
Submission to the NSW Government Department of Customer Service in response to the 'Improving NSW rental laws' consultation paper

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Thank you for the opportunity to respond to the 'Improving NSW rental laws consultation paper' (hereafter, 'consultation paper'). I am responding to this consultation in my capacity as a PhD candidate, whose thesis explores the use of proptech to assess people who are applying for rental properties (referred to throughout this submission as 'rental application technologies'). My research, which looks at proptech that is prevalent in both the Australian and international markets, demonstrates that without effective regulatory intervention renters can be, and are currently being harmed by the use of exploitative rental application technologies.

My response to the consultation paper focuses on questions 10 - 20 in Section 5 of the consultation paper: 'Renters' personal information'. If implemented effectively, the reforms proposed within Section 5 of this paper have the potential to establish an ambitious new standard of protections for renters.

The status quo isn't working for renters in NSW. Renter sentiment shows that 60% of renters were uncomfortable with the amount and type of information collected as part of the rental application process, while 29% of renters opted not to apply for a rental because they did not trust the rental application technology.¹ Urgent reforms are required to better support and protect Australia's growing renter population (ABS data from 2021 showed that the number of renting households in NSW had increased by 17.5% since 2017).² Improving access to housing will make a significant difference to the lives of many people living in NSW.

In writing this submission, I would like to stress that many of the problems discussed within the consultation paper *can and do occur without the use of rental application technologies*. For example, a real estate agent or landlord harbouring a prejudice against a particular ethnic group may deprioritise rental applications supplied by members of the ethnic group (in this case, it can be very difficult to apply anti-discrimination law if the real estate agent or landlord has not explicitly stated that they have discriminated on the basis of ethnicity or demonstrated that they treat applicants from this group unfairly).

However, introducing new technologies into the rental application process can:

- scale, exacerbate, and occlude existing harms, and
- catalyse new harms that did not previously exist.

The above challenges must be considered when designing effective protections and interventions. Importantly, technology can be part of the *solution* and, if designed and regulated correctly, can be used to minimise harms that adversely impact renters in NSW.

Prior to answering the questions posed in Section 5 of the consultation paper, I will first provide an overview of the key harms resulting from the use of rental application technologies:

- **Information is used illegally/unfairly**
- **Information is inaccurate/incomplete**

¹
<https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/choice-renttech-report-release> 'At what cost? The price renters pay to use RentTech', p5

²
<https://www.tenants.org.au/blog/census-2021-renters-are-fastest-growing-tenure-australia#:~:text=The%20number%20of%20renting%20households.to%20fix%20our%20housing%20system>.

- **The use of screening technologies can result in long-term negative consequences**
- **Requiring that consumers pay (the cost being money/data) to apply for property can create and exacerbate consumer disadvantage**
- **Opting-out of using the digital platform may result in penalties**

I have developed this typology in consultation with academics across urban geography, law, housing studies and consumer policy, and with input from housing advocates.

The examples provided in this paper are drawn from both Australian and overseas markets. Examples from other jurisdictions are useful to consider in the context of Australia's proptech sector, which has grown rapidly in recent years.³ Local companies are exploring new business models and techniques to analyse renters that are more established in overseas markets,⁴ so by looking at case studies from other jurisdictions, we can consider them a 'preview' of the kinds of technologies that could appear in Australia.

Harmful rental application technologies are already hurting Australian renters. Without urgent implementation of effective regulatory protections, many more harmful techniques embedded within overseas rental application technologies could be implemented here, resulting in significant adverse impacts on renters in Australia.

In addition to my exploration of key harms and my responses to consultation questions 10-20, I would also like to highlight that there are a number of relevant factors that have not been addressed in the NSW Government's consultation paper, but which should be explored further. These include, but are not limited to:

- The use of open banking data for the assessment of rental applications

There is evidence of this occurring overseas.⁵ The collection and use of open banking and other Consumer Data Right data in the rental application context should be explored further to ensure that appropriate protections exist, or are introduced to protect rental applicants from key harms (outlined later in this paper).

- Landlord and real estate agencies' use of proptech to set rental prices

A ProPublica investigation revealed that RealPage's YieldStar software helps landlords set prices for apartments across the U.S.⁶ The investigation concluded that this software may be hurting competition, driving up rents, and discouraging the practice of negotiating rental prices.

- The use of proptech in sharehousing contexts⁷

Proptech is increasingly being used to help people find and manage shared housing arrangements. More research needs to be done into the impacts of these technologies on renters, with special attention paid to the collection, use and storage of personal information.

- The use of proptech in provision of rental bond products

Certain products such as Trustbond (now defunct) have attempted to 'disrupt' the bond system. Trustbond sought to 'removes (sic) the need for an upfront bond payment', and would instead analyse renters' 'credibility by assessing their digital profile using online data including networks, ratings and reviews from social media and other digital community marketplaces.'⁸ The resulting score would be used to determine the bond fee. The use of automated decision-making technologies in contexts such

³ <https://www.unissu.com/proptech-resources/proptech-in-australia>

Between 2013 and 2019 there was a 428% increase in PropTech companies.

⁴<https://www.theguardian.com/australia-news/2022/nov/17/imperfect-match-australian-renters-in-the-dark-over-use-of-data-by-tech-company-snug> Australian rental application technology company Snug filed a patent application for techniques that leverage renters' social media data. Similar techniques are currently being used in overseas markets. 'A patent application filed by Snug in 2018, which is still active, suggested that the company's intention was to collect information from users that included friend lists, social media networks and ratings on third-party platforms such as Airbnb and Uber, and to develop a kind of rental credit system.'

⁵

<https://gocardless.com/guides/posts/real-estate-open-banking/#:~:text=With%20open%20banking%2C%20users%20can,the%20possibility%20for%20predictive%20models.>

⁶ <https://www.propublica.org/article/yieldstar-rent-increase-realpage-rent>

⁷ For example, Flatmate Finders (a platform for people to advertise and find share houses) and Splitwise (a tool to record and manage shared expenses)

⁸ <https://www.suncorpgroup.com.au/news/news/innovation-rewarded-for-building-trus>

as these must be investigated further to determine the potential harms to rental applicants, and the suitability of existing protections.

Thank you for taking the time to consider my submission to the consultation. I am available to discuss this submission, and am happy to participate in further consultations, briefings and other processes related to improving rental laws in Australia.

Yours sincerely,

Linda Przhedetsky

Key harms resulting from the use of rental application technologies

1. Information is used illegally/unfairly
2. Information is inaccurate/incomplete
3. The use of screening technologies can result in long-term negative consequences
4. Requiring that consumers pay (the cost being money/data) to apply for property can create and exacerbate consumer disadvantage
5. Opting-out of using the digital platform may result in penalties

Information is used illegally/unfairly

In instances where information is used illegally (for example, discriminating against someone on the basis of their ethnicity), renters are protected under relevant anti-discrimination laws. However, it is often difficult to detect when unlawful discrimination has occurred, particularly in instances where proxy variable⁹ have been used within an algorithmic system. The Australian Human Rights Commission's technical paper on algorithmic bias in energy explains how proxy variables can result in discrimination:

*'Sensitive variables, such as the individual's sex, race or age, may be included in the data set. Even if not present, such sensitive information may be inferred by the AI system because the data set contains proxy variables which correlate with the sensitive variable. The AI system is then used to predict each individual's likely profitability if they were accepted as a customer and, on that basis, the company decides whether to offer those individuals market-competitive service contracts.'*¹⁰

Applying the above example to the rental housing market, renters' proxy variables could result in them missing out on a rental property. A key challenge is to understand if, when, and to what extent, the use of renters' data has resulted in discrimination.

Unfair use of information means using information in ways that are not currently considered unlawful, but are nonetheless harmful. An example of this includes disfavoured renters based on information that is not considered a protected attribute (for example, whether a renter receives welfare or is a smoker), or the use of automated social media analysis to determine the outcome of a renter's application.

A note on the use of credit checks in rental application technologies

The Office of the Australian Information Commissioner explains:

'Real estate agents and landlords sometimes request a copy of your consumer credit report as part of a lease application process. Employers and recruitment consultants might also request your credit report in connection with an offer of employment.'

The Privacy Act specifically excludes real estate agents and employers from the definition of credit provider and these entities are not permitted to obtain credit reports.

*There is no obligation for you to provide a copy of your consumer credit report to a real estate agent, landlord or employer if they request you to do so.'*¹¹

Despite this, real estate agencies and landlords continue to ask consumers for credit reports.¹² People who are seeking rental housing may feel obliged to hand this information over, even if they do not wish to disclose it - particularly if they are hoping to be looked upon favourably in a highly competitive rental market.

⁹ A proxy variable, or 'proxies' are variables that are not in themselves directly relevant, but that serve in place of unobservable or immeasurable variables. For example, in certain contexts, postcodes may serve as a proxy for ethnicity. <https://academic.oup.com/book/33461/chapter-abstract/287737508?redirectedFrom=fulltext>
¹⁰ <https://humanrights.gov.au/our-work/technology-and-human-rights/publications/technical-paper-addressing-algorithmic-bias> pp11-12.

¹¹ <https://www.oaic.gov.au/privacy/your-privacy-rights/credit-reporting/real-estate-agents.-employers-and-your-credit-report>

¹² <https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/choice-renttech-report-release> 'At what cost? The price renters pay to use RentTech', p12

In other words, this creates an illusion of choice, rather than a genuine choice that allows renters to decide whether or not to provide this information.

The *Privacy Act 1988 (Cth)* (hereafter, 'Privacy Act') currently prohibits landlords from obtaining credit reports. Renters are sometimes asked, or given the option to upload a credit report as part of a digital application. The NSW government should introduce regulations to prohibit real estate agents and landlords from asking, or providing rental applicants with the option of uploading a credit report.

Information is inaccurate/incomplete

A range of factors can cause inaccurate information to become associated with a person's rental application. These factors include:

- The applicant providing incorrect information;
- A person handling the information removing or altering information contained in, or associated with a renter's application or profile; and,
- An algorithmic system introduces inaccurate information that is included in, or associated with an applicant's profile.

An example of an algorithmic system being used to introduce inaccurate information is documented by The Mark-Up, who describe a renter's experience of inaccurate automated screening reports:

'The automated background check for Johnson cast a wide net, looking for negative information from criminal databases even in states where she had never lived and pulling in records for women whose middle names, races, and dates of birth didn't match her own. It combined criminal records from five other women: four Samantha Johnsons, and a woman who had used the name as an alias—even though the screening report said she was an "active inmate" in a Kentucky jail at the time.'¹³

The use of automated tools to 'find' information about renters can not only introduce inaccuracies, but can provide an incomplete picture of the data that is discovered. Professor Paula Franzese explains how the use of algorithmic screening technologies results in court records being used to disadvantage renters, even if they had previously succeeded in bringing a matter against a landlord who was at fault:

'Using information retrieved from housing court data banks, the service will create a report that indicates whether the applicant was ever named in a landlord-tenant proceeding and, if so, the type of case and the amount of rent or damages sought by the landlord. The reporting system has three major flaws:

- (1) it provides no context and no mention of the given matters' surrounding circumstances, including case dispositions;
- (2) the prospective tenant is afforded no notice; and
- (3) there is no appeal process or assured opportunity for the adversely affected tenant to explain how and why she came to appear on the list.

The report that is issued notes all instances in which that tenant was ever listed as either a plaintiff or defendant in a housing court action. The report reveals nothing about the given circumstances, not even indicating whether the tenant prevailed in the matter— whether the case cited was dismissed, resolved in the tenant's favour, brought by the tenant, or brought by the landlord in error.'¹⁴

When looking at Franzese's example, we can consider that harms may result from the use of *incomplete* information: though the service indicates whether an individual has been *named* in a landlord-tenant proceeding, it fails to provide relevant context. In addition to the problems caused by incomplete information, we can also assume that web-scraping tools can also introduce *inaccuracies*, including through errors in data matching (similar to the example from the Mark-Up's reporting).

¹³ <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters>

¹⁴ <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2732&context=ulj> p668

Lastly, when considering incomplete information, it is important to consider the circumstances that shape people’s ability to provide the information requested by rental application technologies. Privacy concerns aside, excessive requests for information - for example, marriage certificates, medical histories, and evidence of past living arrangements¹⁵ - may not be able to be fulfilled by renters, particularly those experiencing vulnerability.¹⁶ New migrants, refugees, people who have experienced homelessness, or survivors of domestic abuse, amongst others, may also not be able to produce many of the documents that rental application technologies request. If people’s inability to provide documents that go above and beyond what is needed to determine their identity and ability to pay for and care for the property, then there is a risk that they will be disadvantaged in the application process. Worse still, they may be locked out of many parts of the housing market that rely on rental application technologies.

A note on data and algorithmic systems

Many rental application systems claim to be able to conduct a rigorous assessment of a prospective renter. Biases embedded within algorithmic systems (especially those trained on historical data that reflects previous biases and structural inequalities)¹⁷ can be challenging to locate due to trade secrets and algorithmic opacity.¹⁸

For example, Certn’s rental application technology (available in the North American market) claims to use algorithms to identify social media red flags by analysing the ‘content of images, text content of written posts, and metadata. Anything that’s flagged according to pre-defined criteria is documented in the easy-to-read report.’¹⁹ Image 1 (below) shows the categories that Certn claims to screen for:

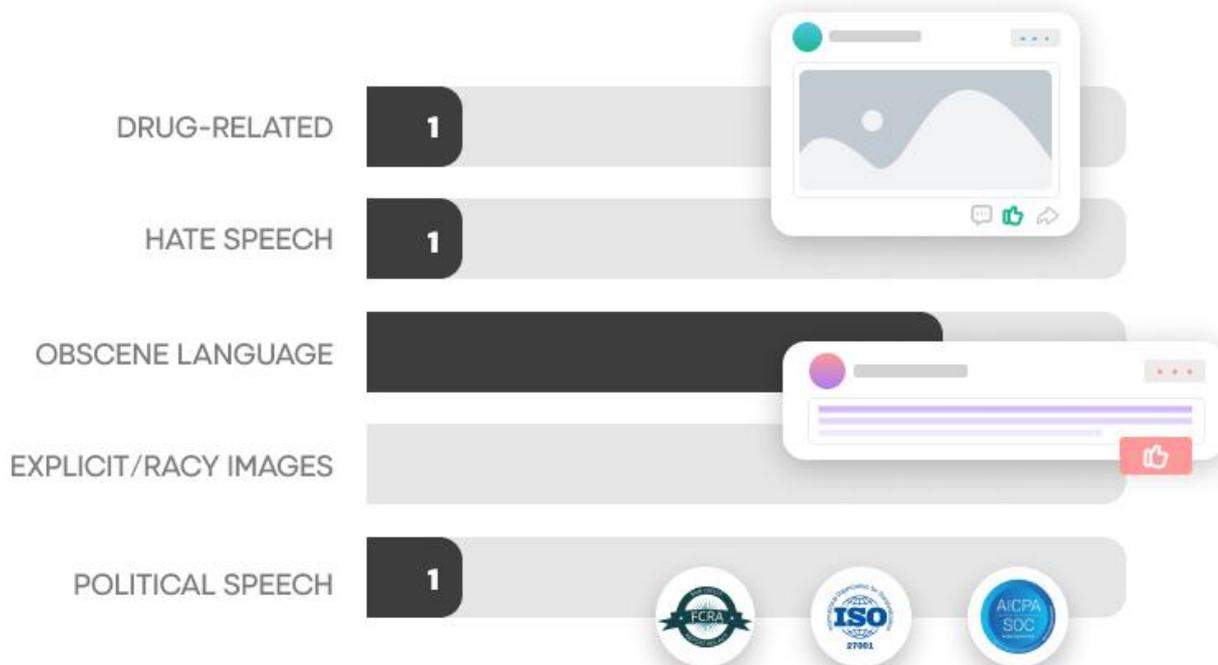


Image 1: Certn’s social media screening tool

¹⁵

<https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/choice-renttech-report-release> ‘At what cost? The price renters pay to use RentTech’, p12

¹⁶

<https://www.communicationsconsumerpanel.org.uk/Behavioural%20Economics%20and%20Vulnerable%20Consumers%20final%20report%20correct%20date.pdf>

Additionally, it is worth noting that people experiencing vulnerability are generally less able to act in their best interests in market settings, when compared to those who are not experiencing vulnerability.

¹⁷ These issues are outlined more comprehensively in Virginia Eubank’s book, *Automating Inequality* (2018).

<https://us.macmillan.com/books/9781250074317/automatinginequality>

¹⁸ See Bednarz and Przhedetsky (2023), ‘AI Opacity in Financial Industry and How to Break It’, in Zofia Bednarz and Monika Zalnieriute (Eds.), *Money, Power and AI: Automated Banks and Automated States*, Cambridge University Press (forthcoming).

¹⁹ <https://certn.co/social-media-screening-questions-answered/>

It is not known how Certn defines categories such as 'political speech' and 'explicit/racy images', or how the company determines what counts as a 'red flag' within each of these categories. Even if rental applicants were provided with clear definitions of the above, some users would undoubtedly disagree with the definitions and parameters used. In addition to these issues, it is unclear whether the technology can differentiate between a genuine issue, and a false positive. For example, what happens if a rental applicant is a public health advocate, and posts regularly about drugs in the context of their work and research? Will their content be considered 'drug-related'? What if someone posts photos of them wearing a swimsuit on a beach holiday? Will they be penalised for having 'explicit/racy images' on their profile?

Algorithms such as this one have a number of issues, including:

- These algorithms often operate in the background of rental application technologies, and users may not even know that an algorithm is being used;²⁰
- These algorithms typically lack transparency, making it difficult for users (landlords, real estate agents, renters and regulators) to know if, when and how information is being used illegally or unfairly;
- Predictive algorithms are often based on correlations (which may be *entirely irrelevant*), instead of causal relationships; and
- Even if certain data sources and algorithmic techniques *could* be used to evaluate prospective renters, it does not mean that they *should* be used to evaluate prospective renters: "many questions are preying on the vulnerable... [and] do not need to be asked, as they're not relevant to whether or not the prospective tenant will be a good tenant."²¹

Lastly, it must be considered that people do not always have control of the information that is posted about them on the internet, and may not always be able to determine which posts, images, and content they are mentioned or tagged in. When users share information online, they are often sharing data that not only relates to themselves, but relates to other people. This phenomenon is referred to as 'interdependent privacy.'²² What this means is, people are rarely able to control their entire digital presence, and are likely to be impacted by others' actions. It would be absurdly unfair for a business to use an algorithm to analyse what someone else posts or publishes online about another individual, to determine that individual's access to housing.

The use of screening technologies to apply for property can create and exacerbate consumer disadvantage

Firstly, renters who are applying for a property using a rental application technology may not fully understand how their information is collected, used or stored. There is ample literature to support the argument that when users accept the terms and conditions in privacy policies, they are not able to provide meaningful, informed consent.²³ The time required to read terms and conditions, and the legal literacy required to understand them are major barriers.

Further, if a user is accepting a privacy policy in order to apply to access an essential service (housing) in an extremely competitive housing market (in New South Wales), there is an even greater chance that they are unable to fully comprehend how their data is collected, used and stored as they are likely to be applying for multiple properties, as quickly as possible, using the technologies that real estate agents and landlords require them to use in order to apply. As a result, they may not be aware of how, or for how long, their data is being used and stored.

Secondly, if a person wants to:

- a) Have their data removed from a rental application technology (or database)

²⁰ If a user does not understand that an algorithm is being used, they may not be able to provide informed consent relating to the use of their data.

²¹ <https://www.abc.net.au/news/2022-11-03/renters-pressured-to-pay-for-background-checks/101600796>

²² https://www.researchgate.net/publication/296669221_Interdependent_Privacy_Let_Me_Share_Your_Data

²³ <https://hbr.org/2018/09/stop-thinking-about-consent-it-isnt-possible-and-it-isnt-right>

- b) Amend or remove part or all of the information held about them in a rental application technology (or database)

there is little legal clarity on timelines for how long they can expect to wait to receive a response and resolution. If a renter wants to lodge a complaint or seek redress through the relevant regulator, it may not be immediately clear under which law they should seek recourse. As summarised by the PropTech Association of Australia, 'unlike other tech sectors (such as fintech) we are not governed by a consistent set of regulations nationally.'²⁴

It is worth noting that although the *Privacy Act Review Report* has recommended the introduction of a right to erasure (Proposal 18.3), this right has not been enacted.²⁵ Further, if an individual did have a right to erasure, it would not remove the issue of choice (individuals not having a genuine choice as to whether or not they consent to the terms, conditions and policies of rental application technologies), nor would it be effective in helping consumers who were not aware, or able to fully comprehend how their data was collected, used and stored

A note on the regulation of tenancy databases

Residential tenancy databases are regulated under the *Residential Tenancies Act 2010 (NSW)*. Part 11 of the Act, which concerns 'Residential tenancy databases' remains relevant to protect consumers from harms arising from the use of databases such as the 'National Tenancy Database.'²⁶

The protections outlined in Part 11 were designed prior to development and use of many of the algorithmic systems discussed throughout this submission. It is unclear whether the current legislation applies to some of these new technologies, and whether it is flexible enough to cover data that is collected, used, stored and *generated* by rental application technologies.

For example, under Part 11, Division 1, section 209:

'residential tenancy database means a database—

- (a) containing personal information—
 - (i) relating to, or arising from, the occupation of residential premises under a residential tenancy agreement, or
 - (ii) entered into the database for reasons relating to, or arising from, the occupation of residential premises under a residential tenancy agreement, and
- (b) the purpose of which is for use by landlords or agents of landlords for checking a person's tenancy history to decide whether a residential tenancy agreement should be entered into with the person.'

This definition has been useful in describing the type of residential tenancy database that is used by real estate agents and landlords to enter a record of renter's breach of a residential tenancy agreement (for example, intentionally causing malicious property damage to the premises). Under existing legislation, there are certain protections for the renter. For example, if a real estate agent wanted to list personal information about the renter into a residential tenancy database, the renter would be notified about the listing, and given an opportunity to object to its submission.²⁷

It is unclear whether the above definition would capture a technology that, for example, analyses a rental applicant with no previous rental history (and would therefore not be listed in a rental tenancy database), and generates a score based on their personal data, social media usage, or answers to a questionnaire. The score, whether it is recorded and stored in a database, or provided to a real estate agent or landlord

²⁴ <https://proptechassociation.com.au/about/>

²⁵ https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf

²⁶ <https://www.tenancydatabase.com.au/>

²⁷ There are flaws with the current protections. For example, a real estate agent or landlord is required to have 'given the person a copy of the personal information or taken other reasonable steps to disclose the personal information to the person', but tenants aren't always told about being listed on the database.

<https://www.abc.net.au/news/2018-03-04/rental-blacklist-tenancy-database-should-i-be-worried/9505712>

would not be the purpose stated in the legislation: 'for checking a person's tenancy history'. It may, however, still be used 'to decide whether a residential tenancy agreement should be entered into with the person.'

It is vital for the NSW Government to revise the definition of residential tenancy databases to ensure consumers aren't only protected when they are 'listed' in a database, but also when they are 'evaluated' by rental application technologies.

Looking to other jurisdictions that regulate the use of personal data, we can see that even in instances where redress is available to consumers, it is not always effected. The Mark Up documents how negative reports (which tenants can request to correct) can still disadvantage consumers in the United States context:

'Federal law requires landlords only to tell tenants if they were turned down because of a negative report and who produced it. Under the Fair Credit Reporting Act, screening companies have 30 days to respond to tenants' requests for corrections. By then, a landlord may have given the apartment away.'²⁸

As a consequence, renters (who are often required to use different rental application technologies to apply for different rental properties through different agencies) face a disproportionate burden of having their information and/or account corrected or removed entirely. Given the frequency with which renters move, renters would likely need to repeat this process many times.²⁹

Finally, if renters are *unaware* that they have a profile or a particular record held on them within a rental application technology (especially an unfavourable record, score, or other data point), it may be extremely difficult for them to find out that this is influencing how they are assessed for properties.

Requiring that consumers pay (the cost being money/data) to apply for property creates/exacerbates disadvantage

When people apply for rental housing, they are applying to access an essential service - something that they cannot live without. Given this, applying - which has no guarantee of securing - rental housing should not come at a cost.

In the current environment, renters are asked to hand over their money and data just to *apply* for a property. When applying for multiple properties, as many renters must do in tight rental markets, renters will often be asked to bear the costs (money and/or data) several times over. A CHOICE report found that 25% of renters surveyed revealed paying a financial cost for a tenancy check.³⁰ These checks regularly expire after several months,³¹ and renters will have to pay again once the check is no longer valid.

Last year the ABC revealed that application platforms commonly charged between \$25 and \$30 for a background check against the Equifax National Tenancy Database.³² If this check is really necessary to verify a tenant's suitability for a property, the cost should be borne by the landlord or real estate agency. Until recently, this was indeed the status quo - if shortlisted, or selected applicants were to have a background check run through a residential tenancy database, this was done *after* they had applied and at a cost to the landlord or real estate agent. The shift towards asking renters to pay for background checks as *part* of their application is a way for rental application technology platforms to extract money from renters. Without intervention, cost shifting practices are likely to continue. In 2022 the Consumer Financial Protection Bureau reported that in the United States, where the use of these technologies is more common than in Australia:

'68% of renters pay application fees when applying for rental housing, which are often used to cover the cost of tenant screening... Although renters frequently pay for these reports, they often have little to no visibility into the information they contain prior to a rental decision being made'³³

²⁸ <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters>

²⁹ <https://www.tenants.org.au/blog/true-cost-eviction> 'Over 80% of private renters have moved in the last 5 years; a third have moved between 2 - 3 times; and 10% have moved 5 times or more.'

³⁰ <https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/choice-renttech-report-release> 'At what cost? The price renters pay to use RentTech', p15

³¹ <https://tenantcheck.realestate.com.au/> For example, realestate.com.au's Tenant Check is only valid for 6 months

³² <https://www.abc.net.au/news/2022-11-03/renters-pressured-to-pay-for-background-checks/101600796>

³³

https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf p2

Although many of these reports are advertised as optional, 'because of Australia's housing crisis, including rental vacancy rates at or below 1 per cent in many cities and regions, many renters feel they have little choice but to comply with any request on a rental application form.'³⁴ As Ben Bartl, Tenants' Union of Tasmania principal solicitor explains:

'Many tenants feel that if they don't pay the money — if they don't provide the information being requested — they're not going to be considered for the rental property'

People who are experiencing vulnerability - whether financial or otherwise - are more likely to be adversely impacted by these processes.

A note on unfair contract terms

Amendments to the unfair contract terms regime under the Australian Consumer Law (ACL) are set to commence in November 2023. These amendments promise to expand consumer protections in industries where standard form contracts are used. These reforms have potential to protect rental applicants from unfair contract terms they may encounter when using rental application technologies.

To apply the unfair contract terms regime, a number of steps to be taken. For example, for a contract term to be considered unfair because it is 'not reasonably necessary':

'A court must find that the term is not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term. The meaning of legitimate interest is open to interpretation by the court.'³⁵

This means that consumers may still be exposed to unfair contract terms until they have been legally proven to be unfair.

Further, there many real estate agents, landlords, and proptech startups may be exempt from the application of the unfair contract terms regime due to the definition of small business.³⁶

The NSW Government should pay close attention to any enforcement action relating to the unfair contract terms regime within the real estate industry, but should not rely on this regime alone to protect consumers from being treated unfairly by organisations.

Opting out of using a digital platform may result in penalties

People may not wish to use rental application technologies to apply for housing. This may be due to privacy concerns (29% of renters have opted not to apply for a rental because they didn't trust the RentTech platform)³⁷, financial concerns, convenience, and accessibility, amongst other reasons. Further, it is important to note that 1 in 4 Australians feel digitally excluded,³⁸ meaning that a quarter of Australians may feel acutely challenged in preparing a digital rental application. Despite this, 41% of renters have been pressured to use a third-party platform by their landlord or agent.³⁹

At a minimum, people should be able to apply for rental housing in ways that are convenient and accessible. This should include the option to supply a paper application, and have a guarantee that a paper format (as opposed to digital) will be given equal consideration.

Answers to consultation questions begin on the next page.

³⁴ <https://www.abc.net.au/news/2022-11-03/renters-pressured-to-pay-for-background-checks/101600796>

³⁵ https://consumer.gov.au/sites/consumer/files/2016/05/0553FT_ACL-guides_ContractTerms_web.pdf

³⁶

<https://www.whitecase.com/insight-alert/unfair-contract-terms-will-your-business-be-caught-changes-regime#:~:text=Ame%20ndments%20to%20the%20unfair%20contract,fall%20within%20the%20UCT%20regime.>

³⁷

<https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/choice-renttech-report-release> 'At what cost? The price renters pay to use RentTech', p5

³⁸ <https://www.goodthingsfoundation.org.au/the-digital-divide/>

³⁹

<https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/choice-renttech-report-release> 'At what cost? The price renters pay to use RentTech', p5

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

The NSW Government should regulate not only which information could be asked for, but which information can be *considered* in the assessment of a rental application.

Currently, real estate agents and landlords request far more information from rental applicants than is necessary, including requesting the details of social media profiles and requesting information about whether tenants have prominent tattoos.⁴⁰ Information about prospective tenants is often requested through rental application technologies. By restricting the information that can be collected as part of the rental application process, the categories of harms outlined above can be minimised.

Though the *Australian Privacy Act 1988* (Privacy Act) is currently under review, potential reforms (such as the removal of the small business exemption) should *not* be relied upon by the NSW Government to protect renters.

It is unclear if the Fair Trading Commissioner's guidance⁴¹ (the development of which I was consulted on) is being accessed, understood, and applied by real estate agents and landlords. While the guidance provides useful information, ultimately, it is still not an adequate substitute for appropriate, enforceable consumer protections that a well-funded, well-resourced regulator can enforce.

Leveraging Digital Identity infrastructure to streamline and harmonise rental application processes should be explored further, and involved detailed consultation processes. If Digital Identity is used for rental application purposes, it should be accessible, usable, and secure.

I strongly support the guiding principles of the proposed model, which will:

- 'limit what information can be collected from applicants,
- restrict how renter information is used and disclosed,
- detail how renter information should be stored and destroyed,
- ensure renters have a right to see and correct information held about them.'⁴²

I strongly support an approach that involves 'specifying that only certain information can be collected (this could include the use of a prescribed tenancy application form)'. Other approaches risk exposing tenants to loopholes, as explained below:

- 'specifying what information is not allowed to be collected (this is the Victorian approach, which limits collection of certain information such as whether a renter has taken legal action or had a dispute with a rental provider),'

Issue: this approach does not prevent overcollection of data, and may prove inflexible if new types of information (not considered at the time that the regulation is developed) become available.

- 'providing general rules about information collection, such as that the information collected must be limited to information that is reasonably necessary to assess a tenancy application (this is the approach in the Privacy Act),'

Issue: general rules can be interpreted in a myriad of ways. The Australian Privacy Principles – and privacy laws and guidance globally – emphasise the importance of not collecting more data than reasonably necessary for the purpose it is collected for. Despite this, renters are still being asked to

40

<https://www.theguardian.com/australia-news/2023/jun/12/wild-west-australias-would-be-tenants-asked-about-tattoos-and-social-media-as-calls-grow-for-regulation>

41 <https://www.fairtrading.nsw.gov.au/housing-and-property/renting/personal-information-and-tenancy-applications>

42

https://ehq-production-australia.s3.ap-southeast-2.amazonaws.com/5ebc0af3f43851ebf13ab5d30a49fec60ce8c07f/original/1688113251/f6baca5cbace52dab82075091dc515e1_Improving_NSW_rental_laws_consultation_paper.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNQAKIOR7VAOP4%2F20230807%2Fap-southeast-2%2Fs3%2Faws4_request&X-Amz-Date=20230807T002106Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=2ddd269e813bb76bc71e130f8471ac54a13e04aff5932769b8ad0847aebdd5a5 p10

provide *far more information than is reasonably necessary*. Providing general rules about information collection is a solution that has been tested, and has demonstrably failed renters.

- ‘only collect information that is reasonably necessary and the Act, regulations, or a prescribed tenancy application form could set out details about what is “reasonably necessary”’.

Issue: this approach, although similar to ‘specifying that only certain information can be collected’ may leave gaps that are open to interpretation. An approach that specifically indicated what information can be collected is more appropriate than setting out what is “reasonably necessary,” because it provides more certainty about what information can be collected.

Limiting the information that applicants can be *asked for* in a tenancy application does not necessarily limit the information that real estate agents and landlords *access* in assessing an applicant’s tenancy application. For example:

- Real estate network LJ Hooker, in a blog post titled ‘The 7 Key Steps to Effectively Screening Potential Tenants’, states: ‘Along with asking a few pointed questions before taking an application, in the modern age it is also wise to have a look at potential applicant’s social media footprint. If their accounts are public, landlords can ascertain a good picture as to what their private life is like, and therefore how they would treat a home.’⁴³
- A rental application technology company, Certn, shows that even when an applicant has not provided any social media accounts, the technology matches the applicant with social media accounts and analyses them for ‘social red flags’.⁴⁴ This process appears to be entirely automated.

SOCIAL PROFILE SCORE

The Social Profile is used to identify red flags, contact information, and an applicant's identity so you know who you're renting to. We do this by sifting through the largest proprietary database of continuously update, risk-relevant, and risk-scored information in the industry.

With 100k+ unique sources, spanning 240 countries and 77 languages, if there's something you should know about your applicant, we're Certn we can find it.

Profiles provided	Profiles found	Social Red Flags
No social accounts provided	 Facebook  LinkedIn  Google+  Twitter	None

Image 2: Certn’s social profile score

- Rental application technology platform Snug bought the administration rights to Fairy Floss Real Estate in 2017. In 2022 The Guardian reported that Fairy Floss Real Estate had ‘316,000 members that has become synonymous with share housing in Melbourne’ and explained:

⁴³ <https://www.ljhooker.com.au/blog/how-to-screen-tenants>

⁴⁴ <https://pen.do/support/sample-credit-report/>

'Since taking over the group, Snug has updated the "About" page to state that users agree to abide by its community standards, which refer to Snug's privacy policy. The policy states that Snug may "collect information regarding your professional qualifications, your employment history, your rental history and information regarding your social media accounts and social media activity".'⁴⁵

Despite Fair Trading stating that looking at a rental applicant's social media profiles would not be 'best practice',⁴⁶ looking at applicants' digital presence appears to be standard industry practice. It is therefore recommended that the NSW Government regulate not only which information could be asked for, but which information can be *considered* in the assessment of a rental application.

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.

As discussed throughout this submission, a key consideration is not only which information is collected, but *how it is used*. Providing a list of documents that can be collected from a tenant as part of a rental application is the first step in preventing the harms outlined in this submission, however, it is equally important to consider restrictions on the use and analysis of the information collected.

Any regulations developed to stipulate which documents can be collected should enable *applicants to specify which documents they would like to provide*. Real estate agents or landlords should not be allowed to give preference to some documents over others.

- Proof of identity

The documents outlined here appear suitable for proof of identity.

- Ability to pay rent

These documents appear to be suitable reference points to determine a person's financial status. At a minimum, consumers should be given guidance on how to redact information (applicants may not know how to do this) from physical and digital documents. Ideally, any digital rental application technologies would offer simple, accessible, and secure digital tools that assist consumers in redacting information as part of the application process.

- Suitability

These documents may be suitable for determining a renter's suitability, so long as the applicant can choose which documents they provide. For example, an individual with no reference history may choose to provide a character reference in writing because they cannot provide a ledger. A real estate agent or landlord should not, under any circumstances, mandate that a character reference be provided. Further, there should be regulations on what a real estate agent or landlord can ask a referee. Currently, rental application technology company Snug asks applicants' employers a range of invasive questions, including those pictured below:

⁴⁵

<https://www.theguardian.com/australia-news/2022/nov/17/imperfect-match-australian-renters-in-the-dark-over-use-of-data-by-tech-company-snug>

⁴⁶ <https://www.fairtrading.nsw.gov.au/housing-and-property/renting/personal-information-and-tenancy-applications>

If you had a rental property, would you consider renting to them?

Yes	No	Maybe
-----	----	-------

What are they like as a person?

Reliable	Punctual	Clean	Friendly	Honest	Diligent
----------	----------	-------	----------	--------	----------

Is there any work issue that might affect the applicant's ongoing employment, income or ability to pay rent (eg. reduced hours, probation, redundancy or other)?

Please describe

47

Image 3: Snug's tenant reference check (sent to employer)

A renter should be able to provide proof of employment using the documentation outlined under 'Ability to pay'. An applicant should *not* be required to provide contact details of their employer for the purposes of the employer being contacted for a reference.

If the applicant *wishes* to provide the details of their employer when supplying information under the proposed 'Suitability' category, the real estate agent or landlord should only be able to ask prescribed questions to determine suitability. This same set of questions should limit what *any* referee can be asked when contacted to determine an applicant's 'Suitability.' Unless there is a clear list of questions that can be asked of referees, there is a risk that referees will be asked invasive, unsuitable, and deeply personal questions that intrude upon an applicant's privacy.

When considering the types of documentation that rental applicants should be required to provide, the NSW Government should ensure that these documents are easy for all rental applicants to access. For this reason, the NSW Government should consult with refugee support organisations, domestic violence support services, crisis support services, national disaster support services, homelessness support services, and other relevant organisations that support people experiencing vulnerability to ensure that their clients would be in a position to provide the specified documents.

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

I strongly support the use of a standard tenancy application form that limits the information that can be collected. The risks posed to people using rental application technologies (outlined in the key categories of harms) would be significantly reduced if this solution were to be implemented.

The emergence of rental application technologies has done little to benefit renters, except in occasionally increasing efficiency. Aside from efficiencies, these companies fail to deliver value to renters, and - as I have outlined in this submission - are more commonly responsible for the introduction, or exacerbation of significant harms. By mandating that a standard tenancy application form (offered digitally and in paper form) is used by every renter, the NSW Government would ensure that people using the digital form would continue to experience the usability and convenience offered by proptech companies.

Renters do not benefit from a variety of rental application technologies being offered. Proptech companies focusing on the application phase of tenancy are in a 'race to the bottom', compromising renter experience, privacy, and wellbeing in the pursuit of market share. The design of these technologies are geared towards landlords and real estate agents, and new market entrants must compete through increased data collection or analysis.

By creating a standard tenancy application form, the Department of Customer Service would introduce a significant, positive intervention that has the potential to:

- Improve renters' experiences

⁴⁷ https://twitter.com/patrick_veyret/status/1686905524439351299

- Protect renters' privacy
- Harness efficiency gains offered by rental application technologies
- Limit the ability for renters' data to be used in illegal/unfair ways
- Provide certainty to real estate agents and landlords who are unsure of which regulations they need to follow
- Standardise the application experience, so that people who wish to apply using a paper application are not unfairly disadvantaged

13. Do you think that limiting the information that may be collected from rental applicants will help reduce discrimination in the application process?

As discussed in my responses to questions 11 and 12, limiting the information that may be collected from rental applicants is likely to reduce discrimination in the application process as there are fewer documents (and specifically, fewer sensitive documents) that can be assessed by an individual or algorithm in charge of reviewing a renters' application. This will not however prevent discrimination entirely, as there must also be restrictions on the use of the information collected (see response to question 14).

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

Any new laws that set out how landlords and agents can use and disclose renters' personal information *must* be accompanied by limitations on the types of information that can be collected in the first place (see responses to questions 10, 11 and 12).

The question of how information is used can be divided into three components.

- Who can disclose renter information?
- Is information used for the relevant purposes?
- Is information used legally and fairly?

Who can disclose renter information?

The proposed South Australian Residential Tenancies (Protection of Prospective Tenants) Amendment⁴⁸ and existing Northern Territory legislation⁴⁹ appear to focus on disclosure, rather than use. The NSW Government should stipulate which information can be collected as part of a rental application, and clearly outline which information can be disclosed, to who, and which permissions need to be sought in order for the disclosure to occur. To design this protection effectively, further consideration and consultation will be required to understand when disclosure may be useful or necessary for real estate agents, landlords and renters.

Is information used for the relevant purposes?

The Privacy Act provides that organisations may only use or disclose personal information for a purpose for which it was collected, or for a secondary purpose if an exception applies. Unfortunately, some businesses exploit user consent through the use of catch-all phrases like 'for marketing purposes'. The Privacy Act is under review, but the NSW Government must not wait for these reforms to protect renters.

Here, the Victorian legislation fills a relevant gap as it clearly states that landlords may only use personal information to determine a person's suitability as a renter. A similar provision should be introduced in NSW.

Is information used legally and fairly?

Even with clear provisions around collection and use of information, more thought needs to be given as to how unlawful treatment and unfair discrimination can be prevented. While the NSW Government cannot prevent a

⁴⁸ The Residential Tenancies (Protection of Prospective Tenants) Amendment Bill 2023 proposes banning a person from disclosing renter information, unless an exception applies (e.g. with consent of the renter or where required by law).

⁴⁹ In the Northern Territory, landlords, renters, or agents for either party may not disclose information about a person's financial or personal affairs if that information was obtained in the course of negotiating a rental agreement.

real estate agent or landlord from forming a discriminatory opinion about an applicant, the NSW Government can:

- legislate to prevent the use of algorithmic systems that facilitate unlawful and unfair treatment (see responses to questions 19 and 20), and
- legislate to guarantee the design and implementation of fairer systems and processes for the assessment of rental applications

The second point may include the legislation of processes that stipulate the order in which applications must be assessed, and how the successful applicant is selected. Seattle's 'first-in-time' (FIT) rule, for example:

'provides that Seattle landlords seeking to fill vacant tenancies must provide notice of their rental criteria, screen all completed applications in chronological order, and offer tenancy to the first qualified applicant, subject to certain exceptions.'⁵⁰

The FIT rule is just one example of a process-based intervention that may provide clearer, fairer processes for determining which rental applicant is selected for the property. More work needs to be done to understand the limitations of this approach,⁵¹ its applicability to a NSW context, and alternative solutions used in different jurisdictions around the world.

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

Rental applicants should be given simple, clear, accurate and accessible guidance on how their information will be used before they submit a tenancy application. Consent must be voluntary, informed, specific, current and given by a person with capacity.

Currently, renters have little choice but to agree with the terms and conditions of the privacy policies outlined by rental application technologies. Further, if renters are using multiple tenancy application technologies, renters will have to comply with multiple privacy policies, each with different terms and conditions.

The most effective solution to these challenges would be to:

- Require the use of a prescribed tenancy application form (question 12);
- Stipulate the ways in which the information collected using the tenancy application form may be used; and
- Stipulate how the use of the information must be communicated to applicants

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

If businesses see fit to collect personal information, they should be in the position to secure and protect it. Last year, real estate business Harcourts had a security breach that exposed tenants' personal information, including 'names, addresses, email addresses, phone numbers, signatures and photo identification.'⁵²

When a breach occurs, and people's personal information is exposed, victims of the breach suffer a range of negative consequences including stress, financial costs, time costs, and other adverse impacts. In the housing context, businesses holding information about renters will possess revealing personal data.

⁵⁰ <https://www.courts.wa.gov/opinions/pdf/958131.pdf>

⁵¹ Given the FIT approach prioritises speedy applications, it is important to consider factors that may prevent people from being able to submit a digital rental application quickly. These could include not having access to a computer, having a physical or intellectual disability that prevents the applicant from filling out the application quickly, or being unable to attend inspections due to employment or caring responsibilities.

⁵² <https://www.smh.com.au/property/news/wake-up-call-for-real-estate-agencies-harcourts-hit-by-data-breach-20221103-p5bvaq.html>

New laws should be introduced to require anyone holding renter information to secure it. The approach put forward in the South Australian Bill⁵³ appears sound, but further consultation with tenancy, privacy, data and legal experts is required to understand the best solution for NSW renters.

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

Clear limits should be applied to outline how long landlords, agents or proptechs are able to keep renters' personal information. The approach detailed in the South Australian Bill⁵⁴ appears sound, however, further consultation must be undertaken with renters, tenants' unions, researchers, and other relevant groups to determine whether this approach would be suitable for the NSW context.

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).**

It is absolutely essential that rental applicants can access their personal information, and other information that is held about them. This is crucial to hold real estate agents, landlords and proptechs accountable to rental applicants, and ensure that rental applicants can ask questions, and, where relevant, seek redress if they suspect that their information has been collected, used, or stored in ways that are illegal or unlawful. Rental applicants' personal information *must* be able to be corrected to prevent the harms outlined under the above heading 'Information is inaccurate/incomplete'.

In the design of regulations that:

- (a) give rental applicants' access their personal information,
- (b) correct rental applicants' personal information?

it is vital to stipulate additional requirements that ensure renters can:

- Access and correct their personal information in a timely manner
- Easily contact the business holding their personal information via a phone call, email and Australian postal address
- Lodge a complaint with Fair Trading in instances where they have not been able to access and correct their personal information in a timely manner
- Access accessible, legible, and explainable information (for example, a score or rating and how it was calculated *must* be clearly explained in plain English)

It is important to note that renters should be able to access personal information that relates to them.⁵⁵ This is particularly vital in the context of:

'a growing range of data practices and services offered by adtech and data analytics providers that do affect individuals' privacy while claiming not to use personal information. These include the

⁵³ The South Australian Bill requires that renter personal information must be destroyed:

- for the successful applicant, three years after a tenancy ends
- for the unsuccessful applicant:
 - six months after collecting the information (with the applicant's consent), or
 - 30 days after a lease was entered into.

⁵⁴ Ibid.

⁵⁵ See GDPR for definition of 'personal data'

https://commission.europa.eu/law/law-topic/data-protection/reform/what-personal-data_en#:~:text=Personal%20data%20is%20any%20information,person%2C%20also%20constitute%20personal%20data

development of persistent unique identifiers, data matching using hashed emails and other “identity resolution” services – practices which are not within most consumers’ knowledge or understanding.⁵⁶

In other words, many companies still hold personal information, but it can be encoded in more complex ways. For example, instead of calling me ‘Linda Przhedetsky’ within a system, a company may label me as ‘user 1424’, and instead of explicitly stating that I am listed as a ‘good tenant’, I might have a score of ‘80’ under ‘feature 27’.

It is very important that the development and use of unique identifiers, data matching, and other identity resolution services does not prevent rental applicants from accessing and correcting their information.

I also note that the use of a government-led NSW Digital ID scheme, if implemented with appropriate legal guardrails and consumer protections, could significantly improve renter choice and control over how their personal information is shared and used by both government and commercial entities. For example, the proposed NSW Digital ID scheme could allow prospective renters to prove their identity to a real estate agent without needing to share actual copies of sensitive documents like passports and drivers’ licences. Another benefit could be that a Digital ID could reduce the time and effort applicants spend locating and producing different forms of ID for different applications, and it could limit the need for applicants to share sensitive documents with multiple third parties.

The Department of Customer Service has indicated that, when fully up and running, Digital ID would enable the government to essentially act as guarantor for a user, verifying the legitimacy of their identity to affiliated private companies without actually sending across personal information. While it is still unclear whether real estate agents would be included as participating third parties in the NSW Digital ID ecosystem, there is a clear case for the benefits this could bring to improving renter privacy and data protections.

A key principle underpinning discussions around a NSW Digital ID scheme is that Digital ID must be optional. If Digital ID is implemented in a way that enables elements of the rental application process to be streamlined, rental applicants must be able to choose whether or not to use it. To guarantee that renters are empowered to make this choice, including Digital ID as part of an application process must be optional. Regulations should be introduced to prohibit Digital ID from being required to complete a rental application.

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

The use of automated decision-making in rental application technologies is the primary focus of my research. The use of ADM technologies and how they can result in unfair and unlawful outcomes has been discussed extensively throughout this submission (please see the ‘Information is used illegally/unfairly’, ‘Information is inaccurate/incomplete’, ‘A note on data and algorithmic systems’, and response to question 10. I will also provide several additional examples below. I note that Snug and 10Ants are currently operating in Australia.

Example 1: Snug’s calculation of ‘Match Score’ is unclear for rental applicants

Snug provides users with a ‘Match Score’ which the company claims is:

‘based on property owner preferences, property data, rental application attributes (start date, rent and term), renter profile completion (non-discriminatory universal platform wide weighted contribution from the renter profile) and market conditions (is not currently utilised in the Match Score).⁵⁷

Firstly, we must remember that even in instances where businesses aim to behave in fair and lawful ways:

‘the use of algorithms can still be the source of wrongful discriminatory decisions based on at least three of their features: the data-mining process and the categorizations they rely on can reconduct human biases, their automaticity and predictive design can lead them to rely on wrongful generalisations, and their opaque nature is at odds with democratic requirements.⁵⁸

⁵⁶

<https://www.competitionpolicyinternational.com/wp-content/uploads/2022/08/3-A-ROSE-BY-ANY-OTHER-UNIQUE-EIDEN-TIFIER-REGULATING-CONSUMER-DATA-TRACKING-AND-ANONYMISATION-CLAIMS-Katharine-Kemp.pdf>

⁵⁷ <https://help.snug.com/hc/en-us/articles/360000132376-What-is-the-Snug-Match-Score>

⁵⁸ <https://link.springer.com/article/10.1007/s43681-022-00233-w>

This means that even if a company has *intended* to act in fair and lawful ways, algorithms can still result in unlawful and unfair outcomes due to inaccurate, 'insufficient, unrepresentative or outdated data', human error, or 'due to the 'intrinsic design or configuration of the AI system itself.'⁵⁹

Secondly, it is unclear which fairness measures have been used to minimise the risk of discriminatory outcomes.⁶⁰ For a detailed explanation of fairness measures, please refer to the Australian Human Rights Commission's technical paper, 'Addressing the problem of algorithmic bias.'⁶¹

Thirdly, it is important to note that machine learning techniques mean that algorithmic models can change, and be updated over time. There is no way of knowing if, when, and how the company inspects its algorithms to ensure that they *continue* to produce fair and lawful outcomes.

Fourthly, removing protected attributes (for example, gender) from model training data or input does *not* guarantee that the algorithm will not produce discriminatory outcomes. Research shows that inclusion of protected attributes may actually be necessary to prevent biased results.⁶²

Fifthly, although the company currently provides the above text to explain its 'Match Score', it previously provided a less-detailed, more ambiguous explanation of the Match Score. The below text is taken from a snapshot of Snug's website on 21 September 2020:

'The Snug Match Score helps owners express their preferences for their property and enables renters to personalise their application. The Snug Match Score is based on property owner preferences, property data, rental application attributes, renter profile completion and market conditions.'⁶³

The above text provided little useful information for renters to understand how they will be assessed by the platform. At the time, my partner and I were applying for properties and received a 73% 'Match Score', which we, as rental applicants, could not interpret. Further, there was no way for us to know if we had been treated unlawfully or unfairly in the calculation of that score, nor did we have any information as to what we could have done to improve the score. A law to require 'any organisation using ADM to explain to Fair Trading, or customers, the ADM rules used to assess applications' is necessary. Both Fair Trading, and renters, should be provided with an accessible, legible, and easy-to-understand explanation of how the ADM technology operates (for example, a score or rating and how it was calculated *must* be clearly explained in plain English).

Lastly, there is currently no way of knowing whether or not the company's claim is accurate. The regulator should also be given powers to *inspect* the algorithm (while protecting companies' trade secrets). This would introduce much-needed accountability that is currently lacking.

Example 2: 10Ant Profiles claim to predict tenant safety

10Ant Profiles produces 'tenant safety profiles' and 'predict future tenant behaviour.'⁶⁴ The company uses a questionnaire as part of a personality assessment in the tenant selection process (in addition to

59

https://humanrights.gov.au/sites/default/files/document/publication/final_version_technical_paper_addressing_the_problem_of_algorithmic_bias.pdf p14

⁶⁰ Different fairness measures may be suitable for different contexts.

61

https://humanrights.gov.au/sites/default/files/document/publication/final_version_technical_paper_addressing_the_problem_of_algorithmic_bias.pdf pp21-22

⁶² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347959 p1314 'Counterintuitively, the first step in this process is for the statistical model under consideration to be re-estimated in a way that explicitly includes data on legally prohibited characteristics. For a model produced by an AI, accomplishing this requires including in the training data information on legally prohibited characteristics, such as the race or health status of individuals in the training population. This first step is necessary because it removes any predictive power that derives from legally permitted variables' capacity to proxy for a prohibited characteristic. In a model that explicitly includes all suspect variables, non-suspect variables will be treated as predictive only to the extent that they are predictive for reasons having nothing to do with their correlation to prohibited characteristics'

63

<https://web.archive.org/web/20201129044658/https://help.snug.com/hc/en-us/articles/360000132376-What-is-the-Snug-Match-Score->

⁶⁴ <https://www.10antprofiles.com/>

employment and rental history checks). Landlords and/or real estate agents using the system will see a rental applicant assessed in the following ways:

- **Scoring:** 'Sam triggered 0/3 impression management flags, meaning that there is a high probability that these results are a true reflection of Sam's safety as a tenant'
- **Rating:** Scores and colour ratings are provided for 'Care' and 'Accommodation'
- **Ranking:** 'compared to others who have completed this assessment, Sam scored in the 80th percentile on tenant safety'⁶⁵

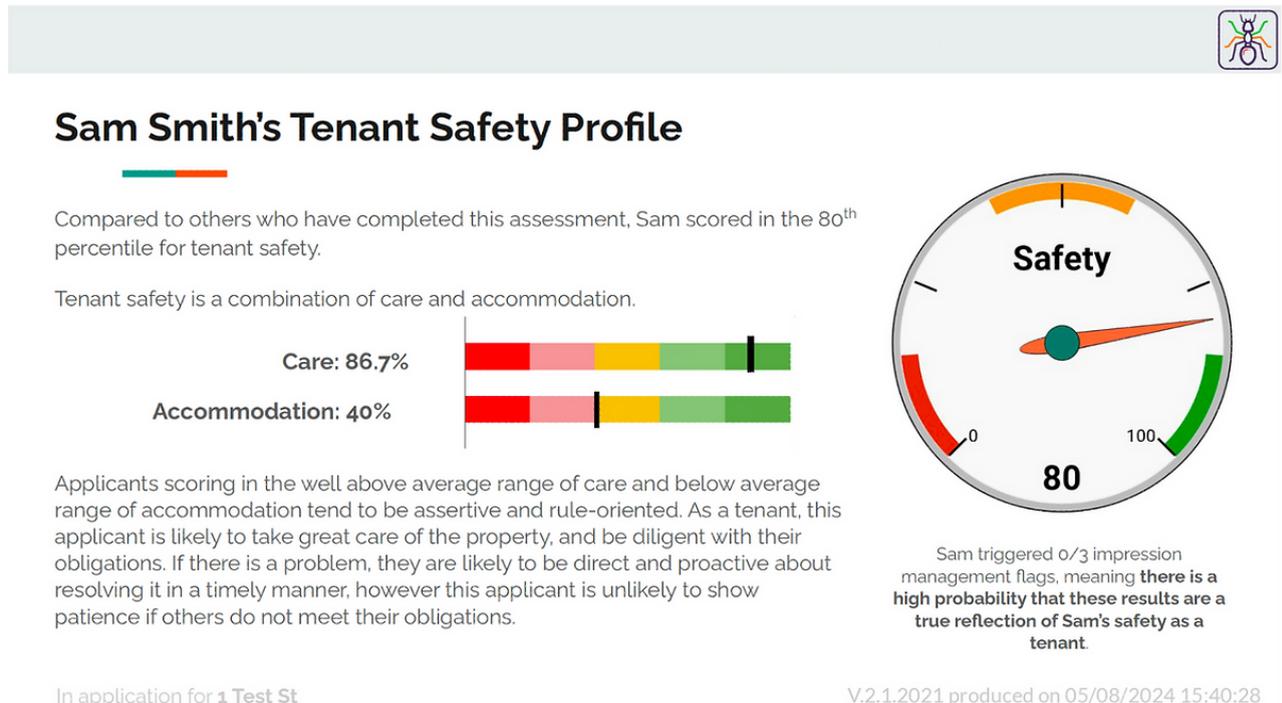


Image 4: 10Ant Profiles' Tenant Safety Profile

Despite the company's claim that the technology can 'Decrease unconscious bias and discrimination in tenant selection by using objective, reliable, and practical insights developed by Organisational Psychologists', this technology presents a range of problems for rental applicants.

Firstly, no person should have to undertake a personality assessment to apply for housing. This is an unnecessary and invasive process. The use of personality assessments to assess rental applications should be explicitly banned.

Secondly, it is difficult to know if and how the company prevents unlawful and unfair treatment from occurring (see issues explored in the Snug 'Match Score' example above).

Thirdly, the company claims to 'predict future tenant behaviour.' While algorithms can do many things, they cannot predict the future with certainty. Tenants should not be evaluated using dubious methods of 'predicting' how they will behave in future. It is especially concerning that tenants' response to questions as part of a rental application is being used to infer their likely future behaviours:

'As a tenant, this applicant is likely to take great care of the property, and be diligent with their obligations. If there is a problem, they are likely to be direct and proactive about patience if others do not meet their obligations.'⁶⁶

Assessments like these raise a range of questions: what if a person with a limited understanding of English has misunderstood some of the questions that have been asked in the questionnaire? What if someone is uncomfortable with answering detailed personal questions and provides more conservative responses instead of those that would better reflect their personality? What if someone has answered

⁶⁵ <https://www.10antprofiles.com>

⁶⁶ <https://www.10antprofiles.com/>

truthfully, and yet the system triggers multiple ‘impression management flags’ and suggests that they are providing false answers?

Lastly, the calculation of ‘Care’ and ‘Accommodation’ scores is both unnecessary, and unclear. A prescribed list of documents should be used to determine an applicant’s proof of identity, ability to pay rent, and suitability (see response to question 11). No additional information should be collected from rental applicants. If any algorithms are used to score, rate, or rank rental applicants, both Fair Trading, and renters, should be provided with an accessible, legible, and easy-to-understand explanation of how the ADM technology is operates (for example, a score or rating and how it was calculated must be clearly explained in plain English). The ‘Care’ and ‘Accommodation’ scores used by 10Ant Profiles are not accompanied by any useful explanation, meaning that it is impossible for real estate agents, landlords, rental applicants and the regulator to understand how they have been calculated.

Example 3: Snug’s ‘Match Score’ increased when renters offered above the advertised price

Snug has previously raised renters’ ‘Match Scores’ if they offered above the advertised price.

Last year, I collaborated with the Guardian for an investigation that found that:

‘Applying to rent at the advertised price of \$490 a week for a two-bedroom townhouse in the Melbourne suburb of Brunswick resulted in a Snug Match Score of 74.

But offering an extra \$10 a week pushed the score up to 77. Each additional \$10 a week offered increased the score by two or three points. It reached a score of 88 when the offer hit \$540 a week.

The results were similar for a one-bedroom apartment in Footscray, advertised at \$310 a week. An initial Snug Match Score of 72 at the advertised rent increased to 85 when the offer reached \$340.

In some states, including Victoria and Queensland, soliciting rental offers above the advertised price is illegal, but a higher rent offer may be accepted if it is made “unprompted”.’

This practice occurred in a state where rental bidding laws were introduced to curb the solicitation of higher rents, yet it is not clear the laws applied to this automated process.

While the company appears to have stopped doing this, this example shows that unless clear regulations are developed to prevent the misuse of ADM tools in the rental market, these tools may be used to disadvantage renters.

Example 4: SafeRent scores disparate impact on Black and Hispanic

Last year, a lawsuit was filed in the U.S. District Court for the District of Massachusetts against SafeRent Solutions, LLC.

‘SafeRent, formerly known as CoreLogic Rental Property Solutions, provides tenant screening services that disproportionately give low scores to Black and Hispanic rental applicants who use federally funded housing vouchers to pay the vast majority of their rent, causing them to be denied housing. The lawsuit alleges that SafeRent’s algorithm has a disparate impact based on race and source of income, in violation of federal and state laws.’⁶⁷

On July 26, 2023:

‘...the Honourable Angel Kelley for the United States District Court of Massachusetts denied defendants’ motion to dismiss Fair Housing Act claims, holding that SafeRent Solutions, LLC, a national tenant screening provider formerly known as CoreLogic Rental Property Solutions, is subject to the Fair Housing Act’s ban on racial discrimination in housing. Even though SafeRent is not a landlord, the court determined that the plaintiffs adequately alleged that property owners relied solely on SafeRent’s tenant screening score, and adequately alleged those scores had a disparate impact on Black and Hispanic renters. FHA claims against landlord Metropolitan were also permitted to proceed, while claims under a Massachusetts consumer protection statute were dismissed.’

67

<https://www.cohenmilstein.com/update/saferent-solutions-accused-illegally-discriminating-against-black-and-hispanic-rental>

This lawsuit is just one example where ADM systems have been shown to treat people unlawfully, and unfairly in determining access to essential services. It is crucial for the NSW Government to learn from this and develop effective regulatory solutions to prevent unfair and unlawful treatment from occurring in the first place.

A note on technical literacy and preventing harms before they occur

Housing is an essential service, and the consequences of being denied access to housing on unlawful or unfair grounds can be significant. In these instances, the negative impacts are not only felt by renters, but by communities, employers,⁶⁸ and for governments (who face significant costs when renters are unable to find suitable rental housing).

It is important to emphasise that businesses who develop, market, and sell ADM technologies that analyse rental applications should be responsible for ensuring that these technologies do not produce unlawful and/or unfair outcomes.

Real estate agents and landlords are likely to lack the technical literacy required to understand the detailed workings of algorithmic systems, and may not know the harms that these systems could initiate or exacerbate. Consumers, particularly rental applicants who are using ADM systems to apply for rental housing, may not know if, when, and how algorithmic systems are being used to assess their applications. Even if rental applicants do suspect that an algorithm is being used unlawfully or unfairly, they are not well-placed to challenge the system when that same system is being used to challenge them.

It is therefore crucial that the NSW Government prioritises the development and enforcement of regulations that *prevent* unlawful and unfair practices before they occur. The NSW Government **should not** rely on real estate agents or landlords to question, and identify problems with rental application technologies, or wait for renters to report harms after they have occurred.

20. What should we consider as we explore options to address the use of automated decision making (ADM) to assess rental applications?

I have outlined a number of considerations that should be explored to address the use of ADM to assess rental applications throughout this submission. In particular, I refer to my response to question 19. Before outlining my final recommendations, I would like to emphasise the following point: the regulation of ADM tools cannot be considered in isolation. Any regulations that consider ADM tools in the rental housing market as a regulatory target must be designed in tandem with the regulations discussed in questions 10-18.

In addressing the challenges posed by the use of ADM in the assessment of rental applications, I recommend that the NSW Government do the following:

1. Prioritise the development of a standard application form (to be made available both digitally and in paper form), the specification of information that can be collected as part of a rental application process, and this information can be used, with a view to limiting what is done with that information (see responses to questions 10 and 11).
2. Reach out to the US Federal Trade Commission⁶⁹ and the Consumer Financial Protection Bureau.⁷⁰ These agencies are currently investigating how these tenancy screening processes impact rental applicants in the US, and this is a major opportunity for the NSW Government to learn from what is happening in another jurisdiction where rental application technologies are more widespread compared to the Australian market.
3. Consider how some of the challenges explored throughout Section 5 of the consultation paper could be addressed through process design (for example, see discussion of Seattle's FIT rule). It may also be worth considering how technology can be used to reduce the risk of bias and discrimination - for

⁶⁸ It is worth noting that based on rental prices alone, essential workers are already struggling to afford to rent alone almost anywhere in Australia
<https://www.theguardian.com/australia-news/2023/apr/11/essential-workers-unable-to-afford-to-rent-alone-almost-anywhere-in-australia-report-shows>

⁶⁹ <https://www.ftc.gov/policy/studies/submit-comment-joint-ftc-cfpb-tenant-screening-request-information>

⁷⁰ <https://www.consumerfinance.gov/rules-policy/tenant-background-checks/>

example, certain data contained within an application (for example, a candidate's name or gender) could be hidden from view when real estate agents or landlords are comparing applications. An additional area that requires further investigation is how scoring, rating, and ranking consumers differ, and whether some processes could achieve fairer outcomes than others.

4. Prioritise regulations that require ADM systems used in rental housing applications to be inspectable by regulators (see response to question 19).
5. Empower regulators to have adequate monitoring and enforcement powers to adequately respond to the challenges outlined in this submission.
6. Consider implementing regulations that require organisations that develop, supply, and/or use algorithmic systems in the evaluation of rental applications to prove to the regulator that they are legally compliant. For example, this could involve requiring these organisations to provide the following to regulators on a regular basis:
 - a. detailed audits of their algorithmic systems
 - b. and meaningful explanations of how these systems function
7. Consider introducing a trigger that automatically requires Fair Trading to investigate organisations once they have been the subject of a certain number of residential tenancy complaints (received by NSW Fair Trading). Identifying the subject of the complaint will be crucial here, as a complainant may struggle to differentiate between the conduct of a real estate agency or landlord, and that of the third party platform that they are using.
8. Ensure that consumers are able to seek timely, meaningful redress for the harms outlined in this paper. Consumers should also be able to easily and quickly notify Fair Trading when they suspect that a rental application system is designed or used in a way that is unlawful or unfair.
9. Consider the challenges not covered in this consultation paper (see introduction to this submission).