

Submission to the

**Ministerial Council on
Consumer Affairs Standing
Committee of Attorneys-
General**

on

**Residential Tenancy
Databases**



Tenants' Union
of queensland inc.

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Table of Contents

1. INTRODUCTION	1
2. EXPERIENCE WITH TENANT DATABASES	1
3. OVERVIEW – TENANT DATABASES AND THEIR OPERATIONS	2
WHAT ARE TENANT DATABASES?	2
DO TENANT DATABASES HAVE A ROLE IN THE MARKET PLACE?.....	3
4. BROAD POLITICAL ENVIRONMENT AND HOUSING POLICY ISSUES.....	4
5. WHAT ARE THE PROBLEMS WITH TENANT DATABASE OPERATIONS?	6
VERACITY OF LISTINGS.....	6
(a) <i>Did the breach occur?</i>	6
(b) <i>Was the matter substantive or not?</i>	7
(c) <i>Is the matter a breach or not?</i>	7
UNDERMINING RESIDENTIAL TENANCIES LEGISLATION	7
LACK OF INFORMATION TO LISTED PERSONS AND COST TO ACCESS	8
LENGTH OF LISTINGS	8
ENTICEMENTS FOR TENANTS TO PAY.....	9
6. THE CURRENT RTD REGULATORY ENVIRONMENT	9
7. OUTSTANDING ISSUES AND RECOMMENDATIONS FOR CHANGE	12
ATTACHMENT ONE.....	14
ATTACHMENT TWO.....	15
ATTACHMENT THREE	16
ATTACHMENT FOUR	21
ATTACHMENT FIVE.....	22

1. Introduction

The Tenants' Union of Queensland Inc. is a statewide community-based, non-profit, organisation incorporated under the Queensland Associations Incorporation Act 1981. The Tenants' Union was formed in 1986, providing services for and representing the interests of residential tenants in Queensland. The Union aims to improve and protect the rights of all people who rent their home including boarding house and caravan park residents.

The Tenants' Union offers support to tenants by improving access to legal advice, information and resources about residential tenancy law and tenants' rights; represents tenants views and concerns to government, industry groups and the media; and, campaigns for better tenancy laws and improved housing condition for all tenants.

2. Experience with Tenant Databases

The Tenants' Union operates a full-time telephone advice service, offering advice, information, and advocacy assistance to tenants. The North Queensland office also operates a limited telephone advice service for tenants in the North Queensland region.

The Phone Advice Service responds to approximately 7000 enquiries from tenants throughout Queensland over a year. The issue of tenant databases is one the Union has been concerned about since the mid-1990s. We have actively lobbied both state and federal governments (through work with the National Association of Tenant Organisations) for greater consumer protections regarding the operation of tenant databases.

The Union has experienced an increasing number of tenants being adversely affected by databases. Once listed, the action a tenant can take to have their name removed and/or correct any inaccuracies in the listing is extremely limited. The table below shows the number of telephone advice calls taken by the Tenants' Union over the last two years. The numbers in the table underestimate the volume of calls as they do not record those where the caller's primary query is in regard to another issue but they also ask about the risk of being placed on a database list. These types of questions from tenants have increased, indicating an increasing impact in regard to the fear of database listings.

Whilst it is impossible to quantify the effect of such a fear, it is clear that tenants are at times 'trading off' their rights because of the fear of a listing. In this way, tenant databases have an effect of undermining tenancy law.

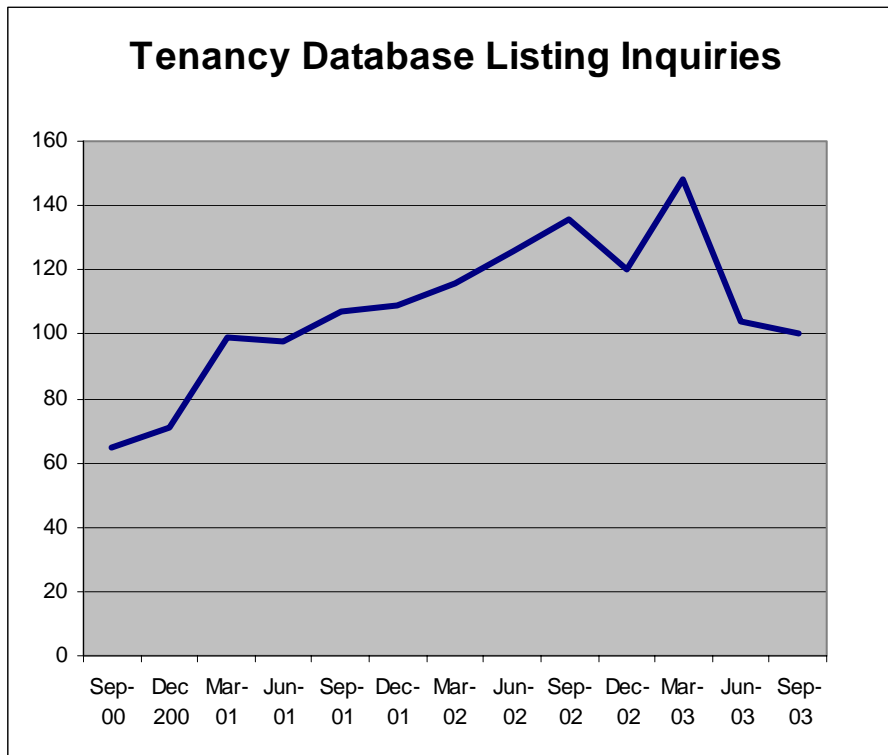


Table 1: Number of phone advice calls taken over two years which are directly regarding tenant database listings.

3. Overview – Tenant Databases and their Operations

What are Tenant Databases?

Tenant databases have emerged within the residential rental industry over the last ten years. Their emergence is a result of the regulation of credit reference organisations and restrictions placed on access to individuals' credit history, through the Commonwealth Privacy Act 1988.

Prior to this, real estate agents were able to access credit information on prospective tenants, which they used in assessing their tenancy applications.

Tenant databases are private companies which hold personal information about tenants. They purport to offer risk management and debt reduction assistance to their members, who are mainly from the real estate industry. Some database companies offer membership to private lessors but usually only if they use real estate agents to manage the property. Recently, one database marketing itself to self-managing lessors emerged but it is yet to develop as a market force.

It can be in the commercial interests of database companies to promote negative stereotypes of tenants and exaggerate the problems faced by lessors. Tenant databases often market themselves to potential members based on the number of persons listed and therefore can have an interest in listing as many people as possible. The Tenants' Union of Queensland believes that the risks promoted by database companies are generally overstated, both in a macro sense but often also in a micro sense about a specific tenant.

There are essentially two ways in which members use the database lists. Firstly, when applications for tenancies are received, the prospective tenant's name will be checked to ascertain whether they are a 'bad' tenant. Secondly, a member of the database can enter the tenant's name on the list of 'bad' tenants.

In relation to members checking applicants for tenancies, one company – the TICA Group (TICA) – has recently developed a new database (the ‘enquiry’ database) which records the names of all prospective tenants checked for ‘bad’ tenant status. This database is likely to be recording hundreds, possibly thousands, of names daily. The information on that person remains on the tenant ‘enquiry’ database whether or not their application is successful.

Most often tenant databases are either 'tenant history' lists or 'bad' tenant lists. However, even those claiming to disclose tenant histories, because of the time consuming nature of entering general histories onto the lists, effectively operate as lists of so called 'bad' tenants¹.

Do tenant databases have a role in the market place?

Industry argue that the role of tenant databases to be that of risk management and debt recovery. Having gone virtually unregulated however, they have also been used in other ways, not least of all as a tenancy management tool. Used in this way, they often have the effect of undermining the state/territory based legislation since they are used to ‘encourage’ tenants to cease or engage in certain actions. With the growing reliance of the private rental market and the increasing communication capacity of information technology, there is no doubt that being placed on a tenant database can have a profound affect on a person’s ability to access housing in the private rental market.

As housing is a basic right and necessity, sanctioned by the Universal Declaration of Human Rights to which Australia is a party, particular care should be taken to ensure people can access this right. Without appropriate housing, engagement with other essential social institutions such as education, employment, health care is severely limited.

There is evidence that many people are being forced to seek crisis accommodation as a result of a listing on a tenant database. In a rudimentary piece of research², the Queensland based Tenant Database Action Group conducted a snap shot survey of Supported Accommodation and Assistance Program (SAAP)³ providers and clients over one week in December 2001. The aim of the survey was to ascertain the impact of tenant database listings on SAAP services. Most of the client respondents were families, single parents or young people. The key findings were as follows:

- Nearly half of the clients who responded to the question on whether they were listed on a tenancy database answered that they were;
- Of these, approximately three quarters of them indicated that this was the primary cause of their homelessness; and,
- Services indicated that there was an increasing number of people accessing accommodation due to databases - with the large majority of services indicating that at least 5 people per week were accessing due to being listed.

As a result of the severe consequences of listings and the ability of lessors and managers to assess tenancy applicants by other methods, the Tenants' Union of Queensland argues there is no role for tenant databases in the market. Tenant databases are already used as a supplement to other methods of assessment, although they usually have a ‘veto’ effect in that when everything else checks out

¹ This comment was made to the Tenants' Union of Queensland by the Director of MIS Barclays in a meeting in May 2001. We also have this perception from our own work.

² ‘The impact of Tenant databases on homeless services’ January 2002

³ This Program, a joint Commonwealth/State/Territory program, is the government’s primary response to matters of individuals and families’ housing crises.

okay, a tenant will be refused if their name is found on a database list. This will usually be the case no matter what the record says. It appears the name being on the list, whether a debt is listed or not, is enough for a person to be denied a property.

The Tenants' Union of Queensland believes there are many tenants who have been wrongfully, trivially or vexatiously listed. However, it is clear there are some tenants listed who have left a tenancy in debt and have been listed for this reason. Sometimes these debts are cleared immediately, whilst other times they may not. It could also be argued that even when a tenant has previously breached an agreement it is not necessarily an indication of being a bad risk in a new tenancy. Even those tenants who are listed for serious defaults of an agreement (perhaps when they broke a fixed term agreement) may have numerous successful prior tenancies. During the tenancy for which they were listed they may have lost a job, had a relationship breakdown, suffered serious health issues etc. It can be during such a crisis a tenant will default on an agreement. However, having moved on from the crisis they may no longer be a risk to an investor.

The Tenants' Union does not agree that tenant databases are a legitimate debt reduction or risk management tool. The severe consequences of a database listing and their effect of undermining tenancy law must be considered when deciding if they have a place in the market.

However, if the government allows for their continued existence, then we call for greater control of their listing practices. The next sections will outline the key issues with tenant databases and the areas requiring greater protection in the current regulatory environment.

4. Broad Political Environment and Housing Policy Issues

Nationally, just over 27%⁴ of all Australian households rented their home in 1999/2000. Whilst in the past the private rental market may have been a transitional tenure on the way to home ownership, over the last decade or more it has become an increasingly permanent and long term tenure for many people. Overall, more people are being housed in the private rental market and those people are staying for longer periods of time. By 1994, about 40% of all renters had rented for more than ten years⁵.

Due to issues such as the history of private rental in Australia, funding constraints and changes in attitudes about the role of governments in social policy issues, governments are also increasingly relying on the private rental market to house low income households⁶. It appears that low income households are the ones which are disproportionately affected by the shift into long term tenure in the private rental market.

According to the Affordable Housing Research Consortium,

'the private rental market is playing an increasingly important role in the overall housing market. Renting is becoming a permanent tenure for a significant and growing proportion of the population.....Although the rental market has grown substantially in the 1986-1996 period – much faster than owner occupation and the number of households – the growth has been highly uneven across rental segments or submarkets. The stock of defined low-rent dwellings actually fell over this period by 28%. This represents an overall stock decline of 70 000 dwellings. Over the same period, the number of low and moderate income households grew strongly, at rates

⁴ p245/6, 'Year Book Australia 2003', Australian Bureau of Statistics, Commonwealth of Australia, 2003

⁵ Wulff, M and Maher, C (1998) 'Long-term renters in the Australian housing market', Housing Studies Vol. 13, no. 1.

⁶ Seelig T, *Private rental housing provision in Australia: A Structural Analysis*, presented to the 2001 National Housing Conference, Brisbane, published at http://www.housing.qld.gov.au/nhc2001/pdf/seelig_tim_32.pdf

*exceeding 70%⁷..... Effectively, a de facto policy exists about the private rental market, and its role in being an appropriate place for low income households to seek long term housing solutions.*⁸

In a policy sense, this is exemplified by the substantial shift in housing assistance, with Commonwealth expenditure on Rent Assistance (CRA) outstripping that of the Commonwealth State Housing Agreement (CSHA). In the ten years to 2003/04, expenditure on CRA increased by 7% in real terms to \$1.92B whilst base grant funding through the CSHA decreased by 54% to \$1.28 over the same time⁹.

There has been no analysis of listed persons income scales and whether households from particular income scales are more likely to be listed. However from our own work, it appears tenants across a spectrum of income scales are listed and this reflects the range of reasons why tenants are listed – vexatiously, before disputes are settled, for trivial matters or for debts owed. However, it would be reasonable to assume if those on low incomes have few choices but the private rental market and they are in increasing housing stress due to the loss of stock at the low cost end, that they may be particularly vulnerable to be listed for debts owed.

In summary, low income households without special needs are increasingly being force into long term tenure in the private rental market, with few other options. At the same time, there is increasing housing stress on these households due to the declining stock at that end of the market, which must be forcing some of these households into unaffordable premises. Under these circumstances, it is reasonable to assume that low income households will be increasingly vulnerable to database listings based on affordability issues.

Concurrently, private rental households across the income spectrum are vulnerable to listings relating to the general unfair practices of some database companies (see section below). However, the strengthening of privacy and other provisions regarding how personal information is used will not deal comprehensively with tenant database issues.

We argue it is for the government to take a role in addressing what is fair practice regarding the listing of persons on databases. However, this role should not only relate to issues of privacy and use of personal information but also what the government regards as fair and reasonable in listing a person who has breached an agreement and left owing a debt. Further, policy responses to those ‘legitimately listed’ on tenant databases must be developed otherwise these people will continue to be vulnerable to homelessness and increasingly relying on crisis housing, as the TDAG research suggests¹⁰.

There are a number of issues which, with the shift in housing assistance to the private market and more limited access to public housing except for those with special needs, governments have less control over. These issues include standards of housing, rent control and access (who gets in and who doesn’t). Tenant database have a direct impact on the issue of access to housing since they can virtually exclude a person from the private rental market. The Tenants' Union of Queensland argues that with the growing reliance on the private rental market and increasing public money in this sector, greater protections for tenants around these issues should be developed.

⁷ Yates J, and Wulff M., cited in Stage one Report of next citation.

⁸ p.11, ‘Affordable Housing in Australia; Pressing Need Effective Solutions’, Affordable Housing Research Consortium, September 2001

⁹ ‘Rent Assistance, Does it Deliver Affordability’, National Shelter, September 2003

¹⁰ ‘The impact of Tenant databases on homeless services’, Tenant Database Action Group, January 2002

Whilst not identifying the issue of access or databases, Seelig¹¹ (2001) argues a more interventionist and supportive role for government in the private rental sector. The Tenants' Union of Queensland sees this area of consumer protection from the unfair practices of tenant databases as a prime example of an area requiring greater intervention.

5. What are the Problems with Tenant Database Operations?

Different states and territories report varying levels of difficulties with the operation of tenant databases. Tenants in Queensland and New South Wales are by far the most adversely affected by the unfair practices of database companies. Other jurisdictions remain concerned about databases but have not had the volume of complaints or problems reported.

It is unclear whether the concentration of problems in these states is the result of the practices of particular database companies or other factors.

However, from recent discussions with other states, in particular Western Australia, it appears at least one company is attempting to secure new membership and a market share in that state. This could be interpreted as a flow on effect from the restrictions being introduced to database listings in Queensland and a saturation of the market there and New South Wales. If we are correct, in the near future the small number of tenant database issues experienced in states like Western Australia will soon mushroom.

Having been virtually unregulated, a range of problems have emerged with the practices of tenant database companies. In the absence of regulation, decisions to list tenants are at the sole discretion of the database company member (usually real estate agents) and the company. Usually, there is no independent adjudication of the alleged actions and as a result tenants have been listed for trivial reasons, vexatiously, in circumstances where the tenant may dispute the listing, or with incomplete details and resulting in mistaken identity. Some of these issues are outlined in more detail below. (This next section does not take into account the recent changes to Queensland tenancy legislation regulating the use of tenant databases. We have attempted to critique these changes and how they may effect the following issues, in the next section - 'The Current RTD Regulatory Environment'.

Veracity of Listings

The issue of veracity usually involve a number of elements. These elements are often intermingled but to try to exemplify matters of veracity we have broken them down into three parts. The three elements we have identified are: (a) whether or not the alleged breach occurred; (b) whether the matter was substantive or trivial; and (c) whether or not it should be regarded as a breach. These matters are discussed separately below.

(a) Did the breach occur?

Some tenants are listed for matters they say did not happen. For example, the property manager may assert the tenant left the property with damage at the end of the tenancy but there was no tribunal hearing substantiating the claim. Other matters include things which are more subjective such as allegations the tenant did not mow the lawn and was in breach of their duty to keep the property clean.

¹¹ p.18 Seelig T (2001), *Private rental housing provision in Australia: A Structural Analysis*, presented to the 2001 National Housing Conference, Brisbane

(b) Was the matter substantive or not?

These matters sometimes crossover with the heading above. Even if there was a breach of the agreement, does it warrant a listing on a tenant database and the severe consequences that brings? For example, the by-laws of a unit apartment block state tenants cannot hang clothes over the railings of the balcony. An offending tenant would technically be in breach of their agreement but is the matter serious enough to warrant a listing on a tenant database?

(c) Is the matter a breach or not?

This matter involves the timing of listings and how they interact with the tenancy legislation in the jurisdiction. The listing practices of database members vary widely, due to both their individual practices and the expectations of the database company. Some members list when a Notice to Remedy (or the equivalent) is issued, others will list at the conclusion of a tribunal hearing and others sometime in the middle. If a tenant disputes a breach and they are using the process set out in the relevant tenancy legislation, we believe they should not get listed during the process since the matter is under dispute.

Further, most tenancy legislation sets out a period of time passed the due date to pay rent (usually 7 – 14 days) before a Notice to Remedy breach can be issued. Some database companies and property managers argue the tenant is in breach as soon as the rent is late and list or threaten to list a tenant at that time. In this way the jurisdiction's tenancy legislation is undermined and databases are used as a mechanism to control the behaviour of tenants (see next topic).

Another example of these matters is a simple bond dispute. There may be a disagreement between the parties about whether minor damage, such as oil on the floor of the garage, was there prior to the tenant moving in or not. In the end (assuming a weekly rent of \$210/wk) a tribunal may, for example, award the lessor \$50 from a tenants' bond for cleaning with the tenant receiving the balance of \$790. The property manager could argue that technically this is a breach of the agreement as the tenant didn't leave the place in the same condition as it was when they got it. However, the tenant did not believe they should be liable and used the processes set out in legislation. The matter was resolved and the money would have been immediately paid to the lessor out of the bond. We do not believe these matters should be listable but there is currently no way to prevent such a listing (not taking into account the recent amendments to Queensland tenancy law).

The lack of any independent assessment of the veracity of allegations can end up in listings which are trivial, vexatious and/or questionable.

Undermining Residential Tenancies Legislation

The use of tenant databases can undermine the intent of tenancy legislation in states and territories. Often the threat of a database listing will result in tenants 'trading off' their tenancy rights in order to avoid a listing. The dire consequences of a listings on a database - to be virtually excluded form the private rental market - means tenants will often acquiesce to a property manager's demands rather than express their rights.

The use of tenant databases adds another process by which agents can manage properties, albeit one which falls outside of tenancy law. This process can be used to coerce tenants to carry out particular actions, even those not compatible with tenancy law provisions.

With virtually no control over when or what a tenant can be listed for, some tenants avoid taking up a dispute with property managers to ensure they are not listed. In short, the threat of a database listing often undermines the tenancy law provisions set out in a particular jurisdiction.

The following exemplifies these matters. Until recently, at least two database companies were issuing pro forma letters to their members which could be sent to tenants when they were four days late in rent payment. This time period is shorter than that allowed for in any jurisdiction we are aware of, for the sending of a Notice to Remedy for rent arrears. The letters mention the potential to be listed on a tenant database if the matter is not attended to promptly¹².

Lack of Information to Listed Persons and Cost to Access

It appears that most tenant database companies make no attempt to inform persons of a prospective or recent listing. For those listed, it can be sometimes be months or years before they become aware of a listing, and only after a number of knock backs on tenancy applications.

At least one database company, namely TICA, tells their members not to give prospective tenants any information about a listings, other than there is one, if one is found¹³. Rather, they are told to refer the tenant to the TICA 'helpline' which costs \$5.45 per minute. It appears the motivation for this is to generate income.

Listed persons can allegedly gain access to information held on them by TICA by sending \$11 to the organisation. TICA state they will get the information within 10 working days. This turn around time seems slow given the nature of the database, which is meant to give quick on-line access to agents. Further, this seems to be a secondary point of contact with most literature encouraging the use of the 'helpline'¹⁴.

Prospective tenants often get limited information at the point of applying for properties too. Typically, prospective tenants are asked to sign tenancy application forms for assessment of their suitability for a property. Usually, tenants sign the bottom of the application form which also gives their consent to the information being checked on a tenant database and to their details being listed on a tenant database if they default on their agreement.

Tenants sign these forms as an offer on premises they are attempting to secure as a home. Most often, prospective tenants are not aware or do not understand the implications of what they are consenting to. Even when they do, they have little choice but to sign the application form, because in all but the exceptional case, they will not get the tenancy otherwise.

Length of Listings

The length of time a tenant remains on the list is a major concern. Some tenants stay on the tenant database lists for longer than criminal convictions are recorded. Even when a database company has policies stating when tenants' details will be withdrawn from the database list, to date they have been virtually impossible to enforce. Further, some companies' removal policies are effectively a lifetime listing, removing any incentive for tenants to re-pay legitimate debts. TICA's policy states three timelines for listings¹⁵. We argue that these listing timeframes are really lifetime listings because the name is never withdrawn from the database, leaving the implication a default has occurred at sometime. It is our experience that it is enough for a tenants' name to appear on the list for them to be denied a tenancy.

¹² See Attachment Five.

¹³ See p2 of Attachment One, 'Advising a Tenant they are Listed'.

¹⁴ See Attachment One.

¹⁵ See Attachment Two for a copy of these.

Without regulation, no control over length of listing exists. This is true even in the current Queensland environment, since the government in drafting the amendments stated that regulating the operators, which are often national companies, was not their intent. They considered the length of listings an issue with the operators of database companies and more appropriately the jurisdiction of the Commonwealth government¹⁶.

Enticements for Tenants to Pay

In negotiations with listing agents about removal of listings, tenants are often given incorrect information. Listing agents will lead them to believe if they pay the money their names will be removed from the list. On this basis some tenants agree to pay, whether they believe they are responsible for the debt or not. They decide the amount being demanded is worth the resolution of the listing.

However, it is untrue that tenants are taken off the list if they pay the alleged debt. Database entries are amended to show the debt has been cleared, but as noted above, database companies often have policies about the length of listings and they will not remove the listing because a debt has been paid¹⁷. Even in circumstances where agents want to take a name off the list, for whatever reason, they are usually unable to do so. (Please note, changes in TICA's actions have been noted on some occasions in Queensland, subsequent to the 'tenant database amendments' to the state tenancy legislation. It appears TICA have allowed agents to remove listings when they do not comply with the state tenancy legislation).

6. The Current RTD Regulatory Environment

This section looks at the problems with tenant databases set out in the previous section, and the capacity for the Commonwealth Privacy Act 1988, Trades Practices Act 1974 and Queensland Residential Tenancies Act 1994 (with the 'database amendments') to respond to these issues. The end of this section will highlight the remaining gaps.

¹⁶ Discussed with the Residential Tenancies Authority during the consultation period.

¹⁷ See Attachment Three for evidence of this matter.

This table outlines the problems with tenant databases and how effectively these three pieces of legislation can deal with them

Area of Concern	How effective is this legislation as a remedy		
	<i>Trades Practices Act</i>	<i>Commonwealth Privacy Act</i> ¹⁸	<i>Queensland Residential Tenancies Act</i> ('database amendments') ¹⁹
<p>Veracity of listings:</p> <p>(a) Did it occur?</p> <p>(b) Was it substantive?</p> <p>(c) Was it a breach?</p>	<p>Some issues of accuracy may be dealt with under this legislation. However, actions using this legislation may succeed against the listing member (property manager) but are unlikely to succeed against tenant database operators²⁰.</p>	<p>This area is the subject of a complaint by us to the Privacy Commissioner and currently awaiting determination. We argue that a matter should not be listed unless it can be substantiated by a tribunal order, otherwise accuracy cannot be guaranteed.</p> <p>(a) There is limited capacity for the CPA to address issues of accuracy if there is no requirement for substantiating evidence such as a tribunal order. Without the requirement for a tribunal order listing such as 'tenant did not keep the premises clean and the yards mowed' could still occur. However, if the OPC were to agree that a tribunal order is required in order to substantiate breaches, CPA will deal with this matter.</p> <p>(b) The CPA will not deal with these matters. The focus of the CPA is the truth and accuracy of information held, not on the seriousness of the matter.</p> <p>(c) There is no capacity for the CPA to deal with this issue unless a tribunal order is required to substantiate matters. However,</p>	<p>For Queensland tenants listed after commencement, the legislation is quite successful in gaining consistency in the reasons for listing²¹ as the Act sets out in what circumstances a listing can be made can and can't be listed. For those listed prior to August 1, 2003 they have only 12 months to make use of these provisions. If they are not aware of the changes and do not take action before August 1, 2004 they may remain listed for reasons inconsistent with the legislation.</p> <p>Further, persons who were listed outside of Queensland (whether they reside here or not) will not gain any benefit from the legislation.</p> <p>(a) These matters are being reasonably well dealt with under the legislation.</p> <p>(b) These matters are reasonably well dealt with as the listing matter has to be one allowed for under the legislation²².</p> <p>(c) These matters are well dealt with as the legislation sets out a listing can only occur when the agreement is terminated.</p>

¹⁸ The Tenants' Union of Queensland is awaiting the outcomes of four representative complaints against TICA, lodged with the Office of the Privacy Commissioner. Therefore it is still too early to tell how effective some areas of Privacy legislation will be.

¹⁹ The Queensland legislation was only proclaimed on August 1, 2003. The views expressed here are from our knowledge of the Act and the limited experience of the amendments to date.

²⁰ This legislation has the capacity to deal with this matter although the TUQ believes the 'benchmark' for listing is too low under the legislative amendments.

²¹ We are not specifically commenting whether we agree or not with the reasons set out in the legislation for listing are effective, rather the concept of limiting the circumstances of listings.

²² see note 15.

		if the OPC were to agree that a tribunal order is required in order to substantiate breaches, CPA will deal with this matter.	
Undermining tenancy legislation	Not effective.	Unless the Privacy Act compels the use of tribunal orders to ensure the accuracy of listings, this matter will not be dealt with under this Act.	By limiting the reasons for listing, many of these issues will be addressed. However, we are still aware of tenants being threatened with listings. To that extent there still exists the problem of the 'trading off' of rights due to fear of a listing.
Lack of information to listed persons	Not effective.	This is the subject of one of the complaints before the OPC. There is potential for this issue to be addressed under this legislation.	It is yet to be seen how effective the legislation is in this regard. Whilst there is an obligation on the listing person to give notice about a proposed listing, this is likely to be after a tenancy agreement has ended. The listing person may not have the correct forwarding address.
Cost to Access information	Not effective.	This is the subject of one of the complaints before the OPC. It is expected that this issue can be addressed through this legislation.	This issue is not addressed by this legislation.
Length of listings	Not effective.	This area is subject to a complaint currently before the OPC.	Not effective.
Enticements to pay	Action may be successful against an agent but not an operator ²³ .	Unless the OPC compels the use of tribunal order to ensure the accuracy of listings, this matter will not be dealt with under this legislation.	This may not be addressed totally because of the capacity to list people without a court order in certain circumstances.
Other issues concerning this remedy	<p>Actions under the TPA are extremely lengthy and carry the risk of costs being awarded against unsuccessful actions. For this reason they are not practical for listed persons to use.</p> <p>Also, actions are likely only to be successful against the listing member and not the database operators.</p>	Limitations are those issues which extend beyond privacy, ie, issues which are not about the accuracy of the personal information being held but more about the accuracy of the issues, how substantive the matter was and at what point of time a listing can be made.	<p>No consistency for tenants across the country. Only tenants listed in Queensland are protected by this legislation. Those listed in Queensland prior to August 1, 2003 have only 12 months to challenge listings in certain circumstances.</p> <p>The actions of the database operators are not regulated by this legislation.</p>

²³ See Attachment Four.

Whilst each of the various pieces of legislation offer some relief, we believe there are still unreasonable gaps in the protections against the unfair practices of tenant database companies. The key gaps relate to:

- the veracity of information listed;
- what standard of proof of an alleged breach is required;
- what matters are serious enough to list a person for;
- how long listings should be allowed to remain; and,
- achieving consistency across the country in relation to listings.

7. Outstanding Issues and Recommendations for Change

The Tenants' Union of Queensland strongly argues for a national framework to provide consistent protections to housing consumers from the unfair practices of tenant database companies. We believe this is necessary because gaps exist in areas where protections are required and/or current remedies are either unworkable due to length of time or risk of costs. Further, greater protections are required because of the growing reliance on the private rental market as a long-term tenure, particularly for those on low incomes, and the increasing amount of public funds being injected into the private rental market through programs such as Commonwealth Rent Assistance.

The Tenants' Union of Queensland believe the key elements to National regulation should be:

- a framework set at the national level in order to address issues of consistency across states and territories;
- capacity to address and resolve grievances quickly, due to the immediate adverse impacts of listings on tenant databases;
- no or limited cost barriers to accessing remedies; and,
- enforceable remedies, such as through the Federal Magistrates Court.

Taking into account these elements, the Tenants' Union of Queensland suggests three models for regulation which are set out below.

Option One – Mandatory National Standards Model

The basis for this model is to implement either:

- a mandatory code under the Trade Practices Act 1974, enforced by the ACCC, or,
- national legislation that is overseen by an appointed regulator or ombudsman.

This approach would ensure consistent standards of practice binding all operators of tenant databases. Consumers who believe operators are in breach of the standards could take action by making a complaint to the relevant regulator. It is essential that listed persons are able to have a grievance dealt with quickly, and so it may be appropriate to include a direct right for individuals to take action through the Federal Magistrates' Court. Under such a model, it is important unsuccessful claimants are protected against orders to pay costs of the other party, unless such action is vexatious or baseless.

Options Two – the Commonwealth Privacy Act extended

This model involves amending to the Commonwealth Privacy Act by inserting a mandatory code on tenancy information that would regulate tenancy database

operators and organisations that exchange tenancy information²⁴. This would operate along similar lines to the credit reporting provisions in Part IIIA of the Privacy Act. Disputes would be dealt with by the Privacy Commissioner, but it would be important that disputes can be resolved more quickly than is currently the case for Privacy Commissioner complaints (owing to under-resourcing).

Option Three – National Standards enforced through the states and territories

This option requires the development of mandatory national minimum standards by the Commonwealth, States and Territories. These standards would then be implemented through relevant existing mechanisms in the States and Territories.

²⁴ Whilst the development of an Industry Code is possible under the current provisions of the CPA this would not be workable for consumers accessing remedies. It is not workable because the decision to develop a code is voluntary and at the discretion of the Industry. Further, such a Code would only cover parts of the Industry who voluntarily participate in its development. This means consumers with complaints would have to work out whether the database company is covered by the National Privacy Principles or the Industry Code. This type of multi-pronged process is too confusing.

Attachment One –

Attachment Two – TICA's policies on listing timelines downloaded December 22, 2003

How long will a default remain on the database?

There are three time periods that a tenant default can remain on the TICA database. These periods are three years, five years or indefinitely.

Three years

If a default is recorded with TICA for a breach of a tenancy agreement where no money has been lodged the recording will remain for three years after the recording was lodged. After the three years has expired and upon confirmation from the listing member that no monies are owing the comment will be changes to read "Tenancy History Only"

Five years

If a default is recorded with TICA is for a debt incurred and a dollar value has been lodged the recording will remain for five years after the debt was cleared. However once the debt is cleared TICA will record that the debt was cleared and the report will show the date it was cleared. After the five years has expired the debt amount will be removed and the comment will be changes to read "Tenancy History Only".

Indefinitely

Your default details will remain on the database until such time as the debt owed has been satisfied. This recording will show future agents how long the debt has been outstanding. It would be in your best interest not to fall into this area of the system.

Attachment Three – Copies of letters

Receipt Number: 452297

This is to acknowledge that [REDACTED] has Paid L.J.Hooker Beersleigh the amount of \$151 for the debt owed on the Property: 17 Jura Crescent Eden landing.

Now that she has paid the money we will at L.J.Hooker Beersleigh take her name off of the tenancy listing for bad tenants with T.I.C.A.

This is payment in full for the complete removal of her name and details from the T.I.C.A. database.

L.J.Hooker Principal: *[Signature]* Date: 7.12.01

[REDACTED]
29713 Country Meadows Circuit
46 - 48 Clarks Road
LOGANHOLME QLD 4129

L.I. Hooker
99 George Street
BENLEIGH QLD 4207

10 May 2002

To the Principal,

On the 7th December 2001, I [REDACTED] paid the amount of \$151 (receipt no. 452297) for the complete removal of my name and details from the TICA listing.

As of this date (10 May 2002) only the amount has been removed. My name and details still remain on the TICA list. You have failed to uphold your end of the agreement.

Please remove my name and details from the TICA list within the next 14 days and provide me with written proof else I will be contacting the tenant's union about the possibility of legal action.

[REDACTED]



Beenleigh

email: beenleigh@ljb.com.au
tel: (07) 3287 2412
www: www.ljb.com.au

13 May 2002

[Redacted]
1 of 13 Country Meadows Circuit
45 - 48 Clark's Road
LOGANBOULME QLD 4129

Dear Ms [Redacted]

Please be advised that once you had paid the amount of \$25,100 this was returned from
NCA. Unfortunately once your name has been entered on TICA your details will stay on
the listing for approximately 3 years. To confirm this information please phone NCA on
02 9243 3256.

When you are applying for any other rental properties please ask the agent to phone
Kimberly Scott our property manager and we will explain the circumstances.

Yours in Real Estate
L.J. Hooker Beenleigh

Fiona Harvey
Fiona Harvey
Property Management Team

COPY

13 June, 2002
Out Ref: \\Legal\O\wy Documents\Casework\██████████\LTR CHJD TICA.doc

The Public Officer
TICA Default Tenancy Control Pty Ltd
(ACN: 087400379)
PO Box 120
Concorde NSW 2137

By Registered Mail
and by Facsimile: (02) 9743 4044

Dear Public Officer,

Re: Removal of listing of ██████████ from tenancy database

We act for ██████████. On 7 December 2001 Ms ██████████ was provided with a written undertaking from L.J. Hooker Eeenleigh ("the Agent") that her name and details would be removed from the TICA Database. We enclose a copy of this undertaking.

Since receiving this undertaking she has been advised that her name and details will remain listed for 3 years. We understand that the Agent is a member of your organisation.

In accordance with the written undertaking provided by the Agent we demand from you the immediate removal of Ms ██████████'s name and details from the database kept by your company within 7 days of the date of this correspondence.

Failure to provide advice within the time specified above that ██████████'s name and details have been removed from your database may result in legal action against the agent and your company.

Yours faithfully,

Colin Hardle
Solicitor
per Anthony Austin



TICA Default Tenancy Control Pty Ltd

ACN : 087 400 379 ABN : 84 087 400 379
 Tel. (02) 9743 1500 Fax. (02) 9743 4844
 PO Box 120, Concord NSW 2137

Email: enquiries@tica.com.au

Web: www.tica.com.au

13th June 2002

Tenant's Union of QLD
 25 Robertson Street
 Fortitude Valley QLD 4006
 Phone : 07 32571411
 Fax : 07 32571136
 Attention: Colin Hardie

Re: [REDACTED]

Dear Colin

We acknowledge receipt of your letter and advise as follows:

1. The policies of TICA are clearly spell out on our web-site in relation to removal of information.
2. No member of TICA has any authority either expressed or implied to provide an undertaking that involves TICA or an undertaking that is against our policies.
3. Our member has adjusted the TICA database to show zero collars owing and to read "Tenancy History". This occurred sometimes ago.
4. TICA is not bound by an undertaking by any member where such undertaking does not comply with the policies of TICA. Furthermore TICA cannot be bound by an undertaking that it has no knowledge of.
5. The policies of TICA have been designed to comply with the Trade Practices Act and the Privacy Act. TICA is very conscious of these Acts and adheres to them.
6. As a sign of good faith TICA will again notify all members of its policies and procedures. TICA will again advise members of the requirements of the Trade Practices Act and Privacy Act.
7. Notwithstanding the above TICA provides no more information to any member than the information that would be discovered through a properly and honestly completed application form.

Yours faithfully

Reginald Joshua
 General Manager
 The TICA Group



Attachment Four

Trades Practices Legislation and Fair Trading Acts

In 2001 the Tenant Database Action Group (TDAG), an alliance of tenant advocates auspiced and co-ordinated by the Tenants' Union of Queensland, engaged four final year law students to investigate the potential legal remedies to unfair RTD listings. The report²⁵ looked mainly at three areas of law. One of these areas was the application of Trade Practices legislation and the Queensland Fair Trading Act 1989²⁶ to tenancy databases.

Within the Trades Practices legislation, the researchers focussed particularly on the application of misleading and deceptive conduct; undue harassment and coercion; unconscionable conduct; and, secondary boycotts for the purpose of causing substantial loss or damage. The Report concluded that:

'the Trades Practices Act and the Fair Trading Act can potentially address some of the consumer problems presented by the operation of tenancy databases. Firstly, those tenants who have been listed with demonstrably incorrect information may successfully bring an action against the real estate agent for misleading or deceptive conduct. Their case will be particularly strong where the agent deliberately intended to mislead or deceive other member agents about their suitability for tenancy. However, it may be difficult to attach liability to the database operator, as it will invariably assert that it was an innocent intermediary.

Secondly, it was found that the very process of threatening to list tenants on a database constitutes undue coercion according to ACCC Guidelines and the case of McCaskey²⁷. However, this finding is unlikely as it challenges the very operation of bad tenant databases. Instead, s60 will probably be useful to those tenants who have been listed in vindictive circumstances and for those tenants who have been coerced into taking a particular course of action unrelated to their purported outstanding responsibilities with the agent.

Thirdly, tenants may be able to establish unconscionable conduct in limited circumstances. Tenants will have an arguable case where they suffered a special disadvantage and their real estate agent was aware of the special disadvantage, such that listing the tenant, or threatening to list the tenant, involved taking an unfair advantage of the tenant's disadvantage. Lastly, it was argued that the secondary boycott provisions do not apply to tenancy databases given that residential tenants are not corporations and the boycott would, nevertheless, be classified as 'permitted'.²⁸

²⁵ 'Tenancy Databases and Fairness to Housing Tenants', Bunning, Clark, Cosier & Williams; Griffith University School of Law, December 2001.

²⁶ In Queensland the FTA substantially mirrors the fair trading provisions of the Commonwealth Trade Practices Act 1974.

²⁷ McCaskey and Cash Return Mercantile Pty Ltd v ACCC Federal Court of Australia, August 2000, French J, unreported.

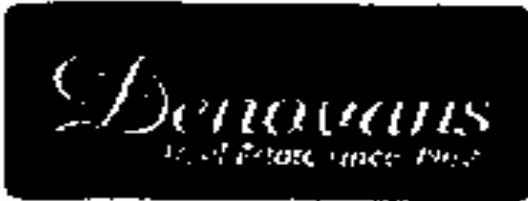
²⁸ p51-52 'Tenancy Databases and Fairness to Housing Tenants', Bunning, Clark, Cosier & Williams; Griffith University School of Law, December 2001.

Attachment Five

03/10/2001 21:34 87-3855-1144

OLIVER NORTHERN HOUSE

PAGE 01



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E-mail: enquiries@derovans.com.au
Website: www.derovans.com.au

September 2001

Dear Tenant

Your rental payments are presently in arrears and you have now forfeited the discount provided to you as per your tenancy agreement for prompt rent payments.

Please pay the outstanding rent at your earliest convenience

Our office is a member of TICA (Tenancy Information Centre of Australia) and as such we report tenants who make late rental payments on any occasion. If you have previously received a letter from our agency regarding late rent payments you will now be added to the TICA database as per your Tenancy Agreement.

Therefore it is important you continually to pay your rent on or before the due date so that your tenancy rental payment record is maintained to benefit you when applying for any future rental accommodation.

Thank you very much for your attention to this matter.

NB: TICA can be contacted on 1902220346. Calls to this number are charged at \$5.45 per minute inclusive of GST.

Kind Regards,

NICOLE RYLE
Property Management Dept.

A long history of success in Real Estate

