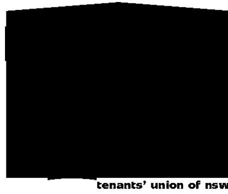

Tenants' Union of NSW
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Millers Point NSW 2000
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The Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

30th May 2000

Dear Secretary,

Thank you very much for the opportunity to make submission on the important topic of privacy protection in the private sector. Thank you also for the understanding extended to our organisation and the extension of time that was allowed.

The Tenants' Union of NSW has been assisting tenants for over twenty years and we are currently the Resourcing Body for the NSW Tenants Advice & Advocacy Program, which assists over 20,000 tenants per year. From this experience we can confirm that the issue your committee is considering (Privacy [Private Sector] Amendment Bill 2000) is of vital interest to tenants, tenancy services and the Tenants' Union.

Since the inception of Tenancy Databases in the late 1980's and early 1990's, we have been made aware of the scope such businesses create for invasions of privacy, discrimination and the creation of homelessness. Without urgent regulatory intervention, the interests of Australian tenants and the community as a whole are adversely affected.

The following submission elaborates on our concerns about the proposed Federal legislation. We would welcome the opportunity to meet with your committee in public hearings and to expand on the material presented here.

Yours truly,

Nicholas Warren
Policy Officer

SUBMISSION TO HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS

RE:

PRIVACY (PRIVATE SECTOR) AMENDMENT BILL, 2000

TENANTS' UNION OF NSW CO-OP LTD
MAY 2000

Contact: **Nicholas Warren**
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TENANCY DATABASES &
PRIVACY (PRIVATE SECTOR) AMENDMENT BILL

BACKGROUND

Tenancy databases developed in the 1980s and '90s in response to a number of factors:

1. Real Estate Agents lost access to credit reporting agencies with the introduction of the Privacy (*Amendment*) Act 1990 (Cth), amending the Commonwealth Privacy Act 1988.
2. State governments introduced or amended tenancy legislation, to provide for standard lease agreements, clear rights & obligations and access to affordable dispute resolution mechanisms.
3. Individual landlords have readily accepted industry myth-making about the level of risk in a well-managed property investment.
4. In the absence of regulation, information about individual tenants could be easily commercialised and traded.

In New South Wales, five tenancy database services operate:

- Tenancy Information Centre Australasia Holdings Pty Ltd, of Ashfield (TICA);
- Remington White Australia Pty Ltd, registered in Victoria (Rentcheck);
- EAC Multilist, of Villawood (EAC);
- Tenant Reference Australia, of Rose Bay (TRA);
- RP Data Ltd, registered in Queensland, with an office in Parramatta (RP Data).

While accurate information is notoriously difficult to get from these services, their own claims indicate that TICA could have over 200,000 tenants on its database and Rentcheck a further 250,000 to 350,000. These figures will be considerably inflated with the inclusion of the other blacklisting businesses.

LANDLORD RISK

The level of myth-making about investor risk and the level of over-collection of personal information, is clear in the mismatch between these astronomical numbers above and the level of disputes through Residential Tribunals and other research. There are many times more tenants with adverse listings than could be expected from other evidence of the incidence of serious tenancy problems.

The Residential Tribunal in NSW, handles about 45,000 applications a year (44,175 in 1999) which accords well with other reported levels of serious dissatisfaction with tenancies.

Research by Keys Young Pty Ltd, for the Department of Fair Trading in NSW (*Fair Trading Issues in the Rental Property Market*), surveyed landlords and tenants and found that 11% of landlords and 5% of tenants said they had 'a big problem' in the last two years. With about 500,000 bonds currently

lodged in NSW, this translates to 27,500 landlords and 12,500 tenants experiencing a significant problem each year.

Most problems are satisfactorily resolved through communication between the parties, often with the assistance of a Tenants Advice & Advocacy Service.

Of the cases that do lead to a Tribunal Application, the Tribunal resolves the majority (over 95%) in conciliation or by a simple hearing.

The most current relevant figures are derived from the *Residential Tribunal Management Report – March 2000* and were as follows, for the month of March:

	Number	%
Applications		
Total applications	4353	100
App'ns by landlord	3656	84
App'ns by tenant	697	16
Outcomes: *		
Finalised without hearing	502	11
Finalised at first or subsequent hearing	3777	86
Finalised after more than one hearing	134	3
Enforcement Orders:		
Warrants for Possession	329	7
Certified Money Orders	736	17

* *Outcomes (total) are greater than number of applications, because of flow-on from previous period.*

Although these figures give a clearer measure of the real rate of tenancy disputation, they still over-estimate any need for protection to landlords via tenancy databases. This is because **most orders are complied with**. It is harder to get ordered monies from a landlord than from a tenant, because unlike tenants, landlords post no bond.

There is no objective evidence of significant levels of default by tenants or of losses sustained by landlords.

What the figures above do demonstrate, is that landlords have ***more*** than equitable access to the Residential Tribunal and that the vast majority of problems are easily resolved, by consent or by order. Database listing is unlikely to be justified in more than a thousand instances a year – nothing like the hundreds of thousands currently adversely listed.

For an up to date discussion of database practices, please see the Council of Social Services NSW (NCOSS) submission based on "*Cash & Cowboys – Barriers for entry to private rental by disadvantaged consumers*" by Craig Johnston, November 1999. (we understand that a copy of this report is being submitted to this Inquiry by the Council of Social Services new South Wales)

A point that we would add to the NCOSS analysis, is that the mechanisms NCOSS reports for privacy protection and information contestability, are comments sourced from the database operators themselves. These DO NOT accord with our experiences in dealing with the database operators. Promised protection and processes rarely exist in at least of two of the databases.

DATABASE PRACTICES

The criteria for provision of information to a tenancy blacklist is often:

- non-specific, based on some nebulous concept of a 'bad tenant',
- tolerant of listing for trivial or malicious reasons and
- given completely at the discretion of the landlord or real estate agent.

This total discretion allowed to the landlord / estate agent, provides considerable scope for inconsistency and inaccuracy at least and abuse, victimisation and discrimination at worst.

A recent phenomena is the request by real estate agents for tenants to sign a form at the start of their tenancy, notifying them that should they breach their agreement they may be listed with a tenant database agency. This is put forward by the industry as a "protection", but illustrates how elements of the proposed regime still disadvantage tenants. This practice is becoming more widespread and works against tenants seeking remedy for disputes for the fear that they may be "listed." This practice also by-passes the legitimate (legislated) mechanisms for resolving tenancy disputes by application to the Residential Tribunal.

John Hill, President of REI NSW, has said publicly (2BL Radio - 25/5/2000) that a tenant who withheld this permission for sharing of personal information, would not be likely to get a tenancy in NSW.

The same distortion of the intent of regulation, is evident in the way that the requirement to notify people of their listing on a database, is used. This action is seen as a protection when a tenant is given clear notice of a listing and reasons for the listing. In the tenancy market however, this is most often used as another opportunity to threaten tenants and to reinforce the pre-existing imbalance in power between tenants and landlords.

Increasingly, we are getting inquiries from people who receive threatening letters on the fifteenth day of being overdue with the rent. No courtesy call, no asking if there is any problem, just a letter threatening to involve the person's

employer, threatening to broadcast the tenant's details to database members and threatening to adversely affect the tenant's credit rating.

Please see Attachment Two for an example of these letters. I have reproduced the letter to ensure it is readable and clear – I can produce original letters for the committee on request.
You will note that

- there is no statement of a tenant's rights in respect of a possible listing,
- the tone of the letter is dogmatic and intimidating and
- there is no opportunity for the tenant to question this assault by the blacklister, except at $5.00 a minute at the tenant's expense.

NEED FOR ACTION

The continuing need for authoritative action, to curb the excesses of tenancy database operators is illustrated in the contacts made with Privacy NSW. We understand that inquiries and complaints about tenancy databases are a significant factor in Privacy NSW's workload. In the last six months tenancy issues generated the fourth highest volume of phone complaints (43) and the second highest volume of calls which involve a complaint resulting in investigation by the Commissioner (15).

Where the satisfaction of the Human Right and Need for housing is at stake, competent and authoritative regulation is needed, to protect individuals from unwarranted discrimination and to protect our community from the adverse impacts of increased housing hardship and the social costs of dislocation and homelessness.

The Tenants' Union of NSW believes that the principles applied to tenancy databases should ensure:

1. Tenants are only listed in justifiable and verified circumstances.
2. Tenants be informed that they have been listed and why.
3. Tenants can easily and freely correct wrong information.
4. Standards of security of information are developed and applied.
5. Accessible legal redress is available to tenants and suitable penalties ensure compliance.

We believe that without a credible privacy protection regime, the abuses present in the current, unregulated environment, will continue.

PROPOSED FEDERAL LEGISLATION

The Tenants' Union of NSW believes that the proposed Privacy (Private Sector) Bill is inadequate to deal with the abuses of privacy by tenancy databases, in a number of respects. We will discuss three:

1. **The National Privacy Principles relating to Collection, Use and Disclosure of information, will not apply to all existing information**

2. **An industry Privacy Code allows for self-regulation.**

3. **The Federal Court's role as the second tier of appeal on privacy issues in the private sector.**

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1. The National Privacy Principles relating to Collection, Use and Disclosure of information, will not apply to all existing information

Section 16C of the proposed Bill allows for various exemptions for information already collected, as follows:

16C Application of National Privacy Principles

(1) National Privacy Principles 1, 3 (so far as it relates to collection of personal information) and 10 apply only in relation to the collection of personal information after the commencement of this section.

(2) National Privacy Principles 3 (so far as it relates to personal information used or disclosed), 4, 5, 7 and 9 apply in relation to personal information held by an organisation regardless of whether the organisation holds the personal information as a result of collection occurring before or after the commencement of this section.

(3) National Privacy Principles 2 and 6 apply only in relation to personal information collected after the commencement of this section.

(4) National Privacy Principle 8 applies only to transactions entered into after the commencement of this section.

Section 16C(1) has the effect of legitimising the data that has been amassed in disregard of the National Privacy Principles. In the case of tenancy databases, this means a perpetuation of inaccurate and prejudicial information already collected.

The provisions are also contradictory and confusing. Sub-section (1) exempts operators from the National Privacy Principles on information collected and held, but sub-section (2) applies National Privacy Principles to the same information if used or disclosed. As tenancy blacklists tend to be held on the Internet and are generally accessible to database customers directly, sub-section (1) undermines sub-section (2) and should be removed.

We also believe that sub-section (3) should be removed, as it has the same effect of allowing a perpetuation of unreliable information collected in disregard of the National Privacy Principles. In particular, it is of grave concern that the exemption from Principle 6 will deny access to information currently held and deny tenants the opportunity to correct wrong information.

In short, **we believe that the National Privacy Principles should apply in their entirety to all information held on tenancy databases, regardless of when the information was collected**. This will require the deletion of information from the databases that have been developed in a careless and discriminatory way. This is a legitimate impact of regulation.

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2. An industry Privacy Code allows for self-regulation.

Part IIIAA of the proposed Bill allows for the Privacy Commissioner to approve a Privacy Code covering an industry affected by the proposed Bill. While the guidelines in the Bill ensure that the provisions of the code do not water down the legislated provisions, the regime established under such a code can make seeking redress more difficult. These codes constitute an introduction of self-regulation that distances database operators from accountability to regulators.

Instead, an extra tier of complaint is introduced that has mediation as its main aim. The effect of this will be to promote immunity for database operators from penalties for their actions and to undermine the credibility of the regulation.

Given our experience of the ethics of some database operators and their disregard of the damage they may inflict on innocent tenants, **we oppose any provision that distances the operators from responsibility for their actions, independent arbitration and penalties for conduct that breaches national Privacy Principles.**

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3. The Federal Court's role as the second tier of appeal on privacy issues in the private sector.

A key barrier to credibility in the current proposals, is the involvement of the Federal Court as the second tier in relation to appeals on privacy issues in the private sector.

Our main concern is regarding the expense of the Federal Court as a mechanism to appeal matters. Currently it costs over $1,000 to file a matter. This makes the lodgement of matters beyond the means of most people - particularly tenants. In NSW it will be difficult / impossible to get grants of Legal Aid for such matters as the Legal Aid Commission cannot indemnify against a costs order.

The Tenants' Union of NSW believes that issues would be best dealt with by a Tribunal, such as the Administrative Appeals Tribunal (AAT), which is cheaper and accessible for low-income people. The new Federal Magistracy should also be considered for this function, if it can offer an accessible and determinative service.

The NSW AAT has experience with codes such as those in the Retirement Villages Act. The proposed Victorian legislation also has a cheap accessible mechanism for appeals. Any barrier to access to a forum that can enforce the terms of the Act on the industry and which can penalise non-compliance, can only be seen as protecting the interests of unethical industry operators at the expense of vulnerable consumers.

It is our view, that the "softly, softly" approach adopted by the government is having the effect of reducing the compliance credibility of the proposed regime. In the first instance, tenants will be required to make a complaint directly to the offending database organisation. The complaint will have to relate to either a breach of a Privacy Code or an NPP.

If an organisation is bound by an approved privacy code that contains a complaint handling process then that process should be followed. The legislation will preclude the Privacy Commissioner from investigating a complaint where the organisation concerned is covered by a code that contains provisions for making and resolving complaints.

Where an organisation is not bound a code (or a code that includes a complaint process) the Privacy Commissioner is responsible for investigating any complaints about an interference with privacy.

The Privacy Commissioner handles complaints in a conciliatory manner, seeking to reach a settlement between the parties. To date, all complaints regarding private sector coverage (ie. credit sector) have been settled and only two companies have actually being fined by the Privacy Commissioner. This conciliatory approach will also apply in respect of complaints about a privacy sector organisation regardless of whether the complaint is handled by the Privacy Commissioner or a code complaint body.

Of particular concern is the lack of penalties under the proposed Bill.

We believe that such an approach is unbalanced and sends a clear message to operators that it is not the government's intention to seriously pursue the issue of compliance.

SUBMISSION TO HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS

RE:

PRIVACY (PRIVATE SECTOR) AMENDMENT BILL, 2000

TENANTS' UNION OF NSW CO-OP LTD
MAY 2000

ATTACHMENT ONE:

Tenancy Information Centre Australasia letter advising tenants of potential listing on the TICA Database.

Pages to follow - one

TICA Default Tenancy Control System

Tel: (190) 222 0346 Email: enquiries@tica.com.au
PO Box 120, Concord NSW 2137

Date/month/2000

Tenant's name
Tenant's address
TENANT'S SUBURB

Re: YOUR BREACH OF TENANCY AGREEMENT

It is with regret that we are forced to advise you that due to your debt your default has been recorded on our national default tenancy database.

Due to your actions you may now find difficulties in freely obtaining rental accommodation due to the large membership of TICA throughout Australia and New Zealand.

We advise that your debt will now be reported to TICA members advising them of your breach and the date it occurred. We will also advise them of the details of your managing agent.

As a direct result of your actions our member may also commence recovery proceedings which may result in a garnisheeing of your income, thus involving your employer. The matter could then be brought to the attention of the Credit Reference Association of Australia (CRAA). A listing with CRAA would have an effect on your ability to obtain future credit.

A default recorded against your rental history and your credit history is not something which should be taken lightly or disregarded. Your tenancy history and credit history is your responsibility to promote.

We advise that until such time as your debt is cleared your details will remain on the database.

We trust you will appreciate the position in which you have placed yourself. Should you wish to discuss this matter further you can call TICA on the number below.
We remain

Yours faithfully

(*signed by Phillip Noonis*)

Tel. 190 222 0346

Calls charged at $4.95 per minute, higher from mobile or pay phones.

TICA Default Tenancy Control System, a division of
Tenancy Information Centre Australasia holdings Pty Ltd ACN 076 658 556