Response to the Improving NSW rental laws Consultation Paper

10 August 2023

Nexus Polytech
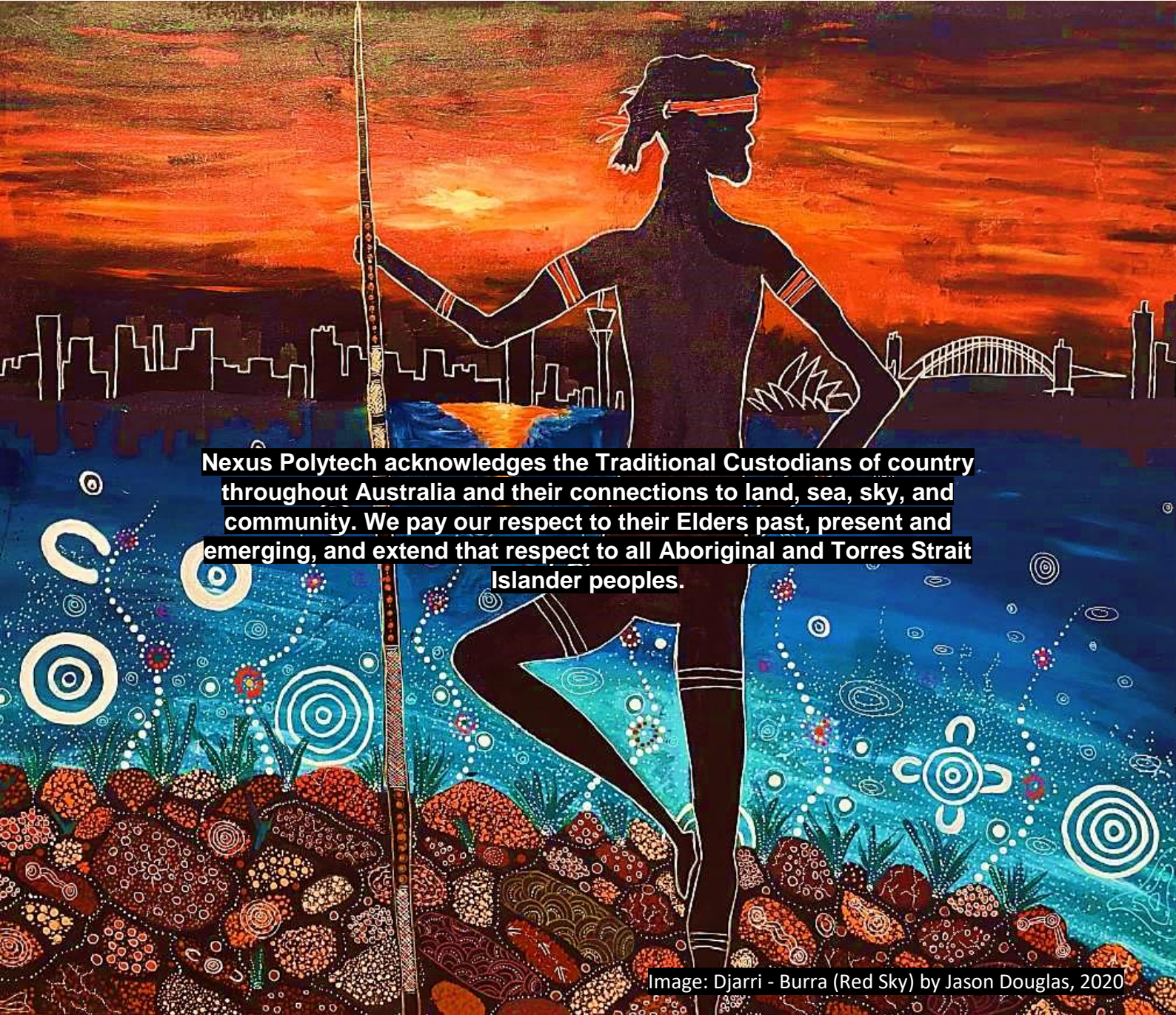
Nexus Polytech acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea, sky, and community. We pay our respect to their Elders past, present and emerging, and extend that respect to all Aboriginal and Torres Strait Islander peoples.

Image: Djarri - Burra (Red Sky) by Jason Douglas, 2020

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Introduction

This is a submission by Nexus Polytech Pty Limited in response to the consultation paper published by the NSW Department of Customer Service titled *Improving NSW rental laws consultation paper* on July 2023.

Within this submission, we refer to the *Property and Stock Agents Act 2002 (NSW)* and the *Property and Stock Agents Regulation 2022 (NSW)* collectively as 'the PSA Act', the *Residential Tenancies Act 2010 (NSW)* and the *Residential Tenancies Regulation 2019 (NSW)* collectively as 'the RT Act', the NSW Civil and Administrative Tribunal as 'NCAT', the Department of Fair Trading and the office of the Minister for Fair Trading as 'Fair Trading', and the Minister responsible for Fair Trading as 'the Minister'.

The scope of this submission is residential tenancies and any references to leases, bonds, and tenancies without specifying the type should be taken as a reference to a residential tenancy.

Nexus Polytech is a solutions architecture and consultancy service provider with numerous current and past clients in the real estate sector, including agents who provide Property Management services. This work has allowed us to develop a deep understanding of the practical implementation of the PSA Act and the RT Act, the industry, and interactions between Tenants, Landlords, Agents, NCAT, and Fair Trading.

As a firm primarily focused on providing solutions to improve daily operations and implementing transformational projects, we have only provided responses to questions where we could provide feedback from a technological, information, and systematic perspective. There has been no commentary on the social fairness, appropriateness, or suitability of any policy or suggestion.

An underlying theme in the feedback provided within this submission is the increasing need for security precautions to the rapidly evolving danger of data theft. As dependence on technological systems increases, the amount of data stored within these systems and the importance of that data increases. Data theft has become an unfortunate factor in day-to-day life that individuals, businesses, and governments must consider regularly and take proactive measures to minimise and reduce risk.

Executive Summary

Limiting what is collected in the tenancy application process

In principle, limiting what can be collected and how it can be collected in the tenancy application processes will likely limit innovation and competition within the industry, leading to worse outcomes for tenants and landlords. Any standardisation of forms and document types must cater to broad use cases and are unlikely to be sufficient and efficient. Each tenancy, property, and landlord's circumstances are unique and may differ significantly. In most circumstances, allowing broader discretion will enable stakeholders to make more appropriate decisions and better consider factors relevant to their circumstances.

Standardised ID system

Implementing the "100 points of ID" system, widely used in Australia and NSW, is proposed as a standardised system to enhance consistency in identity verification. This standard, used by financial institutions, governments, and businesses, strikes an ideal equilibrium by allowing applicants to choose their preferred identity documents, instilling confidence in landlords and agents who can reliably verify identities.

Being clearer about data

In recent years there has been a movement towards simplifying language to enhance user understanding of data collection and usage. This trend should be extended to agents, landlords, and proptech companies. The more sensitive the data collected, the clearer the explanation of its usage should be. Landlords and agents should disclose which third-party software and services they will use with collected data so that applicants can research their privacy policies independently.

Taking a stronger approach to managing data

Introducing regulations to the PSA Act for landlords, agents, and proptech companies on the usage and handling of renter's personal information is recommended. These regulations should outline data storage, protection, destruction protocols, and non-compliance consequences, drawing inspiration from the Fair Trading Commissioner's guidance. Recognising entities not covered by the Privacy Act, including start-ups and smaller agencies, is crucial. Differential thresholds for entities based on data size and tailored consequences are suggested, as real estate agencies and proptech companies are more significant targets for bad actors due to data volume.

Automated decision-making is a tool and must not replace human decision-making.

In real estate, while automatic decision-making (ADM) can support human decision-making, replacing it entirely would be imprudent due to inherent risks and biases in both processes. Considering the evolving nature of ADM systems, particularly in the real estate industry with artificial intelligence technologies, the early implementation stage suggests that prescriptive legislation may not be beneficial. Instead, a more practical approach could involve ongoing monitoring, data gathering, and consultation with experts to inform future decisions.

The portable Bond Scheme should be reviewed after it is implemented

The development of a Portable Rental Bond scheme is a significant undertaking, and the Government's intention to explore this scheme must be commended. Circumstances differ for

each tenant, landlord, and property, so the Portable Rental Bond (PRB) scheme should be as accommodating as possible. The scheme and its implementation should be reviewed and improved as data becomes available after the implementation of the scheme. It is imperative that confidence in the rental system is maintained throughout the design and implementation of this scheme. Reduction in confidence will have determinantal effects and only aggravate the housing shortfall.

Topping-up existing bonds and collecting rent increase data

Functionality that allows a residential tenancy bond to be topped up will be developed to implement the Portable Rental Bonds scheme. There is merit in extending this functionality to existing residential tenancy bonds and allowing tenants to top up their bonds when their rent is increased. This would reduce bond drift over time and enable accurate rent increase data to be collected automatically. Top-up requests through Rental Bonds Online (RBO) in response to a rent increase would allow Fair Trading to identify when a rent increase was issued and the size of the rent increase, using data available in RBO to categorise the data by property type, suburb, and postcode.

Registry for embedded networks and strata scheme details

Requiring agents/landlords to provide details of embedded networks and strata schemes used in rental properties may be challenging due to a lack of information. A proposed alternative approach is establishing a registry with accurate data collated from official sources, such as strata scheme reports and planning data. This registry would enable tenants and applicants to assess property suitability, helping them make informed decisions before applying for a property. If designed according to the NSW Open Data Policy, it could provide automated data access for online marketing websites and proptech software/service providers.

Free electronic payment method

Whilst no singular electronic payment method could serve as the default free electronic payment method for rent, using either EFT or BPay® as the free electronic payment method (whichever the landlord/agent decides) appears to be the most suitable option. The integrated safety features of BPay®, including check digit and biller code validation, minimise the risk of erroneous transfers, while BPay® payment fees are cost-effective and manageable for agents. However, BPay® availability can be an issue as not all banks offer BPay® biller facilities. In contrast, EFT is a widely accessible and inexpensive payment method that landlords and agents have, but its limitations stem from data validation and payment identification issues. These limitations could be resolved as newer payment methods based on the New Payments Platform, like PayID, gain traction and provide improved data validation. Some agents may be concerned about giving trust account details for EFT payments and would have to provide BPay® as the alternative method to address their concerns.

Attitudes toward cyber security within the industry

Our extensive experience working with real estate clients has allowed us to identify a need for more emphasis on cyber security within the industry. Fair Trading has introduced professional development topics on cyber security and privacy to better address the industry's unique challenges in the face of evolving cyber threats. There is potential to further enhance these efforts by combining and mandating these topics for agents frequently dealing with substantial data, like strata and property managers.

Renters' personal information

Question 10: Do you support limiting the information that applicants can be asked for in a tenancy application? Why/why not?

Response: In principle, no, as it would limit innovation and competition within the industry, leading to worse outcomes for tenants and landlords.

The circumstances for each tenancy are unique and vary by numerous factors such as area, market, and property type. There will be times when certain information is necessary to assess an applicant's suitability for a tenancy, such as multi-tenancy properties or situations where they may be shared common areas. A one size fits all approach would be very difficult to implement and would likely require landlords and agents to find alternative methods to collect the necessary information. These alternative methods may produce incomplete and inaccurate information.

As innovation, competition, and societal trends evolve within the industry, different information will become more or less relevant. By implementing a legislative act or regulation to limit the information that can be collected in a tenancy application, it becomes the Government or the Parliament's responsibility to respond to trends and changes and update the relevant legislation accordingly. Regulation of this kind will likely introduce delays in the market and industry's capability to respond to changes, ultimately leading to worse outcomes for tenants and landlords.

Question 11: Do you have any concerns with landlords or agents only being able to collect the information set out in the table above to assess a tenancy application? Please explain.

Response: Some of the proposed limits on the information that may be collected could be improved by aligning it with existing standards, particularly Proof of identity.

The limits and documents for the Ability to pay agreed rent seem sufficient and would allow a landlord/agent to make that determination.

Documents required to assess Suitability are more nuanced as the circumstances to determine an applicant's suitability differ for each property and applicant. It will be difficult to limit or categorise the documents needed, and there may be merit in not placing restrictions on that category.

Table 1
Possible approach to limit the information collected, as proposed on page 10 of the paper

Proof of identity	Ability to pay agreed rent	Suitability
No more than 2 of the following	No more than 2 of the following	No more than 2 of the following
Driver's licence	Confirmation of pay with employer	Rental ledger from previous rental property
Proof of age card	Employment contract with sensitive details redacted	Previous three months of rent receipts
Passport (and visa, if relevant)	Payslips from previous two months	Character reference in writing
Medicare card	Bank statement with daily transactions redacted	Contact for oral character reference
Utilities bill at current address	Evidence of income from other sources, e.g. trusts, Centrelink income	Was bond refunded in full at previous address? If not, explain why
Letter from Government department addressed to current address	Evidence of savings (with proof of ownership, if relevant)	
	Copy of tax return, with sensitive details redacted	

Proof of identity

There may be merit in implementing the "100 points of ID" system used across Australia and within NSW. This standard has proven sufficient for financial institutions, Governments, and businesses. Implementing the system will increase consistency for identity verification within NSW.

While robust, the 100 points of ID system is also simple for landlords, agents, and proptech companies to implement. It is also well understood and would not require an extensive education campaign to raise awareness.

A fundamental feature of the system is that it recognises that not all identification documents provide the same degree of information and thus have different levels of usefulness when verifying an individual's identity. For instance, an NSW-issued driver's license contains the person's full name, date of birth, residential address, and photo, allowing the NSW driver's license to cross-verify other forms of ID and confirm the individual's photo. In contrast, a Medicare card only contains an individual's name. A different individual with the same name as the one listed on that Medicare card could use it, and at face value, it would be impossible to determine that it was not their Medicare card.

Primary identification documents and *Secondary identification documents* are used in the system to differentiate the different classes of identity documents based on the scrutiny that was applied to validate the identity of the individual and their details.

As such, Primary Identification Documents are valued with higher 'points' and may be relied upon required to prove an individual's identity.

Primary Identification Document
Elements of a primary identification document
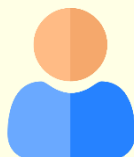
Personal Details | **Photo of Individual** | **Location or Address** | **Government Issued & Verified**

Identity documents that are classified as Primary Identification Documents include:
- Australian Passport
- Australian Citizenship Certificate
- Australian Visa
- State Drivers Licence
- State Proof of Age Card
- State Birth Certificate

Secondary Identification Documents are documents that contain fewer personal details and may have been issued by reputable non-Government entities such as education institutions, financial institutions, and utility companies.

Typical documents that are classified as Secondary Identification Documents include:
- Medicare Card
- Student Card
- Change of Name Certificate
- Marriage Certificate
- Utility Bill
- Bank Statement
- Credit/Debit Card

The issue with the proposed limitations in Table 1 and any other similar limitations is that they limit the ability to verify the individual's identity. Any legislative changes should allow a landlord/agent to request sufficient identity documents that would enable them to verify an applicant's identity thoroughly.

Implementing the 100 points of ID system strikes the optimal balance for all parties. It gives applicants and tenants the choice of identity documents they wish to provide while giving landlords/agents confidence in having verified the applicant's identity.

Implementing a standardised 100 points of ID system that lists which documents may be used, the limit to how ID types may be provided, and the point value for each ID will likely achieve the optimal balance for applicants/tenants and landlords/agents of privacy and confidence.

Ability to pay agreed rent
The proposal in Table 1 for *Ability to pay agreed rent* appears reasonable. The limit on the number of documents is sufficient to make a determination, and the types of documents are appropriate for their purpose. Consideration must be given to ensuring an accessible and reasonable process to verify the authenticity of any redacted documents.

Suitability
The circumstance of each property, tenancy, and applicant is unique, and as such, determining the suitability of a tenancy for a property is nuanced. The suitability assessment criteria are likely to be very difficult to standardise without limiting essential factors for consideration by the agent/landlord.

An applicant's suitability for a specific property has a much broader scope than the other categories. It is likely to become more comprehensive as the current trends in the NSW rental market continue.

Factors typically considered in determining suitability extend beyond the applicant and their history and may include external factors such as existing surrounding tenancies.

For instance, a factor necessary for an applicant applying for a property with multiple tenancies may include the applicant's and existing tenants' capacity to harmoniously co-habitat.

Other factors may also be necessary to consider in some circumstances that may not be necessary for others, such as the likelihood of an applicant creating noise during a specific period in which an existing applicant may require quiet. An example would be a current tenant who is a night worker requiring quiet from other tenants during day hours.

Given the uniqueness and differing levels of complexity of each tenancy and an applicant's circumstance, a standardised approach to determining suitability will likely fail to cater to all scenarios adequately.

There may be merit in allowing applicants/tenants and landlords/agents broad discretion to implement suitability criteria and a determination process that adequately caters to their specific scenario and considers factors appropriate to their circumstances.

Question 12: Do you support the use of a standard tenancy application form that limits the information that can be collected?

Response: No, as it would be impractical to standardise the application in a way that satisfies all use cases and scenarios. Attempting to standardise the tenancy application will likely limit innovation and competition within the industry, leading to worse outcomes for tenants and landlords.

The information collected by the application

The circumstances surrounding each tenancy and property are unique. If a standardised application form accommodates all possible scenarios, then the application form would need to be either as broad as possible or as narrow as possible and rely on supplementary forms.

In the former scenario, such form would grow considerably over time and likely become a burdensome task for tenants to complete and for landlords/agents to validate. In the latter scenario, including additional forms to collect further required data defeats the purpose of a standardised application form, as each application will differ amongst landlords/agents.

There may be information that is more appropriate to be collected in some areas, markets, or circumstances than in others. For example, if an area contains a high population of applicants that receive benefits from the Australian Department of Human Services, such as Centrelink payments, then collecting an applicant's details regarding their benefits could be necessary for determining the applicant's ability to pay rent. This information may not be needed in areas with fewer applicants that receive Centrelink payments and, as such, may not warrant inclusion on the primary tenancy application form.

Limiting integration and innovation

Significant innovations to the tenancy application have occurred within the Australian real estate industry. One such innovation has been the digitisation of application forms through application services which store an applicant's data and allow it to be easily used in many applications, allowing them to apply for more properties in less time with no reduction in the quality or detail of their application.

These proptech companies aspire to innovate new benefits for tenants, landlords, and agents in an attempt to increase their prominence in the market. This continuous drive for innovation out of a desire to compete results in better outcomes for tenants, landlords, and agents as convenience and ease of use are continuously improved.

Another innovation with rental tenancy applications is the integration with services that assist successful applicants in connecting their utility services, such as gas, electricity, or telecommunications.

These connection services use the relevant data from the application form to identify possible providers, plans, and prices for successful tenants. These services often provide convenience for new tenants and save them time and energy in the intensive relocation process.

Using a standardised tenancy application form will likely limit its innovation and integration. This would be an unfortunate regression in an area where Australia is an innovation leader and trendsetter.

Question 14: Do you support new laws that set out how landlords and agents can use and disclose renters' personal information? Why/why not?

Response: Yes. There would be merit in introducing regulations to the PSA Act that detail and outline how landlords, agents, and proptech companies may use and disclose renter's personal information.

These regulations should stipulate how data and information should be stored and protected when data should be destroyed and in which manner, and the consequences for non-compliance. The Fair Trading Commissioner's guidance on Personal information and tenancy applications is a good starting point for the regulations.

Different thresholds based on the size of the data
There may be merit in having different thresholds and consequences for different entity types.

A real estate agency that manages numerous properties would have more information than a private landlord managing one or a small number of properties and thus be more likely of a target for hackers or malicious actors. Further, the real estate agency would have specialised software and services that better place them to implement the requirements in the regulations.

Similarly, a proptech company that provides software or services used by thousands or millions of applicants and tenants, or used by agents/landlords to store the data of applications and tenants, is likely to be a desirable target for hackers and other bad actors. Proptech companies should have dedicated policies and practices for ensuring data is protected and managed appropriately.

In contrast, a landlord who privately manages their property and stores tenancy data in the same method and with the same level of protection as they store their own data is not a more significant target for hackers and bad actors than any other individual could be.

However, landlords who privately manage more than a certain number of properties, such as 5, should be treated the same as real estate agents for the purposes of these regulations, given that they would be in a similar situation as to the amount of data they hold, and the capability to protect that data.

Consequences should scale based on the size of the data
The regulations should scale the consequences based on the data size that was/is at risk.

For instance, an entity that stores information for 1,000 tenancies found to have not complied with the regulations should have a more significant consequence than an entity that holds tenancy information for 25 tenancies.

A proptech company that stores the data of millions of applicants and tenants should have more significant consequences for not complying with the regulations than a real estate agency that stores information for 1,000 tenancies.

Entities not covered by the Privacy Act

It is essential to recognise that while many proptech companies and real estate agencies are regulated by the Australian Privacy Act 1988 (Cth) (Privacy Act) as they have an annual turnover of over $3 million, there are several entities that the Privacy Act does not capture, namely:

- Proptech companies that have started up (start-ups);

- Smaller real estate agents that may still be managing hundreds or thousands of properties; and

- Real estate agents that separate sales and property management into different and separate commercial entities;

It is not unusual for a real estate agency to have different companies conducting different parts of their business, such as sales and property management. There are numerous legitimate reasons for a real estate agency to use this structure, such as making it easier to sell one component of the business, separating losses and profit, and different agreements with franchisors or suppliers (such as online marketing websites).

Using such a structure means that the Privacy Act may not regulate dedicated property management entities if they fall under the $3,000,000 threshold, despite the combined revenue of the office (sales and property management) exceeding the threshold.

Furthermore, the annual revenue of an entity is not always indicative of the amount of data they hold. Below in Example 1, it is demonstrated how an entity responsible for more data than another can fall below the Privacy Act threshold simply because of the rental market in the area it operates.

Example 1
Annual revenue does not always correlate with data stored

Say we have two real estate agencies located in different parts of Sydney who both charge their landlords exactly 5% in management fees (including taxes and all sundries).

Agent A

Agent B

Located in **Parramatta**

Located in **Mosman**

Primarily manages units and apartments.

Primarily manages 2-4 bedroom houses.

	Tenancies	Weekly Rent	Annual Fees	Annual Revenue
Agent A	1,890	$570 *per week*[1]	$1,482 *per property*	$2,800,980
Agent B	580	$2,000 *per week*[2]	$5,200 *per property*	$3,016,000

Despite Agent A having more than three times as much information as Agent B and thus being more at risk of an attack that would impact more people, Agent A is under the threshold and meets the small business exemption in the Privacy Act, whereas Agent B is not.

This example demonstrates that using annual revenue as the primary metric to determine the amount of data that could be potentially at risk within the industry does not accurately reflect the reality of the situation and could lead to fewer protections for tenants.

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[1] Median rental price for Parramatta for the period of July 2022 to June 2023 according data from REA Group.
[2] Median rental price for Mosman for the period of July 2022 to June 2023 according data from REA Group.

Question 15: What should applicants be told about how their information will be used before they submit a tenancy application? Why?

Response: Applicants should be told in plain language exactly how their data will be used and by which third-party vendors/suppliers (as far as the agent/landlord knows).

There has been a trend in recent years to simplify terms such as privacy policies and terms of service by using plain language that can be understood by an average user and being clearer about what data is being collected and how it will be used.

Accordingly, agents, landlords, and proptech companies should be encouraged to follow this trend and simplify their terms and policies. One principle that provides greater transparency for users is that the more sensitive the data being collected is, the clearer the explanation of how it will be used should be.

All landlords and agents use third-party software, services, and vendors. Examples may include a CRM to manage communications, trust accounting software to manage a trust account, inspection management software to deal with inspections and reports, or a KYC verification service to verify a tenant's identity.

As good as an agent or landlord may be at handling collected data, they cannot know what their software and service providers may do. By disclosing the names of the software and services that they will provide tenant data to, an applicant who is concerned or wants to obtain more information can then go and do their research into the privacy policies of those third parties.

Question 16: Do you support new laws to require anyone holding renter personal information to secure it? Why/Why not?

Response: Yes. Regulations should be precise about how particular data is to be stored and how security mechanisms should be implemented on different storage mediums.

Working with proptech's to increase compliance
To ensure a greater rate of compliance with the regulations, Fair Trading could consider the merits of working with proptech companies that make the software and services used by agents and landlords.

Proptech companies could create guidelines on how users should configure their software/services to comply with the relevant regulations. This would put the more technically onerous task of determining how to comply with the regulation on the proptech, which are more likely to have the resources and expertise to make that determination properly and would mean that the agent/landlord could then rely on implementing the guide to ensure compliance with the regulations.

Further, specific software or services may be designed in such a way that users cannot comply with particular regulations. Fair Trading's involvement in a process that works with proptech companies to create guidelines will be more likely to motivate proptech companies to update their software to ensure compliance or to provide users with alternative solutions.

General storage mediums
General principles would likely be required instead of specific policies for generic storage mediums, such as hard drives, USBs, servers, filing cabinets, and physical documents.

Physical storage mediums such as filing cabinets, documents, drawers, and safes should also have general security principles that govern their use and implementation. While physical files and objects are at less risk of being stolen by data criminals, they could accidentally or negligently be leaked or released and cause harm to people.

In addition to general security practices, there may be merit in providing general maintenance requirements for critical technology, such as ensuring computers and servers are regularly updated, ensuring software is up to date, and using anti-virus and malware protection.

General security principles
It would be ideal if modern industry-standard general security principles were implemented within the regulations, such as:
- Multi-factor authentication
- Zero-trust models
- Use of hardware keys or software certificates
- Encryption for stored data
- Use of access-control lists and permissions wherever possible
- Mandatory use of email authentication methods such as DKIM, SPF, and DMARC
- Mandatory use of TLS encryption for applicable web traffic (HTTP, SMTP, etc)

<u>Self-assessment checklist for agents</u>

It would be impractical for Fair Trading to assess the compliance of every agency or landlord with the regulations. Random audits of agencies that match the profile of high-risk non-complying agencies would be practical but would not check overall compliance. The parallel implementation of a self-assessment checklist could be used to assess a real estate agent's compliance with these regulations.

This self-assessment checklist could be provided to Fair Trading as part of the annual audit of trust accounts and could be reviewed at a later date either randomly, upon receipt of a complaint, or when a breach has occurred.

Question 17: How long should landlords, agents or proptechs be able to keep renter personal information? Please explain.

Response: The duration that a renter's information should be kept should depend on the outcome of their application. Successful applicants who become tenants require their data to be stored by landlords/agents for more extended periods than unsuccessful applicants. Whereas the time that a proptech company would need to store data depends on the service/software they offer. For instance, a proptech company that provides tenancy application services needs to keep the data of unsuccessful applicants to be used again for other properties. In contrast, a proptech company that provides a CRM would only require the details of successful applicants who become tenants.

In our experience working with tenants, landlords, agents, and proptech companies, there is merit in using the following times to develop time limits for collected data.

Unsuccessful applicants
Landlord/Agent: Data should be kept for three months from the submission date or 30 days after the property that was applied for is leased or taken off the market, whichever is earlier. Data destruction processes can be integrated into the industry standard end-of-month workflow.

Proptech Companies: Companies that provide services related to the tenancy application process should automatically destroy sensitive data for a user that does not interact with their service for a certain period, such as for 60 days. Unsuccessful applicants who submit another application will restart the clock.

Successful applicants (tenants)
Landlord/Agent: Data needs to be kept for a reasonable amount of time after the tenancy in case it is needed by insurance companies, NCAT, Fair Trading, or any law enforcement. It is reasonable to keep the data for the entire duration of the tenancy and until 12 months after the end of the tenancy. If there are any active matters after the 12 months, such as investigations, litigation, or insurance claims, then the data should be kept for 6 months after all issues are resolved.

Proptech Companies: Companies that provide services related to the tenancy application process should automatically destroy sensitive data for a user who has successfully applied for a property 30 days after they were approved. Companies that provide services unrelated to the tenancy application process, such as inspections, CRM, and trust accounting software, should hold the data until the landlord/agent deletes it.

Software may not be designed to delete data
Some proptech companies have designed software or services where data cannot be deleted as it would destabilise the integrity of the entire data or because data is archived into read-only files after a tenancy. In these instances, it would not be possible for a landlord/agent to comply with the timeline through no fault of their own. Consideration must be made for this in any legislation or regulation that penalises non-compliance.

Question 18: Do you support requiring landlords, agents or proptechs to:
(a) give rental applicants' access their personal information,
(b) correct rental applicants' personal information?
Please explain your concerns (if any).

Response: Yes, so long as additional requirements are not placed on the landlord/agent to correct data they do not maintain, such as tenancy databases.

Giving rental applicants access to their personal information is a relatively straightforward matter. For most landlords/agents, most of this data has been provided by the tenant. Additional data may have been gathered from other sources, such as Eviction and Tenancy databases. This information could and should be accessible to the tenant, given that it is primarily their information or information about them.

Correcting information is a more complicated matter. Many landlords/agents use eviction and tenancy databases provided by proptech companies as another data point to determine an applicant's suitability. Often the landlord/agent has no control over this data and does not maintain it. It would be unreasonable to require the landlord/agent to correct data they are not responsible for.

Fair Trading has completed an extensive body of work on eviction and tenancy databases, as well as creating helpful resources for tenants and applicants to correct data in these databases.

Potential NCAT data release scheme
In an effort to combat landlords/agents using third-party data sources and ensure more reliable applicant data is used by landlords/agents, there may be merit in exploring a scheme whereby an applicant could consent to the release of details for all residential tenancy matters that they have been party to before the NCAT over a period of time, such as the last five years, if any.

Such a scheme would assure the landlord/agent that the data is accurate and exhaustive. It would also allow tenants with no adverse findings against them to have documented proof of this.

This scheme or similar could provide another data point for landlords/agents in determining an applicant's suitability. It would likely have greater weight than other data points of a similar nature, given that the data is verified and complete.

Question 19: Are you aware of automated decision-making having unfair outcomes for rental applicants? Please explain.

Response: It is often difficult to determine if automated decision-making (ADM) produced an unfair outcome, as you may not see all the factors that were taken into consideration or all the alternatives that were decided against. However, one group of people that often face discriminatory outcomes when using ADM or other technology systems are people with limited proficiency in English and/or with technology.

<u>Applicants with limited proficiency in English and/or technology</u>
People with limited proficiency in English and/or limited proficiency with technology often need help with challenges and unfair outcomes when agents/landlords exclusively or primarily use processes that depend on technology, such as online forms, websites, and applications.

This issue is further exasperated when you consider that individuals that belong to more vulnerable groups in society, such as people living with disabilities, migrants, and people experiencing homelessness, tend to have a greater likelihood of having limited language and technological proficiency. There is a greater need to ensure that people in these groups have equal access, allowing them the best chance for equal opportunity. Despite this, people with limited English or technological proficiency are unfortunately more likely to face unfair outcomes and unintended discrimination.

As agents, landlords, proptech companies, and Governments increase their use and reliance on technology, there must be active consideration to not unintentionally create circumstances that greatly disadvantage them, vulnerable people, limit their ability to competitively apply for a tenancy, or lock them out of the process entirely.

Question 20: What should we consider as we explore options to address the use of automated decision-making to assess rental applications?

Response: Many factors must be considered when addressing automatic decision-making (ADM) systems, particularly those that use artificial intelligence technologies such as machine learning. Given that the implementation of ADM systems in the real estate industry is still developing and the underlying artificial intelligence technologies are in active development, creating proscriptive legislation or regulation is unlikely to benefit anyone at this early stage.

There may be more merit in the Government and industry monitoring this issue closely over the next several years as technologies evolve and further data on implementation becomes available, and then engaging in broad consultation with academic, technology, and industry experts.

Automated Decision-Making (ADM) and Human Decision-Making (HDM) both pose risks and have biases, necessitating ADM to aid but not replace HDM in real estate where ADM. Replacing HDM with ADM entirely would be negligent.

Risks in human decision-making
Just as there are risks in ADM, there are also risks in human decision-making (HDM). A variety of cognitive, emotional, and situational factors influence HDM. While often effective, HDM is subject to various risks and biases that can lead to suboptimal or harmful outcomes.

Some risks of human decision-making include cognitive biases, including those that may be subconscious and unintentional, groupthink that leads to flawed decisions in pursuit of conformity, emotional influences that the decision-maker may not even identify, and decision fatigue after making numerous decisions over a short period.

Requiring proptech's to explain how ADM systems work
Requiring proptech companies to explain how their ADM system works is a novel solution in theory but may run into issues when attempted. ADM systems that use artificial intelligence, such as machine learning, may prove difficult to justify why they determined a decision.

Suppose a proptech company trained a machine learning model using data from humans' past decisions. In that case, the machine learning process could unintentionally identify patterns caused by a subconscious bias in the original human decision-maker and replicate said bias. This replicated bias would not be deliberate on the part of the ADM system, its designers, or the proptech company and would be very difficult to detect or identify.

Analysing the decision-making process of an ADM system that uses machine learning algorithms trained on human-made decision data would be difficult. Complete and truthful answers provided by proptech company may not satisfactorily answer any questions or alleviate concerns about the ADM system.

ADM should assist HDM

ADM and HDM are subject to risks and biases that may lead to flawed decisions and suboptimal outcomes. Ideally, ADM should assist HDM in making significant decisions that could impact an individual's living circumstances.

In the context of real estate, given that the decisions relate to people's living circumstances, allowing an ADM process to replace the HDM process entirely would be negligent. ADM systems should be used as tools to assist a human in making the final decision. The human decision maker should not wholly rely on the judgment of the ADM tool and should be able to justify their decision and why they agreed with the ADM recommendation(s) if they did so.

Portable rental bond scheme

Question 21: How long should a renter have to top up the new bond if some or part of the bond has been claimed by the previous landlord?

Response: The landlord should determine the duration a tenant should have to top up their bond, but at most, not more than three months.

Circumstances differ for each tenant, landlord, and property, so the Portable Rental Bond (PRB) scheme should be as accommodating as possible.

If a fixed period to top up a bond is set, there may be circumstances where a tenant may need more time to top up the bond than what is provided. Allowing the landlord to determine the period of time a tenant has to top up their bond gives the landlord and tenant the ability to come to a mutually suitable arrangement and avoid having to terminate the tenancy.

There are many costs often associated with leasing a property that is imposed by real estate agents or proptech companies, such as advertising fees, letting fees, tenancy fees, and other associated marketing costs. As such, it may not be desirable or financially feasible for the landlord to attempt to find a new tenant.

Question 25: What other (if any) things should we consider as we design and implement the portable bond scheme? Please explain.

Response: Since functionality that allows a residential tenancy bond to be topped up will be developed, there may be merit in extending this functionality to existing residential tenancy bonds and allowing tenants to top up their bonds when their rent is increased.

Topping up existing residential tenancy bonds
Currently, the Rental Bonds Online (RBO) system does not allow the landlord/agent to request that a residential tenancy bond be topped up when the rent is increased. This functionality is available in the RBO system as it is available for retail tenancy agreements.

There may be merit in allowing residential tenancy bonds to be topped up when their rent increases. As rent increases over the duration of a tenancy, the bond amount that is held begins to drift from the bond amount that would be required if the lease were to commence in the current day. This drift is exacerbated the longer a tenancy remains.

Currently, the solution to prevent this bond drift is to enter into a new fixed-term lease after each lease term, refund the bond for the previous lease, and require a new bond to be paid in full. This workaround does not take into consideration tenants who continue onto rolling leases.

In our experience working with clients that are real estate agents, bond drift can rise to as much as 50% over 10 years. Allowing agents/landlords to request tenants top up their residential tenancy bonds after a rent increase would eliminate bond drift and allow greater transparency for bond-related transactions. Conversely, the appropriate bond amount should be refunded to the tenant if rent decreases.

Another by-product of allowing top-ups for residential tenancy bonds through RBO would be the ability to use top-up data to determine rent increases. This will be explored further in our response to Question 27.

Maintaining confidence is imperative
The development and implementation of a Portable Rental Bond scheme is a significant undertaking with many technological, financial, and practical obstacles that must be overcome. The Government's intention to explore this scheme must be commended. Naturally, as with any complicated scheme, many questions need to be determined and reassessed as data becomes available after the implementation of the scheme.

Confidence in the rental system must be maintained throughout the design and implementation of this scheme. A bond scheme that leaves landlords out of pocket through no fault of their own or that causes landlords to become non-compliant with their landlords' insurance due to circumstances beyond their control will destroy confidence in the rental market. Reduction in confidence will have determinantal effects and only aggravate the housing shortfall.

Information to help renters know when a rent increase is 'excessive'

Question 26: Do you have any concerns about the NSW Government collecting information on rent increases and making it publicly available for renters? If yes, please provide details.

Response: The data collected needs to be completely accurate. Inaccurate data could distort tenant and landlord perceptions of the market and cause disruptions and instability in the rental market.

As such, there may be better methods of collecting data on rent increases than a voluntary survey. It may be perceived by some stakeholders that there is an incentive for them to provide inaccurate information. The tenant, landlord, and agent must have a deterrent to providing incorrect information.

Question 27: What do you think is the best way to collect this information?

Response: Allowing residential tenancy bonds to be topped up through the Rental Bonds Online (RBO) system would automatically collect the most accurate and up-to-date rent increase data, with built-in incentives for tenants, landlords, and agents to ensure that data is accurate.

Top-up existing bonds when rent changes

As explored in our response to Question 25, allowing agents/landlords to issue top-up requests through RBO in response to a rent increase would allow Fair Trading to identify when a rent increase was issued and the size of the rent increase.

The data for a bond within RBO already contains the property's address, including the suburb and postcode, as well as the dwelling type, the number of bedrooms, the number of tenants on the lease, and the approximate lease start date and length.

With bond top-up data, Fair Trading can determine when top-ups and rent increases occur, how frequently, and by what amounts. Any data that may not be available for an existing bond, such as dwelling type or number of bedrooms, could be collected when the bond is topped-up.

Figure 1

The 'Create a new bond' screen from Rental Bonds Online and what data is collected

Using RBO to collect rent increase information through bond top-ups would require the least amount of resources to implement, as it would consist mainly of generating reports and running data operations on RBO data.

Furthermore, this approach is likely to provide the most accurate data.

Landlords/agents could not underreport the rent increase as the only way to do that would be to take a lesser bond which financially disincentivises them and would likely breach the terms of any landlord's insurance policy they may have.

Tenants could not overreport the increase as the only way to do that would be to overpay for the bond, which financially disincentivises them and would not be possible using the RBO system.

Other changes to make rental laws better

Question 31: Do you support new laws to require landlords or their agents to tell rental applicants if a rental property uses any embedded network? Why/why not?

Response: Yes. However, agents/landlords may not be aware if their property uses embedded networks, and if so, they may not know the details.

Real estate agents manage a number of rental properties and may not be familiar with the details of the embedded networks for a particular property. To the point, agents tend to rely on information provided by the landlord (and tenants). Similarly, a landlord may also not be aware of the details of the embedded networks in their property.

Requiring agents/landlords to give information that they may not have, or may not have in its entirety, to tenants and prospective tenants could increase rates of non-compliance and increase rates of misinformation provided to tenants.

An alternative approach could be creating an NSW registry containing details of any embedded networks used in a property. This registry could draw data from various sources, such as the annual reports from Strata schemes and planning data for new dwellings that use embedded networks.

By drawing data from official sources, the data in the registry will be more accurate, reduce rates of misinformation, and be more helpful to tenants and applicants.

Question 32: When should a rental applicant be told that a property uses an embedded network?

Response: Tenants should be aware of the use of and details of embedded networks before they apply for a property.

The use of embedded networks, or a particular embedded network, may make a property unsuitable for an applicant. Discovering this information later in the application process could cost the applicant valuable time as well as the opportunity to apply for other properties that could be suitable.

For example, as work-from-home and remote working arrangements become more common in Australia, certain telecommunication services are required to engage in these working arrangements. If the use of an embedded network, or a specific embedded network, precludes an applicant who has such working arrangements from using a required telecommunication provider or obtaining a required level of service, this is likely to make the property entirely unsuitable for them.

A registry containing all the relevant information regarding embedded networks used within a property will allow applicants to identify if the property is suitable for them before they even consider or apply for the property.

Further, if the registry were to be designed in accordance with the principles set out in the NSW Government's Open Data Policy, then the development of an API or other data access methods would enable online marketing websites and proptech companies to draw data from the registry automatically, and it makes it available for the applicant on the listing page or in the property management software.

Question 33: What information should a renter be told about a rental property using an embedded network? Please explain.

Response: The information that an applicant or prospective tenant would require to determine the impact of or suitability of the embedded network would be:

- The type of embedded network, such as gas, electric, or telecommunications;
- The name of the embedded network provider
- A link to the website of the embedded network provider.

These details allow an applicant to conduct their research as to the impact of the embedded network on the suitability of the property for them.

If an embedded network provider does not assist applicants in conducting this research, such as not listing their prices or resellers on their network on their website, then this would preclude applicants from applying for the property and, in turn, reduce demand and, appropriately, market rent for that property.

Increasing the transparency and accessibility of this information would allow natural market forces to incentivise embedded network providers to become more competitive and accommodating to potential tenants and applicants.

Question 34: What would be the best way to ensure that the free way for renters to pay rent is convenient or easy to use? Please explain.

Question 35: Should the law require a landlord or agent to offer an electronic way to pay rent that is free to use? Why/why not?

Response: The suitability of an electronic payment method for a landlord/agent and its likelihood to be made available to a tenant to pay rent usually depends on the four following factors:

1. **Identification of Payments** – Payments should identify which tenancy they are for.
2. **Payment Cost** – The cost of receiving the payment.
3. **Cleared Funds** – If funds are clear or could be subject to dishonour.
4. **Payment Speed** – How long it takes to process and receive funds.

The electronic payment systems within the Australian financial landscape are quite mature when compared to other nations of similar economic and property markets. While external payment providers can provide payment services, payments in Australia are deposited into accounts held by deposit-taking institutions primarily through four payment methods.

Other platforms may be built upon these four platforms, such as the New Payments Platform or external providers such as PayPal, but ultimately the primary payment platforms used in the Australian financial system that are available to regular consumers are:

1. Electronic Funds Transfer (EFT); *also referred to as Direct Entry*
2. BPay®;
3. Electronic Funds Transfer at Point Of Sale (EFTPOS); and
4. Card Payments (excluding EFTPOS).

EFT and BPay® are the two most likely candidates that could be provided as a free electronic payment method. Further analysis is necessary to determine the number of agents that use banking platforms that allow BPay® payments.

As the payment methods built on the New Payments Platform are rolled out to more business banking customers and become available for trust accounts, EFT is likely to become the optimal choice for a free electronic payment method. However, until such time, BPay® or EFT could serve as the free electronic payment method.

<u>Identification of Payments</u>
Agents need to identify the intended purpose and property for any funds deposited into their trust account(s). This tends to be less important, or not at all, for private landlords as they typically manage fewer properties and can identify this from the depositors' name.

Agents often manage hundreds, and sometimes thousands of properties, with rent payments deposited into typically one single trust account. It is typical for an agent's trust account to receive tens of thousands of dollars in rent payments over many transactions every business day. Because of the large number of payments received, each payment must be automatically identified and processed.

Many property management software and services that handle trust accounting and provide functions such as rent receipting and reconciliation of accounts can automatically identify, receipt, and reconcile rental payments by using a unique identification/transaction code for each tenant (sometimes with multiple codes per tenancy if there are numerous tenants).

If a payment does not have an identification code or has the wrong identification code, it will fail to be automatically processed and require manual identification by a property manager. This manual process is time-consuming and increases the likelihood of human error or misidentification of payments. As a result, automatic identification of payments to allow automated processing is a high priority for agents.

To prevent a tenant from entering an incorrect code, many property management software/services and payment gateways use codes with a check digit and a payment method that enforces check digit validation.

What is a check digit?

A digit at the end of numeric data is calculated using a special algorithm from all the numbers before it and used to make sure that the data is entered correctly.

A check digit is a digit added to a number or code to help detect data entry, transmission, or storage errors. The purpose of a check digit is to provide a simple form of error checking and help ensure the accuracy of the numbers.

Check digits are especially useful in scenarios involving manual data entry, as they provide a quick way to catch common errors.

The check digit is calculated based on the other digits in the code using a specific algorithm (called a checksum). This algorithm is designed so errors, such as transpositions or digit entry mistakes, are more likely to be caught.

Example

Say our check digit is calculated using an algorithm that results in a **2** if the numbers before it adds up to an even number or results in a **1** if they add up to an odd number.

Code: 4563211

The last digit is the check digit, so we exclude it from the calculation. The sum of 4 + 5 + 6 + 3 + 2 adds up to **21**, which is an **odd** number, so the check digit of 1 is correct, and this code is valid. Actual checksum algorithms are far more complicated.

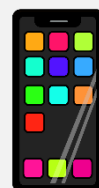Check digits are used in various applications that you encounter on a day-to-day basis like
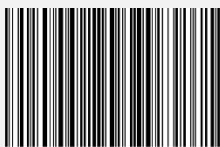
| Barcodes | Credit/Debit Card numbers | Vehicle Identification Numbers (VIN) | International Mobile Equipment Identity (IMEI) |

<u>EFT</u>

There is no built-in identification or data validation for EFT payments. A payer may use their unique payment code as the transfer reference number, but there is no check digit validation to ensure no error in the data entry. A reference is not required to make an EFT transfer and could be left blank.

There is also no capability to check if the account number and BSB to which the funds are being deposited are correct.

Newer Payment methods built on EFT using the New Payments Platform, such as PayID and PayTo, could allow check digits and minimise errors in data entry. However, the rollout of these payment platforms to business banking accounts has been limited and slow and is likely to be even more limited and slower when rolled out to trust accounts.

<u>BPay®</u>

BPay® requires the payer to input a Customer Reference Number (CRN) to make a payment. Payments can be easily and automatically identified when deposited by providing each payer with a unique CRN. Further, CRNs have built-in check digits, and payment cannot be made unless a valid CRN is provided.

BPay® payments are made to unique Biller Codes, which are validated by the payment platform to confirm that the biller code is valid. If the biller code is valid, the name of that biller is displayed to the user. At this point, the user can quickly identify if they have entered an incorrect biller code.

<u>EFTPOS & Card Payments</u>

Electronic payments made through the EFTPOS/Card that are not in person are made through a website or an app designed specifically for making that payment. As such, identification and verification are usually done beforehand, and payments, if successful, include the appropriate identification.

Payment Cost

Almost all electronic payment methods incur a payment cost from the payment network to the landlord/agent, often passed onto the tenant. The only electronic payment method that generally does not incur a fee for the transaction for either the payer or the payee is Electronic Funds Transfer (EFT). The fees incurred by the other payment methods range from low to high.

Section 35 of the RT Act requires that:

> *A landlord or landlord's agent must permit a tenant to pay the rent by at least one means for which the tenant does not incur a cost (other than bank fees or other account fees usually payable for the tenant's transactions), and that is reasonably available to the tenant.*

As the consultation paper has identified, this section does not specify that the payment method must be an electronic payment method. As such, many agents/landlords use a method that does not incur a fee from their bank or may use a method that is inconvenient for the tenant to dissuade them from using that payment option.

EFT

As stated above, payments made via EFT into the landlord's account or the agent's trust account are typically free for both the payer and payee (outside of usual bank account fees).

However, the EFT payment method does not force the identification of the payment (as discussed above) and does not check if the reference or account has been entered correctly. This may dissuade agents from providing this payment method to tenants to prevent payments from going to the wrong account due to human error in data entry.

BPay®

Payments made through BPay® typically incur no cost to the payer and typically incur a low cost to the payee. The transaction cost charged to the payee for a BPay® transaction varies amongst banks but generally ranges from $0.88 to $0.99.

However, not all banks may offer BPay® biller facilities for their business customers. Agents who operate a trust account with a bank that does not provide BPay® biller facilities will need to use a third-party payment service if they wish to offer BPay® to tenants.

EFTPOS & Card Payments

The Reserve Bank of Australia (RBA) published a bulletin on 15 September 2022 titled *The Cost of Card Payments for Merchants*, which analysed the cost of card payments for merchants.

Unlike other electronic payment methods, charges incurred by the payee for card payments are a percentage of the total value of the payment. When used for the payment of rent, this results in high fees charged to the agent, which is why in most cases, the agent will choose to pass this cost on to the tenant. Most agents would concur that it would be unsustainable for their business model to absorb this cost across all tenants and properties.

Australian Debit cards are routed through either the EFTPOS network or the card issuers network. Both networks attract a smaller fee than credit card routing, with the average EFTPOS cost found to be 0.3% and the average card issuer network cost found to be 0.5%.

A debit card that is usable on the EFTPOS payment network and its issuers' payment network (such as Visa or MasterCard) is a dual-network debit card. When a payment is made from a dual-network debit card, it can be routed through the EFTPOS payment network or the card's payment network. The merchant/payment platform must opt to route the transaction through the network that costs them the least; this is called 'least-cost routing' (LCR).

Following a review of Payment System Regulations by the Reserve Bank of Australia, the bank has put forward a stronger position to increase the availability of LCR for merchants. Despite best efforts, the uptake of LCR appears to be slow.

Although an estimated 90% of debit cards issued in Australia are dual-network debit cards[3], it was found that as of June 2022 while 85% of merchant facilities had LCR availability, only 50% of merchants had it active[4].

This means that it is unlikely that rent paid through a card will be routed through the lower-cost network and is more likely to attract higher than necessary fees that are likely to be passed on to the tenant.

Payments made through credit cards can only be routed through the card issuers' network. Australian credit cards issued by Visa and MasterCard were found to have an average cost of 0.9%, whereas American Express and Diners Club credit cards were found to have average costs of 1.3% and 1.7%, respectively.

It is important to note that international Credit cards issued by Visa and MasterCard attract higher fees.

Overall, the slow uptake of LCR, the difference in cost for credit and debit cards, and the cost being a percentage of the transaction value make electronic payments through Credit/Debit cards the most expensive electronic payment option. Unless there is a fundamental architectural change to how card payment networks operate, this is unlikely to change.

Preliminary analysis of payment data released by the RBA every quarter shows that for the 2022-23 Financial Year, online payments using domestic cards decreased across all types and networks.

Table 2
Payment Data released by the RBA shows card payment fees for online payments using domestic cards decreased during FY22-23.

Network	Type	Average Fees	Change
EFTPOS	Debit	0.28%	-0.02% ▼
Visa	Debit	0.46%	-0.04% ▼
MasterCard	Debit	0.49%	-0.01% ▼
Visa	Credit	0.77%	-0.13% ▼
MasterCard	Credit	0.80%	-0.10% ▼
American Express	Credit	1.33%	**+0.03% ▲**
Diners Club	Credit	1.62%	-0.08% ▼

Further analysis will be required to draw any conclusions from this data, but preliminary analysis of the data indicates an alignment with the continuing trend of card fees gradually decreasing over time.

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[3] Reserve Bank of Australia (2019), *"Review of Retail Payments Regulation: Issues Paper"*.
[4] Gill T, Holland C and Wiley G (2022), "*The Cost of Card Payments for Merchants"*.

Conclusions

Our findings indicate that electronic payment methods not used at the point of sale when ordered at the lowest cost to the payee are:

1. EFT (typically free)
2. BPay® (typically $0.88)
3. Card payments made by EFTPOS (typically 0.3% of the transaction value)
4. Card payments made using Debit cards on the Visa and MasterCard networks (typically 0.5% of the transaction value)
5. Card payments made by Credit cards on the Vista and MasterCard networks (typically 0.9% of the transaction value)
6. Card payments made by Credit cards on other networks (typically 1.5%).

Note: All Credit/Debit card costs assume that the card used is an Australian Debit/Credit card.

These findings are in line with those found in the bulletin published by the Reserve Bank of Australia in 2022, a paper published by the Reserve Bank of Australia.[5] in 2008, and discussions from the Payments System Review Conference held on 29 November 2007 as part of the Reserve Bank of Australia's 2007/08 Review of the Payments System[6].

Despite a trend in fees decreasing over time, fees for card payments remain relatively high compared to other electronic payment types and the most expensive electronic payment method.

Cleared Funds

Some electronic payment methods may permit funds to be transferred into another account that may not be actually available to have been transferred in the first place and may be returned. This is an issue that is more likely to apply to an agent than a landlord, as most landlords would not provide these types of payment methods.

BPAY®, EFTPOS & Card Payments

Transfers via BPay®, EFTPOS, and Credit/Debit can only be completed if the payee has the funds in their account. This means the likelihood of receiving clear funds from these payments is very high.

EFT

Payments made through EFT could be subject to dishonour depending on how the payment was initiated. Payments initiated by the payer (Direct Credits) will be transferred if the payer has the funds available in their account. Different banks have different rules and processes for this.

Payments made through EFT that the payee initiates are called Direct Debit and are subject to dishonour. A Direct Debit Request (DDR) is an authorisation that allows a designated organisation, in this context, a real estate agency, to automatically withdraw funds from an individual's bank account, in this context, the tenant.

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[5] Schwartz C, Fabo J, Bailey O and Carter C (2008), "*Payment Costs in Australia*".
[6] Reserve Bank of Australia (2008), "*Payments System Review Conference*".

However, the debtor (agent) cannot determine if the nominated funds are available in the tenant's account. The tenant's bank receives the DDR and may process it accordingly, regardless of whether the funds are available. The funds are then deposited into the real estate agent's trust account. At this point, the agent does not know if the funds will remain or if the DDR will be dishonoured and if the funds will be returned to the tenant. If the funds are not returned within a few business days, they are deemed to be cleared, and it is unlikely that they will be returned.

In addition to a DDR dishonour causing confusion and administrative work, a dishonour fee is often charged to the agent by their bank and/or the tenants' bank, and in some instances, a dishonour fee may also be charged to the tenant by their bank. In most cases, the Direct Debit agreement specifies that any dishonour fees that the agent incurs will be passed onto the tenant.

Direct debit dishonour fees are more significant than the typical cost of an electronic payment. Dishonour fees are typically between $35 and $50.

Further, payments that dishonour and are returned may have already been paid out of the trust account. In these instances, the agent must recover those funds from the landlord or the tenant or cover the difference of those funds themselves.

In some instances, this may cause the trust account to become overdrawn, requiring the license holder to discharge their obligations as per section 89 of the PS Act and the bank to discharge their obligations as per section 92 of the PS Act.

To avoid issues such as this, some agents may use external third-party payment providers that hold funds until they clear before depositing them into the agency trust account.

Payment Speed
The time it takes for a payment to be received by the intended recipient after it has been made is important. Typically, most electronic payment methods will deduct the money from the user at the time of payment but not transfer funds on the next business day.

EFT and BPay®
Payments made via EFT and BPay® are typically received on the next business day if the payment was made before the payment cut-off time of the payers' bank (usually sometime in the evening). Some banks may allow payments via EFT to be made to accounts held by the bank at any time during the day and may transfer those funds instantly or shortly after.

EFT payments made using New Payment Platforms methods such as Osko or PayID allow transfers to be made between participating institutions in near real-time. However, not all banks may support Osko payments, and these payments would be processed like any standard EFT payment. The rollout of these methods to business banking customers has been slow and may not be a priority for all banks.

EFTPOS & Card Payments
Payments made via EFTPOS and Card payments are transferred instantly but may not be deposited into a bank account until the next business day.

Given that no particular electronic payment method provides any significant advantage over any other in terms of payment speed and receiving funds on the next business day is sufficient for most agents and landlords in most cases, there is no ideal method. However, this will likely change as more payment methods built on the New Payments Platform are rolled out to business banking customers.

Comparison of Payment Methods
When comparing all four electronic payment methods to determine if one is suitable to be used as the free electronic payment method, it becomes clear that no singular payment method is an ideal choice that is free from issues.

Table 3
Comparing all four electronic payment types.

	Electronic Funds Transfer (EFT)	BPay®	Card Payments & EFTPOS
Payment Speed	Next business day / Instant	Next business day	Instant
Payer Initiated Method	Direct Credit	BPay®	Card payment
Payee Initiated Method	Direct Debit	N/A	
Clear Funds	Yes - if payer initiated	Yes	Yes
Built-in Verification	No	Required - reference number	Yes - integrated into custom systems
Unique Identifier	Possible but not enforced	Enforced - by payment method	Yes - integrated into payment systems
Payment Cost	None to Low	Free for payer Low for payee	Medium to High
Dishonour Fees	High	N/A	N/A

The EFTPOS and Card Payments fees are too high to be absorbed by the agent and landlord, and these facilities are unlikely to be provided by landlords.

The integrated safety features in BPay®, such as the check digit and biller code validation, make accidental transfers to incorrect accounts highly unlikely. Payment fees for BPay® are reasonably cheap and could be absorbed by agents if provided with sufficient notice.

The primary issue with BPay® is availability. This payment facility is unlikely to be provided by a landlord, and not all agents may have trust accounts with banks that offer BPay®. Further analysis is required to determine the percentage of rental trust accounts held by each bank in NSW and if those banks provide BPay® biller functionality for their business banking customers.

EFT is the cheapest electronic payment method that is virtually free for users, accessible by everyone, and can be accepted by all landlords/agents. The limitations of EFT are primarily related to the lack of data validation and payment identification. Payments can be made to the wrong account if a single digit is wrong in either the Account Number or BSB, and payments could be made into an agent's trust account with missing or incorrect identification data, making it difficult or impossible for the agent to identify the payment.

These limitations are likely addressed as the payment methods built on the New Payments Platform are rolled out to more business banking customers and become available for trust accounts. Payment methods such as PayID, in association with unique email addresses, have been successfully implemented in other industries to allow users to make identified payments without needing to enter an account and with built-in data validation. Once these limitations are addressed, EFT is most suitable to become the most suitable choice for a free electronic payment method.

Some agents may be reluctant to provide the BSB and Account Number of their trust account to tenants to ensure that no unidentified funds are deposited into their account. In these cases, these agents would have to provide BPay® as the free electronic payment method.

Possible options to explore
A possible option that could be explored in consultation with banks and other State Governments is to see if there is an appetite for reducing or waiving BPay® transfer fees for rental payments.

Financial institutions in NSW, Victoria, and Western Australia must inform the relevant Minister if a real estate statutory trust account becomes overdrawn. Given that the banks identify real estate statutory trust accounts within their systems to discharge their reporting obligation, it may be possible to use this data to identify payments made to property trust accounts for rent and charge a waived or reduced fee.

Another possible option would be to discuss improvements to the EFT payment method with banks and other State Governments by building on the New Payments Platform to address the limitations explained above.

Question 36: What are the issues faced by renters when moving into a strata scheme? Would better disclosure about the strata rules for moving in help with this?

Response: Real estate agents manage a number of rental properties and may not be familiar or up-to-date with the details and by-laws of the strata scheme. Agents tend to rely on information provided to them by the landlord, who may also not be aware of these details.

Requiring landlords/agents to give information that they may not have, or may not have in its entirety, to tenants and prospective tenants could increase rates of non-compliance and increase rates of misinformation provided to tenants.

An alternative approach could be creating an NSW registry containing details about the strata scheme and any by-laws relevant to prospective tenants.

This registry could draw data from various sources, such as the annual reports provided by strata schemes, and contain data about embedded networks within the strata scheme, as suggested in our response to Question 31.

By drawing data from official sources, the data in the registry will be more accurate and reduce rates of misinformation, being more helpful to tenants and applicants.

Other Feedback

<u>Attitudes toward cyber security within the industry</u>

Our in-depth experience working with clients in the real estate industry has allowed us to engage with many real estate agents and their service providers. Unfortunately, we have observed a generally lax approach to cyber security that is prevalent within the industry.

We do not believe that this is necessarily a fault of the industry or agents but an unfortunate by-product of the rapidly evolving nature of cyber threats and the high-value targets that real estate agents have become due to the data-rich nature of their work.

We recognise that Fair Trading has introduced the compulsory topics 1C *'Cyber Security & Fraudulent Activity'* and 1E *'Privacy'* into the 2022-2024 Continuing Professional Development requirements for Class 1 and Class 2 agents that were not present for earlier years. This is a positive development; however, given that these topics are compulsory, the agent may not select them.

There may be merit in exploring the possibility of combining these topics and making them mandatory for agents who perform work duties where they regularly access or work with large stores of data, such as strata managers, property managers, and administrative support staff.

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