



**Draft Property, Stock and Business Agents
Amendment (Tenant Databases) Regulation 2004**

**Submission from
Shelter NSW**

9 February 2004

Shelter NSW

Shelter NSW is a community-based, State-wide, peak housing body which aims to advance the housing interests of low-income and disadvantaged people in NSW. It is also part of a national network of Shelter organisations in each State and Territory, and is a constituent member of National Shelter.

Shelter's vision is to work for a just and equitable housing system, where housing for all is a right, not a privilege.

Shelter's role is to:

- Promote a co-ordinated response within the community sector to housing issues affecting housing low-income and disadvantaged people;
- Work with and influence government and relevant community sector organisations so that they develop housing policies and programs which meet the needs of low-income and disadvantaged people;
- Increase public awareness of housing issues and support for adequate and sustainable responses;
- Research and develop responses to housing issues;
- Provide quality information, assistance and support to the community sector, members and other stakeholders.

Shelter has 112 organisational members and 37 individual members. Organisational membership includes specific-interest peak groups (e.g., tenants, youth, community housing, etc.), a wide range of housing providers, public and private tenant groups, local government councils, regional housing bodies, community services agencies, etc.

1. Introduction

Shelter NSW commends the Minister for her interest in an issue that has been troubling advocacy and consumer rights bodies for a number of years. We appreciate the fact that she is undertaking action to redress a situation that has grave consequences for many tenants who may temporarily fall into rental arrears for reasons beyond their control, or who may have made some attempt to assert their rights only to fall foul of their landlord or agent. There is now a wealth of information both as to the inadequate, incorrect, tendentious or unfair nature of many such listings, and of the disastrous long-term consequences this can have for tenants – including the denial of affordable rental housing to them. You will be aware of the current national inquiry being undertaken by the Ministerial Council on Consumer Affairs Standing Committee of Attorneys-General, and we urge reference to their website and perusal of the detailed submissions made by a substantial number of community agencies, including one from this agency. Because of the national reach of residential tenancy databases (RTDs), it is vital that there should be both national and state legislative responses. This is particularly the case because it is difficult to regulate at a state level RTDs that are operating nationally.

While we appreciate the fact that it is simpler and quicker to address issues by way of regulation – and we are supportive of many aspects of the regulations proposed by the Office of Fair Trading – we believe it would be far preferable to address the matter legislatively, by way of **amendment to the Residential Tenancies Act 1987**. This, in fact, is the course of action that has been followed in Queensland, and we commend this legislation (though it does not meet all of our concerns) for your consideration.

1. In particular, we are concerned about **the process for dealing with complaints, dispute resolution and formal determination**. While, presumably, it will be possible for tenants to complain to the Commissioner for Fair Trading, we are concerned about an adequate process being in place to ensure compliance, and to have urgent hearings, to provide dispute resolution, for ensure formal and speedy determination, and to deal with issues like penalties and compensation for breach. The CTTT is well equipped for these functions, but as the legislation currently stands it is not able to undertake them in relation to RTDs. In addition, we are concerned that tenants should be advised, and promptly, of progress and outcomes in relation to their complaint.

We have other general concerns as well, e.g.,

2. The regulation endeavours to deal with **the operations of RTDs by way of disciplining references from property managers**. Test cases will hopefully help to ensure that property managers take note of listing requirements. However, this does not directly affect what RTDs might choose to list, especially in relation to information that is not defined in the regulations, or how they might move information between databases to ensure they fulfil the formal requirements of the NSW regulations. It would be better if complaints involving RTDs could be directly dealt by the CTTT.
3. In addition, **the regulations are silent on listings held by RTDs prior to their introduction**. Given that these are substantial, and contain many entries that are problematical, trivial, malicious or plain wrong, as well as not necessarily meeting the criteria listed by the regulation, this is a matter of serious concern. How does the

Office of Fair Trading propose to deal with these? Will the regulation be applied to prior listings? As the matter currently stands, there is nothing to stop RTD operators from setting up a new database complying with the Act, but they could continue to make available their pre-existing non-compliant listings, with all of the prejudicial, trivial, inaccurate and untested material they may contain. So long as RTD operators establish a discrete compliant database, they can continue to purvey prejudicial information previously held without check.

4. While the regulation will apply to property managers, they leave untouched **landlords operating as their own property managers**, and in general residential park owners and boarding house proprietors. While these are excluded from the operations of some RTDs, they are not excluded from all, and they are also perfectly capable of establishing their own RTDs – indeed, we are aware of at least one case where this has occurred. How is it proposed that these operations should be regulated?
5. While the regulation specifies the circumstances in which a listing may be made and the reasons for doing so, **it does not place any restriction on what information may be provided for a listing**. Given that we are aware of instances where quite intrusive information can be gathered when tenants apply for private rental housing, we do not believe it appropriate that RTDs should become a catchall for all kinds of prejudicial information: They should be restricted to the matters defined in the regulation, and these in turn should be based on objective criteria such as determination by the CTTT.

2. Individual clauses of the Regulation

Clause 1: Definitions

We note that the definition of *tenant database* specifically excludes “any such database kept by an agent for use only by that agent”. This is consistent with the Queensland legislation, but we have some concern about it. For example, it is possible to circumvent the intention of the regulation by RTD operators developing an alternative non-compliant database listing product and making it available for subscribers or members to download the product to their own computers. This was, indeed, threatened in Queensland, on our information. Property managers already have more than adequate powers at the point of letting to undertake risk management by checking the credentials of applicants, and they do so fully, to the extent in many cases of requiring access to a medley of intrusive and unnecessary information. We believe this exclusion should be removed. In our view, there is no reason why the circumstances and requirements listed in clauses 2, 3 and 4 of the Regulation should not apply equally to property managers use of their own databases.

Clause 2: Restrictions on listing persons on tenant database

We support all of the inclusions in Clause 2(1) (a-e), in regard to who must not be listed. We do not favour any widening of the circumstances in which it may be possible to make a listing. We also believe that listings should be possible only on the basis of determinations that have been made by the CTTT in all cases, as well as the case referred to below.

Clause 2, sub-clause 2(2)(a)

We have two concerns about this sub-clause. First, listing should be possible only upon a determination by the CTTT, as, for example, is the case in the Queensland legislation. Clearly, there could well be a dispute between the landlord and the tenant as to any amount owing. And second, it could still be a relatively trivial amount – e.g., the tenant may owe one dollar or a few dollars in excess of the rental bond. It would be better if the sub-clause both relied on a tribunal determination, and set the figure at “substantially more than the amount of the rental bond”.

Clause 3: Requirement for agent to notify database operator when debt paid

We support this clause.

Clause 4: Other requirements in relation to tenant databases

Note our earlier comments (Introduction, Point 3) with regard to prior listings. We believe the regulation should be specifically applied to previous listings to ensure the problems we have discussed are not permitted to arise. The listings already held by RTDs are substantial and affect many thousands of tenants. Adding a new layer of “clean” entries may simply add to a total listing that is already extensive.

Clause 4(c) and (d)

While we agree with the intent of the clause, we do not understand why debts owing for a longer period than three months should be treated differently than debts owing for a lesser period. This is even more the case, given that under clause 2(2)(a), this may very well in any event be a subject of dispute, and the latter clause does not require the issue to have been determined by the CTTT. We believe the “three months” phrase should simply be removed from Clause 4(c), and Clause 4(d) should be deleted. If a person pays a determined debt at any time, they have remedied the breach, and that should be the end of the matter. It is punitive to allow a listing to remain for any period of time, once a breach has been remedied. And given the serious effect listing may have – i.e., denial of rental housing – the punishment scarcely fits the crime.

Clause 4(e)

Consistent with our submission to the Ministerial Council on Consumer Affairs Standing Committee of Attorneys-General, we believe listings for reasons other than for non-payment of debts should be permitted for no longer than two years. This is on the basis specified in that submission, that RTDs are supposed to be useful as a means of risk management, and there are already sufficient alternative methods for managing risk prior even to a tenancy being undertaken; and the consequences of listing (e.g., denial of affordable rental housing) outweigh the advantages of this particular form of risk management.

For further information

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