Tenants' Union of NSW
ABN 88 984 223 164

1 Buckingham St
Surry Hills NSW 2010
p 02 8117 3700 f 02 8117 3777
http://www.tenants.org.au
email: tunsw@clc.net.au

Focus on

Tenancy databases

Part of the NSW Office of Fair Trading's proposed residential tenancies law reform

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In its report on New South Wales residential tenancies law, the NSW Office of Fair Trading (OFT) proposes a new regime for the regulation of tenancy databases.

The proposed new regime would change the law in a number of respects. The most significant changes are that all tenancy database users and tenancy databases themselves would be covered, not just agents; and that the Consumer, Trader and Tenancy Tribunal would have the power to resolve disputes relating to tenancy databases.

The TU strongly supports these changes.

Tenancy databases have operated throughout Australia for almost 20 years. The operations of tenancy databases have had, and continue to have, very serious consequences for many tenants and their families. Being listed on a tenancy database 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 TU agrees with the analysis as to the shortcomings of the present regulation of tenancy databases. The need for stronger regulation of tenancy databases is widely acknowledged, including by agencies such as the Residential Tenancy Database Working Party of the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General,[1] the Office of the Federal Privacy Commissioner,[2] and the Victorian Law Reform Commission.[3]

The leading view on how to better regulate tenancy databases is that tenancy databases should be subject to the Commonwealth's general privacy legislation, as well as State- and Territory-based legislation that deals with tenancy databases specifically and provides for dispute resolution through the State- and Territory-

[1] Residential Tenancy Database Working Party of the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General (2006) 'Report on Residential Tenancy Databases' and (2006) 'Regulation Impact Statement'.

[2] Office of the Federal Privacy Commissioner (2005) 'Getting in on the Act: Review of the Private Sector Provisions of the Privacy Act 1988'.

[3] Victorian Law Reform Commission (2006) 'Residential Tenancy Databases: Report'.

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based Tribunals, such as the NSW Consumer, Trader and Tenancy Tribunal (the Tribunal). This is the view of the Residential Tenancy Database Working Party and the Victorian Law Reform Commission; it is also the view of the TU. The proposals are consistent with this leading view.

The proposals

98) Schedule 6A of the Property Stock and Business Agents Regulation 2003 be repealed. 99) the provisions of Schedule 6A be included in legislation and extended to anyone who lists a tenant on a tenancy database (this would include self-managing landlords and database operators as well as agents).

The TU strongly supports these proposals. The proposals would ensure that all users of tenancy databases are covered, and not agents only. In doing so it would close a significant loophole in the current regime that is being exploited by one tenancy databases operator, TICA Pty Ltd, which takes listings from persons other than agents where the listings would otherwise contravene the Schedule. The proposals would also provide the necessary legislative basis for an effective dispute resolution mechanism.

In relation to proposal 99, the relevant provisions of the Schedule are clauses 3, 4 and 5, which provide for certain restrictions and obligations on agents in their use of tenancy databases. These include restrictions as to the circumstances in which a listing may be made, and obligations to inform prospective tenants as to the possible use of their information in listings, and to inform the tenancy database when a listed person pays a debt.

The TU considers that these restrictions and obligations are, for the most part, appropriate and should be incorporated in the reformed regime.

We submit that the reformed regime might group these provisions together as 'requirements relating to tenancy database users.' The TU submits that the proposed new regime should include the following two requirements, in addition to the requirements from cl 3-5 of the Schedule:

- tenancy database users should be required not to use tenancy databases that do not comply with the requirements in relation to tenancy databases (these are the requirements proposed by proposal 100 and discussed by the TU, further below). This would help ensure that tenant database operators based outside New South Wales would comply with the requirements in order to do business with tenancy database users in New South Wales.
- where a tenancy database user finds that a prospective tenant is listed on a tenancy database, the tenancy database user should be required to inform the prospective tenant of the listing. There is no such requirement in the current regime. Such a requirement would inform tenants as to listings of which they might not otherwise be aware – it might even inform then as to debts of

which they are not aware – and help resolve problems. The Residential Tenancy Database Working Party also recommends such a requirement.

We also submit that the following amendments would make the requirements transferred from cl 3-5 of the Schedule clearer and more workable:

- disclosure, per cl 3, should be made before entering into a residential tenancy agreement, not 'at the time' of entering into an agreement.
- clause 4(2)(a)(i) and (ii) should be deleted, so that where a tenancy database user wants to list a tenant because they owe money for rent arrears or damage, the listing should be made per cl 4(2)(b). This would mean that listings relating to rent arrears and damage would be subject to the same proviso as the other listings: that is, that the reason is substantiated by a determination of the Tribunal. This would simplify the restrictions on listings. As a consequence of such an amendment, cl 4(3) should be amended to refer to cl 4(2)(b), and cl 4(4) should also be deleted.
- the reason for listing at cl 4(2)(c) should be 'termination by the Tribunal on the ground of breach by the tenant', not termination 'by order under section 64 of the Residential Tenancies Act 1987 on the grounds referred to in subsection (2) (a) (ii) or (b) of that section.'

100) in order to enable effective direct regulation of those requirements which rely on the actions of the database operator the new legislation impose on database operators obligations not to accept or retain on their system listings for non-permissible reasons, to provide tenants with free and prompt access to listings, to ensure the accuracy and completeness of listings, and to ensure that debts are listed as paid and listings are deleted within specified timeframes.

The TU strongly supports the proposal. It would correct a significant flaw in the current regulation of tenancy databases, which does not directly regulate tenancy databases. Clause 6 of the current Schedule sets out a number of requirements relating to tenancy databases and their operations, but the subject of the Schedule is still the agent (that is, the Schedule prohibits agents from dealing with tenancy databases that do not comply with the requirements).

The proposal comprises five elements, and we submit that they might be grouped together in the reformed regime as 'requirements relating to tenancy databases.' The first would require that tenancy databases 'not… accept or retain on their systems listings for non-permissible reasons'.

The TU considers that this sort of prohibition is a crucial part of the reformed regime, but we submit that it would be better expressed as applying to 'listings made in breach of the requirements relating to tenancy database users.' This would include not only listings for non-permissible reasons, but also listings during the tenancy and listings without proper notification.

The four other elements of the proposal – the requirements relating to access, accuracy, debts and timeframes – reflect the provisions at clause 6 of the Schedule.

The TU considers that these provisions are, for the most part, appropriate and should be incorporated in the reformed regime.

The TU submits that the requirements relating to tenancy databases should address a loophole in the current regime that allows tenancy databases to avoid the requirements relating to timeframes. The current regime provides for different timeframes depending on the stated reason for the listing. It assumes that the reason for a listing will be referred to in each listing – the unintended result is that if a listing does not refer to the reason for the listing, there is no applicable timeframe. This loophole is currently being exploited by the tenancy database operator TICA Pty Ltd.

The TU submits that the reformed regime should make clear that all requirements relating to tenancy databases apply in relation to all listings on a tenancy database, including those that were made before the commencement of the reformed regime. This is a matter that is raised in the OFT analysis, and reflected in proposal 101, which would allow the Tribunal to make orders in relation to these listings. We submit that, for purposes of clarity, the reformed regime should provide:

- where a listing was made before the commencement of the reformed regime, and it was made in a way that is inconsistent with the requirements relating to tenancy database users, the tenancy database must delete the listing.
- where a listing was made before the commencement of the reformed regime, and it was made in a way that is consistent with the provisions relating to tenancy database users, the listing may remain on the tenancy database, subject to the other requirements relating to tenancy databases.
- upon commencement of the reformed regime, tenancy database operators must conduct an audit of their databases and delete any non-conforming listings.

We agree with the analysis that to make such a provision would not be to legislate with retrospective effect, and that the tenancy database users who made those old listings would not be liable for any penalty. It would merely mean that old listings that do not now measure up are deleted.

101) the Consumer, Trader and Tenancy Tribunal be given jurisdiction to hear claims regarding any breaches of legislation relating to tenancy databases, and to order the amendment of past database listings.

The TU strongly supports the proposal. It would correct a significant flaw in the current regulation of tenancy databases, which makes no provision for the effective resolution of disputes. The proposal would allow disputes relating to tenancy databases to be heard and determined.

The TU agrees with the statement in the analysis that the Tribunal should be able to make any person, including an agent or database operator, the subject of an order. The TU submits that the Tribunal should be able to make any of the following orders:

- that a proposed listing not be made

- that an unlawful listing be deleted
- that an inaccurate or out of date listing be corrected or deleted
- that an old listing (that is, a listing made before the commencement of the proposed regime) that does not comply with the provisions of the reformed regime be deleted
- that a lawful listing that causes undue hardship be deleted
- that a tenancy database user or a tenancy database operator compensate a person where the person has suffered loss due to an unlawful or inaccurate listing.