Residential Tenancies and Rooming Accommodation Amendment Bill 2011

Explanatory Notes

Title of the Bill

Residential Tenancies and Rooming Accommodation Amendment Bill 2011 (the Bill)

Objectives of the Bill

The Bill will amend the *Residential Tenancies and Rooming Accommodation Act 2008* for a particular purpose. The Bill seeks to introduce the national uniform law on residential tenancy databases adopted by the Ministerial Council on Consumer Affairs (MCCA) in December 2010, with some additions and minor variations to ensure the provisions operate effectively in Queensland.

The model provisions are similar to the existing provisions in Chapter 9 of the *Residential Tenancies and Rooming Accommodation Act 2008* in that they recognise the rights of lessors and their agents to list former tenants on a residential tenancy database, while introducing limitations and obligations on lessors and their agents to ensure tenancy databases are used fairly for the benefit of those investing in the residential property rental sector.

Reasons for the Bill

Residential Tenancy Databases (RTDs) are privately owned electronic databases that contain information about an individual's tenancy history. Most real estate agents subscribe to one or more RTDs and use them to screen prospective tenants for the purpose of renting private residential properties.

Queensland was the first jurisdiction in Australia to develop legislation to regulate listings on tenancy databases by amending the *Residential Tenancies Act 1994* (repealed) in 2003. Subsequently, a national working party was established by the Standing Committee of Attorneys-General

(SCAG) and the MCCA to develop national uniform legislation and maintain consistency between states and territories. In July 2008, the SCAG removed the development of the model provisions from its agenda, leaving the task to be managed solely by the MCCA. At this time, Queensland, the Australian Capital Territory and New South Wales had enacted laws specifically dealing with the use of RTDs. South Australia and the Northern Territory included provisions relating to RTD listing practises in their Fair Trading legislation. However, Victoria, Western Australia and Tasmania did not specifically regulate the use of RTDs.

The model provisions were drafted in accordance with the recommendations in the final report of the joint SCAG/MCCA working party, *Report on Residential Tenancy Databases* and the associated *Regulatory Impact Statement*. The national consultation process for the draft model provisions occurred between November 2009 and January 2010. Queensland consulted on the draft *Residential Tenancies and Rooming Accommodation Amendment Bill 2009*, which showed how the model provisions would be implemented in Queensland.

The MCCA formally adopted a revised set of model provisions in December 2010. By this time, the New South Wales Parliament had already passed an earlier version of the model provisions in June 2010, as part of their new *Residential Tenancies Act 2010*. The tenancy database provisions included some drafting and substantive variations from the model provisions to address local circumstances. Similarly, in September 2010, the Victorian Parliament passed the *Residential Tenancies Amendment Act 2010*. The legislation inserted the tenancy database provisions approved by the MCCA with some jurisdictional variations.

Implementation of the uniform law by states and territories will ensure national consistency in relation to minimum standards. As noted in relation to New South Wales and Victoria, a jurisdiction may add to the rights, obligations or limitations by including or adopting a higher standard for them. This consistency in minimum standards across jurisdictions provides certainty and clarity for tenants, who may move within Australia as it potentially standardises the regulatory regime for tenancy database operators that operate in more than one jurisdiction.

This Bill implements the national uniform legislation for residential tenancy databases in Queensland with some local variations. The new provisions are similar to the existing provisions on tenancy databases in the Act. However, there are some new obligations for lessors, lessors' agents

and database operators. The impact of these provisions is to strengthen and offer additional safeguards and protections for tenants.

Achievement of the objectives

The objectives are achieved by replacing the existing tenancy database provisions in the Act with the model provisions in the Bill. In accordance with the existing provisions in the Act, the new provisions:

- specify restrictions on listing for lessors, their agents and database operators, which include an obligation to consult with former tenants before making a listing; and

- provide for an application to the tribunal where there has been a contravention of the restrictions or the listing is incorrect, or a listing is otherwise unjust given the circumstances.

In addition, in accordance with the national uniform law, the new provisions also require:

- lessors and their agents who use residential tenancy databases to advise prospective tenants of the databases they use, the purpose for which they use them, and how the database operators can be contacted;

- lessors and their agents to advise prospective tenants that they are on tenancy databases and in particular, advise them of the person that listed them and how they can challenge the listing;

- lessors, their agents and database operators to update the information on the database when necessary to ensure the listings are accurate;

- lessors, their agents and database operators to provide persons listed by them with a copy of the personal information on the database on request;

- information is to be listed for a restricted period of time on a tenancy database.

Alternatives to the Bill

In the *Report on Residential Tenancy Databases* and the *Regulatory Impact Statement* the national working party on residential tenancy databases concluded that the issues raised by the use of RTDs were best addressed by regulatory action, given the significant consequences of a negative listing

for prospective tenants and the lack of an industry body that covered database operators that could facilitate an effective form of self-regulation or quasi-regulation, including the provision of an efficient self-regulatory dispute resolution process.

In particular, the working party recommended that the states and territories develop agreed uniform model legislation on the use by lessors, their agents and listing parties of RTDs. The creation of a Commonwealth legislative scheme for RTDs and their use by real estate agents was not considered appropriate given the existing state and territory responsibilities for real estate agents and tenancy issues.

Estimated Cost for Implementation

Any financial implications arising out of amendments to the *Residential Tenancies and Rooming Accommodation Act 2008* will be met by the Residential Tenancies Authority. A public information campaign will be conducted on the amendments to the Act. The cost of the campaign will be met from the normal operating budget of the Residential Tenancies Authority, which administers the legislation.

Consistency with Fundamental Legislative Principles

The proposed amendments are generally consistent with fundamental legislative principles. However, there are some potential breaches of fundamental legislative principles that have been identified:

Individuals' rights and liberties

Section 4(3)(g) of the *Legislative Standards Act 1992* provides that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively. These proposed amendments to the *Residential Tenancies and Rooming Accommodation Act 2009* may be considered to impose obligations retrospectively by applying the new provisions to listings made on tenancy databases before commencement. However, it is considered that this is justified on a number of grounds:

- firstly, the Bill clarifies existing rights for tenants and introduces new obligations on lessors, their agents and database operators for the necessary protection of tenants;

- secondly, costs for lessors, their agents and database operators have been minimised by not requiring them to review and amend existing listings in the absence of an application to the tribunal by a tenant. The

exception to this rule is in relation to the introduction of the new time limit for listings, in which case database operators have been provided with a 12 month period after commencement in which to update their listings;

- finally, this approach, under which the new provisions apply to both existing and new listings is expected to be simpler for the sector to understand and administer, and reflects the general approach to the transition from the *Residential Tenancies Act 1994* (repealed) to the *Residential Tenancies and Rooming Accommodation Act 2009.*

Reasons for limiting offence in section 459 to subsection (3)

The proposed section 459 and section 460 provide for restrictions on listing personal information about a person on a tenancy database. However, the Bill creates an offence only for listing personal information about a person who was not named in a residential tenancy agreement that has ended (see proposed section 459(3)). These are fundamental requirements. For other contraventions, which are the grounds for listing, the person to whom the personal information relates may apply to the tribunal for an order for the amendment or removal of the personal information. The approach of limiting the offence to the circumstances provided in section 459(3) has been taken because it would be extremely difficult for the prosecution to prove that the other restrictions which are the grounds for listing have been contravened. An alternative option could be have no offences and have the tribunal as the only recourse for all contraventions of the restrictions on listing. This would be consistent with the approach in the current Act. However, including the restriction for the circumstances provided in section 459(3) could add value by acting as a further deterrent for contraventions by lessors, their agents and database operators.

Section 509A

Proposed section 509A deems particular documents to be evidence of what is listed in a tenancy database about a particular person. This shifts the onus of proof of what is in fact a listing on the tenancy database onto the person seeking to rely on that matter. The shift in onus potentially breaches the fundamental legislative principles that legislation has sufficient regard to the rights and liberties of individuals because it imposes the obligations relating to evidence on the defendant. The potential breach is justified on the basis that it will facilitate seeking penalties or remedies for contraventions of this law, and that the person seeking to rely on what is

listed on the tenancy database will be in a better position to prove the matter.

Consultation

Community

Public consultation on the draft Bill was undertaken between December 2009 and January 2010. The following non-government organisations provided submissions:

- Annual Property Operating Data – APOD

- Australian Resident Accommodation Managers Association Queensland Inc (Qld) – ARAMA

- Caravan and Manufactured Home Residents' Association of Queensland Inc – CAMHRA

- Console

- Landlords Advisory Service – LAS

- National Tenancy Database P/L – NTD

- Northern Suburbs Tenancy Advice and Advocacy Services Queensland –TAAS (Q)

- Property Owners Association of Queensland – POAQ

- Queensland Shelter

- Real Estate Institute of Australia – REIA

- Real Estate Institute of Queensland – REIQ

- RP Data

- TAAS(Q) Palm Beach

- Tenant Check – TC

- Tenants' Union of Queensland – TUQ

- The Advocacy and Support Centre, Toowoomba – TASC

- The Landlord

- TICA

- Trading Reference Australia – TRA

- Whitsunday Housing Company Ltd

Government

The following agencies have been consulted during the development of the amendments:

- Aboriginal and Torres Strait Islander Services
- Department of Communities – Housing and Homelessness Services
- Department of Community Safety
- Department of Education and Training
- Department of Employment, Economic Development and Innovation
- Department of Environment and Resource Management
- Department of Environment and Resource Management - Office of Climate Change
- Department of Local Government and Planning (Formerly the Department of Infrastructure and Planning)
- Department of Justice and Attorney General
- Department of the Premier and Cabinet
- Department of Public Works – Government Employee Housing Unit
- Department of Transport and Main Roads
- Office of Fair Trading
- Queensland Health
- Queensland Police Service
- Queensland Treasury

The following agencies have been consulted about the amendments contained within the Bill:

- Department of Communities – Housing and Homelessness Services
- Department of Employment, Economic Development and Innovation
- Department of the Premier and Cabinet
- Department of Public Works – Government Employee Housing Unit
- Queensland Treasury

Uniform or complementary legislation of the Commonwealth or another State

The Bill will give effect, in Queensland, to the national uniform law on residential tenancy databases adopted by the MCCA in December 2010. To the extent that the law is uniformly adopted by jurisdictions, the tenancy database provisions in the Act will be the same as other Australian jurisdictions.

Notes on Provisions

Part 1   Preliminary

Short title

Clause 1 sets out the short title of the Bill.

Commencement

Clause 2 provides for the commencement of the Bill fixed by proclamation.

Act amended

Clause 3 provides that this Act amends the *Residential Tenancies and Rooming Accommodation Act 2008*.

Amendment of section 445 (Power to require information from certain persons)

Clause 4 amends the existing section 445 subsections (1) and (2) to clarify the information sought by an authorised person is about a suspected offence rather than an offence. The clause also increases the maximum penalty to 15 penalty units and provides that an individual can claim the privilege against self-incrimination rather than a person. It further provides that the nominated person does not commit an offence against subsection (4) if the information sought by the authorised person is not in fact relevant

to the suspected offence or the suspected offence is not proven to have been committed.

Replacement of Chapter 9 (Tenancy databases)

Clause 5 replaces *Chapter 9 – Tenancy Databases* with the following provisions:

Part 1   Preliminary

Section 457 defines the terms used in the chapter including "database" and "database operator". The term "inaccurate" is defined to clarify that information is inaccurate when it indicates that the person who owed the lessor money has paid the amount, when the amount was paid to the lessor more than 3 months after the amount became due. In contrast, the term "out of date" applies to information that is no longer accurate because either the amount owing was paid to the lessor within 3 months after the amount became due or because the termination order that was made has been revoked. "List" is defined to mean the entry of information into the database as well as giving information for entry by someone else.

The definition of "personal information" is based on the definition found in section 6 of the *Commonwealth Privacy Act 1988* with some modifications to reflect the context. "Prescribed amount" means the amount of the rental bond plus the amount stated for a relevant tenancy guarantee, if any. The term "tenancy guarantee" is defined in section 180 of the Act. The term "tenancy database" is defined to mean a database containing specified types of information, which also has an intended purpose of use by lessors or their agents for checking a person's tenancy history for deciding whether a residential tenancy agreement should be entered into with that person.

The new section 458(1)(a) is similar to the previous section 458 in that it provides that the chapter does not apply to internal tenancy databases kept by an entity such as a state government department, which is only for the use of its employees or their agents. The new section 458(1)(b) specifically excludes any tenancy databases that are kept by a government department for the purpose of administering the affordable housing scheme, approved supported accommodation scheme and the government employee housing scheme and any related purpose. The new section 458(2) defines the words

"department" and "government employee housing scheme" as they are used in this section.

Part 2   Restrictions on Listing

The new section 459 is similar to the existing section 459 in that it provides that a lessor, their agent or database operator must not list personal information about a person in a tenancy database unless that person was named as a tenant in a tenancy agreement and that tenancy agreement has ended. However, the new section 459 now sets out the grounds for such listings. These are a breach of agreement that results in the tenant owing the lessor more money than the amount of any bond, and a tenancy guarantee or a breach that results in the tribunal terminating the agreement. The personal information listed on the database must relate only to the breach, indicate the nature of the breach, be accurate, complete and unambiguous.

The new section 460 sets out a consultation requirement similar to that set out in the existing section 459. The new section requires a lessor, their agent or database operator to give the person being listed a copy of the personal information to be listed on a tenancy database prior to making the listing. In addition, the lessor, their agent or database operator must give the person to be listed at least 14 days to review the information and make submissions about the information. The lessor, their agent or database operator must consider the submissions. The requirement to provide the 14 day period and consider submissions does not apply to personal information that has already been published by a court or tribunal. In addition, these obligations do not apply where an existing listing is amended in accordance with section 464G, in order to ensure amendments to a listing made under section 464G are made promptly.

Part 3 Disputes about listing etc.

New section 461 is similar to the existing 462 and provides that a person who is aware of a proposed listing about themselves may apply to the tribunal. The tribunal may order a lessor, real estate agent, or any other listing person not to make the listing, or for the listing to be made with stated changes or conditions, or any other order the tribunal considers appropriate. The tribunal may only make the order if the proposed listing would be in breach of new section 462 and section 463 about unlawful, incorrect or unjust listings.

New section 462 is similar to the existing section 460 and provides that a person who believes there has been a breach of the tenancy database listing provisions under new section 459 and section 460 may apply to the tribunal about the breach within six months after the person becomes aware of the breach. The tribunal may order a person to take stated steps to remedy the breach, or any order it considers appropriate.

New section 463 is similar to the existing section 461 and allows a person who has been listed on a tenancy database to apply to the tribunal about a listing which they consider to be inaccurate, incomplete, ambiguous, out of date or unjust. The tribunal may order a person to take stated steps to have the person's name or personal information omitted from the database, or have stated changes made to the information included about the person in the database. In making the order, the tribunal must determine that the personal information is inaccurate, incomplete, ambiguous, out of date or that the inclusion of the personal information about the tenant is unjust in the circumstances, taking into account a number of factors. These factors are the reason for the listing, the tenant's involvement in the acts warranting the listing and the adverse consequences suffered, or likely to be suffered, by the tenant because of the listing, or any other relevant information.

New section 464 provides that a person who claims that a listing is in a tenancy database for a period longer than provided for under section 464J can apply to the tribunal for the removal of the listing. The tribunal may order a person to remove the listing or make any order it considers appropriate.

New section 464A is similar to the existing section 461(4) and clarifies that the tribunal can make an order against a database operator and the person who actually lists information on a tenancy database.

New section 464B states that if the tribunal makes an order that a person, such as a database operator, must amend or remove a listing and they are not a party to the proceeding for the dispute, then the tribunal must give a copy of the order to the relevant person. In accordance with section 121(3) of the *Queensland Civil and Administrative Tribunal Act 2009*, the tribunal complies with this obligation if they order a party to the proceeding to give a copy of the order to the relevant person.

New section 464C is similar to the existing section 463 and provides that a person must comply with an order of the tribunal made about tenancy databases under this Act.

Section 464D is similar to the existing 464 and applies where a court convicts a person of an offence against section 464C. It provides that a court may order the convicted person to pay to a person within a required time an amount for compensation for loss or damage. The person awarded the compensation may enforce the order by filing with a court of competent jurisdiction a certified copy of the order and an affidavit stating the amount remaining unpaid. The order would then become enforceable as if it were an order of the court in which the order and affidavit are filed.

Part 4 Other obligations about listing

Section 464E applies where a lessor or their agent has a subscription to a tenancy database or otherwise usually uses a database for deciding whether to accept an applicant. Under the section, the lessor or their agent must advise the applicant, when the application is made, of any tenancy databases they usually use, the reason they use them, and how persons may contact the database operators. Section 464E(3) clarifies that the section applies even if the lessor or their agent does not intend to use the database to check the history of the particular applicant. However, the section does not apply if the lessor or their agent has given the applicant the notice not more than 7 days before the application was made.

Section 464F applies where a lessor or their agent uses a tenancy database for checking the tenancy history of the applicant and finds that the person is listed on the database. Under section 464F(2) the lessor or their agent must give written notice to the applicant stating the name of the database, the names of the persons recorded as having listed the information, and how

and in what circumstances the applicant can have the personal information removed or amended under the Act.

Section 464G provides that, where a lessor or their agent who lists information about a person in a database becomes aware that the information is inaccurate, incomplete, ambiguous or out of date, they must notify the database operator in writing that the information must be amended or removed. In addition, the lessor or their agent must keep a copy of the notice for one year after it was given under the section. However, the obligation to provide written notice does not apply if the lessor or their agent directly amends or removes the information from the database.

Section 464H provides that where a lessor or their agent gives written notice to a database operator of a necessary amendment the database operator must amend the personal information as directed within 14 days after the notice is given.

Section 464I(1) requires a lessor or their agent who lists personal information on a tenancy database to give the listed person a copy of the information within 14 days after it is requested by the listed person. Similarly, under section 464I(2) a database operator must, on request, give a person whose information is listed on the database a copy of the information within 14 days of the request. Section 464I (3) clarifies that the obligations on lessors, their agents and database operators to provide the copy only applies if any fee required is paid. However, under section 464I (4), any fee charged must not be excessive and must not apply to lodging a request for the information.

Section 464J imposes a limit on the length of time a listing can be kept on a database. The database operator must not keep personal information about a person on the database for longer than 3 years or that period provided under the *Commonwealth National Privacy Principles*, if that period is shorter. However, section 464J(2) clarifies that a person can keep a person's name on the database for a longer period if there is another listing for that person and this information is not required to be removed under section 464J(1) or another law. The section does not limit the operation of another provision of this Chapter or a provision of another law that requires the removal of the personal information.

Section 480 refers to the application of the *Financial Administration and Audit Act 1997*. This reference is out of date as this Act has been repealed.

This section has now been amended to refer to the replacement Act which is the *Financial Accountability Act 2009*.

Amendment of Chapter 14, Part 2, Savings and transitional provisions

Clause 6 inserts a new section that applies to a document that is or purports to be a copy of personal information about a person on a tenancy database that has been given to an authorised person under section 445 or to the tenant under section 464I. The section provides that in the proceeding of an offence against this Act or a preceding Act, the document is evidence of the personal information about the person listed on the tenancy database when it is given to the authorised person or the tenant.

Clause 7 inserts a specific reference to the original Act into the heading for the savings and transitional provisions.

Clause 8 inserts a new Part 3 into Chapter 14.

Section 553 inserts definitions for Part 3.

Section 554 clarifies that terms used in Part 3, which are defined in section 457, have the same meaning given in section 457.

Section 555 clarifies that where the notice under section 459 of the pre-amended Act was given before commencement, section 459 of the pre-amended Act applies to the listing even if the listing is made after commencement.

Section 556 clarifies that if a person becomes aware of a proposed listing before commencement, and does not make an application under section 462 of the pre-amended Act about the proposed listing before commencement, the person can make an application under section 461 of this Act in relation to the proposed listing. However, the tribunal may make an order under section 461 of this Act in these circumstances only if they could have made the order under section 460 or section 461 of the pre-amended Act.

Section 557 applies to an existing listing or a listing to which section 555 applies if the tenant claims there has been a breach of section 459 of the pre-amended Act. Under section 557(2), a tenant may apply under section 462 of this Act as if the reference to the contravention of section 459 or section 460 of this Act in section 462 were a reference to a contravention of section 459 of the pre-amended Act.

Section 558 clarifies that applications can be made under section 463 of this Act in relation to listings that were on a database at commencement and to listings where notice under the pre-amended section 459 was given before commencement.

Section 559 clarifies that applications made to the tribunal before commencement, and not decided before commencement, must be heard under the pre-amended Act.

Section 560 clarifies that orders made under the pre-amended Act are taken to be orders under the equivalent sections under this Act.

Section 561 clarifies that section 464 of the pre-amended Act about orders for compensation continues to apply in relation to an offence against section 463 of the pre-amended Act.

Section 562 clarifies that section 464G of this Act, about the lessors' or their agents' obligation to ensure the quality of the listing, applies to existing listings if the lessor or their agent becomes aware after commencement that the listing is inaccurate, incomplete, ambiguous or out of date.

Section 563 clarifies that section 464H of this Act, about the database operators' obligation to ensure the quality of the listing, applies to existing listings if the lessor or lessors' agent gives the written notice mentioned in the section after the commencement.

Section 564 sets out how section 464J applies to listings in the database at commencement. Under the section, where the information has been on the database for longer than 3 years at commencement or will have been on a database for 3 years within 1 year after the commencement, subject to the application of section 464J(1)(b) regarding the national privacy principles the information must removed from the database.

Clause 9 amends Schedule 2 of the Act which defines certain terms as they apply in the Act. The definition of "list" is deleted. Definitions are inserted for "amending Act", "commencement", "database", "database operator", "existing listing", "inaccurate", "list", "out of date", "pre-amended Act", "prescribed amount", and "this Act".