Residential Tenancies Practice Note 11-08
Residential Tenant Databases

Background

The *Residential Tenancies Amendment Act* 2010 (Amendment Act) amends the Residential Tenancies Act (the Act) through the introduction of Part 10A. This new part contains provisions pertaining to the regulation and use of residential tenancy databases.

It is currently proposed that these provisions will take effect on **1 September 2011**.

Summary of the Amendments

1. Personal information can only be listed in certain circumstances:
    a. The tenancy has ended; and
    b. There has been a specific breach which either results in a debt that is more than the bond or a possession order.

2. Listing can only remain on a database for a maximum of 3 years.

3. Listing must be removed if:
    a. the debt was paid within 3 months of the amount becoming due; or
    b. a possession order has been revoked pursuant to an application for review.

4. Specific notification requirements apply to a listing.

5. Obligations in regard to quality control.

6. Remedies available at VCAT such as orders for prohibition, removal or amendment of a listing.

Terminology

For the purposes of Part 10A:

Landlord: Includes a rooming house owner, caravan park owner, caravan owner, site owner, or their agent.

Tenant: includes a resident, site tenant, former tenant, former resident or former site tenant.

Tenancy Agreement: includes a residency right and a site agreement

What is the issue?

Until now there has been little a Victorian tenant can do to prevent or remove a listing on a tenant database. Such a listing can detrimentally affect a tenant's chances of successfully applying for a rental property. The amendments to the Act significantly alter this situation, for example, the introduction of a 3 year time limit on listings. The new provisions also include notification requirements at the time of application and listing and restrict the circumstances in which a listing can be made.

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When can personal information be listed?

A landlord or database operator must not list personal information unless:

- The person was named as a tenant in a tenancy agreement that has ended. (note above definitions of tenant and tenancy agreement which includes residents and residency rights); **and**

- The person has breached the tenancy agreement; or section 243, (malicious damage), 244 (danger), 246 (rent arrears), 248 (failure to comply with a VCAT order made under s212), 250 (illegal use), 253 (illegal assignment/sub-letting), and the equivalent sections for rooming houses, caravan parks and part 4A parks; **and**

- As a result of the breach either the person owes the landlord an amount that is more than the bond; or

- The Tribunal had made a possession order; **and**

- The person has been given a copy of the personal information or reasonable steps have been taken to disclose it; **and**

- The person has been given 14 days to review the personal information and make submissions either objecting to its entry or in regard to its accuracy, completeness and clarity. (unless the person cannot be located after reasonable enquiries have been made); and

- Any submissions made have been considered **(ss. 439E & 439F)**

If the above circumstances exist the personal information can be listed. However, it must be accurate, complete and unambiguous and relate only to the breach.

Notification Requirements

1.   Applying for a tenancy

When a person applies for a rental property and the landlord **usually uses** a residential tenancy database/s for the purpose of assessing an application, he/she must at the time the application is made, provide the applicant with written notice. This is regardless of whether or not the landlord intends to use the database in the assessment process.

The notice must state the name of the database(s) used, why it is used and the database operator's contact details.

If a listing is found, the landlord must within 7 days give notice to the applicant stating the nature of the information and other relevant details including how it can be removed or amended. **(ss. 439C & D)**

2.   Before Listing

A landlord or database operator cannot list personal information until after they have done the following:

- given the person a copy of the information; and

- allowed at least 14 days for review of the information and possibly make submissions in regard to its accuracy, completeness and clarity; and

- the submissions are given consideration.

How can a listing be checked?

Upon receipt of a written request by a tenant a landlord or database operator must provide a copy of listed information within 14 days. (**s439I (1)**)

A fee can be charged for the provision of the information though it must not be excessive. (**s. 439I (4)**)

How can a listing be changed?

If a landlord becomes aware that the personal information they have listed is inaccurate, incomplete, ambiguous or out of date he/she has 7 days to give written notice to the database operator and direct them to either amend the listing according to instructions or remove it.

The database operator must amend or remove the listing in accordance with the notice **within 14 days** of receipt. (**ss. 439G & H**)

How long can the listing remain?

A listing can only remain on a residential tenancy database for **3 years** or a lesser period if required by the national privacy principles. (**s. 439K**)

A listing must be removed if it is out of date. (**s. 439G(2)(b)**) A listing is out of date if it arises from a debt which was paid within 3 months of it falling due or if it arises from a possession order, where the order has been revoked as a result of an application for review.

Applications to VCAT

A person can apply to VCAT for an order prohibiting a landlord or database operator from listing personal information or requiring amendment or removal on the grounds that, in relation to the specific listing, there has been a breach of section 439 D, E, F or G. (notice if database used; restrictions on listing; remove or amend if inaccurate, incomplete, ambiguous or out of date). (**s. 439L**)

A person can apply to VCAT for an order that a database operator remove personal information from a residential tenancies database if they have failed to act on a request from the landlord to amend or remove information or kept it in the database for longer than 3 years – or other period as prescribed by the national privacy principles.

VCAT can order that a listing be removed, amended or prohibited if it is determined that the landlord has not notified an applicant of the discovery of personal information in a database or a listing has been made in contravention of the Act or a landlord has not notified a database operator that a listing is inaccurate, ambiguous or out of date or a database operator has not acted on notification of the above.

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What should you do?

1. As these are new provisions we cannot be certain about their application until litigation at VCAT enables us to discern at least the pattern of interpretation that VCAT will adopt. Please contact the Tenants Union Legal Service if you are interested in referring a matter where the application of a provision may be unclear.

2. If a listing is more than 3 years old, s. 439L states that an application may be made (to VCAT) whether or not the personal information was listed before, on or after the commencement of this Part. The current interpretation of s. 439L is that any listing that is more than 3 years old is in breach of s. 439K and therefore an application under s. 439L may be made for an order to remove the listing.

3. If a tenant is or has applied for a rental property, check that the applicant has received notice under s. 439C stating the name of the residential tenancy databases usually used, why they are used and the relevant contact details.

4. If the tenant has not received notice it may be because a landlord does not usually use a residential tenancy database for deciding whether a tenancy agreement should be entered into with a person. However, this would be difficult to determine. It may only be discovered after a listing has occurred.

5. If a listing has been made after the commencement of Part 10A then check the following information:

    a. Is the listing due to a debt that was paid within 3 months of it becoming due?

    b. Is the listing due to a possession order that was revoked subsequent to an application for a review?

    c. Was the client the named tenant in a tenancy agreement or the equivalent for rooming house, or caravan park residents or site tenants?

    d. Is the listing only related to a breach of the tenancy agreement or a breach of a specific section and the result of the breach is a debt greater than the bond or a possession order?

    e. Is the listing accurate, complete and unambiguous?

    f. Has the landlord or database operator made reasonable attempts to give the client a copy of the personal information?

    g. Has the landlord or database operator given the client 14 days to review the information, make submissions about the information and have those submissions been considered by the landlord or database operator?

6. This may require the client to check or obtain the database listing. The client should contact the relevant database operator. If the database operator is uncooperative or seeks to charge an excessive fee to access or obtain the listing then the client should apply to VCAT. The application would be made under s 452 of the Act.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific case and you require advice, then you should contact us on **(03) 9411-1444.**

Tenants Union Legal Team