National Association of Tenant Organisations

Submission on the

National Rental Affordability Scheme – technical discussion paper

May 2008

The National Association of Tenant Organisations (NATO) welcomes the opportunity to comment on the National Rental Affordability Scheme (NRAS), as outlined in the technical discussion paper (TDP).

About NATO

NATO comprises the peak non-government organisations for tenants across Australia: the Tenants' Union of NSW, the Tenants' Union of Queensland, the Tenants' Union of Tasmania, the Tenants' Union of Victoria, the Western Australian Tenants Advice Service, the Tenants' Union ACT and the Tenants' Advice Service of the Darwin Community Legal Service. Each of NATO's members gives information and advice to tenants about their legal rights and responsibilities, and works to promote the interests of tenants in their respective jurisdictions. NATO pursues this work at a national level.

Some of NATO's members were participants in the National Summit on Housing Affordability in 2004 and in the Summit group's subsequent activities, including its promotion of an affordable rental scheme along the lines of the NRAS.

We are pleased to see the NRAS adopted by the Government and given such a high priority. We welcome it as an innovation and an addition to national housing policy. By the same token, we also believe that the NRAS cannot be regarded as relieving the need to reinvest in Australia's social housing systems.

This submission was prepared by the Tenants' Union of NSW, and therefore tends to use examples and illustrations from New South Wales; nonetheless, NATO considers the issues illustrated are relevant across Australian States and Territories. Our comments are directed at those sections of the TDP relating to changing the recipient of the incentives (section 3.5), tenants (section 6), tenancy managers (section 7) and rents (section 8).

Changing the Recipient of the Incentives [3.5]

NATO supports the proposed general requirement that recipients of incentives under the NRAS hold each subsidised dwelling for 10 years. We consider that this should be a strong requirement, and that exceptions to it should be made only in extraordinary circumstances.

NATO is concerned that where a dwelling is sold within the 10-year period, the position of the tenant should be secure: that is, the tenant should be entitled to remain in possession of the dwelling and continue to receive the benefit of the discounted rent.

We consider that this would be best achieved by requiring that the dwelling be subject to a lease with a term of 10 years, which is registered on the title documents for the dwelling. The parties to the 10-year lease would be the participant, as owner of the dwelling, and either the tenancy manager (being an accredited non-profit housing provider – see our comments on section 7, below), the relevant State or Territory Housing Authority, or some other corporation established by the State or Territory Government for the purpose of holding such interests. In the event of the sale of the dwelling, the purchaser would take the title subject to the lease for the remainder of the 10-year term.

The tenant – that is, the individual person actually living in the premises – would have possession under a sublease between themselves and the holder of the 10-year lease. As we discuss in our comments on section 6.3, below, we do not think it is appropriate that individual tenants should be required or expected to enter into leases with long fixed terms. The above arrangement would keep dwellings within the NRAS by means of the security provided by a long fixed-term lease, without exposing tenants to the liabilities and other disadvantages that long fixed term leases present for individuals.

Tenants – Initial eligibility [6.1]

NATO welcomes that the NRAS is intended to provide housing to both low-income and moderate-income households.

It is important that moderate-income households are included in the NRAS for a number of reasons. First, these households have increasingly missed out on public housing as the State housing authorities have effectively tightened their eligibility criteria. For example, in New South Wales the eligibility criteria for public housing remained unchanged from 1992 for more than 13 years, in which time many households drifted out of eligibility as incomes rose; recent changes to eligibility criteria have not restored eligibility to more than a few of these households. This has been to the detriment of moderate-income households and, ultimately, to the detriment of public housing generally.

Secondly, in some instances NRAS housing will be too expensive for households with very low incomes. For example, a one-bedroom flat in the inner ring suburbs of Sydney let at 80 per cent of the median rent for new tenancies commencing in the quarter to March 2008 would still cost $256 per week; this represents 94 per cent of the weekly income of a single person in receipt of Newstart allowance and Rent Assistance.

NATO considers, therefore, that eligibility criteria for NRAS housing should include income limits that are significantly higher than those for public housing. Accordingly, of the income limits presented in the TDP, we prefer the less restrictive limits associated with Commonwealth Rent Assistance (CRA) to those associated with the low-income Health Care Card (HCC).

We submit that the HCC-based income limits are too close to those of the current eligibility criteria for public housing. For example, for a single person, the HCC-based limit is $134 per week (or 33 per cent) higher than income limit for public housing in New South Wales; for a couple with two children, the HCC-based limit is $170 (or 20 per cent) higher. We do not consider that this represents enough of a range of incomes to assist moderate-income households or to ensure the mix of incomes that is intended for NRAS projects.

The more generous CRA-based income limits would better achieve the aims of the NRAS. In fact, for a number of household types, the CRA-based limits are very similar to what the income limits for public housing in New South Wales would have been if they had kept pace with incomes since the early 1990s.[1] If the CRA-based income limits are adopted, the NRAS could be said to be assisting the sorts of households who used to be assisted by public housing.

Tenants – Continuing eligibility [6.2]

The TDP proposes that NRAS housing should also be subject to a tenant's continuing eligibility.

NATO holds grave concerns about regimes of continuing eligibility in relation to housing. NATO members have been close observers of the establishment in recent years of continuing eligibility regimes in the social housing systems of New South Wales, Queensland, and Western Australia, and in our experience these regimes are vexed with problems.

Our concerns about continuing eligibility in NRAS housing relate to two broad areas of impact. First, we are concerned that continuing eligibility regimes affect the decisions made by tenants about important aspects of their lives, including – but not limited to – decisions about participation in work. Secondly, we are concerned that regimes of continuing eligibility can detrimentally affect the relationship between landlord and tenant.

Continuing eligibility and tenants' work and life decisions

One of NATO's members, the Tenants' Union of NSW, has analysed the effect of new provisions relating to continuing eligibility for public housing introduced by the NSW State Government in 2005, and found they have created very significant work disincentives.[2] A particular problem is that tenants become ineligible for continuing in public housing at income levels that are insufficient to afford the

[1] If the income limits for eligibility for public housing in New South Wales as at February 1992 are adjusted for increases in average weekly earnings (all adults, seasonally adjusted) to November 2007, the income limit for single persons would be $38 480 pa (compare the CRA-based limit of $39 000); for a couple with two children, the income limit would be $64 792 pa (compare the CRA-based limit of $67 000).

[2] TUNSW (2006) '"Reshaping Public Housing" and Work Disincentives', TUNSW research paper.

median rent in most parts of Sydney. We understand that since Housing NSW commenced reviews as to continuing eligibility, very few tenants have been found to be ineligible. We are concerned that many tenants have made sure to remain eligible by knocking back opportunities to work, or do more work.

We are also concerned that the continuing eligibility provisions have affected other life decisions made by tenants, such as whether a child who joins the workforce is to stay at home or be made to move out, or whether a tenant's boyfriend or girlfriend is to move in as the tenant's partner. Each of these life decisions affects the tenant's household income, which in turn affects continuing eligibility.

It appears to NATO that the continuing eligibility regime for NRAS housing, as outlined in the TDP, would not entail work disincentives and other effects on life decisions to the same degree as in public housing systems, primarily because NRAS housing will not involve income-related rents. Nonetheless, losing eligibility for NRAS housing will come at a cost to tenants: assuming they rent like premises at the market rent, they will incur an effective rent increase of 25 per cent; in addition they will incur the costs – financial and emotional – of moving.

NATO submits that in order to minimise work disincentives and other effects on life decisions, the question of continuing eligibility in NRAS housing should, where possible, go only to the tenant's receipt of the benefit of a below-market rent, so that an ineligible tenant could continue to live in their dwelling at the market rent, while the benefit of a below-market rent goes to another eligible tenant. This could be achieved by allocating NRAS incentives to participants whose projects or property portfolios include a stock of non-NRAS dwellings to which an NRAS incentive could be switched if a tenant in an NRAS dwelling becomes ineligible. This would allow the ineligible tenant to remain in their dwelling and for the NRAS participant to continue to receive the NRAS incentive when the next vacant non-NRAS dwelling is let to an eligible tenant.

In any event, we submit that further analysis should be conducted as to whether the loss of eligibility at the proposed income limits would compound with the withdrawal of other benefits and the imposition of taxes such as to create work disincentives and other effects on life decisions.

As to the details of the regime outlined in the TDP, we note a couple of ambiguities. The TDP is not clear as to whether the income limit for continuing eligibility is an amount 25 per cent above the person's initial income, or an amount 25 per cent above the income limit for initial eligibility. We submit that the income limit for continuing eligibility must be an amount above the income limit for initial eligibility. An income limit for continuing eligibility that relates merely to the person's initial income would produce absurd results (for a example, a tenant who increases their income from $12 000 to $18 000 would become ineligible, while a tenant whose income of $20 000 remains unchanged would remain eligible).

We also submit that it should be clear that where a tenant's household changes, their continuing eligibility should be assessed according to the income limit for their new household type: for example, where a tenant who was initially eligible as a single person finds a partner, their continuing eligibility should be assessed according to the income limit for a couple.

As to whether the income limit for continuing eligibility should be 25 per cent more than the income limit for initial eligibility, NATO's first impression is that this formula sounds fair and has the advantage of simplicity, but we submit that it should be set subject to the analysis as to work disincentives, recommended above.

Continuing eligibility and the landlord-tenant relationship

The assessment of continuing eligibility entails the monitoring of tenants' incomes and household members. For tenants, this can give rise to the feeling that their privacy is being infringed; for landlords, it appears to us that it can give rise to a disposition of suspicion. In our experience, this happens all too often in public housing, where tenants who, for whatever reason, do not keep the landlord informed as to changes in their income or household members are apt to be treated as 'frauds'.

It appears to NATO that the continuing eligibility regime outlined in the TDP could operate with a lighter touch than those of public housing, again primarily because NRAS housing will not involve income-related rents, which entail more precise attention to changes in tenants' income and household members.

We also consider that our suggestion that tenants who become ineligible be allowed, where possible, to remain in their dwellings would help reduce the stakes of reviews as to continuing eligibility and, consequently, reduce pressure on the landlord-tenant relationship.

In any event, the sensitivity and professionalism of NRAS tenancy managers in the conduct of reviews will be very important. We submit that this is best addressed by allocating NRAS incentives to projects with tenancy managers who have demonstrated ability in this regard – we believe that the non-profit housing providers will likely be best – and ensuring that tenancy managers' decisions as to eligibility are subject to independent review.

Tenants – Leases [6.3]

NATO discussed the use of 10-year fixed term leases between NRAS participants and either tenancy managers or other corporations – not individual tenants – above. The TDP also raises the issue of the term of individual tenants' leases. The TDP indicates that long-term fixed terms will not be required under the NRAS, but they would be seen as beneficial.

NATO is aware that there is some enthusiasm for long-term fixed term leases as a device for improving tenants' security of tenure, but we do not share it. NATO considers that reasonable security of tenure is better achieved by means other than long-term fixed term leases.

Under current tenancy laws, fixed-term leases provide tenants with a degree of security against termination of their tenancies and increases in rents, but they also entail potential liabilities and disadvantages for tenants.

A tenant who ends a tenancy before the expiration of the fixed term is liable to compensate the landlord for loss of rent over the remainder of the fixed term (subject to landlords' statutory obligations to mitigate such losses). In the case of long-term fixed term agreements, this liability can run to many thousands of dollars.

Fixed term leases also reduce what little bargaining power tenants have. In most consumer relations, consumers can attempt to ensure the quality of service they receive by threatening to take their business elsewhere. In the case of tenancies, this is somewhat harder to do because of the costs to tenants of moving out, but it still may be an option. Where the tenancy has a fixed term, it becomes much harder still,

because the tenant can terminate the tenancy only where the landlord is in breach, and must be able to prove the breach – if not, the tenant's own termination of the lease may be a breach, exposing the tenant to liability for loss of rent, as above.

We further note that unlike service providers in most other consumer relations, most Australian landlords do not have reputations or 'brands' that they are motivated to protect by providing good service. Some of the non-profit housing providers are starting to develop this sort of brand, but most landlords do not trade on their reputations.

If a prospective tenant asked a NATO member's advice as to whether they should enter into a long-term (say five year) fixed term lease with a landlord with which they had had no prior dealings, which did not have an established 'brand' to be protected and maintained, and which did not give clear undertakings limiting the tenant's liability if the tenant had to move out before the end of the fixed term, the NATO member would likely caution them against it.

We submit that a reasonable degree of security would be better achieved by requiring NRAS tenancy managers, as a condition of their participation in the NRAS, to give notices of termination only on the following reasonable grounds:

- Breach of a term of the lease by the tenant
- Frustration of the lease because the dwelling has become uninhabitable
- The tenant is not eligible according to the continuing eligibility criteria
- Sale or redevelopment of the dwelling requiring vacant possession.
- The tenant ceases to be employed by the NRAS participant or tenancy manager (where the tenancy arises from the tenant's employment by the NRAS participant or tenancy manager)

In addition, a further degree of security would be achieved by limiting the availability of these grounds: in particular, the third ground might be limited to where the tenant has ceased to be eligible for a period of 12 months or more; the fourth might be limited to where the 10-year period for receipt of the NRAS incentive has elapsed.

NRAS tenancy managers might also be required to give long periods of notice for termination on these or other grounds: for example, the notice period for the third and fourth grounds above might be 12 months.

We note also that in most Australian jurisdictions, a fixed term lease under residential tenancies legislation would restrict the review of market rents, as envisaged at section 8 of the TDP. On the other hand, a fixed term lease between a participant and a tenancy manager or other corporation would not be subject to residential tenancies legislation, and so would not be subject to such a restriction.

Tenancy Managers [7]

NATO strongly prefers that tenancy managers under the NRAS should be accredited non-profit housing providers rather than private sector property managers or State or Territory Housing Authorities.

The TDP states that one of the roles of tenancy managers will be to determine the initial and continuing eligibility of prospective tenants and tenants. We consider

that these questions are more appropriately determined by accredited non-profit housing providers than by private sector property managers.

We also submit that accredited non-profit housing providers are less likely than private sector property managers to manipulate the setting of rents – see our comments on section 8, below.

NATO submits that the NRAS should make a number of specific provisions relating to the conduct of tenancy managers.

First, as discussed in our comment on tenants' leases [6.3] above, tenancy managers should give notices of termination only on specified reasonable grounds.

Secondly, tenancy managers' decisions in relation to tenants and prospective tenants initial and continuing eligibility should be subject to independent review. Each of the States and Territories currently has a review panel for their respective public housing authorities; in some, the panel has jurisdiction over community housing providers too. We submit that decisions by NRAS tenancy managers as to eligibility should be subject to review by these panels.

Thirdly, tenancy managers should be required, as a term of their participation in the NRAS, not to use tenant databases to either vet applicants or list tenants. The use of tenant databases excludes listed persons from rental accommodation and contributes to homelessness, and the threat of being listed undermines tenants' legal rights.

Rents [8]

Rents payable by tenants under the NRAS will be related to the market rent for the premises, and not to the household income of the tenant, as is the case in social housing. NATO supports this point of difference and is interested in seeing, as the NRAS is implemented, whether it has an impact on tenants' work and other life decisions.

We are concerned, however, that there should be safeguards and scrutiny applied to the initial setting of market rents and their occasional review. We are particularly concerned that if these matters are left to be determined only by the valuations of property valuers, 'helpful' property valuers may overvalue the market rent, in anticipation of the discount that is to apply, thus reducing or wiping out the benefit of the discount.

NATO submits that this risk might be mitigated in a number of ways.

First, as indicated above, we consider that the engagement of accredited non-profit housing providers, rather than private sector property managers, to deal with the setting of rents would help minimise the risk of 'helpful' valuations being sought.

Secondly, rent increases might be capped so that they do not exceed the increase in the rents category of the CPI for the relevant year or, alternatively, proposed rent increases in excess of the increase in the rents category of the CPI might be subject to further review.

Thirdly, the relevant State or Territory Housing Authority's system for setting market rents for social housing might provide another means of valuation, or capping, or threshold for further review.