

Residential Tenancy Databases

TAS WA submission to the Ministerial Council on Consumer Affairs
Standing Committee of Attorneys-General
January 2004

Preamble

This submission is made by the Tenants Advice Service WA (Inc) ("TAS") to the inquiry of the Ministerial Council of Consumer Affairs and the Standing Committee of Attorney's-General in to the role, operation and regulation of residential tenancy databases ("RTD's").

TAS' submission responds to the "tenant" and "general" discussion questions raised in the November 2003 *Residential Tenancy Databases Issues Paper November 2003*, published by the Ministerial Council on Consumer Affairs Standing Committee of Attorneys-General

Introduction

TAS is a not for profit, specialist community legal centre. TAS acts as a resource unit to a network of tenancy services throughout WA and to both government and non-government organisations that work with tenants. TAS provides information and advice services, specialist casework, policy and law reform work, community legal education and publications. For more information about TAS please see our website at www.taswa.org.

Overview

It is important to consider the market context in which RTDs operate. Housing affordability is on the decline in Australia. Increasing numbers of people rely on the private rental market to meet their housing needs. While the overall supply of private rental stock has increased, there has also been a marked decline in the availability of both low cost private rental housing and public rental housing. A high percentage of private renters experience "housing stress", where more than 30% of a person's income is paid on housing costs¹.

As the RTD industry has expanded and adopted concerning practices, increasing numbers of tenants have approached tenant advocacy services around Australia for advice and assistance to address RTD related issues. These have included: threats to list; frivolous, vexatious and retaliatory listings; inaccurate listings; and difficulty accessing and correcting information held by RTDs.

¹ For more information see "*Tenant Databases in the context of Tenure Management: Risk minimisation and tenant outcomes in the private rental sector*" Australian Housing and Urban Research Institute, Queensland Research Centre, 2003. See also "*More Affordable Housing*" Australian Council of Social Service's Submission to the Productivity Commission, October 2003 http://coss.net.au/news/upload/info352_housing_sub.doc

In this climate, TAS has witnessed an increasing vulnerability of tenants, particularly those at risk of marginalisation such as larger families, young people, single mothers, Aboriginal people, some migrant/refugee groups, people with poor literacy skills and people suffering mental illness.² Where once vulnerable tenants could turn to public housing as a “last resort”, increasingly restrictive eligibility criteria and tight public housing budgets have meant that this avenue may no longer be available. For the vulnerable, the emergence of RTDs has equated with a “one strike and you’re out” housing environment.

However, it is not only the vulnerable who are at risk:

Case Study

The tenant was an experienced school teacher who had ongoing problems getting the agent to carry out necessary repairs. Because of these problems she decided to vacate at the end of the fixed term agreement and her bond was returned to her in full. When she relocated to another State and made several unsuccessful applications for another tenancy, she learned she was listed on a database. It cost her \$120 in phone calls and access fees to confirm the listing, only to be told if she disagreed with the listing she must convince the listing agent to alter or remove it. The agent refused and she remains listed.

There is a significant power imbalance in all transactions between landlords and tenants, particularly at the affordable end of the market where demand is high and choices are few. Tenants are not often in a position of being able to negotiate the terms of a tenancy agreement. If prospective tenants do not agree to the terms offered (such as those relating to the collection and use of personal information) their applications may be viewed less favourably³.

TAS believes the emergence of RTDs may lead to increasing numbers of homeless people who are effectively locked out of all forms of housing. Western Australia has amongst the highest rates of homelessness in Australia (see Australian Bureau of Statistics *Counting the Homeless 2001*, December 2003). Lack of access to housing (a human right which is enshrined in International Conventions to which Australia is signatory⁴) has implications for the health, education, safety, employment and well-being of individuals, families and communities.

Case Study

² .The case studies contained in this submission are the result of anecdotal information provided to TAS either from individual clients or members of the Western Australian Tenancy Network.

³ See extract of sample real estate agency application form, attached at appendix 1, which notes that the application will not be processed unless it is completed in full.

⁴ For example, Article 11.1 of the International Covenant on Economic, Social and Cultural Rights which states: “*The State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and for his family, including adequate food, clothing and housing, and to the continuous improvement of living condition’s.*”

A homeless tenant reported that they had been unsuccessful in her application for three residential tenancies and she thought this may have been because she was listed on a tenant database. The tenant had an outstanding debt with Homeswest and had been fulfilling her payment arrangement with Homeswest for some time. Half of the debt had been settled at the time that the tenant had contacted TAS. The tenant and her family had been sleeping in a caravan, parking at a number of opportune locations.

Recommendations

1. *TAS recommends that privacy statements should separately and accurately reflect the various purposes for the collection of information, with the tenants consent being required for each separately.*
2. *TAS recommends that privacy statements be required to be written in plain English*
3. *TAS recommends that a prospective tenant's consent for personal information to be provided to third parties be restricted to those parties specifically identified at the time of application.*
4. *TAS recommends the introduction of legislation to ensure that tenants are notified in writing by the listing agent at the time they are listed, what information has been listed and the reasons for listing⁵. In addition TAS recommends that the RTD itself should confirm and provide a copy the listing within 14 days*
5. *TAS recommends restriction on the development and use of internal databases that compile personal information.*
6. *TAS recommends that access to identifying details of the listing agent be restricted to the tenant and the database operator.*
7. *TAS recommends that listings should only be allowed in the case of a Court order for non-payment of an amount payable under the tenancy agreement, which exceeds the amount held as a security bond for the tenancy.*
8. *TAS recommends that grounds for listing be restricted to a Court ordered monetary amount that is greater than the amount of the security bond held in relation to the tenancy.*
9. *TAS recommends that the Court have the ability to consider "all the circumstances" of the case in making a determination in relation to a listing.*

⁵ Please see 48 and 50 below. TAS contends that a tenant should only be listed by court order at the end of a tenancy, however should this position not be accepted, the above recommendations are made in the alternative.

10. *TAS further recommends that in all cases, the onus of proof that the tenant is responsible/liable and that listing is justified, be placed on the listing agent.*
11. *TAS recommends that the owner/agent be able to apply for an order granting the right to list on an RTD **only** at the time of seeking an order for a substantial, quantifiable financial loss **at the end of the tenancy**.*
12. *TAS recommends that the circumstances of the case should be considered by an independent, objective arbiter (the Courts) before an RTD listing allowed.*
13. *TAS recommends that owners/agents be required to provide 14 days written notice of an intention to list a tenant and the reason why.*
14. *TAS recommends that tenants who have been unfairly listed have the right to seek compensation for associated losses.*
15. *TAS recommends provision for (former) tenants to apply to Court for removal of their name from an RTD.*
16. *TAS recommends that any future legislation to regulate RTDs is specifically retrospective to ensure that tenants who have been listed in the past have not been listed unjustifiably.*
17. *TAS recommends that property managers be required to provide reasons for refusing an application, and that penalties be applicable for failure to notify of an RTD listing.*
18. *TAS recommends that an individual's access to information in relation to an RTD listing should be free of charge and readily accessible*
19. *TAS recommends:*
 - *That relevant definitions are established. In particular the definition of an RTD should encompass both internal and external electronic databases.*
 - *That tenants who have been listed in the past and remain listed on an RTD be provided with legislative protection.*
 - *That provision be made for compensation for losses linked to an unjust listing.*
 - *That provision be made for automatic removal of an RTD listing upon payment in full of any monies owing, in order to limit the need for a tenant to make an application to the Court/Tribunal for an order to remove*
 - *That tenants may authorise in writing for their own agent/advocate to make enquires of RTDs and act on their behalf in relation to disputed listings.*
 - *That owners/agents be required to keep an accurate, up to date separate record of any listings they have initiated, in addition to*

the information being kept on individual tenant files which may not be easily accessible (for example if archives are kept off site).

- *That appropriate public education strategies are designed and implemented in order to ensure all relevant parties are aware of their rights and obligations, and the risk of dispute is therefore minimised.*

20. *TAS recommends that provision be made for the listing to be removed upon the remedying of the issue which led to the listing.*

21. *TAS recommends that there is automatic removal from the list after the passage of 2 years, in order to ensure that the information contained on RTDs is accurate and up to date.*

22. *TAS recommends that the onus of proof that listing or continued listing is justified, lies with the owner/agent who initiated the listing.*

23. *TAS recommends a provision which requires written confirmation by the RTD to the tenant, within 14 days, that a listing has been removed subsequent to a Court/Tribunal order.*

24. *TAS recommends a provision allowing for the Court/Tribunal to hear an application from a tenant, a prospective tenant or former tenant for the removal of a listing on the grounds that*

- *the problem which led to the listing has been rectified*
- *the listing was vexatious or frivolous*
- *their identity has been mistaken*
- *the listing is more than 2 years old*

Discussion Questions

This submission responds to general questions and questions directed at tenants, according to the numbering in the RTD Inquiry discussion paper.

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?

Advocates report that tenants often don't even know what a database is let alone whether they are listed. TAS has received calls from tenants saying their applications have continually been knocked back and that they fear, but do not know for sure, that they are on a database. When tenants have asked for reasons why their application was not successful, the most commonly reported responses by agents are that they do not have to give reasons⁶ or that the owner preferred a different applicant.

⁶ See sample real estate agency "Tenancy Application", attached at appendix 2, which states "Note also that should your application be declined by the owner/agent, no reason will be given as to why you have been refused. All decisions are final."

Case Studies

- A tenant applied for a tenancy and through the application process learnt that they were on a tenant database, however, they did not have information as to who had placed the listing. Upon the tenant contacting the agent to ask them to remove their name from the database, the agent claimed they knew nothing about the listing.
- A tenant together with her defacto partner made an application for a residential property but was declined. The real estate agent stated that their application was refused due to the defacto partners previous debts. The agent had received this information through contact with TICA and the defacto partner was unaware of the listing or who had listed him. When advised by the agent of the listing, the prospective tenant was not advised of what TICA stands for or its purpose.

Following changes to the *Privacy Act* many agents have included a clause in their tenancy application forms, which provides information about databases and their implications for the applicant. Alternatively, agents may require the applicant to sign a privacy statement⁷ as a precondition to accepting the tenancy application. However, there is a concern as to the accessibility and efficacy of the information contained in such documents, in regard to establishing informed consent.

TAS believes the information provided confuses primary and secondary purposes: see example *Privacy Act 1988 Collection Notice*, attached at appendix 4. TAS notes that the front of this form advises potential tenants of four reasons for requiring completion of the application form but only the third is tenuously linked to RTDs – “*To make you aware of conditions associated with the application*”. Then, on the reverse side of this document three further reasons are provided within one sentence, for the collection of personal information prior to and during a potential future tenancy:

1. to verify the applicant’s identity (as is necessary for the purpose of entering into a contract).
2. to process and evaluate the application (risk management – the reason for the existence of RTDs).
3. to manage the tenancy.

The third reason is only marginally related to the collection of personal information. For example, the owner/agent may need to contact the tenant at their place of work if there is an emergency, or call their next of kin for a valid reason. Otherwise, all the personal information necessary for managing a tenancy is contained in the future tenancy agreement itself.

The consent required for checking a prospective tenant’s name on an RTD as part of a risk evaluation process is distinct from management aspects of the proposed tenancy. Arguably the “bundling” of consent may be misleading and confusing, that it offends *National Privacy Principles* and it is therefore inadequate.

⁷ For example see the attached Disclosure Statement downloaded from the National Tenancy Database website, appendix 3.

TAS recommends that privacy statements should separately and accurately reflect the various purposes for the collection of information, with the tenants consent being required for each separately.

Moreover, the information contained in the privacy clauses of some application forms is inaccessible to many prospective tenants. In the example attached at appendix 5, complicated and lengthy sentences can be difficult to decipher and/or their implications ascertained.

TAS recommends that privacy statements be required to be written in plain English.

Arguably notices such as the attached *Privacy Act 1988 Collection Notice* (appendix 6), raise the issue as to whether informed consent has been obtained in respect of potential future disclosure of information to a broad range of undisclosed individuals and organisations.

Case Study

At a social function, a real estate agent offered a private landlord (who unbeknownst worked in the housing sector) to look up the name of their tenant on a database and pass on information if any was found. The landlord had consciously chosen not to use database services on principle, and consequently the tenant had not given any consent for their personal information to be passed on. Interestingly, notwithstanding the fact that the agent did not manage the property they were both willing and able to obtain information on the tenant.

TAS recommends that a prospective tenant's consent for personal information to be provided to third parties be restricted to those parties specifically identified at the time of application.

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?

Tenants are not always told they have been listed at the time of listing and do not always find out they have been listed until they are applying for another tenancy (see 13 above). Whilst some protection has been provided through changes to the *Privacy Act*, there are still many tenants who had been previously listed who have not been properly informed.

Case Study

A tenant was applying to court for the return of her bond. When the tenancy agreement was produced in evidence, the agent also produced an “annexure” to the agreement which stated that database listing may occur if the tenant was in breach of the agreement. The tenant had never seen the document before and it did not bear her signature.

Some real estate agents appear to take the view that the clause in their tenancy agreements, which refers to listing in case of breach (see sample attached at appendix 7⁸), is sufficient notification. In other words, the agents’ position is that if the tenant has been served a breach notice they should already be aware from the tenancy agreement that it will result in a listing.

TAS recommends the introduction of legislation to ensure that tenants are notified in writing by the listing agent at the time they are listed, what information has been listed and the reasons for listing⁹. In addition TAS recommends that the RTD itself should confirm and provide a copy the listing within 14 days.

TAS has received calls from tenants who say they have been threatened by their property manager with a database listing.

Case Study

A tenant contacted TAS due to concerns that she would be listed with a tenant database. The tenant’s real estate agent had told the tenant that she would be “blacklisted” and this followed a number of disagreements between the tenant and the real estate agent as to maintenance problems at the property. As a result of the agents refusal to adequately secure the rental property the tenants changed the locks. This lead to the conflict that resulted in the tenant being threatened by the real estate agent about being blacklisted

The incident outlined above illustrates a practice that is unacceptably coercive. If an owner/agent believes that a tenant is in breach of their tenancy agreement they have recourse to fair procedures as set out in the *Residential Tenancies Act* (WA) to resolve the matter. That process involves service to tenants of the correct notice, providing 14 days for response. Should the matter remain unresolved, the owner/agent may apply to the Small Disputes Division of the Local Court for a performance order, payment of monies owing or termination of the tenancy agreement. The Court will then make a determination based on the objective consideration of the facts and circumstances of the case.

To couple an *allegation* of breach with a threat to cause a detriment may contravene section 338A of WA’s *Criminal Code*, which prohibits threats with intent to influence.

⁸ Note that the warning of potential future listing in the case of breach does not specify the type or severity of breach, nor does it distinguish proven from alleged breach.

⁹ Please see 48 and 50 below. TAS contends that a tenant should only be listed by court order at the end of a tenancy, however should this position not be accepted, the above recommendations are made in the alternative.

Case Studies

- The owner wanted to recover the rental premises and the agent asked the tenant to move out. The tenant had a fixed term agreement and therefore was under no obligation to vacate and further, did not want to face the unexpected expense of moving. The agent threatened to list the tenant on a database if the tenant did not move out.
- The tenant had a dispute with a real estate agent over oil that had leaked from a vehicle parked in the carport of the tenanted property. The agent sought to evict the tenant (and claimed that the tenant was responsible for the rent and advertising costs until another tenant was found) and threatened the tenant that if they did not move out by a certain date then they would be listed on a RTD. Further, in an effort to dissuade the tenant from seeking court intervention, the agent said that if the matter proceeded to court she would place the tenant on an RTD

Tenants who are threatened with a listing if they do not comply with an owner/agents unreasonable demands may be forced into resigning their rights as tenants and may remain in an unsatisfactory tenancy for fear that they will be unable to secure alternative accommodation.¹⁰

Case study

A tenant had notified the owner/agent that he had to go into hospital for a couple of weeks, however, he found a breach notice in the letterbox when he got home. The notice required the tenant to fix the garden within two weeks, despite the agent being aware that the tenant was not physically able to do the work at that time. The tenant had no family to help and had no alternative but to pay for a gardener out of his pension. The tenant suffered both financial and emotional distress over the incident but felt he had no choice because his tenancy agreement contained a clause stating that a breach would result in a database listing.

See also 54 below.

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?

In addition to tenants not finding out that they are listed on an RTD until they make an application for a tenancy, tenants also face significant barriers to obtaining information about a (possible) listing. For example, if the listing agent is no longer in the employ of the real estate agency, it is difficult for the former tenant to establish the facts or challenge the listing. However, TAS is aware of some cases where the tenant has been informed they are on a database at the time of listing.

¹⁰ WA's *Residential Tenancies Act* provides for evictions without cause from periodic tenancies (s64) and refusal to renew or extend fixed term tenancies without reason (s72).

Case Study

The tenant was renting for several years without any significant problems until she fell into rent arrears over the Christmas period, when she had her children come to stay. The agent for the premises was a member of an RTD and listed the tenant's name. However, because the tenant had been a good tenant, she was able to negotiate to pay off the arrears. The tenant maintained the payments and when her tenancy agreement expired, it was renewed. Despite fulfilment of the agreement the tenant remains listed on the database.

Tenants face a difficult and flawed process in disputing a listing and in that regard TAS made submissions to the current statutory review of the *Residential Tenancies Act WA*, seeking amendments that would bring RTDs under the Act (see extracts attached at appendix 8a, b and c¹¹).

Case Study

A tenant discovered he had been listed on a database for rent arrears and damages. The tenant disputed the information on the database and believed he could prove the listing was unjust because his bond money for the premises had been returned in full. The tenant applied to court for an order to remove his name. The agent confirmed the database listing and that no claims had been made on the tenant's bond money. However, the Magistrate said the dispute was outside the court's jurisdiction and refused to make the order. The agent declined to remove the tenants name from the database, despite the evidence that the listing was unjustified.

It is at the discretion of the Court as to whether a dispute about an RTD listing will be heard and as a consequence decision making has been inconsistent. In the event that the Court makes an order that a listing be removed, the Court can only order the owner to instruct the agent to do so as the agent is not a party to a tenancy agreement.

¹¹ Copies of TAS submissions to the review of the *Residential Tenancies Act* can be obtained from our website at www.taswa.org.

Case Study

A tenant advocate assisted a tenant to apply to Court for removal of their name from a tenancy database, on the grounds that it was unjustified. The Magistrate would not hear the case, saying the dispute was not within the Court's jurisdiction. However, the tenant advocate had previously been successful in obtaining an order for removal of a client's name from a database, under a different Magistrate. In that case the tenancy agreement had contained a clause relating to tenant databases.

Tenants can make complaints about RTD listings, to the Commonwealth Ombudsman, who acts for the Commonwealth Privacy Commission in WA.¹² On 18 February 2003, the Tenants Union of Queensland lodged 4 complaints with the Privacy Commissioner on behalf of tenants who had been listed on RTDs. With no determination being made on those cases the current process does not provide an effective remedy for tenants, who may suffer ongoing detriment as a consequence of a listing.

See also 54 below.

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 the cost?

The cost to tenants for access to their own personal information held by RTDs can be prohibitive. For example, TICA operates a 190 phone information number which charges \$5.45 per minute (or \$327 an hour). Arguably this charge does not reflect the cost to provide the service, and it appears that its purpose may be to generate profits. The existence of excessive charges to access one's own personal information is contrary to the spirit and principles of the privacy legislation.

Tenants who need to contact RTDs like TICA may be low income earners who find such costs to be a substantial amount of money. However, tenants have no choice but to incur costs if a listing is preventing them from accessing housing (a necessity of life).

Tenants have the option of paying a fee (for example, \$11 to TICA or \$15 to NTD) with a written request for information. Arguably this charge contravenes privacy principals which prohibit a charge for lodging a request to access information. Provision of an extract from TICA's database can take upwards of 10 days and this can be a disastrous delay for tenants who may be at risk of homelessness. Importantly, it is the whole community who must bear the social and economic costs associated with increased homelessness, as a large body of research demonstrates that homelessness impacts heavily upon society on both an individual and collective level.

¹². TAS is unaware of any complaints which have been successfully resolved through this avenue

Case study

A tenant made phone contact with the database operator to request information on her listing. The operator stated that they could not provide the tenant with that information, and that she needed to forward money and proof of identity to a postal address, and wait up to 4 weeks for a reply. The tenant and her children were at risk of homelessness and needed to know urgently who had listed her and the reasons why.

See also 56, 57 and 60 below.

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

As discussed above, there are significant barriers to tenants for resolution of any concerns about a database listing. In the first instance they must be able to afford the phone call charges, have access to the internet or have good written communication skills. All of which may present difficulties to the disadvantaged groups in the community who may be most likely to be at risk of a listing. Tenant advocates report that some of their clients do not have the funds to obtain their personal information held by RTD's and others find the process too difficult to follow.

As a pre-condition to disputing a listing, a tenant needs to know what information they may need to contest. Therefore, it is imperative that the tenant be notified of any listing and provided full details of the information contained in the listing for free and on request (see also 17 above and 54 below).

The dispute resolution process provided by RTDs is totally inadequate as the onus is placed on the tenant to investigate the reasons for the listing with the agent who initiated the listing (if they can find out who that was). However, this is dependent on too many variables as the agent may refuse to cooperate, or they may have changed employment and be untraceable to the tenant. Therefore there is little that can be done if the tenant disagrees with the listing agent about the facts or circumstances surrounding the listing. Information available on RTD websites contain minimal information for the tenant on how they should go about proving a listing is incorrect or unfair to the satisfaction of the RTD operator.

Lack of clarity about dispute processes by both RTDs and agents is evident in the attached newspaper article¹³ where an agent says it is TICA's responsibility to review listings, while TICA maintains it is the agent's responsibility to do so.

¹³ *Locked Out*, page 4, The West Australian Weekend Extra, Saturday October 25 2003, appendix 9.

Case Study

A tenant became aware that she was listed on a tenant database and sought to have her personal details removed from the list. The tenant wrote a letter to the real estate agent that had listed her, however, the tenant did not receive any reply to this correspondence. Following verbal contact with the agent she was asked to resend the letter which she did. However, despite a second letter being sent to the agent the tenant did not receive a response. Upon contacting TAS the tenant did not know how to proceed.

See also 58 below.

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

Many tenants are unaware they are listed and few will know who listed them. Further, tenants may be unaware as to how long they have been listed.

Case Study

When the prospective tenant applied for a tenancy in a regional town, the agent informed him that his name was listed with a database company. The agent refused to give any other information apart from a phone number. The tenant had no idea who might have listed him as, because of his work, he had rented in many places over recent years. The tenant was unable to access the database number by mobile or public phone and faced considerable inconvenience due to being unable to secure housing.

TAS understands that some RTDs keep listings indefinitely. For example, tenants may be listed indefinitely by TICA under the descriptor 'Tenancy History Only'. To users of the TICA database such a description may indicate a past default. However, such a listing may be unjust because people's circumstances (financial or otherwise) change over time and there is a risk that the wrong conclusions may be drawn in regard to the individual's capacity to comply with tenancy agreements.

Case Study

A tenant had applied for three tenancies and had been unsuccessful in all three applications. Subsequently the tenant was informed that real estate agents maintain their own tenancy database lists and that he had been listed. Ten years prior the tenant has vacated a shared tenancy and not informed the owner and this resulted in a tenancy dispute that was heard in the Small Disputes Division of the Local Court. The listing resulted from this dispute. The tenant was unaware of any breaches committed by him in the intervening ten year period that would have justified a listing.

TICA applies a 5 year time frame for listings related to debt - a long period of time for this kind of listing when compared to the detriment likely to be suffered by a tenant (and their family) who is unable to find housing. Debt related listings include both outstanding debts and debts which have been

repaid. The very existence of the listing, even where it demonstrates repayment of the debt, will make it difficult for a tenant to find a new tenancy.

See also 61 below

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

TAS is not aware of risk minimisation tools used as an *alternative* to RTDs, however, TAS is aware of risk minimisation tools which are used in *addition* to RTDs. Such tools are sufficient to satisfy risk management objectives. For example, other risk minimisation tools in use in WA include:

- The processes set out in the *Residential Tenancies Act*, the purpose of which is to provide a procedurally fair mechanism for protecting and balancing the interests of parties to a residential tenancy agreement.
- Security Bond provisions which provide a safety net to owners should tenants default on payment for rent or costs to repair damage caused or permitted by the tenant.
- Landlords insurance, the cost of which may be tax deductible, can indemnify landlords for a number of risks including damages, outstanding and lost rent.
- References from previous landlords which can establish a past tenancy history.
- References from other providers of products and services which can establish a past payment history.
- Personal references. In WA, many owner/agents require guarantors, for example in order to rent to young people without a prior tenancy or payment history.

TAS concedes that real estate agents have the ability to compile an internal database system and this may consist entirely of lists downloaded from an RTD, with the potential for some internal amendments: (see TICA publication attached at appendix 10) TAS is opposed to such practices as they contravene the spirit of provisions set out in the recent *Privacy Act* amendments.

TAS recommends restriction on the development and use of internal databases that compile personal information.

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

In WA complaints against Real Estate Agents are reviewed by the Real Estate Agent's Supervisory Board ("the REASB"). The REASB is based within the

Department of Consumer and Employment Protection. TAS is unaware of any cases of negative consequences being applied to an agent following a complaint by a tenant.

It is difficult for a tenant to prove unprofessional conduct. For example, threats to list on an RTD may be made without witness. Similarly, there may be no way to independently verify whether an agent provided a misleading explanation of the use of RTDs, for example in relation to the type or severity of breach which could result in an RTD listing¹⁴. While an unjust listing may appear to equate with unconscionable conduct, without a Court hearing to examine the facts of the case, justification for listing cannot be objectively established. The court which hears tenancy disputes in WA, may refuse to consider disputes over database listings (see also 48 below).

Case Study

The Tenant successfully applied to court for the return of the bond money. Outside the Court, after the Hearing, the agent said to the owner, within clear earshot of the tenant and her advocate, words to the effect: "Don't worry, I'll list on her a database. That *will fix her*".

47. Can you provide any RTD complaint statistics?

TAS does not keep quantitative statistics on the number of contacts in relation to RTDs as the NIS¹⁵ database system does not contain an identifying code. We have conducted a review of core data sheets completed by telephone advice workers and as a result of this review we have provided qualitative data as evidenced by the case examples used throughout this submission. In addition we have included reports from other tenant advocates in our network.

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?

The potential consequences of an adverse RTD listing to tenants are serious and far reaching. Barriers to housing impact on all areas of life including health, safety, education, and employment. Consequences extend beyond the individual to the whole community, who bear the cost of homelessness in terms of welfare, public housing, justice, and health budgets.

¹⁴ See sample application form appendix x, which requires the tenant to “..acknowledge that we have been advised that in the event of breach of Tenancy Agreement by me/us items of personal information contained in this application may be recorded in a Tenancy Data Base.....”.

¹⁵ The National Information Scheme (NIS) database is a system established by the Commonwealth Government for the collection of data by Community Legal Centres. It is currently being replaced with the CLSIS system.

The information listed on an RTD should be restricted to:

1. The minimum necessary to establish correct identity of the tenant,
2. The minimum necessary to identify the tenancy agreement relevant to the listing (i.e. the name of the parties and/or the address of the rental premises).
3. The wording of a Court order granting the listing.

As there is no process in place to verify the accuracy of a listing and no consistent standards are required by RTDs the decision to list is made entirely at the subjective discretion of an RTD member. As a result, tenants have reported being listed vexatiously, inaccurately, for trivial matters or under non-specific headings such as 'refer to agent'.

A consequence of the listing of contact details for agents is the potential uncontrolled exchange of information that is not objectively verifiable.

TAS recommends that access to identifying details of the listing agent be restricted to the tenant and the database operator.

TAS recommends that listings should only be allowed in the case of a Court order for non-payment of an amount payable under the tenancy agreement, which exceeds the amount held as a security bond for the tenancy.

In the event that the Ministerial Council does not accept that RTD listings should be restricted to those ordered by a Court, TAS makes the alternative recommendation:

TAS recommends that grounds for listing be restricted to a Court ordered monetary amount that is greater than the amount of the security bond held in relation to the tenancy.

It is important for the Court to be able to consider all the circumstances in any dispute relating to a tenancy. For example, an owner/agent may hold a tenant responsible for damage caused by the perpetrator of domestic violence (although there are other avenues of redress available to a landlord who suffers a loss because of the criminal actions of a third party). The Court should have the discretion to consider whether a victim of violence should be penalised by a database listing because of an act committed against them (and incidentally to the premises they live in).

Case Study

The tenant (a single mother) and her three children were renting a property in a county town for 6 months. The family had to abandon the property (and the town) urgently due to family violence (note tenancies cannot be terminated on grounds of domestic violence under WA's tenancy legislation). The tenant was listed on a tenancy database. The family remain homeless after 12 months of moving from town to town. The children are without stability, their education, health and well being is affected.

TAS recommends that the Court have the ability to consider “all the circumstances” of the case in making a determination in relation to a listing.

TAS further recommends that in all cases, the onus of proof that the tenant is responsible/liable and that listing is justified, be placed on the listing agent.

See also 51 below.

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?

RTD listings should be restricted to people who have signed the tenancy agreement under which a dispute has arisen as other occupants and visitors have no contractual relationship with the owner/agent of residential premises. Rather, signatories to tenancy agreements are vicariously responsible for any other occupants or visitors at the premises with the tenant's permission (s50 RTA (WA)). To list personal information about occupants or visitors without consent would be a breach of privacy principles. Arguably other avenues are available to owners/agents if a third party's actions have caused them to suffer a loss.

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

A person should not be listed on an RTD during the term of a tenancy. If the primary purpose of an RTD is to assist an owner to minimise risk in the assessment of applications, an RTD has no relevance during the term of a tenancy agreement. Whilst TAS is aware that some agents use the threat of RTDs as a management tool during the term of a tenancy, TAS is strongly opposed to such practices (see 17 above).

While tenants may, from time to time, find themselves in breach of agreement due to circumstances outside their control, as long as the breach is rectified during the term of the agreement, RTDs are irrelevant to risk assessment or management in relation to the current tenancy. As discussed at 17 above, owners/agents have the option of applying to the court for termination if they believe the tenant is presenting an ongoing risk of breach, and if successful

they may also seek quantifiable costs (from the bond or in addition to the bond). It is at that point, the required application for listing should be made, if there is any money outstanding. As tenants are required to provide a forwarding address (see 54 below) TAS submits that at this point in time, the likelihood of the tenant being notified about a listing or potential listing is maximised.

TAS is opposed to RTD listings during a tenancy due to the substantial power imbalance between the parties (see background above) and the potential for coercion. Further, there is a risk that both parties may be detrimentally affected by the use of RTDs as a management tool. For example, a tenant who would suffer hardship if they remained in the tenancy, may be deterred from breaking their agreement and minimising any potential losses, as the listing would make it difficult to access alternative accommodation.

Case Study

A single mother of 3 young children was renting for two years without any problems, when her premises were severely damaged by a storm. The owner/agent failed to repair the damage so the tenant applied to court for an order for repairs. She was successful and her rent was reduced until the repairs were completed. However, immediately after the hearing she was harassed by the agent with repeated property inspections, phone calls, letters, notices and threats of database listing. This tenant fears leaving the tenancy as the database listing will affect her ability to secure alternative accommodation.

TAS recommends that the owner/agent be able to apply for an order granting the right to list on an RTD only at the time of seeking an order for a substantial, quantifiable financial loss at the end of the tenancy.

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

A person should only be listed in certain restricted circumstances (see 48 above). Given that for the owner of the premises, the contract between themselves and the tenant is a commercial transaction, listing should be restricted to circumstances of financial loss.

Tenants should not be listed for non financial matters such as alleged failure to keep the premises clean during the tenancy. If nothing the tenant has done during the tenancy has led to a financial loss (such as the cost of professional cleaners) at the time of termination, there is no indicator of risk which would justify a listing.

The Court should retain the discretion to refuse approval to list, having considered the circumstances of the case. For example, there may be matters beyond the control of the tenant, or situations which have been caused or exacerbated by the owner/agent's actions.

Case Studies

- A tenant who returned to Western Australia (WA) after three years found that she had been listed on an RTD. The tenant had left a shared tenancy in WA in an effort to escape a domestic violence situation. The tenant had an outstanding debt of \$800.00 though the real estate agent had retained the bond. The tenant contacted the real estate agent that had placed the listing and was informed that her name would not be removed until the outstanding amount had been paid. Consequently the tenant, a welfare recipient, offered to pay the debt off at \$10.00 per week. While the real estate agent agreed to accept the payment they maintained their previous position not to remove her name from the database.
- A tenant had a good relationship with her agent until they got into a dispute over a broken soap dish. The tenant maintained she did not cause the damage as she believed it was caused by age and natural deterioration. The agent served her with a breach notice, insisted she pay for a replacement dish and sent a tradesperson who would bill her for the cost. The tenant refused the tradesperson entry as she did not accept liability. The agent served the tenant with a termination notice and the tenant vacated the premises because she felt that their previously good relationship had broken down. Some time later the tenant learned that the agent had listed her on a tenant database 3 weeks after service of the termination notice, citing an amount owing of more than \$5,000. Yet the Court order for bond disposal in relation to this tenancy was for the entire bond to be returned to the tenant.

Pursuant to *section 71(2)(b)* of the *RTA(WA)* the court may take the circumstances of the case into consideration in deciding whether to terminate a tenancy. This reflects the seriousness of both removing a person from their home and severing a legally binding contract. When tenancies are simultaneously terminated and listed on an RTD, the consequences extend past a remedy to the owner into the realms of punishment into the future. This should only happen in the most serious of circumstances.

TAS recommends that the circumstances of the case should be considered by an independent, objective arbiter (the Courts) before an RTD listing allowed.

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

Yes. It is simply a matter of natural justice that the tenant be informed of any decision which may lead to significant detriment and that they be provided an opportunity to resolve the problem which led to the decision. The principles of natural justice are enshrined in the breach notice provisions of the *RTA (WA)*.

It is in the interests of all parties to resolve difficulties as amicably and expeditiously as possible. A process, similar to the breach notice process, should be established for owner/agent's to notify of their intention to list a tenant on an RTD.

TAS recommends that owners/agents be required to provide 14 days written notice of an intention to list a tenant and the reason why.

This would provide an early opportunity to address any misunderstandings or mistakes. It would also provide notice of the substance of the owner/agent's claim should the matter not be resolved within that time and a court application become necessary.

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

Many RTD listings are fundamentally unfair because of the lack of informed consent by the tenant for exchange of their personal details. The forms required to be signed by applicants at commencement "bundle" consent for a number of things, without clear explanation being given to them on the implications (see 13 above). In addition, prospective tenants may have no choice but to agree to checking and listing on RTDs because they otherwise face homelessness. If they refuse, their application may be refused. It is usually only later (sometimes years later) that they realise the significance of the documents.

TAS is aware of cases of mistaken identity, people who have been listed for taking legal action to secure their rights, tenants who have been listed for trivial amounts and tenants who have been listed despite paying all their debts in full.

Case Study

Five years ago a tenant in a mining town vacated his tenancy and provided a forwarding address. His bond money was returned and there were no additional costs. He was recently seeking rental housing again when he learned he was on a tenant database. He followed up with the agent who had listed him. He was told he owed money for a water bill, but this had never been raised with him previously and the agent was unable to provide any documentary evidence of the debt. He remains listed.

In such cases, tenants can face considerable difficulties accessing housing. This may result in increased costs for example in having to pay higher daily costs for accommodation in hotels, washing at Laundromats, or storing their furniture. In addition tenants may also suffer the costs of attempts to clear their name (see 31 above). Some tenants suffer embarrassment from the stigma attached to the listing. Even if a tenant is successful in challenging a listing if they return to their local agent to make another application, there may be a risk that the tenant will be seen as troublesome. Such risks are heightened in rural and regional areas where there is little choice of real estate agencies.

TAS recommends that tenants who have been unfairly listed have the right to seek compensation for associated losses.

The risk of unfair listing would be significantly reduced if a Court order were required and the court order should be worded to provide for removal upon payment in full.

TAS recommends provision for (former) tenants to apply to Court for removal of their name from an RTD.

See also 58 below.

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

Given the serious consequences of an RTD listing, the tenant should be notified at the time of listing. As discussed above, the requirement for a Court order prior to listing would resolve issues with notification. However, should the Ministerial council not accept TAS' submission on that point, TAS submits that the tenant should be notified by the listing agent, with the RTD themselves confirming the listing and providing a copy of the details in the listing within 14 days.

Arguably RTDs are currently in breach of National Privacy principles because they do not routinely advise tenants that a listing has been made. As discussed above, many only find out that they have been listed when they make subsequent applications for tenancies.

As so many people were listed before the new *Privacy Act* protections were implemented, all RTDs should be required to take reasonable steps to contact all previously listed persons and advise them of their right to have the listing reviewed. Any listings which cannot be verified with the agent who originally listed the tenant, and any persons listed who cannot be contacted, should be removed from RTDs.

TAS recommends that any future legislation to regulate RTDs is specifically retrospective to ensure that tenants who have been listed in the past have not been listed unjustifiably.

See also 17 above

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

Yes. Many people have been listed over the years without their knowledge or consent and there is a need for a nationally consistent framework for RTDs with property managers being required to notify a prospective tenant if they are listed on an RTD. This may provide the only opportunity for some tenants to learn about their listing and take steps to correct unjust, incorrect and out-of-date listings.

Case Study

A prospective tenant contacted TAS as a result of twenty unsuccessful private rental applications. The prospective tenant believed that her status as a single mother was the cause of each refusal. The real estate agents had informed her that they were not required to provide reasons for declining applications. The prospective tenant stated that she had not experienced difficulties leasing premises prior to having children.

TAS recommends that property managers be required to provide reasons for refusing an application, and that penalties be applicable for failure to notify of an RTD listing.

See also 17 above.

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?

See 31 above. Arguably it is a breach of *National Privacy Principal 6.2*, to make excessive charges for access to personal information, or to charge anything for lodging a request for access to personal information.

The actual cost to an RTD to provide access to personal information would be minimal. This is due to the very nature of electronic databases and the continuing emergence of technology, which increases efficiency and accessibility of huge amounts of information. The greater cost would lie in the initial uploading of information from owners/agents. This is recouped through membership fees and sale of associated products to owners/agents, apparently at a rate sufficient to generate healthy profit and growth in the RTD industry.

In these circumstances, it is never reasonable or appropriate to charge tenants anything to access information which *essentially* belongs to them, but which is being traded by, and for the exclusive benefit of, other parties. This is especially so in cases of an RTD listing which has been made without the knowledge or informed consent of the tenant.

TAS recommends that an individual's access to information in relation to an RTD listing should be free of charge and readily accessible.

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

It is in the interests of all parties to attempt to resolve disputes informally and as amicably as possible and some allegations of breach can easily be resolved by mutual cooperation of the parties.

However, it is essential that a formal and nationally consistent dispute resolution process be established for those disputes which are not resolved at this first step. The most effective and efficient way to achieve this is to establish specific provisions within State tenancy legislation.

As discussed at 33 and 48 above, in considering an RTD related dispute, the onus of proof should reside with the listing owner/agent and the Court should have the power to consider all the circumstances in reaching its decision.

In implementing legislation to regulate RTDs, it is also necessary to ensure appropriate attention is given to addressing incidental matters. For example *TAS recommends*:

- ***That relevant definitions are established. In particular the definition of an RTD should encompass both internal and external electronic databases.***
- ***That tenants who have been listed in the past and remain listed on an RTD be provided with legislative protection.***
- ***That provision be made for compensation for losses linked to an unjust listing.***
- ***That provision be made for automatic removal of an RTD listing upon payment in full of any monies owing, in order to limit the need for a tenant to make an application to the Court/Tribunal for an order to remove***
- ***That tenants may authorise in writing for their own agent/advocate to make enquires of RTDs and act on their behalf in relation to disputed listings.***
- ***That owners/agents be required to keep an accurate, up to date separate record of any listings they have initiated, in addition to the information being kept on individual tenant files which may not be easily accessible (for example if archives are kept off site).***
- ***That appropriate public education strategies are designed and implemented in order to ensure all relevant parties are aware of their rights and obligations, and the risk of dispute is therefore minimised.***

For further discussion and recommendations on dispute resolution, please refer to 33, 48, 52 and 53 above.

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

As discussed and referenced at 58 above a listing should require a Court/Tribunal order. In addition *TAS recommends*:

- ***Provision for the listing to be removed upon the remedying of the issue which led to the listing.***
- ***Provision for automatic removal from the list after the passage of 2 years, in order to ensure that the information contained on RTDs is accurate and up to date.***
- ***Provisions to ensure that the onus of proof that listing or continued listing is justified, lies with the owner/agent who initiated the listing.***

- ***Provisions which require written confirmation by the RTD to the tenant, within 14 days, that a listing has been removed subsequent to a Court/Tribunal order.***
- ***Provision for the Court/Tribunal to hear an application from a tenant, a prospective tenant or former tenant for the removal of a listing on the grounds that***
 - ***the problem which led to the listing has been rectified;***
 - ***the listing was vexatious or frivolous***
 - ***their identity has been mistaken***
 - ***the listing is more than 2 years old***

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

A maximum timeframe of two years be established to limit the life of listings (as recommended in the Lavarch Report of Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases, August 2002, p16). Two years is a reasonable period to ensure information kept is “up-to-date” while still meeting risk management imperatives of RTD members. See also 36 above.