



REAL ESTATE INSTITUTE OF AUSTRALIA
SUBMISSION TO INQUIRY INTO RESIDENTIAL TENANCY DATABASES

BACKGROUND

1. On 1 August 2003, following representations by the Real Estate Institute of Australia (REIA), the Commonwealth/State Ministerial Council on Consumer Affairs announced the establishment of a high level Working Party to consider the options for a nationally consistent framework for regulating residential tenancy databases (RTDs). Recognizing the significance of privacy issues, the Council agreed to develop options in cooperation with the Commonwealth/State Standing Committee of Attorneys-General.
2. In November 2003, the Working Party promulgated an issues paper for comment by stakeholders relating to the role, operation and extent of RTD use in Australia.

AIM

3. The aim of this submission is to outline the REIA position in response to issues and specific questions raised in the issues paper.

REIA OVERVIEW

4. The REIA advocates that the aim of a nationally consistent framework for the operation of RTDs should be to provide guidelines for their efficient and effective use, and provide protection for all stakeholders including the consumer and the real estate industry. Guidelines may be included in legislation or an agreed code of conduct.
5. The property management industry has a major responsibility to lessors and tenants to ensure that the rights and responsibilities of both these parties are upheld. To an extent, tenant reference services, their operators and users some aspects of RTDs are covered under federal legislation and some State legislation, eg the Privacy Act for collection and use of personal data. However, there is differing State legislation on RTDs across Australia which can lead to inconsistencies and confusion.
6. There is considerable public interest and some industry concerns about RTDs which have resulted in inquiries in Tasmania and Queensland, and proposed changes to legislation in other States. There are many legitimate stakeholders who have interests to be addressed, eg the real estate property management industry, tenants, landlords, State governments, database operators, and the Commonwealth Government.

7. The REIA contends that it is important to ensure all stakeholders understand clear guidelines on their role and responsibilities as part of a nationally consistent framework.

THE ROLE OF RTDS

8. The main purposes of an RTD are to act as a central collection point for information about tenants, provide information to subscribers when assessing prospective tenant applications, and deter problem tenants. The property management industry has a major responsibility to lessors and tenants to ensure that the rights and responsibilities of both these parties are upheld. While being primarily responsible to the lessor who has appointed the agency to manage their property and protect the lessor's interest, tenants must be treated with fairness and courtesy as they are reminded of their responsibilities as a tenant.

9. RTDs are operated by private companies who collect information about tenants and make it available to real estate agents. Agents use this information to assess a person's rental history when considering an application to rent a property. RTDs exist as a resource to assist the property manager in assessing the suitability of a tenant and thereby identify problem applicants. A tenancy database should never be used in a threatening manner to ensure the performance of the tenant.

10. If the default by a tenant is actionable under law and is in accordance with relevant Codes of Conduct and the Privacy Act, then the REIA considers that a tenancy database listing is legitimate.

11. Because a listing has a long-term effect on the tenant, it is necessary to consider the use of an RTD in association with the following aspects of a tenancy:

- a. at time of the application for a residential tenancy,
- b. during the term of a tenancy,
- c. at the end of the tenancy, and
- d. post termination of tenancy and referral to tribunals.

12. RTDs are an effective risk management tool against defaulting tenants that have been listed. The access cost is minimal, however the cost of non-use can be expensive in terms of potential litigation, professional negligence, property damage and loss of rent. The most likely effect on a tenant who has defaulted, if listed on an RTD, is future difficulty of finding alternate accommodation.

INDUSTRY STRUCTURE

13. The REIA, as a national organization, does not have an affiliation with a particular RTD. There are State institutes which have an affiliation. For example, the Real Estate Institute of Western Australia (REIWA) has an agreement with the National Tenancy Database (NTD) to supply their members with access to the database. REIWA considers this to be a valuable service to its membership and that NTD complies with the appropriate national and State legislative requirements concerning the provision of this type of information.

14. The REIA is itself a professional industry organization. The members of the REIA are the separate State and Territory real estate institutes which are themselves professional organizations. The REIA and State institutes are respectively the peak national and State level organizations that represent real estate agents.

THE OPERATION OF RTDS

Screening Prospective Tenants

15. Real estate agents have a duty of care to obtain the best tenant for their owners using any available resources, which could include RTDs and other reference checks. The use of RTDs is an effective risk minimisation tool against defaulting tenants that have been lodged and for confirming that recommended tenants have been lodged. It also reduces the risk of rent loss and damage to an owner's property. Owners could incur major costs if an agent fails to use the RTD to check information on a tenant who has previously defaulted and for whom information has not been recorded on an RTD. Many rental property owners prefer to utilise a property manager who is a subscriber to an RTD.

16. A property manager is expected to have sufficient systems in place so that tenancies are managed in a professional manner. RTDs are used Australia-wide by agents to lodge both defaulting tenants and recommended tenants. RTDs are a very useful management tool in making other agents aware of recommended and problem tenants.

17. Some agents use their RTD for each and every Tenancy Application while others use this resource sparingly and only when they have doubts about an application. Some property managers use more than one RTD to screen prospective tenants in order to ensure a comprehensive check. Several RTDs encourage the regular use of their service, in order to make their database more comprehensive.

18. Agents generally make prospective tenants aware that the RTD will be checked during the process of their application. The property managers use the standard application form which is completed and signed by the prospective tenant to ensure that the tenant is aware of the process.

Process for Listing

19. Agents variously lodge both defaulting tenants and recommended tenants. Agents often use more than one database. The following criteria for listing tenants on an RTD provide useful consistent guidelines:

- a. arrears of rent where a Notice to Leave has been issued,
- b. undisputed abandonment where there is a loss to the lessor,
- c. tribunal/court orders,
- d. financial loss to lessor greater than the bond amount claimed,
- e. serious and repeated breaches as defined in the relevant residential tenancy legislation,
- f. damage to property,
- g. occupation without approval, and
- h. the person is the named tenant on the agreement.

20. The tenant must never be threatened that they will be listed on a database with the objective to make them meet their obligations under the General Tenancy Agreement. If it is necessary that a tenant be listed on the database, the tenant should be advised in writing that they are in breach of their lease agreement and their details may be lodged on the RTD. This information is usually also disclosed on the standard lease.

21. Dispute resolution is part of the property manager's role. A tenant must be given due notice to rectify their breach of a lease. It is not recommended that tenants be listed if a breach has been remedied.

22. The tenants should be informed that all tenants that are signatories in a joint tenancy will be listed individually on the tenancy database for the same debt. The reason for this is that all tenants are jointly and severally responsible for the tenancy rent and conditions. While it is acknowledged that an "approved occupant" may have a commitment to pay a share of the rent, this is an issue between all residents of the property. The only person that has a legal obligation to the lessor/owner is the nominated tenant(s).

23. RTDs should list as much identification of the tenant as will make it unlikely to relate to more than one person. For example, full name, date of birth, previous name (s), current address, previous addresses, drivers licence number, occupation, place of birth, gender, etc. Listing details should state the type of breach only. This will ensure that the inquiring agent will contact the listing agent for further details including the severity of the breach.

Disputing a listing

24. There should be a time constraint set for amendment of a listing, which should be based on the facts, and not on quantum. That is, a breach should be noted if the tenant continues to owe any money, even while negotiations are trying to arrive at a mutually accepted dollar amount. Such negotiations should not delay the listing of the tenant's breach.

25. REIWA has a cooperative arrangement with the NTD and has planned a series of training sessions for its members commencing in February 2004. These sessions will cover the correct use of the database, eg how and when to lodge tenants.

Duration of a Listing

26. It is proposed that listings should be for a maximum duration of three years or until breaches are remedied. The listings may be reviewed periodically.

EXTENT OF RTD USE

27. Other risk minimisation tools include credit agencies, employment record and reference checks. Some agents will check all prospective tenants whereas others will only check if there are doubts on the application.

CURRENT REGULATORY ENVIRONMENT

Commonwealth

28. The owner of the database and the real estate agent has respective responsibilities for the collection, use, and disclosure of data under the provisions of the Privacy Act. They must comply with the National Privacy Principles. The owner of the database essentially owns the database and is generally bound by the Privacy Act to update inaccurate information.

State and Territory

29. Each State/Territory has specific legislation to cover the use of RTDs. In principle, the guidelines for a real estate agent who gives information about a client or customer for recording in a public document or in a database relating to customers should be as follows:

- a. ensure the information is accurate in the first instance;
- b. ensure the information if adverse to the client or customer, relates to a matter that is not trivial or is not a minor breach of a tenancy agreement;
- c. take reasonable steps to disclose the information to the client or customer;
- d. give the client or customer a reasonable opportunity to review the information;
- e. ensure the client or customer is informed about how the information may be used; and
- f. immediately seek to amend the information if the client or customer provides evidence that the information is inaccurate.

30. In New South Wales, the draft *Property, Stock and Business Agents Amendment (Tenant Databases) Regulation 2004* aims to protect tenants from unfair treatment in relation to the use of tenant databases. The regulation prescribes rules of conduct under the *Property, Stock and Business Agents Act 2002* regarding the use of tenant databases by New South Wales real estate agents. The rules of conduct provide that:

- a. an agent must take steps to notify a tenant that the agent is going to list them on a database and provide the tenant with a reasonable opportunity to review and correct the information which will be listed;
- b. tenant can only be listed on a database for the following reasons – owing rental arrears which are more than the rental bond, failing to comply with a Tribunal order for the payment of money, or being subject to a Tribunal order terminating a tenancy for breach of a lease or causing serious damage or injury;
- c. an agent must notify a database operator that a debt listed on a database has been paid within 7 days of becoming aware of the payment; and
- d. an agent can only use a tenant database if the database provides tenants with free access to information about the tenant, amends inaccurate, out of date or incomplete information without any charge to the tenant, and deletes listings within certain specified time periods.

31. Agents who are members of State/Territory institutes can be expelled, suspended, fined or receive warnings for proven breaches of their Code of Practice, which includes the use of RTDs, although RTDs are not specifically mentioned. Generally, members must not engage in any harsh or unconscionable conduct. For example, under the statutory Code of Conduct, Western Australian real estate agents may be required to appear before the relevant Supervisory Board and may lose their licence. That body can hand down mandatory penalties or removal of registration or licence. This could then result in losing membership of REIWA. In relation to REIWA's Codes of Practice, financial penalties can be imposed on members as can expulsion from the Institute.

KEY ISSUES

Complaints Statistics

32. Complaints statistics are not available Australia-wide. However, indicatively in Western Australia, REIWA has received less than five written complaints in the last 12 months from members of the public.

Unfair Listings

33. A preferred tenant should be listed at the time of the bond refund being issued. The point at which a defaulting tenant would be listed would vary depending on the severity of the breach. For example, if a tenant is defaulting on rental payments it would be recommended that the tenant be lodged on the RTD during the termination process so that other landlords are forewarned. The principal licensee of the real estate agency would have the final determination.

34. Once the tenant has been advised either of the potential listing or that they have been listed on the database, they should be able to make inquiries to ascertain the accuracy of the information and any reasons for listing.

35. If the tenant can substantiate that the listing is inaccurate, the agency should take the following steps towards their database listings:

- a. verify that the information to be listed is accurate and where necessary carry out a substantial check of the agency records,
- b. if the listing is related to the tenant's behaviour the agency should be able to substantiate the reason for listing with evidence of a written complaint, and
- c. listings **MUST** be kept up to date.

Moreover, where practicable, it would be the responsibility of the listing agent to seek to have the inaccurate information corrected by the database operator and for the operator to comply.

36. To ensure that listings on RTDs are accurate, it is proposed that:

- a. listings should be updated regularly,
- b. the agent should do clearances of their database listings on a regular basis,

- c. the agency should develop a system to monitor any changes to a listing and update regularly, and
- d. the Agency should develop an audit process to check the accuracy of their listings with the tenancy database.

37. It is appreciated that the listing of a defaulting tenant may have a serious and ongoing effect on the tenant. An agent should exercise reasonable care prior to listing the defaulting tenant and should only do so when any of the previously listed criteria have been reached. However, on balance, the listing of a defaulting tenant on an RTD also protects a future lessor from potential losses caused by that tenant.

38. Recommended times for listing include:

- a. after the third “Notice to Remedy Breach” is sent for rent arrears (three strikes),
- b. after a “Notice to Leave” sent for rent arrears, and
- c. after the occurrence of any of the other recommended listing criteria.

39. Tenants should be made aware of what they can be listed for (per recommended listing criteria shown above) and this is laid out at the application stage. This could be done in the form of a brochure or handout. Any such publication should be in non-threatening language. When signing a lease, there should be acknowledgement of the listing criteria.

Non-Disclosure of Listings

40. Tenants should be made aware that the agency they are dealing with is a member of a tenancy database organization. In doing so, the agency must not threaten the tenant but supply this information in a manner that simply alerts the tenant to the possibility of a listing in the event that any of the recommended criteria should be applicable to the tenant and their occupancy. This information should be made available to the tenant at time of application, as appropriate during the tenancy and if the tenant is to be listed to the database.

41. An agency should not be required to give a reason(s) for an unsuccessful tenancy application because this may lead to further dispute and possible retaliation initiated by the applicant. However, any individual should have access to information recorded on the RTD on that individual.

Access to Listing

42. The REIA recommends that agencies have a specific method for notifying the tenant/s that their actions have led to them being listed on a tenancy database. Upon receipt of this advice the tenant should have the right to review the information.

43. The following procedures are suggested for notifying tenants of a listing:

- a. a non-threatening standard letter giving reasons for the listing in accordance with the recommended criteria and provided on the same day they are listed, with a copy of the listing included, and

- b. the tenant must be notified they have been listed when the “Notice to Leave” is sent out and attached to it would be the notification advising them that they will be or have been placed on a data base

44. It is reasonable for RTD operators to charge a nominal fee for providing a service to access listing because the RTD operator will incur costs in the service and maintaining data.

Dispute Resolution

45. Firstly, the tenant should contact the agent to try to resolve the issue. It is the experience of the REINSW that most listings will be the result of matters previously brought before the Residential Tribunal for orders, so any disputes should first be directed through the Office of Fair Trading. The listing agent should remove a listing immediately after resolution of the matter/debt. Where the RTD determines that the listing was inappropriate, that listing should be removed immediately. In general, changes should be made by agreement between both parties (agent and tenant) and if still in dispute, the matter should be brought before the Residential Tribunal.

Listing Duration

46. A listing should remain valid for at least three years unless resolved. Longer duration should be considered for more serious breaches. Care should be taken where an indefinite listing conflicts with the provisions of bankruptcy or privacy legislation.

SUMMARY

47. A nationally consistent framework for regulation or agreed guidelines for the operation of RTDs should be developed to ensure their efficient and effective use, and provide protection for all stakeholders including the consumer and the real estate industry. This framework should take into account the professional requirements of the real estate industry as well as the rights and responsibilities of property owners and of tenants.

Prepared by:

Secretariat
Real Estate Institute of Australia

4 February 2004