

2011

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

RESIDENTIAL TENANCIES (DATABASES) AMENDMENT BILL 2011

EXPLANATORY STATEMENT

**Presented by
Simon Corbell MLA
Attorney General**

RESIDENTIAL TENANCIES (DATABASES) AMENDMENT BILL 2011

Overview of the Bill

The Bill replaces part 6A of the *Residential Tenancies Act 1997*, which regulates residential tenancy databases, with new part 7.

New part 7 incorporates nationally uniform model provisions for the regulation of residential tenancy databases, agreed to by the Ministerial Council of Consumer Affairs (MCCA).

Residential tenancy databases (RTDs) are nationally accessible databases which contain personal information about tenants.

Most real estate agents in Australia subscribe to at least one RTD.

RTDs are often used by lessors and real estate agents when checking a prospective tenant's history. Any information contained in the database may be used in deciding whether a tenancy should be entered into with that person.

The Bill introduces new requirements for lessors and lessors' agents. These new requirements relate to information that must be provided to tenancy applicants.

The Bill also clarifies the circumstances in which a lessor or lessor's agent is entitled to list personal information about a former tenant in an RTD.

Purpose

The purpose of the new regulatory regime for RTDs is to ensure that tenants are not unfairly discriminated against in the rental market.

The Bill also recognises the importance of RTDs as a legitimate risk management tool for lessors, and is intended to ensure the integrity of information contained in RTDs.

Human Rights Act implications

Human Rights Act 2004, section 12

Section 12 of the *Human Rights Act 2004* provides as follows:

“Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.”

The provisions in the Bill are relevant to this right.

The Bill introduces provisions that restrict the personal information about a person that may be listed in an RTD. The provisions require that lessors, agents and database operators ensure that personal information kept on a database is not inaccurate, incomplete, ambiguous or out of date.

The provisions require lessors and agents to notify prospective tenants of their practice in using tenancy databases and to provide certain information if a search of a database reveals information about the particular applicant.

On request, landlords and database operators must give a person a copy of personal information that is held about them.

A person may apply to the tribunal for an order to prohibit, remove or amend a listing in certain circumstances.

These provisions enhance the right to privacy of prospective tenants and persons whose personal information is listed on an RTD. The provisions put safeguards in place to protect people's privacy.

Clause Notes

Clause 1 Name of Act

This clause names the Act as the *Residential Tenancies (Databases) Amendment Act 2011*.

Clause 2 Commencement

This clause provides for the Act's commencement, which is on a day fixed by the Minister by written notice.

Clause 3 Legislation amended

This clause states that the Act amends the *Residential Tenancies Act 1997*.

Clause 4 Tenancy databases Part 6A

Part 6A, which currently regulates residential tenancy databases, is removed from the *Residential Tenancies Act 1997*.

Clause 5 New part 7

New part 7 is introduced to the *Residential Tenancies Act 1997*, and replaces part 6A.

Part 7 Residential Tenancy Databases

Section 87 Definitions—pt 7

New section 87 provides definitions for words that are used in part 7.

In particular, the terms “inaccurate” and “out of date” are new. New section 87 provides definitions for these terms.

The terms “inaccurate” and “out of date” are defined to include situations where information listed in an RTD becomes inaccurate or out of date at a later time, as follows:

In the case of a tenant who is listed on the ground that the tenant owes the lessor an amount that is more than the rental bond:

- if the full amount was paid within 3 months after it was due, the information would be “out of date” and would need to be removed;
- if the full amount was paid later than 3 months after it was due, the information would be “inaccurate” if the listing did not include details of the payment.

Section 88 Application—pt 7

New section 88 provides that new part 7 does not apply to internal databases kept by entities, including real estate agencies, for their own use.

Section 89 Notice of usual use of database

New section 89 requires lessors and lessors’ agents to give notice to tenancy applicants of any RTDs that are usually used by the lessor or agent.

The notice must inform the applicant of:

- the name of each RTD that is usually used;
- that the reason the lessor or agent uses an RTD is for checking the applicant’s tenancy history;
- for each RTD named in the notice, how the applicant may contact and obtain information from the RTD operator.

New section 89(4) provides that if this information has already been given to the applicant within 7 days of the tenancy application being made, there is no need to give this information to the applicant again.

This section would be complied with if the lessor or agent includes this information in (or attached to) the tenancy application form, provided the form is submitted to the agent or lessor within 7 days.

New section 89 is intended to increase the likelihood of tenancy applicants finding out whether they may have a listing in an RTD, and in which RTDs their personal information may be listed.

Section 90 Notice of listing if database used

New section 90 requires that if a lessor or lessor’s agent finds a listing about a tenancy applicant in an RTD, notice must be given to the applicant about the listing within 7 days.

The notice needs to give the applicant notice of:

- the name of the RTD;

- that personal information about the applicant is in the RTD;
- the name of each person who listed the information (if their names are in the database);
- how, and in what circumstances, the applicant can have the personal information removed or amended under part 7.

Section 90 is designed to bring to a person's attention any listings about him or her that are contained in an RTD, and in which RTD their personal information is kept.

This is intended to avoid a situation where a tenant who is listed in an RTD is not aware of any listing made about them, and only comes to suspect that a listing exists when they have encountered significant difficulties in securing a tenancy.

Section 91 Listing can be made only for certain breaches by certain people

New section 91 provides the lawful bases on which a person may be listed in an RTD.

Firstly, a person cannot be listed in an RTD unless they were a tenant under a residential tenancy agreement that has ended.

This is intended to prevent the potentially unjust outcome that may arise where a person is listed in an RTD while the person is still a tenant under the residential tenancy agreement.

Also, the requirement that the listing must be about a former tenant under a residential tenancy agreement is designed to protect people under other agreements such as occupancy agreements and sub-tenancy agreements.

People who rely on these types of agreements may already have a more disadvantaged rental market position and are likely to suffer further significant hardship if listed in an RTD.

Secondly, a person can only be listed for certain breaches of a residential tenancy agreement.

There are no provisions in current part 6A prescribing the breaches of a residential tenancy agreement that give rise to a right for a lessor or lessor's agent to list a former tenant in an RTD.

New section 91(1) provides that a former tenant may be listed in an RTD where, because of the former tenant's breach:

- 1) the lessor is owed an amount that is more than the rental bond under the agreement; or
- 2) a court or the ACAT has made an order terminating the residential tenancy agreement.

The reason for identifying the breaches that may give rise to a listing is twofold.

It is intended to provide clarification and certainty for lessors and lessors' agents as to the circumstances where a former tenant may be listed in an RTD.

It is also intended to prevent listings being made about tenants in RTDs for reasons that may be unjust, frivolous or vexatious.

As a listing in an RTD can have serious consequences for tenants, including homelessness, it is important that listings are only made for more serious breaches of the residential tenancy agreement.

The breach set out in 1) above is intended to do justice to both parties. It requires that any listing on the basis of a breach by a tenant that has resulted in an amount being owed to the lessor must be for an amount that is more than the rental bond paid.

The rental bond is an amount paid by the tenant as security for the performance of the tenant's obligations under the agreement. It is intended to be available for the financial protection of the lessor against the tenant breaching the agreement.

Where a tenant has breached the residential tenancy agreement in a way that has not left the lessor out-of-pocket, it may be unreasonable and unjust for a listing to be made.

Where the tenant has breached the agreement in a way that has left the lessor out-of-pocket after the whole of the bond has been released to the lessor, it is open to the lessor or the lessor's agent to list the tenant in a database.

The breach set out in 2) is intended to allow the lessor or the lessor's agent to list a tenant where the ACAT (or court) is satisfied that there has been a breach by a tenant significant enough to warrant the termination of the residential tenancy agreement.

New section 91(1)(d) requires that a listing must relate only to the breach and must not be inaccurate, incomplete, ambiguous or out of date.

In addition, new section 91(2) requires that the listing must indicate the nature of the breach.

The combined effect of new section 91(1)(d) and section 91(2) is to ensure the integrity of information contained in RTDs.

Section 92 Further restriction on listing

New section 92 requires that before a person is listed in an RTD, the listing person must give the person to be listed a copy of the information to be listed, or take other reasonable steps to disclose the information to the person.

The listing person must also give the person to be listed at least 14 days to review the personal information to be listed and make submissions about it.

The requirement to give notice under section 92 about a proposed listing does not apply where the listing person cannot locate the person after making reasonable enquiries.

The requirement to give 14 days' notice does not apply to information contained in publicly available court or tribunal records.

The requirement to give 14 days' notice also does not apply to amending a listing in an RTD that would make personal information in the listing accurate, complete and unambiguous.

New section 92 is similar in its effect to combined current sections 107D(1)(e), 107D(1)(f), 107D(2) and 107D(3).

New section 92 recognises that a person has a right to know about any personal information proposed to be listed about him or her in an RTD. It also recognises that a former tenant has a right to object to a listing or to personal information proposed to be included in a listing.

At the same time there are circumstances where complying with the notice requirements in section 92 are impracticable for a lessor or agent, such as where a tenant absconds or fails to provide a forwarding address.

Section 93 Ensuring quality of listing—lessor’s or agent’s obligation

New section 93 requires that where a lessor or lessor’s agent who has listed a person in an RTD becomes aware that information in the listing is inaccurate, incomplete, ambiguous or out of date, they must give written notice to the database operator within 7 days.

In the event that the information is out of date, the written notice must advise the database operator that the information is out of date and must be removed.

In the event that the information is inaccurate, incomplete or ambiguous, the written notice must inform the database operator of the fact, and how the information must be amended so that it is no longer inaccurate, incomplete or ambiguous.

New section 93 is intended to ensure the integrity of information stored in RTDs. The new section is also designed to ensure that former tenants are not unfairly discriminated against because of information that is stored in an RTD that is out of date, inaccurate, incomplete or ambiguous.

Section 94 Ensuring quality of listing—database operator’s obligation

New section 94 requires a database operator to amend or remove personal information about a person in an RTD within 14 days of being given a written notice from the lessor or lessor’s agent to do so.

New section 94 is intended to ensure the integrity of information contained in RTDs. It is also designed to protect former tenants from being unfairly discriminated against because of information contained in an RTD that is out of date, inaccurate, incomplete or ambiguous.

Section 95 Providing copy of personal information listed

Section 95 requires a lessor or lessor’s agent who has listed a former tenant in an RTD, or the database operator who keeps the person’s information in an RTD, to give the person a copy of the information if requested to do so in writing.

If the lessor, lessor’s agent or database operator charges a fee for giving the information, the lessor, lessor’s agent or database operator need only comply with the request if the fee has been paid.

Any fee charged by the lessor, lessor’s agent or database operator must not be excessive.

Also, any fee charged must not apply to lodging a request for information. This is intended to prevent a person having to pay a fee for information if no information is held by the database operator.

The lessor, lessor's agent or database operator must provide the information to the person within 14 days of the request, or 14 days from the fee being paid (if a fee is charged), whichever is the later.

The purpose of new section 95 is to provide an avenue for a tenant to obtain a copy of information kept about them in an RTD. New section 95 is intended to be consistent with the National Privacy Principles under the Commonwealth *Privacy Act 1988*.

Section 96 Notifying relevant non-parties of tribunal order about listing

New section 96 provides that the ACAT must give a copy of any order made against a person not a party to the ACAT proceedings to that person within 14 days of the order being made.

An example of where this section would be relevant is where the parties to the ACAT proceedings are a former tenant and the lessor or agent who listed the former tenant in an RTD. An order may be made requiring that the RTD operator amend or remove the listing. New section 96 would operate to ensure that the RTD operator is given a copy of the order.

Section 97 Keeping personal information listed

New section 97 requires that RTD operators do not keep personal information about a person on an RTD for longer than 3 years, or any shorter period prescribed under the national privacy principles under the Commonwealth *Privacy Act 1988*.

The RTD operator may keep a person's name in an RTD for longer, where other personal information about the person is listed that is not required by law to be removed.

New section 97 is designed to ensure the integrity of information contained in RTDs.

The new section is also intended to prevent the potentially unjust outcome that may arise where a tenant is listed on an RTD indefinitely.

Section 98 Application to ACAT about contravention

New section 98 provides for applications to be made to the ACAT about the inclusion of personal information in an RTD in contravention of part 7.

New section 98 replicates current section 107E. It empowers the ACAT to order a person to take stated steps to remedy the contravention and any other order it considers appropriate.

New section 98 is intended to provide ACAT with a broad power to make orders about information listed in contravention of a requirement in part 7.

Note 2 of the model provisions states that each jurisdiction is to prescribe the consequences of failing to comply with the provisions.

Section 98 gives the ACAT power to make orders to remedy a contravention of part 7, and section 101 gives the ACAT additional power to require a person to pay compensation to a person for loss or damage caused by a listing in an RTD.

Section 99 Application to ACAT about certain personal information listed in residential tenancy database

New section 99 replicates current section 107F, but amends the reference to information that is “incorrect or misleading” to information that is “inaccurate, incomplete, ambiguous or out of date”. This is intended to incorporate new terminology that is used throughout new part 7.

New section 99 allows an application to be made to the ACAT for an order to require the removal or amendment of personal information in an RTD where the information is inaccurate, incomplete, ambiguous or out of date.

Section 99(3)(b) retains the further ground where the ACAT can order the removal or amendment of information in an RTD, that being where the listing is unjust in the circumstances.

Note 2 of the model provisions states that the provisions have been prepared on the basis that a person who claims that they should not have been listed, or that information is inaccurate, incomplete, ambiguous or out of date may apply to a tribunal for an order requiring the removal or amendment of the listing.

Section 99 is designed to provide ACAT with the power to order the removal or amendment of listings.

Section 100 Application to ACAT about proposed listing of personal information

New section 100 replicates current section 107G.

New section 100 allows an application to be made to the ACAT for an order requiring that a proposed listing in an RTD is not to be made or is only to be made with stated changes or conditions, or any other orders the ACAT considers appropriate.

The ACAT can only make an order under section 100 if satisfied that, if the information were already listed, it could make an order under section 98 or section 99.

The section is intended to prevent a listing where there has been a threat of a listing, and that listing would either be in contravention of part 7, or would be inaccurate, incomplete, ambiguous, out of date or unjust in the circumstances.

Section 101 Order for compensation

New section 101 replicates current section 107H.

New section 101 provides that where the ACAT makes an order under part 7, the ACAT may also make an order requiring a person to pay to another person compensation for loss or damage caused by the listing.

The ACAT may order an amount up to \$5000, or another amount prescribed by regulation.

Note 2 of the model provisions states that each jurisdiction is to prescribe the consequences for contravention of the provisions.

Section 101 provides the consequence for a failure by a lessor, agent or database operator to comply with part 7.

Dictionary

The dictionary defines various words and expressions used in the Act.