

# **Submission to the Australian Law Reform Commission Inquiry into Privacy**

**Tenants' Union of NSW**

**January 2007**

**Question 7-3** How should personal information on residential tenancy databases be regulated? For example, should it be regulated under the *Privacy Act*, by a binding code, or in some other way?

## **Background**

Residential tenancy databases (RTDs) have operated throughout Australia for almost 20 years. The operations of RTDs have had, and continue to have, very serious consequences for many tenants and their families. On one hand, these consequences can be considered in terms of persons' privacy. On the other hand, these consequences can be considered more specifically in terms of persons' housing. Being listed on an RTD can effectively exclude a person from rental housing. The prospect of being listed can discourage a person from asserting their rights as a tenant.

The Tenants' Union of NSW (TUNSW) believes that RTDs should be subject to both the general regime of privacy regulation provided by the Privacy Act 1988, and a strong, comprehensive regime of regulation that deals specifically with the housing consequences of RTDs.

## **The present regulation of RTDs**

Until recently, RTDs were unregulated. At present RTDs are subject to a number of regulatory regimes in different jurisdictions, such as the Privacy Act 1988 (Cth), the Residential Tenancies Act 1994 (Qld) and, indirectly, the Property, Stock and Business Agents Regulation 2003 (NSW). Each of these regimes, however, only partially regulates RTDs, and even when all these regimes are taken together, significant regulatory gaps remain. In particular, the housing consequences of RTDs remain poorly regulated.

The Privacy Act 1988, for example, does not make prescriptions as to many important aspects of RTDs' operations, such as the circumstances in which a person may be listed, the grounds on which a person may be listed, or the length of time for which a person may be listed. The Privacy Act's dispute resolution processes, administered by the Office of the Federal Privacy Commissioner, are generally not suited to individual disputes about RTD listings, which are often matters of urgency. Some RTDs may not be covered by the Privacy Act 1988 at all, because of an

exemption for small businesses that deal in personal information with persons' consent, and RTD users routinely extract 'consent' from applicants for tenancies.

The different regimes enacted by some States and the ACT apply, of course, in those respective States and that Territory only. Within each jurisdiction, these regimes are also partial and limited. In New South Wales, the rule of conduct relating to RTDs in the Property, Stock and Business Agents Regulation 2003 regulates agents' use of RTDs, and sets out certain standards for RTDs in order for agents to legitimately use them. The rule is deficient in a number of respects:

- The rule does not regulate the use of RTDs by persons who are not agents, such as landlords, boarding house owners, caravan park operators or community housing associations. It does not directly regulate RTDs themselves.
- The rule makes no provision for a person affected by an RTD listing to bring proceedings against either an agent or an RTD for a remedy.
- The standards for RTDs do not require the RTD to specify the reason for a listing, and listings without a specified reason are not subject to the timeframes otherwise provided in the rule.
- The standards also do not require that RTDs list only persons who were tenants under a tenancy agreement: for example, the RTD operator TICA lists all applicants who are checked against its database, regardless of whether they enter into a tenancy agreement – and the NSW Office of Fair Trading has confirmed that this practice does not contravene the standards.
- Finally, the NSW Office of Fair Trading is of the view that the standards apply only in relation to information listed after the commencement of the rule on 15 September 2004. This means that the NSW Office of Fair Trading considers that persons who were listed before 15 September 2004 are not entitled to free access to their listing, to have the listing corrected if it is inaccurate, or to have it removed according to the timeframes – even though the listing may remain on the RTD now.

### **Support for stronger regulation of RTDs**

The need for stronger regulation of RTDs, particularly in relation to their housing effects, is widely acknowledged. The following authorities have recently recommended stronger regulation for RTDs:

- The RTD Working Party of the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General – 'Report on Residential Tenancy Databases' and 'Regulation Impact Statement', March 2006
- The Office of the Federal Privacy Commissioner – 'Getting in on the Act: Review of the Private Sector Provisions of the Privacy Act 1988', March 2005
- The Victorian Law Reform Commission – 'Residential Tenancy Databases: Report', March 2006

Each of these authorities has made specific recommendations as to how RTDs should be regulated. In almost all relevant respects, the recommendations of the RTD Working Party and the Victorian Law Reform Commission are consistent: that is, each proposes that States and Territories implement RTD legislation that is nationally uniform or consistent. Each makes a series of recommendations for legislation that deals with the housing consequences of RTDs, by prescribing, requirements relating to, amongst other things, the circumstances in which persons may be listed, the grounds for listings, the accuracy of listings, timeframes, and dispute resolution by the relevant jurisdiction's Tenancy Tribunal.

The Privacy Commissioner, on the other hand, recommends that the Privacy Act 1988 be amended to provide for binding codes, and that such a code should be developed for RTDs. The Privacy Commissioner's recommendations do not indicate in detail what the content of the code should be; the TUNSW submits that it could include almost all of the elements recommended by the RTD Working Party and the Victorian Law Reform Commission. We are concerned, however, that a binding code under the Privacy Act may not make provision for dispute resolution by the Tenancy Tribunals of the States and Territories. These forums are relatively accessible, quick, affordable and experienced in housing matters, and could deal with RTD disputes and other disputes arising from a tenancy in the same proceedings. Whether RTD regulation is pursued through nationally uniform legislation by each State and Territory, or through a binding code under the Privacy Act 1988, we submit that it should provide dispute resolution through the State and Territory Tenancy Tribunals.

## **Recommendations**

The TUNSW supports national uniform RTD regulation along the lines recommended by the RTD Working Party. We have made specific recommendations, below, as to the elements of national uniform RTD regulation, which are in almost all respects consistent with those recommended by the RTD Working Party.

Alternatively, TUNSW would support national uniform RTD regulation in the form of a binding code under the Privacy Act 1988, provided that the code included the same elements.

**1. *Privacy Act 1988.*** Make regulations to prescribe RTDs as organisations for the purposes of the Act.

**2. *National uniform RTD regulation.*** Ensure that national uniform RTD regulation includes the following elements:

- *Information about RTDs.* Require users of RTDs to inform applicants:
  - that they use RTDs;
  - whether the applicant is listed on an RTD they use;

- how to contact the RTDs they use; and
  - how to dispute a listing.
- *Restrictions on listings.* Restrict the circumstances in which a person's information may be listed on an RTD to all of the following:
    - the person was a tenant under a residential tenancy agreement;
    - the tenancy has ended;
    - there are lawful grounds for listing the person; and
    - the RTD user has taken reasonable steps to inform the person of the proposed listing, and given them an opportunity to dispute the proposed listing.

Restrict the grounds for which a person's information may be listed on an RTD to the following:

- the relevant State or Territory Tenancy Tribunal has determined that the person owes money under a debt arising from the tenancy (being an amount in excess of the rental bond, if any);
  - the tenancy was terminated by the relevant State or Territory Tenancy Tribunal on the ground that the person was in breach of their tenancy agreement.
- *Accuracy.* Require that a listing on an RTD specify the ground for the listing and, where the ground is that the person owes money, specify the amount of the debt. Require RTDs to delete a listing if they are notified that the RTD user who made the listing cannot substantiate it.
- *Timeframes.* Provide that RTD users may not list a person later than 60 days after the end of the tenancy. Require RTD users to notify an RTD of payment of a debt within seven days. Require RTDs to deal listings according to the following timeframes:
    - listing on ground of debt, and the debt is paid within 3 months of the end of the tenancy – delete the listing immediately
    - listing on ground of debt, and the debt is paid later than 3 months after the end of the tenancy – amend the amount of the debt immediately, and delete the listing on the third anniversary of the end of the tenancy
    - other listing – delete the listing on the third anniversary of the end of the tenancy.
- *Old listings.* Require RTDs to delete any listings that were made before the enactment of the national uniform regulation and that do not comply with the requirements relating to grounds, accuracy or timeframes.

- *Dispute resolution.* Provide that persons may apply to the relevant State or Territory Tenancy Tribunal for the following orders:
  - that a proposed listing not be made
  - that an inaccurate or out of date listing be corrected or deleted
  - that an unlawful listing be deleted
  - that a lawful listing that causes undue hardship be deleted
  - that an RTD user or an RTD operator compensate a person where they have suffered loss due to an unlawful or inaccurate listing.