

RESIDENTIAL TENANCY DATABASES

**Issues Paper
November 2003**

**MINISTERIAL COUNCIL ON CONSUMER AFFAIRS
STANDING COMMITTEE OF ATTORNEYS-GENERAL**

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1. Introduction

Residential Tenancy Databases (RTDs) are privately owned, electronic databases that collect information on tenants to assist property managers and landlords assess risk and identify potential problem tenants. A range of parties have an interest in the operation of RTDs, including the real estate industry, tenants, housing organisations, RTD operators, landlords, State and Territory Governments and the Australian Government.

Considerable research has been undertaken on the impacts of RTD use in Australia over the past ten years and this work has been instrumental in forming the background to this Issues Paper¹.

Much of this previous work has focused on RTD use in Queensland. In August 2002, a special Queensland Government Backbench Committee ('the Lavarch committee') chaired by the Hon Linda Lavarch, released a report on its inquiry into the operation of RTDs. The Committee concluded that:

Tenancy databases, if operated properly, used fairly, maintained accurately and monitored correctly are legitimate tools to protect lessors' interests. If however, the databases cannot meet the tests of fairness and accuracy and openness then the risk of unconscionable harm to tenants outweighs their value to lessors and their use should be curtailed if not prohibited².

Subsequent to the Lavarch Committee investigation, the Queensland Government amended its *Residential Tenancies Act 1994* to establish listing criteria for RTDs and processes for a tenant to dispute a current or proposed listing³.

An Australia-wide investigation of RTDs, of the same scale as that undertaken by Queensland, has not to date been undertaken. It is therefore unclear if tenants in other Australian States and Territories are experiencing similar difficulties with RTDs, and to the same degree, as has been reported in Queensland.

1.1. THE RESIDENTIAL TENANCY DATABASE WORKING PARTY

At its 1 August 2003 meeting, the Ministerial Council on Consumer Affairs (MCCA) agreed to establish a joint MCCA/Standing Committee on Attorneys-General (SCAG) RTD Working Party (WP). SCAG later supported the joint WP proposal at its 8 August 2003 meeting.

The WP is chaired by the Commonwealth and includes officers from each State and Territory, the Commonwealth Department of the Treasury, the Commonwealth Attorney-General's Department, the Australian Competition and Consumer Commission (ACCC) and the Office of the Federal Privacy Commissioner (OFPC). Following its investigation, the WP will report its findings to both MCCA and SCAG.

¹ The Working Party has drawn heavily from a number of authors including, but not limited to: Guthrie 2002; Seelig 1997 and 1998; Lavarch Committee 2002; AHURI 2003; Griffith University 2001; Consumer Affairs and Fair Trading Tasmania 2001.

² Lavarch Committee report, Queensland, August 2002.

³ This legislation came into effect on 1 August 2003.

1.2. TERMS OF REFERENCE

The WP is to:

- investigate and report on the role and operation of RTDs and the extent of RTD use in Australia;
- examine the existing framework for regulating the use of RTDs, highlighting key issues relevant to tenants and other market participants such as RTD operators, real estate agents and landlords; and
- develop, where necessary, options for a nationally consistent framework.

1.3. STRUCTURE OF THE PAPER

This Issues Paper aims to prompt stakeholder input on issues relating to the role, operation and extent of RTD use in Australia. As this paper is intended to raise issues for discussion, it is not, in itself, a proposal for regulatory action and does not take a policy position on the issues raised. Any recommendations for reform of the industry are a matter for consideration by MCCA and SCAG, and would only be progressed following further public consultation.

Part 2 of this paper examines the operation of the RTD industry, by outlining the industry structure, role, operation and extent of RTD use in Australia. Part 3 then considers the current RTD regulatory environment, including both legislative and non-legislative initiatives. Finally, Part 4 of the paper seeks to gather information on stakeholder experiences by examining key issues relating to RTD use.

1.4. CONSULTATION PROCESS

1.4.1. The process

MCCA and SCAG are currently seeking submissions from interested parties on issues raised in this paper. The WP will incorporate views raised in these submissions into a final report to be presented to MCCA and SCAG. It is envisaged that the final report will include recommendations for consideration by MCCA and SCAG Ministers⁴.

⁴ If MCCA and SCAG recommend regulatory action the proposal would be subject to the usual legislative processes. The Council of Australian Governments' *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-setting Bodies* states that Ministerial Councils that propose regulatory action must first undertake a regulatory impact assessment process. Any regulatory proposal would also have to satisfy the principles of National Competition Policy.

1.4.2. Making a submission

Interested parties are encouraged to respond to the discussion questions that follow each section of the paper. The questions have been drafted to obtain the greatest amount of information possible and every question will not be relevant to every submitter. Parties should not feel bound by these questions and general comment is welcome. In making a submission, you are encouraged to provide practical examples and, whenever possible, to attach relevant data and documentation to support the comments made.

Formal submissions can be lodged electronically (preferred) or in hard copy to the address below. The closing date for submissions is **Wednesday 24 December 2003**.

Postal Address: Residential Tenancy Database Working Party
Consumer Policy Framework Unit
Competition and Consumer Policy Division
Department of the Treasury
Langton Crescent
CANBERRA ACT 2600

Email: RTD@treasury.gov.au

Phone: 02 6263 3874

Facsimile: 02 6263 3964

All submissions will be published on the MCCA website, www.consumer.gov.au (subject to claims for confidentiality). Please note that submissions, including confidential submissions, may be subject to Freedom of Information and other laws and this should be taken into consideration when making submissions.

Further copies of this Issues Paper can be obtained from www.consumer.gov.au.

2. The RTD industry and how it operates

2.1. THE ROLE OF RTDs

It is believed that the first formal RTD began operation in Australia in 1987⁵. Since that time advancements in technology, in particular database technology, Internet access and changes to credit reporting requirements under the *Privacy Act 1988*⁶, have contributed to the development of RTDs in Australia⁷.

RTDs have emerged in the private rental market primarily as a means of minimising risk to property managers and to their landlord clients by listing tenants who have defaulted on rent or caused damage to property. RTDs are viewed by many as a valuable debt reduction or risk minimisation tool. The Lavarch Committee concluded that

*Landlords are entitled to take reasonable steps to protect their property and manage the return to be delivered on rental property investment*⁸.

In keeping with the objective of minimising risk for landlords, RTDs serve three main purposes. These are:

- acting as a central collection point for information about tenants, including tenant rental history and default, primarily to identify problem tenants⁹;
- providing information to subscribers when assessing prospective tenant applications; and
- deterring problem tenants from applying for housing through real estate agent offices which are part of the subscriber network¹⁰.

It is important to note that the costs and benefits associated with the use of RTDs may be indirect, as well as extending to parties beyond landlords. For example, insurance companies' costs may be otherwise lower and investment in rental accommodation otherwise higher in circumstances where RTDs operate to protect rental property investments¹¹. Conversely, a higher number of damage claims that could have been avoided through reliance on RTDs could

⁵ Guthrie, F, Recommended Queensland Government Strategy Regarding Tenancy Databases, January 2002.

⁶ The changes to the Privacy Act ensure that information held by a credit reporting agency is only used to assess applications for credit lodged with a credit provider. Previously, real estate agents could access this information and use it in determining the suitability of a prospective tenant.

⁷ Seelig, T, "Privacy Issues in the private rental market -The Growth of tenant databases in Australia", May 1997; Tenancy Databases in the Context of Risk Management, for the Australian Housing and Urban Research Institute, August 2003.

⁸ Lavarch Committee report, Queensland, August 2002.

⁹ Although RTDs are primarily used as a means of identifying 'difficult' or 'problem' tenants, the WP is aware that some RTD operators have now begun listing "recommended" tenants. However, unless otherwise stated, any further references to the listing of tenants will refer to the listing of problem, rather than recommended tenants.

¹⁰ Seelig, T, "Privacy Issues in the private rental market -The Growth of tenant databases in Australia", May 1997.

¹¹ Some insurance companies offer landlord insurance providing coverage for tenancy mishap. The level of cover varies between providers, with some providers not covering landlords for such things as malicious damage.

contribute to higher costs for individuals through higher insurance premiums generally. Moreover, tax deductible claims by landlords might also be otherwise higher¹².

When used appropriately, RTDs can be a legitimate tool for minimising risk and reducing costs generally in the rental property market. However considerable debate remains on the appropriate operation and use of RTDs. Issues include whether RTDs are used fairly, maintained accurately and monitored correctly.

Discussion questions

Property managers:

1. Do you use RTDs? If so, for what purpose do you use them? What are the benefits associated with RTD use/non use?
2. Are RTDs an effective risk minimisation tool? What are the costs associated with RTD use/non use?

Landlords:

3. How important is the use of risk management tools by property managers? Are you more likely to use a property manager that is a subscriber to an RTD?

2.2. INDUSTRY STRUCTURE

There are two groups of participants in the rental property market who use or maintain RTDs. These are real estate agents, who use and supply information to the RTDs, and RTD operators who manage the databases. While in most cases RTDs can only be accessed by real estate agents, some RTDs are now available for use by other property managers including caravan park managers and restricted letting agents and self-managing landlords¹³.

The Real Estate Institute of Australia (REIA) is the national representative association for the real estate industry. REIA has eight members, comprising State and Territory Real Estate Institutes, and through these bodies approximately 6500 real estate firms and licensed agents. This figure represents roughly 70 per cent of the industry nationally¹⁴.

The WP is aware of seven RTD operators currently operating in Australia, these being:

- The Tenancy Information Centre Australasia (TICA);
- National Tenancy Database (NTD);
- Barclay Group (BG);
- RP Data;
- Trading Reference Australia (TRA);

¹² Section 25-10 of the *Income Tax Assessment Act 1997* sets out that expenditure for repairs made to a rental property may be deductible. For further information on what is deductible visit the Australian Taxation Office website, <http://www.ato.gov.au>.

¹³ Further references to 'property managers' will refer to real estate agents, caravan park managers and restricted letting agents.

¹⁴ Further information on the REIA can be found at www.reiaustralia.com.au

- Australian Property Owners Database (APOD); and
- Console.

TICA and NTD are the two largest RTD operators. A number of RTD operators also provide other services, for example, software for property managers, debt collection and property price information.

Discussion questions

Property managers:

4. Is your company affiliated with a particular RTD operator/operators? If so, which operator/operators and why are you affiliated with a particular RTD?
5. Is your company a member of a professional industry body/bodies? If so which body/bodies?

RTD operators:

6. Do you have any further information on the number of RTD operators in Australia?
7. When did your company begin operation in Australia? What regions does your company cover, both in Australia and internationally? What percentage of your business is in each jurisdiction? Does your company provide any other services apart from the RTD? If so, what services?
8. Can self-managing landlords, caravan parks and/or other organisations access your RTD?
9. How many members does your RTD have in each category (real estate agents, self-managing landlords, etc)?
10. What are the costing arrangements for property managers (or other applicable parties) to access your RTD?
11. Is your company affiliated with any particular Real Estate, Property Management or debt collection/credit reference body/bodies? If so, which body/bodies?
12. Is your company a member of a professional industry body/bodies? If so which body/bodies?

2.3. THE OPERATION OF RTDS

The operation of RTDs can be separated into two main functions – screening prospective tenants and listing tenants.

2.3.1. Screening prospective tenants

RTDs are commonly used by property managers during the application process to assess an individual's suitability for tenancy¹⁵. The *Privacy Act 1988* requires property managers to notify

¹⁵ It is recognised that the use of RTDs by real estate agents for this purpose is only one means used to make a final assessment of a tenant's suitability.

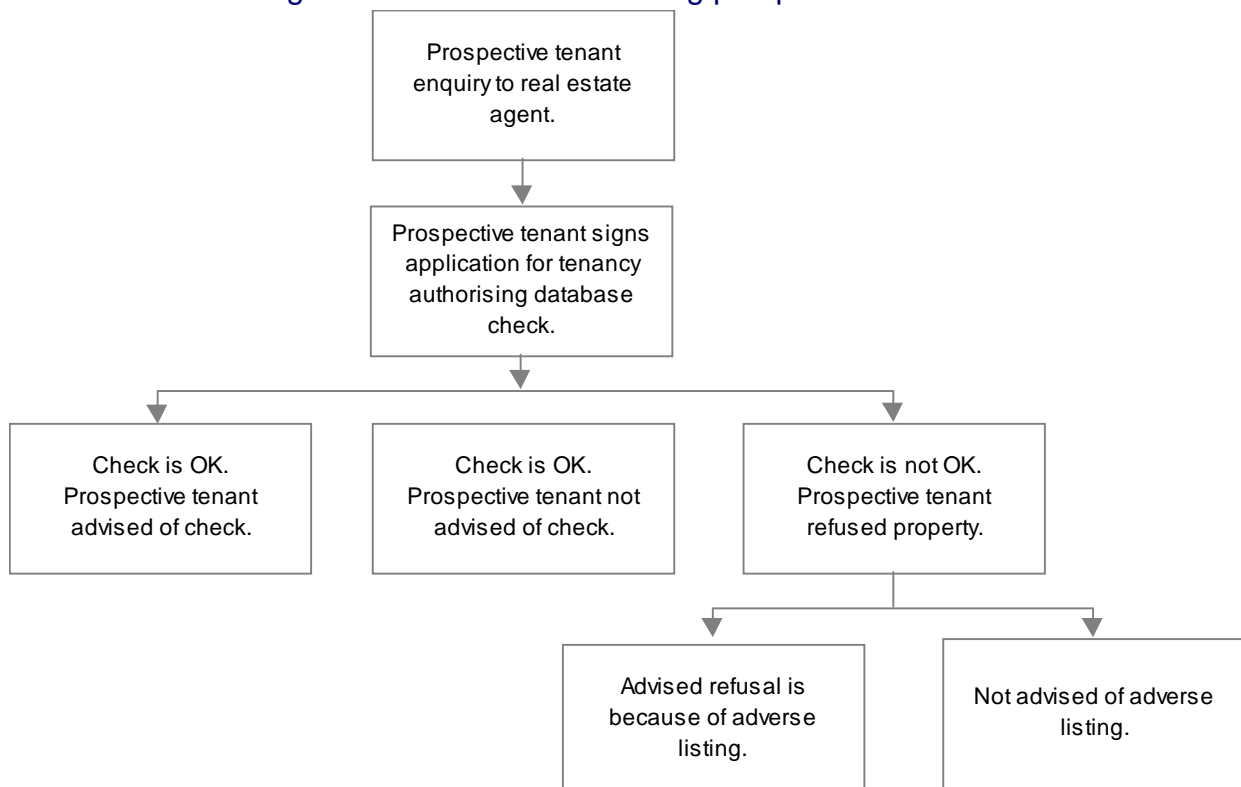
prospective tenants that the personal information they provide will be used for screening purposes. This is generally done in either of the following ways:

1. A clause or section in the tenancy application form will indicate that the property manager will use the personal information supplied in the application to run checks with an RTD¹⁶.
2. The prospective tenant is asked to sign a separate form authorising the property manager to check an RTD.

Any listed information (or alternatively a non-listing) will impact on the likelihood of the tenancy application being accepted. While the WP is aware that some property managers inform tenants as to why their application was unsuccessful, due to an unfavourable RTD listing or other reason, property managers are not required to provide reasons for rejecting tenancy applications.

The screening process is represented in Figure 1.

Figure 1: Process for screening prospective tenants.



Source: Guthrie, F, Recommended Queensland Government Strategy Regarding Tenancy Databases, January 2002

¹⁶ The specific wording used will differ depending on the policy used by each property manager.

Discussion questions

Tenants:

13. Were you made aware that the property manager was checking an RTD during the application process? If so, how were you informed and were you given adequate information about RTDs?

Property managers:

14. Do you use RTDs to screen prospective tenants during the application process? If so, do you use more than one RTD operator to do this?

15. Do you make prospective tenants aware that you will be checking an RTD during the application process? If so, what information is supplied to the tenant?

16. Do you have information on the number of tenants that you have rejected due to an unfavourable listing?

2.3.2. Process for listing

There are three types of RTD listings - negative, positive and neutral. Negative listings record tenant defaults, positive listings are given to recommended tenants and neutral listings record tenant rental history. The type of listing will affect the experience of the tenant in the private rental market.

In all States and Territories excluding Queensland¹⁷, property managers have the discretion to decide under what circumstances a tenant will be listed on an RTD. This discretion has led to a lack of uniformity in the listing practices and criteria used by real estate agent/property managers.

If a property manager believes a tenant has in some way acted inappropriately in the course of a tenancy, the property manager may record a negative listing on an RTD. In the absence of industry-wide standards on listing practices, listing decisions are likely to be based on individual standards used by a specific property manager, the property manager's employer/firm and/or on the basis of guidance provided by an RTD operator¹⁸.

Individual RTD operators also use different listing criteria to determine if a tenant should be listed. For example, TICA advertises on its website that breaches of damage to property, dishonoured cheques, tribunal or court orders, poor periodic inspections and unauthorised pets are examples of circumstances that warrant an RTD listing¹⁹. Alternatively, Guthrie (2002) suggests that BG primarily list tenants after a tribunal order has been passed down²⁰.

As is the case with the screening of prospective tenants, the Privacy Act provides relevant guidance, although there appears to be some confusion or uncertainty about whether property managers are required to inform a tenant that they will or have been listed on an RTD. Guthrie (2002) suggests that in most instances tenants who breach their tenancy agreement will be advised by their property manager that they may be listed on an RTD unless they remedy the breach²¹.

¹⁷ On 1 August 2003, Queensland introduced legislation that outlines in what circumstances a tenant can be listed. The details of this legislation are explored in greater detail in Part 3.

¹⁸ Alternatively, an RTD operator may use a web-based program, which requires 'compulsory' fields to be listed.

¹⁹ This list is not comprehensive. For the full list of specific circumstances visit www.tica.com.au.

²⁰ Guthrie, F, Recommended Queensland Government Strategy Regarding Tenancy Databases, January 2002.

²¹ It should be noted that in some cases, tenants have been listed even when a breach has been remedied.

Discussion questions

Tenants:

17. Did your property manager inform you that you would be, or had been, listed on an RTD? At what stage of your tenancy were you informed of the listing? How did the real estate agency inform you of this?
18. If you were made aware prior to the listing, were you given the opportunity to dispute the listing or rectify the breach before being listed? How long were you given to dispute the listing or rectify the breach? If you were not informed that you had been listed, how did you become aware of the listing?

Property managers:

19. Do you use RTDs to record positive, negative and neutral listings? For what reasons do you place a tenant on an RTD?
20. Do you list tenants on more than one RTD? If so, why do you do this?
21. Do you actively seek to resolve disputes with tenants before they are listed? If so, what process do you follow? Do you list tenants in circumstances where the breach has been remedied?
22. If you decide to list a tenant on an RTD, do you advise them that they will be listed? How and when do you advise them? Do you provide guidance to tenants on RTD listing policies before tenancy agreements are signed?
23. Which parties (signatory or non-signatory to the tenancy agreement) do you list on an RTD?

RTD operators:

24. Do you provide guidance on what constitutes a breach warranting a listing? What kind of guidance do you provide? Who is this guidance given to – tenants and/or the real estate industry?
25. Do you list the information provided to you by the property manager or do you edit the information before it is listed?
26. How do you verify that the information provided to you by the property manager is accurate, complete and up to date? If you find the information is not accurate, what do you do to correct the information? What steps do you take to inform the property manager and/or tenant about the correction?
27. Do you provide tenants and/or property managers with a copy of the information you place on your RTD or advise tenants in some other way that they have been listed? If so, what information do you supply?
28. Do you allow 'refer to agent' listings? If so, what process do you follow to determine whether such a listing is – and remains – appropriate?
29. Do you provide a facility for attaching photographs showing the condition of premises to listings? If so, what process do you follow to determine whether doing so is appropriate in a particular case?
30. Do you exchange the information listed on your RTD with other RTD operators? If so, what is the process you follow?

2.3.3. Tenant access to listings

The mechanisms available for tenant access to listings vary between RTD operators. Most operators require tenants to put their request in writing, while some will allow tenants to query listings over the telephone. Some operators charge tenants to access their listing, while others offer free access.

Discussion questions

Tenants:

31. Have you attempted to access an RTD listing? If so, what process did you follow? Did you incur a cost? If so, what was this cost?

RTD operators:

32. What are your company's arrangements for providing individuals access to a listing? Do you charge individuals to access their listing? If so, how much and how do you determine the charge?

2.3.4. Disputing a listing

As there are two parties involved in the listing of tenants on RTDs – the property manager and the RTD operator – there appears to be some confusion as to who is responsible for maintaining and monitoring the information listed, and ultimately who is responsible for resolving listing disputes²². This becomes relevant where a tenant becomes aware of an adverse listing and disputes the accuracy of the listing.

The WP is aware that there are also differences in the dispute resolution practices of RTD operators. However, a dispute is generally resolved in one of two ways:

1. The tenant is advised by the operator to contact the relevant property manager to resolve the dispute in the first instance. If no satisfactory resolution is achieved between the tenant and agent, it is open to the tenant to contact the operator again and provide them with evidence as to why their listing should be changed or removed.
2. Upon the tenant advising the operator that they dispute their listing, the operator will act as a mediator between the tenant and property manager to resolve the dispute.

²² Section 3.1.1 of this paper discusses how the National Privacy Principles (NPPs) in the *Privacy Act 1988* relate to the operation of RTDs. NPP 3 is of relevance to the maintenance of information on RTDs.

Discussion questions

Tenants:

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

Property managers:

34. What are your company's arrangements for resolving listing disputes with tenants? Is this process dictated by the terms of your agreement with the RTD?

RTD operators:

35. What are your company's arrangements for resolving listing disputes with tenants? Is this process dictated by the terms of your agreement with the RTD subscriber?

2.3.5. Duration of a listing

The duration of a listing on an RTD again depends on the practices of individual RTD operators. For some operators, the listing duration varies depending on the nature of the alleged breach. For example, TICA states on its website that a debt related breach will remain listed: for three years for a non-monetary breach; five years after a debt is cleared; or indefinitely if the debt is never repaid. Conversely, some other operators retain all listings indefinitely²³.

Discussion questions

Tenants:

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

Property managers:

37. How often do property managers review listings and advise the RTD to amend or remove a listing?

RTD operators:

38. How long does your company retain a tenant's listing on your company's RTD? Does the retention period differ depending on the nature of the listing? Why do you retain the information for this length of time?

39. How often does your company review listings to ensure they are up-to-date and accurate?

40. What happens to information listed by a property manager who is no longer in business or where the rent roll has been sold to another agency?

²³ Guthrie, F, Recommended Queensland Government Strategy Regarding Tenancy Databases, January 2002.

2.4. EXTENT OF RTD USE

The growth of the RTD industry indicates an increased use of RTDs by real estate agents and other relevant parties. It is suggested that a majority of real estate agents (possibly as many as 90 per cent) use RTDs²⁴. The remaining real estate agents not using RTDs, coupled with most self-managing landlords who do not access RTDs, presumably rely on other risk minimisation processes or on their best judgment based upon the impressions they gain in individual cases.

It has been reported that there are in excess of 500, 000 tenants listed on RTDs²⁵. This figure may be considerably higher as NTD alone claim to have 700, 000 tenant records on file²⁶. These records are comprised of positive, negative and neutral listings, although it is unclear as to the proportion of listings in each category. It is also unclear to what extent identical listings occur on multiple RTDs.

Discussion questions

General questions:

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

Property managers:

42. How often do you use RTDs to screen potential tenants during the application process?
Do you screen all prospective tenants by using an RTD? How many tenants have you listed on an RTD to date?

RTD operators:

43. How many tenants are currently listed on your company's RTD?

44. Of the tenants listed on your company's RTD, how many of these are negative listings, How many are positive and neutral?

²⁴ Guthrie, F, Recommended Queensland Government Strategy Regarding Tenancy Databases, January 2002. This figure is an overall representation of use. It does not separate the proportion of real estate agents using them for each purpose.

²⁵ Sydney Morning Herald, "Tenants get a chance to challenge blacklist", November 2002.

²⁶ For further information visit <http://www.ntd.net.au>.

3. The Current RTD Regulatory Environment

3.1. COMMONWEALTH REGULATORY ENVIRONMENT

3.1.1. Privacy Act

Organisations that trade in personal information, such as operators of RTDs, are subject to the private sector provisions of the *Privacy Act 1988* and are required to comply with the National Privacy Principles (NPPs)²⁷. In brief, the NPPs:

- set minimum standards for the collection, use, storage and disclosure of personal information, and particular rules for ‘sensitive information’²⁸;
- require organisations to inform individuals about their collection and information handling practices; and
- provide individuals with rights of access to, and correction of, their personal information.

Some of the NPPs are of particular relevance to RTD operators:

- NPP 1 requires organisations at the time of collection of personal information, or close to it, to take reasonable steps to ensure that the individual is aware of who is collecting the information and why, to whom the organisation usually discloses it, the individual’s access rights and the main consequences for the individual if all or part of the information is not provided. Collection is limited to information necessary to an organisation’s functions and activities.
- NPP 2 limits the range of circumstances in which an organisation can use or disclose personal information held by it for purposes other than the original purpose of collection.
- NPP 3 places an onus on organisations to take reasonable steps to ensure that the information they collect, use and disclose is complete, accurate and up-to-date.
- NPP 4 requires organisations to take reasonable steps to destroy or permanently de-identify personal information which is no longer needed for any purpose permitted under NPP 2.

²⁷ A copy of the NPPs can be obtained from www.privacy.gov.au. The private sector provisions of the Privacy Act are expressed to apply to ‘organisations’ as defined by section 6C of the Act. Small business operators (ie those with an annual turnover of less than \$3 million – see section 6D) are excluded from the definition. However, the effect of paragraph 6D(4)(d) is that an organisation cannot make use of the small business exclusion if it “provides a benefit, service or advantage to collect personal information about another individual from anyone else”.

²⁸ Sensitive information is a subset of personal information and is defined in section 6 of the Privacy Act to mean information or opinion about an individual’s racial or ethnic origin, political opinions, membership of a political association, religious beliefs or affiliations, philosophical beliefs, membership of a professional or trade association, membership of a trade union, sexual preferences or practices, criminal record or health information about an individual.

- NPP 6 requires an organisation holding personal information about an individual to provide the individual with access to that information except in a limited, and specified, number of circumstances. The Principle prohibits charging an individual to lodge a request for access. If the organisation is to charge the individual to provide access to records (eg. to give them copies), then those charges must not be excessive.
- NPP 10 prohibits organisations from collecting sensitive information except with the individual's consent, as required by law, or in a limited number of other circumstances.

Individuals who believe their privacy rights under the NPPs have been breached can complain to the OFPC. Generally, relevant parties are encouraged to resolve the problem, before complaint procedures are considered by the OFPC. Should investigation by the OFPC find that a complaint has been substantiated, the OFPC will attempt to conciliate the matter. If conciliation is unsuccessful, the Privacy Commissioner can issue a determination under section 52 of the *Privacy Act 1988*, including a declaration that:

- the respondent should not repeat or continue the conduct giving rise to the complaint;
- the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant; and
- the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice which was the subject of the complaint.

A determination by the Privacy Commissioner is not binding of itself and must be enforced through a Federal court to have compulsory effect²⁹. The Privacy Commissioner is yet to make a determination under section 52 of the *Privacy Act 1988*.

3.1.2. The Trade Practices Act

The *Trade Practices Act 1974* (TPA) includes a number of provisions that have potential application to undesirable practices associated with RTDs. These provisions are generally limited in their application to incorporated traders. The main provisions of interest are those relating to:

- unconscionable conduct;
- misleading and deceptive conduct; and
- undue harassment and coercion.

Unconscionable conduct

Section 51AB of the TPA prohibits unconscionable conduct by corporations when they supply goods or services that are ordinarily acquired by consumers for their personal, domestic or household use. In such a transaction the stronger party may not take advantage of its position by behaving in an unfair or unreasonable manner. The TPA does not define 'unconscionable

²⁹ Sections 54 to 55B of the Privacy Act deal with enforcement of determinations.

conduct' but section 51AB does include a non-exhaustive list of factors that may be taken into account by the Court.

Section 51AB could be most readily applied to the conduct of listing a tenant on a database in circumstances where the tenant suffers a particular disadvantage that sets them apart from other tenants listed on the database.

Section 51AA provides that a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law of the Australian States and Territories – that is, the general non-statutory or common law as it has evolved through decisions of the courts. This in effect means that the courts, when determining whether an action is unconscionable, may base their decision on common law precedent. The inclusion of Section 51AA in the TPA provides litigants access to the Act's remedies and redress provisions.

Misleading and deceptive conduct

Section 52 is a very broad provision that prohibits conduct by business that is misleading or deceptive, or is likely to mislead or deceive. It appears arguable that a real estate agent placing a tenant on a database incorrectly would involve a misrepresentation and constitute misleading or deceptive conduct irrespective of whether there is any intention to mislead or deceive.

There are likely to be difficulties in applying liability to RTD operators that claim to merely record information provided by real estate agencies without any knowledge of the accuracy of the information.

Undue harassment and coercion

Section 60 prohibits the use of physical force or undue harassment or coercion in connection with the supply of goods or services to a consumer or payment for goods or services by a consumer. It is likely that it would require more than a mere threat of placing the name of a tenant on an RTD to constitute harassment or coercion.

Remedies

Remedies including injunctions and compensation can be granted by the Court in civil actions brought by the ACCC and individuals under sections 51AA, 51AB, 52 and 60. Criminal actions for penalties can be brought by the ACCC for a breach of section 60 but not for sections 51 AA, 51AB and 52.

The ACCC has indicated that priority will be given to conduct targeting vulnerable or disadvantaged consumers. Accordingly, the ACCC would be particularly willing to examine complaints associated with RTDs in which the party suffering damage fits within this category.

3.2. STATE AND TERRITORY REGULATORY ENVIRONMENT

3.2.1. Consumer protection legislation

Each State and Territory has Fair Trading legislation that applies comprehensively within its jurisdiction. This legislation largely mirrors the consumer protection provisions of the TPA.

Under the consumer protection legislation in the Northern Territory a real estate agent who refuses a prospective tenant's application for accommodation on the basis of information received from a reporting agency must, upon request, disclose to that tenant that a report has been received and details of the reporting agency. In addition, the provisions place a duty of disclosure on reporting agencies upon a written application by an individual and give listed parties the right to dispute an entry. In the event of a dispute, the reporting agency is required to verify the accuracy of the listing³⁰.

In Queensland, *The Property Agents and Motor Dealers Act (PAMDA) (Real Estate Agency Code of Conduct) Regulation 2001* sets out a mandatory Code of Conduct for real estate agents. It contains a number of provisions relating to RTDs and the public recording of information about a tenant. The Regulation stipulates that the information on the RTD must be accurate. If it is an adverse listing, it must not be for a trivial reason or a minor breach. Tenants must be advised how the information will be used and about any proposed listing. Information must be amended if inaccurate³¹.

3.2.2. Residential tenancy legislation

Residential Tenancies legislation applies in all State and Territory jurisdictions. This legislation defines the bounds of the relationship between lessors or agents and tenants. The legislation also sets out the rights and obligations for both parties in relation to such matters as what constitutes a breach of relevant legislation or the tenancy agreement and procedures for dispute resolution.

As depicted in Table 2, some States and Territories have provisions that relate to dispute resolution procedures for general disputes between lessors and tenants. In all jurisdictions, residential tenancy legislation applies specifically to the relationship between tenants and landlords and does not extend to disputes between tenants and RTD operators. In most jurisdictions, the general dispute resolution clauses specifically relate to disputes in the context of tenancy agreements. However, in the Australian Capital Territory and Northern Territory, the general dispute clauses extend to any dispute between lessor and tenant.

³⁰ Refer to Part 8 Fair Reporting of the Northern Territory *Consumer Affairs and Fair Trading Act*.

³¹ Both the PAMDA and Code of Conduct are currently under review, which will consider the recent amendments to the *Residential Tenancy Act 1994* tenancy database provisions to achieve consistency in Queensland legislation.

Table 2: Dispute resolution clauses in State and Territory Residential Tenancy Acts

State/Territory	General dispute resolution clauses in residential tenancy legislation
Australian Capital Territory	A general clause allowing the Tribunal to make orders relating to a tenancy dispute as the tribunal considers appropriate.
New South Wales	No provisions relating to general disputes between lessors and tenants that do not relate to the rental agreement.
Northern Territory	A tenant or landlord can apply to the Commissioner if a tenancy dispute has arisen between parties to a tenancy agreement.
Queensland	The Tribunal can make an order it considers appropriate to resolve a general tenancy dispute between a tenant and lessor under the agreement.
South Australia	The Residential Tenancies Tribunal can generally give directions and do all things that it thinks necessary or expedient in the proceedings.
Tasmania	No provisions relating to general disputes between lessors and tenants that do not relate to the rental agreement.
Victoria	No provisions relating to general disputes between lessors and tenants that do not relate to the rental agreement.
Western Australia	No provisions relating to general disputes between lessors and tenants that do not relate to the rental agreement.

As the above table indicates, jurisdictions differ in the way they handle residential tenancy dispute resolution, which may include mediation or similar dispute resolution. In Queensland, there is a two step dispute resolution model in place, requiring all parties to non-urgent matters to attempt dispute resolution through the Residential Tenancy Authority's Dispute Resolution Section which offers a conciliation service. Urgent matters, and unresolved non-urgent matters, can progress to the Small Claims Tribunal. From 1 August 2003, the Queensland Small Claims Tribunal has been able to hear disputes about tenancy database matters, although it is too early to report on experience with this activity at this stage.

The Commissioner of Tenancies in the Northern Territory has received one dispute application relating to an inappropriate placement of a tenant on an RTD. This dispute was successfully conciliated in the tenant's favour, with the RTD operator agreeing to remove the tenant's details from their records. The WP is not aware of other RTD disputes that have been heard by tribunals in other jurisdictions.

Queensland Residential Tenancy Act

Currently, Queensland is the only jurisdiction that includes provisions in its residential tenancy legislation that specifically relate to the operation of RTDs³². Amendments to the Queensland *Residential Tenancies Act 1994* (the RTA), which commenced on 1 August 2003, regulate what information can be listed on an RTD³³. The RTA sets out who can be listed, when and for what reasons. People who make a listing are required to take reasonable steps to disclose a proposed listing and the reasons for it. The RTA also provides a related dispute resolution procedure. Proposed and existing listings can be disputed in the Small Claims Tribunal on the grounds that the listing does not comply with the legislative criteria, is inaccurate or the

³² New South Wales is considering prescribing rules of conduct under the *Property Stock and Business Agents Act 2002* to: require real estate agents to notify tenants when they intend to list them on an RTD; give them an opportunity to review and correct the information being listed and limit the reasons for which a real estate agent can list a tenant on an RTD.

³³ Further information on the changes to Queensland's *Residential Tenancy Act 1994* can be obtained at <http://www.rta.qld.gov.au>.

applicant believes it is unjust. It is an offence to fail to comply with a Tribunal order about a listing. Given its only recent introduction, the amended Queensland legislation is yet to be tested in the courts.

3.2.3. Industry self-regulation

As indicated previously, the current regulatory environment allows for significant discretion on the part of real estate agents and other property managers in the screening and listing of tenants.

The REIA has issued a code of conduct for use by its members which outlines professional standards for the industry. The objective of the Code is to promote and encourage a high standard of ethical behaviour by members in their dealings with other members, other non-member agents, their employees and members of the public. While the Code does not specifically include practices relating to the use of RTDs, it does include provisions relating to fraud, misrepresentation, offensive behaviour and unethical practices in real estate transactions. Individual State and Territory Real Estate Institutes have implemented the national Code to varied extents.

Discussion questions

General questions:

45. What are the consequences for real estate institute members if they do not abide by the Code of Conduct in their jurisdiction?
46. Are you aware of any other forms of industry self regulation that may be relevant to the operation of RTDs?

4. Discussion of key issues

The establishment of the WP reflects an awareness that the use of RTDs can substantially restrict an individual's ability to secure rental accommodation and the consequent adverse effects on such individuals.

The WP recognises that inconsistencies exist not only in terms of RTD use and management practices but also in the regulatory environment between jurisdictions. Inconsistency is undesirable for all parties as it creates uncertainty and confusion for tenants.

The Lavarch Committee (2002) concluded that in Queensland:

The operation of databases and their use by property agents and lessors are not always meeting the standards of fairness, accuracy and openness and as a result serious problems are being experienced by tenants and the community more widely.

The WP investigation is seeking, among other things, to determine if tenants in other Australian States and Territories share the Queensland experience.

Reflecting its Terms of Reference, the WP is not seeking to examine ways to improve the operation of RTDs except in pursuit of consumer protection objectives. However the WP would welcome any comments from industry participants on non-consumer protection issues. For example, there may be opportunities to improve the design and functioning of RTDs in order to enhance the risk management practices of property managers and landlords, or to make the rental property market more effective overall. Such proposals may not necessarily be inconsistent with consumer protection objectives.

4.1. ISSUES RELATING TO COMPLAINTS STATISTICS

An examination of relevant and comprehensive complaint statistics would provide a useful picture of potential systemic problems. The WP is currently compiling complaint statistics from Consumer Affairs and Fair Trading agencies.

It is recognised that over-reliance on complaint statistics can be misleading, as not all parties formally complain when they experience problems and, as discussed below, some are not aware that there is a problem. Accordingly, the WP is interested in examining both quantitative and qualitative data in its investigation.

Discussion questions

General questions:

47. Can you provide any RTD complaint statistics?

4.2. ISSUES RELATING TO LISTING TENANTS ON RTDS

4.2.1. Unfair listings

Concern exists that some listings may be unfair and lead to inappropriate outcomes for tenants. Examples of unfair listings include:

- inaccurate listings;
- trivial, vexatious and discriminatory listings;
- listings being made or retained indefinitely (even after disputes have been resolved);
- intimidation of the tenant by threats of listings;
- non-specific or 'refer to agent'³⁴ listings; and
- listings not including default reasons.

Further, unfair listings may also result from information being placed on an RTD that is based on hearsay or subjective standards or which has been influenced by personal landlord/tenant disputes. This may also be a consequence of tenants not having the opportunity to review the proposed listing information prior to it being listed and the power imbalance in the property manager/tenant relationship.

Discussion questions

General questions:

48. What information should be listed on an RTD? Should the listing include information on the type of breach or reasons for the breach? Who should determine what information is listed on an RTD?
49. Who do you think should be listed on an RTD? People who have signed the tenancy agreement or anyone occupying the house at the time?
50. When should a person be listed? Eg. During or at the termination of a tenancy agreement?
51. In what circumstances should a person be listed? Are there any exceptions to these circumstances?
52. Should a person be given the opportunity to review and correct inaccurate information before it is listed? If so, what process should be followed?

Tenants:

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

³⁴ A 'refer to agent' listing may be either positive or negative. In order to ascertain the nature of the listing, a subscriber is required to contact the listing agent for further details.

4.2.2. Non-disclosure of listings

There are two main issues resulting from property managers not disclosing to tenants that they have been listed on an RTD. Firstly, an individual may not be aware that the property manager would use an RTD to screen their tenancy application. While the applicant may have signed a document that consents to the property manager accessing an RTD, it is apparent that not all individuals are aware that they have given this consent.

Secondly, a tenant may not be aware that they have been listed on an RTD. Indeed, some tenants may only learn of their listing after being repeatedly refused a property³⁵. Non-disclosure does not provide the tenant with an opportunity to dispute or change the information placed on the RTD before their details are listed.

Discussion questions

General questions:

54. Should a person be informed about a listing on an RTD? If so, when should the person be informed and by whom?
55. Should a property manager be required to provide reasons as to why they have refused an application?

4.3. ISSUES RELATING TO THE MANAGEMENT OF THE RTDS

4.3.1. Accessing a listing

A number of tenants have experienced some difficulty in accessing their listing, reflecting uncertainty about whom to contact with particular queries. This may have been exacerbated by the variability of disclosure policies between RTD operators. The costs imposed on tenants seeking to access listings by some RTD operators may have contributed to access difficulties.

Discussion questions

General questions:

56. Is it reasonable for RTD operators to charge for accessing a listing? If so, why and under what circumstances is it appropriate? What is a reasonable charge?

Tenants:

57. Have you experienced any difficulties accessing information listed on an RTD? Please provide details.

4.3.2. Dispute resolution issues

There is concern that the dispute resolution processes of some RTD operators are insufficient, as they place the onus on the tenant to investigate the reasons for a particular listing and then

³⁵ Guthrie, F, Recommended Queensland Government Strategy Regarding Tenancy Databases, January 2002.

arrange to change or remove listed information. In some circumstances, tenants may find that, despite being able to prove that the listed information about them is incorrect, they still have difficulty removing their listing.

A related concern is that many RTD operators have no process for verifying the accuracy of particular listings. In most circumstances, RTD operators rely solely on the information provided by the listing property manager and, as a consequence, may list inappropriate or unfair information. There is also concern that RTD operators cannot undertake this process impartially as they benefit financially from the existence of listings.

Discussion questions

General questions:

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

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

Tenants:

60. Have you experienced difficulties when querying/disputing a listing? If so, what was the difficulty and was it with the property manager or the RTD operator? What was the outcome?

4.3.3. Listing duration

Being listed on an RTD may cause difficulties for tenants in obtaining housing. The longer a tenant is listed, the longer the period they may experience difficulties. As outlined earlier, the duration of a listing can vary considerably depending on the particular RTD operator and also on the nature of the breach.

Discussion questions

General questions:

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

4.4. OTHER ISSUES

The above discussion of issues relating to the operation of RTDs is not exhaustive. Interested parties should not feel constrained by the questions raised in this paper and the WP would be pleased to receive any information on RTDs of relevance to the WP's terms of reference.