Submission on

Improving the National Rental Affordability Scheme

Consultation Paper

National Affordable Housing Providers Ltd.

nsw Federation of Housing Associations inc

Endorsed by

Community Housing FEDERATION OF VICTORIA

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Improving the National Rental Affordability Scheme

Submission from the National Affordable Housing Providers Ltd and the NSW Federation of Housing Associations

Endorsed by the Community Housing Federation of Victoria

Overview

This is a collaborative submission from the National Affordable Housing Providers Ltd ,(NAHP) the national peak body of NRAS participants; and the NSW Federation of Housing Associations (the Federation), the NSW community housing peak body. It has also been endorsed by the Community Housing Federation of Victoria (CHFV), the community housing peak body for Victoria.

Our comments reflect feedback received from NAHP members during a consultation that was conducted on the discussion paper. A further consultation was undertaken with the Federation members at their CEOs forum on 15 December 2016 and their further comments have been incorporated into this submission. CHFV has reviewed this submission and has endorsed it on behalf of their members.

The submission provides comments on each of the specific questions set out in the discussion paper. Our comments as a whole reflect several key themes:

- Need for administrative consistency and for conflicting regulations within the Scheme, as well as with other regulatory regimes, to be resolved;
- Reduce red tape and ensure the regulations are not administratively burdensome, both for Approved Participants and the Department;
- Improved fairness in the application of the regulations, to ensure there is uniformity across all Approved Participants and that changes to policies and regulations will not retrospectively impact on NRAS providers and investors;
- Greater transparency and accountability, through service agreements between Approved Participants and the Commonwealth; and improved information to Approved Participants and investors; and
- Greater recognition and responsiveness to the commercial nature of NRAS, the reputational risks from inappropriate regulation, and the need to enhance investor confidence and support for NRAS and government affordable housing initiatives on the whole.

NAHP and NSWFHA comments

Question 1: What provisions in the NRAS Regulations could be changed/simplified in order to provide further clarity, reduce red tape and improve the overall efficiency of the Scheme?

- Regulations should allow for rent rebates or credits when an unintentional overcharge has occurred in order to be compliant with the 80% 'at all times' rule, e.g rent reduction required mid-lease due to a decreased MRV or negative NRAS Index. The prohibition on issuing rent refunds is not explicitly set out in the Legislation or the Regulations. Several NAHP members noted that under the RTA in their jurisdictions, refunds for overcharges are acceptable.
  There is a significant degree of frustration among NAHP and Federation members on the inability of Approved Participants to rectify unintended rental overcharges with a refund. In one example, tenants sometimes pay their rent well in advance. To state that an approved participant is not able to rectify any rent overcharged by issuing a refund does not acknowledge this possible circumstance.

  In another example, without the capacity to refund or credit unintentional overcharges, Approved Participants cannot remain compliant in cases where a marker rent valuation (MRV) undertaken within the allowable post 'available for rent anniversary' (AFRA) period of 13 weeks results in a decreased valuation requiring a rent reduction. An immediate rent reduction will still find them afoul of the 80% rule for the period between the MRV finding and the AFRA date.

- Regulations should allow for MRV's to be undertaken in years when it is not required (other than years 5 and 8) when there are substantial changes to the dwelling that warrant a new valuation. For example, if an NRAS dwelling is converted from an unfurnished to a furnished dwelling in Year 3, a new MRV should be allowable to reflect this substantial alteration. Under the current interpretation of the Regulations, an investor could not realise any benefit from this significant improvement in the property until year 5 (in this example) when the required MRV is undertaken.

  As NAHP has noted in previous submissions, changing market dynamics in communities with declining rental markets have made it difficult for Approved Participants/investors to attract tenants to their NRAS properties without making alterations in keeping with similar dwellings in the private rental market. Faced with extended vacancies and possible loss of their NRAS incentive, owners are making market-appropriate improvements to safeguard their investment. Allowing for additional MRVs *when warranted* would make the Regulations more responsive to market fluctuations and recognise investor risk as participants in the Scheme.

- Regulation 18 (1A)(2) states, "*A valuer preparing a valuation under subregulation (1) must assess the market value rent of an approved rental dwelling on the basis of the condition in which the dwelling is to be rented, including whether the dwelling will be rented fully or partially furnished*". When amenities such as internet services form part of the condition for which the dwelling will be rented, the valuer would be assessing the value of the dwelling against other properties with similar amenities. There is nothing in the Regulations that speaks to exclusions yet NRAS policy specifically excludes certain amenities. We do not think the Regulations extend to altering the criteria for what valuers consider in making their market rent valuation. This needs to be resolved.

- In reviewing the Regulations as a whole, it is evident that while there are a significant number of regulations that specify Approved Participants' responsibilities under the Scheme, there is no service level agreement between NRAS Approved Participants and the Commonwealth that delineates the Commonwealth's responsibilities under the Scheme. Approved Participants have a simple letter awarding them incentives but unlike any other commercial arrangement, there is no legal contract or service agreement between the two participating parties. This situation leaves Approved Participants in a vulnerable position without recourse when the Commonwealth does not deliver NRAS incentives in an anticipated and/or timely manner. NAHP and the Federation members recommend that the Regulations include a direction that the Commonwealth develop a service agreement that would clearly articulate the Commonwealth's responsibilities and delivery requirements with performance benchmarks as well as the requirements that govern NRAS Approved Participants' participation.

- The issue of retrospectivity has been raised continually with DSS since 2014 following the legislative changes that affected incentives from NRAS year 2013/14 onwards. The Department has recognised and acknowledged that in the years prior to the legislative changes, Approved Participants were directed and advised by DSS to operate NRAS in accordance with certain processes and DSS's interpretations of the legislation. Approved Participants submitted claims consistent with DSS direction and advice; claims were processed and approved; and incentive payments were made.

  DSS has stated on a number of occasions that they may pursue action to demand repayment of incentives issued prior to the legislative and regulatory changes in 2013/14, retrospectively applying current regulations to past actions. It is our firm position that Approved Participants and their investors are not liable for alleged non-compliance resulting from a review of current legislation and a new interpretation of compliance based on the current regulations. A demand for repayment would cause a significant financial loss to Approved Participants and investors and would likely result in investors resorting to legal means to seek recompense from the Government for this loss.

  NAHP has obtained legal advice on this and other regulatory concerns from Neumann & Turnour, lawyers with extensive experience on NRAS matters. To remedy the retrospectivity issue and provide certainty to Approved Participants and investors that they will not be pursued in the future for these repayments, Neumann & Turnour proposed an amendment to the regulations. The amendment states that, in respect to all NRAS years prior to the 2013/14 NRAS year, any assessment by the DSS Secretary is deemed to be made in compliance with the requirements of NRAS. This means prior decisions to issue a partial payment or to not issue payment (or reassessments) will stand. The only exception would be those assessments which have been, at the date of this amendment or thereafter, objected to by the Approved Participant.

  A copy of this advice is attached. The relevant portions on retrospectivity are on pages 4, 11-15.

- Without a clear guarantee that DSS will not retrospectivity review and reassess past claims, NAHP and Federation members are concerned that there is no regulatory definition concerning income for eligibility purposes. The Fact Sheet on this issue was published in September 2016 after requests from Approved Participants for some consistent advice. Prior to this time, Approved Participants were left to make their own determinations. Approved Participants do not want to be in the position of having past income eligibility determinations overturned by

new policies as has occurred in the past when updated Fact Sheets or Policy Guidelines reversed previous policies. This is a significant area of operation and concern for NRAS providers and NAHP and the Federation propose that DSS work with Approved Participants to develop appropriate regulations that reflect current practice and precedents established by other DSS programs.

- The current compliance procedure of auditing every Statement of Compliance (SOC) should be replaced with a risk-based system that focuses on reports of exception, examining claims where there is a change that may affect an incentive. The vast majority of claims do not change from year to year beyond standardised adjustments such as indexation. Rather than spend resources auditing each SOC, DSS should focus on incentives where data provided through the NRAS Portal has 'flagged' the claim as one where a reduced or nil incentive may be appropriate, e.g. extended vacancies past the 13 and/or 26 week period; non-compliant tenants, rent overcharges. This approach would allow DSS to focus on high risk cases, would expedite processing and is aligned with the ANAO audit recommendation to adopt a risk-based framework for compliance.

- Compliance with NRAS Regulations to immediately terminate tenants who are over-income for two consecutive years conflicts with jurisdictional Residential Tenancy Acts in respect to time requirements when giving notice to vacate. According to NRAS Regulation 17(3)(a), the Statement of Compliance lodged by an Approved Participant must include a statement that at all times during the year, any tenant or tenants of the dwelling were eligible tenants. In cases where there is a fixed tenancy agreement and the tenant's income has exceed the income threshold for the second consecutive year, the Approved Participant is required to issue a 'no cause' notice to vacate. This notice cannot be issued during the period of the fixed tenancy agreement and the first available date to issue the notice would be the day after the fixed term lease expires. According to the relevant RTA, the period of time to vacate can vary from 60 days to 26 weeks[1].

  Therefore, during the no cause notice period, the tenant will continue to reside in the NRAS dwelling, paying appropriate rent but will not be an eligible tenant. Consequently, the Approved Participant will *not* receive an NRAS incentive for the vacate notice period, which can be as long as 6 months.

  Approved Participants are bound by the notice to vacate regulations in their jurisdictions, a fact that is further enforced by Regulation 16 (1D)(2) that requires Approved Participants to comply at all times with the ' landlord, tenancy, building, and health and safety laws of the State or Territory and local government area in which the dwelling is located". This conflict between two NRAS Regulations and with RTA regulations must be resolved. It is a common situation and Approved Participants should not be penalised for being stuck between competing compliance regimes.

- The current interpretation of Regulation 19(3) does not allow an existing NRAS tenant to move to another NRAS dwelling without having to be assessed against the initial income eligibility threshold rather than the 25% above initial income limit as an existing tenant. Current interpretation requires that they be treated as a new tenant. Allowing tenants to move between NRAS properties as *existing* tenants could facilitate tenants moving to locations closer to a new job, new school, to a different child care facility, to a larger dwelling when a new child is born or to a smaller dwelling when a grown child leaves home.

[1] ACT requires 26 weeks for a no clause notice

In a similar vein, when a couple separates and one partner moves out, a new tenancy agreement is entered into that assess the new situation and the income of the remaining partner. The remaining partner is an existing tenant and should be assessed against the initial income plus 25%. However, the NRAS Portal will not accept or recognise the new agreement with an existing tenant that does not include the income of the departed partner. Perhaps this is just a Portal adjustment issue but NAHP and the Federation members have had to assess remaining partners as new tenants at the lower initial income level in order for the tenancy agreement to be accepted.

- The dates and period of assessment for determining income for eligible tenants in Regulation 19(2) does not allow for any time to process the application. The Regulation requires that the income assessed for eligibility be for the preceding 12 months ending on the day before the start day of the tenancy agreement. Tenancy managers need at least a month to notify the prospective tenant, obtain necessary documentation and process the application. For example, if a tenancy was to start on 1 November, the Regulations stipulate that the income to be assessed must be for the 12 months preceding that date, i.e. all income up to 30 October. This is neither practical nor feasible. The Regulation needs to be revised to factor in processing time for the application process.

  One option would be for the income documentation period to be 12 months preceding the date of agreement with the tenant to enter into a tenancy agreement on an NRAS dwelling. Another more convenient option would be to use any consecutive 12 month period within the previous 15 months prior to the start of the lease. In this way, the 12 month period could more easily be aligned with available evidence such as pay slips and monthly bank statements.

Question 2: What documentation should approved participants be required to provide to the Department to support the information obtained in relation to:

- an allocation (such as market rent valuations); and
- lodgement of the annual Statement of Compliance (such as rents charged, household income and occupancy records)?

- It is not uncommon for an MRV certificates to have two addresses, particularly if it is on a corner block. NAHP and Federation members recommend that as long as one of the addresses matches the address on record in the NRAS Portal, that the certificate be accepted as valid.

- In the same context as our comment under Question 1 re: review by exception rather an auditing each claim, Approved Participants should not have to re-enter documentation into the NRAS Portal that remains unchanged from year to year, e.g. lot numbers and street address. This is unnecessary paperwork that burdens both the Approved Participants and the NRAS team.

- NAHP and Federation members recommended more flexibility with providing all the documentation from tenants in situations where the missing documentation will not affect the tenant's eligibility. For example, often tenants who have multiple jobs during a year will have difficulty obtaining a pay slip or salary confirmation from one of their employers but a bank statement will substantiate the tenant's claim of the amount received. In another example, where the tenant's income is well under the income threshold, Approved

Participants contend that trying to retrieve the missing documentation is costly, may be unsuccessful and in the end will have no impact on tenant's eligibility.

- When providing vacancy documentation, NAHP members felt that providing tenancy agreements for the periods of occupancy was sufficient to document the periods when there was no tenancy agreement in place and hence the dwelling was vacant. Members did not think it was appropriate to provide tenancy ledgers as documentation since these can be confusing to interpret outside of the organisation and may include data that is irrelevant to substantiating the vacancy.

- To document situations where a tenant's income is over the eligibility threshold for one year, Approved Participants should provide an income calculation sheet as acceptable documentation.

- To document rent charged, a signed tenancy agreement or a letter advising of a rent change should be sufficient documentation.

- Federation members recommend that NRAS documentation requirements could be aligned with the Community Housing National Regulatory System (NRS) documentation requirements. The NRS requirements provide a framework for appropriate documentation that has been tested and in practice among community housing providers seeking similar tenant information. While acknowledging not all Approved Participants are community housing providers, for profit NRAS providers have extensive internal documentation requirements that would be consistent with NRS requirements.

Question 3: Are there circumstances under which the Department should consider allocating a dwelling even when the applicant has not met all of the conditions of reservation?

- As noted in the discussion paper, the current Regulations do not provide sufficient discretion to deal with changes in conditions or minor administrative errors, and is limited to three options for issuing an incentive: nil; proportional reduction; or revoking the allocation altogether. The option to pay the incentive in full is not available to the Delegate.

  In situations where there has been a clear unintentional error on the part of the Approved Participant, and the error has been satisfactorily corrected, the Approved Participant should be entitled to a full incentive payment. This should also apply when the error is rectified after the required date for compliance. Considering the massive amount of documentation provided through the NRAS Portal each year, coupled with complicated administrative procedures, it is likely that errors will occur, both by Approved Participants and DSS. Approved Participants and their investors should not be penalised for minor mistakes.

- NAHP sought legal advice from Neumann & Turnour on this issue of inflexibility. Several amendments were proposed that addressed inadvertent rent increases; rent exceeding certain conditions; recording errors in the Statements of Compliance; conflicts with local tenancy laws; and loss of incentive due to third party fraud or negligence. The relevant sections on this issue are detailed in the attached legal advice and can be found on pages 2-4, 6-10.

- When assessing the conditions that have not been met, consideration should be given to the rationale for the unmet condition and whether the allocation in its present form still meets the needs of the community for affordable housing. For example, an initial allocation specified a 3 bedroom unit but has changed to a 2 bedroom unit. However, there is a high demand in that location for 2 bedroom affordable units. In such a case, the Regulations should have the flexibility to approve that incentive in full.

- As this submission (and other NAHP submissions) has noted, NRAS Regulations make it nearly impossible for the Scheme to respond to rental market fluctuations and changing demographics that would enable NRAS to remain relevant and appropriate to the local needs for affordable housing. The significant time lapse between when NRAS applications were proposed, allocations approved, dwellings constructed and finally tenants accommodated means that the affordable housing need in a location may have shifted. The Regulations need to reflect this reality in order to target NRAS dwellings to the most appropriate communities, as well as reflect the object of NRAS to increase the supply of affordable housing and reduce rental costs for low and moderate income families.

Question 4: Under which circumstances should the Department consider issuing an incentive even when the approved participant has not met all of the conditions of allocation but issuing an incentive is still in the best interests of the Scheme?

- In instances where delays are caused by DSS delays that consequently impact on the Approved Participants capacity to comply in a timely manner, incentives should be issued in full. It is inappropriate for Approved Participants and investors to be penalised and have their incentives jeopardised for actions beyond their control, especially when the delays are caused by the same entity deciding on whether to issue an incentive. For example, long delays in approvals to transfer NRAS properties to another Approved Participant can cause the new NRAS incentive holder to miss compliance time frames pertaining to the newly acquired dwellings.

- There is much consternation about this policy among NAHP members, especially when a very short period of the continuous vacancy occurs in a new NRAS year resulting in nil incentive. For example, take a situation where a vacancy period of 28 weeks spans two NRAS Years with 27 weeks in the first year and 1 week in the second year. The Regulations dictate that this would result in nil incentive for two NRAS years. However, if that same 28 week vacancy occurred in the middle of an NRAS year, the nil incentive payment would only apply to one NRAS year. That the vacancy period straddles two NRAS years is a quirk of timing and APs should not be penalised for it. NAHP and the Federation do not agree with the current interpretation and application of the Regulations pertaining to extended vacancies that straddle two NRAS years, i.e. receiving nil incentive in both years. The Regulation needs to be revised to reject this interpretation and provide a proportional incentive for the period when the NRAS dwelling was occupied.

- A nil incentive decision should not be levied on Approved Participants when there is a vacancy that lasts longer than 26 weeks. Instead a proportional incentive should be applied. As noted elsewhere in this submission, rapidly changing rental markets in some areas, such as former mining communities, has resulted in long vacancy periods as Approved Participants and

investors strive to attract tenants in a depressed market. Other NRAS restrictions, such as limitations on adjusted MRVs even if substantial alternations have been made, hamper investors' efforts to adjust to changing markets to attract tenants and avoid vacancies and the resulting penalties. NAHP and the Federation support a proportional incentive for all vacancies longer than 13 weeks, retaining the current provision of a full incentive for vacancies of 13 weeks or less.

- When determining the vacancy period, NAHP and Federation members contend that the period an NRAS dwelling is 'unavailable' due to major repairs or refurbishment, should not be counted as part of the vacant period and therefore not subject to any reduction in the incentive.

- NAHP and the Federation has recommended elsewhere in this submission that Approved Participants be allowed to rectify unintentional rent overcharges that exceed the 80% of market rent by providing a refund or credit to the tenant. By providing a refund or credit, the Approved Participant would be entitled to a full incentive. Under current Regulations, an Approved Participant in this situation would receive nil incentive unless the Delegate under Regulation 28(2)(d) uses his/her discretion and provides a proportional incentive. Our first preference is for a *full incentive* to be issued as the error has been rectified and the tenant compensated to a position of no disadvantage. If that revision cannot be accommodated, NAHP and the Federation support a proportional incentive be paid as a matter of course and not subject to a case by case decision by the Delegate.

Question 5: While there is no legal relationship between the Department and NRAS investors, how might the Department keep investors informed of the status of their dwelling and related incentive?

- In DSS documentation, there are clear time frames for Approved Participants to submit their Statements of Compliance but no time frames for DSS to complete the processing. It was a strongly held view by NAHP and Federation members that if the Approved Participants submit their Statements of Compliance in a timely fashion, that DSS should process them in a likewise timely fashion. NAHP members have reported that delays in processing and receiving incentives has had a significant impact on their investors, with some incurring financial penalties from the ATO for filing late returns or incurring additional accounting costs to amend tax returns.

  NAHP members reported that telling investors they were 'in the queue' was insufficient. Since there is nothing in writing that confirms an Approved Participant's status or progress in the assessment process, Approved Participants are left without any verification or documentation they can give to their investors to show they have meet the compliance requirements for which they have been contracted by the investor to undertake.

  Providing information to Approved Participants that is *specific* to their case that can be passed on to investors would be beneficial. For example, an estimate of the time it will take DSS to process that APs Statements of Compliance (SOC); written verification that all SOC's have been submitted and received; timely updates specific to the Approved Participant on which SOCs require further review and the reason for that review. Also updates when DSS misses an indicative completion date, with reasons for the delay, that can be passed on to investors.

- The Federation suggested that DSS establish an online 'portal' for investors that would provide them access to the status of their specific incentives throughout the claims process. Similar to the information that would be provided to Approved Participants specific to their portfolio of incentives, providing the information in this portal would allow an investor, using the dwelling identification number, to check the status of their investment. This could avert investor contacts to DSS and provide verification that the claims had been lodged and were being processed accordingly.

Question 6: Under what circumstances should the Secretary consider revoking an NRAS allocation?

- In cases where DSS can demonstrate there is fraudulent behaviour or a clear intent to deceive, NRAS allocations should be revoked. Revocation should also apply when an Approved Participant becomes insolvent.

Question 7: Under what circumstances should the Secretary consider offering withdrawn/revoked allocations to other existing approved participants?

- NAHP and Federation members were generally in favour of offering withdrawn or revoked allocations to existing Approved Participants depending on the process. Any process would have to re-allocate the allocations quickly to avoid disruptions to the tenants and breaches of the tenancy agreements. Depending on the quantum of allocations involved, consideration should be given to how the withdrawn allocations would be offered, i.e. as a group or if it was a large number, broken into several tranches to be taken up by different Approved Participants.

Question 8: What are the issues the Department should consider when determining if one dwelling can be substituted for another?

- Consideration on should be given to location when considering substitutions, i.e. changing the location to one where housing affordability is now a problem. Members have noted that the market dynamics have changed in some communities, such as mining communities, and areas where the demographics have shifted since the inception of NRAS. In the early days of the Scheme, States relied on demographic information to determine areas of high need for affordable housing that would be appropriate for NRAS dwellings. In some cases, that information was already a few years old. Since then, areas of disadvantage have dissipated in some communities and emerged in others, resulting in a glut of affordably priced rental housing in one community and not enough in other communities. In other areas, rents in the private market have significantly declined, making them comparable in price to NRAS properties and contributing towards the difficulties some Approved Participants are experiencing in securing tenants.

  By allowing incentives to be moved from an area with an oversupply of affordable housing to locations with a greater demand for affordable housing, the Scheme can better meet its

objectives of increasing the supply of affordable rental dwellings and reducing rental costs for low and moderate income households.

- Substitutions should also go beyond 'like for 'like' and consider the housing needs in the community. Similar to the changing demographic from one community to another noted above, there are also shifts in demographics within an existing community. For example, where affordable 3 bedroom houses were in short supply when NRAS commenced, the housing need has changed and the demand is now for 2 bedroom dwellings. Often State and local governments have current needs analysis data that DSS can use to inform their decision making. These changes in demand should be considered when determining substitutions.

- Substitutions should also be allowed for an NRAS allocation to be transferred to another similar dwelling of the same configuration and built at the same time, i.e. has already been lived in. In situations where an NRAS dwelling has been sold to an owner occupier, the only way to maintain the NRAS incentive is to find a similar dwelling in the same location that is brand new, which is often difficult if not impossible. For example, in year 4 a 2 bedroom unit in a multi-unit building is sold by the investor to an owner occupier. There is a similar 2 bedroom unit in the same building, of the same configuration and age where the NRAS incentive could be transferred. By allowing a transfer to a dwelling of equal value and characteristics, the NRAS incentive stays in the Scheme and provides an opportunity for a low or moderate income household to live in an affordable home.

- An issue was raised specific to substitutions that involved NRAS dwellings built under the 'shovel ready' round of allocations. There are special conditions attached to these dwellings that have proved to be administratively problematic both for DSS and Approved Participants. Under current practice, substitutions of these dwellings carry with them the special conditions of that shovel ready round. For example, priority was given to certain types of tenants specified in the allocation. NAHP and the Federation recommend that these conditions be removed and these dwellings be treated like NRAS dwellings allocated under the other funding rounds.

- The lengthy time frame for processing a substitution needs to be shortened to make the substitution more efficient and less administratively burdensome. Currently the process takes as long as 12 weeks. During that period a suitable dwelling is empty, ready to be tenanted. Investors are losing money on lost rent and eligible tenants are missing an opportunity to live in an affordable home. NAHP and the Federation recommend that a substitution take no longer than 4 weeks to process.