

Homelessness and Residential Tenancy Databases

**Submission to the Ministerial
Council on Consumer Affairs and
the Standing Committee of
Attorneys-General Inquiry into
Residential Tenancy Databases**

December 2003

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Affairs and the Standing Committee of Attorneys-
General Inquiry into Residential Tenancy Databases**

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1. Executive Summary and Recommendations

1.1 Summary

This submission is made by the PILCH Homeless Persons' Legal Clinic ('Clinic') to the inquiry of the Ministerial Council of Consumer Affairs and the Standing Committee of Attorneys-General into the role, operation and regulation of residential tenancy databases ('RTDs').

A summary of findings and recommendations is set out below.

1.2 Findings

If a person is the subject of a negative RTD listing, that person will face an additional barrier to accessing the private rental market. There is a direct causal relationship between RTD listings and homelessness.

We consider that the best mechanism to ensure that individuals are treated fairly, and that their rights to adequate housing and privacy are protected in dealings with RTD operators, is by way of a consistent national approach to the regulation of RTDs.

A clearly stated and enumerated list of grounds for RTD listings would provide certainty for tenants and agents in relation to the information and circumstances that may be the subject of an RTD listing.

Listings should be removed in situations where the likely prejudice to the tenant outweighs the usefulness of an RTD listing in reflecting the current risk the tenant may pose, such as in the case of inaccurate listings, rectified faults, loss recoverable through bond monies, old listings and other particular circumstances.

As many people do not realise until they are refused a private rental that they are the subject of an RTD listing, the right to be given notice before a listing is created, and the opportunity to dispute the accuracy of information to be listed, is essential to ensure accuracy. Further, where a listing already exists, an individual's right to access information held on an RTD is fundamental to ensuring that the RTD listing is accurate and up-to-date. Information that is not accurate, complete or up-to-date must be corrected immediately.

The creation of an independent dispute resolution scheme, such as an ombudsman, would assist in ensuring fairness, impartiality and accountability in relation to the maintenance of RTDs.

1.3 Recommendations

Recommendation 1 *The States and the Commonwealth should consider implementing a national regulatory regime for RTDs which has as a central tenet the individual's right to adequate housing and right to privacy.*

Recommendation 2 *The Commonwealth, States and Territories should consider implementing a codified set of grounds for which tenants can be listed on an RTD.*

Recommendation 3 *RTD listings should be limited to adverse tribunal or court decisions.*

Recommendation 4 *If RTD listings are not so limited, the codified grounds for listing should include no more than:*

- *unpaid rent;*
- *damage to property; and*
- *inappropriate behaviour, but only where that behaviour puts individuals lawfully entitled to enter or remain on the premises at risk.*

Recommendation 5 *RTD operators should be required to verify the accuracy of information that they hold on an annual basis. Any information not confirmed as correct should be permanently removed from the RTD.*

Recommendation 6 *Agents should be required to cause to be removed an RTD listing if the underlying issue in respect of which the listing was created is remedied, eg if a debt is paid.*

Recommendation 7 *A time limit of two years should be set for all RTD listings, after which the RTD listing should be permanently removed.*

Recommendation 8 *All RTD listings should be removed where the tenant can show that a past default was due to circumstances beyond the individual's control and does not indicate a current risk to prospective landlords, eg domestic violence.*

Recommendation 9 *Only a person who is a party to the tenancy agreement should be the subject of an RTD listing.*

Recommendation 10 *An agent should be required to give an individual reasonable notice of its intention to create an RTD listing, and the reasons for that proposed listing.*

Recommendation 11 *Individuals should be given the opportunity to respond to the reasons for the proposed listing and, where appropriate, dispute those reasons.*

Recommendation 12 *If there is still a dispute after the tenant has had the opportunity to respond, the agent should not be entitled to proceed to create an RTD listing until this process is complete.*

Recommendation 13 *An individual should be able to access information held by an RTD operator about himself or herself in an easily accessible form for free.*

Recommendation 14 *Agents and RTD operators should be required immediately to correct or remove listings, as appropriate, where the agent or RTD operator becomes aware that the information held is not accurate, complete and up-to-date.*

Recommendation 15 *The Commonwealth, States and Territories should conduct a feasibility study into setting up a national ombudsman for the real estate industry.*

Recommendation 16 *Agents should be required to give reasons as to why an application for a tenancy was refused.*

Recommendation 17 *Where an RTD was accessed in relation to a prospective tenant and the RTD provided a negative report, the prospective tenant should be informed that a negative report was received and provided with a copy of the report, whether or not the RTD information is included in a statement of reasons.*

Recommendation 18 *Agents should provide all individuals with the following information at the time of applying for a tenancy or entering into a lease, whichever is first:*

- *details of any personal information that will be collected and stored by the agent;*
- *that this personal information may be disclosed to third parties such as RTD operators in the event that the tenant satisfies one of the grounds for listing;*
- *that the personal information and ground for listing may be supplied by the RTD operators to other agents or landlords; and*
- *information on the individual's rights in respect of the RTD listing process.*

2. Introduction

2.1 Overview

This submission is made by the PILCH Homeless Persons' Legal Clinic ('Clinic') to the inquiry of the Ministerial Council of Consumer Affairs and the Standing Committee of Attorneys-General into the role, operation and regulation of residential tenancy databases ('RTDs').

The submission examines and discusses:

- the nature, extent and scope of RTD listings;
- the relationship between RTD listings and homelessness;
- the process for creating an RTD listing;
- the use of RTD listings in relation to tenancy applications;
- the veracity and rectification of RTD listings; and
- the resolution of disputes arising from RTD listings.

The submission makes findings and recommendations in relation to each of these issues.

2.2 What is the PILCH Homeless Persons' Legal Clinic?

The Clinic, a joint project of the Public Interest Law Clearing House (Vic) Inc ('PILCH') and the Council to Homeless Persons ('CHP'), provides free advice and advocacy in the areas of civil, administrative and summary criminal law to people who are homeless or at risk of homelessness. Many of these people also experience poverty, mental illness and drug addiction.

The Clinic was established in October 2001 and was originally funded as an 18-month pilot by the Victorian Department of Human Services through the Supported Accommodation Assistance Program. It is now funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Program Fund administered by Victoria Legal Aid. This funding is supplemented by fundraising efforts and by donations from Arnold Bloch Leibler and the National Australia Bank Legal Department. The Clinic does not receive any monies from the Commonwealth of Australia.

Legal services are provided by volunteer lawyers from Allens Arthur Robinson, Blake Dawson Waldron, Clayton Utz, Hunt & Hunt, Mallesons Stephen Jaques, Minter Ellison, the National Australia Bank Legal Department and Phillips Fox. The services are offered on a weekly basis at eight outreach locations that are already accessed by homeless people for more basic subsistence needs, such as soup kitchens and crisis accommodation facilities. The legal service delivery model is, so far as possible, integrated with the welfare service delivery model of the host homelessness agency. For example, Clayton Utz lawyers provide free legal advice over a bowl of spaghetti each Tuesday to clients at Credo Café, an open lunch program for

Melbourne's homeless which operates in the basement of Collins Street Baptist Church. At Flagstaff Crisis Accommodation, an emergency shelter operated by the Salvation Army in West Melbourne, lawyers from Minter Ellison and Hunt & Hunt offer free legal advice on a drop-in basis each Tuesday night after clients have finished their evening meals.

Since the inception of the Clinic in October 2001, over 200 lawyers have contributed more than 10 000 hours of assistance, at a commercial value exceeding A\$2.5 million, to over 750 clients. The matters ranged from fines, to debt, to social security, to housing, to personal injury, to mental health, to guardianship and administration.

In addition to delivering direct legal services, the Clinic also aims to use the law to promote, protect and realise the human rights of people experiencing homelessness, to redress unfair and unjust treatment of people experiencing homelessness, and to reduce the extent to which homeless people are disadvantaged and marginalised by the law. In this respect, it undertakes extensive law reform work, public policy advocacy and community legal education.

3. Homelessness

3.1 Definitions of Homelessness

Any person who is homeless or at risk of homelessness is eligible for assistance from the Clinic.

In Australia, a person is defined, at law, to be homeless if, and only if, he or she has inadequate access to safe and secure housing.¹ Section 4 of the *Supported Accommodation Assistance Act 1994* (Cth) provides that a person is taken to have inadequate access to safe and secure housing if the only housing to which a person has access:

- (a) damages, or is likely to damage, the person's health; or
- (b) threatens the person's safety; or
- (c) marginalises the person through failing to provide access to:
 - (i) adequate personal amenities; or
 - (ii) the economic or social supports that a home normally affords; or
- (d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security or affordability of that housing.

This is consistent with the international law definition of 'homelessness' developed by the United Nations Committee on Economic, Social and Cultural Rights ('CESCR') which provides, in effect, that a person is homeless unless he or she has adequate housing that affords the right to live in security, peace and dignity.²

It is also consistent with definitions of homelessness that are identified by people experiencing homelessness themselves. Andrew, a client of Sacred Heart Mission in St Kilda, Victoria, reflects on the experience of sleeping rough:

With life on the street, you don't know what's going to happen next. You're forever on the edge. You don't know if you're going to overdose or if someone's going to give you a 'hot shot'. You don't know if you're going to get enough money to get on.³

Having a home means more than just having a roof over your head.⁴ Ned, another client of Sacred Heart Mission, regards himself as homeless despite the fact that he lives in a boarding house:

¹ *Supported Accommodation Assistance Act 1994* (Cth) s 4. This definition is used to determine eligibility for federal and state funded transitional supported accommodation and related support services ('SAAP services').

² United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing*, UN Doc E/CN4/1991/4 (12 December 1991).

³ Andrew, quoted in Peter Cullen and Carol Ann Marshall (eds), *Voices of the Streets* (1999) 69.

⁴ Ian Charles, 'A Roof Over Your Head Doesn't Guarantee the Safety of a Home' (2002) 2 *Urban Seed* 2.

Boarding houses segregate people. You have walls but no real freedom. You can't bring anyone to your room, and you have to be in by a certain time. You lose your choices in boarding houses.⁵

For the purpose of identifying the extent of homelessness and assisting governments to appropriately develop and deliver services, the Australian Bureau of Statistics has adopted the definition of homelessness proposed by Chamberlain and MacKenzie.⁶ Chamberlain and MacKenzie argue that homelessness is best defined in relation to common community standards regarding the minimum accommodation necessary to live according to the 'conventions of community life'.⁷ In Australia, the accepted minimum community standard is said to be a small, rented flat with basic amenities such as a bedroom, bathroom and kitchen.⁸ Having regard to this standard, Chamberlain and MacKenzie identify three categories of homelessness:

Primary homelessness

People without conventional accommodation, such as people living on the streets, sleeping in parks, squatting in derelict buildings, or using cars or railway carriages for temporary shelter.

Secondary homelessness

People who move frequently from one form of temporary shelter to another. It covers: people using emergency accommodation (such as hostels for the homeless or night shelters); teenagers staying in youth refuges; women and children escaping domestic violence (staying in women's refuges); people residing temporarily with other families (because they have no accommodation of their own); and those using boarding houses on an occasional or intermittent basis.

Tertiary homelessness

People who live in boarding houses on a medium to long-term basis. Residents of private boarding houses do not have a separate bedroom and living room; they do not have kitchen and bathroom facilities of their own; their accommodation is not self-contained; they do not have security of tenure provided by a lease.⁹

⁵ Ned, quoted in Peter Cullen and Carol Ann Marshall (eds), *Voices of the Streets* (1999) 2.

⁶ Chris Chamberlain and David McKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274; Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999).

⁷ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 9-11, 49.

⁸ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 9-11, 49. The Clinic recognises that notions such as 'conventions of community life' and 'minimum community standards' are culturally contingent and that any definition derived from such notions does not necessarily reflect whether persons the subject of the definition self-identify as 'homeless'. To the extent that definitions are used to assess need and eligibility for services, and to appropriately target and deliver such services, it is important that they account for subjective understandings of homelessness.

⁹ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 1, 9-11, 13, 49.

Using the definition proposed by Chamberlain and McKenzie, the Australian Bureau of Statistics enumerated that, on Census night in 2001, there were almost 100,000 people experiencing homelessness across Australia.¹⁰

3.2 Homelessness and RTD Listings

Landlords, through their agents, access RTD listings in the process of screening prospective tenants. As such, if a person is the subject of a negative RTD listing, that person will face an additional barrier to accessing the private rental market.

The Tenancy Databases Action Group in Queensland undertook a survey in December 2001 on the effect of RTD listings on people accessing homelessness services. The conclusions were twofold. Firstly, in relation to the direct impact on individuals, survey results found that nearly half those who responded to the question as to whether they were listed on a tenancy database answered that they were, and of those listed, three quarters responded that the listing was the primary cause of their homelessness. Secondly, in relation to the impact on services, the survey also reported that an increasing number of people were accessing services due to RTD listings. Further, people were requiring longer stays in accommodation due to a lack of exit points, thus causing a 'logjam' for the services.¹¹

The results of this survey confirm the anecdotal experience gathered by Clinic lawyers and clients that there is a direct causal relationship between RTD listings and homelessness.

Case study: JM, a client of the Clinic, was forced to leave the private rental premises she inhabited with her two children after experiencing extreme domestic violence. Her violent partner, who was not a party to the rental agreement, remained in the premises for a further period of 8 weeks without paying rent. Without her knowledge, JM was subsequently listed on a RTD and, by consequence, was unable to move from a domestic violence refuge into the private rental market. She is now on a waiting list for public housing.

Inability to access adequate housing also has an impact on a person's quality of life beyond their failure to meet their accommodation needs. People experiencing secondary or tertiary homelessness often pay far more in rent or board for short-term, low quality housing than they would pay in rent for higher quality housing available on the private rental market. For example, a small room in a boarding house with shared cooking, bathroom and laundry facilities can cost up to \$150 per week. This high cost for substandard accommodation necessarily has an impact on homeless people's quality of life, as people have less money to spend on other necessities such as food and health care. As the comments of Ned, above, attest, a person living in a

¹⁰ Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003).

¹¹ Special Government Backbench, Parliament of Queensland, *Report of Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases* (2002) 49. We note that the Tenancy Databases Action Group acknowledged that a number of variables may have distorted the survey results.

boarding house also does not enjoy the same security of person and privacy as if they were living in a private house.

3.3 Rationale of this Submission

RTDs are, in one sense, a risk management tool employed by landlords and their agents to attempt to reduce the risk of loss or damage when considering prospective tenants.

However, an RTD listing will not always reflect the risk that a tenant may pose in relation to loss or damage to the landlord. In many cases, RTD listings are inaccurate or out-of-date. Further, the Tenants Union of Queensland points out that past behaviour is not necessarily an indicator of the risk the tenant currently poses.¹²

However, if landlords and agents are not able to access RTDs, it is possible that other risk management tools may be employed, such as increasing bond monies, which may also have the effect of reducing access to the private rental market for homeless people on an indiscriminant basis.

A report by Fiona Guthrie on RTDs entitled 'Recommended Queensland Government Strategy Regarding Tenancy Databases' (the 'Guthrie Report')¹³ identified three specific problems in the way in which RTDs operate:

- inappropriate listings;
- unfair or poor operating practices; and
- reduced access to housing.

This submission sets out a number of recommendations aimed at eliminating the problems identified in the Guthrie Report. We have set out what we consider to be the essential minimum standards by which RTDs should operate to ensure that individuals are treated fairly, and that their rights to adequate housing and privacy are protected.

We consider that the best mechanism to enforce these essential minimum standards would be a consistent national approach to the regulation of RTDs.

Recommendation 1 *The States and the Commonwealth should consider implementing a national regulatory regime for RTDs which has as a central tenet the individual's right to adequate housing and right to privacy.*

¹² Special Government Backbench, Parliament of Queensland, *Report of Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases* (2002) 22.

¹³ Special Government Backbench, Parliament of Queensland, *Report of Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases* (2002) 13-14.

4. Nature, Extent and Scope of RTD Listings

4.1 Overview

Every individual has the right to be protected against arbitrary or unlawful interference with his or her privacy.¹⁴ RTDs record personal information about people for the purpose of providing that information to third parties, which may affect those people's ability to access the private rental market. Set out below are a series of recommendations on the nature, extent and scope of RTD listings designed to protect the individual's right to privacy.

4.2 Grounds for Listing

Presently, there are no stated grounds setting out the circumstances in which a tenant may be listed on an RTD which apply Australia-wide. This means that the determination about whether or not a listing should be created is left to the agent based on that agent's own standards or on guidance provided by an RTD operator.¹⁵ Often, listings are based on untested or corroborated allegations.¹⁶

Inconsistencies may exist in listing practices between agents and between RTD operators. As set out above, the potential effect of being the subject of an RTD listing is wide-ranging, including denial of the right to housing, the right to privacy and the right to security of person. A clearly stated and enumerated list of grounds applicable Australia-wide for RTD listings would provide certainty for tenants and agents as to what information and circumstances may be the subject of an RTD listing. Depending on how the grounds are formulated and applied, a nationally consistent approach may lead towards equity across the industry and the avoidance of trivial or vexatious listings.

It is imperative that the grounds for listing be formulated to strike the appropriate balance between the risk-management function of RTDs and respect for the individual's rights.

In our view, the most appropriate grounds for listing are matters that are the subject of a tribunal or court decision. This ground would minimise unfair or unsubstantiated listings. The normal operation of tenancy tribunals is undermined if an agent is able to create a listing in respect of matter that is before a tribunal, but has not yet been decided.

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980) art 17; see also Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 151-3.

¹⁵ Ministerial Council on Consumer Affairs and Standing Committee of Attorneys-General, *Residential Tenancy Databases: Issues Paper* (November 2003) 8.

¹⁶ Kirsty Needham, 'Tenants Get Chance to Challenge Blacklist', *The Sydney Morning Herald* (Sydney) 11 November 2002, 3.

Case study: SL, on the Gold Coast, ended her tenancy a few weeks before the fixed term date with the permission of the property manager. When she moved out allegations were made that the premises were untidy, and the carpet would need replacing. She says she was told by the property manager that if she signed over the bond monies (\$680) and paid a further \$400, the property manager wouldn't list her on TICA. She refused and applied to the Queensland Residential Tenancies Authority for dispute resolution. The property manager went ahead and created the listing (for a damages debt of \$2012) even though the matter had not been heard by the RTA.¹⁷

Recommendation 2 *The Commonwealth, States and Territories should consider implementing a codified set of grounds for which tenants can be listed on an RTD.*

Recommendation 3 *RTD listings should be limited to adverse tribunal or court decisions.*

Recommendation 4 *If RTD listings are not so limited, the codified grounds for listing should include no more than:*

- *unpaid rent;*
- *damage to property; and*
- *inappropriate behaviour, but only where that behaviour puts individuals lawfully entitled to enter or remain on the premises at risk.*

4.3 Duration of Listing and other Risk Factors

Homelessness is often the result of a number of complex and interwoven causes. Over time, an individual's circumstances change. However, where a person is the subject of an RTD listing that is for a long or indefinite period, the listing itself may prevent a person from regaining an adequate standard of living by preventing the person from accessing the private rental market.

In addition to limiting the grounds for which an RTD listing can be created, we strongly urge that any industry standards adopted also require agents and RTD operators to remove listings in situations where the likely prejudice to the tenant outweighs the usefulness of an RTD listing in reflecting the current risk the tenant may pose. There are five main situations where this may arise:

- inaccurate listings;
- faults that have been rectified;

¹⁷ Special Government Backbench, Parliament of Queensland, *Report of Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases* (2002) 25-6.

- situations where the loss suffered was fully recoverable through the bond monies;
- old listings; and
- listings arising out of particular circumstances such as domestic violence.

These five circumstances are discussed further below.

Inaccurate listings

Under National Privacy Principle ('NPP') 3, an organisation is under an obligation to ensure that information that it collects, uses or discloses is accurate, complete and up-to-date. Inaccurate listings should not be created. However, in the event that an inaccurate listing exists, it should be removed as soon as it is discovered. Generally, agents collect the information about the individual, and that information is then passed onto an RTD operator, where the information is stored and then disclosed to third parties as requested. We believe that it is reasonable to require RTD operators to check the accuracy of information they hold with the agent who created the listing on an annual basis. If the information is not able to be confirmed as correct, the listing should be removed.

Rectified faults

Currently, a listing may be created where a breach occurred that has subsequently been rectified. For example, the Queensland Real Estate Agency Code of Practice allows listings for an unremedied *or repeated breach* of a term of the tenancy. Where a breach is capable of rectification, for example by paying a debt or remedying damage to property, the agent should be obliged to remove any RTD listing created in respect of that breach as soon as it is rectified.

Loss recoverable from bond monies

An RTD listing should also not be created where, although a tenant has caused loss to a landlord in the past, that loss was fully recoverable out of bond monies.¹⁸

Old listings

Further, it is our view that the older an RTD listing is, the less likely it is to reflect the current risk the prospective tenant poses. Industry standards should therefore include mandatory removal after a certain amount of time has elapsed. In our view, two years is an appropriate time after which an RTD listing should be removed.

Listings arising from particular circumstances

Particular circumstances may arise in a person's life which may lead to a default on a tenancy agreement which is beyond the control of that individual. An example is the abandonment of a property due to domestic violence. In an inquiry into privacy in the private sector, the Senate Legal and Constitutional Committee noted that:

data collected is unlikely to take into account the reasons why some tenants may have defaulted on a tenancy lease. Loss of employment, cuts in social

¹⁸ See paragraph 4.7 of Special Government Backbench, Parliament of Queensland, *Report of Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases* (2002) 25-6.

welfare benefits, illness, late workers' compensation payments, domestic violence can all force tenants into rent arrears.¹⁹

RTD operators should be required to take into account individual tenants' circumstances before an RTD listing is created. Where circumstances beyond the individual's control lead to the breach, a listing should not be created.

Recommendation 5 *RTD operators should be required to verify the accuracy of information that they hold on an annual basis. Any information not confirmed as correct should be permanently removed from the RTD.*

Recommendation 6 *Agents should be required to cause to be removed an RTD listing if the underlying issue in respect of which the listing was created is remedied, eg if a debt paid.*

Recommendation 7 *A time limit of two years should be set for all RTD listings, after which the RTD listing should be permanently removed.*

Recommendation 8 *All RTD listings should be removed where the tenant can show that a past default was due to circumstances beyond the individual's control and does not indicate a current risk to prospective landlords, eg domestic violence.*

4.4 Who Should be Listed?

Only the tenants party to a tenancy agreement should be capable of being listed on an RTD. There is no direct legal relationship between other tenants and the landlord.

Some protection from arbitrary interference with a person's right to privacy is already provided where information is collected by a third party. NPP 1.4 provides that, where it is reasonable and practicable to do so, an organisation must collect personal information about an individual only from that individual. NPP 1.5 further provides that, where an organisation collects information about a person from someone else, the organisation must take reasonable steps to ensure that person is aware of various matters, including the identity of the organisation collecting the information.

The operation of RTDs should be consistent with the National Privacy Principles.

Recommendation 9 *Only a person who is a party to the tenancy agreement should be the subject of an RTD listing.*

¹⁹ Senate Legal and Constitutional Committee, Parliament of Australia, *Privacy in the Private Sector: Inquiry into Privacy Issues, Including the Privacy Amendment Bill 1998* (1999) [2.43].

4.5 Penalties for Inaccurate, Trivial or Vexatious RTD Listings

Dispute resolution models, including the possibility of imposing penalties for inaccurate, trivial or vexatious RTD listings, are discussed further below at paragraph 6.3.

5. Process for Creating RTD Listings

5.1 Procedure Before an RTD Listing is Created

On 21 December 2001, the *Privacy Act 1988 (Cth)* was extended to the private sector. The Act sets out the 10 National Privacy Principles ('NPPs') which apply to the private sector.

NPP 1.3 requires an organisation, at the time of collection of personal information or close to it, to take reasonable steps to ensure that the individual is aware of, among other things:

- who is collecting the information and how to contact them;
- to whom the organisation usually discloses the information; and
- the individual's access rights.

NPP 3 requires an organisation to take reasonable steps to make sure that the personal information it collects, uses or discloses is accurate, complete and up-to-date.

Many people who are the subject of an RTD listing do not realise until they are refused a private rental that they are the subject of an RTD listing. Even then, they may not be aware. Research into one RTD disclosed that 70 per cent of homeless people listed were unaware of their listing.²⁰ This is because many agents do not inform tenants that they intend to provide personal information to an RTD operator for the purpose of creating a listing.

Without notice that listing will be created, individuals are denied the opportunity to dispute the accuracy of the information to be listed. Further, notice may provide the agent and the individual with an opportunity to resolve the underlying problem.

It is also fundamental that the agent give reasons for the proposed listing and give the individual the right to respond to the factual basis for the proposed listing. Proposed dispute resolution models are discussed further below.

Under NPP 1.5, an organisation collecting personal information about an individual from someone else (such as the case with an RTD operator receiving information from an agent) must take reasonable steps to ensure that the individual is aware of the matters set out in NPP 1.3, discussed above. This means that if RTD operators do not themselves take steps to inform individuals, or ensure that agents providing information to the RTD operator comply with the NPPS, the RTD operator itself is in breach.

Recommendation 10 *An agent should be required to give an individual reasonable notice of its intention to create an RTD listing, and the reasons for that proposed listing.*

²⁰ Catherine Mahoney, 'Ticked Off: Regional Research on Tenancy Databases and Homelessness' (December 2002) *NCOSS News* 7. The database the subject of the research was TICA.

Recommendation 11 *Individuals should be given the opportunity to respond to the reasons for the proposed listing and, where appropriate, dispute those reasons.*

Recommendation 12 *If there is still a dispute after the tenant has had the opportunity to respond, the agent should not be entitled to proceed to create an RTD listing until this process is complete.*

6. RTD Dispute Resolution

6.1 Ability to Access RTD Listings

An individual's ability to access information held about that individual is fundamental to ensuring that RTD listings are accurate and up-to-date.

NPP 6 provides a person with a right to reasonable access to information about him or herself, for free or for a minimal charge.

Homeless people face additional obstacles to accessing information which other members of the community would not have difficulty accessing. For example, a person who does not have stable accommodation will have difficulty accessing information which is only made available to people by post. Some RTD operators make information available to individuals by telephone, but charge for accessing that service. For example, TICA charges \$5.45 a minute²¹ to individuals to access information held about them. This cost may prove prohibitive to a person on a very low income or social security payments which are pegged below the poverty line. Burdensome administrative requirements may also discourage people from accessing information held about them, such as complicated forms to fill in. This particularly impacts on people with limited education or from culturally and linguistically diverse backgrounds.

As an RTD listing is capable of having a substantial impact on the quality of life of a person who does not have alternative access to accommodation, RTD operators should be required to make information available at no charge, and in a manner which is easy for members of the public to access.

Recommendation 13 *An individual should be able to access information held by an RTD operator about himself or herself in an easily accessible form for free.*

6.2 Ability to Rectify or Remove RTD Listings

NPP 6.5 states that where an individual is able to establish that information held about him or herself is not accurate, complete and up-to-date, the organisation holding the information must take reasonable steps to correct the information. This means that an RTD operator is under an obligation to rectify or remove RTD listings that are not accurate, are outdated, or are not substantiated or verified, as this is the reasonable step necessary to correct the information.

As discussed above, at paragraph 4.3, we believe that agents and RTD operators should have a positive obligation to check regularly that information they hold, use and disclose is accurate, complete and up-to-date.

Often a tenant will not know which RTD operator holds the relevant information, and will only have direct contact with the agent. We are also of the view that, above and

²¹ See <www.tica.com.au>.

beyond the requirement set out in NPP 6.5 on RTD operators, an agent who creates a listing should be obliged to ensure the RTD operator corrects a listing where the individual is able to show that the information contained in that listing is not accurate, complete and up-to-date.

Penalties for not rectifying or removing listings as appropriate are discussed below at paragraph 6.3.

Recommendation 14 *Agents and RTD operators should be required immediately to correct or remove listings, as appropriate, where the agent or RTD operator becomes aware that the information held is not accurate, complete and up-to-date.*

6.3 Dispute Resolution Models

Currently, disputes between tenants and agents are often referred to mediators who have a relationship with the agent, and do not offer impartiality to the tenant. If tenant and agent are not able to agree, an independent mediator should assist in resolving a dispute. Other industries have implemented an ombudsman as an independent dispute resolution mechanism. It is our view that an ombudsman should be created in the real estate industry to ensure fairness, impartiality and accountability in relation to the maintenance of databases, among other things.

The Federal Government has released benchmarks for Industry Based Consumer Dispute Resolution Schemes, with which a real estate ombudsman should comply. These benchmarks are:²²

1. Accessibility: the scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
2. Independence: the decision-making process and administration of the scheme are independent from scheme members.
3. Fairness: the scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
4. Accountability: the scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
5. Efficiency: the scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
6. Effectiveness: the scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

²² Commonwealth Government, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* at <<http://www.selfregulation.gov.au/publications/BenchmarksForIndustry-BasedCustomerDisputeResolutionSchemes/index.asp>>.

To discourage agents from creating inaccurate, frivolous or vexatious listings, any real estate ombudsman should also have a discretion to award monetary penalties against offending organisations.

Recommendation 15 *The Commonwealth, States and Territories should conduct a feasibility study into setting up a national ombudsman for the real estate industry.*

7. Use of RTD Listings When Applying for a Tenancy

7.1 General Procedures When a Tenancy Application is Refused

The primary purpose of RTDs is to disclose information to agents about people applying for tenancies, to assist those agents and the landlords who are their clients to assess the risk a potential tenant poses, and ultimately to decide whether or not to let a property to a particular individual.

Often tenants do not realise they are the subject of an RTD listing, notwithstanding that this may be the basis for refusal of a tenancy. As a matter of procedural fairness it is important that the tenant is provided reasons why the tenancy was refused, and where a negative RTD listing was received, the fact that the agent had a negative report from an RTD.

Recommendation 16 *Agents should be required to give reasons as to why an application for a tenancy was refused.*

Recommendation 17 *Where an RTD was accessed in relation to a prospective tenant and the RTD provided a negative report, the prospective tenant should be informed that a negative report was received and provided with a copy of the report, whether or not the RTD information is included in a statement of reasons.*

8. General Procedures When a Tenant Applies for a Tenancy

RTD listings are usually created by an agent who passes on identifying information, together with the details of the listing, to an RTD operator. Generally, the agent collects the identifying information when the individual applies for the tenancy or signs the lease. Therefore, prospective tenants should be informed that the information they give to an agent at the time they apply may be disclosed to an RTD operator in future. Agents should not retain personal information supplied by individuals who do not enter into a lease.

Recommendation 18 *Agents should provide all individuals with the following information at the time of applying for a tenancy or entering into a lease, whichever is first:*

- *details of any personal information that will be collected and stored by the agent;*
- *that this personal information may be disclosed to third parties such as RTD operators in the event that the tenant satisfies one of the grounds for listing;*
- *that the personal information and ground for listing may be supplied by the RTD operators to other agents or landlords; and*
- *information on the individual's rights in respect of the RTD listing process.*

NPP 2 limits the range of circumstances for which personal information can be disclosed to a third party such as an RTD operator. NPP 2 does, however, permit the disclosure of personal information to a third party where the individual has consented to the use or disclosure of the information. Almost certainly, a power imbalance will exist between the agent and the prospective tenant, and the prospective tenant may not want to object to a request for consent. A pro forma consent clause in a tenancy application form or lease should not replace other safeguards and requirements for notice set out above.

9. Acknowledgments

We would like to acknowledge the assistance of the following people in preparing this submission:

- Nadia Deltondo, Intern, Public Interest Law Clearing House
- Marie Biswell, Intern, Public Interest Law Clearing House