NSW.ACT

SUBMISSION TO RESIDENTIAL TENANCY DATABASE WORKING PARTY

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Introduction to Uniting*Care NSW.ACT*

Uniting*Care NSW.ACT* is an agency of the NSW Synod of the Uniting Church in Australia. It has responsibility for assessing issues of public policy in which the Church has an interest and is the peak body for all community services, chaplaincy and social justice and advocacy activities of the Uniting Church in New South Wales. Our view of social justice is guided by the Christian scriptures, theological reflection, insights of social, political and economic analysis, the statements of the Synod and Assembly and our encounters with people and their life experiences in our work. Belief in the God who works for justice carries a further obligation to work for social and systemic reform to change the social conditions that produce injustice such as violence, homelessness, unemployment, discrimination, poverty and the unequal distribution of power. Uniting*Care* also bases its community service provision and its advocacy on the principles of access, equity, participation and support for human rights.

Uniting*Care NSW.ACT* provides a range of community services including aged care, child care, services for children and young people who are at risk and their families, disability support and tenants services. Comments provided in this submission are significantly based on information provided by the Western Sydney Tenants Service, (WESTS), an agency of Uniting*Care*. WESTS have been providing tenancy advice services in Western Sydney since 1990, and have direct experience in dealing with tenants adversely affected by the current operation of tenancy databases in NSW.

Terms of Reference

The Terms of Reference (TOR) of the Working Party are to:

- " investigate and report on the role and operation of residential tenancy databases (RTDs) and the extent of RTD use in Australia;

- examine the existing framework for regulating the use of RTDs, highlighting key issues relevant to tenants and other market participants such as RTD operators, real estate agents and landlords; and

- develop, where necessary, options for a nationally consistent framework",

Persons making a submission are encouraged to respond to the discussion questions, however the Issues Paper notes that "parties should not feel bound by these questions and general comment is welcome" (Ministerial Council on Consumer Affairs: 2003: 2-3).

Our comments address these TOR particularly as they relate to the impact of RTDs on tenants, with reference to the inadequacy of existing regulatory frameworks in protecting consumer rights, and ultimately in protecting the human right to housing.

Summary of key points

Residential tenancy databases and the listing practices of real estate agents and landlords, are of concern from a human rights perspective, particularly with regard to the right to housing and the right to privacy. By preventing socio-economically and otherwise disadvantaged people from accessing the private rental market, databases can directly lead to a vulnerable group becoming homeless. As databases make available personal information that identifies individuals to real estate agents and landlords, particularly information that may be inaccurate, they also present privacy concerns as do the listing practices of agents/ landlords. For example current tenancy application practices mean that a tenant may be listed on a database by a real estate agent without their knowledge, even under the National Privacy Principles.

An overview of key problems with the operation of databases is provided below. Matters covered include the lack of consistent national regulation of the reasons a tenant may be listed and duration of a listing, lack of procedures for ensuring that information listed is correct and for removing information that is not correct or out of date. There is also a lack of options for a tenant to prevent a listing being made, to dispute a listing once it has been made and to receive compensation for an unfair listing.

These problems reveal the urgent need for consistent national regulation of databases, should they continue to be allowed under law. Regulation should not only cover database operators, but also the listing practices of real estate agents and private landlords. Uniting*Care NSW.ACT* supports the comprehensive set of recommendations developed by the Tenants Union of NSW setting forth the ways in which the operation of databases and all users of databases should be regulated to offer adequate protections to tenants, (Attachment 1). However we concur with the latter that the preferred option is that the use and operation of such databases should be prohibited by the Commonwealth and State and Territory Governments. We base this conclusion on the proven potential of such databases to seriously breach the human rights of tenants.

Role and operation of RTDs and issues relevant to tenants

Overview of problems with current operation of databases

Tenancy databases have become a significant industry: it has been claimed that databases such as The Tenancy Information Centre Australia (TICA), which cover Australia, New Zealand and the United Kingdom, has over 200,000 tenants listed and that Rentcheck has tenant listings of 250,000- 350,000 (Tenants Union of NSW: 2000:3). The primary reason for the operation of databases is to reduce risk to landlords by screening prospective tenants to identify and screen out so-called 'problem tenants', as part of a tenancy application process. However Uniting*Care* is concerned that the current largely unregulated operation of tenancy databases has become a barrier to tenants, particularly the socio-economically disadvantaged, in satisfying the basic human right to housing. The Western Sydney Tenants Service, (WESTS), an agency of Uniting*Care,* report that in recent years residential tenancy databases have become a major obstacle for tenants in two major respects: firstly, as a barrier to low income persons and households gaining access to the residential rental market; and, secondly, as a form of intimidation to stop tenants seeking to enforce their rights as tenants.

Johnston (1999)[1] provides an overview of the problems associated with listing tenants on databases, identifying the key consumer problems as "transparency and accountability". The former relates to tenants not knowing that they are on a database, and the second to the "practice of accepting information supplied at face value and the process for correcting this (or deleting wrong data) requires a tenant to challenge a listing after the event" (Johnston: 1999: 51). Even under the National Privacy Principles, lack of awareness that they have been listed remains a problem for tenants (Ministerial Council on Consumer Affairs: 2003: 21).

Except in Queensland, there is also no control of the reasons for which tenants may be listed and these matters do not have to be proven in an independent Tribunal. For example TICA indicates on its website that a tenant may be listed if the agent believes that they have not complied with the Residential Tenancies Act, or have broken a tenancy agreement, however minor the breach. A tenant may also be listed if they are in rent arrears, even if the arrears is not the two weeks provided for in the NSW Residential Tenancies Act: arrears may be of only several days, for example. Tenants may thus be subject to listings for trivial, unproven breaches that it may be possible to resolve with the tenant, without resorting to a listing or threat of listing. Listings may also be unfair in the sense of vindictive or grudge listings (Boswell cited in Johnston: 1999: 51). Furthermore there is evidence that the threat of a listing may also be used to "exert undue market power over tenants", and to intimidate tenants to prevent them from entering into a dispute with a landlord or agent. Johnston lists a number of cases reported by Boswell, and this issue is also evident in Case Study Three, below, handled by the Western Sydney Tenants Service.

Problems also exist with the maintenance of databases, in terms of who is responsible for ensuring that information is accurate, the person supplying the information, usually an estate agent, or the database operator. Correcting inaccurate listings, ensuring that information can only be listed for a limited period of time, and removing information when it is no longer valid, for example in cases where a debt has been paid, are currently processes occurring at the discretion of the database operator. As the Ministerial Council on Consumer Affairs *Residential Tenancy Databases Issues Paper* notes, there is also confusion and inconsistency in regard to who is responsible for resolving disputes about listings (MCCA: 2003: 10). There is currently a lack of access to a timely independent process of appeal in regard to listings, that is also able to offer compensation and impose penalties for unfair listings, that may have breached the National Privacy Principles, for example. The processes of tenants obtaining access to listed information also vary, with TICA charging a rate of $5.45 per minute to provide information over the telephone.

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[1] Johnston's report, *Cash and Cowboys, Barriers for entry to private rental market by disadvantaged consumers*, provides useful material that would assist the Working Party to devise guidelines for the operation of tenancy databases that are transparent, accountable and provide meaningful redress for wronged consumers, applicable at both a State and Federal level. This report includes a review of tenancy databases, their practices and their impact on access to the private rental market by low income persons and households.

Tenancy databases and human rights

The Uniting Church supports the international human rights instruments as a means of benchmarking the responsibilities of government and sees them as having significant ethical content consistent with the Church's belief in the dignity of the human person, the equality of human beings, and the importance of families and community. We are thus concerned that the operation of tenant databases, particularly without adequate regulation, violate a number of human rights set out in the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

The Right to Housing and Protection of Family

Being listed on a database has a direct bearing on the capacity of individuals to obtain housing for themselves and their families, and can result in homelessness. The operation of databases thus violates Article 25.1 of the UDHR[2] and Article 11.1 of the ICESCR which include the right to housing in a set of basic human rights, together with food and clothing, as a right shared by everyone.

Article 23.1 of the ICCPR and Article 16.3 of the UDHR, state that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state". The operation of tenant databases, as they may prevent an individual from obtaining housing for herself and her family, represent a failure by the state to offer adequate protection to the family.

Right to Privacy and Protection of Reputation

Article 12 of the UDHR, states that "None shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

Tenant databases violate the right to privacy, since they list alleged information about an individual's renting history and make that individual clearly identifiable by name. This information is available to real estate agents and may also be available to landlords for a fee. Listed information may also be an attack on a tenant's 'honour and reputation', as database entries list alleged breaches of the Residential Tenancies Act, which in all jurisdictions apart from Queensland, do not have to be proven through an independent process, and thus may be untrue or trivial. These matters are listed for the purpose of indicating that the listed person is not a suitable person to obtain rental housing.

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[2] Article 25.1 of the UDHR states that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

Access to Independent & Impartial Tribunal

Article 10 of the UDHR states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him". It is argued in this submission that tenants in most states of Australia do not currently have access to a reasonable process of complaint and appeal with regard to the operation of tenant databases, including through the Office of the Federal Privacy Commissioner. As the consequences of being listed on a database are severe, the listing may not be true or accurate, and the process to correct and remove an inaccurate listing can be long and difficult, an adequate process should exist for tenants to dispute a listing before it is made and prevent it being made.

Databases as a cause of homelessness

Tenancy databases have the potential to exclude tenants from access to the private rental market, resulting in primary or secondary homelessness. The notion of primary homelessness "accords with the common sense assumption that homelessness is the same as 'rooflessness'. It includes all people without conventional accommodation, such as people living on the streets…or using cars or railway carriages for temporary shelter". Secondary homelessness "includes people who move from one form of temporary shelter to another", including 'all people staying in emergency or transitional accommodation under the SAAP [Supported Accommodation Assistance Program]….Secondary homelessness also includes people residing temporarily with other households because they have no accommodation of their own" (Chamberlain & Mackennzie: 2003: 1-2).

Research conducted by a tenant advocacy group in Queensland found that the operation of databases was a direct cause of homelessness in 36.4% of the homeless people recently surveyed. The survey of SAAP clients found that over one week, 76 of the 162 clients contacted said they were listed on a tenant database. "Of the 76 who reported they are listed on a tenant database, 59 said the listing was the primary cause of their homelessness" (Australian Consumers Association: 2004).

Such databases target the more disadvantaged sections of the rental market, who are at greater risk of homelessness, because this group are more likely to find themselves in situations of rental arrears and be considered a rental risk. Being listed on a database and the threat of such a listing, is likely to have a more adverse impact on tenants who may already be struggling to maintain private rental housing because of the cost. This group can experience difficulty obtaining rental housing in the first place in a competitive market in which employed, higher income tenants are preferred. Databases thus target a group who are already disadvantaged,[3] making access to the

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[3] Adkins et al place the development of databases to manage rental risk in the context of the failure of both government and the private market to meet the housing needs of the low-income. The Federal Government has chosen to channel funds into Commonwealth Rent Assistance (CRA), rather than into increased provision of social housing. This is despite the fact that many low-income tenants in the private market live in housing related poverty

rental market even more difficult. Having said this, the Case Studies below indicate that it is possible for any tenant, regardless of income or socio-economic status, to be listed for trivial, unreasonable and incorrect reasons, and to experience the adverse consequences that result.

Case Studies of Unfair Listings

Paragraph 4.2.1. of the MCCA *Residential Tenancy Databases Issues Paper* refers to the following as examples of unfair listings: "trivial, vexatious and discriminatory listings"; "listings being made or retained indefinitely (even after disputes have been resolved)"; and "intimidation of the tenant by threats of listings". The following Case Studies are examples of such unfair practices recently handled by the Western Sydney Tenants Service (WESTS). These case studies reveal the ways in which the existence and current operation of tenancy databases directly prevent tenants from obtaining housing. According to WESTS such cases are not atypical.

Case Study One

In the first case, a tenant fell into arrears of rent after their employer made an error in payment of wages. This resulted in the tenant not being able to make a rent payment on time. The real estate agent promptly listed them on a residential tenancy database. As soon as the employer corrected their mistake, the tenant paid off the their arrears. The employer had previously written to the real estate agent acknowledging that it was their error. The real estate agent refused to remove their name from the residential tenancy database, asserting that he could do what he liked.

Case Study Two

In the second case, a new tenant was warned by a real estate agent that it was their practice that, should a tenant not ring back promptly in response to letters from their office, then that tenant would be listed on a residential tenancy database.

after receiving CRA (National Shelter & ACOSS: 2003).

Case Study Three

A tenant sought to have repairs carried out and alluded to possible legal action to enforce their rights. What follows is a copy of the landlord's response via an email:

"Due to this conversation I have decided that it is best that you find another premises to live in. (You probably will not be able to find a premises this cheap anywhere in Sydney)

As for your legal proceedings, it is entirely up to you. I honestly don't mind which ever way you go. It's your choice. But I strongly recommend that you don't for your and your families sake. I may warn you that if you proceed with this measure it may affect your entire leasing ability in your life time. You may be Put on TICA & TRA which are data bases that all agencies Australia wide which lists problematic and unqualified tenants. This mean that you may not be able to rent anywhere in Australia for the duration of your natural life.

I will only speak with you from now on only if you change your attitude and deal in a proper humane way. My only interest in life is to pursue selfless godly activities for the benefit of the planet and it's residents. I do not need any opinions from any persons that do not know my history or reputation. (You do not know me [name deleted] so why comment??).

So I will leave the ball in your court. The agent may issue you with a termination notice as they may choose this option.

I have found assistance to fix the garage (But this may not concern you anymore). I will be there on Saturday some time. I will not have a direct time. I hope that you have a change of heart otherwise you will make life difficult for yourself and your family.

I wish you all the best in your life. I hope that you do good for the world. I would like to deal with you as a life long friend and as a present tenant, but it is up to you. God Bless. Kind Regards."

Case Study Three is evidence of the importance that private landlords who manage their own rental properties are also subject to regulation.

Proposed Treatment of Tenancy Databases

In the view of Uniting*Care* the negative consequences that the operation of databases pose to tenants, particularly in the current situation where there is inadequate regulation, outweigh any benefit that they may provide to landlords and agents in regard to risk management. As a consequence we support the position of the Tenants Union of NSW (TUNSW) that such databases be prohibited by the Commonwealth and State and Territory Governments.

Real estate agents currently have access to adequate information about tenants through standard tenancy application processes, without the need to refer to a database. Prospective tenants are normally required to provide identifying details about themselves such as name, drivers license and car registration number in their application for tenancy, and provide names and contact details of previous agents / landlords from whom they have rented as referees. Without such references it can be difficult to obtain rental accommodation. In our view such a system provides adequate safeguards for owners in regard to rental risk, and negates the need for tenancy databases, which can have such adverse impacts on disadvantaged tenants. Furthermore, the level of serious disputation between landlords and tenants not easily resolved through the NSW

Consumer, Trader and Tenancies Tribunal is not significant enough to justify the existence of such databases to manage rental risk (TUNSW: 2000: 3-4).

If a decision is taken not to ban tenancy databases, there is clearly an urgent need for effective and consistent national regulation of such databases to prevent the abuses documented above. Such regulation should cover data base operators, and the listing practices of real estate agents and private landlords who manage their own properties, and as the TUNSW has argued, cover tenants who are currently listed and may be listed in the future.

The Tenants Union of NSW is the umbrella organization for the New South Wales Tenants Advice and Advocacy Services Network. Accordingly, Uniting*Care* supports the recommendations in the submission being forwarded to the databases Working Party by the Tenants Union of NSW, which deals with issues relevant at both a Federal and State Level.

Recommendation:

- **The use and operation of tenancy databases should be prohibited by the Commonwealth and State and Territory Governments. However if a decision is taken not to ban tenancy databases, consistent national regulation should be adopted based on the recommendations on this issue put forward by the Tenants Union of NSW in their submission to this Working Party, (Attachment 1).**

Regulation of Tenant Databases

If a decision is taken to regulate rather than ban databases, we support the approach put forward by Johnston, of regulation of databases and conduct of real estate agents and landlords on a " 'double prong' basis- in both the Commonwealth sphere, to protect privacy, and in the State sphere, to (pro-)actively promote fair trading" (Johnston: 1999: 67), and also to prevent abuses in the landlord/ tenant relationship. However, both State and Federal Governments have been slow to regulate residential tenancy databases, and it is important that action is taken to address this issue in the near future.

The legislation that is developed should ensure that options are available to tenants in regard to complaints about treatment of personal information about them by real estate agents, landlords and data base operators, other than pursuing a complaint through the courts under the *Trade Practices Act*, or through the laws of defamation. Boswell and Warren have pointed out that such processes are not easily accessed by tenants, are time consuming and can be costly for the tenant and taxpayer (Boswell & Warren: 2001). They are not best suited to resolving urgent complaints that can lead to inability to obtain housing. Furthermore Johnston has pointed out that the Fair Trading Act "does not contain provisions comprehensive enough to regulate the range of consumer problems presented by tenancy databases" (Johnston: 1999: 62).

State Based legislation

At present Queensland is the only State in Australia that has adopted residential tenancy legislation regulating the use of residential tenancy databases. This has occurred through an amendment to the Queensland *Residential Tenancies Act 1994.*

The *Residential Tenancy Database Issues Paper* notes that consumer protection legislation exists in each State and Territory mirroring the relevant provisions of the *Trade Practices Act*. The Northern Territory's consumer protection legislation gives tenants some access to information about whether details have been sought about them from a reporting agency and also places some responsibility on the reporting agency to provide information to tenants. Queensland has also made some stipulations about database listings in *The Property Agents and Motor Dealers Act (PAMDA) (Real Estate Agency Code of Conduct) Regulation 2001.*

At present, legislation governing the listing practices of estate agents and controlling the type of information that may be listed, duration of listing, accuracy of listing and tenant access to information about a listing is proposed by the NSW Office of Fair Trading through an amendment to the regulation under the *Property, Stock and Business Agents Act 2002*. As discussed below, this Amendment will regulate the behaviour of real estate agents with regard to listing tenants, but will not cover private landlords, and will not adequately regulate data base operators.

On the basis of this brief overview it is fair to say that approaches to handling the issue of the operation of tenancy databases vary considerably across jurisdictions, leading to inconsistencies which give tenants more rights in some States than others. The Working Party has recognised that such inconsistency is "undesirable for all parties as it creates uncertainty and confusion for tenants" (MCCA: 2003: 19). At present the State of Queensland offers the best protections and rights to tenants in regard to this issue.

Uniting*Care* NSW.ACT, through Western Sydney Tenants Service, has contributed to discussions within the NSW Tenants Advice and Advocacy Services Network on the need for government regulation of residential tenancy databases at a State level. At its meeting on 4 December 2003 the Network passed the following resolution:

> That State-level regulation of tenant databases must do all of the following:
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> 1. apply to all tenant database users, and all persons subject of a listing (including a listing made prior to the regulation) or proposed listing;
> 2. prescribe limited circumstances in which a listing may be made;
> 3. require that tenant database users notify persons of a proposed listing before it is made;
> 4. provide a dispute resolution mechanism that can respond urgently and make binding orders requiring a listing to be amended or removed, and preventing a proposed listing from being made.

The States and Commonwealth should consider each of these points, in addition to the 12 recommendations put forward by the Tenants Union of NSW in their submission to this Working Party, in determining how best to regulate the operation of databases.

Queensland's database legislation under Residential Tenancies Act

In their submission to the Residential Tenancy Databases Working Party, the Tenants Union of NSW (TUNSW), identifies some weaknesses in the Queensland legislation that should be addressed if this approach is taken up by other States and Territories. The TUNSW points out that at present under the *Queensland Residential Tenancies Act 1994*, not all of the prescribed reasons for listing require a determination by the Small Claims Tribunal, and they argue that this should be changed so that only matters determined by the latter against the tenant can be listed. In addition internal real estate databases that list information about tenants are exempt from the legislation, and the TUNSW argues that these databases should be included. This loophole has led to a situation in which TICA has allegedly attempted to sell deleted information directly to agents for internal use. Furthermore the TUNSW notes that the Queensland legislation does not directly address the issue of residential tenancy database operators, and so does not deal with matters such as tenants access to listings or the length of time tenants are listed. This is a serious flaw in the legislation.

Proposed NSW legislation

At the present time the NSW Office of Fair Trading has signaled its intention to regulate the practices of real estate agents in NSW in regard to listing tenants on tenancy databases. A Regulation has been drafted and made available for public comment, *The Property, Stock and Business Agents Amendment (Tenant Databases) Regulation 2004*. While this Regulation will to some degree influence the operation of databases in NSW since it deals with matters such as the length of time a tenant may be listed and access to information in a listing, the Office makes it clear that it is not the intention of the Regulation to cover all aspects of the operation of tenancy databases and that national legislation is needed to do this.

Although, as the TUNSW notes, the Regulation is a step in the right direction, they identify a number of flaws that should be addressed before it is finalised. These are discussed below:

- Because it is an amendment of the *Property, Stock and Business Agents Act 2002*, the Regulation will only cover the conduct of persons listed as real estate agents under the Act, and will exclude landlords who manage a rental property themselves. As most private landlords are not real estate professionals they are less likely than real estate agents to be familiar with tenancy law, and hence with their obligations as landlords and the rights of tenants. Nevertheless, they represent quite a large group, with approximately 40% of rental property in Australia managed by landlords (ABS: 1994). There is thus a self-evident need for private landlords to be covered by legislation of this type.

  Case Study Three, above, reveals that landlords can use threats of listing as a way to intimidate tenants to prevent them from asserting their rights under law, whether or not they actually make a listing against a tenant. Although databases such as TICA do not allow private landlords managing their own properties to become members, others, such as Trading Reference Australia (TRA) do allow private landlords who become members to list information about tenants. It is therefore a serious discrepancy that they are not covered by the proposed NSW Regulation.

- The proposed regulation does not adequately cover database operators.

- The TUNSW point out that the proposed legislation will only cover the listing of future tenants, not tenants currently listed on databases.

- The TUNSW also point out that the proposed regulation makes no special provisions in regard to the resolution of disputes, nor does it discuss an appeals procedure. The nature of the dispute resolution procedure should be specified in the Regulation. Rather than disputes being resolved by the Commissioner of Fair Trading, it would be preferable if they could be resolved by the NSW Consumer, Trader & Tenancy Tribunal, as disputes are more likely to be resolved in an accessible and timely manner, according to an already established procedure.

- Other potential problems with the NSW regulation are that it allows tenants to be listed on a database by an agent for reasons which may not be serious or significant enough to warrant such a listing, given that listing a tenant can be in effect a very severe penalty which may result in homelessness. In addition to being permitted to list tenants for owing money in excess of the rental bond, the proposed Regulation would allow tenants in NSW to be listed because, 2 (2) (b) "the person has failed to pay an amount of money to the landlord in accordance with an order of the Tribunal," regardless of the size of the amount owed.

  A person may also be listed if the Tribunal has, on application of the landlord, terminated the residential tenancy agreement on certain grounds. These grounds are that the tenant has breached the agreement in such a way as to justify termination of the agreement: however no specific reasons are identified, which appears to leave open the reasons that a tenant may be listed, (2 (2) (c) of draft Regulation, referring to section 64 (2) (a) (ii) of the NSW residential Tenancies Act 1987). Allowing a person to be listed for unspecified breaches of their tenancy agreement resulting in termination of the agreement may be unfair to a tenant, and appears to go beyond the reasons for listing allowed in Queensland. The National Association of Tenant Organisations' position on tenancy database services is that minimum standards should include that a tenant is only be able to be listed for a serious breach of the tenancy agreement (Boswell and Warren: 2001).

- A further concern is that although an agent is required to attempt to contact a tenant before making a listing, tenants may prove difficult to contact, in circumstances where a forwarding address has not been left or a tenant becomes homeless. It is also possible that an agent may not make a genuine effort to contact a tenant and that some tenants may not be able to respond to a letter, due to intellectual disability or low levels of literacy, or because English is not their first language, for example. In addition, tenants may not understand the seriousness of a listing on a tenancy database, in terms of their future access to housing. For reasons such as these it is likely that even under the proposed NSW legislation, tenants will still be listed without their knowledge, including very disadvantaged tenants such as those described above. This is an unsatisfactory situation and is another reason why databases should be banned.

A further problem with 2 (1) (a), (b), (c), (d) & (e) of the proposed Regulation is that the amount of time agents must give tenants to respond is not specified, only that a person be given 'a reasonable opportunity to make submissions'. The amount of time agents must provide should be specified, and should be at least 28 working days, given that some tenants may need to have mail forwarded, and should have time to seek advice about the listing from an advocate. The letter sent by the agent should inform them of a relevant Office of Fair Trading number to call for information about how to obtain assistance.

A separate submission to the New South Wales Office of Fair Trading will propose that the matters raised above, particularly the need for appropriate legislation to apply to landlords, be addressed before the Regulation is finalised

The Commonwealth Privacy Act 1988

The Commonwealth Privacy Act was amended in 2000 to apply to the private sector. It has covered the operation of tenancy databases and disclosure of personal information by real estate agents since 21 December 2002[4].

However the Privacy Act is a set of general principles and does not provide adequate control of the specific operation of databases and listing practices. Since the private sector amendment took effect, the Act does not appear to have significantly influenced the listing practices of database operators or the collection and disclosure of information by agents. The Queensland amendment of the Residential Tenancies Act has been much more effective, and has meant that certain information has not been able to be listed in Queensland by TICA, for example, while they have continued to be able to list such information in NSW. Rather than relying on inadequate coverage under the Privacy Act, there is a need for effective national legislation that strictly controls the operation of databases, along the lines proposed by the NSW Tenants Union.

Furthermore, it is arguable that real estate agents and database operators are not complying with the spirit and in some cases the specific provisions of the 10 National Privacy Principles (NPP) under the Act. Areas of concern are set out below:

Collection, Use and Disclosure of Personal information

- Some real estate agents are informing tenants that personal information about them provided as part of a tenancy application process may be disclosed to a whole host of parties, including tenancy database operators, without informing the tenant, at some future time at the

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[4] Small businesses with a turnover of less than $3,000,000 are exempt from the Act, unless they deal in personal information. The exemption does not apply to small businesses that :

> 6 D 4 (c) "disclose personal information about another individual to anyone else for benefit, service or advantage; or
> (d) provide a benefit, service or advantage to collect personal information about another individual from anyone else".

discretion of the estate agent. Guthrie (2002) has identified this is as a problem with the operation of the Act, since this practice means that tenants may be unaware that they have been listed with a database operator, even though the agent has technically complied with the NPP by obtaining the tenant's consent.

The McGrath Tenancy Application Form[5] indicates that information may be disclosed to a database operator as part of the application process, whether or not the application for tenancy is successful[6]. It also states that without this information, the agent may not be able to process the application. Personal information that the tenant is requested to provide includes employment details such as net income and length of employment, current rental details including length of occupation and reason for leaving, and family particulars, including number of children, and names and contact details of two referees.

[5] The McGrath Tenancy Application Form is available in full at www.mcgrath.com.au/renting.application.pdf.

[6] McGrath Property Management's Tenancy Application Form's so- called Privacy Statement states:

The personal information you provide in this application or collected by us from other sources is necessary for us to verify your identity, to process and evaluate your application and to manage the tenancy. Personal information collected about you in this application and during the course of your tenancy, if your application is successful, may be disclosed for the purpose for which it was collected to other parties including the Landlord, referees, other agents and third party operators of tenancy reference databases. Information already held on these databases may also be disclosed to us and the Landlord. If you enter into a Residential Tenancy Agreement, and you fail to comply with your obligations under that Agreement, that fact and other relevant personal information collected during the course of your tenancy may also be disclosed to the Landlord, third party operators of tenancy reference databases and other agents. If you would like to access the personal information we hold about you, you may contact your Property Manager. You can also correct this information if it is inaccurate, incomplete or out of date. If the information required from you is not provided by you, we may not be able to process your application and manage your tenancy.

By signing the McGrath Tenancy Application Form, the tenant is in fact signing a Consent Form agreeing to the terms of the Trading Reference Australia Disclosure[7]. The tenant agrees to personal information given as part of the application process being kept and recorded by TRA and given to video stores, even if their tenancy application is unsuccessful. The tenant also agrees that information may be given to 'c)…other persons or institutions for the purpose of locating me' and may be transferred to another agent should the business change hands. A person could thus find that they are unable to become a customer of a video store, or are pursued by debt collectors, because of information given as part of a tenancy application process. The Tenancy Application Form of Complete Home Hunters is similar and includes a similar 'privacy statement' to the above, however also requires that the tenant disclose financial institution details such as his/her bank or building society, branch and account number.

It is arguable that collection of the type of information described above breaches Privacy Principle 1.1, which states that "An organisation must not collect personal information unless that information is necessary for one or more of its functions or activities". The way in which this information is collected also breaches 1.2 which states that information must only be collected "by lawful and fair means". Again the distribution of information collected by one

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[7] TRADING REFERENCE AUSTRALIA DISCLOSURE from McGrath Property Management Tenancy Application Form:

"I understand this agent is a member of Trading Reference Australia Pty. Ltd (TRA) and may conduct a reference check with that organisation. I authorise this Agent to provide any information about me to TRA / Landlord / Video Store for the purpose of that check and I acknowledge that such information may be kept and recorded by TRA.

I acknowledge that if I am currently listed as a defaulter with TRA, this Agency / Landlord / Video Store has the authority to reject my application. I understand that I am under no obligation to sign this consent form, but that failure to do so may result in my application being refused.

I acknowledge that if I default on my tenancy / rental obligations in future, I may be listed as a defaulter with TRA, until such time as the problem giving rise to the listing is resolved to the satisfaction of the Agent / Landlord / Video Store and I hereby authorise this agent to provide information about me to TRA and my default to TRA in connection with that listing.

I acknowledge that information provided to TRA by these authorities given by me may be available to:

a) Real Estate Agents and Landlords to assist them in evaluating applications for leases.

b) Video Stores to evaluate applications for Memberships.

c) Real Estate Agents, Landlords, Video Stores and other persons or institutions for the purpose of locating me.

Should this Agent transfer its agency business to another person, I consent to the new agent (and any further person to whom that business may be transferred) taking any step which the former agent could have taken. (If more than one applicant, "I" means "We" in this form).

agent to a range of people, including database operators, other agents and video stores, is not in the spirit of 1.4, which states that "If it is reasonable and practicable to do so, an organisation must collect personal information about an individual only from that individual".

The practice of real estate agents collecting personal information and obtaining consent for its disclosure as part of the tenancy application process is unjust and unethical, because a person is consenting under duress in order to obtain an essential service, that is, in order to obtain housing. The practice of making the successful processing of a tenancy application conditional on providing consent to the future disclosure of information, about which they may not be informed, should be prohibited under the National Privacy Act.

Data Security

Given the lack of available information about their business practices, it is difficult to ascertain whether agents and tenancy database operators are complying with Principle 4.1, on data security. Compliance with 4.2 is an identified problem, since there are currently no limits in any State or Territory on the amount of time that a tenant may be listed and no requirement that information be destroyed "if it is no longer needed", for example in cases where a tenant has paid a debt. Queensland is the only State that has provisions for the removal of a listing where it is found by a Tribunal to be unfair or incorrect.

Access to information- Charging a fee

In addition some database operators charge for access to information, including charges that could be considered excessive and that may apply to lodging a request for access in breach of NPP 6.4.   On TICA's website under Tenant Information, TICA informs tenants that to inquire if they are listed on a database they must send a written request with a cheque for $11.00 and can expect to receive a reply within 10 days. Telephone inquiries are charged at $5.45 per minute.

In order to process this inquiry a tenant must supply certain information about themselves such as a drivers license and passport number, a current address and telephone number. On such occasions the database operator should only request further personal information about the tenant that is necessary to identify a person. Personal information supplied by the tenant should not be used to update the tenant's details on the tenancy database.

Problems with *Privacy Act 1988* identified by other commentators

Further problems with the current operation of the Commonwealth Privacy Act with regard to databases have been identified by other commentators: TUNSW: 2000; Boswell and Warren: 2001; Johnston: 1999; Adkins, Short, Mead, Minnery, Owens and Heffernan: 2003. These include that:

- Certain Privacy Principles under the Act do not apply to information already collected.

- Guthrie has pointed out that NPP 3 does not cover " ' trivial breaches' or 'inappropriate listings' such as when a tenant is listed after an unsatisfactory condition report, even through the problem was rectified", (Adkins et al: 2003: 10). The Tenants Union of Victoria has argued that database operators should only be able to record information obtained from a court or tribunal (Johnston: 1999: 61). The fact that the Act does not limit or clearly specify the type of personal information that can be listed is probably its most significant flaw in regard to the operation of tenant databases. This matter should be rectified so that only justifiable and current information can be listed.

- The Act lacks penalties for breaches of Industry Codes or the National Privacy Principles. This is the case although the Ministerial Council on Consumer Affairs *Residential Tenancy Database Issues Paper* notes that compensation may be paid to tenants. The Privacy Act indicates that the party in breach may be sued and the compensation recoverable from them as a debt. It is important that tenants have access to compensation however the lack of formal financial penalties for breaches of the Act seriously weakens it. It is also an area where there is inconsistency with State based law such as that which exists in Queensland and is proposed for NSW, where fines may apply.

- The TUNSW, in its submission to the House of Representatives Standing Committee on Constitutional and Legal Affairs on the proposed 2000 amendments to the Act to extend it to the private sector, expressed concern that "access to independent dispute resolution is delayed where an industry establishes a self-regulatory complaints mechanism" (TUNSW: 2000).

  The Office of the Federal Privacy Commissioner has informally indicated in response to a telephone query that few Privacy Codes as set out under the Act have been developed and approved, and none with regard to the operation of tenancy databases or the real estate industry. In practice complaints go straight to the Commissioner, however there is a complaint backlog and delays can thus be expected processing complaints.

  In the event that there was an Approved Privacy Code governing tenancy database operators, and a person was dissatisfied with the way their complaint was handled by an industry body under such a Code, and they then referred the complaint to the Privacy Commissioner as the adjudicator, it is likely that very lengthy delays could be experienced. This is a real problem, given the probable urgency of complaints dealing with blacklisting. Strategies should be developed to ensure the timely processing of complaints, such as investigating the resources needed by the Federal Privacy Commissioner to process complaints within a reasonable period of time. It is suggested that statutory timeframes be established for the processing of complaints: failing this internal guidelines should be set for complaint processing times. The problem of delays also suggests that State based systems for dealing with complaints about tenancy database operators are desirable.

In the case of a dispute under an Approved Privacy Code, the adjudicator may not be the Privacy Commissioner, but one identified under an Approved Privacy Code. Given the documented abuses of tenancy databases by the real estate industry, self-regulation is not appropriate in handling complaints of this nature. The adjudicator under such Codes should not be an industry representative but an independent public agency with the capacity to adequately adjudicate such disputes, such as the NSW Consumer, Trader & Tenancy Tribunal.

- Boswell and Warren also point out that *The Privacy Act 1988*, "allows and possibly encourages the creation of a myriad of inconsistent privacy schemes cutting across States, industries and classes of information" (Boswell and Warren: 2001: 2).

Conclusion

It is evident from the above analysis that there are currently serious shortcomings in regard to regulation of tenancy database operators and of the listing practices of real estate agents and landlords under existing State and Federal legislation. The inadequacies identified above should be taken into consideration by the Working Party in determining how to respond to this issue. As stated in the body of the submission, it is the view of Uniting*Care* that the harm to tenants as a consequence of the operation of tenancy databases outweighs any benefit to landlords and agents resulting from their operation. Being listed on a database is in essence a severe penalty that can result in disadvantaged tenants being unable to obtain the human right to housing, with homelessness the documented result. As a consequence it is our view that tenancy databases should be prohibited by law. Failing this, adequate, consistent national regulation controlling the operation of tenancy databases and the listing practices of agents and private landlords, should be developed as a matter of urgency on the basis of the principles put forward by the NSW Tenants' Union in their submission to this Working Party (Attachment 1).

Recommendation

- **The use and operation of tenancy databases should be prohibited by law. However if a decision is taken not to ban tenancy databases, consistent national regulation should be adopted based on the recommendations on this issue put forward by the Tenants Union of NSW in their submission to this Working Party (Attachment 1).**

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Attachment 1.

Summary of recommendations from the Tenants Union of NSW submission to the MCCA Working Party on Residential Tenancy Databases.

TUNSW recommends:

1. *That the use and operation of RTDs should be prohibited by the Commonwealth and State and Territory Governments.*

2. That, should governments allow RTDs to be used and operated, both their use and operation should be subject to a national regime of legislative regulation.

3. That a national regime of legislative regulation should apply to all operators of RTDs, all users of RTDs, and all persons who are the subject of a listing (including an existing listing) or a proposed listing.

4. That a person's information may be listed on an RTD in the circumstances only:

- *the person was a tenant under a residential tenancy agreement as prescribed by the relevant State or Territory; and*
- *the person's tenancy is terminated; and*
- *the person has been notified by the member-subscriber of the proposal to list, and has been given an opportunity to review and respond to the proposed listing; and either*
- *the tenancy was terminated by the relevant State tribunal on the grounds that the tenant caused damage to the property, and the cost of the damage as determined by the tribunal is in excess of the bond; or*
- *the tenancy was terminated by the relevant State tribunal on the grounds that the tenant was in rent arrears, and the amount of arrears as determined by the Tribunal is in excess of the bond; or*
- *the tenancy was terminated by the relevant State tribunal on the grounds that the tenant caused or threatened to cause injury to the landlord, the landlord's agent or another person lawfully on the premises.*

5. That where a member-subscriber of an RTD proposes to list a person's information, the member-subscriber should be required to notify the person and provide them with an opportunity to review the information and respond to the proposed listing.

6. That where an RTD lists a person's information, the RTD should be required to notify the person of the information listed.

7. That where a member-subscriber of an RTD declines a tenancy application, the member-subscriber should be required to give the applicant reasons for the decision, including the contents of any information provided by an RTD.

8. That RTDs should be required to provide a person who is listed on the RTD with a copy of the information listed, without charge and without delay.

9. That the tenancy tribunal of each State and Territory be empowered to make urgent, binding, enforceable orders in relation to listings and proposed listings on RTDs.

10. That a person who is the subject of a proposed listing on an RTD should be able to seek urgent orders that a proposed listing must not be made, where the proposed listing would:

- *be in breach of the prescribed circumstances for listing;*
- *contain inaccurate information; or*
- *cause injustice or excessive hardship to the person or their household.*

11. That a person who is the subject of a listing should be able to seek urgent orders that a listing must be amended or removed, where the listing:

- *is in breach of the prescribed circumstances for listing;*
- *contains inaccurate information; or*
- *is causing or may cause injustice or excessive hardship to the person or their household.*

12. That where a listing is made for a reason other than an unpaid debt, the listing should be required to be removed after two years; and that where a listing is made for a unpaid debt, the listing should be required to be removed immediately upon payment of the debt, or after two years, whichever is the sooner.