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11th December 2009

National Regulation of Residential Tenancy Databases
Residential Tenancies Authority
GPO Box 390
BRISBANE QLD 4001

Dear National Working Group,

Re: Residential Tenancy Databases – Model Provisions

The Tenants' Union of Tasmania thank you for the opportunity to comment upon the model provisions associated with residential tenancy databases.

If you need further information or clarification please feel free to call Tracey Chapman or Sandy Duncanson on 03 6223 2591 or email me (Tracey_Chapman@clc.net.au).

Yours Sincerely,

Tracey Chapman
Residential Tenancy Act Review Coordinator
Tenants' Union of Tasmania

Tenants' Union of Tasmania

Submission on Residential Tenancy Databases Model Provisions

December 2009

TENANTS' UNION OF TASMANIA SUBMISSION

National Regulation of Residential Tenancy Databases
Submission to the National Working Group Representing the Ministerial Council on Consumer Affairs (MCCA)
December 2009

This is a submission by the Tenants' Union of Tasmania Inc. in response to the draft model provisions on residential tenancy databases, which have been prepared by the Ministerial Council on Consumer Affairs for national consultation.

The Tenants' Union of Tasmania is pleased to offer input into the new proposed model provisions. Please note that rather than follow the discussion questions outlined in the explanatory paper, this submission has used a structure that outlines our position section by section.

1. Outline of the Role of the Tenants' Union of Tasmania

The Tenants' Union of Tasmania Inc. (TUT) is a not for profit organisation representing residential tenants in Tasmania. We operate as a Community Legal Centre funded largely by the Tasmanian Department of Health and Human Services and the Commonwealth Attorney-General Department.
The TUT works to protect the interests and rights of tenants and:

- Seeks to improve conditions in rental housing in Tasmania so that accommodation meets acceptable community standards;
- Raises awareness within the community about tenancy issues; and
- Promotes legislative change to improve conditions for tenants.

The TUT has extensive contact with tenants through its Telephone Advice Line, Drop-In Service and Legal Representation and therefore has intimate knowledge of the conditions confronting tenants in Tasmania.

2. Introduction

The TUT does not support the use of tenancy databases as they are an arbitrary mechanism utilised by lessors and agents that tend to perpetuate disadvantage and inequality, affecting the most vulnerable and disadvantaged members of our community with the ultimate result of denial of a basic need, housing. They are difficult to monitor and regulate and they perpetuate the ever-present imbalance in the relationship between a tenant and a lessor and lessor's agent. In practice, the TUT would postulate a prohibition on the use of tenancy databases. However, we acknowledge that while tenancy databases are not widely used in Tasmania, the use has become extremely prevalent in other Australian states, particularly New South Wales, Queensland and Victoria and is adversely affecting the housing opportunities of tenants in those jurisdictions, thus giving rise to the need to implement law reform.

Therefore, without detracting from our previous position in seeking a prohibition, the TUT supports the approach of all Australian jurisdictions adopting uniform provisions, as this provides a cohesive, collaborative

approach to the use of databases throughout Australia. We also support the use of uniform legislation to address the ever-emergent issue of Residential Tenancy Databases (RTDs) as it provides greater and stringent regulation of database operators who may be difficult to regulate due to operation in multiple jurisdictions.

The TUT believes that uniform legislation is imperative in regulating the use of databases, as this legislation can operate to fill in the gaps where privacy legislation is unable to do so. The *Privacy Act 1988* (Cth) contains high-level principles relating to the use of personal information. While privacy legislation can operate to regulate the collection, retention, use and disclosure of personal information, it is unable to regulate the acts and practices to be used by organisations in meeting their information handling requirements. The amendments to the *Privacy Act* in 2007 extended the application of the Privacy Act to all residential tenancy databases and these provided further regulation of database operators to fulfill requirements arising under the *Privacy Act* in the use and dissemination of a tenant's personal information.

However, the development and implementation of uniform legislation in addition to privacy legislation is of fundamental importance in three respects. Firstly, there are exemptions from the privacy legislation in some circumstances, for example, real estate agents may not be covered by privacy legislation because they are considered to be a small business, that is they have an annual turnover of $3 million or less. Secondly, there are issues with enforceability for breaches of privacy legislation whereas uniform legislation can provide greater enforcement through the creation of offences for breaches of provisions. Thirdly, privacy legislation may only provide limited protections as tenants quite regularly consent to the use and retention of their personal details upon application for prospective rental properties. Uniform legislation can provide greater regulation of tenancy databases as it can regulate the circumstances in which information may be given to a database operator in the first instance, separate and distinct from any prior consent that may have been given.

3. Position of the Tenants' Union on Residential Tenancy Databases in Tasmania

Overview

While the TUT recognises the need to introduce legislation addressing the use of tenancy databases, we have overriding concerns with the current model legislation. One of our primary concerns is the arbitrary nature of the provisions. A tenant can be listed on a database at the discretion of a lessor or their agent, obviously in compliance with the listing requirements. However, a tenant can be listed even though a court or tribunal order is not in place allowing for the listing. This has significant ramifications for procedural fairness and natural justice, as a tenant can be listed without the need for any evidentiary proof on the part of the lessor and/or their agent. Therefore, the model provisions as they currently stand place the onus on the tenant to actually dispute a proposed listing.

The TUT would be seeking the requirement that a lessor/owner can only list the details of a tenant on a database after a court order allowing for the listing. This is a matter of procedural fairness to a tenant, who would then be provided the opportunity to appear before a court or tribunal to put their case forward and the court can make an impartial decision premised upon the evidence presented by both parties. Alternatively, we advocate that listings only be permitted where there is a court order in place against the tenant for breach of the residential tenancy agreement and the tenant has not complied with the said order.

In this regard, the TUT submits that the model legislative provisions fall significantly short of achieving the policy objectives enunciated. The policy objective of the reforms have been identified as addressing the risks to tenancy applicants by ensuring RTDs are not used unfairly or inappropriately, while maintaining the role of RTDs as a legitimate risk minimisation tool. The reforms do not reach an effective equilibrium between the competing interests of the parties involved as a person can be listed on a database and the onus remains on the tenant to undertake dispute resolution processes and then apply to a court or tribunal if this dispute resolution process is unsuccessful. It is our submission that the legislation is increasingly obsequious to the rights and interests of the property owners and real estate agents, as opposed to the rights and interests of the tenant. This balance is unacceptable to the TUT as the only result that may follow is that a vulnerable tenant will be unable to find adequate housing and therefore may be thrust into a market where the housing or shelter is substandard, or indeed unavailable. The legislation should reflect the real identified interests of the parties – the need for housing of the tenant and the right of risk minimisation of the owner. The tenant needs housing, whereas it must be borne in mind that the owner still has legal recourse to pursue a tenant for legal action independent from the tenancy database.

We also have several other overriding concerns that we will note during the course of this paper and these relate to the following:

- The enforceability of breaches of the provisions of the model legislation
- The provisions of the legislation need to be clearer and stipulate more stringent obligations on the part of lessors, agents and database operators
- The provisions need to be tighter in general otherwise database operators such as TICA can exploit loopholes in the legislation, as they have done so in the past.

4. DETAILED COMMENTS

4.1 Definitions – section 457

We are concerned that the operational ambit of the term "listing" is too narrow upon construction. It appears upon interpretation of the definition that the use of the word "enter" limits the operation of the provisions to the requirement that the model provisions would have limited effect if the personal information of the tenant is used merely for conducting enquiries. A lessor or their agent may give personal information to a database operator to conduct enquires in processing the application of a tenant and in deciding the outcome of such an application. We have been advised that TICA has an enquiries database which may be utilised by real estate agents and/or property owners upon subscribing to the service.

We submit that the definition of "listing" needs to be amended to allow for these circumstances, as the wording at present would allow real estate agents and database operators to exploit this loophole in the legislative provisions. It is our submission that this problem could be addressed in a number of ways. Firstly, an additional provision could be added in the legislation regulating the use of information that is used for the purposes of enquiries on the part of owners and agents. Secondly, the definition of listing could be broadened to encompass the above reservations. The definition could be expressed so as to include giving information to a database operator, whether or not the purpose of obtaining the information was entry onto the database.

We are also concerned about the definition of the term "out of date", as a particularly narrow interpretation could be adopted upon construction. The legislation needs to be worded very carefully, with the underlying expectation or assumption that if terms are not broad enough the court or tribunal could adopt and implement a narrow interpretation of particular provisions. Our concern with the definition of out of date is two fold. Firstly, it imposes a limitation upon the kind of matters that can be out of date. For example, when monetary debts are paid within a certain timeframe then a listing can become out of date. This means that only monetary debts can be removed from the database if a tenant pays within the specified time limits but a tenant can be listed for matters that do not relate to monetary breaches. Secondly, we are concerned about the three-month time limit that is imposed. This could mean that upon a narrow interpretation of this definition if a tenant pays a debt after this time period they could remain listed. We submit that the legislation should specifically and clearly provide that once a tenant has paid a debt owing their name should be removed from the database within seven days.

4.2 Part 2 – Restrictions on Listing s 459 and 460

The TUT is concerned that the provisions relating to restrictions on listings are still too broad in nature. A person may be listed on a tenancy databases if they were named as a tenant on a residential tenancy agreement that has ended, and the person has breached the agreement, and because of the breach either the person owes the lessor an amount that is more than the rental bond or the tribunal has made an order terminating the residential tenancy agreement. It is our concern that in cases of joint tenancies, though joint and several liability applies, this principle may be exploited by real estate agents.

The TUT also is concerned about the operation of section 459 (c) (i) as a person may be listed if they owe money that exceeds the total amount of bond. This allows a person to be subject to a listing if the owner merely alleges that a tenant owes money that exceeds the total amount of bond held, as there is no evidentiary burden to be satisfied by the owner. This section is open to severe exploitation by lessors and their agents. It is also our concern that the ability of a lessor/agent to list a person for these perceived breaches is a breach of the principles of natural justice and procedural fairness. We recommend that as above-mentioned the imposition of the requirement that the listing person have a court order before a person can be listed on a tenancy database.

The TUT also submits that section 459 (c) (ii) is too broad in nature by allowing a person to be listed for a breach of a tenancy agreement and the tribunal then terminates the agreement based on this breach. It is our concern that once the tribunal has terminated the tenancy agreement the interest of the owner in the tenant has ended thereafter and the need to list the tenant for such a breach is unnecessary, particularly where there is no money alleged to be owing. The operation of this provision is merely fostering a culture whereby tenants can be subject to listings for breach of tenancy agreements and it is our submissions that this is unfair and unnecessary. We recommend that if this provision remains in force further clarification needs to be provided, relating to the exact breaches that a tenant can be listed for. For example at present in most jurisdictions there is little discretion on the part of courts and tribunals in relation to terminating a tenancy once certain formalities have been adopted, however, this does not necessarily justify placing a tenant on a tenancy database.

We also have concerns with the operation of section 460 of the model provisions. While we welcome the imposition of more stringent obligations upon a lessor/agent we believe that the current limitations are artificial and open to exploitation by agents. Also, while the provisions create an obligation on an agent to take reasonable steps to disclose the information that may be listed on a database, it does not stipulate any requirements on what could constitute reasonable steps. This therefore creates a minimal threshold requirement upon agents before listing a person. Section 460 (2) states that subsection 1 does not apply if the lessor or lessor's agent cannot locate the person after making reasonable enquiries. This detracts from the significance of subsection 1 and could potentially limit the effectiveness of the requirements enunciated in subsection 1. This is further exacerbated by the

use of the term "reasonable enquiries" which is relatively artificial, creating only minimal obligations upon the lessor or agent. This is compounded again by the lack of penalties attached to the section for potential breaches.

The TUT also has concerns with section 460 (1) (b) as it only provides that a lessor or agent give the person a reasonable opportunity to review the personal information. The TUT recommends the imposition of a timeframe in this section before a lessor or agent can list a person. Further, while these provisions create minimal obligations upon the lessor and the agent to disclose information to a tenant before listing, there is nothing in the provisions that prohibits the lessor or agent from listing a tenant. Upon a strict interpretation of these provisions the obligation of the lessor and/or agent is to disclose the information to the tenant, provide a reasonable opportunity to review the information but assuming this has been complied with the lessor or agent can then list the person. In these circumstances the TUT recommends that if a tenant disputes the potential listing the lessor or agent should be prohibited from listing the person until the matter has been resolved by a court or tribunal.

In addition to the above concerns, we submit that a significant shortfall of the listing provisions is the apparent lack of regulation of database operators. While sections 459 and 460 attempt to operate to impose obligations on a lessor or lessor's agent, database operators are significantly neglected in these provisions. Therefore, while the provisions operate to limit and prohibit a lessor or agent to list a person in certain defined circumstances the prohibition prima facie does not apply to database operators. This shortfall leaves a loophole in the legislation that would inevitably be exploited by database operators. This in conjunction with the minimal threshold obligations imposed on the lessor or agent in the first place effectively renders the operation of the provisions futile.

We recommend that the wording of section 459 and 460 should be altered from "a lessor or lessor's agent must not list personal information…." to "a person must not list" or "personal information must not be listed on a residential tenancy database unless…" If this approach were adopted the ambit of these sections would be significantly widened to encompass database operators.

While there are no penalties attached to this section, presumably leaving this to the discretion of individual jurisdictions, the TUT strongly advocates for the necessity for uniform penalty provisions in this section. The penalties imposed in the legislation need to be uniform in nature; otherwise legal anomalies could arise where database operators operate in multiple jurisdictions and would then be subject to different penalties. We, therefore, recommend that the model legislation contain substantial penalty provisions.

4.3 Part 3 - Disputes about listing

The TUT has concerns that the obligations and onus placed upon the person listed are too onerous, given the relatively low threshold of obligations that are placed upon lessor's and their agents. Section 461 imposes an obligation upon

a listed person to undertake dispute resolution with the lessor before making an application to the tribunal. It is our submission that this section only operates to provide a deterrent for persons seeking to dispute the listing. As well as acting as a deterrent this section perpetuates the inequitable relationship between the lessor and the tenant. This process of dispute resolution can occur through the presence of a third person, and the provisions provide for an example of a conciliator as a third person. However, this gives rise to the question of financial costs associated with the undertaking of dispute resolution. If the provisions seek to introduce dispute resolution then this needs to occur in a formal setting, for example, before the matter is heard by the tribunal a requirement the parties undergo court conciliation would be more apt, than transferring the obligation and responsibility onto the tenant.

Another major concern with section 461 of the model provisions is that while a tenant disputes the listing of a tenant on a database, upon a strict interpretation of the wording of the section there is nothing in place to prevent a lessor or agent from listing a tenant while it is disputed. It is our submission that the legislation should operate to prohibit a lessor or agent from listing a person once the proposed listing is disputed.

We are also concerned with the wording of section 461 (5) of the provisions; again they are worded to the effect that they may operate as a deterrent from a person undertaking dispute resolution. Section 464 (5) specifically states, "*Despite section 462, 463 or 464, the person may apply for an order under that section in relation to the claim only if –"* then it proceeds to enunciate the circumstances in which a person may apply to the tribunal. It is our submission that the use of the word "only if" acts as a deterrent and attempts to limit the circumstances in which a person may appeal to the tribunal. It is unjust to purportedly limit the circumstances in which a tenant may appeal to a court or tribunal, given that there is little to regulate the tenant from being listed in the first instance. If the regulations are proposing to allow a lessor or agent to list a person without an order of a tribunal, then the dispute resolution process needs to be strengthened to allow for this to occur.

We also have concerns in relation to section 461 (5) (a), (b) and (c), as it places the tenant in a position where the onus is upon them to undertake dispute resolution before seeking recourse in the tribunal. This is unreasonable as the tenant may be in a vulnerable position and the operation of this section operates to impose obligations for the tenant to negotiate resolution of the matter before the tribunal will intervene. This creates a volatile situation as tenants may be placed under duress to resolve matters that do not necessarily benefit them.

In relation to section 463 of the model provisions we have concerns about the imposition of a six-month timeframe after the tenant becomes aware of the listing. It is our submission that this six-month time frame is unreasonable in limiting the ability of the tenant to make a claim disputing the listing. This provision is indicative that the model provisions are obsequious to the rights of the lessors and their agents, rather than protecting the rights of the tenant. This three month limitation effectively acts as a barrier to natural justice, if a

tenant does not dispute the listing within six months then they are subject to a listing for three years, which may have actually been unjust in the first instance.

4.4 Part 4 – Other obligations

In relation to section 464G of the model provisions while we welcome the requirement that the database operator remove a listing, we recommend that given that databases are based on quick access to information such a listing should be removed within seven days as opposed to fourteen days contained in the section.

Significantly, we are concerned with the operation of section 464F, as difficulties could arise when a tenant is unable to make contact with the lessor and/or their agent. If this occurs there is no recourse for a tenant to have their name removed. We recommend that this section needs to operate to potentially allow a person to provide written notice to a database operator to remove the listing, particularly if the person is in possession of evidence that shows that the original information was inaccurate, incomplete, ambiguous or out of date.

We also have concerns that section 464H does not provide stringent regulation of the fees that may be charged by database operators. While section 464H (1) states that a lessor or lessor's agent provide personal information without fee, section 464 (3) states that if a database operator is going to charge a fee for providing information to the tenant then the fee must not be excessive. It is our submission that this is open to exploitation by database operators as the use of the word "excessive" provides minimal regulation of fees associated with obtaining personal information. It is our submission that the database operator should be legally obligated to provide this information free of charge. It is unreasonable for tenants to be charged fees for obtaining their own personal information.

In regard to section 464I of the model provisions we submit that a three year time frame for a tenant to be listed on a database is too long. We recommend that this time frame should be reduced to one year. It is unreasonable that a tenant could face the potentiality of difficulties finding housing for a period of three years.

In relation to removal of listings we recommend that a significant shortfall of the model provisions is the lack of regulation for breaches that have been remedied. In the model provisions there is no requirement that a listing be removed if the breach is remedied. We recommend that if a person remedies a particular breach that instigated the initial listing the listing should be required to be removed. Alternatively, we recommend at a minimum the information on the database should be updated to show that the breach has been remedied.

We also submit that the model provisions need to allow for current tenants who are listed on a database to dispute those listings. The legislation does not necessarily have to be retrospective in nature, but rather facilitate a

framework for tenants who were listed prior to the enactment of the legislation to dispute their listing.

5. Conclusion

The Ministerial Council on Consumer Affairs has indicated that the draft model provisions on tenancy databases confer minimum rights on tenants or potential tenants, and impose minimal obligations and limitations on lessors, agents, and database operators. Obviously this is with a view that each jurisdiction can bolster these rights and obligations accordingly. However, if these provisions are to be used as uniform model provisions the TUT has significant concerns that they do not balance the competing interests of the parties.

First and foremost, we are concerned that the model provisions fall significantly short in providing adequate and clear protections for the rights of tenants. The provisions do not reach equilibrium between the identified interests of the parties concerned, rather adopting a balance that is obsequious to the rights and interests of the lessors and their agents, to the detriment of the tenant. This is apparent in a number of respects, including rights and obligations of the lessor and/or agent and the tenant, enforcement provisions, fees that may be charged and fundamentally the lack of court intervention.

It is our position that the model provisions do not place stringent obligations upon a lessor and their agent, or database operators. While certain obligations are placed upon a lessor or their agent to disclose certain information to a tenant and allow time to review this information, there is no prohibition on listing a tenant if the tenant disputes the proposed listing. This is an important shortfall in the provisions creating a loophole for exploitation by lessor and agents, and database operators. The obligations do not go far enough to bind database operators, while imposing minimal obligations upon lessors and agents to disclose certain information; there is nothing to prohibit a database operator from entering information on databases that does not comply with the provisions. There are no provisions binding a database operator to even make "reasonable enquiries."

It is our position that the obligations placed upon the tenant to undertake dispute resolution steps before making an application to a court or tribunal operates as a deterrent and disincentive for tenants to undertake dispute resolution. Further, a limitation is placed upon dispute resolution rendering a tenant vulnerable who may not have disputed in the six months after discovering the listing and this means a tenant can remain listed even though the original listing may have been inaccurate, unjust or ambiguous.

We are also concerned that the model provisions do not cover situations where the database may be utilised not for the purpose of entering information but for the purpose of making enquiries. Further, there is no obligation imposed upon a database operator to remove a listing, other than a monetary listing. We recommend that this needs to be amended so as to allow

for tenants to remedy breaches and once this occurs the listing should be removed.

We are also concerned with the lack of penalties relating to some provisions. While we understand that this may have been omitted for the discretion of individual jurisdictions it is our position that a comprehensive framework needs to exist for the effective enforcement of the provisions. If this does not occur then the database operator may be subject to the operation of penalties in multiple jurisdictions. It is our position that penalties need to be attached to the obligations on the lessor and agent disclosure requirements contained in section 460. This creates an incentive for compliance with the requirements contained therein. The TUT, in this regard, would advocate for the model provisions to contain substantial penalties.

It is our position that the provisions relating to fees are unacceptable. As the provisions currently stand a lessor's agent is unable to impose fees for providing information to a tenant. However, there is no prohibition or even restriction placed upon a database operator in the charging of fees. The provisions merely prevent a database operator from charging "excessive fees". The provisions do not provide any clarification as to what would constitute excessive fees, therefore providing little regulation of charging of fees and this lack of regulation would be exploited by database operators. This lack of regulation is also exacerbated by the lack of penalties attached to this provision. It is our position that substantial penalties need to be in place, particularly in relation to database operators.

The TUT also recommends inclusion in the provisions to allow existing tenants to dispute listings that may be unjustified or incorrect. The provisions do not necessarily have to be retrospective in nature, but could expound defined circumstances in which a tenant can apply to a court or tribunal. Another major concern that we have is in relation to some of the timeframes. It is our position that the timeframes binding database operators should be reduced to seven days as opposed to fourteen days.

While we have previously stated that we do not support the use of tenancy databases, we recognise that they are utilised widely in other Australian states. In this regard, if the practice of listing tenants on databases were to gain momentum in Tasmania we would advocate for the requirement that a person not be listed on a database without a court order stipulating that this may occur. Alternatively, we would advocate for the listing of a person on a tenancy database if a tenant has failed to comply with the terms of a court order. The model provisions do not require a lessor or agent to apply to a court or tribunal for a listing, and we believe that this is a breach of natural justice and procedural fairness, as tenants could potentially be subject to listings without the lessor or agent having any evidence to substantiate their allegation, particularly in relation to alleged monetary debts in excess of the security deposit.

Therefore, the TUT has significant reservations about the present model provisions in addressing the policy objectives enunciated and in addressing the power imbalance between the relationship between the property owner/

lessor and the tenant. Overall, we would be advocating that if Tasmania were to adopt legislation regulating the use of databases that listings could not occur without an order from a tribunal or court. While we do recognise that the model provisions provide assistance in other Australian jurisdictions by imposing restrictions on listings, we would advocate for the abovementioned amendments to the model provisions.

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