

## New way to invade tenants' privacy

*Chris Martin, Senior Policy Officer*

Tenancy databases (aka tenant blacklists, bad tenant databases) have been in the news recently with the revelation that the big tenancy database operator, TICA Pty Ltd, has hit upon a brand new way to invade the privacy of tenants.

This is TICA's new 'Virtual Manager' service – a bit of software that TICA is selling to real estate agents. It works like this:

- An agent enters their current tenants' names and other personal information into Virtual Manager, and 'flags' them.
- Whenever one of these tenants applies for a tenancy with another TICA agent (and the agent does a search of TICA's database), an automatic email alert is sent to the current agent. The email alert contains the location and contact details of the agent who took the application.

In other words, Virtual Manager tips off the agent when a current tenant applies elsewhere. This is a gross invasion of privacy. When a tenant decides to move out, the agent is entitled to receive a termination notice. They are



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not entitled to receive prior email alerts and tip-offs.

The potential consequences of the Virtual Manager tip-off service are worrying. Having received the email alert, the current agent might then contact the other agent and cruel the tenant's application, or take some other form of revenge (no repairs, bothersome inspections).

A particularly creepy agent (or indeed, anyone who should get their hands on the service) might also use it to receive email alerts about the possible movements of ex-girlfriends, spouses, etc. But even where it is not abused like that, this service, in its ordinary operation, tells agents about things that are none of their business.

TICA boss Philip Nounnis says that TICA cannot police the way agents use Virtual Manager – nor can the government, because Virtual Manager is an 'internal database' for each agent who buys it, and internal databases are excluded from the current regime of tenancy database regulation and, for that matter, from the soon-to-commence *Residential Tenancies Act 2010*.

The TU disagrees. It's not 'internal'. Each application of Virtual Manager is integrated with TICA's other databases. After all, where do the email alerts come from? How does the system know to send an email alert about any particular person?

Our view is that any NSW agent who enters a tenant in Virtual



Manager and flags them for email alerts is listing the tenant on a tenancy database in breach of the Rule of Conduct under the *Property, Stock and Business Agents Act 2002* and, when the new *Residential Tenancies Act 2010* commences, in breach of that Act too.

The NSW Government should act now to make it clear to agents that using TICA's Virtual Manager in this way is unlawful. ■

### Media coverage

- Tenant database 'invades privacy', *Sydney Morning Herald*, 20 October 2010
- Anger over rental application tracking, 'The World Today', ABC Radio, 20 October 2010

### 'Virtual Manager' is not the first time TICA has departed from its purported 'risk-management' role.

For some years now, it has operated, in addition to its 'Tenancy History Database', an 'Enquiry Database'. Here's how it works:

- You apply for a tenancy with an agent who is a member of TICA.
- The agent enters the details from your application into the search fields of the Tenancy History Database to see if you're listed on that database.
- Zap! You're now listed on the Enquiry Database.

It doesn't matter if there's no listing about you on the Tenancy History Database, if you've never rented before, if you're offered the tenancy or you knock it back. You're listed.

From the Enquiry Database, TICA members can see how many applications you have made, to

whom, where and when – none of which is useful in a sensible assessment of the riskiness or otherwise of an applicant.

Some time ago, the TU complained to NSW Fair Trading that Enquiry Database listings were in breach of the agents' Rule of Conduct. Fair Trading's view was that even though the listing is made when an agent enters information into the search fields, this is incidental to the search – it is actually TICA that is doing the listing. TICA, not being an agent, is not covered by the Rule of Conduct.

We welcome the regime of database regulation under the *Residential Tenancies Act 2010*. It will apply to agents, landlords and database operators, set clear circumstances, reasons and timeframes for listings and allow disputes about listings to be heard and determined by the Consumer, Trader and Tenancy Tribunal.

## Distressing development in distress compensation claims

*Carl Freer, Aboriginal Legal Officer*

Tenants and their advocates have long been able to claim compensation for mental distress or emotional hurt in the Consumer, Trader and Tenancy Tribunal (CTTT). Unfortunately, a recent decision of the NSW Court of Appeal has turned all of this on its head. Now, most of these claims are likely to fail.

### The right to claim for mental distress

A residential tenancy agreement provides that a landlord must not interrupt the peace, comfort or

privacy of the tenant. Because of this term, any breach of agreement by a landlord that causes distress or emotional hurt can be the subject of a claim for compensation by the tenant.

To make such a claim, a tenant would need to show that the landlord had breached the agreement between them and that because of the breach, they had suffered mental distress or emotional injury. These claims have always been difficult to quantify, but, in each case, the CTTT has used its best efforts to arrive at an appropriate figure for compensation.

### Limits on claims

Claims for mental distress were relatively straightforward, but the NSW Court of Appeal has complicated the picture with its decision in a case called *Insight Vacations v Young*. In that case (which had nothing to do with tenancy law), their Honours decided that a claim for mental distress or emotional hurt is a personal injury claim.

That decision was important because the *Civil Liability Act 2002* tightly regulates personal injury claims. Under that law, a person making a claim for this



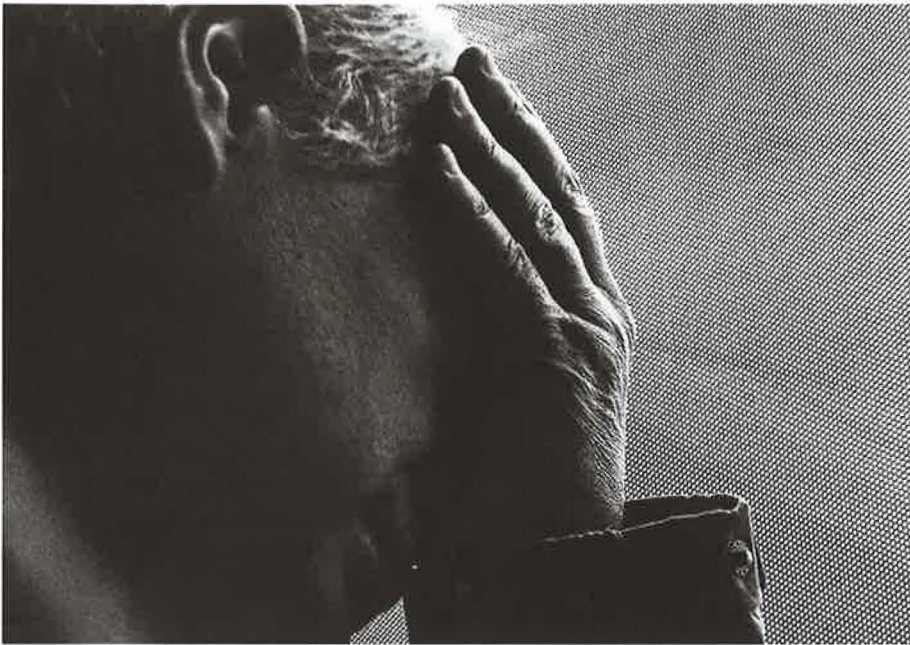


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kind of compensation must show that they have suffered up to 15 percent of the most extreme case of loss – anything less and no compensation is awarded.

Not many people have been found to have suffered the most extreme case of loss, but one example was where a 19-year-old woman was completely paralysed, but fully conscious, and would have to suffer the rest of her life knowing all that she had lost. In light of that kind of finding, it seems unlikely that many claims involving only mental distress or emotional hurt will reach the 15-percent threshold.

Tenants will technically still be able to claim compensation for mental distress or emotional injury. However, if the CTTT applies *Insight Vacations* as we expect, most of these claims will likely fail.

This is an unwelcome development in NSW tenancy law. Claims about mental distress have not been a means by which

tenants are enriched, rather, they are a bulwark against the disregard that some landlords show for the rights of tenants.

There may be some landlords, knowing they face no real prospect of financial detriment for their actions, are much less dutiful in observing their obligations under their agreements with tenants.

### Some alternatives and reasons for hope

There will be some cases to which the *Civil Liability Act 2002* does not apply – such as where a landlord does an intentional act and by that act intends to injure the tenant (this includes mental distress and emotional harm).

This is a difficult test to apply in practice and, for now, we cannot be sure how many cases will satisfy the exception, but there are already cases working their way through the CTTT concerning this very question.

Even where the *Civil Liability Act 2002* does apply, there are other means by which tenants can make a claim against a landlord. Where a tenant would have once brought a claim for compensation, they could instead bring a claim that the rent is (or was) excessive, having regard to the withdrawal of goods, services or facilities by the landlord.

The tenant's peace, comfort and privacy under the agreement are a key part of the service of accommodation provided by the landlord. If that is taken away, the rent should be regarded as excessive and reduced accordingly.

The above suggestions concern individual cases, but it is also possible that minor changes to legislation could restore the practical ability to make claims for compensation due to mental distress in the tenancy context.

The TU has already written to the relevant government authorities seeking and arguing for an exception from the *Civil Liability Act 2002* for these kinds of claims.

Compensation for mental distress was an appropriate and adapted means of regulating the relationship between landlords and tenants in New South Wales. The practical removal of this sort of compensation has been a surprise and a disappointment. It is hoped that both the developing case law and legislative change can minimise the effect of the *Civil Liability Act 2002* in this regard. ■



# Draft regulation means new law one step closer

Ned Cutcher, Policy Officer

The *Residential Tenancies Act 2010* was passed by the NSW Parliament in June 2010, and NSW Fair Trading tells us the Act will come into operation soon after its supporting regulation is finalised.

The release of the draft *Residential Tenancies Regulation 2010*, and its regulatory impact statement, brings us one step closer to the introduction of these important new laws for tenants in New South Wales.

Acts of parliament (such as the *Residential Tenancies Act 2010*) often include a provision allowing regulations to be made, so that the law-makers (parliament) can delegate the 'mechanics', or more

technical aspects of the law, to the bureaucracy (the executive arm of government).

In doing this, the government subjects the broad principles of a law to the consideration of members of parliament but it leaves the finer points to the office of the minister in charge. This facilitates quick and easy changes to these technical parts of a law, if required, without an Act of parliament.

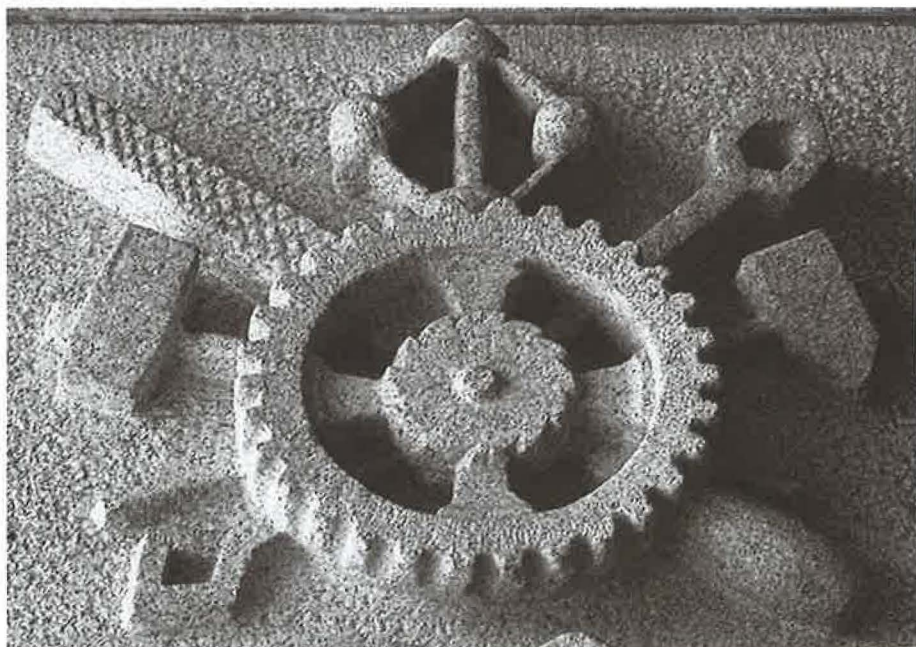
A regulation can only be made to the extent that the 'governing' legislation allows it, and several provisions of the *Residential Tenancies Act 2010* require a regulation in order to operate effectively. For example, the Act does not specify any time limits for applications to the Consumer,

Trader and Tenancy Tribunal, or the tribunal's monetary jurisdiction for tenancy-related applications. These are expressly left to regulation.

NSW Fair Trading has circulated the draft regulation broadly, allowing almost a month for interested parties to make comments and submissions. This consultation period ended in mid-October. The TU made a detailed submission.

There may be changes to the regulation in its final form, but based on the consultation draft, the regulation will do four things. It will:

- provide a standard form of residential tenancy agreement and condition report to which the Act will apply. This means tenants can expect consistency from landlords when entering into new agreements. It also means that landlords can't use the cost of preparing new agreements as an excuse to charge a higher rent – because the costs will be negligible.
- clarify certain rights and obligations of landlords and tenants provided by the Act. This is likely to include details about the information landlords must disclose to tenants before entering into a residential tenancy agreement. It will also outline what landlords will



The regulation allows law-makers to delegate the mechanics of the law to the bureaucracy  
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need to do to make properties 'water efficient' so they can ask tenants to pay for their water consumption.

- clarify the forms of rental accommodation that are not covered by the Act. This is likely to include some forms of refuge or crisis accommodation,

heritage-listed properties (in some circumstances), residential park agreements to which a 'trial' period applies, life tenancies, and residential colleges in tertiary institutions.

- provide detail on how tenants and landlords may enforce their rights under the Act.

This will include setting time-limits for applications to the Consumer, Trader and Tenancy Tribunal and providing a list of offences under the Act for which a penalty notice may be issued by NSW Fair Trading (without the need for prosecution in the courts). ■

## What will the Residential Tenancies Act 2010 do?

Tenants will have better access to information held about them by **tenant databases**. Databases will be prevented from keeping listings that are inaccurate, incorrect, out-of-date, ambiguous or unjust. The tribunal will be able to hear and determine disputes about database listings.

**Share-houses** will be recognised. It will be possible to change the names on a residential tenancy agreement as a household's composition changes. Tenants who move out will not be liable for rent arrears

or damage caused by remaining occupants, provided they give the proper notice.

A residential tenancy agreement will no longer be an obstacle to escaping **domestic violence**. A final apprehended violence order that excludes a person from their rented premises will automatically end the violent person's tenancy. Any remaining occupants will be able to take over the tenancy or move out and end their rental liability if they can't afford to stay.

Tenants who fall into **rent arrears** will have some assurance that if they pay their arrears the tenancy will not be terminated, even by the tribunal (as long as they have not "frequently failed to pay the rent owing").

Tenants will be able to **move out during a fixed-term tenancy**, without having to compensate the landlord, if they have been offered a social housing tenancy or are required to move into an aged-care facility.

## Rent increase for public housing pensioners postponed again

Last year the Federal Government lifted the single pension by \$30 per week. This would normally have been included in the assessment of households' incomes when calculating rent subsidies for Housing NSW tenants.

However, after a campaign by pensioners and pressure from the Federal Government, the NSW Government agreed to quarantine the \$30 increase from rent subsidy calculations until mid 2010.

At a further request from the Commonwealth, the NSW Government agreed to extend the rent freeze until the 2011 State Budget – when it will again be reviewed. This means that the one-off

increase for single-rate pensioners will be excluded from the assessment of household income at least until mid-2011.

The NSW Government convened an official roundtable with pensioner and social housing groups (including the TU) to discuss the impact the Commonwealth's request will have on the supply and financial sustainability of community, affordable and social housing.

While the rent freeze will help single pensioners in public housing, we should spare a thought for the situation facing pensioners in private rental housing. On our calculation (based on a 'low-income' median rent in the September 09 quarter of \$248 per week, and the rents component

of the CPI increasing 3.1 percent in the nine months since then), these renters' landlords have already taken a quarter of the \$30 increase.

In 2007–08, there were 117,000 private renter households across Australia whose income came solely from government payments, and who were paying more than 30 percent of their incomes in rent. Forty-two thousand of them were paying more than 50 percent.

If there is one conclusion to draw here, it is the need for better support for private renters on low incomes. Lifting the maximum rate of Commonwealth Rent Assistance would be a good place to start.

*Chris Martin*



# The year in review

*Gregor Macfie, Executive Officer*

**This has been a big year for tenants in New South Wales and the Tenants' Union.**

The most significant achievement was to see many of the reforms that the TU has been advocating for over a decade now reflected in the new *Residential Tenancies Act 2010*. Though this was due to painstaking work done over many years, this year's comprehensive submission on the draft legislation and the coordinated advocacy activities that took place in support of the TU's positions were influential.

With the NSW Government clearly committed to commencing the new legislation at the beginning of 2011, the TU worked hard to prepare for it. This has involved a comprehensive revision of our training and factsheets, preparing a guide and index to the new legislation for tenant advocates and working with Tenant Advice and Advocacy Services to identify the additional resources they will need to maintain current service levels, undertake training and conduct community education to raise broader awareness and familiarity with the new law.

Positive though much of the new legislation is for tenants, it leaves some unfinished business. Most significantly, boarders and lodgers will continue to rent with no effective legal protection. The TU worked during the year on a



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package of reforms to assist this vulnerable group and recently convened an expert roundtable of government and non-government representatives to further the case for effective protection and support.

The TU's legal output during the year speaks for itself, with over 1,200 advices provided to Tenants Advice and Advocacy Services and 1,500 tenants assisted directly. The litigation practice goes from strength to strength with 25 cases of strategic significance finalised or on hand, and 46 Consumer, Trader and Tenancy Tribunal (CTTT) or court appearances.

On the training front, the TU has developed and delivered four new training courses this year: Commonwealth Rent Assistance Calculator, Negotiating the CTTT, Experienced Advocates Forum, and Tenancy Law for Community Workers. This was on top of the eight other courses we run on a

regular basis. In total 31 days of training were conducted, with 262 advocates, community workers and volunteers trained.

The TU continues to maintain and develop the Tenants NSW website, which provides up-to-the-minute factsheets on tenancy law for tenants as well as a host of other useful resources to assist tenants in managing their tenancy issues. There were 168,700 visitors to the website in the last financial year, or just over 14,000 a month.

The TU's support for the network of services funded under the Tenants Advice and Advocacy Program ('TAAP Network') was another highlight this year, with three Network meetings that brought together tenant advocates from across the state to share their knowledge and learn. Speakers this year included the Minister for Fair Trading, the Hon Virginia Judge MP; NSW Aboriginal Housing Office; NSW



Aboriginal Land Council; Housing Appeals Committee; and the NSW Federation of Community Housing Associations.

This year has seen a strong focus on the governance of the TU. A new set of modern rules were approved and registered which have greatly improved the efficiency and transparency of the organisation's governance. A revised strategic plan was also agreed and will provide clear guidance as to how the TU will meet its objectives over the next three years.

The TU's ability to respond to significant external developments while maintaining its usual output has been underpinned by a welcome increase in staffing. This year saw a doubling of our policy capacity and the creation of a new Legal Support Officer position – a one-year contract for experienced tenant advocates who wish to expand their knowledge of housing law within the TU and to assist with legal backup, policy and project work.

Legal resources were also freed up from the decommissioning the Tenants Hotline and replacing it with the Tenants Advice Line, which runs on Monday afternoons only. The Tenants Advice Line provides a more reliable and comprehensive service to callers and is staffed by a roster of 12 volunteers supervised by the TU. Results to date have been impressive.

Earlier this year, the TU commissioned research from Roy Morgan Research, which found

that people in New South Wales support stronger protections for tenants. This gives us the confidence to continue to pursue better outcomes for the one in four people in New South Wales who rent.

The TU cannot achieve what it does without the support of many individuals and organisations and we would like to thank everyone who has contributed to our work in 2010 and look forward to your continuing support in 2011. ■

## TENANCY Q&A

# Water charges



**I am about to leave the flat I have rented for two years. I gave notice to the agent and everything seemed fine, until she sent me copies of ten water bills she says I have to pay. Is this right?**



Unfortunately, it might be right. But you need to check a few things before you consider paying.

First, is the flat individually metered for water? If not, you do not have to pay for water at all.

Second, check the dates of the meter readings in the bills. Water bills are usually quarterly so ten over two years seems too many.

Third, offer to share the cost with the landlord, because it is not fair that you have to pay the whole amount at once due to the landlord's or agent's delay.

If you cannot make a deal about the amount, try negotiating to pay in instalments. If the agent takes you to the Consumer, Trader and Tenancy Tribunal, you can argue for paying in instalments. ■

*Grant Arbuthnot*

### The law is changing

The new tenancy law (starting early 2011) requires the landlord to present water bills to the tenant within three months of their issue or they are not payable.

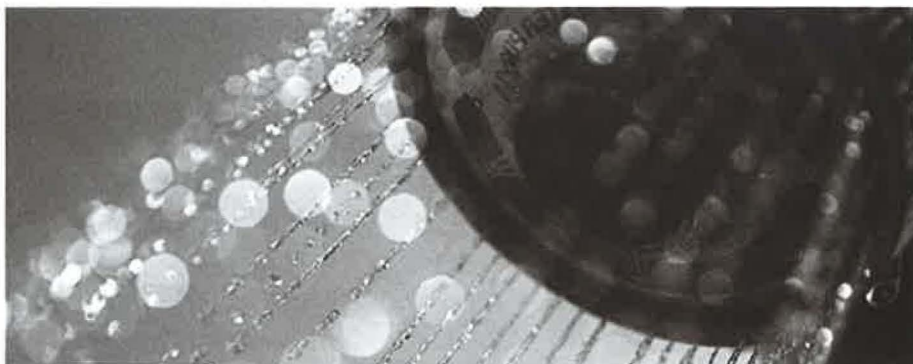


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# JOIN THE TENANTS' UNION

Support us in our work for safe, secure and affordable rental housing for people in New South Wales

## Membership application (tax invoice)

I would like to apply for membership of the Tenants' Union of NSW Co-operative Limited (ABN 88 984 223 164)

First name

Last name

Organisation\*

Position\*

E-mail

Postal address

Suburb

State

Postcode

Phone (W)

Phone (H)

\* If applicable

## Membership type

☐ tenant

☐ tenant organisation

☐ non-tenant

☐ non-tenant organisation

## Fees (all include GST)

- unwaged \$ 8.00
- waged \$16.00
- organisation \$32.00

Annual fee runs 1 January–31 December.

## Payment

Please enclose a cheque/money order made out to the Tenants' Union of NSW for:

\$

I am over 18 years of age. I support the objectives of the Tenants' Union of NSW.

Signed

Date

Return with payment to Tenants' Union of NSW  
Suite 201, 55 Holt St, Surry Hills NSW 2010

## CONTACTS

## NSW Tenants Advice and Advocacy Services



Inner Sydney	9698 5975
Inner Western Sydney	9559 2899
Southern Sydney	9787 4679
South Western Sydney	1800 631 993 4628 1678
Eastern Sydney	9386 9147
Western Sydney	8833 0911
Northern Sydney	9884 9605
North Western Sydney	1800 625 956 9413 2677
Blue Mountains	1300 363 967
Central Coast	4353 5515
Hunter	1800 654 504 4969 7666
Illawarra and South Coast	1800 807 225 4274 3475
Mid North Coast	1800 777 722 6583 9866
Northern Rivers	1800 649 135 6621 1022
North Western NSW	1800 836 268 6772 4698
South Western NSW	1800 642 609

## Specialist services

Greater Sydney Aboriginal	9569 0222
Western NSW Aboriginal	1800 810 233
Southern NSW Aboriginal	1800 672 185 4472 9363
Northern NSW Aboriginal	1800 248 913 6643 4426
Older persons (statewide)	1800 131 310 9566 1120

Tenants NSW website [www.tenants.org.au](http://www.tenants.org.au)



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## Tenants' Union of NSW

The Tenants' Union of NSW is a specialist community legal centre that has been active in promoting the rights of over 1.5 million tenants in New South Wales since 1976.

The Tenants' Union is also the peak resourcing body for the NSW Tenants Advice and Advocacy Program.

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