

**Submission to the Ministerial Council of
Consumer Affairs and Standing Committee of
Attorneys General**

Residential Tenancy Database Inquiry



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About NCOSS

The Council of Social Service of NSW (NCOSS) is an independent non-government organisation and is the peak body for the non-government human services sector in NSW. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales.

It was established in 1935 and is part of a national network of Councils of Social Service, which operate in each State and Territory and at Commonwealth level.

NCOSS membership is composed of community organisations and interested individuals. Affiliate members include local government councils, business organisations and Government agencies. Through current membership forums, NCOSS represents more than 7,000 community organisations and over 100,000 consumers and individuals.

Member organisations are diverse; including unfunded self-help groups, children's services, youth services, emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, and a range of population-specific consumer advocacy agencies.

Background

NCOSS welcomes the opportunity to make a submission to the Residential Tenancy Database Inquiry. NCOSS has a long standing interest in the issue and in particular the impacts of residential tenancy databases (RTD's) upon disadvantaged people in NSW.

In 1999, NCOSS released the report *"Cash and Cowboys – Barriers to entry to private rental by disadvantaged consumers"*. This report included an analysis of RTD's and made recommendations regarding their regulation. Since that time NCOSS has maintained an interest in the issue as part of its broader policy commitment to addressing housing need and homelessness.

Whilst the scope and operation of residential tenancy databases is often seen as a privacy issue, NCOSS would argue that RTD's are fundamentally a housing access issue and hence any legislative or policy response needs to be framed within a social justice paradigm as well as within a right to privacy and consumer rights analysis. By positing the debate about RTD's solely within privacy, the key impact of the operation of the RTD industry is ignored, that is a denial of housing, and subsequent homelessness of people identified (rightly or wrongly) as "problem tenants".

NCOSS is concerned that despite the inclusion of residential tenancy databases within the small business amendments to the Privacy Act 1988, the operation of tenancy databases continues to create a barrier to accessing housing. This in turn contributes to homelessness and creates additional pressure on emergency housing providers, including Supported Accommodation and Assistance Program (SAAP) services.

The RTD industry and how it operates

We note that the discussion paper locates the reasoning of RTD's solely within a risk management framework. That is, the discussion paper accepts, without debate, the notion that RTD's are a legitimate business tool. NCOSS agrees that landlords have an interest in minimizing risk and that databases might be seen by some as a strategy to address such risks. However other simple strategies are also available to landlords.

In NSW, the Residential Tenancies Act (1989) provides landlords with suitable remedies for rent arrears and damage to property. The fact that the tenants bond can be withheld (subject to a dispute mechanism in the Consumer Tenancy and Trading Tribunal (CTTT)) provides the landlord with additional risk protection. The CTTT is a reasonably quick means for landlords pursuing their rights. Advances in technology, including electronic listing of tribunal applications and auto generated hearing dates has provided landlords (and their agents) with even shorter timeframes for gaining a remedy. Similar legislative protections exist in all states and territories.

RTD's may be seen as contributing to market inefficiencies. "The way in which those services operate, and in particular the lack of transparency, accountability and means for meaningful redress for wronged consumers, create inefficiencies in the market through the institutionalization of misinformation and disinformation. A perverse outcome is a potential major reinforcement of the (already great) structural power imbalance in the market in the suppliers favour."¹

The discussion paper identifies three main purposes of RTD's. Of these, the first "to identify problem tenants" and the third "deterring problem tenants from applying for housing" is particular interest to NCOSS as they imply that RTD's have a clearly defined, just and equitable measure of what constitutes a "bad tenant." NCOSS submits that no such clear measure exists, and even if it did we could not scrutinize it because within the existing legislative framework there is no transparency as to the operations of RTD's. Even with the improvements under the Privacy Act 1988, RTD's remain accountable only to their shareholders. The only means of monitoring their compliance with existing

¹ Johnson C. (1999) *Cash and Cowboys – Barriers to entry to private rental by disadvantaged consumers.* NCOSS. Pg ii

privacy law is through measurement of complaints, which at best will only ever indicate a small percentage of tenant experiences of RTD's.

NCOSS would also argue that there is in effect a fourth purpose of RTD's. That is to deter tenants from pursuing their rights due to fear of listing. This may be an unintentional purpose but it has a powerful impact in the market. Tenants – whether “good” or “bad”, are less likely to pursue repairs, or complain about the activities of a real estate agent through fear that they may be placed on a RTD and thereafter be denied housing.

In principle NCOSS submits that RTD's do not have a valid place in the market and should be prohibited. However, the reality is that RTD's do exist, are growing in market penetration and are likely to be with us for at least the foreseeable future. Therefore, if RTD's are to continue to operate the key issues of transparency, accountability, listing criteria, duration, cost and access to review, disputes mechanism and remedies need to be addressed through tenancy as well as privacy legislation.

The operation of RTD's

Screening prospective tenants

The discussion paper describes the screening process in the context of the Privacy Act 1988, noting the requirement that property managers notify prospective tenants that their personal information will be used for screening purposes. Generally, this process is part of a bundling up of consents that tenants **must** provide if they wish to apply for a tenancy. The nexus between RTD's and homelessness is at its most apparent at this point. The poorer and more vulnerable the tenant, the more desperate for accommodation they are likely to be. If the tenants does not consent they will not be considered for housing. This removes any real consent and reflects the unequal bargaining power in the landlord/tenant relationship.

The Privacy Act only protects the tenant in so far as they must be told that they will be subject to screening. It does not protect them from being refused housing because they wish to protect their own privacy. It does not protect them from being placed on the database, simply by making an application for a tenancy², nor does it protect them from being screened via databases that may contain inaccurate or out of date information.

² Anecdotal reports suggest that at least one large RTD automatically lists tenants on the database whenever they are put through a screen, regardless of the tenants behaviour they are placed on the database simply because they applied for housing.

Process for listing

The discussion paper suggests that there are three types of listings - negative, positive and neutral. NCOSS considers that the positive and neutral listings serve no real purpose for the stated aim of risk management and therefore those listings should be expunged.

The discussion paper identifies the lack of uniformity in listing practices and criteria used by property managers. This is of very serious concern as this lack of objectivity goes to the heart of the accuracy problem inherent in the current system.

This lack of objectivity leads to denial of natural justice to tenants who may not be aware of the details of the listing and would be unlikely to complain through fear of additional listings. When the only criteria applied is “if a property manager believes a tenant has in some way acted inappropriately” the industry is left open to allegations of unfair listings and discrimination.

The only solution to this systemic failure to ensure accuracy and uniformity in listing practice is to have a prescribed list of matters that can be put onto a RTD. This list should be limited to proven breaches of the tenancy, confirmed by the appropriate state based (residential) tenancy tribunal or court.

In this regard, NCOSS supports the Queensland model in that tenancy legislation outlines in what circumstances a tenant may be listed on a RTD. However the actual list of items that can be included on a listing would need to be determined on a state by state basis to reflect the diversity of tenancy legislation. Only serious breaches, accompanied by an order from the Tribunal/Court should be listed and then only for a reasonable period of time. Please see below for more discussion of duration of listings.

NCOSS also supports the Queensland statutory requirement that only the tenant/s named on the tenancy agreement should be listed on a tenancy database. This is for three reasons, the first being simplicity. Secondly, they are the party who agreed to enter into the contractual relationship with landlord and took on the rights and obligations of the tenant. Thirdly, the unnamed occupier is most likely to have moved into the premises after the signing of the original tenancy agreement and so was never asked for consent.

Listings should only be made after a tenancy agreement has ended. This is because the various tenancy Acts already contain processes for breaches occurring during a tenancy agreement. The current landlord knows of the tenants behaviour and has no need to look at a database to be informed of the proven breach.

The current National Privacy Principles (NPP's) contained in the Privacy Act are not strong enough to protect tenants from unfair listings. In particular NPP 6 – to provide access to information held on a database, only applies after the information has been listed. The regulatory regime needs to be tightened to ensure inaccurate or unfair listings do not get onto RTD's in the first place.

Residential tenancy legislation in each state and territory should prohibit a person or agency from listing a tenant on a database unless they have advised the tenant in writing along with full details of the listing, or taken reasonable steps to advise the tenant about the proposed listing. The tenant should be given a reasonable opportunity to consider the information about to be listed. Tenants should be able to initiate proceedings in the relevant tribunal/court to order the person or agency not to list, or vary the listing with certain changes and/or conditions as appropriate. If the Agent or RTD fails to comply with the order stiff financial penalties should apply.

Tenant access to listings

The discussion paper highlights the variation in practice regarding tenant access to their records. As such, tenants do not enjoy a general right to know what information is being held on them. Tenants ability to check the accuracy of a listing is curtailed through access restrictions, delays, cost and the possibility that they are listed on multiple RTD's. In addition, tenants may be too frightened to ask about their listing through fear that this might generate another negative listing.

The speed with which a tenant can check the accuracy of a listing is very important as they are likely to be refused housing for as long as the negative listing remains on the RTB. If a tenant has to write to request a copy of their listing and then go through the dispute process the time taken to do this may mean that they lose the opportunity of a home as another prospective tenant will be likely to take their place.

Support organisations for homeless people may need to intervene and assist people in checking and disputing RTD listings. One SAAP service reports spending over one hundred dollars telephoning an RTD to check and then dispute a homeless persons RTD record so that the person would be able to move out of the refuge into private rented accommodation. This cost related to telephone charges to call the RTD. Clearly the spirit of NPP 6 – prohibiting charging for access or limiting charging to copy costs is being avoided by RTD's by way of other costs such as telephone costs.

This contrasts with the experience of agents/landlords, who once they pay a joining fee, can access information about any tenant in the database, immediately and without cost.

Disputing a listing

It is generally accepted that effective dispute resolution involves low cost, easy access, speedy handling of the matter and compliance with natural justice principles. The current system as described in the discussion paper fails each of these tests. It is particularly disturbing that RTD operators sometimes act as mediators in disputes when they have no training in mediation and are in a conflict of interest due to the fact that they have contractual arrangements with the landlord which are the subject of the dispute.

The alternative system whereby the tenant is told to sort it out with the landlord fails to recognise the systemic imbalance in power relations between landlord and tenant. It also encourages delay as the landlord is under no compulsion to respond to the dispute whereas the tenant may be risking retaliatory eviction or non-renewal of tenancy if the landlord finds out that they complained about the accuracy of the listing.

The simplest way to deal with disputes is to avoid them – a prescribed list of matters that can be listed based on verification of the breach evidence by a tribunal/court order would go a long way to avoiding many disputes as the accuracy of data on RTD's would be improved.

However, a simple, cheap and speedy disputes mechanism delivered by an independent organisation with experience in tenancy matters is required. NCOSS would submit that using the relevant state residential tenancy tribunal/court as the venue for dispute resolution is the preferred option. This is the system that operates in Queensland.

Duration of listings

Once again this area is subject to wide variation and so to abuse. The Tenancy Information Centre Australasia (TICA) holds listings for up to five years and then places them in a "tenancy history" section of the database, effectively meaning the listing is never removed.

Listings should only remain on a RTD for as long as they are current, for example if the listing is for rent arrears/debt then the listing should be removed once the debt is paid. For other matters, a reasonable time period should be defined by statute.

Other Issues relating to RTD's

NCOSS notes with concern the phenomena of "refer to agent" listings, which are in effect an avoidance mechanism. No hard data on the usage of refer to agents listings is available as RTD's are not subject to public scrutiny. However as a matter of principle the "refer to agent" loophole in the Privacy Act 1988 should be closed.

In some states, including NSW, some residential occupiers (boarders and lodgers) do not enjoy the protection of residential tenancy legislation. Some large boarding house operators in NSW use RTD's and so boarders and lodgers can be subject to unfair treatment as discussed above. This gives added impetus to all states and territories introducing basic protections for boarders and lodgers, and including within such legislative arrangements, regulation of RTD's.

There is a clearly identifiable nexus between RTD's and homelessness. This has a particular impact on people who are vulnerable or who have a disability. The impacts of which may be of particular relevance in smaller regional communities where housing options are already limited.

Research in the far north coast region of NSW found that of 150 people seeking emergency housing at least 65% of these people were listed on the TICA database. The study also found that 70% of homeless people assisted by that organisation were unaware that they were listed on a database. The report found that " a major obstacle in obtaining rental accommodation was an intangible thing called the "the black list". ³Given that the client group of the organisation undertaking the study (the Tweed River Valley Fellowship) specializes in assisting people with mental health disability these preliminary results are extremely disturbing as the effect of the listing on the database can be entrenched homeless amongst some of the most vulnerable members of our community. This in turn creates pressures on SAAP services and emergency housing providers . Hence the privacy rubric is only one lens through which government may consider the issue of RTB's. More fundamental, from a social justice perspective is the contribution RTB's may be making to homelessness in our community.

Conclusions

NCOSS considers that uniform legislation should operate across all states and territories to codify landlord and tenant rights and obligations regarding residential tenancy databases. This legislation could be brought forward by way of amendments to existing residential tenancy law in each state.

³ Mahoney C. (2002) "Ticked off: Regional research on tenancy data bases and homelessness" *NCOSS News, December 2002*. <http://www.ncoss.org.au/bookshelf/index.html> (last accessed 17/12/2003)

Commonwealth privacy law should continue to provide a regulatory framework for RTD's, as some issues may not be easily dealt with within the state and territory jurisdictions. For example, when RTD's provide services in a state but their registered business address is in another state.

It should be noted however that current remedies via the Commonwealth Privacy Commissioners are slow to be realized. NCOSS notes with interest a case currently on foot before the Commissioners, which commenced in February 2003 and has still not been decided

That said, the comprehensive legislative package described above could assist in dealing with some of the systemic problems associated with RTD's . It would also assist in striking a fair balance between the rights and interests of agents, landlords and tenants. It would be of benefit to the industry as a whole as the law would target the "cowboys" and improve public perceptions of RTD operators and agents that use them.

NCOSS recommends

1. That Commonwealth privacy law be strengthened to provide a more effective regulatory framework for RTD's.
2. That uniform legislation, codifying landlord (and their agents) and tenant rights and obligations regarding residential tenancy databases be brought forward in each state and territory.
3. That this legislation be introduced by way of amendments to existing tenancy residential tenancy legislation.
4. That Boarders and Lodgers legislation be brought forward in all state and territories where such legislation does not currently exist and that this legislation include protections regarding RTD's as described in the recommendations below.
5. The state and territory residential tenancy legislation be amended to include the following :
 - a. A prescribed list of matters that can be put onto a RTD. This list should be limited to proven breaches of the tenancy, confirmed by an order of the appropriate state based (residential) tenancy tribunal or court.
 - b. Provision that only the tenant/s named on the tenancy agreement should be listed on a tenancy database.

- c. Provision that listing on a RTD only be made after a tenancy agreement has ended.
- d. Provision that a person or agency be prohibited from listing a tenant on a RTD unless the tenant has been advised of the listing in writing along with full details of the listing.
- e. The right of the tenant to initiate proceedings in the relevant tribunal/court to order the person or agency not to list, or vary the listing with certain changes and/or conditions as appropriate.
- f. Fines/financial penalties for landlords, agents and RTD's if they fail to comply with an order not to list or to vary the listing.
- g. That tenants be given a statutory "right to know" the details of their listing on the RTD
- h. That tenants should be not be charged for accessing their records for the purposes of checking the accuracy of the information recorded
- i. That time limits be set on the release of listing information to tenants, and that if the RTD does not release the record within the statutory timeframe that the record be expunged from the database
- j. Listings should only remain on a RTD for a maximum of two years or until the breach is remedied, whichever is sooner.
- k. Provisions for the tenancy tribunal/court to be the venue for dispute resolution regarding the accuracy of RTD listings and that the fee structure of the relevant tribunal/court apply for applications associated with RTD disputes.