in support of the investor's application from the Northern Territory Government on our behalf on the following date:

Table 6 – Information from Northern Territory Government

Date	Information Provided
12 March 2018	Payment information for FY2012-13, 2013-14, 2014-15, 2015-16 and 2016-17 Territory incentive payments to the approved participant

Obtaining Information (Approved Participant)

3.6 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

3.7 We analysed information provided by the investor, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁷ – for each potential Regulation 21A ground for transfer.

3.8 This process involved:

- Analysing information provided by the investor, the Department and the Northern Territory Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investor and the Department where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁷ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department⁸
 - There is a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor⁹, and
 - The investor did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.¹⁰
- 4.2 The investor's application to transfer identified this ground for transfer, stating "I have not received the Northern Territory Governments [sic] component of my NRAS incentive for 2016 – 2017. In past years a cheque has been posted to me by Ethan Affordable Housing... I suspect Ethan is holding the payment" (refer to Exhibit 001).
- 4.3 The investor's application to transfer did not identify other instances where the approved participant failed to pass on the incentive. However, from review of information provided by the investor, the Department and the Northern Territory Government, we have identified other instances where the approved participant did not pass on the incentive within a reasonable time.

Analysis

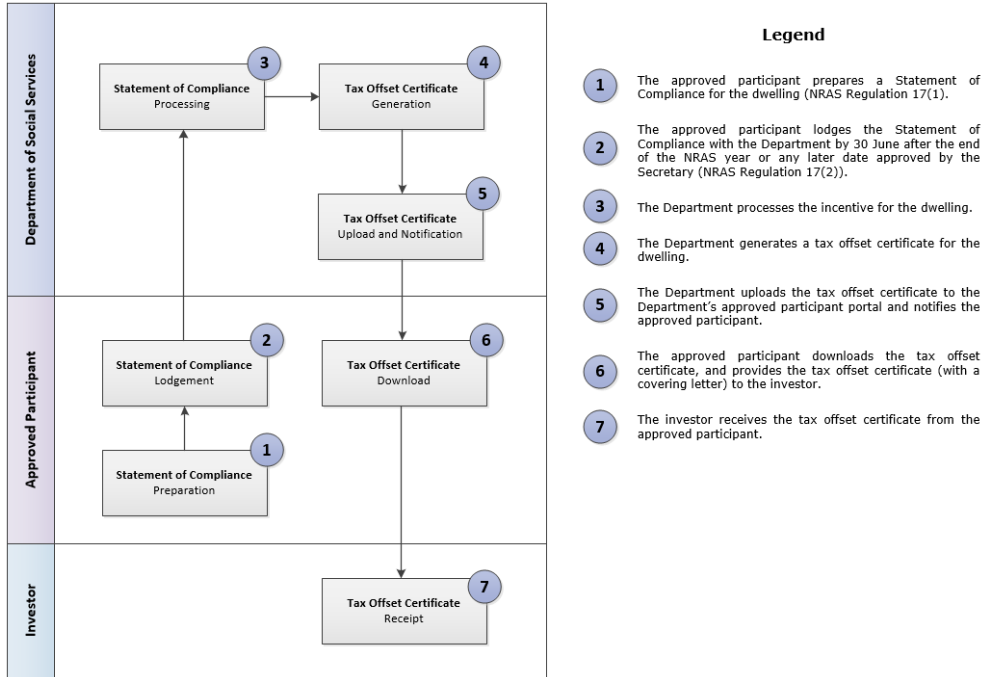
- 4.4 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.5 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investor through the following process for all relevant financial years:

⁸ NRAS Regulation 30B(1)(a).

⁹ NRAS Regulations 30A(2) and 30B(1)(b).

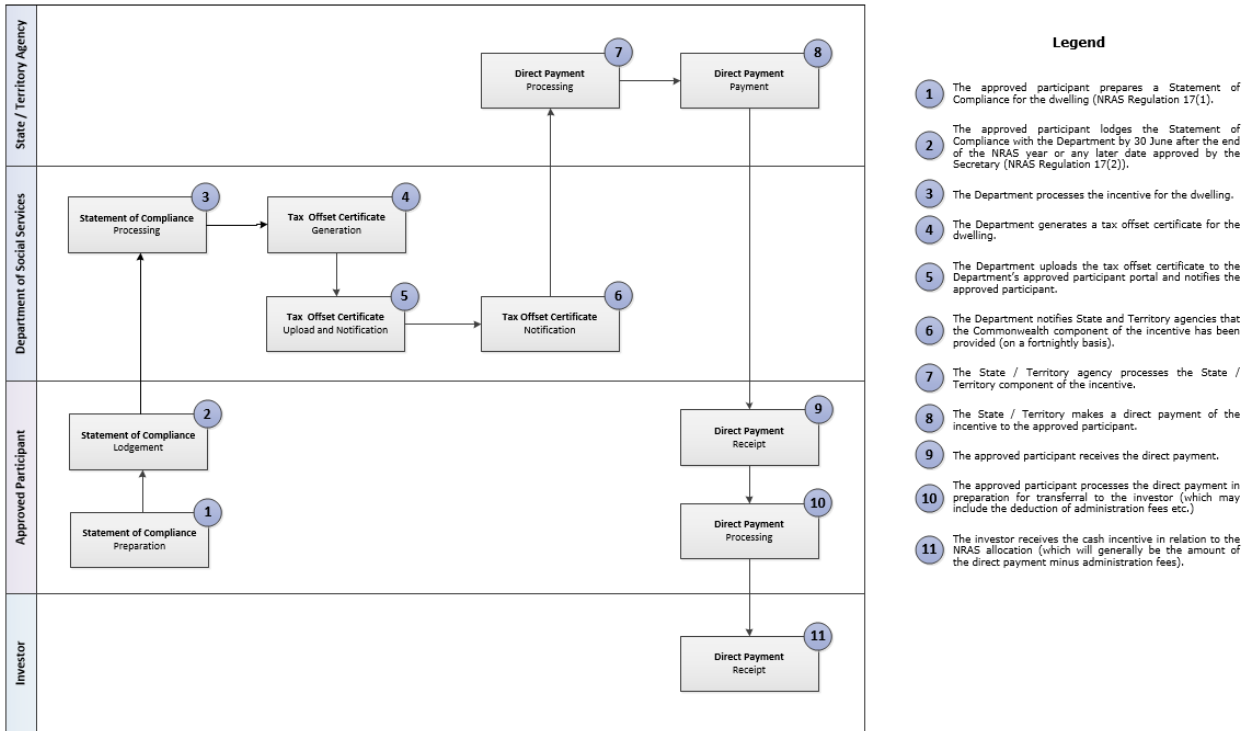
¹⁰ NRAS Regulation 30B(2).

Figure 1 – Provision of Commonwealth Incentive to Investor



4.6 For the Territory portion of the incentive, we have identified incentives were provided to the investor through the following process for all relevant financial years:

Figure 2 – Provision of Territory Incentive to Investor



Element 1 | Receipt of Incentive by Approved Participant

- 4.7 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling.
- 4.8 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwelling in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 7 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹¹	Date of Processing	Exhibit
2013-14	30 March 2015	Exhibit 002
2014-15	14 December 2015	Exhibit 003
2015-16	14 September 2016	Exhibit 004
2016-17	13 June 2017	Exhibit 005

- 4.9 For the Territory portion of the incentive, the approved participant received the incentive for the dwelling as a direct payment.

Table 8 – Receipt of Territory Incentive by Approved Participant

Financial Year ¹¹	Date of Payment	Exhibit
2012-13	31 October 2013	Exhibit 006
2013-14	17 April 2014	Exhibit 006
2014-15	14 January 2016	Exhibit 006
2015-16	17 October 2016	Exhibit 006
2016-17	1 August 2017	Exhibit 006

Element 2 | Contractual Agreement between Approved Participant and Investor

- 4.10 The second element for this ground for transfer is the existence of a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor. There is a requirement to pass on an incentive where, under a contractual agreement with the investor, the approved participant is required to¹²:
- Make a payment to the investor in relation to the incentive
 - Take steps to enable the investor to claim a tax offset to which the investor is entitled in relation to the incentive, or
 - To make an election in relation to the incentive.
- 4.11 The investor provided a signed contractual agreement with the approved participant dated 20 August 2012 (refer to Exhibit 007). The contractual agreement states at Clause 1(vii) that "Ethan agrees to

¹¹ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

¹² NRAS Regulation 30A(2).

ensure the NRAS incentives issued by the Government are passed on to the investor” and at Clause 1(viii) that “Ethan agrees to undertake all actions necessary to complete the tasks set out above”.

- 4.12 We note the contractual agreement between the investor and the approved participant does not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

- 4.13 The third element for this ground for transfer is the approved participant’s failure to pass on the incentive for the dwelling to the investor within a reasonable time after receiving the incentive.

- 4.14 For the Commonwealth portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 9 – Receipt of Commonwealth Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2013-14	30 March 2015	31 March 2015	Exhibit 008	1 Day
2014-15	14 December 2015	16 December 2015	Exhibit 009	2 Days
2015-16	14 September 2016	24 October 2016	Exhibit 010	40 Days
2016-17	13 June 2017	31 July 2017	Exhibit 011	48 Days

- 4.15 For the Territory portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 10 – Receipt of Territory Incentive by Investor

Financial Year	Date of Payment	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2012-13	31 October 2013	1 November 2013	Exhibit 012	1 Day
2013-14	17 April 2014	20 April 2015	Exhibit 008	368 Days
2014-15	14 January 2016	28 January 2016	Exhibit 013	14 Days
2015-16	17 October 2016	21 November 2016	Exhibit 014	35 Days
2016-17	1 August 2017	27 November 2017 ¹³	Exhibit 011	118 Days

- 4.16 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 states “What is a ‘reasonable time’ would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant’s business or undertaking

¹³ We note the investor stated in their application to transfer dated 26 November 2017 “I have not received the Northern Territory Governments component of my NRAS incentive for 2016 – 2017” (refer to Exhibit 001). However, the investor subsequently provided a proof of payment of the Territory component of the incentive for FY2016-17 dated 27 November 2017 (refer to Exhibit 011).

and any explanation the approved participant provided for any apparent delay in passing on the incentive".¹⁴

- 4.17 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 (40 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years.
- 4.18 In particular, we note the contrast between the time to pass on the incentive for these financial years compared to the 2013-14 (1 day to pass on the incentive) and 2014-15 (2 days to pass on the incentive) financial years. This supports a finding that the delay in passage of the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investor received the incentive in the same manner (as a refundable tax offset certificate) from the approved participant for all relevant financial years.
- 4.19 For the **Territory** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2013-14 (368 days taken to pass on the incentive), 2015-16 (35 days taken to pass on the incentive) and 2016-17 (118 days taken to pass on the incentive) financial years.
- 4.20 In particular, we note the contrast between the time to pass on the incentive for these financial years compared to the 2012-13 (1 day to pass on the incentive) and 2014-15 (14 days to pass on the incentive) financial years. This supports a finding that the delay in passage of the incentive for the 2013-14, 2015-16 and 2016-17 financial years was not reasonable, considering the investor received the incentive in the same manner (as a cheque) from the approved participant for all relevant financial years.

Finding

- 4.21 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (40 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years, and
 - For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2013-14 (368 days taken to pass on the incentive), 2015-16 (35 days taken to pass on the incentive) and 2016-17 (118 days taken to pass on the incentive) financial years.
- 4.22 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.23 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for the delay in passing on the incentive.

¹⁴ Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investor's application to transfer states "I believe that the action of Ethan Affordable Housing contravenes the ACCC anti-competitive legislation". The investor identified the conduct of the approved participant in requiring the investor to move from their incumbent property manager ^{s47F} to a different property manager (Ethan Residential Pty Ltd) as supporting this ground for transfer (refer to Exhibit 001).
- 5.3 The investor's application to transfer further identified the conduct of Ethan allegedly contravened consumer protection laws relating to third line forcing, stating "Third line forcing occurs when a business will only supply goods or services, or give a particular price or discount on the condition that the purchaser buys goods or services from a particular third party... Exclusive dealing will only break the law when the conduct has the effect of substantially lessening the competition in the relevant market" (refer to Exhibit 001).

Analysis

- 5.4 This ground for transfer requires the conduct of the approved participant to have "contravened" a consumer protection law. We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹⁵
- 5.5 However, as this ground for transfer was identified by the investor in their application, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(6) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹⁶
- 5.6 In the context of the NRAS and the investor's application to transfer, this ground for transfer is constituted by the following elements:
- An approved participant supplies, or offers to supply goods or services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investor¹⁷
 - The approved participant supplies these services on the condition that the investor will acquire services (such as tenancy management services) directly or indirectly from a third party that is not related to the approved participant¹⁸, and

¹⁵ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹⁶ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

¹⁷ *Competition and Consumer Act 2010* s47(6)(a).

¹⁸ *Competition and Consumer Act 2010* s47(6).

- The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.¹⁹

Element 1 | Supply of Services

- 5.7 The first element for this ground for transfer is the supply of services by the approved participant to the investor.
- 5.8 The investor provided a signed contractual agreement with the approved participant dated 20 August 2012 (refer to Exhibit 007). The contractual agreement identifies the approved participant will provide a range of services to the investor – including at Clause 1(iii) to provide tenancy management services and related work in conjunction with the appointed property manager.

Element 2a | Condition of Supply

- 5.9 The second element for this ground for transfer is that the approved participant supplies these services on the condition the investor acquires services from a third party that is not related to the approved participant.
- 5.10 In email correspondence from the approved participant to the investor dated 18 March 2015, the approved participant identifies it is ceasing its relationship with the investor's incumbent property manager s47F in managing NRAS properties for the approved participant (refer to Exhibit 015).
- 5.11 The email states that "The action to remove s47F from this position has not been taken lightly, currently your property is considered non-complaint and Ethan is unable to claim your NRAS incentive for this year" and identifies a number of reasons for the removal (including actions s47F allegedly took that breached NRAS compliance requirements and allegedly failed to follow the approved participant's instructions).
- 5.12 The email further states that "You may choose to retain s47F as your property manager. You are completely entitled to do this, however, this means that you will no longer be compliant with Ethan's contract requirements and Ethan may then choose to terminate Ethan's agreement with you and withdraw the NRAS allocation from your property".
- 5.13 The email further states that "You may choose to terminate your appointment of s47F and then appoint Ethan Residential Pty Ltd instead. You will then continue to be compliant with Ethan's contract".

Element 2b | Third Party

- 5.14 The second element for this ground for transfer also identifies the entity from which the investor is required to acquire services from be a third party (that is, a person not being a body corporate related to the approved participant).
- 5.15 For the purposes of the *Competition and Consumer Act 2010*, a body corporate is considered related to another body corporate where one is the holding company, subsidiary or subsidiary of a holding company for the other.²⁰
- 5.16 From a series of ASIC searches, we have identified that although Ethan Residential Pty Ltd shares a common director with the approved participant, it is not a holding company or subsidiary for the approved participant and could therefore be considered a third party for the purposes of the *Competition and Consumer Act 2010*.

¹⁹ *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

²⁰ *Competition and Consumer Act 2010* s4A.

Figure 3 – Relationship between Ethan Residential Pty Ltd²¹ and Ethan Affordable Housing Pty Ltd



Element 3 | Substantial Lessening of Competition

- 5.17 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.18 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.²² As the investor had acquired tenancy management services from s47F this would include the market for tenancy management services.
- 5.19 From information provided by the investor, we are unable to establish whether the conduct of the approved participant in requiring the investor to use the services of Ethan Affordable Housing Limited substantially lessened competition in the market for tenancy management services.

Finding

- 5.20 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer. While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct of the approved participant in requiring the investor to use the services of Ethan Affordable Housing Limited substantially lessened competition in the market for tenancy management services.
- 5.21 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²¹ Ethan Residential Pty Ltd changed its name to Tebter Property Pty Ltd on 9 May 2017.

²² *Competition and Consumer Act 2010* s47(13)(b).

6 Ground 3 | Provision of False or Misleading Information to Investor

Overview

- 6.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:
- The approved participant provides information about the NRAS to the investor (such as a representation made by an email or letter), and
 - The information provided to the investor is false or misleading.
- 6.2 The investor's application to transfer did not identify this ground for transfer. However, from our assessment of information provided by the investor, we have identified representations about the NRAS made by the approved participant to the investor that can be characterised as false or misleading.

Element 1 | Provision of Information

- 6.3 The first element for this ground for transfer is the provision of information about the NRAS by the approved participant to the investor.
- 6.4 In email correspondence from the approved participant to the investor dated 18 March 2015, the approved participant states "Currently your property is considered non-compliant and Ethan is unable to claim your NRAS incentive for this year" (refer to Exhibit 015).
- 6.5 The correspondence identifies a number of instances of non-compliance (including actions ^{s47F} allegedly took that breached NRAS compliance requirements and allegedly failed to follow the approved participant's instructions) and "At least one of the above issues relates to your property and in some cases multiple issues identified above are affecting owner's properties".
- 6.6 This correspondence further states "You may choose to retain ^{s47F} as your property manager. You are completely entitled to do this, however, this means that you will no longer be compliant with Ethan's contract requirements and Ethan may then choose to terminate Ethan's agreement with you and withdraw the NRAS allocation from your property".

Element 2 | Information is False or Misleading

- 6.7 The second element for this ground for transfer is that the information about the NRAS provided by the approved participant to the investor is false or misleading.
- 6.8 For the representation on 18 March 2015 that "Currently your property is considered non-compliant and Ethan is unable to claim your NRAS incentive for this year", we have identified the approved participant lodged a FY2014-15 Statement of Compliance for the NRAS dwelling on 14 September 2015 (refer to Exhibit 016).
- 6.9 This Statement of Compliance did not identify any instances of non-compliance for the investor's property, and was approved by the Department (prior to provision of the incentive to the approved participant) on 11 December 2015.
- 6.10 Although this representation may refer to non-compliance with the contractual agreement between the investor and the approved participant, the connection drawn between the representation and the alleged inability of the approved participant to claim the NRAS incentive implies the investor's property

was non-compliant with NRAS regulatory requirements. Because the FY2014-15 Statement of Compliance did not identify any instances of non-compliance for the investor's property, this representation can be characterised as false or misleading.

- 6.11 For the representation on 18 March 2015 that "Ethan may then... withdraw the NRAS allocation from your property", we have identified that approved participants cannot unilaterally withdraw or transfer incentives attached to NRAS dwellings.
- 6.12 NRAS Regulation 20 identifies that "If the approved participant for an approved rental dwelling, or a person acting on behalf of the approved participant, requests the Secretary, in a form approved by the Secretary, to transfer the allocation to a different rental dwelling, the Secretary may transfer the allocation as requested".
- 6.13 In addition, NRAS Regulation 22 identifies that "The Secretary may revoke an allocation (other than a provisional allocation) made to an approved participant in relation to an approved rental dwelling" if certain grounds are met.
- 6.14 Because the power to transfer or revoke an allocation is vested in the Secretary, the representation that the approved participant may withdraw the allocation from the investor's property can be characterised as false or misleading.

Finding

- 6.15 From our assessment of information provided by the investor and the Department, there is **sufficient information** to support this ground for transfer because:
- The approved participant provided information about the NRAS to the investor
 - The representation on 18 March 2015 that "Currently your property is considered non-compliant and Ethan is unable to claim your NRAS incentive for this year" can be characterised as false or misleading because the approved participant did not identify any instances of non-compliance for the investor's property in their FY2014-15 Statement of Compliance, and
 - The representation on 18 March 2015 that "Ethan may then... withdraw the NRAS allocation from your property" can be characterised as false or misleading because the investor may infer that the approved participant can unilaterally withdraw or transfer the allocation despite the power to transfer or revoke allocations being vested in the Secretary.
- 6.16 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

7 Limitations

- 7.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 7.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice.
- 7.3 This report has been prepared based on work completed as at 13 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 7.4 As at 13 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 7.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 7.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 7.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 7.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 7.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 7.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | ^{s47F}

NRAS Regulation 21A | Application to Transfer

Department of Social Services

26 March 2018
Private and Confidential

26 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report | s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed an application to transfer a National Rental Affordability Scheme allocation made by an investor^{s47F} under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on ^{s47G}

^{s47G} Yours sincerely

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to Transfer for 1-HGI-744
002	Extract from FY2014-15 NRAS incentive report
003	Extract from FY2015-16 NRAS incentive report
004	Extract from FY2016-17 NRAS incentive report
005	Processing data for Territory incentive payments
006	Contract between s47F and Ethan Affordable Housing Pty Ltd for 1-HGI-744
007	FY2014-15 Commonwealth refundable tax offset certificate for 1-HGI-744
008	FY2015-16 Commonwealth refundable tax offset certificate for 1-HGI-744
009	FY2016-17 Commonwealth refundable tax offset certificate for 1-HGI-744
010	FY2015-16 Territory cheque letter for 1-HGI-744
011	Email statement from s47F dated 23 February 2018
012	Correspondence from Ethan Affordable Housing Pty Ltd to s47F dated 21 March 2017
013	Correspondence from Ethan Affordable Housing Pty Ltd to s47F dated 21 April 2017
014	Default notice from Ethan Affordable Housing Pty Ltd for 1-HGI-744
015	Termination notice from Ethan Affordable Housing Pty Ltd for 1-HGI-744
016	Correspondence from Ethan Affordable Housing Pty Ltd to s47F dated 18 March 2015
017	Extract from FY2014-15 Statement of Compliance for 1-HGI-744

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-744	s47F
ASIC	Australian Securities and Investments Commission
Department	Department of Social Services
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the application to transfer an allocation made by the investor s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-HGI-744**).
- 1.9 The investor’s application identified **three** potential Regulation 21A grounds for transfer. From our assessment of the information provided by the investor in support of their application, we **did not** identify any additional Regulation 21A grounds for transfer.
- 1.10 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is sufficient information to support **two** Regulation 21A grounds for transfer (refer to Table 1 – Grounds for Transfer):

Table 1 – Grounds for Transfer

Ground	Identification	Support
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investor’s application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investor’s application to transfer	Insufficient information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investor’s application to transfer	Sufficient information

Methodology

- 1.11 We reviewed the investor’s application to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 1.12 We requested and reviewed additional information in support of the investor’s application through correspondence with the investor, the Department and the Northern Territory Government.
- 1.13 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.14 We analysed information provided by the investor in support their application to transfer to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁴ – for each potential Regulation 21A ground for transfer.

Findings

- 1.15 From our assessment of information provided by the investor, the Department and the Northern Territory Government, **three** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **two** Regulation 21A grounds for transfer.

Failure to Pass on Incentive

- 1.16 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement dated 12 March 2015 between the investor and the approved participant that required the approved participant to pass on the incentive

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ NRAS Regulation 21A(2)(c).

⁴ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (41 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2015-16 financial year.

Contravention of Consumer Protection Law

- 1.17 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer.
- 1.18 We have not assessed the legal interpretation of “contravention” – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁵ However, as this ground for transfer was identified by the investor in their application, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.
- 1.19 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other’s freedom to choose with whom, in what, or where they deal.⁶
- 1.20 A required element in exclusive dealing is that the conduct of a person has the purpose, or is likely to have the effect, of substantially lessening competition. From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Provision of False or Misleading Information to Investor

- 1.21 From our assessment of information provided by the investor and the Department, there is **sufficient information** to support this ground for transfer because:
- The approved participant provided information about the NRAS to the investor
 - The representation on 18 March 2015 that “Currently your property is considered non-compliant and Ethan is unable to claim your NRAS incentive for this year” can be characterised as false or misleading because the approved participant did not identify any instances of non-compliance for the investor’s property in their FY2014-15 Statement of Compliance, and
 - The representation on 18 March 2015 that “Ethan may then... withdraw the NRAS allocation from your property” can be characterised as false or misleading because the investor may infer that the approved participant can unilaterally withdraw or transfer the allocation despite the power to transfer or revoke allocations being vested in the Secretary.

⁵ See, e.g., Australian Competition and Consumer Commission’s Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

⁶ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
 - The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist:

Table 2 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the application to transfer an allocation made by the investor s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-HGI-744**).

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investor’s application to transfer (refer to Exhibit 001) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 3.2 We contacted the investor on the following dates to discuss their application to transfer, and source additional information in support of their application.

Table 3 – Contact with Investor

Date	Contact Method
14 February 2018	Phone call
14 February 2018	Email
20 February 2018	Phone call
22 February 2018	Phone call
26 February 2018	Voicemail
27 February 2018	Phone call
27 February 2018	Email

- 3.3 We received additional information in support of the investor’s application on the following dates:

Table 4 – Information from Investor

Date	Information Provided
21 February 2018	Contract with approved participant Correspondence with approved participant Default notice from approved participant Termination notice from approved participant
23 February 2018	Incentive statements from approved participant Refundable tax offset certificate Statement from investor regarding incentive payments
28 February 2018	Incentive cheques from approved participant Refundable tax offset certificates

Obtaining Information (Department)

- 3.4 We requested and received additional information in support to the investor’s application from the Department on the following date:

Table 5 – Information from Department

Date	Information Provided
13 March 2018	FY2014-15 Statement of Compliance

Obtaining Information (Northern Territory Government)

3.5 The Department requested and received additional information in support of the investor’s application from the Northern Territory Government on our behalf on the following date:

Table 6 – Information from Northern Territory Government

Date	Information Provided
12 March 2018	Payment information for 2015-16 and 2016-17 Territory incentive payments to the approved participant

Obtaining Information (Approved Participant)

3.6 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

3.7 We analysed information provided by the investor, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁷ – for each potential Regulation 21A ground for transfer.

3.8 This process involved:

- Analysing information provided by the investor, the Department and the Northern Territory Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investor where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁷ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department⁸
 - There is a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor⁹, and
 - The investor did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.¹⁰
- 4.2 The investor's application to transfer identified this ground for transfer, stating "As of 07 December 2017 I have not received the state NRAS component for the 16/17 NRAS year, seven months after the end of that year" (refer to Exhibit 001).
- 4.3 The investor's application to transfer did not identify other instances where the approved participant failed to pass on the incentive. However, from review of information provided by the investor, the Department and the Northern Territory Government, we have identified other instances where the approved participant did not pass on the incentive within a reasonable time.

Analysis

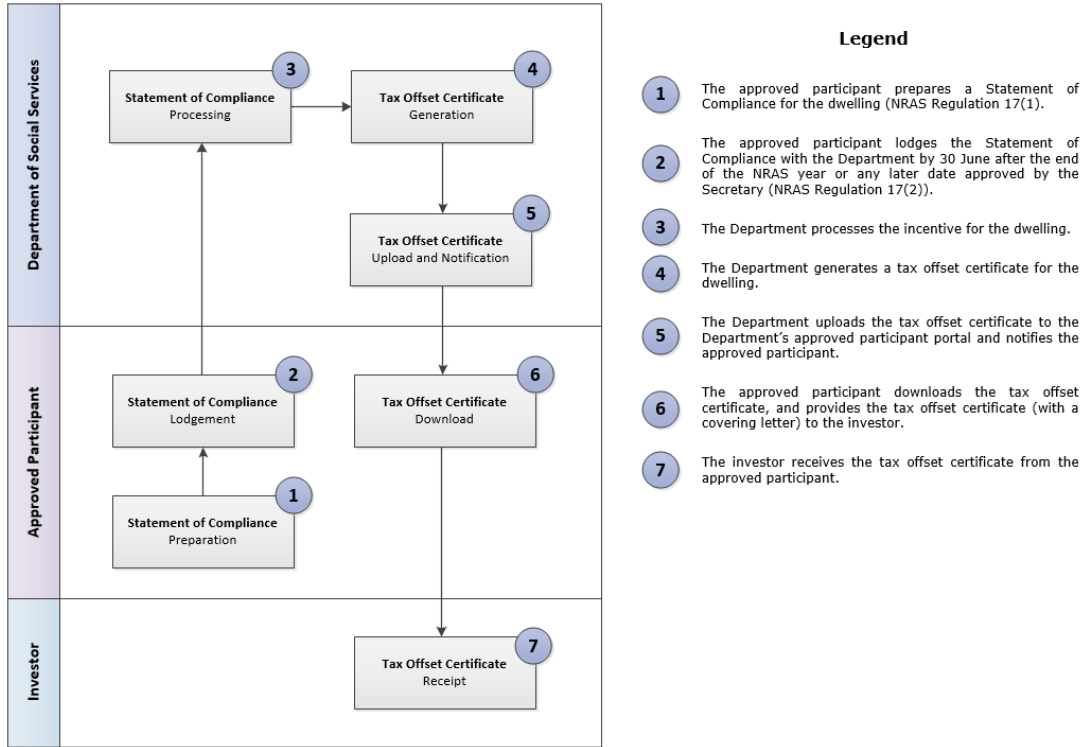
- 4.4 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.5 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investor through the following process for all relevant financial years:

⁸ NRAS Regulation 30B(1)(a).

⁹ NRAS Regulations 30A(2) and 30B(1)(b).

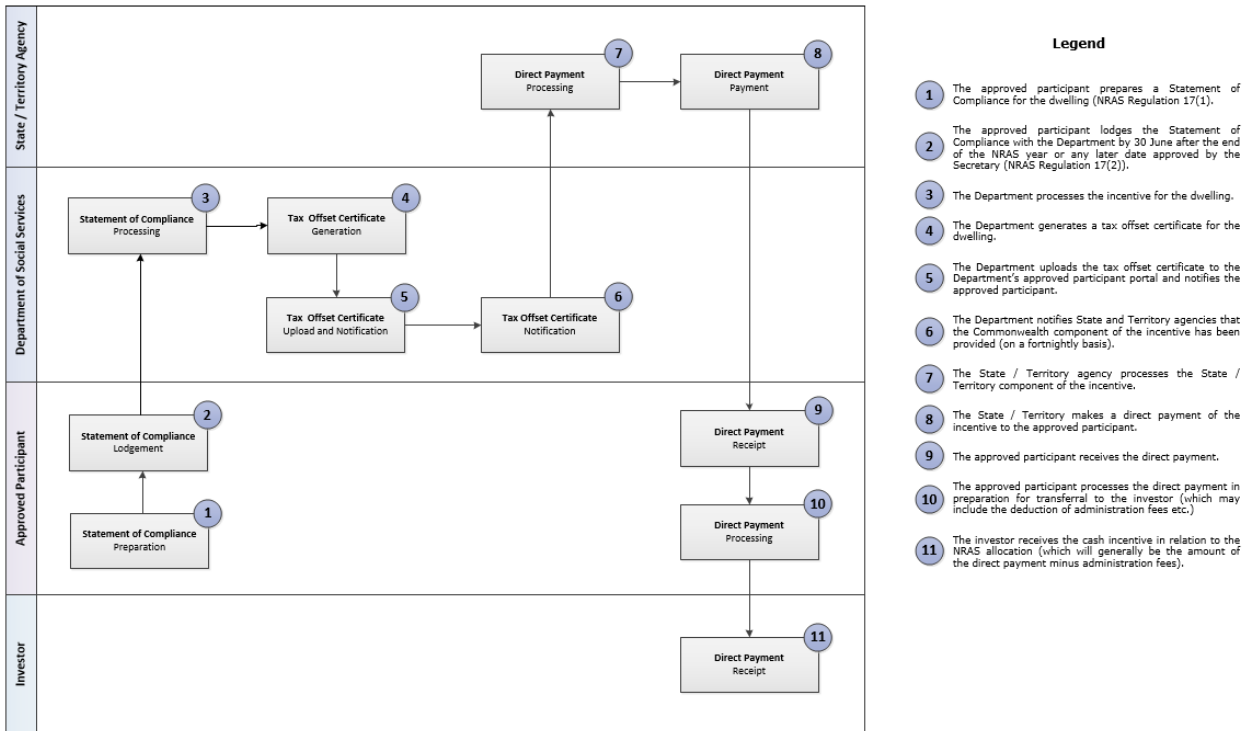
¹⁰ NRAS Regulation 30B(2).

Figure 1 – Provision of Commonwealth Incentive to Investor



4.6 For the Territory portion of the incentive, we have identified incentives were provided to the investor through the following process for all relevant financial years:

Figure 2 – Provision of Territory Incentive to Investor



Element 1 | Receipt of Incentive by Approved Participant

- 4.7 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling from the Department and State and/or Territory agencies.
- 4.8 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwelling in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 7 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹¹	Date of Processing	Exhibit
2014-15	4 April 2016	Exhibit 002
2015-16	14 September 2016	Exhibit 003
2016-17	13 June 2017	Exhibit 004

- 4.9 For the Territory portion of the incentive, the approved participant received the incentive for the dwelling as a direct payment.

Table 8 – Receipt of Territory Incentive by Approved Participant

Financial Year ¹¹	Date of Payment	Exhibit
2015-16	17 October 2016	Exhibit 005
2016-17	1 August 2017	Exhibit 005

Element 2 | Contractual Agreement between Approved Participant and Investor

- 4.10 The second element for this ground for transfer is the existence of a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor. There is a requirement to pass on an incentive where, under a contractual agreement with the investor, the approved participant is required to¹²:
- Make a payment to the investor in relation to the incentive
 - Take steps to enable the investor to claim a tax offset to which the investor is entitled in relation to the incentive, or
 - To make an election in relation to the incentive.
- 4.11 The investor provided a signed contractual agreement with the approved participant dated 12 March 2015 (refer to Exhibit 006). The contractual agreement states at Clause 1(vii) that "Ethan agrees to ensure the NRAS incentives issued by the Government are passed on to the investor" and at Clause 1(viii) that "Ethan agrees to undertake all actions necessary to complete the tasks set out above".
- 4.12 We note the contractual agreement between the investor and the approved participant does not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

¹¹ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

¹² NRAS Regulation 30A(2).

Element 3 | Passing on Incentive within Reasonable Time

- 4.13 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwelling to the investor within a reasonable time after receiving the incentive.
- 4.14 For the Commonwealth portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 9 – Receipt of Commonwealth Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2014-15	4 April 2016	8 April 2016	Exhibit 007	4 Days
2015-16	14 September 2016	25 October 2016	Exhibit 008	41 Days
2016-17	13 June 2017	31 July 2017	Exhibit 009	48 Days

- 4.15 For the Territory portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 10 – Receipt of Territory Incentive by Investor

Financial Year	Date of Payment	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2015-16	17 October 2016	21 November 2016	Exhibit 010	35 Days
2016-17	1 August 2017	Not Received	Exhibit 011	159 Days ¹³

- 4.16 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 states "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive".¹⁴
- 4.17 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 (41 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years.
- 4.18 In particular, we note the contrast between the time to pass on the incentive for these financial years compared to the 2014-15 (4 days to pass on the incentive) financial year. This supports a finding that the delay in passage of the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investor received the incentive in the same manner (as a refundable tax offset certificate) from the approved participant for all relevant financial years.
- 4.19 For the **Territory** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investor for the 2016-17 financial year.

¹³ As of the date of statement (23 February 2018) from the investor that they have not received the Territory incentive for this financial year (refer to Exhibit 011).

¹⁴ Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

- 4.20 In particular, we note the contrast between the time taken to pass on the incentive for the 2015-16 financial year (35 days), and the failure to pass on the incentive for the 2016-17 financial year (159 days as at the date of the investor's statement of non-receipt) (refer to Exhibit 011).
- 4.21 This supports a finding that the failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investor received the incentive in the same manner (as a direct payment) from the approved participant for the 2015-16 financial year.

Finding

- 4.22 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement dated 12 March 2015 between the investor and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (41 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years, and
 - For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2015-16 financial year.
- 4.23 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.24 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for both the delay and failure to pass on the incentive.

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investor's application to transfer identified this ground for transfer, stating "Ethan has twice attempted to force me into using them as the property manager by threats of withdrawing my NRAS allocation unless I employ them as my property manager" (refer to Exhibit 001).
- 5.3 The investor's application to transfer identified the conduct of the approved participant in requiring the investor to move from their incumbent property s47F to a different property manager (Ethan Residential Pty Ltd) as supporting this ground for transfer (refer to Exhibit 001).

Analysis

- 5.4 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹⁵
- 5.5 However, as this ground for transfer was identified by the investor in their application, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹⁶
- 5.6 In the context of the NRAS and the investor's application to transfer, this ground for transfer is constituted by the following elements:
- The approved participant refuses to supply services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investor¹⁷
 - The approved participant has refused to supply these services because the investor has not used (or agreed to use) services (such as tenancy management services) from a third party¹⁸, and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.¹⁹

¹⁵ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹⁶ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

¹⁷ *Competition and Consumer Act 2010* s47(7)(a).

¹⁸ *Competition and Consumer Act 2010* s47(7).

¹⁹ *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

Element 1 | Refusal to Supply Services

- 5.7 The first element for this ground for transfer is the approved participant's refusal to supply services to the investor.
- 5.8 In correspondence from the approved participant to the investor dated 21 March 2017, the approved participant identifies that the investor's incumbent property manager ^{s47F} was no longer approved as a property manager by the approved participant and the investor would need to change to a new property manager that is approved by the approved participant (refer to Exhibit 012).
- 5.9 The correspondence states "Your current property manager was recently informed that their services are no longer required or approved as property managers for any existing properties that are operating in the Ethan NRAS program... This means that your NRAS property that has been managed by ^{s47F} ^{s47F} will need to roll across to a new agency that is approved by Ethan" (refer to Exhibit 012).

Element 2 | Refusal to Supply Because of Failure to Use Third Party

- 5.10 The second element for this ground for transfer is that the approved participant has refused to supply services to the investor because the investor has not used services from a third party.
- 5.11 In correspondence from the approved participant to the investor dated 21 April 2017, the approved participant identifies that the investor was in breach of their agreement with the approved participant as they had failed to appoint a property manager approved by the approved participant (Refer to Exhibit 013).
- 5.12 The correspondence states "Your property... is currently being managed by an agent who is no longer an approved property manager in Ethan's NRAS program. As your NRAS agreement with Ethan requires you to appoint a property manager approved by Ethan, you are currently in breach of this agreement" (refer to Exhibit 013).
- 5.13 The correspondence also included a Default Notice dated 20 April 2017 which states "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan" (refer to Exhibit 014).
- 5.14 The approved participant also issued the investor with a Termination Notice dated 22 May 2017. The Termination Notice states "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan... This is official notification of termination of your agreement Ethan Affordable Housing Ltd" (refer to Exhibit 015).

Element 3 | Substantial Lessening of Competition

- 5.15 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.16 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.²⁰ As the investor had acquired tenancy management services from ^{s47F} ^{s47F} this would include the market for tenancy management services.
- 5.17 From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

²⁰ *Competition and Consumer Act 2010* s47(13)(b).

Finding

- 5.18 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer. While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.
- 5.19 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

6 Ground 3 | Provision of False or Misleading Information to Investor

Overview

- 6.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:
- The approved participant provides information about the NRAS to the investor (such as a representation made by an email or letter), and
 - The information provided to the investor is false or misleading.

Analysis

Element 1 | Provision of Information

- 6.2 The first element for this ground for transfer is the provision of information about the NRAS by the approved participant to the investor.
- 6.3 In correspondence from the approved participant to the investor dated 18 March 2015, the approved participant states "Currently your property is considered non-compliant and Ethan is unable to claim your NRAS incentive for this year" (refer to Exhibit 016).
- 6.4 The correspondence identifies a number of instances of non-compliance (including actions^{s47F} allegedly took that breached NRAS compliance requirements and allegedly failed to follow the approved participant's instructions) and "At least one of the above issues relates to your property and in some cases multiple issues identified above are affecting owner's properties".
- 6.5 This correspondence further states "You may choose to retain ^{s47F} as your property manager. You are completely entitled to do this, however, this means that you will no longer be compliant with Ethan's contract requirements and Ethan may then choose to terminate Ethan's agreement with you and withdraw the NRAS allocation from your property".

Element 2 | Information is False or Misleading

- 6.6 The second element for this ground for transfer is that the information about the NRAS provided by the approved participant to the investor is false or misleading.
- 6.7 For the representation on 18 March 2015 that "Currently your property is considered non-compliant and Ethan is unable to claim your NRAS incentive for this year", we have identified the approved participant lodged a FY2014-15 Statement of Compliance for the NRAS dwelling on 14 September 2015 (refer to Exhibit 017).
- 6.8 This Statement of Compliance did not identify any instances of non-compliance for the investor's property, and was approved by the Department (prior to provision of the incentive to the approved participant) on 16 March 2016 (refer to Exhibit 017).
- 6.9 Although this representation may refer to non-compliance with the contractual agreement between the investor and the approved participant, the connection drawn between the representation and the alleged inability of the approved participant to claim the NRAS incentive implies the investor's property was non-compliant with NRAS regulatory requirements. Because the FY2014-15 Statement of

Compliance did not identify any instances of non-compliance for the investor's property, this representation can be characterised as false or misleading.

- 6.10 For the representation on 18 March 2015 that "Ethan may then... withdraw the NRAS allocation from your property", we have identified that approved participants cannot unilaterally withdraw or transfer incentives attached to NRAS dwellings.
- 6.11 NRAS Regulation 20 identifies that "If the approved participant for an approved rental dwelling, or a person acting on behalf of the approved participant, requests the Secretary, in a form approved by the Secretary, to transfer the allocation to a different rental dwelling, the Secretary may transfer the allocation as requested".
- 6.12 In addition, NRAS Regulation 22 identifies that "The Secretary may revoke an allocation (other than a provisional allocation) made to an approved participant in relation to an approved rental dwelling" if certain grounds are met.
- 6.13 Because the power to transfer or revoke an allocation is vested in the Secretary, the representation that the approved participant may withdraw the allocation from the investor's property can be characterised as false or misleading.

Finding

- 6.14 From our assessment of information provided by the investor and the Department, there is **sufficient information** to support this ground for transfer because:
- The approved participant provided information about the NRAS to the investor
 - The representation on 18 March 2015 that "Currently your property is considered non-compliant and Ethan is unable to claim your NRAS incentive for this year" can be characterised as false or misleading because the approved participant did not identify any instances of non-compliance for the investor's property in their FY2014-15 Statement of Compliance, and
 - The representation on 18 March 2015 that "Ethan may then... withdraw the NRAS allocation from your property" can be characterised as false or misleading because the investor may infer that the approved participant can unilaterally withdraw or transfer the allocation despite the power to transfer or revoke allocations being vested in the Secretary.
- 6.15 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

7 Limitations

- 7.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 7.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 7.3 This report has been prepared based on work completed as at 26 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 7.4 As at 26 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 7.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 7.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 7.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 7.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 7.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 7.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | ^{s47F}

NRAS Regulation 21A | Application to Transfer

Department of Social Services

28 March 2018
Private and Confidential

28 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report | s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed three applications to transfer a National Rental Affordability Scheme allocation made by joint investors s47F under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G

Yours sincerely
s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-HGI-853
002	Application to transfer for 1-HGI-250
003	Application to transfer for 1-HGI-621
004	Extract from FY2014-15 NRAS incentive claim report
005	Extract from FY2015-16 NRAS incentive claim report
006	Extract from FY2016-17 NRAS incentive claim report
007	Processing data for Territory incentive payments
008	Contract between investors and Ethan Affordable Housing Pty Ltd for 1-HGI-853
009	Contract between investors and Ethan Affordable Housing Pty Ltd for 1-HGI-250
010	Contract between investors and Ethan Affordable Housing Pty Ltd for 1-HGI-621
011	FY2014-15 Commonwealth cheque letter for 1-HGI-853
012	Email statement from investors dated 5 March 2018
013	FY2014-15 Commonwealth cheque letter for 1-HGI-250
014	FY2014-15 annual NRAS incentive statement for 1-HGI-621
015	FY2014-15 Territory cheque letter for 1-HGI-853
016	Correspondence from Ethan Affordable Housing Pty Ltd to investors dated 20 December 2017
017	Correspondence from Ethan Affordable Housing Pty Ltd to investors dated 16 November 2017

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-853	s47F
1-HGI-250	
1-HGI-621	
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
Department	Department of Social Services
FY	Financial Year
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the applications to transfer an allocation made by joint investors s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the following NRAS dwellings:

Table 1 – NRAS Dwellings

Address	NRAS Dwelling ID
s47F	1-HGI-853
	1-HGI-250
	1-HGI-621

- 1.9 The investors’ applications identified **four** potential Regulation 21A grounds for transfer for all properties. From our assessment of information provided by the investors in support of their applications, we **did not** identify any additional Regulation 21A grounds for transfer.

1.10 From our assessment of information provided by the investors and the Northern Territory Government, there is sufficient information to support **one** Regulation 21A ground for transfer for each property.

Table 2 – Grounds for Transfer

Ground	Source	Support
1-HGI-853		
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investors' application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investors' application to transfer	Insufficient information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investors' application to transfer	Insufficient information
Deregistration⁴ ASIC has published a notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	Investors' application to transfer	Insufficient information
1-HGI-250		
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investors' application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investors' application to transfer	Insufficient information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investors' application to transfer	Insufficient information
Deregistration⁴ ASIC has published a notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	Investors' application to transfer	Insufficient information

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ NRAS Regulation 21A(2)(c).

⁴ NRAS Regulation 21A(2)(f).

Ground	Source	Support
1-HGI-621		
Failure to Pass on Incentive⁵ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investors' application to transfer	Sufficient information
Contravention of Consumer Protection Law⁶ The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investors' application to transfer	Insufficient information
False or Misleading Information to Investor⁷ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investors' application to transfer	Insufficient information
Deregistration⁸ ASIC has published a notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	Investors' application to transfer	Insufficient information

Methodology

- 1.11 We reviewed the investors' applications to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of each application.
- 1.12 We requested and reviewed additional information in support of the investors' applications through correspondence with the investors and the Northern Territory Government.
- 1.13 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.14 We analysed information provided by the investors and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁹ – for each potential Regulation 21A ground for transfer.

Findings

- 1.15 From our assessment of information provided by the investors and the Northern Territory Government, **four** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **one** Regulation 21A ground for transfer for each property the subject of the investors' applications to transfer.

⁵ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

⁶ NRAS Regulation 21A(2)(d).

⁷ NRAS Regulation 21A(2)(c).

⁸ NRAS Regulation 21A(2)(f).

⁹ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

Failure to Pass on Incentive

1.16 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-853** because:

- The approved participant has received incentives for the approved rental dwelling
- There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (539 days taken to pass on the incentive) and 2016-17 (265 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2016-17 financial year (142 days taken to pass on the incentive).

1.17 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-250** because:

- The approved participant has received incentives for the approved rental dwelling
- There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (539 days taken to pass on the incentive) and 2016-17 (265 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2016-17 financial year (142 days taken to pass on the incentive).

1.18 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-621** because:

- The approved participant has received incentives for the approved rental dwelling
- There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (539 days taken to pass on the incentive) and 2016-17 (265 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, we have not been provided with information to enable us to assess whether the incentive was passed on within a reasonable time.

Contravention of Consumer Protection Law

1.19 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer for all properties the subject of the investors' applications to transfer.

1.20 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to

our Limitations for further information).¹⁰ However, as this ground for transfer was identified by the investors in their applications, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.

1.21 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹¹

1.22 From information provided by the investor, we are unable to establish whether:

- The approved participant refused to supply services to the investors because they failed to use a third party specified by the approved participant, and
- The alleged conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Provision of False or Misleading Information to Investor

1.23 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer for all properties the subject of the investors' applications to transfer, because the investors did not identify or provide us with any representations from the approved participant that the investors considered to be false or misleading.

Deregistration

1.24 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer for all properties the subject of the investors' applications to transfer.

1.25 From review of ASIC's database of published notices¹² (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) as at 21 March 2018, we have not identified that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

¹⁰ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹¹ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

¹² <https://insolvencyntices.asic.gov.au/> (Accessed 21 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
 - The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist.

Table 3 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration ASIC has published a notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the applications to transfer an allocation made by joint investors ^{s47F} in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the following NRAS dwellings:

Table 4 – NRAS Dwellings

Address	NRAS Dwelling ID
^{s47F}	1-HGI-853
	1-HGI-250
	1-HGI-621

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investors' applications to transfer (refer to Exhibit 001, Exhibit 002 and Exhibit 003) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the applications.
- 3.2 We contacted the investors on the following dates to discuss their applications to transfer, and source additional information in support of their applications.

Table 5 – Contact with Investors

Date	Contact Method
15 February 2018	Phone call
15 February 2018	Email
20 February 2018	Phone call
23 February 2018	Phone call
23 February 2018	Email
27 February 2018	Phone call
27 February 2018	Email
5 March 2018	Phone call
5 March 2018	Email

- 3.3 We received additional information in support of the investors' application on the following dates:

Table 6 – Information from Investors

Date	Information Provided
22 February 2018	Refundable tax offset certificates from approved participant Incentive cheques from approved participant Incentive statements from approved participant Correspondence with approved participant
26 February 2018	Correspondence with approved participant
27 February 2018	Correspondence with approved participant
5 March 2018	Statement from investors regarding incentive payments
7 March 2018	Correspondence with approved participant

Obtaining Information (Northern Territory Government)

- 3.4 The Department requested and received additional information in support to the investors' application from the Northern Territory Government on our behalf on the following date:

Table 7 – Information from Northern Territory Government

Date	Information Provided
12 March 2018	Payment information for FY2014-15, 2015-16 and 2016-17 incentive payments to the approved participant

Obtaining Information (Approved Participant)

3.5 We have not been provided with information from, or provided an opportunity for the approved participant to respond to these applications. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

3.6 We analysed information provided by the investors and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact¹³ – for each potential Regulation 21A ground for transfer.

3.7 This process involved:

- Analysing information provided by the investors and the Northern Territory Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investors where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

¹³ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department¹⁴
 - There is a contractual agreement between the investors and the approved participant that requires the approved participant to pass on the incentive to the investors¹⁵, and
 - The investors did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.¹⁶
- 4.2 The investors' applications to transfer identified this ground for transfer, stating "We have not received the Federal Incentive for the 2015-16 financial year and we have not received the Federal or State Incentive for the 2016/17 Financial year" (refer to Exhibit 001, Exhibit 002 and Exhibit 003).
- 4.3 The investors' applications to transfer did not identify other instances where the approved participant failed to pass on the incentive. However, from review of information provided by the investors and the Northern Territory Government, we have identified other instances where the approved participant did not pass on incentives within a reasonable time.

Analysis

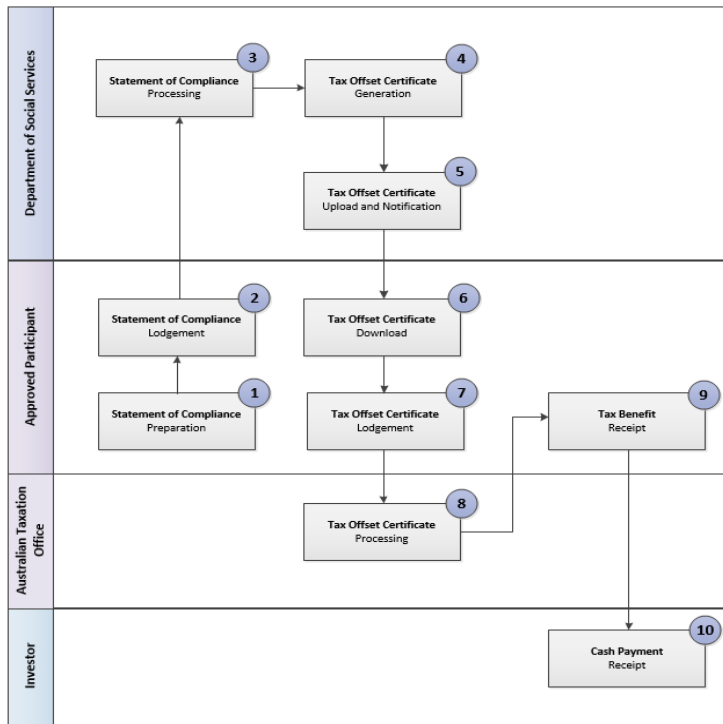
- 4.4 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.5 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investors for all properties subject of the applications to transfer through the following process for all relevant financial years:

¹⁴ NRAS Regulation 30B(1)(a)

¹⁵ NRAS Regulation 30B(1)(b)

¹⁶ NRAS Regulation 30B(2)

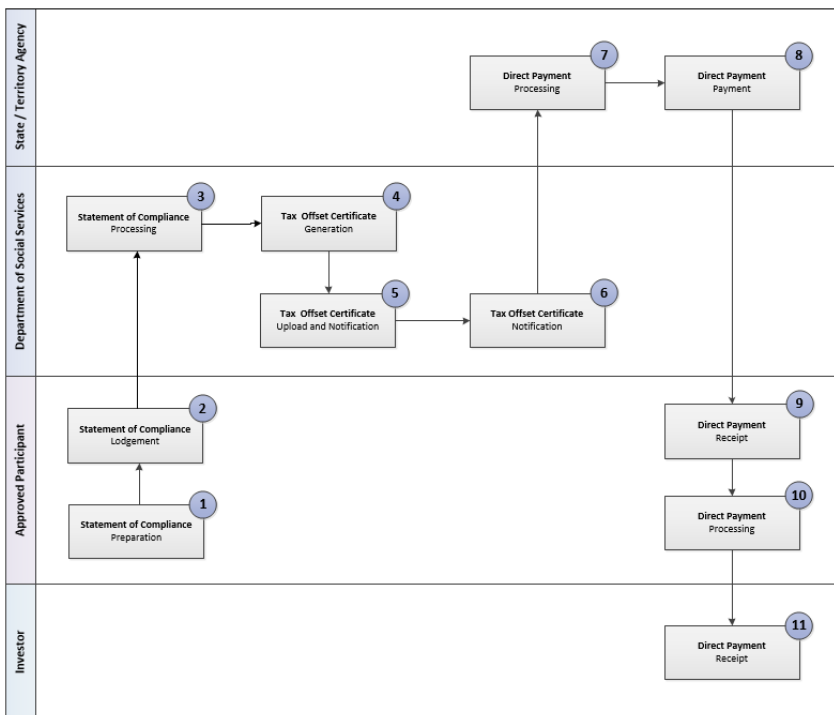
Figure 1 – Provision of Commonwealth Incentive to Investors



- Legend**
- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
 - 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
 - 3 The Department processes the incentive for the dwelling.
 - 4 The Department generates a tax offset certificate for the dwelling.
 - 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
 - 6 The approved participant downloads the tax offset certificate.
 - 7 The approved participant lodges the tax offset certificate with the Australian Taxation Office.
 - 8 The ATO processes the RTOC. This involves assessing the taxable income of the party claiming the refundable tax offset and determining the cash refund (if any) that is payable to the party.
 - 9 The approved participant receives a tax benefit (which may include a cash refund) from the ATO in relation to the NRAS allocation.
 - 10 The investor receives the cash payment from the approved participant.

4.6 For the Territory portion of the incentive, we have identified incentives were provided to the investors for all properties subject of the applications to transfer through the following process for all relevant financial years:

Figure 2 – Provision of Territory Incentive to Investor



- Legend**
- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
 - 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
 - 3 The Department processes the incentive for the dwelling.
 - 4 The Department generates a tax offset certificate for the dwelling.
 - 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
 - 6 The Department notifies State and Territory agencies that the Commonwealth component of the incentive has been provided (on a fortnightly basis).
 - 7 The State / Territory agency processes the State / Territory component of the incentive.
 - 8 The State / Territory makes a direct payment of the incentive to the approved participant.
 - 9 The approved participant receives the direct payment.
 - 10 The approved participant processes the direct payment in preparation for transfer to the investor (which may include the deduction of administration fees etc.)
 - 11 The investor receives the cash incentive in relation to the NRAS allocation (which will generally be the amount of the direct payment minus administration fees).

Element 1 | Receipt of Incentive by Approved Participant

- 4.7 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling.
- 4.8 For the Commonwealth portion of the incentive, the approved participant received the incentive for all the properties in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 8 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹⁷	Date of Processing	Exhibit
1-HGI-853		
2014-15	4 April 2016	Exhibit 004
2015-16	14 September 2016	Exhibit 005
2016-17	13 June 2017	Exhibit 006
1-HGI-250		
2014-15	14 December 2015	Exhibit 004
2015-16	14 September 2016	Exhibit 005
2016-17	13 June 2017	Exhibit 006
1-HGI-621		
2014-15	14 December 2015	Exhibit 004
2015-16	14 September 2016	Exhibit 005
2016-17	13 June 2017	Exhibit 006

- 4.9 For the Territory portion of the incentive, the approved participant received the incentive for the dwelling as a direct payment.

Table 9 – Receipt of Territory Incentive by Approved Participant

Financial Year ¹⁷	Date of Processing	Exhibit
1-HGI-853		
2014-15	20 June 2016	Exhibit 007
2016-17	1 August 2017	Exhibit 007
1-HGI-250		
2016-17	1 August 2017	Exhibit 007
1-HGI-621		
2014-15	14 January 2016	Exhibit 007

¹⁷ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

Element 2 | Contractual Agreement between Approved Participant and Investor

4.10 The second element for this ground for transfer is the existence of a contractual agreement between the investors and the approved participant that requires the approved participant to pass on the incentive to the investors. There is a requirement to pass on an incentive where, under a contractual agreement with the investors, the approved participant is required to¹⁸:

- Make a payment to the investors in relation to the incentive
- Take steps to enable the investors to claim a tax offset to which the investors are entitled in relation to the incentive, or
- To make an election in relation to the incentive.

4.11 The investors provided signed contractual agreements with the approved participant for all properties subject of the applications to transfer:

Table 10 – Contractual Agreements

Property	Contract Date	Exhibit
1-HGI-853	2013	Exhibit 008
1-HGI-250	2013	Exhibit 009
1-HGI-621	5 December 2011	Exhibit 010

4.12 The contractual agreements state at Clause 1(vii) that "Ethan agrees to ensure the NRAS incentives issued by the Government are passed on to the investor" and at Clause 1(viii) that "Ethan agrees to undertake all actions necessary to complete the tasks set out above".

4.13 We note the contractual agreements between the investors and the approved participant do not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

4.14 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwelling to the investors within a reasonable time after receiving the incentive.

4.15 For the Commonwealth portion of the incentive, the investors provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 11 – Receipt of Commonwealth Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
1-HGI-853				
2014-15	4 April 2016	7 October 2016	Exhibit 011	188 Days
2015-16	14 September 2016	Not Received	Exhibit 012	539 Days ¹⁹

¹⁸ NRAS Regulation 30A(2)

¹⁹ As of the date of statement (5 March 2018) from the investors that they have not received the Commonwealth incentive for this financial year (refer to Exhibit 012).

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2016-17	13 June 2017	Not Received	Exhibit 012	265 Days ²⁰
1-HGI-250				
2014-15	14 December 2015	27 January 2016	Exhibit 013	44 Days
2015-16	14 September 2016	Not Received	Exhibit 012	539 Days ²⁰
2016-17	13 June 2017	Not Received	Exhibit 012	265 Days ²⁰
1-HGI-621				
2014-15	14 December 2015	27 January 2016	Exhibit 014	44 Days
2015-16	14 September 2016	Not Received	Exhibit 012	539 Days ²⁰
2016-17	13 June 2017	Not Received	Exhibit 012	265 Days ²⁰

4.16 For the Territory portion of the incentive, the investors provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 12 – Receipt of Territory Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
1-HGI-853				
2014-15	20 June 2016	7 October 2016	Exhibit 015	109 Days
2016-17	1 August 2017	Not Received	Exhibit 001	142 Days ²¹
1-HGI-250				
2016-17	1 August 2017	Not Received	Exhibit 002	142 Days ²¹

4.17 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 identifies "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive".²²

Analysis | 1-HGI-853

4.18 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investors for the 2015-16 and 2016-17 financial years. In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 financial year (188 days taken to pass on the incentive), and the failure to pass on the incentive for the 2015-16 and 2016-17 financial years.

²⁰ As of the date of statement (5 March 2018) from the investors that they have not received the Commonwealth incentive for this financial year (refer to Exhibit 012).

²¹ As of the date of the applications to transfer (21 December 2017) from the investors stating that they have not received the Territory incentive for this financial year (refer to Exhibit 001 and Exhibit 002).

²² Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

- 4.19 This supports a finding that the failure to pass on the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investors received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.
- 4.20 For the **Territory** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investors for the 2016-17 financial year. In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 financial year (109 days taken to pass on the incentive), and the failure to pass on the incentive for the 2016-17 financial year.
- 4.21 This supports a finding that the failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investors received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.

Analysis | 1-HGI-250

- 4.22 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investors for the 2015-16 and 2016-17 financial years. In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 financial year (44 days taken to pass on the incentive), and the failure to pass on the incentive for the 2015-16 and 2016-17 financial years.
- 4.23 This supports a finding that the failure to pass on the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investors received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.
- 4.24 For the **Territory** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investors for the 2016-17 financial year.

Analysis | 1-HGI-621

- 4.25 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investors for the 2015-16 and 2016-17 financial years. In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 financial year (44 days taken to pass on the incentive), and the failure to pass on the incentive for the 2015-16 and 2016-17 financial years.
- 4.26 This supports a finding that the failure to pass on the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investors received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.
- 4.27 For the **Territory** portion of the incentive, we have not been provided with information to enable us to assess whether the incentive was passed on within a reasonable time.

Finding

- 4.28 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-853** because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (539 days taken to pass on the incentive) and 2016-17 (265 days taken to pass on the incentive) financial years, and

- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2016-17 financial year (142 days taken to pass on the incentive).

4.29 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-250** because:

- The approved participant has received incentives for the approved rental dwelling
- There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (539 days taken to pass on the incentive) and 2016-17 (265 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2016-17 financial year (142 days taken to pass on the incentive).

4.30 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-621** because:

- The approved participant has received incentives for the approved rental dwelling
- There was a contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (539 days taken to pass on the incentive) and 2016-17 (265 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, we have not been provided with information to enable us to assess whether the incentive was passed on within a reasonable time.

4.31 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

4.32 These findings may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for the failure to pass on the incentive

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investors' applications to transfer identified this ground for transfer, stating "Ethan have terminated our contract with them on 30 November 2017 via email because we did not use a service specified by the approved participant which was Tebter Property Services. Tebter cancelled their contract with us and we changed to ^{s47F} Ethan then terminated our contract with them based on the fact that we were not using a property management service that they approved of" (refer to Exhibit 001, Exhibit 002 and Exhibit 003).

Analysis

- 5.3 This ground for transfer requires the conduct of the approved participant to have "contravened" a consumer protection law. We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).²³
- 5.4 However, as this ground for transfer was identified by the investors in their applications, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.²⁴
- 5.5 In the context of the NRAS and the investors' applications to transfer, this ground for transfer is constituted by the following elements:
- The approved participant refuses to supply services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investor²⁵
 - The approved participant has refused to supply these services because the investors have not used (or agreed to use) services (such as tenancy management services) from a third party²⁶, and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.²⁷

²³ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

²⁴ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

²⁵ *Competition and Consumer Act 2010* s47(7)(a).

²⁶ *Competition and Consumer Act 2010* s47(7).

²⁷ *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

Element 1 | Refusal to Supply Services

- 5.6 The first element for this ground for transfer is the approved participant's refusal to supply services to the investors.
- 5.7 In correspondence from the approved participant to the investors relating to all properties subject of the applications to transfer on 20 December 2017, the approved participant states "You have defaulted on your NRAS agreement with Ethan because you have not engaged a property manager that is approved by Ethan... A copy of the signed Ethan NRAS agreement for each of your three NRAS properties are attached for your reference. These agreements are now terminated effective immediately" (refer to Exhibit 016).

Element 2 | Refusal to Supply Because of Failure to Use Third Party

- 5.8 The second element for this ground for transfer is that the approved participant has refused to supply services to the investors because the investors have not used services from a third party.
- 5.9 In correspondence from the approved participant to the investors relating to all properties subject of the applications to transfer on 16 November 2017, the approved participant states "You are in default of your NRAS Agreement with Ethan because you have not engaged a property manager that is approved by Ethan... Tebter Property is an approved property manager in the Northern Territory. However, if you have another agency you would prefer to use, you may do that as long as they agree to the attached guidelines" (refer to Exhibit 017).
- 5.10 We note this representation from the approved participant does not require the investor to acquire property management services from a particular third party. No further information was provided by the investor to indicate the approved participant has supplied services on the condition the investor acquires services from a third party.

Element 3 | Substantial Lessening of Competition

- 5.11 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.12 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.²⁸ As the investors had acquired tenancy management services from a property manager, this would include the market for tenancy management services.
- 5.13 From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Finding

- 5.14 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer because:
- We are unable to establish whether the approved participant refused to supply services to the investors because they failed to use a third party, and
 - We are unable to establish whether the alleged conduct of the approved participant substantially lessened competition in the market for tenancy management services.

²⁸ *Competition and Consumer Act 2010* s47(13)(b)

- 5.15 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

6 Ground 3 | Provision of False or Misleading Information to Investor

Overview

- 6.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:
- The approved participant provides information about the NRAS to the investor (such as a representation made by an email or letter), and
 - The information provided to the investor is false or misleading.
- 6.2 The investors' applications to transfer identified this ground for transfer, but did not expressly identify any representations from the approved participant that the investors considered to be false or misleading (refer to Exhibit 001, Exhibit 002 and Exhibit 003).

Finding

- 6.3 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer for all properties the subject of the investors' applications to transfer because the investors did not identify or provide us with any representations from the approved participant that the investors considered to be false or misleading.
- 6.4 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

7 Ground 4 | Deregistration

Overview

- 7.1 NRAS Regulation 21A(2)(f) identifies the Secretary may transfer an allocation where the approved participant is a company and ASIC has published a notice of proposed deregistration of the approved participant or a court has ordered the deregistration of the approved participant by ASIC.
- 7.2 The investors' applications to transfer identified this ground for transfer, but did not expressly identify any information indicating the approved participant is subject to a notice of proposed reregistration or has been deregistered (refer to Exhibit 001, Exhibit 002 and Exhibit 003).

Analysis

- 7.3 From review of ASIC's database of published notices²⁹ (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) as at 21 March 2018, we have not identified that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

Finding

- 7.4 From our assessment of information provided by the investors and ASIC's database of published notices, there is **insufficient information** to support this ground for transfer because we are unable to establish that the approved participant is subject to a notice of proposed reregistration or has been deregistered.
- 7.5 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²⁹ <https://insolvencynotices.asic.gov.au/> (Accessed 21 March 2018).

8 Limitations

- 8.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 8.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 8.3 This report has been prepared based on work completed as at 28 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 8.4 As at 28 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 8.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 8.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 8.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 8.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 8.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 8.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | s47F

NRAS Regulation 21A | Application to Transfer

Department of Social Services

26 March 2018
Private and Confidential

26 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report | s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed an application to transfer a National Rental Affordability Scheme allocation made by an investor s47F under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G .

s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-HGI-534
002	Processing data for Commonwealth incentive payments
003	Extract from FY2014-15 NRAS incentive report
004	Extract from FY2015-16 NRAS incentive report
005	Processing data for Territory incentive payments
006	Contract between s47F and Ethan Affordable Housing Pty Ltd for 1-HGI-534
007	FY2013-14 Commonwealth cheque letter for 1-HGI-534
008	FY2014-15 Commonwealth cheque letter for 1-HGI-534
009	FY2015-16 Commonwealth cheque letter for 1-HGI-534
010	FY2013-14 Territory cheque letter for 1-HGI-534
011	FY2014-15 Territory cheque letter for 1-HGI-534
012	FY2015-16 Territory cheque letter for 1-HGI-534
013	Correspondence from Ethan Affordable Housing Pty Ltd to s47F dated 1 June 2016
014	Termination notice from Ethan Affordable Housing Pty Ltd dated 13 July 2017
015	Correspondence from Ethan Affordable Housing Pty Ltd s47F dated 4 January 2017
016	ACNC Charity Register Summary for Ethan Affordable Housing Pty Ltd

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-534	s47F
ACCC	Australian Competition and Consumer Commission
ACNC	Australian Charities and Not-For-Profits Commission
ASIC	Australian Securities and Investments Commission
Department	Department of Social Services
FY	Financial Year
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the application to transfer an allocation made by the investor s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-HGI-534**).
- 1.9 The investor’s application identified **four** potential Regulation 21A grounds for transfer. From our assessment of information provided by the investor in support of their application, we **did not** identify any additional Regulation 21A grounds for transfer.
- 1.1 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is sufficient information to support **two** Regulation 21A grounds for transfer (refer to Table 1 – Grounds for Transfer):

Table 1 – Grounds for Transfer

Ground	Source	Support
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investor's application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investor's application to transfer	Insufficient information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investor's application to transfer	Sufficient information
Deregistration⁴ The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC	Investor's application to transfer	Insufficient information

Methodology

- 1.2 We reviewed the investor's application to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 1.3 We requested and reviewed additional information in support of the investor's application through correspondence with the investor, the Department and the Northern Territory Government.
- 1.4 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.5 We analysed information provided by the investor, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁵ – for each potential Regulation 21A ground for transfer.

Findings

- 1.6 From our assessment of information provided by the investor, the Department and the Northern Territory Government, **four** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **two** Regulation 21A grounds for transfer.

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ NRAS Regulation 21A(2)(c).

⁴ NRAS Regulation 21A(2)(f).

⁵ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

Failure to Pass on Incentive

1.7 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:

- The approved participant has received incentives for the approved rental dwelling
- There was a contractual agreement dated 12 August 2013 between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 financial year (175 days taken to pass on the incentive), and
- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2014-15 (42 days taken to pass on the incentive) and 2015-16 (130 days taken to pass on the incentive) financial years.

Contravention of Consumer Protection Law

1.8 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer.

1.9 We have not assessed the legal interpretation of “contravention” – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁶ However, as this ground for transfer was identified by the investor in their application, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.

1.10 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other’s freedom to choose with whom, in what, or where they deal.⁷

1.11 A required element in exclusive dealing is that the conduct of a person has the purpose, or is likely to have the effect, of substantially lessening competition. From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Provision of False or Misleading Information to Investor

1.12 From our assessment of information provided by the investor and the Department, there is **sufficient information** to support this ground for transfer because:

- The approved participant provided information about the NRAS to the investor, and
- The representation on 4 January 2017 that “the incentive is only available from the DSS as a tax offset, which is then converted to cash for Ethan’s investors via the ATO. It is not something DSS offer directly” can be characterised as false or misleading because the Commonwealth incentive is available to approved participants as either a direct payment or a tax offset certificate depending on their status as an endorsed charitable institution and the form of incentive they have elected to receive.

⁶ See, e.g., Australian Competition and Consumer Commission’s Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

⁷ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

Deregistration

- 1.13 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer.
- 1.14 From review of ASIC's database of published notices⁸ (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) as at 21 March 2018, we have not identified that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

⁸ <https://insolvencynotices.asic.gov.au/> (Accessed 21 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
- The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist:

Table 2 – Regulation 21A Grounds for Transfer

Ground	Source
<p>Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation</p>	NRAS Regulation 21A(2)(a) NRAS Regulation 16
<p>Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive</p>	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
<p>False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor</p>	NRAS Regulation 21A(2)(c)
<p>Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law</p>	NRAS Regulation 21A(2)(d)
<p>Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled</p>	NRAS Regulation 21A(2)(e)
<p>Deregistration The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC</p>	NRAS Regulation 21A(2)(f)
<p>Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt</p>	NRAS Regulation 21A(2)(g)
<p>False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations</p>	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the application to transfer an allocation made by the investor s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-HGI-534**).

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investor's application to transfer (refer to Exhibit 001) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 3.2 We contacted the investor on the following dates to discuss their application to transfer, and source additional information in support of their application.

Table 3 – Contact with Investor

Date	Contact Method
14 February 2018	Phone call
14 February 2018	Email
20 February 2018	Phone call
20 February 2018	Email
21 February 2018	Email
22 February 2018	Phone call
27 February 2018	Email
6 March 2018	Phone call
7 March 2018	Phone call
7 March 2018	Email

- 3.3 We received additional information in support of the investor's application on the following dates:

Table 4 – Information from Investor

Date	Information Provided
16 February 2018	Incentive statements from approved participant Termination notice from approved participant Correspondence from approved participant
21 February 2018	Correspondence from approved participant
2 March 2018	Contract with approved participant
7 March 2018	Incentive statements from approved participant Incentive cheques from approved participant

Obtaining Information (Department)

- 3.4 We requested and received additional information in support to the investor's application from the Department on the following date:

Table 5 – Information from Department

Date	Information Provided
13 March 2018	Processing data for FY2013-14 incentive payments

Obtaining Information (Northern Territory Government)

- 3.5 The Department requested and received additional information in support to the investor’s application from the Northern Territory Government on our behalf on the following date:

Table 6 – Information from Northern Territory Government

Date	Information Provided
13 March 2018	Payment information for 2013-14, 2014-15 and 2015-16 incentive payments to the approved participant

Obtaining Information (Approved Participant)

- 3.6 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

- 3.7 We analysed information provided by the investor, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁹ – for each potential Regulation 21A ground for transfer.

- 3.8 This process involved:

- Analysing information provided by the investor, the Department and the Northern Territory Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investor where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁹ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department¹⁰
 - There is a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor¹¹, and
 - The investor did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.¹²
- 4.2 The investor's application to transfer identified this ground for transfer, stating "I did not receive the Federal and State NRAS incentive for FY 15/16 until May 2017... For the FY 15/16 I received the State incentive in Feb 2016... I have not received the state NRAS component for FY 16/17... I do not believe I will receive the State incentive from Ethan" (refer to Exhibit 001).
- 4.3 The investor's application to transfer did not identify other instances where the approved participant failed to pass on the incentive. However, from review of information provided by the investor, the Department and the Northern Territory Government, we have identified other instances where the approved participant did not pass on the incentive within a reasonable time.

Analysis

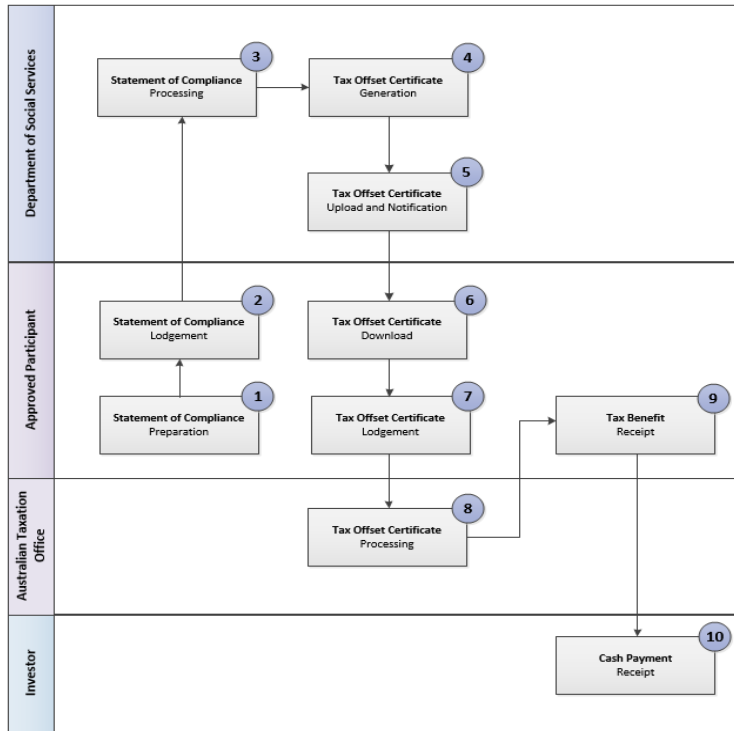
- 4.4 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.5 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investor through the following process for all relevant financial years:

¹⁰ NRAS Regulation 30B(1)(a).

¹¹ NRAS Regulations 30A(2) and 30B(1)(b).

¹² NRAS Regulation 30B(2).

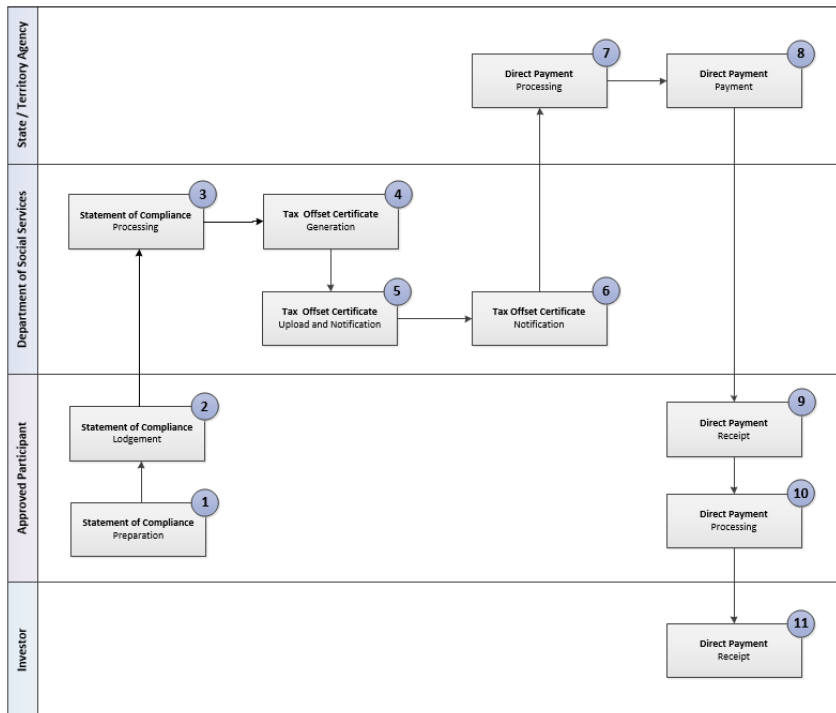
Figure 1 – Provision of Commonwealth Incentive to Investor



- Legend**
- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
 - 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
 - 3 The Department processes the incentive for the dwelling.
 - 4 The Department generates a tax offset certificate for the dwelling.
 - 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
 - 6 The approved participant downloads the tax offset certificate.
 - 7 The approved participant lodges the tax offset certificate with the Australian Taxation Office.
 - 8 The ATO processes the RTOC. This involves assessing the taxable income of the party claiming the refundable tax offset and determining the cash refund (if any) that is payable to the party.
 - 9 The approved participant receives a tax benefit (which may include a cash refund) from the ATO in relation to the NRAS allocation.
 - 10 The investor receives the cash payment from the approved participant.

4.6 For the Territory portion of the incentive, we have identified incentives were provided to the investor for the NRAS dwelling (1-HGI-534) through the following process for all relevant financial years:

Figure 2 – Provision of Territory Incentive to Investor



- Legend**
- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
 - 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
 - 3 The Department processes the incentive for the dwelling.
 - 4 The Department generates a tax offset certificate for the dwelling.
 - 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
 - 6 The Department notifies State and Territory agencies that the Commonwealth component of the incentive has been provided (on a fortnightly basis).
 - 7 The State / Territory agency processes the State / Territory component of the incentive.
 - 8 The State / Territory makes a direct payment of the incentive to the approved participant.
 - 9 The approved participant receives the direct payment.
 - 10 The approved participant processes the direct payment in preparation for transferal to the investor (which may include the deduction of administration fees etc.)
 - 11 The investor receives the cash incentive in relation to the NRAS allocation (which will generally be the amount of the direct payment minus administration fees).

Element 1 | Receipt of Incentive by Approved Participant

- 4.7 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling.
- 4.8 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwelling in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 7 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹³	Date of Processing	Exhibit
2013-14	30 March 2015	Exhibit 002
2014-15	14 December 2015	Exhibit 003
2015-16	14 September 2016	Exhibit 004

- 4.9 For the Territory portion of the incentive, the approved participant received the incentive for the dwelling as a direct payment.

Table 8 – Receipt of Territory Incentive by Approved Participant

Financial Year ¹³	Date of Payment	Exhibit
2013-14	17 April 2015	Exhibit 005
2014-15	14 January 2016	Exhibit 005
2015-16	17 October 2017	Exhibit 005

Element 2 | Contractual Agreement between Approved Participant and Investor

- 4.10 The second element for this ground for transfer is the existence of a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor. There is a requirement to pass on an incentive where, under a contractual agreement with the investor, the approved participant is required to¹⁴:
- Make a payment to the investor in relation to the incentive
 - Take steps to enable the investor to claim a tax offset to which the investor is entitled in relation to the incentive, or
 - To make an election in relation to the incentive.
- 4.11 The investor provided a contractual agreement with the approved participant dated 12 August 2013 (refer to Exhibit 006). The contractual agreement states at Clause 1(vi) that "Ethan agrees to ensure the NRAS incentives issued by the Government are passed on to the investor" and at Clause 1(vii) that "Ethan agrees to undertake all actions necessary to complete the tasks set out above".

¹³ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

¹⁴ NRAS Regulation 30A(2).

- 4.12 We note the contractual agreement between the investor and the approved participant does not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

- 4.13 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwelling to the investor within a reasonable time after receiving the incentive.
- 4.14 For the Commonwealth portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 9 – Receipt of Commonwealth Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2013-14	30 March 2015	30 April 2015	Exhibit 007	31 Days
2014-15	14 December 2015	27 January 2016	Exhibit 008	44 Days
2015-16	14 September 2016	8 March 2017	Exhibit 009	175 Days

- 4.15 For the Territory portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 10 – Receipt of Territory Incentive by Investor

Financial Year	Date of Payment	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2013-14	17 April 2015	21 April 2015	Exhibit 010	4 Days
2014-15	14 January 2016	25 February 2016	Exhibit 011	42 Days
2015-16	17 October 2016	24 February 2017	Exhibit 012	130 Days

- 4.16 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 identifies "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive".
- 4.17 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 financial year (175 days taken to pass on the incentive). In particular, we note the contrast between the time to pass on the incentive for this financial years in comparison to the 2013-14 (31 days taken to pass on incentive) and 2014-15 (44 days taken to pass on incentive) financial years.
- 4.18 This supports a finding that the delay in passage of the incentive for the 2015-16 financial year was not reasonable, considering the investor received the incentive in the same manner (as a direct payment) from the approved participant for all relevant financial years.
- 4.19 For the **Territory** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 financial year (130 days to pass on incentive). In particular, we note the contrast between the time to pass on the incentive for this financial year

compared to the 2013-14 (4 days taken to pass on the incentive) and 2014-15 (42 days taken to pass on the incentive) financial years.

- 4.20 This supports a finding the delay in passage of the incentive for the 2015-16 financial year was not reasonable, considering the investor received the incentive in the same manner (as a direct payment) from the approved participant for all relevant financial years.

Finding

- 4.21 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement dated 12 August 2013 between the investor and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 financial year (175 days taken to pass on the incentive), and
 - For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2014-15 (42 days taken to pass on the incentive) and 2015-16 (130 days taken to pass on the incentive) financial years.
- 4.22 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.23 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for the delay in passing on the incentive.

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investor's application to transfer identified this ground for transfer, stating "I have been coerced into using Ethan Residential Property management at the threat of losing my NRAS incentive if I did not use their Property management arm... I returned my property management back to s47F in Jan 2017. I have been advised that my NRAS contract with them has been terminated by default because of this" (refer to Exhibit 001).

Analysis

- 5.3 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹⁵
- 5.4 However, as this ground for transfer was identified by the investor in their application, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹⁶
- 5.5 In the context of the NRAS and the investor's application to transfer, this ground for transfer is constituted by the following elements:
- The approved participant refuses to supply services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investor¹⁷
 - The approved participant has refused to supply these services because the investor has not used (or agreed to use) services (such as tenancy management services) from a third party¹⁸, and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.¹⁹

¹⁵ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹⁶ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

¹⁷ *Competition and Consumer Act 2010* s47(7)(a).

¹⁸ *Competition and Consumer Act 2010* s47(7).

¹⁹ *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

Element 1 | Refusal to Supply Services

- 5.6 The first element for this ground for transfer is the approved participant's refusal to supply services to the investor.
- 5.7 In correspondence from the approved participant to the investor dated 1 June 2016, the approved participant identifies that the investor's incumbent property manager ^{s47F} was no longer approved as a property manager by the approved participant and the investor would need to change to a new property manager that is approved by the approved participant (refer to Exhibit 013).
- 5.8 The correspondence states "You may choose to retain ^{s47F} as your property manager. You are completely entitled to do this, however, this means that you will no longer be compliant with Ethan's contract requirements and Ethan will seek to terminate the agreement with you; or You may choose to terminate your appointment of ^{s47F} and then appoint another property manager who will manage your property instead" (Exhibit 013).

Element 2 | Refusal to Supply Because of Failure to Use Third Party

- 5.9 The second element for this ground for transfer is that the approved participant has refused to supply services to the investor because the investor has not used services from a third party.
- 5.10 The approved participant issued the investor with a Termination Notice dated 13 July 2017. The Termination Notice states "You are in default under the Agreement in that you have failed to... Appoint a property management company Approved by Ethan... This is official notification of termination of your agreement Ethan Affordable Housing Ltd" (refer to Exhibit 014).

Element 3 | Substantial Lessening of Competition

- 5.11 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.12 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.²⁰ As the investor had acquired tenancy management services from ^{s47F} this would include the market for tenancy management services.
- 5.13 From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Finding

- 5.14 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer. While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.
- 5.15 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²⁰ *Competition and Consumer Act 2010* s47(13)(b).

6 Ground 3 | Provision of False or Misleading Information to Investor

Overview

6.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:

- The approved participant provides information about the NRAS to the investor (such as a representation made by an email or letter), and
- The information provided to the investor is false or misleading.

6.2 The investor's application to transfer identified this ground for transfer, stating "I was advised by Ethan that the Federal NRAS incentive is allocated by the DSS as a RTO only and that is why they need to make application to ATO to have it converted to a cash payment thereby causing protracted delays in payment to me" (Exhibit 001).

Element 1 | Provision of Information

6.3 The first element for this ground for transfer is the provision of information about the NRAS by the approved participant to the investor.

6.4 In correspondence from the approved participant to the investor dated 4 January 2017, the approved participant states "The incentive is only available from the DSS as a tax offset, which is then converted to cash for Ethan's investors via the ATO. It is not something DSS offer directly" (refer to Exhibit 015).

Element 2 | Information is False or Misleading

6.5 The second element for this ground for transfer is that the information about the NRAS provided by the approved participant to the investor is false or misleading.

6.6 For the representation dated 4 January 2017 that "the incentive is only available from the DSS as a tax offset, which is then converted to cash for Ethan's investors via the ATO. It is not something DSS offer directly", we have identified that the Commonwealth incentive is available to approved participants as either a direct payment or a tax offset certificate depending on their status as an endorsed charitable institution and the form of incentive they have elected to receive.

6.7 NRAS Regulation 28A identifies an approved participant may elect to receive the Commonwealth incentive as either a tax offset certificate or a direct payment, depending on their status as an endorsed charitable institution. NRAS Regulation 29 identifies the Secretary must give an approved participant an incentive in the form elected by the approved participant.

6.8 We note that the approved participant had their status as an endorsed charitable institution revoked by the Australian Charities and Not-For-Profits Commission (ACNC) with an effective date of 1 July 2013 (refer to Exhibit 016). As such, the approved participant was not eligible to receive incentives in the form of a direct payment at the date of the representation to the investor.

6.9 Although this representation may refer to the approved participant's ability to source the incentive as a tax offset only, the representation that "the incentive is only available from the DSS as a tax offset... It is not something DSS offer directly" implies the incentive is only available in this manner as a function of the structure of the NRAS.

6.10 Because the Department may provide incentives to an approved participant as either a payment or a tax offset certificate depending on their status as an endorsed charitable institution and the form of incentive they have elected to receive, the representation that the incentive is only available from the Department as a tax offset can be characterised as false or misleading.

Finding

6.11 From our assessment of information provided by the investor and the Department, there is **sufficient information** to support this ground for transfer because:

- The approved participant provided information about the NRAS to the investor, and
- The representation on 4 January 2017 that “the incentive is only available from the DSS as a tax offset, which is then converted to cash for Ethan’s investors via the ATO. It is not something DSS offer directly” can be characterised as false or misleading because the Commonwealth incentive is available to approved participants as either a direct payment or a tax offset certificate depending on their status as an endorsed charitable institution and the form of incentive they have elected to receive.

7 Ground 4 | Deregistration

Overview

- 7.1 NRAS Regulation 21A(2)(f) identifies the Secretary may transfer an allocation where the approved participant is a company and ASIC has published a notice of proposed deregistration of the approved participant or a court has ordered the deregistration of the approved participant by ASIC.
- 7.2 The investor's application to transfer identified this ground for transfer, and stated "I am not aware of Ethan being deregistered by ASIC but I am aware that Ethan has had its charitable status removed for serious offence by the ACNC" (refer to Exhibit 001).

Analysis

- 7.3 From review of ASIC's database of published notices²¹ (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) as at 21 March 2018, we have not identified that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

Finding

- 7.4 From our assessment of information provided by the investor and ASIC's database of published notices, there is **insufficient information** to support this ground for transfer because we are unable to establish that the approved participant is subject to a notice of proposed reregistration or has been deregistered.
- 7.5 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²¹ <https://insolvencynotices.asic.gov.au/> (Accessed 21 March 2018).

8 Limitations

- 8.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 8.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 8.3 This report has been prepared based on work completed as at 26 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 8.4 As at 26 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 8.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 8.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 8.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 8.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 8.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 8.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | s47F

NRAS Regulation 21A | Application to Transfer

Department of Social Services

26 March 2018
Private and Confidential

26 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report |s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed three applications to transfer a National Rental Affordability Scheme allocation made by an investor s47F under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G .

Yours sincerely
s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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5	Ground 2 Contravention of Consumer Protection Law	22
6	Limitations	25

Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-HGI-588
002	Application to transfer for 1-HGI-470
003	Application to transfer for 1-HGI-759
004	Extract from FY2014-15 NRAS incentive claim report
005	Extract from FY2015-16 NRAS incentive claim report
006	Extract from FY2016-17 NRAS incentive claim report
007	Processing data for FY2013-14 Commonwealth incentive payments
008	Processing data for Territory incentive payments
009	Contract between ^{s47F} and Ethan Affordable Housing Pty Ltd for 1-HGI-588
010	Contract between and Ethan Affordable Housing Pty Ltd for 1-HGI-470
011	Contract between and Ethan Affordable Housing Pty Ltd for 1-HGI-759
012	FY2014-15 Commonwealth refundable tax offset certificate for 1-HGI-588
013	FY2015-16 Commonwealth refundable tax offset certificate for 1-HGI-588
014	FY2016-17 Commonwealth refundable tax offset certificate for 1-HGI-588
015	FY2013-14 Commonwealth refundable tax offset certificate for 1-HGI-470
016	FY2014-15 Commonwealth refundable tax offset certificate for 1-HGI-470
017	FY2015-16 Commonwealth refundable tax offset certificate for 1-HGI-470
018	FY2016-17 Commonwealth refundable tax offset certificate for 1-HGI-470
019	FY2014-15 Commonwealth refundable tax offset certificate for 1-HGI-759
020	FY2015-16 Commonwealth refundable tax offset certificate for 1-HGI-759
021	FY2014-15 State annual incentive statement and bank record for 1-HGI-588
022	FY2016-17 State annual incentive statement and bank record for 1-HGI-588
023	FY2013-14 Territory cheque letter for 1-HGI-470
024	FY2014-15 State annual incentive statement and bank record for 1-HGI-470
025	FY2016-17 State annual incentive statement and bank record for 1-HGI-470
026	FY2014-15 Territory cheque letter for 1-HGI-759
027	FY2015-16 Territory cheque letter for 1-HGI-759
028	Correspondence from Ethan Affordable Housing Pty Ltd to investor dated 22 February 2018
029	Correspondence from Ethan Affordable Housing Pty Ltd to investor dated 15 March 2018

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-588	s47F
1-HGI-470	
1-HGI-759	
ASIC	Australian Securities and Investments Commission
Department	Department of Social Services
EAH	Ethan Affordable Housing Pty Ltd
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for the investor, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the applications to transfer an allocation made by ^{s47F} in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the following NRAS dwellings:

Table 1 – NRAS Dwellings

Address	NRAS Dwelling ID
^{s47F}	1-HGI-588
	1-HGI-470
	1-HGI-759

- 1.9 The investor’s applications identified **two** potential Regulation 21A grounds for transfer. From our assessment of the information provided by the investor in support of their applications, we **did not** identify any additional Regulation 21A grounds for transfer.

- 1.10 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is sufficient information to support **one** Regulation 21A ground for transfer for each property:

Table 2 – Grounds for Transfer

Ground	Source	Support
1-HGI-588		
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investors' application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investors' application to transfer	Insufficient information
1-HGI-470		
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investors' application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investors' application to transfer	Insufficient information
1-HGI-759		
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investors' application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investors' application to transfer	Insufficient information

Methodology

- 1.11 We reviewed the investor's applications to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the applications.
- 1.12 We requested and reviewed additional information in support of the investor's applications through correspondence with the investor, the Department and the Northern Territory Government.

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

- 1.13 We have not been provided with information from, or provided an opportunity for the approved participant to respond to these applications. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.14 We analysed information provided by the investor, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact³ – for each potential Regulation 21A ground for transfer.

Findings

- 1.15 From our assessment of information provided by the investor, the Department and the Northern Territory Government, **two** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **one** Regulation 21A ground for transfer for each property the subject of the investor’s applications to transfer.

Failure to Pass on Incentive

- 1.16 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-588** because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a signed (but undated) contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (40 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years, and
 - For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2016-17 (127 days taken to pass on the incentive) financial year.
- 1.17 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-470** because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a signed contractual agreement dated 18 December 2012 between the investor and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (39 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years, and
 - For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2016-17 (127 days taken to pass on the incentive) financial year.
- 1.18 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-759** because:
- The approved participant has received incentives for the approved rental dwelling

³ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

- There was a signed contractual agreement dated 12 March 2015 between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (41 days taken to pass on the incentive) financial year, and
- For the **Territory** portion of the incentive, the investor the investor did not receive the incentive from the approved participant within a reasonable time for the 2014-15 (122 days taken to pass on the incentive) financial year.

Contravention of Consumer Protection Law

- 1.19 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer for all properties the subject of the investor's applications to transfer.
- 1.20 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁴ However, as this ground for transfer was identified by the investor in their applications, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.
- 1.21 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.⁵
- 1.22 A required element in exclusive dealing is that the conduct of a person has the purpose, or is likely to have the effect, of substantially lessening competition. From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

⁴ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

⁵ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
 - The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist:

Table 3 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an Australian Securities and Investment Commission (ASIC) notice of proposed deregistration or a court has ordered the deregistration of the company by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under Regulation 21A.
- 2.15 This report assesses the applications to transfer an allocation made by s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the following NRAS dwellings:

Table 4 – NRAS Dwellings

Address	NRAS Dwelling ID
s47F	1-HGI-588
	1-HGI-470
	1-HGI-759

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investor's applications to transfer (refer to Exhibit 001, Exhibit 002 and Exhibit 003) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the applications.
- 3.2 We contacted the investor on the following dates to discuss their applications to transfer, and source additional information in support of their applications:

Table 5 – Contact with Investor

Date	Contact Method
13 February 2018	Phone Call
13 February 2018	Email
20 February 2018	Phone Call
20 February 2018	Email
21 February 2018	Email
23 February 2018	Phone Call
23 February 2018	Email

- 3.3 We received additional information in support of the investor's applications on the following dates:

Table 6 – Information from Investor

Date	Information Provided
14 February 2018	Contract with approved participant Correspondence with approved participant Default notice from approved participant
16 February 2018	Correspondence with approved participant
20 February 2018	Correspondence with approved participant
21 February 2018	Correspondence with approved participant
22 February 2018	Contract with approved participant Refundable tax offset certificates from approved participant Termination notice from approved participant
16 March 2018	Termination notice from approved participant

Obtaining Information (Department)

- 3.4 We requested and received additional information in support to the investor's applications from the Department on the following date:

Table 7 – Information from Department

Date	Information Provided
1 March 2018	Processing data for FY2013-14 incentive payments

Obtaining Information (Northern Territory Government)

The Department requested and received additional information in support of the investor's applications from the Northern Territory Government on our behalf on the following date:

Table 8 – Information from Northern Territory Government

Date	Information Provided
12 March 2018	Payment information for FY2013-14, 2014-15, 2015-16 and 2016-17 incentive payments to the approved participant

Obtaining Information (Approved Participant)

- 3.5 We have not been provided with information from, or provided an opportunity for the approved participant to respond to these applications. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

- 3.6 We analysed information provided by the investor, the Department and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁶ – for each potential Regulation 21A ground for transfer.

- 3.7 This process involved:

- Analysing information provided by the investor, the Department and the Northern Territory Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investor where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁶ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department⁷
 - There is a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor⁸, and
 - The investor did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.⁹
- 4.2 The investor's applications to transfer identified this ground for transfer, stating "Ethan has failed to, on numerous occasions, deliver the NRAS incentive in a timely manner causing significant financial stress to me and my family (refer to Exhibit 001, Exhibit 002, Exhibit 003).

Analysis

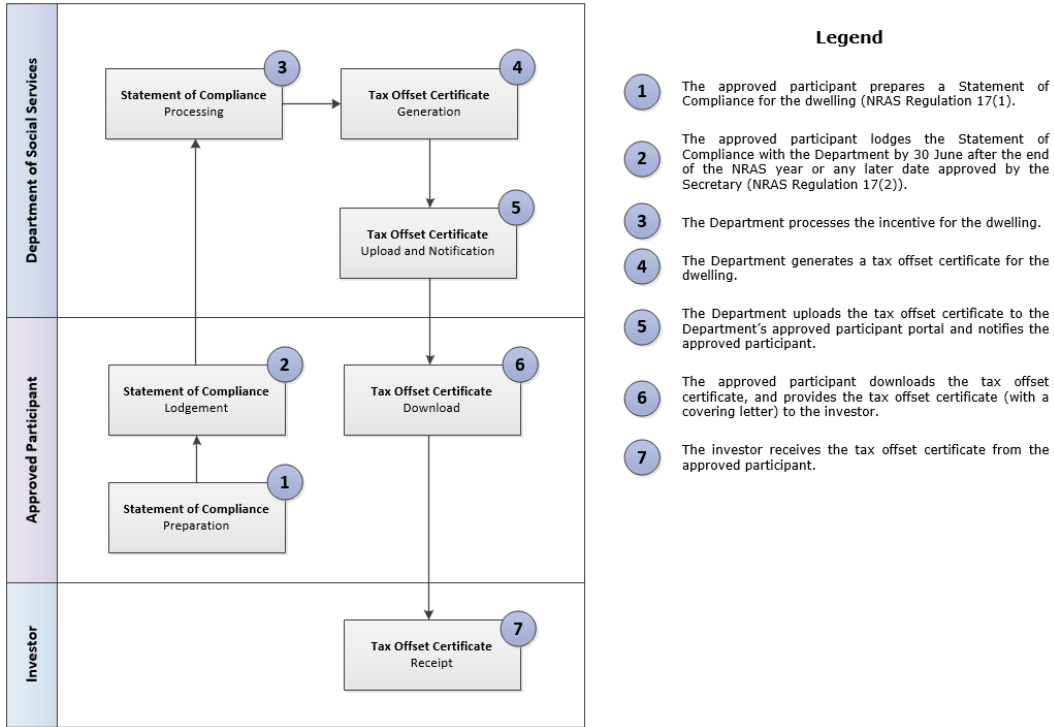
- 4.3 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.4 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investor for all properties subject of the applications to transfer through the following process for all relevant financial years:

⁷ NRAS Regulation 30B(1)(a)

⁸ NRAS Regulation 30B(1)(b)

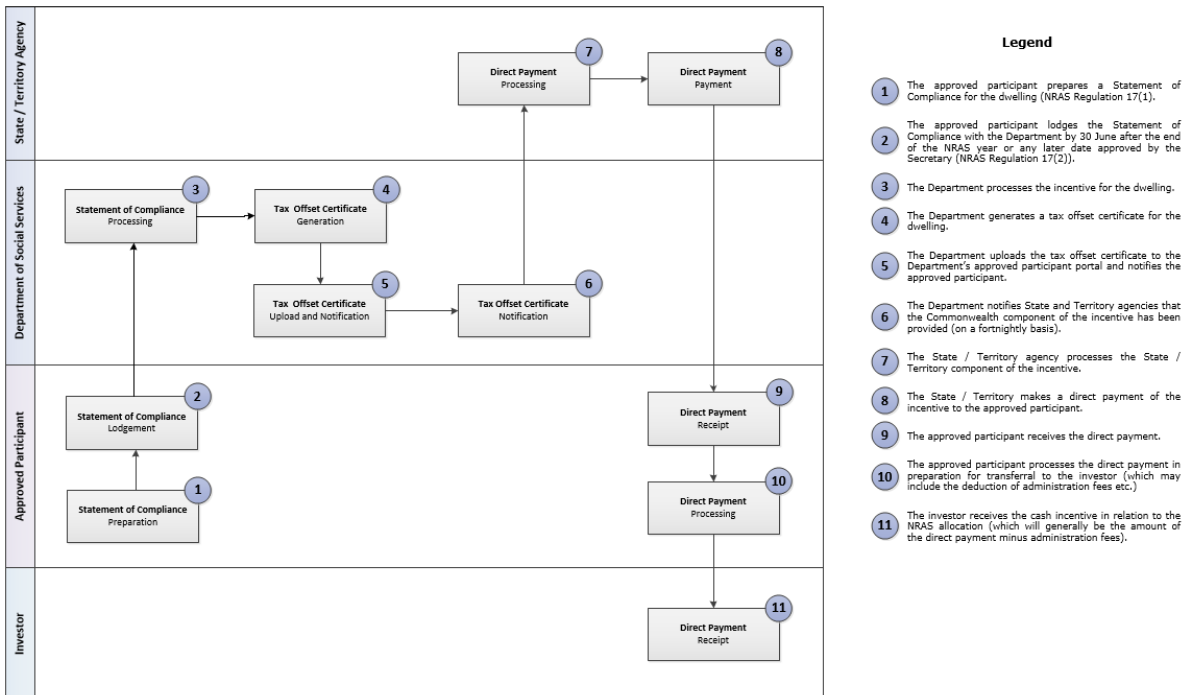
⁹ NRAS Regulation 30B(2)

Figure 1 – Provision of Commonwealth Incentive to Investor



4.5 For the Territory portion of the incentive, we have identified incentives were provided to the investor for all properties subject of the applications to transfer through the following process for all relevant financial years:

Figure 2 – Provision of Territory Incentive to Investor



Element 1 | Receipt of Incentive by Approved Participant

- 4.6 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling from the Department and State and/or Territory agencies.
- 4.7 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwellings in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 9 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹⁰	Date of Processing	Exhibit
1-HGI-588		
2014-15	14 December 2015	Exhibit 004
2015-16	14 September 2016	Exhibit 005
2016-17	13 June 2017	Exhibit 006
1-HGI-470		
2013-14	30 March 2015	Exhibit 007
2014-15	14 December 2015	Exhibit 004
2015-16	14 September 2016	Exhibit 005
2016-17	13 June 2017	Exhibit 006
1-HGI-759		
2014-15	4 April 2016	Exhibit 004
2015-16	14 September 2016	Exhibit 005

- 4.8 For the Territory portion of the incentive, the approved participant received the incentive for the dwellings as a direct payment.

Table 10 – Receipt of Territory Incentive by Approved Participant

Financial Year ¹⁰	Date of Processing	Exhibit
1-HGI-588		
2013-14	17 April 2015	Exhibit 008
2014-15	14 January 2016	Exhibit 008
2015-16	17 October 2016	Exhibit 008
2016-17	1 August 2017	Exhibit 008
1-HGI-470		
2013-14	17 April 2015	Exhibit 008
2014-15	14 January 2016	Exhibit 008
2015-16	17 October 2016	Exhibit 008
2016-17	1 August 2017	Exhibit 008

¹⁰ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

Financial Year ¹⁰	Date of Processing	Exhibit
1-HGI-759		
2014-15	20 June 2016	Exhibit 008
2015-16	17 October 2016	Exhibit 008

Element 2 | Contractual Agreement between Approved Participant and Investor

4.9 The second element for this ground for transfer is the existence of a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor. There is a requirement to pass on an incentive where, under a contractual agreement with the investor, the approved participant is required to¹¹:

- Make a payment to the investor in relation to the incentive
- Take steps to enable the investor to claim a tax offset to which the investor is entitled in relation to the incentive, or
- To make an election in relation to the incentive.

4.10 The investor provided signed contractual agreements with the approved participant for all properties subject of the applications to transfer:

Table 11 – Contractual Agreements

Property	Contract Date	Exhibit
1-HGI-588	Undated	Exhibit 009
1-HGI-470	18 December 2012	Exhibit 010
1-HGI-759	12 March 2015	Exhibit 011

4.11 The contractual agreements state at Clause 1(vii) that "Ethan agrees to ensure the NRAS incentives issued by the Government are passed on to the investor" and at Clause 1(viii) that "Ethan agrees to undertake all actions necessary to complete the tasks set out above".

4.12 We note the contractual agreements between the investor and the approved participant do not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

4.13 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwellings to the investor within a reasonable time after receiving the incentive.

4.14 For the Commonwealth portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

¹¹ NRAS Regulation 30A(2)

Table 12 – Receipt of Commonwealth Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
1-HGI-588				
2014-15	14 December 2015	16 December 2015	Exhibit 012	2 Days
2015-16	14 September 2016	24 October 2016	Exhibit 013	40 Days
2016-17	13 June 2017	31 July 2017	Exhibit 014	48 Days
1-HGI-470				
2013-14	30 March 2015	31 March 2015	Exhibit 015	1 Day
2014-15	14 December 2015	16 December 2015	Exhibit 016	2 Days
2015-16	14 September 2016	24 October 2016	Exhibit 017	40 Days
2016-17	13 June 2017	31 July 2017	Exhibit 018	48 Days
1-HGI-759				
2014-15	4 April 2016	8 April 2016	Exhibit 019	4 Days
2015-16	14 September 2016	25 October 2016	Exhibit 020	41 Days

- 4.15 For the Territory portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 13 – Receipt of Territory Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
1-HGI-588				
2014-15	14 January 2016	3 February 2016	Exhibit 021	20 Days
2016-17	1 August 2017	6 December 2017	Exhibit 022	127 Days
1-HGI-470				
2013-14	17 April 2015	21 April 2015	Exhibit 023	4 Days
2014-15	14 January 2016	3 February 2016	Exhibit 024	20 Days
2016-17	1 August 2017	6 December 2017	Exhibit 025	127 Days
1-HGI-759				
2014-15	20 June 2016	20 October 2016	Exhibit 026	122 Days
2015-16	17 October 2016	21 November 2016	Exhibit 027	35 Days

- 4.16 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 identifies "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking

and any explanation the approved participant provided for any apparent delay in passing on the incentive".¹²

Analysis | 1-HGI-588

- 4.17 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 (40 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years.
- 4.18 In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 financial year (2 days taken to pass on the incentive), and the delay in passage of the incentive for the 2015-16 and 2016-17 financial years.
- 4.19 This supports a finding that the delay in passage of the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investor received the incentive in the same manner (as a refundable tax offset certificate) from the approved participant for the 2014-15 financial year.
- 4.20 For the **Territory** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2016-17 (127 days taken to pass on the incentive) financial year.
- 4.21 In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 (20 days to pass on incentive) financial year, and the delay in passage of the incentive for the 2016-17 financial year.
- 4.22 This supports a finding that the delay in passage of the incentive for the 2016-17 financial year was not reasonable, considering the investor received the received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.

Analysis | 1-HGI-470

- 4.23 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 (40 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years.
- 4.24 In particular, we note the contrast between the time taken to pass on the incentive for the 2013-14 (1 day taken to pass on the incentive) and 2014-15 (2 days taken to pass on the incentive) financial years, and the delay in passage of the incentive for the 2015-16 and 2016-17 financial years.
- 4.25 This supports a finding that the delay in passage of the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investor received the incentive in the same manner (as a refundable tax offset certificate) from the approved participant for the 2013-14 and 2014-15 financial years.
- 4.26 For the **Territory** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2016-17 (127 days taken to pass on the incentive) financial year.
- 4.27 In particular, we note the contrast between the time taken to pass on the incentive for the 2013-14 (4 day taken to pass on the incentive) and 2014-15 (20 days to pass on incentive) financial year, and the delay in passage of the incentive for the 2016-17 financial year.

¹² Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

4.28 This supports a finding that the delay in passage of the incentive for the 2016-17 financial year was not reasonable, considering the investor received the received the incentive in the same manner (as a direct payment) from the approved participant for the 2013-14 and 2014-15 financial years.

Analysis | 1-HGI-759

4.29 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2015-16 (41 days taken to pass on the incentive) financial year.

4.30 In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 (4 days taken to pass on the incentive) financial year, and the delay in passage of the incentive for the 2015-16 financial year.

4.31 This supports a finding that the delay in passage of the incentive for the 2015-16 financial year was not reasonable, considering the investor received the incentive in the same manner (as a refundable tax offset certificate) from the approved participant for the 2014-15 financial year.

4.32 For the **Territory** portion of the incentive, we have not identified any justification in support of the delay in passage of the incentive for the 2014-15 (122 days taken to pass on the incentive) financial year.

4.33 In particular, we note the contrast between the time taken to pass on the incentive for the 2015-16 (35 days taken to pass on the incentive) financial year, and the delay in passage of the incentive for the 2014-15 financial year.

4.34 This supports a finding that the delay in passage of the incentive for the 2014-15 financial year was not reasonable, considering the investor received the received the incentive in the same manner (as a direct payment) from the approved participant for the 2015-16 financial year.

Finding

4.35 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-588** because:

- The approved participant has received incentives for the approved rental dwelling
- There was a signed (but undated) contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (40 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2016-17 (127 days taken to pass on the incentive) financial year.

4.36 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-470** because:

- The approved participant has received incentives for the approved rental dwelling
- There was a signed contractual agreement dated 18 December 2012 between the investor and the approved participant that required the approved participant to pass on the incentive

- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (39 days taken to pass on the incentive) and 2016-17 (48 days taken to pass on the incentive) financial years, and
- For the **Territory** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2016-17 (127 days taken to pass on the incentive) financial year.

4.37 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer for **1-HGI-759** because:

- The approved participant has received incentives for the approved rental dwelling
- There was a signed contractual agreement dated 12 March 2015 between the investor and the approved participant that required the approved participant to pass on the incentive
- For the **Commonwealth** portion of the incentive, the investor did not receive the incentive from the approved participant within a reasonable time for the 2015-16 (41 days taken to pass on the incentive) financial year, and
- For the **Territory** portion of the incentive, the investor the investor did not receive the incentive from the approved participant within a reasonable time for the 2014-15 (122 days taken to pass on the incentive) financial year.

4.38 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

4.39 These finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for the delay in passing on the incentive.

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investor's applications to transfer identified this ground for transfer, stating "Ethan has also used their power as an Approved Participant to strongarm and threaten investors into using their own incapable property management arm. I believe this is also in contravention of consumer protection law" (refer to Exhibit 001, Exhibit 002 and Exhibit 003).

Analysis

- 5.3 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹³
- 5.4 However, as this ground for transfer was identified by the investor in their applications, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(7) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.¹⁴
- 5.5 In the context of the NRAS and the investor's applications to transfer, this ground for transfer is constituted by the following elements:
- The approved participant refuses to supply services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investor¹⁵
 - The approved participant has refused to supply these services because the investor has not used (or agreed to use) services (such as tenancy management services) from a third party¹⁶, and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.¹⁷

¹³ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

¹⁴ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

¹⁵ *Competition and Consumer Act 2010* s47(7)(a).

¹⁶ *Competition and Consumer Act 2010* s47(7).

¹⁷ *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

Element 1 | Refusal to Supply Services

- 5.6 The first element for this ground for transfer is the approved participant's refusal to supply services to the investor.
- 5.7 In correspondence from the approved participant to the investor relating to 1-HGI-588 and 1-HGI-470 dated 22 February 2018, the approved participant states "You are in default under the Agreement in that you have failed to; Appoint a property management company Approved by Ethan. You are in breach of your agreement with Ethan Affordable Housing Ltd. This is official notification of termination of your agreement Ethan Affordable Housing Ltd" (refer to Exhibit 028).
- 5.8 In correspondence from the approved participant to the investor relating to 1-HGI-759 dated 15 March 2018, the approved participant states "Your ^{s47F} property is in default of the Ethan Affordable Housing NRAS agreement as the building's by-laws require use of a property manager that is not approved by EAH. This agreement was regrettably terminated on 22/5/2017. ^{s47F} remains unapproved to provide property management services for those ^{s47F} properties that have NRAS incentives allocated to EAH on them" (refer to Exhibit 029).

Element 2 | Refusal to Supply Because of Failure to Use Third Party

- 5.9 The second element for this ground for transfer is that the approved participant has refused to supply services to the investor because the investor had not used services from a third party.
- 5.10 In correspondence from the approved participant to the investor relating to 1-HGI-588 and 1-HGI-470 dated 22 February 2018, the approved participant states "You are in default under the Agreement in that you have failed to; Appoint a property management company Approved by Ethan. You are in breach of your agreement with Ethan Affordable Housing Ltd. This is official notification of termination of your agreement Ethan Affordable Housing Ltd" (refer to Exhibit 028).
- 5.11 In correspondence from the approved participant to the investor relating to 1-HGI-759 dated 15 March 2018, the approved participant states "Your ^{s47F} property is in default of the Ethan Affordable Housing NRAS agreement as the building's by-laws require use of a property manager that is not approved by EAH. This agreement was regrettably terminated on 22/5/2017. ^{s47F} remains unapproved to provide property management services for those ^{s47F} properties that have NRAS incentives allocated to EAH on them" (refer to Exhibit 029).

Element 3 | Substantial Lessening of Competition

- 5.12 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.13 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.¹⁸ As the investor had acquired tenancy management services from ^{s47F} ^{s47F} this would include the market for tenancy management services.
- 5.14 From information provided by the investor, we are unable to establish whether the conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Finding

- 5.15 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer for all properties. While we can establish the conduct of the approved participant has met some elements of third line forcing, we are unable to establish whether the conduct

¹⁸ *Competition and Consumer Act 2010* s47(13)(b).

of the approved participant in requiring the investor to use the services of Ethan Affordable Housing Pty Ltd substantially lessened competition in the market for tenancy management services.

- 5.16 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

6 Limitations

- 6.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 6.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 6.3 This report has been prepared based on work completed as at 26 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 6.4 As at 26 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to these applications. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 6.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 6.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 6.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 6.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 6.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 6.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | s47F

NRAS Regulation 21A | Application to Transfer

Department of Social Services

20 March 2018
Private and Confidential

20 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report | s47F

for Services dated 20 December 2017, we have assessed an application to transfer a National Rental Affordability Scheme allocation made by an investor (s47F) under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G

Yours sincerely

s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

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7	Ground 4 Deregistration	22
8	Limitations	23

Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-HGI-261
002	Extract from FY2014-15 NRAS incentive claim report
003	Extract from FY2015-16 NRAS incentive claim report
004	Extract from FY2016-17 NRAS incentive claim report
005	Processing data for Territory incentive payments
006	Contract between s47F and Ethan Affordable Housing Pty Ltd for 1-HGI-261
007	FY2014-15 annual head lease statement for 1-HGI-261
008	FY2014-15 Commonwealth payment remittance for 1-HGI-261
009	FY2015-16 Commonwealth cheque payment for 1-HGI-261
010	Email statement from s47F dated 6 March 2018
011	FY2014-15 State cheque payment for 1-HGI-261
012	FY2015-16 State cheque payment for 1-HGI-261
013	Correspondence from Ethan Affordable Housing Pty Ltd to s47F dated 10 November 2015

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-HGI-261	s47F
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Department	Department of Social Services
FY	Financial Year
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
RTO	Refundable Tax Offset Certificate
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the application to transfer an allocation made by the investor ^{s47F} in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at **1B** ^{s47F} (NRAS identification **1-HGI-261**).
- 1.9 The investor’s application identified **four** potential Regulation 21A grounds for transfer. From our assessment of information provided by the investor in support of their application, we **did not** identify any additional Regulation 21A grounds for transfer.
- 1.10 From our assessment of information provided by the investor and the Northern Territory Government, there is sufficient information to support **one** Regulation 21A ground for transfer (refer to Table 1 – Grounds for Transfer):

Table 1 – Grounds for Transfer

Ground	Source	Support
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investor's application to transfer	Sufficient information
Contravention of Consumer Protection Law² The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	Investor's application to transfer	Insufficient information
False or Misleading Information to Investor³ The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investor's application to transfer	Insufficient information
Deregistration⁴ ASIC has published a notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	Investor's application to transfer	Insufficient information

Methodology

- 1.11 We reviewed the investor's application to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 1.12 We requested and reviewed additional information in support of the investor's application through correspondence with the investor and the Northern Territory Government.
- 1.13 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.14 We analysed information provided by the investor and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁵ – for each potential Regulation 21A ground for transfer.

Findings

- 1.15 From our assessment of information provided by the investor and the Northern Territory Government, **four** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **one** Regulation 21A ground for transfer.

Failure to Pass on Incentive

- 1.16 From our assessment of information provided by the investor and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(d).

³ NRAS Regulation 21A(2)(c).

⁴ NRAS Regulation 21A(2)(f).

⁵ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

- The approved participant has received incentives for the approved rental dwelling
- There was an unsigned contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive (noting that the approved participant generally acted in a manner consistent with an agreement, such as providing annual statements to the investor referencing the agreement)
- For the **Commonwealth** portion of the incentive, the investor has not received the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2014-15 and 2015-16 financial years, and
- For the **Territory** portion of the incentive, the investor has not received the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2014-15 and 2015-16 financial years.

Contravention of Consumer Protection Law

- 1.17 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer.
- 1.18 We have not assessed the legal interpretation of “contravention” – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).⁶ However, as this ground for transfer was identified by the investor in their application, we analysed whether the alleged conduct of the approved participant may have constituted a breach of consumer protection law.
- 1.19 We were unable to establish whether the conduct of the approved participant constituted exclusive dealing in contravention of section 47(6) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other’s freedom to choose with whom, in what, or where they deal.⁷
- 1.20 From information provided by the investor, we are unable to establish whether:
- The approved participant supplied services to the investor on the condition the investor acquires services from a third party, and
 - The alleged conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Provision of False or Misleading Information to Investor

- 1.21 From our assessment of information provided by the investor and the Department, there is **insufficient information** to support this ground for transfer.
- 1.22 The investor’s application to transfer states “I was advised by Ethan that the Federal NRAS incentive is allocated by the DSS as a RTO only and that is why they need to make application to ATO to have it converted to a cash payment and this is what is causing the delay”.
- 1.23 NRAS Regulation 29 identifies approved participants may receive incentives as either a payment or a tax offset certificate depending on their status as an endorsed charitable institution and the form of incentive they have elected to receive.

⁶ See, e.g., Australian Competition and Consumer Commission’s Compliance and Enforcement Policy and Priorities, which makes a distinction between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

⁷ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

- 1.24 A representation to the investor that the incentive is allocated by the Department “as a RTO only” may be characterised as false or misleading depending on the context of the representation –such as where the approved participant has represented that the incentive is only available as a tax offset certificate to all approved participants in the NRAS.
- 1.25 However, as no further information was provided by the investor, we were unable to establish whether this representation is false or misleading.

Deregistration

- 1.26 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer.
- 1.27 From review of ASIC’s database of published notices⁸ (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) as at 16 March 2018, we have not identified that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

⁸ <https://insolvencynotices.asic.gov.au/> (Accessed 16 March 2018).

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
 - The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist.

Table 2 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an ASIC notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the application to transfer an allocation made by s47F in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at s47F (NRAS identification **1-HGI-261**).

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investor's application to transfer (refer to Exhibit 001) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 3.2 We contacted the investor on the following dates to discuss their application to transfer, and source additional information in support of their application.

Table 3 – Contact with Investor

Date	Contact Method
13 February 2018	Phone call
13 February 2018	Email
21 February 2018	Phone call
26 February 2018	Phone call
26 February 2018	Email
5 March 2018	Phone call
6 March 2018	Phone call
6 March 2018	Email

- 3.3 We received additional information in support of the investor's application on the following dates:

Table 4 – Information from Investor

Date	Information Provided
13 February 2018	Correspondence with approved participant
25 February 2018	Correspondence with approved participant
26 February 2018	Incentive statements from approved participant Incentive cheques from approved participant
3 March 2018	Correspondence with approved participant
5 March 2018	Contract with approved participant Incentive statements from approved participant Incentive cheques from approved participant
6 March 2018	Statement relating to non-receipt of incentives

Obtaining Information (Northern Territory Government)

- 3.4 The Department requested and received additional information in support of the investor's application from the Northern Territory Government on our behalf on the following date:

Table 5 – Information from Northern Territory Government

Date	Information Provided
12 March 2018	Payment information for FY2014-15, 2015-16 and 2016-17 Territory incentive payments to the approved participant

Obtaining Information (Approved Participant)

3.5 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Obtaining Information (Public Sources)

3.6 We reviewed ASIC's database of published notices⁹ (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) to assess whether the approved participant is subject to a notice of deregistration.

Review of Evidence

3.7 We analysed information provided by the investor and the Northern Territory Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact¹⁰ – for each potential Regulation 21A ground for transfer.

3.8 This process involved:

- Analysing information provided by the investor and the Northern Territory Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investor and the Northern Territory Government where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁹ <https://insolvencyntices.asic.gov.au/> (Accessed 15 March 2018).

¹⁰ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department¹¹
 - There is a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor¹², and
 - The investor did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.¹³
- 4.2 The investor's application to transfer identified this ground for transfer, stating "I have not received the NRAS incentive for 2016-17 even though Ethans have had it since 13-6-17" (refer to Exhibit 001).
- 4.3 The investor's application to transfer did not identify other instances where the approved participant failed to pass on the incentive. However, from review of information provided by the investor and the Northern Territory Government, we have identified other instances where the approved participant did not pass on the incentive within a reasonable time.

Analysis

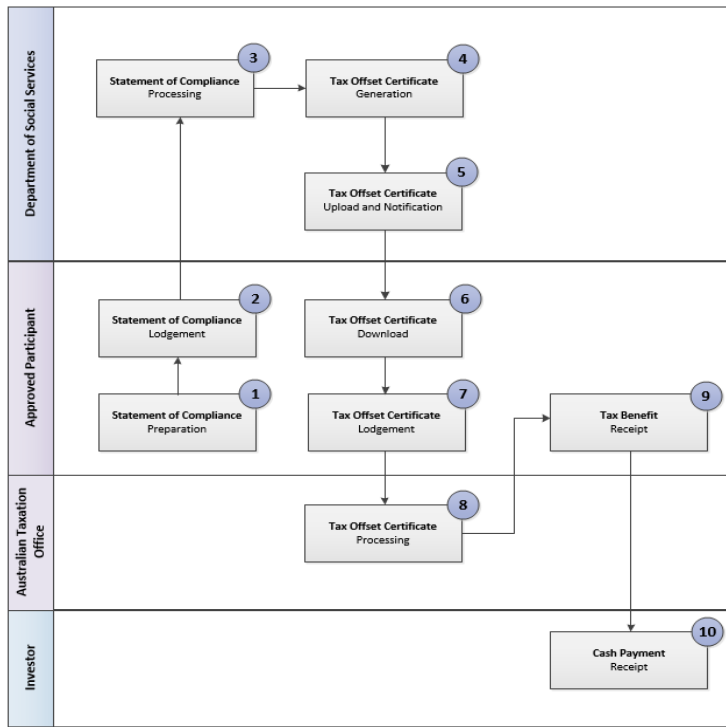
- 4.4 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.5 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investor through the following process for all relevant financial years:

¹¹ NRAS Regulation 30B(1)(a).

¹² NRAS Regulations 30A(2) and 30B(1)(b).

¹³ NRAS Regulation 30B(2).

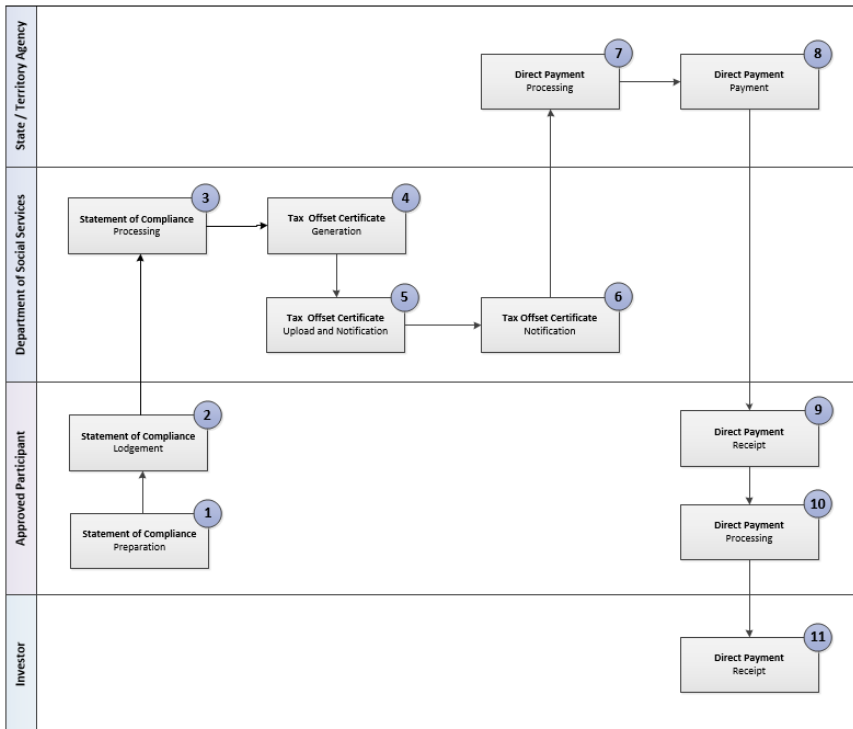
Figure 1 – Provision of Commonwealth Incentive to Investor



- Legend**
- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
 - 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
 - 3 The Department processes the incentive for the dwelling.
 - 4 The Department generates a tax offset certificate for the dwelling.
 - 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
 - 6 The approved participant downloads the tax offset certificate.
 - 7 The approved participant lodges the tax offset certificate with the Australian Taxation Office.
 - 8 The ATO processes the RTOC. This involves assessing the taxable income of the party claiming the refundable tax offset and determining the cash refund (if any) that is payable to the party.
 - 9 The approved participant receives a tax benefit (which may include a cash refund) from the ATO in relation to the NRAS allocation.
 - 10 The investor receives the cash payment from the approved participant.

4.6 For the Territory portion of the incentive, we have identified incentives were provided to the investor through the following process for all relevant financial years:

Figure 2 – Provision of Territory Incentive to Investor



- Legend**
- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
 - 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
 - 3 The Department processes the incentive for the dwelling.
 - 4 The Department generates a tax offset certificate for the dwelling.
 - 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
 - 6 The Department notifies State and Territory agencies that the Commonwealth component of the incentive has been provided (on a fortnightly basis).
 - 7 The State / Territory agency processes the State / Territory component of the incentive.
 - 8 The State / Territory makes a direct payment of the incentive to the approved participant.
 - 9 The approved participant receives the direct payment.
 - 10 The approved participant processes the direct payment in preparation for transfer to the investor (which may include the deduction of administration fees etc.)
 - 11 The investor receives the cash incentive in relation to the NRAS allocation (which will generally be the amount of the direct payment minus administration fees).

Element 1 | Receipt of Incentive by Approved Participant

4.7 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling.

4.8 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwelling in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 6 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ¹⁴	Date of Processing	Exhibit
2014-15	14 December 2015	Exhibit 002
2015-16	14 September 2016	Exhibit 003
2016-17	13 June 2017	Exhibit 004

4.9 For the Territory portion of the incentive, the approved participant received the incentive for the dwelling as a direct payment.

Table 7 – Receipt of Territory Incentive by Approved Participant

Financial Year ¹⁴	Date of Payment	Exhibit
2014-15	14 January 2016	Exhibit 005
2015-16	17 October 2016	Exhibit 005
2016-17	1 August 2017	Exhibit 005

Element 2 | Contractual Agreement between Approved Participant and Investor

4.10 The second element for this ground for transfer is the existence of a contractual agreement between the investor and the approved participant that requires the approved participant to pass on the incentive to the investor. There is a requirement to pass on an incentive where, under a contractual agreement with the investor, the approved participant is required to¹⁵:

- Make a payment to the investor in relation to the incentive
- Take steps to enable the investor to claim a tax offset to which the investor is entitled in relation to the incentive, or
- To make an election in relation to the incentive.

4.11 The investor provided an **unsigned** contractual agreement with the approved participant dated 18 July 2013 (refer to Exhibit 006). The contractual agreement states at Clause 1(vi) that "Ethan agrees to ensure the NRAS incentives issued by the Government are passed on to the investor" and at Clause 1(viii) that "Ethan agrees to undertake all actions necessary to complete the tasks set out above".

4.12 We note the contractual agreement provided by the investor was not signed by the approved participant, but it appears the approved participant generally acted in a manner consistent with an agreement. For example, the FY2014-15 annual head lease statement provided by the approved

¹⁴ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or Territory incentive payments for other financial years.

¹⁵ NRAS Regulation 30A(2).

participant for the dwelling identifies "Pursuant to the Ethan Head Lease Agreement please find below a summary of your entitlements" (refer to Exhibit 007).

- 4.13 We also note the contractual agreement between the investor and the approved participant does not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

- 4.14 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwelling to the investor within a reasonable time after receiving the incentive.
- 4.15 For the Commonwealth portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 8 – Receipt of Commonwealth Incentive by Investor

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2014-15	14 December 2015	27 January 2016	Exhibit 008	44 Days
2015-16	14 September 2016	12 January 2017	Exhibit 009	120 Days
2016-17	13 June 2017	Not Received	Exhibit 010	265 Days ¹⁶

- 4.16 For the Territory portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 9 – Receipt of Territory Incentive by Investor

Financial Year	Date of Payment	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2014-15	14 January 2016	25 February 2016	Exhibit 011	42 Days
2015-16	17 October 2016	12 January 2017	Exhibit 012	87 Days
2016-17	1 August 2017	Not Received	Exhibit 010	216 Days ¹⁷

- 4.17 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 states "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive".¹⁸
- 4.18 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investor for the 2016-17 financial year.

¹⁶ As of the date of statement (6 March 2018) from the investor that they have not received the Commonwealth incentive for this financial year (refer to Exhibit 010).

¹⁷ As of the date of statement (6 March 2018) from the investor that they have not received the Territory incentive for this financial year (refer to Exhibit 010).

¹⁸ Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

- 4.19 In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 (44 days) and 2015-16 (120 days) financial years, and the failure to pass on the incentive for the 2016-17 financial year (refer to Exhibit 010).
- 4.20 This supports a finding that the failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investor received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 and 2015-16 financial years.
- 4.21 For the **Territory** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investor for the 2016-17 financial year.
- 4.22 In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 (42 days) and 2015-16 (87 days) financial years, and the failure to pass on the incentive for the 2016-17 financial year (refer to Exhibit 010).
- 4.23 This supports a finding that the failure to pass on the incentive for the 2016-17 financial year was not reasonable, considering the investor received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 and 2015-16 financial years.

Finding

- 4.24 From our assessment of information provided by the investor, the Department and the Northern Territory Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was an unsigned contractual agreement between the investor and the approved participant that required the approved participant to pass on the incentive (noting that the approved participant acted in a manner consistent with the contract)
 - For the **Commonwealth** portion of the incentive, the investor has not received the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2014-15 and 2015-16 financial years, and
 - For the **Territory** portion of the incentive, the investor has not received the incentive from the approved participant for the 2016-17 financial year, despite receiving the incentive for the 2014-15 and 2015-16 financial years.
- 4.25 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.26 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for the failure to pass on the incentive for the 2016-17 financial years.

5 Ground 2 | Contravention of Consumer Protection Law

Overview

- 5.1 NRAS Regulation 21A(2)(d) identifies the Secretary may transfer an allocation where the conduct of the approved participant in relation to an allocation has contravened a consumer protection law.
- 5.2 The investor's application to transfer identified this ground for transfer, stating "I have been forced to sign over the property management to Ethan or lose my incentive" (refer to Exhibit 001).

Analysis

- 5.3 We have not assessed the legal interpretation of "contravention" – which may or may not require a court to have determined whether a provision of consumer protection law has been breached (refer to our Limitations for further information).¹⁹
- 5.4 However, as this ground for transfer was identified by the investor in their application, we have analysed whether the alleged conduct of the approved participant may have constituted third line forcing. Third line forcing is a type of exclusive dealing prohibited by section 47(6) of the *Competition and Consumer Act 2010*. Exclusive dealing is a form of anti-competitive behaviour that occurs where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.²⁰
- 5.5 In the context of the NRAS and the investor's application to transfer, this ground for transfer is constituted by the following elements:
- An approved participant supplies, or offers to supply goods or services (such as facilitating compliance with the NRAS and passing on incentive payments) to the investor²¹
 - The approved participant supplies these services on the condition that the investor will acquire services (such as tenancy management services) directly or indirectly from a third party that is not related to the approved participant²², and
 - The conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition in the market.²³

Element 1 | Supply of Services

- 5.6 The first element for this ground for transfer is the supply of services by the approved participant to the investor.
- 5.7 The investor provided an **unsigned** contractual agreement with the approved participant (refer to Exhibit 006). The contractual agreement identifies the approved participant will provide a range of

¹⁹ See, e.g., Australian Competition and Consumer Commission's Compliance and Enforcement Policy and Priorities, which distinguishes between alleged contraventions of consumer protection law and contraventions substantiated through court-based outcomes and court enforceable undertakings (<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>) (Accessed 13 March 2018).

²⁰ Australian Competition and Consumer Commission (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>) (Accessed 7 March 2018).

²¹ *Competition and Consumer Act 2010* s47(6)(a).

²² *Competition and Consumer Act 2010* s47(6).

²³ *Competition and Consumer Act 2010* s47(10) and s47(13)(b).

services to the investor – including at Clause 1(iii) to provide tenancy management services and related work in conjunction with the appointed property manager.

- 5.8 We note the contractual agreement provided by the investor was not signed by the approved participant, but it appears the approved participant generally acted in a manner consistent with an agreement. For example, the FY2015-16 Annual Statement provided by the approved participant for the dwelling identifies “Pursuant to the Ethan Head Lease Agreement please find below a summary of your entitlements” (refer to Exhibit 007).

Element 2 | Condition of Supply

- 5.9 The second element for this ground for transfer is that the approved participant supplies these services on the condition the investor acquires services from a third party that is not related to the approved participant.
- 5.10 In correspondence from the approved participant to the investor dated 10 November 2015, the approved participant states “Ethan have had significant issues with ^{s47F} in the management of NRAS properties and as such they are no longer approved to manage any properties within the Ethan NRAS program... You are able to use anyone who will comply with the attached guidelines” (refer to Exhibit 013).
- 5.11 We note this representation from the approved participant does not require the investor to acquire property management services from a particular third party. No further information was provided by the investor to indicate the approved participant has supplied services on the condition the investor acquires services from a third party.

Element 3 | Substantial Lessening of Competition

- 5.12 The third element for this ground for transfer is the conduct of the approved participant has the purpose, or is likely to have the effect, of substantially lessening competition.
- 5.13 For the purposes of the *Competition and Consumer Act 2010*, competition refers to competition in any market in which the approved participant or the investor supplies or acquires (or is likely to supply or acquire) goods or services.²⁴ As the investor had acquired tenancy management services from ^{s47F} this would include the market for tenancy management services.
- 5.14 From information provided by the investor, we are unable to establish whether the alleged conduct of the approved participant substantially lessened competition in the market for tenancy management services.

Finding

- 5.15 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer because:
- We are unable to establish whether the approved participant supplied services to the investor on the condition the investor acquires services from a third party, and
 - We are unable to establish whether the alleged conduct of the approved participant substantially lessened competition in the market for tenancy management services.
- 5.16 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²⁴ *Competition and Consumer Act 2010* s47(13)(b).

6 Ground 3 | Provision of False or Misleading Information to Investor

Overview

6.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:

- The approved participant provides information about the NRAS to the investor (such as a representation made by an email or letter), and
- The information provided to the investor is false or misleading.

6.2 The investor's application to transfer identified this ground for transfer, but did not expressly identify any representations from the approved participant that the investor considered to be false or misleading (refer to Exhibit 001). However, from our assessment of information provided by the investor, we have identified a representation that the investor may have considered false or misleading.

Element 1 | Provision of Information

6.3 The first element for this ground for transfer is the provision of information about the NRAS by the approved participant to the investor.

6.4 The investor's application to transfer states "I was advised by Ethan that the Federal NRAS incentive is allocated by the DSS as a RTO only and that is why they need to make application to ATO to have it converted to a cash payment and this is what is causing the delay" (refer to Exhibit 001).

6.5 No further information was provided by the investor to support this assertion that the approved participant had advised the investor that the Commonwealth incentive was only allocated as a refundable tax offset certificate.

Element 2 | Information is False or Misleading

6.6 The second element for this ground for transfer is that the information about the NRAS provided by the approved participant to the investor is false or misleading.

6.7 NRAS Regulation 29 identifies approved participants may receive incentives as either a payment or a tax offset certificate depending on their status as an endorsed charitable institution and the form of incentive they have elected to receive.

6.8 A representation to the investor that the incentive is allocated by the Department "as a RTO only" may be characterised as false or misleading depending on the context of the representation –such as where the approved participant has represented that the incentive is only available as a tax offset certificate to all approved participants in the NRAS.

6.9 However, as no further information was provided by the investor, we are unable to establish whether this representation is false or misleading.

Finding

6.10 From our assessment of information provided by the investor, there is **insufficient information** to support this ground for transfer because we are unable to establish the context of the alleged representation that the incentive is allocated by the Department "as a RTO only".

- 6.11 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

7 Ground 4 | Deregistration

Overview

- 7.1 NRAS Regulation 21A(2)(f) identifies the Secretary may transfer an allocation where the approved participant is a company and ASIC has published a notice of proposed deregistration of the approved participant or a court has ordered the deregistration of the approved participant by ASIC.
- 7.2 The investor's application to transfer identified this ground for transfer, and stated "Ethan also informed me that they were closing down and were going to transfer all NRAS allocations to Quantum²⁵" (refer to Exhibit 001).

Analysis

- 7.3 From review of ASIC's database of published notices²⁶ (which includes notices relating to voluntary or ASIC-initiated proposals to deregister a company) as at 15 March 2018, we have not identified that the approved participant is subject to a notice of proposed reregistration or has been deregistered.

Finding

- 7.4 From our assessment of information provided by the investor and ASIC's database of published notices, there is **insufficient information** to support this ground for transfer because we are unable to establish that the approved participant is subject to a notice of proposed reregistration or has been deregistered.
- 7.5 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

²⁵ Quantum Housing Group Pty Ltd as Trustee for The Quantum Affordable Housing Unit.

²⁶ <https://insolvencynotices.asic.gov.au/> (Accessed 15 March 2018).

8 Limitations

- 8.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 8.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice. In respect of our assessment of the contravention of consumer protection law, we have not assessed the legal interpretation of "contravention".
- 8.3 This report has been prepared based on work completed as at 20 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 8.4 As at 20 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 8.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 8.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 8.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 8.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 8.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 8.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.

Report | ^{s47F}

NRAS Regulation 21A | Application to Transfer

Department of Social Services

22 March 2018
Private and Confidential

22 March 2018

Kathryn Campbell
Secretary
Department of Social Services

Dear Secretary,

Re: Report |s47F

In accordance with our signed Order for Services dated 20 December 2017, we have assessed an application to transfer a National Rental Affordability Scheme allocation made by joint investors s47F under Regulation 21A of the National Rental Affordability Scheme Regulations 2008.

We are pleased to provide you with our report. Should you have any questions, please do not hesitate to contact me on s47G .

Yours sincerely
s47G

Matt O'Donnell
Partner

Deloitte Touche Tohmatsu

Contents

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Exhibits

Copies of documents referred to in this report have been collated as exhibits and should be read in conjunction with this report.

Exhibit	Description
001	Application to transfer for 1-H59-2792
002	Extract from FY2014-15 NRAS incentive claim report
003	Extract from FY2015-16 NRAS incentive claim report
004	Extract from FY2016-17 NRAS incentive claim report
005	Processing data for State incentive payments
006	Contractual agreement between investors and Ethan Affordable Housing Pty Ltd for 1-H59-2792
007	FY2014-15 Commonwealth cheque letter for 1-H59-2792
008	Email statement from investors dated 4 March 2018
009	FY2014-15 State cheque letter for 1-H59-2792

Glossary

Throughout this document, unless otherwise indicated, the following references apply. These references act to clarify this report and are not intended to be authoritative.

Reference	Description
1-H59-2792	s47F
ASIC	Australian Securities and Investments Commission
Department	Department of Social Services
FY	Financial Year
NRAS	National Rental Affordability Scheme
NRAS Act	<i>National Rental Affordability Scheme Act 2008</i>
NRAS Regulations	National Rental Affordability Scheme Regulations 2008
Regulation 21A	Regulation 21A of the NRAS Regulations
Secretary	Secretary of the Department

1 Executive Summary

Background

- 1.1 The National Rental Affordability Scheme (NRAS) is a joint Commonwealth-State government program managed by the Department of Social Services (the Department) to encourage large-scale investment in affordable housing.
- 1.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives (either as direct payments or in the form of refundable tax offset certificates) from the Department and State and/or Territory authorities.
- 1.3 The NRAS does not require approved participants to own the property for which they hold an allocation. A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 1.4 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.
- 1.5 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the *National Rental Affordability Scheme Act 2008* (NRAS Act) or the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) to remedy investor complaints.
- 1.6 In order to address these complaints and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.
- 1.7 Under Regulation 21A of the NRAS Regulations (Regulation 21A), an investor may make a written application to the Secretary of the Department (the Secretary) to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.

Scope

- 1.8 This report assesses the application to transfer an allocation made by the joint investors ^{s47F} in relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at ^{s47F} (NRAS identification **1-H59-2792**).
- 1.9 The investors’ application identified **two** potential Regulation 21A grounds for transfer. From our assessment of information provided by the investors in support of their application, we **did not** identify any additional Regulation 21A grounds for transfer.
- 1.10 From our assessment of information provided by the investors, the Department and the Victorian Government, there is sufficient information to support **one** Regulation 21A ground for transfer (refer to Table 1 – Grounds for Transfer):

Table 1 – Grounds for Transfer

Ground	Source	Support
Failure to Pass on Incentive¹ The approved participant has failed to pass on an incentive to the investor within a reasonable time after receiving the incentive	Investors' application to transfer	Sufficient information
False or Misleading Information to Investor² The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	Investors' application to transfer	Insufficient information

Methodology

- 1.11 We reviewed the investors' application to transfer and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 1.12 We requested and reviewed additional information in support of the investors' application through correspondence with the investor and the Victorian Government.
- 1.13 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 1.14 We analysed information provided by the investors and the Victorian Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact³ – for each potential Regulation 21A ground for transfer.

Findings

- 1.15 From our assessment of information provided by the investors and the Victorian Government, **two** potential Regulation 21A grounds for transfer were identified. Of these grounds, there is sufficient information to support **one** Regulation 21A ground for transfer.

Failure to Pass on Incentive

- 1.16 From our assessment of information provided by the investors and the Victorian Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement between the investors and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investors have not received the incentive from the approved participant for the 2015-16 and 2016-17 financial years, despite receiving the incentive for the 2014-15 financial year, and

¹ NRAS Regulations 21A(2)(b), 30A(2), 30B(2).

² NRAS Regulation 21A(2)(c).

³ Administrative Review Council – Best Practice Guide 3 "Decision Making – Evidence, Facts and Findings".

- For the **State** portion of the incentive, the investors have not received the incentive from the approved participant for the 2015-16 and 2016-17 financial years, despite receiving the incentive for the 2014-15 financial year.

Provision of False or Misleading Information to Investor

- 1.17 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer, because the investors did not identify or provide us with any representations from the approved participant that the investors considered to be false or misleading.

2 Background

National Rental Affordability Scheme (NRAS or Scheme)

- 2.1 The NRAS is a joint Commonwealth-State government program managed by the Department to encourage large-scale investment in affordable housing. The purpose of the NRAS is to increase the supply of affordable rental dwellings and reduce rental costs for low and moderate income households.
- 2.2 Under the NRAS, the Department has approved a range of third parties to act as “approved participants” for the program. As of December 2017, there are 131 approved participants comprising property developers, not-for-profit organisations and community housing providers (among others).
- 2.3 Approved participants are provided with affordable housing allocations under the NRAS by the Department. Approved participants then build, lease or buy housing stock to lease to eligible tenants at 20% below market rate, and collect incentives.
- 2.4 The provision of incentives is jointly managed by the Department (for the Commonwealth portion of the incentive) and State and Territory authorities (for the State and Territory portion of the incentive):
- The Commonwealth portion of the incentive (approximately 75% of the value of the incentive) may be provided to the approved participant as either direct payments or in the form of refundable tax offset certificates, and
 - The State or Territory portion of the incentive (approximately 25% of the value of the incentive) is provided to the approved participant as a direct payment.
- 2.5 Allocations are generally provided for ten year periods, with the current average incentive value of an allocation approximately \$11,000 per year (indexed annually).

Relationship with Investors

- 2.6 The NRAS does not require approved participants to own the property for which they hold an allocation.
- 2.7 A common arrangement is for an approved participant to enter into an agreement with an investor (the legal or beneficial owner of a dwelling), where the approved participant manages compliance with NRAS regulatory requirements and passes the NRAS incentive on to the investor, usually after deducting administrative and/or other fees.
- 2.8 The Department does not have a direct relationship with these investors as they generally sign an agreement directly with approved participants, but concerns have been raised over the treatment of investors by a limited number of approved participants.
- 2.9 The Department has previously received complaints that approved participants have forced investors to use certain services (such as tenancy management services) from the approved participant or providers specified by the approved participant, and complaints that approved participants have failed to pass on NRAS incentives either entirely or not in a timely manner.

Transferral of Allocation

- 2.10 However, under the regulatory structure of the NRAS at the time, the Department did not have powers under the NRAS Act or the NRAS Regulations to remedy investor complaints.
- 2.11 In order to address these concerns and provide additional protections for investors, a number of regulatory changes were made to the NRAS in November 2017 and December 2017.

- 2.12 Under Regulation 21A, an investor may make a written application to the Secretary to transfer the allocation for their NRAS dwelling from one approved participant to another approved participant.
- 2.13 The Secretary may transfer an allocation where the Secretary is satisfied one or more of the following grounds exist.

Table 2 – Regulation 21A Grounds for Transfer

Ground	Source
Failure to Comply with Condition of Allocation The approved participant has failed to comply with a condition of an allocation	NRAS Regulation 21A(2)(a) NRAS Regulation 16
Failure to Pass on Incentive The approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive	NRAS Regulation 21A(2)(b) NRAS Regulation 30A(2) NRAS Regulation 30B(2)
False or Misleading Information to Investor The approved participant has provided information that may be characterised as false or misleading about the NRAS to the investor	NRAS Regulation 21A(2)(c)
Contravention of Consumer Protection Law The conduct of the approved participant in relation to an allocation has contravened a consumer protection law	NRAS Regulation 21A(2)(d)
Non-Compliant Claiming of Tax Offset The approved participant has claimed a tax offset (or a part of a tax offset) to which they were not entitled	NRAS Regulation 21A(2)(e)
Deregistration The approved participant is subject to an ASIC notice of proposed deregistration or a court has ordered the deregistration of the approved participant by ASIC	NRAS Regulation 21A(2)(f)
Bankruptcy The approved participant has become bankrupt, taken steps to benefit from bankruptcy laws or otherwise acted as a bankrupt	NRAS Regulation 21A(2)(g)
False or Misleading Information in Application The approved participant has included false or misleading information (or failed to include relevant information) in an application under the NRAS Regulations	NRAS Regulation 21A(2)(h)

Our Engagement

- 2.14 Deloitte has been engaged to assess a number of applications to transfer an NRAS allocation made by investors under NRAS Regulation 21A.
- 2.15 This report assesses the application to transfer an allocation made by the joint investors ^{s47F} relation to the approved participant **Ethan Affordable Housing Pty Ltd** for the NRAS dwelling at ^{s47F} NRAS identification **1-H59-2792**).

3 Methodology

Obtaining Information (Investor)

- 3.1 We reviewed the investors' application to transfer (refer to Exhibit 001) and supporting documentation to assess the potential grounds for transfer under Regulation 21A and the sufficiency of information provided in support of the application.
- 3.2 We contacted the investors on the following dates to discuss their application to transfer, and source additional information in support of their application.

Table 3 – Contact with Investors

Date	Contact Method
16 February 2018	Phone call
16 February 2018	Email
20 February 2018	Phone call
25 February 2018	Phone call
26 February 2018	Email
2 March 2018	Phone call
2 March 2018	Email

- 3.3 We received additional information in support of the investors' application on the following dates:

Table 4 – Information from Investors

Date	Information Provided
25 February 2018	Contract with approved participant Correspondence with approved participant Incentive statements from approved participant Incentive cheques from approved participant
27 February 2018	Correspondence with approved participant
4 March 2018	Statement from investor regarding incentive payments

Obtaining Information (Victorian Government)

- 3.4 The Department requested and received additional information in support of the investors' application from the Victorian Government on our behalf on the following date:

Table 5 – Information from Victorian Government

Date	Information Provided
9 March 2018	Payment information for FY2014-15, 2015-16 and 2016-17 State incentive payments to the approved participant

Obtaining Information (Approved Participant)

3.5 We have not been provided with information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

Review of Evidence

3.6 We analysed information provided by the investors and the Victorian Government to identify logically probative evidence – material that tends logically to prove the existence or non-existence of a fact⁴ – for each potential Regulation 21A ground for transfer.

3.7 This process involved:

- Analysing information provided by the investors and the Victorian Government to ensure the constituent elements of the information provided are logically probative towards a Regulation 21A ground for transfer
- Requesting additional evidence from the investors where the information previously provided was not logically probative towards a Regulation 21A ground for transfer, and
- Ensuring that the same weight was applied to similar pieces of evidence (such as similar correspondence received by different investors) for all applications that we reviewed.

⁴ Administrative Review Council – Best Practice Guide 3 “Decision Making – Evidence, Facts and Findings”.

4 Ground 1 | Failure to Pass on Incentive

Overview

- 4.1 NRAS Regulation 21A(2)(b) identifies the Secretary may transfer an allocation where the approved participant has failed to pass on an incentive to an investor within a reasonable time after receiving the incentive. This ground for transfer is constituted by the following elements:
- The approved participant received an incentive for the dwelling from the Department⁵
 - There is a contractual agreement between the investors and the approved participant that requires the approved participant to pass on the incentive to the investors⁶, and
 - The investors did not receive the incentive within a reasonable time after the approved participant received the incentive from the Department.⁷
- 4.2 The investors' application to transfer identified this ground for transfer, stating "Ethan has failed to pass on the incentives from 2015–2016 and 2016–2017. We believe they have the money and are not passing it on" (refer to Exhibit 001).

Analysis

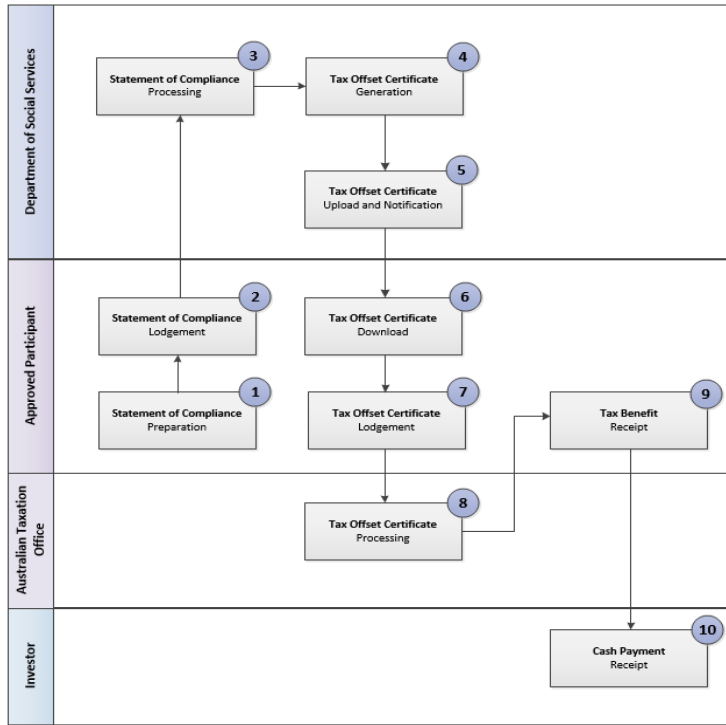
- 4.3 Because an approved participant may receive the incentive for an NRAS dwelling either as a direct payment or in the form of refundable tax offset certificate, there are several ways in which an investor may receive the incentive from the approved participant. The manner of passing on the incentive may also vary between financial years.
- 4.4 For the Commonwealth portion of the incentive, we have identified incentives were provided to the investors through the following process for all relevant financial years:

⁵ NRAS Regulation 30B(1)(a).

⁶ NRAS Regulations 30A(2) and 30B(1)(b).

⁷ NRAS Regulation 30B(2).

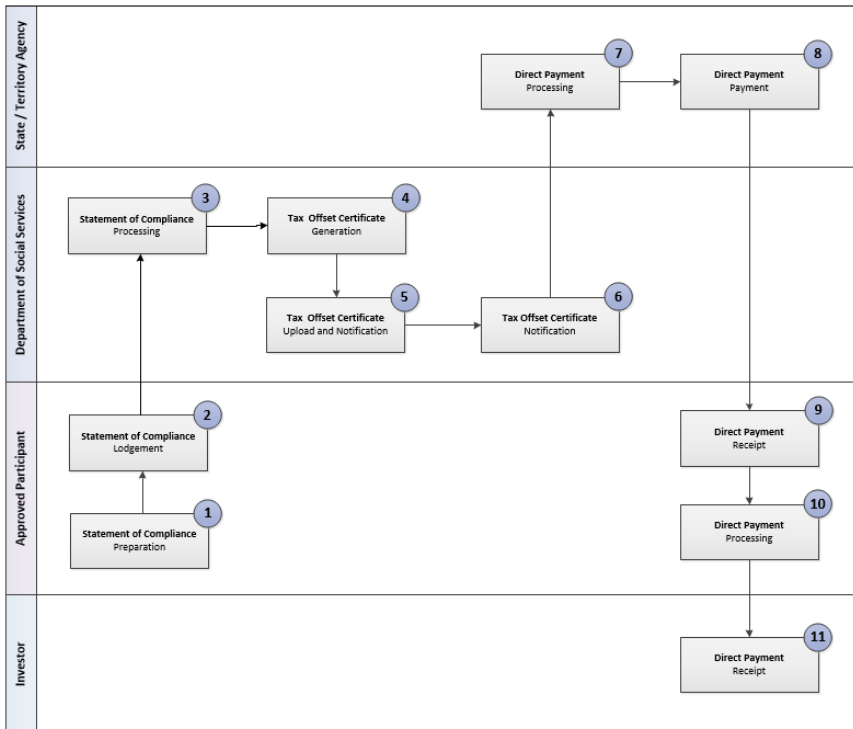
Figure 1 – Provision of Commonwealth Incentive to Investors



- Legend**
- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
 - 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
 - 3 The Department processes the incentive for the dwelling.
 - 4 The Department generates a tax offset certificate for the dwelling.
 - 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
 - 6 The approved participant downloads the tax offset certificate.
 - 7 The approved participant lodges the tax offset certificate with the Australian Taxation Office.
 - 8 The ATO processes the RTOC. This involves assessing the taxable income of the party claiming the refundable tax offset and determining the cash refund (if any) that is payable to the party.
 - 9 The approved participant receives a tax benefit (which may include a cash refund) from the ATO in relation to the NRAS allocation.
 - 10 The investor receives the cash payment from the approved participant.

4.5 For the State portion of the incentive, we have identified incentives were provided to the investors through the following process for all relevant financial years:

Figure 2 – Provision of State Incentive to Investors



- Legend**
- 1 The approved participant prepares a Statement of Compliance for the dwelling (NRAS Regulation 17(1)).
 - 2 The approved participant lodges the Statement of Compliance with the Department by 30 June after the end of the NRAS year or any later date approved by the Secretary (NRAS Regulation 17(2)).
 - 3 The Department processes the incentive for the dwelling.
 - 4 The Department generates a tax offset certificate for the dwelling.
 - 5 The Department uploads the tax offset certificate to the Department's approved participant portal and notifies the approved participant.
 - 6 The Department notifies State and Territory agencies that the Commonwealth component of the incentive has been provided (on a fortnightly basis).
 - 7 The State / Territory agency processes the State / Territory component of the incentive.
 - 8 The State / Territory makes a direct payment of the incentive to the approved participant.
 - 9 The approved participant receives the direct payment.
 - 10 The approved participant processes the direct payment in preparation for transfer to the investor (which may include the deduction of administration fees etc.)
 - 11 The investor receives the cash incentive in relation to the NRAS allocation (which will generally be the amount of the direct payment minus administration fees).

Element 1 | Receipt of Incentive by Approved Participant

- 4.6 The first element for this ground for transfer is the receipt of the incentive by the approved participant for the dwelling.
- 4.7 For the Commonwealth portion of the incentive, the approved participant received the incentive for the dwelling in the form of a refundable tax offset certificate. The Department has stated that these certificates are available to the approved participant within two business days of the date of processing published by the Department.

Table 6 – Receipt of Commonwealth Incentive by Approved Participant

Financial Year ⁸	Date of Processing	Exhibit
2014-15	15 August 2016	Exhibit 002
2015-16	14 September 2016	Exhibit 003
2016-17	13 June 2017	Exhibit 004

- 4.8 For the State portion of the incentive, the approved participant received the incentive for the dwelling as a direct payment.

Table 7 – Receipt of State Incentive by Approved Participant

Financial Year ⁸	Date of Payment	Exhibit
2014-15	8 September 2016	Exhibit 005
2015-16	29 October 2016	Exhibit 005
2016-17	29 July 2017	Exhibit 005

Element 2 | Contractual Agreement between Approved Participant and Investor

- 4.9 The second element for this ground for transfer is the existence of a contractual agreement between the investors and the approved participant that requires the approved participant to pass on the incentive to the investors. There is a requirement to pass on an incentive where, under a contractual agreement with the investors, the approved participant is required to⁹:
- Make a payment to the investors in relation to the incentive
 - Take steps to enable the investors to claim a tax offset to which the investors are entitled in relation to the incentive, or
 - To make an election in relation to the incentive.
- 4.10 The investors provided a signed contractual agreement with the approved participant dated 8 April 2014 (refer to Exhibit 006). The contractual agreement states at Clause 1(vi) that "Ethan agrees to ensure the NRAS incentives issued by the Government are passed on to the investor" and at Clause 1(vii) that "Ethan agrees to undertake all actions necessary to complete the tasks set out above".

⁸ Processing and payment data was reviewed for financial years where information has been provided by the investor. The approved participant may have received Commonwealth and/or State incentive payments for other financial years.

⁹ NRAS Regulation 30A(2).

- 4.11 We note the contractual agreement between the investors and the approved participant does not identify a timeframe for the passage of the incentive, nor an undertaking by the approved participant to pass on the incentive within a reasonable time.

Element 3 | Passing on Incentive within Reasonable Time

- 4.12 The third element for this ground for transfer is the approved participant's failure to pass on the incentive for the dwelling to the investors within a reasonable time after receiving the incentive.
- 4.13 For the Commonwealth portion of the incentive, the investors provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 8 – Receipt of Commonwealth Incentive by Investors

Financial Year	Date of Processing	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2014-15	15 August 2016	13 October 2016	Exhibit 007	59 Days
2015-16	14 September 2016	Not Received	Exhibit 008	536 Days ¹⁰
2016-17	13 June 2017	Not Received	Exhibit 008	264 Days ¹⁰

- 4.14 For the State portion of the incentive, the investor provided correspondence with the approved participant indicating the receipt of the incentive from the approved participant on the following dates:

Table 9 – Receipt of State Incentive by Investors

Financial Year	Date of Payment	Date of Receipt	Date of Receipt (Exhibit)	Time to Pass
2014-15	8 September 2016	13 October 2016	Exhibit 009	35 Days
2015-16	29 October 2016	Not Received	Exhibit 001	465 Days ¹¹
2016-17	29 July 2017	Not Received	Exhibit 008	218 Days ¹¹

- 4.15 The explanatory statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 states "What is a 'reasonable time' would vary depending on the circumstances... It may... be relevant to consider the nature and terms of the agreement between the investor and the approved participant, the nature of the approved participant's business or undertaking and any explanation the approved participant provided for any apparent delay in passing on the incentive".¹²
- 4.16 For the **Commonwealth** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investors for the 2015-16 and 2016-17 financial years. In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 (59 days) financial year, and the failure to pass on the incentive for the 2015-16 and 2016-17 (financial years).

¹⁰ As of the date of statement (4 March 2018) from the investors that they have not received the Commonwealth incentive for this financial year (refer to Exhibit 008).

¹¹ As of the date application to transfer (6 February 2018) from the investors that they have not received the State incentive for this financial year (refer to Exhibit 001).

¹² Explanatory Statement to the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2017 (<https://www.legislation.gov.au/Details/F2017L01488/Explanatory%20Statement/Text>) (Accessed 13 March 2018).

- 4.17 This supports a finding that the failure to pass on the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investors received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.
- 4.18 For the **State** portion of the incentive, we have not identified any justification in support of the incentive not being passed on to the investors for the 2015-16 and 2016-17 financial years. In particular, we note the contrast between the time taken to pass on the incentive for the 2014-15 (35 days) financial year, and the failure to pass on the incentive for the 2015-16 and 2016-17 financial years.
- 4.19 This supports a finding that the failure to pass on the incentive for the 2015-16 and 2016-17 financial years was not reasonable, considering the investors received the incentive in the same manner (as a direct payment) from the approved participant for the 2014-15 financial year.

Finding

- 4.20 From our assessment of information provided by the investors and the Victorian Government, there is **sufficient information** to support this ground for transfer because:
- The approved participant has received incentives for the approved rental dwelling
 - There was a contractual agreement between the investors and the approved participant that required the approved participant to pass on the incentive
 - For the **Commonwealth** portion of the incentive, the investors have not received the incentive from the approved participant for the 2015-16 and 2016-17 financial years, despite receiving the incentive for the 2014-15 financial year, and
 - For the **State** portion of the incentive, the investors have not received the incentive from the approved participant for the 2015-16 and 2016-17 financial years, despite receiving the incentive for the 2014-15 financial year.
- 4.21 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).
- 4.22 This finding may change following the Department's contact with the approved participant under NRAS Regulation 21B, where the approved participant may provide an explanation for the delay and/or failure to pass on the incentive.

5 Ground 2 | Provision of False or Misleading Information to Investor

Overview

- 5.1 NRAS Regulation 21A(2)(c) identifies the Secretary may transfer an allocation where the approved participant has provided false or misleading information about the NRAS to an investor. This ground for transfer is constituted by the following elements:
- The approved participant provides information about the NRAS to the investors (such as a representation made by an email or letter), and
 - The information provided to the investors is false or misleading.
- 5.2 The investors' applications to transfer identified this ground for transfer, but did not expressly identify any representations from the approved participant that the investors considered to be false or misleading (refer to Exhibit 001).

Finding

- 5.3 From our assessment of information provided by the investors, there is **insufficient information** to support this ground for transfer because the investors did not identify or provide us with any representations from the approved participant that the investors considered to be false or misleading.
- 5.4 We have not sought information from, or provided an opportunity for the approved participant to respond to our findings. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B (refer to our Limitations for further information).

6 Limitations

- 6.1 This report has been prepared using resources from the Deloitte Risk Advisory Pty Ltd's Forensic practice (Deloitte Forensic).
- 6.2 Deloitte Forensic partners and staff are not lawyers, and this report should not be relied upon as legal advice.
- 6.3 This report has been prepared based on work completed as at 22 March 2018. Deloitte has not updated its work since that date. Deloitte assumes no responsibility for updating this report for events and circumstances occurring after the date of this report.
- 6.4 As at 22 March 2018, we have not sought information from, or provided an opportunity for the approved participant to respond to this application. We understand the Department will provide the approved participant with an opportunity to respond under NRAS Regulation 21B.
- 6.5 We reserve the right to alter the findings reached in this report on completion of our work or should information that is relevant to our findings subsequently become available after the date of this report. This will include where the approved participant has provided the Department with additional information that we have not assessed.
- 6.6 For the purposes of preparing this report, reliance has been placed upon the material, representations, information and instructions provided to us. Original documentation has not been seen (unless otherwise stated) and no audit or examination of the validity of the documentation, representations, information and instructions provided has been undertaken, except where it is expressly stated to have been.
- 6.7 The Services provided are advisory in nature and have not been conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards are expressed. The procedures and enquiries undertaken in the preparation of this report do not include verification work, nor do they constitute an audit or review in accordance with Australian Accounting and Assurance Standards.
- 6.8 Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. Our work is performed on a sample basis; we cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud.
- 6.9 We believe that the statements made in this report are accurate, but no warranty of completeness, accuracy, or reliability is given in relation to the statements and representations made by, and the information and documentation provided by Department of Social Services personnel, approved participants or investors. We have not attempted to verify these sources independently unless otherwise noted within the report.
- 6.10 This report has been prepared exclusively for the purposes of the Department of Social Services. The distribution of this report is limited to authorised recipients of the Department of Social Services and will not be otherwise distributed without the written consent of Deloitte. This report should not be used for any other purpose without our prior written consent and, if it is used otherwise, neither Deloitte nor its partners or staff accept any liability or responsibility for loss suffered by any party.