

submission

Submission by Privacy NSW
to the Office of Fair Trading in relation to the proposed

Property, Stock and Business Agents Amendment (Tenancy Databases) Regulation 2004



privacy**nsw**

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**Submission to the Office of Fair Trading in relation to the proposed
Property, Stock and Business Agents Amendment (Tenancy Databases)
Regulation 2004 (the “Draft Regulation”)**

Privacy NSW’s jurisdiction

Privacy NSW, the Office of the NSW Privacy Commissioner, administers the *Privacy and Personal Information Protection Act 1998* (the PPIP Act) in NSW.

The PPIP Act sets out 12 Information Protection Principles (IPPs), which govern the way personal information must be collected, stored, used, accessed and disclosed by NSW public sector agencies. The PPIP Act provides binding enforceable privacy rights in relation to public sector agencies.

The PPIP Act does not bind private sector organisations, such as real estate agents or property managers (who use and supply information to the Residential Tenancy Databases (RTDs)) or RTD operators (who manage and maintain the tenancy databases).

However, it is possible for an individual to make a complaint under the PPIP Act to Privacy NSW against a real estate agent, property manager or an RTD operator, where it is alleged that their privacy has been violated or interfered with. While the Privacy Commissioner has the power to investigate and conciliate complaints he or she does not have the power to make a legally binding and enforceable determination in this situation.

Since December 2002 the jurisdiction of the Commonwealth *Privacy Act* (1988) has been extended to private sector organisations with a turn over of \$3 million or more per annum, and to organisations (regardless of turnover) which trade in personal information or deal with health records. Where Privacy NSW receives enquiries or complaints about RTDs, since December 2002, they are therefore usually referred to the Office of the Federal Privacy Commissioner (OFPC).

Due to lack of regulatory jurisdiction, this Office has had only a limited capacity to intervene in the issues raised by tenants in relation to RTDs. However Privacy NSW has received many complaints and enquiries over the years about the operation of RTDs from individuals who are concerned that they have, or may have, adverse tenancy records.

Privacy NSW’s submission to the MCCA and the SCAG on *Residential Tenancy Databases*

Privacy NSW has recently made a submission to the Federal Ministerial Council on Consumer Affairs (MCCA) and the Standing Committee of Attorneys General (SCAG) on the public issues paper *Residential Tenancy Databases*. Our submission to the MCCA and the SCAG provides some statistical details and case studies which explore in some detail the complaints and enquiries received by Privacy NSW in

relation to RTDs. A copy of that submission is enclosed, and should be regarded as forming part of this submission.

Privacy NSW's main concerns are in relation to the widespread use and operation of RTDs which currently operate in a largely unregulated environment without industry wide or national standards. Privacy NSW invites the Office of Fair Trading to consider our submission to the MCCA and the SCAG. This submission includes details of the enquiries and complaints which Privacy NSW has received from members of the public which highlight the ways in which the operation of RTDs can unfairly impact upon the privacy of tenants and their families, often affecting their ability to rent property in the future.

The operation and use of RTDs in Australia, which contain large amounts of personal information, are widespread, spanning State boundaries. It is clear that real estate agents and property managers rely heavily on RTDs in deciding whether or not an individual is a suitable tenant. Privacy NSW considers that the regulation of RTDs, including their use and operation by RTD operators, real estate agents, and property managers will be best achieved at the national level, given their widespread use and operation across state boundaries. Our submission concludes that there is an urgent need for a nationally consistent legislative and regulatory framework to be established to govern the operation of RTDs throughout Australia. This will provide a fairer, more transparent and accountable system for all stakeholders, and particularly tenants in terms of how their personal information will be collected, stored, used accessed and disclosed by real estate agents, property managers and RTD operators.

I note that the NSW Government is currently participating in the national working party under the auspices of the MCCA and SCAG to consider the possible national regulation of RTDs, which is aiming to provide a report to Ministers in June 2004.

The Draft Regulation

In the absence of the national regulation of RTDs Privacy NSW welcomes the attempt by the Minister for Fair Trading to introduce regulations in NSW to ensure the fairer use of tenancy databases by real estate agents in NSW.

The Draft Regulation does not directly regulate the operators of RTDs. However, the Regulation will clearly impact upon RTD operators indirectly given that for example, a real estate agent can only use a database if the database provides tenants with free access to information about themselves (Schedule 6A clause 4(a)), and deletes listings within certain specified periods of time (Schedule clause 6A s4(c)-(e)). It is the real estate agent or property manager who is liable for a breach of Regulation which carries fines, for individuals and corporations, as well as other disciplinary measures including cancellation of real estate license. Therefore, those RTD operators which do not, or refuse to, provide a service which complies with the requirements of the Draft Regulation may find it difficult to attract real estate agents to use their database services.

I am pleased to note that the Draft Regulation addresses the majority of Privacy NSW's main concerns in relation to the use of RTDs by real estate agents and property managers, with particular reference to the following issues:

1. What 'breaches' should give rise to an adverse report?

Currently, in the absence of industry wide standards and listing practices for either real estate agents, property managers or RTD operators, there is no consistency or uniformity in terms of which breaches should be reported. Property managers and real estate agents have the discretion to decide under what circumstances a tenant will be listed on an RTD. In addition different RTD operators use different listing criteria to determine if a tenant should be listed. As a result even minor or trivial breaches could result in an adverse listing being made.

Schedule 6A clause 2(2) of the Draft Regulation addresses this issue by providing that a person may only be listed on a database if the person was a tenant under a tenancy agreement, and the tenancy has ended. A person may only be listed for a prescribed reason: that the person owes the landlord rent which is more than the amount being held by the Rental Bond Board; has failed to pay an amount of money to the landlord in accordance with an order of the Consumer, Trader and Tenancy Tribunal (the "CTTT"); or certain orders have been made by the CTTT under the *Residential Tenancies Act 1987* for example to terminate a lease.

2. Advising affected tenants of a listing

Currently, a real estate agent is not obliged to advise a tenant of the reasons for which they intend to lodge an adverse report either before or after the listing is made. It is my understanding that RTD operators do not separately advise a tenant when an adverse report about them is lodged. The majority of enquiries and complaints received by this Office suggest that tenants were never advised by real estate agents that an adverse report had been listed on an RTD. These include cases where the real estate agent had been provided with a forwarding address for that tenant, and therefore inability to advise was not an issue.

The Draft Regulation places an obligation upon the real estate agent to give written notice to the former tenant of the content of the intended listing, which will go some way to avoiding the common problem of listings being made without notice to the tenant. Schedule 6A clause 2(1)(d) of the Draft Regulation provides that the agent must not list a person on a database unless the agent has given the person written notice of the agent's intention to list the person and the reason for doing so. This will not apply if the agent can not locate the person concerned after making reasonable enquiries. Under clause 2(4) an agent must record the details of the matters referred to in clause 2(1)(d), or of the agent's attempt to locate the person concerned, and must keep the record for at least five years.

3. Accuracy of Information

Currently, many of the issues which are often adversely reported on are matters involving the subjective judgement of the real estate agent or property manager, for example issues relating to maintenance of property, or overall compliance with tenancy agreements. This raises the question of what obligations are placed on real estate agents to ensure that any adverse report is based on fact or reasonable opinion, and that they have supporting documentation justifying their views. Presumably such a process is most rigorous when the real estate agent is required to provide a written advice to a tenant outlining the alleged breaches which they intend to report. As I understand it, currently there is no obligation upon a real estate agent to provide a tenant with an opportunity to dispute information before a listing is made.

RTD operators act as holders of information provided by the real estate agent. I understand that RTD operators will accept an adverse report based entirely on the views provided by the real estate agent or property manager. There is no obligation on an RTD to ensure that the real estate agent or property manager can justify their views and/or has supporting evidence. There is no separate requirement placed on the RTD to ensure the accuracy of information before accepting an adverse report on the database.

Schedule 6A clause 2(1)(e) of the Draft Regulation provides that a person be given a reasonable opportunity to make submissions to the agent in respect of the proposed listing and to review or correct any personal information that is proposed to be listed on a database. Under clause 2(4) an agent must record the details of the matters referred to in clause 2(1)(e) or of the agent's attempt to locate the person concerned, and must keep the record for at least five years. Clause 3 also requires an agent to notify a database operator within seven days of becoming aware that any debt specified on a tenant database has been paid. These provisions will assist in ensuring that any information recorded is accurate, up to date and not excessive.

4. How long should an adverse report be retained?

Privacy NSW understands that at least one RTD's policy is, in relation to monies owed, to keep the listing for five years from the date the breach is rectified (ie. from years from the date the monies owing are paid). At the expiry of the five years the listing is changed to show that the tenant has an unspecified "history".

Furthermore it is our understanding that some RTD operators' policies effectively mean that a tenant's details will never be removed from the database, and they will always be recorded as having some type of tenant "history". A common problem expressed by tenants is that the mere existence of an adverse report or tenant history ever having been recorded will result in a new tenancy being denied (irrespective of how long ago the alleged breach occurred, the accuracy of the original listing, the significance of the breach or whether the breach was since rectified).

This problem is also exacerbated where a tenant did not receive advice that an adverse report had been lodged. Thus it may be many years before the affected person seeks rental accommodation again. If this is the first time they become aware of an adverse report and it relates to outstanding money, then the listing will still not be removed for another five years, until after they subsequently clear the debt.

Schedule 6A clause 4 of the Draft Regulation sets out time limits in which an adverse listing can remain on a database. A real estate agent can not use a tenant database unless these requirements are complied with. These time limits appear to ensure that a former tenant does not remain listed for excessive or indefinite periods of time. Clauses 4(c)(d) and (e) require a listing to be amended and deleted within prescribed timeframes depending upon the nature of the listing and whether it involves non-payment of a debt.

Therefore although the Draft Regulation does not directly regulate the RTD operators the effect of this clause will no doubt have a flow on effect which will ensure that RTD operators will only maintain adverse reports on their databases for a limited time after which they will be deleted in compliance with the Draft Regulation.

5. Access to RTDs

Enquiries to this Office indicate that many tenants are uncertain as to whom they should contact to ascertain if, and/or why they are on an RTD. As a matter of general practice where a tenant questions the accuracy or truthfulness of the information submitted to an RTD operator, many aggrieved tenants would probably feel it necessary to contact the RTD operator before approaching the real estate agent who made the listing, either to obtain specific details of the adverse report or to discuss their options further.

As the enquiries and complaints to this Office indicate, the cost of accessing RTDs is prohibitive. Some RTDs charge approximately \$5-\$5.50 per minute to seek telephone advice, or offer a copy of the report for a fee. Such telephone charges would seem to be excessive, and unreasonable.

Schedule 6 Clauses 4(a) and (b) provide that an agent must not list an individual on a tenant database unless free access to the personal information held on a database is provided, and that any such information must be amended if it is out of date, inaccurate or incomplete, at the request of the listed person and without any charge. Again it would appear that these provisions although not directly regulating the RTD operators will have an important flow on effect in terms of attempting to ensure that tenants have free and easy access to information held about them, including a right to amend incorrect or incomplete information.

6. Dispute Resolution

In the absence of industry wide standards and listing practices for either real estate agents/property managers or RTD operators, there is no consistency or uniformity to regulate the handling of dispute resolution where a tenant disputes the accuracy or

fairness of an adverse listing. It appears that the onus is upon the tenant to approach the real estate agent or property manager who made the listing to resolve the alleged breach or other issue before an RTD operator will delete or modify an existing listing. Complaints and enquiries received by Privacy NSW indicate that occasions may arise where an RTD operator may refuse to remove a listing in any event.

Although the Draft Regulation provides that a tenant should be notified of the contents of an adverse listing, should be given the opportunity to make submissions to the agent in respect of the proposed listing, and the opportunity to review or correct any personal information that is proposed to be listed on a database, there is no provision for dispute resolution where the real estate agent and tenant can not agree.

Privacy NSW is also aware of cases in which the real estate agent concerned has ceased operations, and therefore there is no remaining agent to instruct the RTD to remove, alter or correct a listing on behalf of the tenant.

Privacy NSW therefore suggests that the Draft Regulation should include an independent dispute resolution process which either party may use, which will work even if there is no longer any real estate agent responsible for the original listing. Given the limited number of situations which can give rise to an adverse listing under clause 2(2) it is envisaged that disputes would arise in only limited circumstances.

Conclusion

Privacy NSW supports the Draft Regulation which aims to protect tenants in NSW from unfair treatment arising from the widespread and unregulated use of RTDs. The Draft Regulation prescribes rules of conduct by which real estate agents and property managers provide information to, and use information from, these databases.

Privacy NSW anticipates that the MCCA and SCAG working party will provide options for the national regulation of the RTD operators themselves, which will provide further protection for tenants

In the meantime, the Draft Regulation goes some way to ensuring that use of tenancy databases in NSW will provide a fairer, more transparent and accountable system for all stakeholders, and particularly tenants in terms of how their personal information will be collected, stored, used accessed and disclosed by real estate agents, property managers and RTD operators.

Privacy NSW supports the Draft Regulation.