

**RESIDENTIAL TENANCY DATABASES
RESPONSES TO THE ISSUES PAPER OF NOVEMBER 2003**

13 Were you made aware that the property manager was checking an RTD during the application process? If so, how were you informed and were you given adequate information about RTDs?

We were not told specifically that the property manager was checking an RTD during the application process. However, the application for tenancy required us to give permission for the real estate agent to access information from other estate agents. The agent concerned is a member of the Tenancy Information Centre Australasia (TICA), so we assume that information from other estate agents in RTDs is included in this permission.

We feel that any use of an RTD should be distinctly listed.

17 Did your property manager inform you that you would be, or had been, listed on an RTD? At what stage of your tenancy were you informed of the listing? How did the real estate agency inform you of this?

No, but see next question.

18 If you were made aware prior to the listing, were you given the opportunity to dispute the listing or rectify the breach before being listed? How long were you given to dispute the listing or rectify the breach? If you were not informed that you had been listed, how did you become aware of the listing?

We are not aware of being listed. However, the then property manager made unfounded complaints against us, at the beginning of the tenancy, and was supported by the principal of the firm. This type of complaint forms the basis for one of the grounds given for a possible listing.

31 Have you attempted to access an RTD listing? If so, what process did you follow? Did you incur a cost? If so, what was this cost?

No.

33 Have you disputed an RTD listing? If so, what process did you follow? What was the outcome?

No.

36 How long has information about you been listed on an RTD?

See the response to point 18.

41 Are you aware of any other risk minimisation tools used as an alternative to RTDs?

We have lived in other places and in both places estate agents asked for referees. We were asked to allow a check with employers when applying for our current tenancy.

45 What are the consequences for real estate institute members if they do not abide by the Code of Conduct in their jurisdiction?

We know of none. Given that at present it is a seller's market, and will be as long as tax rules keep favouring investors over owner occupiers, it seems unlikely that the situation will change. Obviously, not all estate agents are members; losing membership does not prevent them from carrying on their business.

46 *Are you aware of any other forms of industry self regulation that may be relevant to the operation of RTDs?*

No.

47 *Can you provide any RTD complaint statistics?*

No.

48 *What information should be listed on an RTD? Should the listing include information on the type of breach or reasons for the breach? Who should determine what information is listed on an RTD?*

This question pre-supposes that an RTD is a valid tool for the business of renting out residential accommodation. It does not follow that this is true.

It should be possible to obtain information on defaulting or damaging tenants of a serious nature through a legal process maintained by a state or federal body. For minor breaches, remedy by, e.g., loss of bond, should be sufficient. An RTD effectively denies tenants a defence in its current form. If information is listed on an RTD, it should include as much information as can be gathered, including any response made by a tenant, or only list such information as may be deemed suitable by a judge after a legal process has occurred.

49 *Who do you think should be listed on an RTD? People who have signed the tenancy agreement or anyone occupying the house at the time?*

The tenancy agreement is between the tenant and the owner of the property. Others are not directly involved. The owner of the property can only be legitimately interested if the rent is not paid, property is damaged, something occurs to affect the value of the property, or where the owner has a legal responsibility (e.g. a tenant selling illegal drugs from the property). If this is the responsibility of the tenant (i.e. they caused the damage, or, for example, one of their dependants did) the owner can have recourse to them. If it is not the responsibility of the tenant, then there would be a legal action. Tenants should not necessarily be held responsible for their fellow occupants' behaviour.

While it could be possible to list others, again this should only be after a legal process has decided that the other occupant, not the tenant, is responsible for the breach. In particular, other occupants should not be listable if the breach is non-payment of rent, since the agreement between the other occupant and the tenant is not made with the owner.

50 *When should a person be listed? Eg. During or at the termination of a tenancy agreement?*

If an RTD is used, a tenant should be listed when the breach is determined. If an RTD lists a poor tenant for a breach for a period of time (e.g. 5 years for non-maintenance of a garden), that period should begin at the time the tenant is notified of the listing, which should be at the time the non-maintenance is proven to have occurred. Otherwise, that

tenant receives extra punishment if they prove to be a good long-standing tenant over several years following the breach, then leaving.

It makes a nonsense of the RTD if the listing is not available until the tenant leaves after signing another agreement...

51 In what circumstances should a person be listed? Are there any exceptions to these circumstances?

All situations should be treated on merit. It is not reasonable to take harsh measures against someone lying unconscious in a hospital bed who thereby misses a rent payment, whereas someone who misses rent payments regularly could be dealt with more severely. Nevertheless, if RTDs are to be allowed, there must be guidelines for their use that are seen to be reasonable by both tenant and owner. This is not the case at present.

The circumstances under which a person may be listed is only part of the wider issue involved here. For most RTD listings, there appears to be **no process of law involved**, simply an allegation by an property manager or owner. The property manager/owner acts as judge, jury and executioner. In such a case, there is no reason why a person should not be listed for any breach of a tenancy agreement. However, without due process of law, such a listing should not only be required to be notified to the person concerned, but also should not be allowed as the basis for that person to be denied another tenancy at a later date. Otherwise the RTD can be used, for example, to force a tenant to remain at their current property since they cannot move into another tenancy.

If a legal process takes place, that may be seen as a different matter - clearly, it is likely to be seen as reasonable for an property manager/owner to deny a proven serial rent defaulter a tenancy.

Nevertheless, it is important to remember that shelter is one of the fundamental requirements of life. Governments have chosen to privatize this provision, but a person must not be denied one of the requirements of life without very good reason.

52 Should a person be given an opportunity to review and correct inaccurate information before it is listed? If so, what process should be followed?

Yes. Natural justice decrees that a person should be informed that there is proposal to put their name on the database and be given a chance to dispute and correct the information. There must be no secrecy about this. Australia is a signatory to the Universal Declaration of Human Rights. Article 12 of the Universal Declaration of Human Rights states that:

"No one shall be subjected ... to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks"

Australia is in breach of its obligations under the declaration not to act against any body which tries to besmirch a person's reputation unfairly.

To allow a person to review and correct information requires a legal process. If a system based on allegations is to continue, there is a possibility that this "review" process could be seen as consent by the tenant to the listing (remember that the tenant will have little power in such a process as they will not want to end up homeless). The only process that should

count is to have an independent tribunal review complaints by property managers before a listing is allowed.

53 *Do you believe that you are/have been unfairly listed on an RTD? What was your experience?*

No, but given that the approach taken by the estate agent to informing us that they were checking an RTD was "obtaining information from other agents", it is possible that the later letter regarding our "breach" was a notice that we were being put onto the RTD. We have simply not checked.

54 *Should a person be informed about a listing on an RTD? If so, when should the person be informed and by whom?*

Yes. Natural justice decrees that a person should be informed that there is proposal to put their name on the database and be given a chance to dispute and correct the information. There must be no secrecy about this. As stated above, Australia is a signatory to the Universal Declaration of Human Rights, which is supposed to protect citizens from unfair attacks on their reputation. Clearly this is not happening, nor does any level of government take it seriously, since there are instances in other fields where the requirements are ignored.

The person should be informed of the intention to place their name on a register (and be informed which register) by the organization proposing to do it, before it is done. Such an intention should not require the tenant to "show consent" to the listing, since, as described above, the tenant is unlikely to be in a position to "refuse" consent.

55 *Should a property manager be required to provide reasons as to why they have refused an application?*

Yes. Once again, natural justice decrees that a person should be informed of the outcome of a process and the reasons for it. To refuse to do so suggests that somebody wants to hide something - that the process is not fair and reasonable.

If the decision involves an RTD listing, that that listing should be specifically mentioned in the notification. It is not enough to say that "we have information that..." or "an agent/owner has informed us that..." if an RTD is involved. A copy of the details of the listing should be supplied.

56 *Is it reasonable for RTD operators to charge for accessing a listing? If so, why and under what circumstances is it appropriate? What is a reasonable charge?*

As we have said previously, natural justice decrees that a person should be informed of the proposal to place their details on an RTD. The listing must be kept confidential; therefore only the person themselves and those property managers/owners who have registered to use the database should be able to view listings.

If a (potential) tenant makes a direct request to an RTD operator, then a reasonable charge based on the cost of providing a listing may be permissible: any charge must only cover the costs of making the information available: administrative staff's time and materials. This must be transparent and a breakdown of costs must be made available upon request. The charge must not be set so high as to discourage people from making enquiries.

Where it can be supplied, the person listed should get a copy of the listing as part of the process, including the final listing after corrections, for which no charge should be payable, since this is an intrinsic part of the RTD proprietor's operations (of course, absconders would be difficult to notify of a listing). Also, when a listing is supplied to a property manager and they refuse an application for a tenancy, they should have to supply a copy of the listing to the applicant. This should apply even if the applicant is denied for a reason not connected to the RTD listing.

A reasonable charge for property managers and owners is one which results in the operator making a reasonable, not excessive, profit.

57 Have you experienced any difficulties accessing information listed on an RTD? Please provide details.

N/A

58 If a dispute about a listing arises, how should it be resolved?

If there is a dispute about a listing, it should be arbitrated by an independent party.

The principle of "innocent until proven guilty" means that it should be a requirement for the listing agent to show that a breach of an agreement occurred and that the clause or clauses broken were reasonable clauses in the agreement. The same standards should apply as in an application to end a tenancy based on breach of the agreement. (having said that there is a case that the process should be simpler, to avoid eviction happening as a result of trivial breaches where the property manager has to go to as much trouble to obtain a listing only!).

59 Under what circumstance should an RTD listing about a tenant be changed/removed? Who should determine whether a listing should be changed/removed?

The lister should be able to remove a listing at any time. There should be a requirement that the RTD operator should check details of all listings on their database and should be liable for damages in the case of a wrong or frivolous listing. The RTD should be a separate entity from the owner or property manager and liable for wrong information provided. Obviously, in the case of an RTD entry based on allegation only, the lister and operator will be the only people involved in the listing and will also determine the listing. A court of law should also be able to order the removal or modification of a listing. In any case, the burden of proof should be on the lister and/or operator.

60 Have you experienced difficulties when querying/disputing a listing? If so, what was the difficulty and was it with the property manager or the RTD operator? What was the outcome?

N/A

61 How long should a listing remain valid? Should listing duration relate to the severity/type of the breach?

There is a danger that listings will be out of proportion with the offence. For example, a listing for several years for a minor breakage that is made good at the time is out of proportion to the offence. The general approach should be to remove listings within a short period of time - weeks or months - after a breach has been made good, especially where there is no legal proceeding to refer to.

Where a listing is made as a result of a legal action, a standard period should be laid down for the listing to remain in force, much as convictions are considered to be spent after a specified period. It should be possible for a judge to vary this period.

To deal with the question of lapsed entries, it should be legal for an RTD operator to keep a record of a lapsed entry but not to reveal it to property managers/owners. In the case of a serial offender, the RTD operator could be allowed to apply to a court to extend the period of a listing and include details of previous breaches in the listing.

Other remarks

It appears to us that the weak point in the RTD system is that it is possible for a person to be excluded from private rental purely on the basis of a unproven allegation from a property manager/owner. A result is that some property managers, at least, are prepared to use that to leverage power over tenants and as a selling point in attracting owners.

RTDs are often presented as self-regulation of the (residential) real estate industry but in fact, they are only regulating one section of their customer base.

The system as it stands at present allows property managers/owners to deny applications from tenants on the basis of an allegation made in a database, without revealing details of who is making the allegation or that it came from an RTD. There are a number of ways to tackle this weakness. The simplest is to ban RTDs from including listings made without a legal judgement being made against a tenant. The second is to make it illegal to deny an application based on an RTD entry where a legal judgement has not been obtained. (It may be possible to allow other actions in such a case, for example requiring a higher bond or allowing shorter notice to quit in the first six months. However, this is still a penalty resulting from an unproven allegation).

Any changes to the law on RTDs that allows them to continue should do the following:

- 1) make the RTD operator the supplier of the information, not the listing agent. This effectively makes the operator responsible for checking the details of any listing, as they become liable in the case of that listing being incorrect. It also prevents the loophole we found of our estate agent using a wording to get us to consent to the check of an RTD that does not mention it;
- 2) an RTD entry should not be the sole basis for denying a tenancy application unless it results from a legal judgement against the person concerned. People should not be penalized on the basis of an unproven or unsupported allegation;
- 3) any RTD entry obtained as part of checking an applicant for a tenancy or any other activity should have to be given to that applicant;

- 4) in any legal case regarding an RTD entry or a bad reference given by a property manager/owner, the burden of proof should be on the property manager and the RTD operator;
- 5) anyone placed on an RTD must be informed at the time, and a process by which this information is to be passed on should be included in any legislation or code of practice;
- 6) any RTD operator should be a distinct legal entity, and it should have no connection with any property manager, real estate agent or property owner. In particular, no property manager/real estate agent should be owner or part owner of an RTD;
- 7) there needs to be both an independent regulator or legal process to resolve disputed listings. Additionally, there needs to be a procedure where no major impediments (such as high legal fees) are put in the way of a listed person making a complaint.

Database of owners and property managers

Notwithstanding the comments above, we feel that the biggest question remains - why is there no similar database for owners/property managers, so that renters have some way of finding out what the owner of a property and real estate agents are like - to be able to make an informed choice.

For example, the property in which we live has needed painting, both inside and out, for some years, but although we have pointed this out since we moved, nothing has happened and there is no indication that anything will happen in the near future.

A database of owners and property managers would be an extra element in our search for a decent place to live, and might encourage owners of properties such as ours to maintain them to a higher standard.