

Tenants' Union of NSW

**Submission to the
Residential Tenancy Database Working Party**

December 2003

1. INTRODUCTION

1.1. ABOUT THE TENANTS' UNION OF NSW

The Tenants' Union of NSW (TUNSW) aims to represent the interests of all tenants in New South Wales, including tenants in both private rental housing and public housing, boarders and lodgers and residential park residents. TUNSW works to:

- Raise awareness of tenants' problems and rights
- Promote secure, affordable and appropriate housing
- Provide high quality advice and advocacy to tenants
- Advocate with governments and non-government organisations for improvements in residential tenancies legislation and housing policy
- Support, train and resource local, independent tenants' advice services across New South Wales.

TUNSW is a specialist Community Legal Centre with its own tenancy legal practice, and coordinates the Tenants' Hotline. TUNSW is also the resourcing body for the State-wide Tenants Advice and Advocacy Program (TAAP), providing training, legal, policy, IT and service development resources for services in the TAAP network. Since its formation in 1976, TUNSW has contributed to the creation of the Rental Bond Board in 1977, the law reform campaigns that resulted in the Residential Tenancies Act 1987 (NSW) and the Residential Parks Act 1998 (NSW), and the creation and maintenance of the TAAP, and continues to promote and advance the rights of tenants as the peak tenant organisation in New South Wales.

1.2. TUNSW ON RTDS

TUNSW welcomes the opportunity to make submissions to the Residential Tenancy Database Working Party. The problems caused by the operation of residential tenancy databases (RTDs) are a major issue for TUNSW and its constituents. We especially welcome that the Working Party's focus is specifically on RTDs. We hope that this will enable the Working Party to consider RTDs in terms of their actual operation and effects in the rental housing system, rather than obliquely through frames of reference that do not capture all of the issues to which RTDs give rise. For instance, TUNSW has previously made submissions in relation to RTDs in the context of privacy legislation. While RTDs undoubtedly have serious implications for privacy rights, not all of the issues and problems raised by RTDs can be dealt with under a privacy model. Likewise, the theme of 'risk management' is relevant to thinking about RTDs, but it also does not address all of the issues raised by RTDs – in fact, a focus on 'risk' conceals as much as it reveals about the operation of RTDs. Instead, we submit that RTDs should be approached generally as an issue of access to housing. RTDs directly affect the ability of listed persons to access housing, and generally affect the housing conditions under which all tenants live. Their effect is overwhelmingly negative and destructive.

The extent and severity of the problem of RTDs will be analysed below, according to the heading used in the issues paper, and illustrated with case studies from TUNSW's own legal practice and from the casework of tenants advocates in the TAAP network. RTDs are a major problem for TUNSW, tenants advice services in the TAAP network and very many tenants. RTDs undermine the right to housing that the Australian

Government acknowledged in its ratification of the International Covenant on Economic, Social and Cultural Rights, and that the Australian people affirm in the importance we attribute to a secure and dignified home-life.

The operation of RTDs depends on a basic inequality between landlords and tenants. In considering the role played by RTDs, and the effects their operations have on tenants, it is revealing to consider why there are no 'bad landlord' databases: quite simply, it is because tenants are never in a position to demand that their prospective landlords offer up details such as their date of birth, their driver's licence number, their income and bank account details, and other personal information. Tenants are never in a position to threaten to use this information to ruin a landlord's chances of ever getting another tenant. RTDs are predicated on this inequality, and their operations compound it.

It is the view of TUNSW that RTDs do not have a legitimate place in the rental housing system and that their use and operation should be outlawed. Our first recommendation, therefore, is that RTDs should be prohibited. We acknowledge, however, that firm legislative regulation of RTDs would be an improvement on the prevailing situation in which RTDs are, with the notable exception Queensland, almost entirely unregulated. In part 4 of this submission, we will make detailed recommendations as to the regulation of RTDs where governments chose to allow them to operate.

1.3. SUMMARY OF RECOMMENDATIONS

TUNSW recommends:

- 1. That the use and operation of RTDs should be prohibited by the Commonwealth and State and Territory Governments.*
- 2. That, should governments allow RTDs to be used and operated, both their use and operation should be subject to a national regime of legislative regulation.*
- 3. That a national regime of legislative regulation should apply to all operators of RTDs, all users of RTDs, and all persons who are the subject of a listing (including an existing listing) or a proposed listing.*
- 4. That a person's information may be listed on an RTD in the circumstances only:*
 - the person was a tenant under a residential tenancy agreement as prescribed by the relevant State or Territory; and*
 - the person's tenancy is terminated; and*
 - the person has been notified by the member-subscriber of the proposal to list, and has been given an opportunity to review and respond to the proposed listing; and either*
 - the tenancy was terminated by the relevant State tribunal on the grounds that the tenant caused damage to the property, and the cost of the damage as determined by the tribunal is in excess of the bond; or*
 - the tenancy was terminated by the relevant State tribunal on the grounds that the tenant was in rent arrears, and the amount of arrears as determined by the Tribunal is in excess of the bond; or*

- *the tenancy was terminated by the relevant State tribunal on the grounds that the tenant caused or threatened to cause injury to the landlord, the landlord's agent or another person lawfully on the premises.*
5. *That where a member-subscriber of an RTD proposes to list a person's information, the member-subscriber should be required to notify the person and provide them with an opportunity to review the information and respond to the proposed listing.*
 6. *That where an RTD lists a person's information, the RTD should be required to notify the person of the information listed.*
 7. *That where a member-subscriber of an RTD declines a tenancy application, the member-subscriber should be required to give the applicant reasons for the decision, including the contents of any information provided by an RTD.*
 8. *That RTDs should be required to provide a person who is listed on the RTD with a copy of the information listed, without charge and without delay.*
 9. *That the tenancy tribunal of each State and Territory be empowered to make urgent, binding, enforceable orders in relation to listings and proposed listings on RTDs.*
 10. *That a person who is the subject of a proposed listing on an RTD should be able to seek urgent orders that a proposed listing must not be made, where the proposed listing would:*
 - *be in breach of the prescribed circumstances for listing;*
 - *contain inaccurate information; or*
 - *cause injustice or excessive hardship to the person or their household.*
 11. *That a person who is the subject of a listing should be able to seek urgent orders that a listing must be amended or removed, where the listing:*
 - *is in breach of the prescribed circumstances for listing;*
 - *contains inaccurate information; or*
 - *is causing or may cause injustice or excessive hardship to the person or their household.*
 12. *That where a listing is made for a reason other than an unpaid debt, the listing should be required to be removed after two years; and that where a listing is made for a unpaid debt, the listing should be required to be removed immediately upon payment of the debt, or after two years, whichever is the sooner.*

2. THE RTD INDUSTRY AND HOW IT OPERATES

2.1. THE ROLE OF RTDS

RTDs are described in the issues paper as a risk management tool for landlords and three main purposes served by RTDs are identified. These are: the collection of information about tenants; the provision of information for consideration in the assessment of persons' tenancy applications; and the deterrence of certain 'problem tenants' from applying for housing through RTD member-subscribers.

TUNSW agrees that it is important to look carefully at the basic purposes of RTDs, but submits that the purposes identified in the issues paper do not tell the whole story of what RTDs do. In our analysis, the first of these purposes – the collection of information about tenants – might more usefully be considered as ancillary to RTDs’ other purposes, and will not be considered separately here. The two other purposes identified – the provision of information for the assessment of applications, and the deterrence of certain tenants from making applications – do stand as important purposes of RTDs, but a more critical consideration of them is necessary. Also, the issues paper omits another purpose of RTDs: that is, to deter tenants from entering into disputes with their landlord. This purpose, we submit, is actually the most important of the purposes of RTDs, and the result of it is injustice for tenants.

We will consider each of these purposes in turn.

Purpose 1: *‘providing information to subscribers when assessing prospective tenant applications.’*

In taking applications from prospective tenants, landlords and their agents already collect information that is used in the assessment of applications: most importantly, they collect evidence of the applicants’ income and employment, and references from previous landlords, employers and others. RTDs provide information that is additional to this basic information.

For the information provided by RTDs to be useful for the purpose of assessing tenancy applications, there must be some assurance as to the quality of that information. RTDs cannot give that assurance. First, the processes used by RTDs for the collection of information are without any respectable controls as to accuracy. RTD operators rely on their member-subscribers to furnish them with information, and cannot give the assurance that the information is anything more than the assertion or opinion of the listing member-subscriber. These problems of process are considered further below at 2.3. Second, it is evident that a considerable amount of the information listed on RTDs is in fact mere assertion or opinion, or worse. Some listings contain corrupted data; others contain information that is deliberately false and malicious.

- Case study: L moved to Sydney from interstate and applied to rent a house. On her application, she included identifying details such as her date of birth, maiden name and drivers’ licence number. When the real estate agent checked the RTD, it listed an entry for a person with the same name as L – and the agent supplemented the listing with L’s personal information. L can prove that she is not the person originally listed, but as the listing now includes L’s own identifying information, she is continually declined rental housing on the basis on the listing.

- Case study: When serious structural defects made S’s rented premises unsafe, S and her landlord agreed to end the tenancy, and the landlord gave S a glowing reference. S subsequently applied to the (then) Residential Tribunal seeking compensation for her moving costs. Immediately after S made her application, the landlord’s agent listed S on an RTD.

- Case study: R, a real estate agent, had a falling out with a partner in his agency and resigned. Out of spite, the partner listed R on an RTD.

There is currently so little credibility to RTD's processes for information collection, and so much inaccurate, trivial and out-of-date information actually listed on RTDs, that they do not provide a sound basis for assessing tenancy applications. RTDs serve this purpose very poorly.

Purpose 2: *'detering problem tenants from applying for housing through real estate agent offices which are part of the subscriber network.'*

We submit that this purpose can be stated more plainly as excluding listed persons from rental housing – or, more plainly still, as making people homeless. This is an unworthy purpose. We also note that because of the systemic problem of inaccurate RTD listings, it is not tenable to equate listed tenants with 'problem tenants'.

RTDs have a specific and severe effect upon persons who are listed: a listing can exclude a person from the rental housing market. In New South Wales, this is especially the case in regional areas. For example, a survey of persons seeking emergency housing in the Tweed Valley area indicates that more than 65 per cent were listed on an RTD.¹ TAAP services report that many of their clients who are listed on RTDs are continually moving between friends and family, representing a kind of secondary homelessness.

- Case study: N was listed on an RTD for rent arrears. A single, working woman with two children, N cannot get rental housing because of her listing. She and her children have stayed with friends, and are currently living with N's mother in a single bed-room flat, but their welcome is wearing out.

- Case study: D was listed on an RTD for not mowing his lawn. He cannot get rental housing and now lives in a caravan.

The exclusionary effect of RTDs also places pressure on other parts of the housing system that are outside the usual reach of the RTD subscriber network, such as boarding and lodging houses and caravan parks. Both of these sectors of the housing system are already highly pressurised, as many boarding houses and caravan parks are closing for redevelopment. Furthermore, the standard of housing they deliver to tenants is patchy, at best: caravan park residents are covered by the Residential Parks Act 1998 (NSW), but respect for residents' rights varies considerably across the industry; boarding house residents have no legislative rights at all. RTD listings are forcing more people and their households to look for accommodation in these marginal tenures.

Similarly, persons who are listed on RTDs often try to find housing in the informal parts of the rental housing sector, such as through private landlords. Again, these

¹ NCOSS News, vol 29 no 11, December 2002.

housing providers are more likely to have a poor knowledge of and respect for residential tenancies law, and are more likely to provide substandard housing. TUNSW has heard reports from one tenants advocate of a real estate agent who they suspect is referring tenancy applicants who have been refused housing because of a listing to an associate who offers housing without the legal protections of written agreements and lodged bonds.

The effect of ‘deterrence’ is to make listed persons homeless, or force them into insecure, pressurised forms of housing. Each effect is grossly disproportionate to the legitimate protection of landlords’ interests under residential tenancies law.

Purpose 3: *detering tenants from entering into disputes with their landlord.*

This purpose is not considered in the issues paper but TUNSW submits that it is at least as important as that of excluding listed persons from rental housing. RTDs promote themselves not only as a means of screening out poor applicants before the start of a tenancy, but also as a mechanism for keeping tenants in line throughout the period of the tenancy. This is another unworthy purpose. It has a generalised, pervasive effect on all tenants, and undermines the balance of rights and responsibilities provided in residential tenancies legislation.

The threat posed by RTDs lurks at the back of many tenants’ minds when dealing with matters relating to their tenancy. TAAP services report that it is common for enquiries from tenants on other matters, such as taking action to get repairs done, to also touch on RTDs – specifically, whether taking action under the Residential Tenancies Act 1987 (NSW), or insisting on the protection of the Act’s provisions, might result in the tenant being ‘blacklisted’.

▪ Case study: A miscommunication between T’s employer and his bank resulted in T’s pay being delayed. This also meant that T was late paying the rent. Under the Residential Tenancies Act 1987 (NSW), a landlord cannot take action against a tenant for rent arrears unless the rent is unpaid for 14 days or more. In T’s case, the rent was paid within one week, but the landlord’s agent listed T on an RTD. T complained to the agent and was told that the agent ‘could do as he pleased’.

▪ Case study: W had difficulty getting his landlord to do repairs, so wrote to the landlord advising that he might apply to the Consumer, Trader and Tenancy Tribunal if repairs were not made. The landlord’s response, by email, read in part: ‘Due to this conversation I have decided that it is best that you find another premises to live in. (You probably will not be able to find a premises this cheap anywhere in Sydney)... As for your legal proceedings, it is entirely up to you. I honestly don’t mind which ever way you go. It’s your choice. But I strongly recommend that you don’t for your and you’re your families sake. I may warn you that if you proceed with this measure it may affect your entire leasing ability in your life time. You may be Put on TICA & TRA which are data bases that all agencies Australia wide which lists problematic and unqualified tenants. This mean that you may not be able to rent anywhere in Australia for the duration of your

natural life... So I will leave the ball in your court. The agent may issue you with a termination notice as they may choose this option.'

- Case study: H took action in the Consumer, Trader and Tenancy Tribunal against her landlord for failing to do repairs, and was awarded several thousand dollars in compensation for the value of goods belonging to H that were damaged as a result of the landlord's breach. H also agreed with the landlord to terminate the tenancy. Subsequently, H was not able to move out on the date arranged. The landlord's agent confirmed that they had listed H on an RTD, and put an offer to H: the agent would remove the listing if H repaid to the landlord \$1000 of the amount that the Tribunal had ordered the landlord pay H.

The general sense of threat posed by RTDs is encouraged by both RTDs and their member-subscribers. For example, one RTD advises its member-subscribers to send tenants warning letters about being listed on the RTD, and to print these warnings on blue paper 'akin to the police department because it may be more effective'.² Also, TUNSW is aware of a member-subscriber of an RTD whose practice on signing up new tenants is to show them the RTD interface and impress upon the new tenant the ease with which information about them can be created and disseminated throughout the real estate industry.

Of these three purposes, RTDs perform the second and third significantly more effectively than the first: that is, they are better at excluding specific tenants and threatening tenants generally and worse at vetting tenancy applications. To describe these purposes simply as 'risk minimisation' is to obscure the abusive, threatening nature of what RTDs do. It is also to risk overemphasising the benefit in risk management that landlords and member-subscribers derive from the use of RTDs. Other less odious tools for risk minimisation are available to landlords, such as through landlords' insurance, the lodgement of rental bonds, the services of professional property managers, the terms of residential tenancies legislation, and the provision for quick orders for arrears, damages and terminations in each State or Territory's tenancy tribunal. For the dubious benefit landlords gain from RTDs, a massive cost paid by tenants in terms of their access to housing and the value of their legal rights.

2.2. INDUSTRY STRUCTURE

The majority of member-subscribers to RTD operators are real estate agents, but they are not the only member-subscribers. TUNSW is aware that a number of residential park owners are database members, as are a small number of Community Housing Associations. TUNSW is also aware of a boarding house operator who is a member-subscriber of the TICA database. Private landlords may access the TRA database on an ad-hoc 'pay-per-view' basis, without becoming full member-subscribers.

² Trading Reference Australia, <<http://www.tenantreference.com.au/tra/realty.asp>>, downloaded 16 September 2002.

The relationship between RTDs and member-subscribers is embodied in the products that RTDs provide. RTDs therefore may change their products and the relationships they have with member-subscribers, and develop new products and relations with new types of member-subscribers. For example, in response to the enactment of the recent Queensland legislation, TICA announced a new product that would allow member-subscribers to download information from TICA, including information deleted under the legislation, directly to member-subscribers' own computers and their own 'internal databases'. The product was obviously designed to exploit a particular exemption under the Queensland legislation and, after criticism from the Tenants' Union of Queensland and the Queensland Government, it was withdrawn by TICA; nonetheless it still serves as an example of the potential for RTDs to change their product in order to manipulate loopholes in regulation. It is conceivable that should a regime of regulation be implemented that affects only real estate agents, as has recently been proposed in New South Wales, the RTDs could begin to market a product directly to private landlords.

It is important, therefore, that regulation of RTDs include the RTDs themselves and all users of RTDs – not just real estate agents.

2.3. THE OPERATION OF RTDS

2.3.1. Screening prospective tenants

In TUNSW's view, RTDs perform poorly as a means for screening prospective tenants, as discussed above at 2.1.

As well as the problem of RTDs providing information that is inaccurate and prejudicial to prospective tenants' applications, there are other troublesome aspects to the operations of RTDs and their member-subscribers at the tenancy application stage. Of particular concern is the practice among member-subscribers of seeking the consent of prospective tenants to a number of uses of the information in their applications, including their consent to having the information listed on an RTD at an unspecified later date. These consents are apparently sought because of the requirements of the Privacy Act 1988 (Cth) and National Privacy Principle 2. However, by bundling these consents together in tenancy applications, member-subscribers are effectively extorting consent at a point in time when prospective tenants, because of their need for housing, are vulnerable to exploitation. Applicants do not have a realistic choice to withhold their consent to any of the uses asked for. In an interview in May 2000, the President of the Real Estate Institute of NSW stated that a person withholding their consent would not likely get a tenancy in New South Wales.³

TUNSW also notes that an aspect of the screening process of at least one RTD operator is not considered in the issues paper. Under the screening process of the TICA database, personal information that is collected from applicants to be matched against information on the TICA 'History' database is also entered on a second TICA database, called the 'Inquiry' database. This database keeps a record of every application made to any TICA member-subscriber, whether or not the applicant is on the 'History' database, whether or not the application was successful, and is available

³ John Hill, interview on Radio 2BL, 25 May 2000.

to be searched by TICA member-subscribers. The listing includes the location and contact details of the member-subscriber who checked the application. TICA has stated that the purposes of the Inquiry database include allowing member-subscribers to find out if a particular tenant has been applying for other tenancies. This has nothing to do with risk minimisation.

2.3.2. Process for listing

The issues paper suggests that RTD listings can be considered according to three categories – negative, positive and neutral. TUNSW submits that this interpretation does not completely describe the reality of listing processes and tenants' experiences of RTDs. First, all listings are potentially negative – that is to say, the threat of a negative listing hangs over a tenant throughout their tenancy and for some indeterminate time after the tenancy ends. A negative listing has a greater damaging effect than a positive listing has a beneficial effect: the former may exclude a person from housing but the latter will never guarantee access to housing or security of tenure. Second, 'neutral' listings may in fact be negative. For example, TICA uses the apparently neutral notation 'Tenancy History', except that one of its uses is to denote where a person has been listed in excess of the time periods used by TICA for certain listings. The notation is thus an indicator of a previous negative listing and may in fact be more prejudicial and damaging than the original listing, because of its vagueness.

Whether particular listings are bad, good or neutral, listing processes for RTDs are *dangerous* – they are poorly controlled and full of opportunities for member-subscribers to severely damage the housing prospects of tenants. As the issues paper indicates, the process for RTD member-subscribers to make a listing is, in all Australian States and Territories other than Queensland, almost entirely subject to the actions of individual member-subscribers. There are a number of implications of this lack of procedural rigor.

The first, as indicated at 2.1 above, relates to the inaccuracy of the information listed. Leaving aside Queensland's legislation, it is not necessary for any information listed on an RTD to refer to specified, objective standards, such as a breach of a particular term of a residential tenancy agreement. For example, member-subscribers of the TICA database may list tenants for 'unsatisfactory inspection reports', which does not disclose a breach. Notoriously, member-subscribers of TICA could previously list tenants with the notation 'phone agent' or 'refer to lister', which allowed member-subscribers to share information about tenants that they did not wish to put in writing. TICA has recently stated that it no longer uses this notation, but it is not clear whether the notation has been removed from existing listings.

Second, even where the listing refers to something specific (for example, a particular type of breach), it is not necessary that the information should be verified independently, such as through a determination by the Consumer, Trader and Tenancy Tribunal. In many instances where a tenant is listed for something as apparently concrete as a debt or property damage, the matter has never been determined by the Tribunal; instead it is merely an allegation that the member-subscriber has not been

required to substantiate and prove to the standard required by law. In particular, TICA has encouraged its member-subscribers to make listings without Tribunal orders.⁴

- Case study: H's landlord terminated her tenancy at the end of the fixed term. H was subsequently listed on an RTD for property damage and as owing more than \$600 for cleaning and repairs. H maintains that she left the premises in undamaged and clean, but the landlord's agent has not applied to the Consumer, Trader and Tenancy Tribunal for the claim to be determined. For H, a young person with a disability, finding housing can be difficult at the best of times, and the listing has eliminated her prospects. H's family is considering whether just to pay the agent's unsubstantiated claim.

A third implication is that there is no regulation (again, aside from Queensland's legislation) as to when a listing may be made. Instead, listings may be made at any point in time, including while a tenancy remains on foot. For example, TICA has advised its member-subscribers that 'the whole concept of TICA is to shut the gate before the horse bolts.... With this mind when do you report a tenant the obvious answer is from the time of arrears [*sic*]'. This practice can effectively trap a person in a tenancy, as in the first case study below. More often, the effect is even more negative, because the listing damages a person's housing prospects at precisely the time when their tenancy is ending and they need to find alternative housing. In some circumstances, such as in the second case study below, the effect is to force the tenant into moving sooner than they may need or want to; in others, a listing can frustrate the desire of both the tenant and the landlord that the tenancy should end and the tenant move out.

- Case study: B was renting premises in a small country town, and mentioned to the real estate agent that she was thinking of moving. The agent listed B on an RTD, apparently to keep B, an excellent tenant, on his agency's books.
- Case study: M was given a notice of termination without grounds by her landlord's agent. Shortly before the date given in the notice, M received a letter from the agent warning that if she did not vacate on the date in the notice, she would be listed on an RTD. Under the Residential Tenancies Act 1987 (NSW), M is not required to give vacant possession of the premises unless ordered to do so by the Consumer, Trader and Tenancy Tribunal – which may decline to make such an order. The threat of being listed and potentially excluded from housing raises the stakes for M of having her 'day in court'.

2.3.3. Tenants' access to listings

As the issues paper indicates, persons' means of access to information about them varies between RTDs. In addition to the phone and mail methods mentioned in the

⁴ 'TICA Group' newsletter, no 2, 2000.

issues paper, we note that TRA offers access through its website. TRA's 'Once-off Search' subscription provides persons with access to information listed about themselves, or indeed to anyone for whom the enquirer has sufficient identifying information (the Once-off Search is available to private landlords).

TUNSW submits that there are two major problems relating to tenants' access to listings. The first is that persons may not be aware that they are listed, and there is no clear requirement (apart from under Queensland's legislation) that either the RTD or the member-subscriber who listed them should notify the person of the listing. It is generally a requirement under the National Privacy Principles and the Privacy Act 1988 (Cth) that uses of personal information for a secondary purpose are notified and consented to, but it appears that RTD member-subscribers commonly attempt to meet this obligation by including a reference to this use in tenancy application forms, and seeking the applicant's 'consent' at that stage (see 2.3.1 above). The intended result is to obviate any requirement to notify if and when a listing is actually made. In any event, to TUNSW's knowledge no RTD operator sends notices of listings to tenants, instead leaving such correspondence to their member-subscribers.

The second major problem is the cost of access. The Working Party is aware of the rate charged by TICA on its 190 phone line. A single call to TICA can be exorbitantly expensive; where a person disputes the listing, it is common for numerous calls to be made. TICA does offer access to listings by post, at a charge of \$11. For persons on low incomes, this amount too can cause hardship, especially when the costs of getting a bank cheque or money order are included. We note that the TICA database interface instructs member-subscribers not to give listed persons a copy of the listing, and refers them to the 190 phone number only. TRA's 'Once-off Search' costs \$36.30 for 20 minutes. TUNSW submits that all of these charges are excessive.

- Case study: A women's refuge contacted TICA on behalf of a client, L, who was listed on the database. L disputed the alleged debt, and the real estate agent who listed her had since closed down. Over the course of several calls to TICA's 190 line, the refuge incurred charges in excess of \$100 to TICA.

2.3.4. Disputing a listing

In New South Wales there is no effective way of disputing an RTD listing. In the experience of TUNSW and services in the TAAP network, RTDs themselves do not offer fair or effective means of resolving a dispute about a listing. From our experience, the most common response is for the tenant to be told to contact the listing member-subscriber. This often leads to delays and obfuscation by the member-subscriber, or buck-passing between the RTD and the member-subscriber. TAAP services report that even where they are successful in securing the agreement of an RTD member-subscriber to remove a listing, the member-subscriber's request to the RTD operator may be refused. TUNSW is aware of cases where the member-subscriber has closed down, and still the disputed listing is not removed.

- Case study: While searching for rental housing in a regional NSW town late 2003, J discovered that she had been listed for an alleged debt from a tenancy, in another regional town, that ended in 1999. At the time, the agent told J that the bond would cover any outstanding liabilities, and did not subsequently notify J of any further claim. J has now attempted to contact the listing agent numerous times, including travelling back to the town: the

agent has variously advised that the relevant manager is ‘not available’, or that ‘the files are in boxes out the back’, but has never given details of the asserted claim to J. An agent to whom J has applied for a tenancy has advised that J will be signed up, but only if she pays the debt listed.

2.3.5. Duration of a listing

The duration of listings is a matter determined by each RTD operator. In the experience of TUNSW and services in the TAAP network, it is a common practice across RTDs to maintain a listing indefinitely, particularly where it relates to a debt. As discussed at 2.3.2 above, these listings include mere allegations of debts that have not been determined by a court or tribunal. These listings may also include debts that are so old as to be barred from recovery. Indefinite listings contribute to the amount of out-of-date information listed on RTDs and are unjust to tenants.

Other policies as to the duration of listings also cause injustice. TICA’s policy of maintaining a listing for a paid debt for five years is a particular problem, especially as it captures tenants who end their tenancies with small amounts of money owing that are covered by the bond. We submit that this policy may, in some cases, also have the perverse effect of discouraging persons from paying a debt because payment will not cure the damage done by the listing to their housing prospects. Again, this policy also contributes to the amount of out-of-date information on RTDs and prejudices the applications of prospective tenants.

- Case study: When V gave notice to end her tenancy, she asked the agent if the rent for the final two weeks of the tenancy could come out of the bond. The agent agreed and duly claimed that amount from the bond. V was then listed on TICA anyway and the listing will remain for 5 years.

- Case study: G entered her first tenancy at the age of 16. When it ended, the landlord listed G for a debt of \$180, but did not apply to the Tribunal in relation to this claim, and did not notify G of the alleged debt. Thereafter, G found that she could not successfully obtain tenancies through real estate agents (instead she rented through private landlords), but was not advised that she was listed until five years after the listing. G immediately paid the amount claimed, and was informed that the RTD would keep her listed for another 5 years – a total of 10 years, for an alleged debt of \$180 – then list her indefinitely as having a ‘Tenancy History’ – a category so vague that it is at least as prejudicial as the original listing.

2.4. EXTENT OF RTD USE

RTDs are used extensively throughout New South Wales. In the experience of TUNSW and services in the TAAP network, the use of RTDs is especially extensive in regional New South Wales, where it is common for all the real estate agents in town to be member-subscribers of an RTD.

The use of RTDs also appears to be ‘intensive’ in the sense that where a check against an RTD shows that an applicant is listed and therefore should not be offered a tenancy, few exceptions may be admitted. In many cases, applications are declined on

the basis of a listing even where the applicant can show good references from previous landlords and other factors in their favour. One TAAP service reports that it has been advised by a member-subscriber of the Barclays RTD that they will not offer a tenancy to a listed person because to do so may invalidate the coverage of landlords' insurance, also provided by Barclays. If RTD member-subscribers are abdicating their judgement and discretion in the assessment of tenancy application through the use of RTDs, it is added reason to ensure that the circumstances in which a listing may be made are limited and prescribed in legislation.

3. THE CURRENT RTD REGULATORY ENVIRONMENT

The current RTD regulatory environment is patchy, and even those patches of regulatory intervention are few and far between. Only one piece of legislation in Australia – Queensland's Residential Tenancies Act 1994 (Qld) – deals specifically with the use RTDs, and while some of its provisions are strong, its reach is limited. Some other pieces of legislation – notably the Privacy Act 1988 (Cth) and the Trade Practices Act 1974 (Cth) – are relevant to some aspects of RTD practice, but otherwise RTDs are unregulated.

3.1. COMMONWEALTH REGULATORY ENVIRONMENT

3.1.1. Privacy Act

As we have indicated, TUNSW believes that while some provisions of the Privacy Act 1988 (Cth) and the National Privacy Principles have an important bearing on aspects of RTDs' operations, the Act does not deal with all aspects of RTDs and leaves crucial issues unaddressed.

The relevance to RTDs of a number of provisions of the Privacy Act 1988 (Cth) is currently being considered by the Office of the Federal Privacy Commissioner, following four representative complaints by the Tenants' Union of Queensland against TICA. TUNSW made submissions in support of the complaints. Without prejudice to those proceedings, it is clear that the Privacy Act 1988 (Cth) leaves largely unaddressed the crucial issues of what information can be listed – that is, the grounds for listing – and at what point a listing can be made. It is also apparent that the complaints process under the Privacy Act 1988 (Cth) is ill-suited to the resolution of complaints about RTDs. TUNSW has experience of the complaints process, through its involvement with the Tenants' Union of Queensland's representative complaints against TICA, and having made an individual complaint against TICA on behalf of a client. These complaints still have yet to be finally resolved, and the process even to this point has been a long one. On the contrary, complaints about listings are complaints about a person's access to housing, and need to be resolved urgently

3.1.2. Trade Practices Act

TUNSW's experience of the Trade Practices Act 1974 (Cth) is similar to our experience of the Privacy Act 1988 (Cth): while relevant to some of the problems caused by RTDs, the provisions of the Trade Practices Act 1974 (Cth) are of relatively limited use.

TUNSW has communicated with the ACCC about grounds of action under the Trade Practices Act 1974 (Cth) in relation to RTDs, and the ACCC has provided TUNSW with some scenarios of conduct that may be proscribed by the Act. As the issues paper indicates, the grounds of action are quite narrow. Notwithstanding some previous successful actions by the ACCC in relation to RTD listings, it appears that most ordinary complaints, such as where a listing is made for a minor breach or small arrears paid out of the bond, cannot proceed as actions under the Trade Practices Act 1974 (Cth).

Also, it appears to us that even where there are grounds for an action under the Trade Practices Act 1974 (Cth), the process for taking action, like that under the Privacy Act 1988 (Cth), may be poorly suited to delivering what the listed person really needs – a quick resolution to their housing problem. TUNSW is aware of proceedings against an RTD and a member-subscriber under the provisions of New South Wales legislation that mirrors the Trade Practices Act 1974 (Cth) that have now been going on for several years in the costly jurisdictions of the District Court and Supreme Court. As a matter relating to access to housing, complaints about RTD listings should be dealt with urgently in an accessible forum.

3.2. STATE AND TERRITORY REGULATORY ENVIRONMENT

3.2.1. Consumer protection legislation

As stated in the issues paper, the provisions of the Trade Practices Act 1974 (Cth) are mirrored in the main consumer protection Acts of each State and Territory. We note that in addition to these and other provisions mentioned in the issues paper, the South Australian Fair Trading Act 1995 (SA) contain provisions relating to transfers of information between traders, which would appear to be relevant to RTDs. However, it is the understanding of TUNSW that these provisions have not been relied upon, perhaps because like other provisions in consumer protection legislation the litigation process is not readily accessible to tenants.

The New South Wales State Government has announced that it will provide some degree of regulation over real estate agents' use of RTDs under Regulations to the Property, Stock and Business Agents Act 2002 (NSW). According to the Government's draft Regulation, agents' use of RTDs will become subject to a Rule of Conduct, which provides that an agent must not list a person on an RTD unless the person's tenancy has ended, the agent has notified the person of the proposed listing and given them a reasonable opportunity to respond, and the listing is for a reason prescribed in the Regulation. Any one of the following reasons may justify listing: that the person owes rent in excess of the bond; that the person has failed to pay money in accordance with an order of the Consumer, Trader and Tenancy Tribunal; or that the Tribunal has terminated the tenancy on grounds of tenants' breach (including serious damage or injury). The draft Regulation also provides that an agent would not be allowed to list a person unless the RTD they use meets criteria prescribed in the Regulation. These are: that each person listed on the RTD is given free access to information held about them; that any such information is amended at the request of the listed person if inaccurate, out of date or incomplete; that where listed debts that are paid within three months of being incurred must be deleted, and debts paid after three months must be listed as paid and deleted after three years; and that listings for other than debts must be deleted in three years.

While each of these provisions is an improvement on the current situation, TUNSW sees a number of serious shortcomings with the draft Regulation and the approach taken by the New South Wales State Government. First, the Regulation would cover only those users of RTDs who are agents or managers under the Property, Stock and Business Agents Act 2002 (NSW). Other users of RTDs, noted above at 2.2, would not be covered, to say nothing of the RTD operators themselves. Even more importantly, the Regulation appears not to cover persons who are currently listed. The thousands of people currently suffering because of RTD listings would appear to gain nothing from the draft Regulation.

Secondly, the draft Regulation makes no particular provision for the resolution of disputes about listings in breach of the Regulation. As a part of the Rules of Conduct under the Property, Stock and Business Agents Act 2002 (NSW), a breach of the RTD regulations may result in disciplinary proceedings by the Commissioner of Fair Trading, but the manner in which these proceedings are currently conducted is quite different from the dispute resolution process of hearings and orders in the Consumer, Trader and Tenancy Tribunal. TUNSW holds serious concerns about the accessibility and efficacy of the disciplinary process in relation to RTD complaints and, as a consequence, serious concerns for the efficacy of the draft Regulation in general.

We submit that Regulations of this kind are not a satisfactory alternative to comprehensive State-level legislation. Nor does the draft Regulation obviate the need for national legislative reform. We note that at least on the latter point, the Minister for Fair Trading might agree, having stated that the draft Regulation ‘is not designed as a cure-all’.

3.2.2. Residential tenancy legislation

As noted in the issues paper, Queensland’s Residential Tenancies Act 1994 (Qld) is the only residential tenancies legislation in Australia that deals with the use of RTDs. In the view of TUNSW, the Queensland legislation is a genuine advance and presents a strong example of what can be achieved by State-level legislation. There are, however, some weaknesses in the legislation that should be addressed if emulated by other States and Territories; and some limitations to the regulatory scheme it creates that should be addressed by national legislation.

The weaknesses that TUNSW sees in the legislation come from some of the prescribed reasons for listing. For the most part, the regime of prescribed reasons limits listings to matters that have been determined by the Small Claims Tribunal. This has the two-fold benefit of giving some opportunity to dispute the matters for which they may be listed, and of improving the accuracy of listings by submitting the matters to which it relates to the scrutiny of the Tribunal. Not all of the prescribed reasons, however, require a determination by the Tribunal: in particular, tenants can still be listed for rent arrears without the claim being proved before the Tribunal. It is a simple matter to require that landlords apply to the Tribunal for orders in relation to rent arrears (in excess of the bond), and such a requirement should be included in any legislation based on Queensland’s legislation.

Another weakness relates to the exemption for ‘internal databases’, discussed above at 2.2. Again, it would be a simple matter to remove this exemption, or at least to closely define the term ‘internal database’, so as to close this loop-hole.

The major limitation of the Queensland legislation is that it does not attempt to regulate the conduct of the RTD operators. As such it does not address such matters as tenants access to listings or the duration of listings. It does not attempt to regulate RTD operators' conduct even indirectly: in this respect, it does even less than the otherwise inferior draft Regulation in New South Wales. These are serious limitations, and should be addressed by national, including Commonwealth, legislation.

3.2.3. Industry self-regulation

TUNSW believes that industry self-regulation is not appropriate where the industry concerned is involved in the provision of a service – that is, housing – that is a basic human right. The power that RTDs have to do real damage to the lives of people is too great for its regulation to be left to the RTD operators and users themselves.

4. DISCUSSION OF KEY ISSUES

As we stated at the outset of these submissions, it is the view of TUNSW that the problems caused by RTDs are so severe and unjust that the use and operation of RTDs should be prohibited. We acknowledge, however, that strict, comprehensive, effective legislative regulation would be an improvement on the current situation.

TUNSW recommends:

- 1. That the use and operation of RTDs should be prohibited by the Commonwealth and State and Territory Governments.*
- 2. That, should governments allow RTDs to be used and operated, both their use and operation should be subject to a national regime of legislative regulation.*

In the following sections, TUNSW details our recommendations as to what particular objectives must be achieved by a national regime of RTD legislation.

The structure of the RTD industry presents a challenge to regulation: the RTDs themselves operate interstate, while RTD users work within State-level legislative frameworks governing residential tenancies and property agents. TUNSW submits that a national regime of legislation is required to properly regulate the operation and use of RTDs. All Australian Governments – Commonwealth, States and Territories – have a role to play in RTD regulation. The scope of the operations of RTDs places the industry as a whole outside the jurisdiction of any one State. The interstate character of their business also represents a constitutional basis upon which the Commonwealth can act to legislate with respect to RTDs. At the same time, State and Territory Governments can play a crucial role in dealing with the problems caused by RTDs. The Queensland legislation shows that it is possible to effectively regulate the use of RTDs, and provide rights and remedies to listed persons. If State and Territory legislation along these lines were complemented by Commonwealth legislation dealing with matters such as access to listings, notices of listings, listing durations, and the enforcement of orders that listings be removed or amended, Australian tenants would be protected by a reasonable regime of regulation.

4.1. ISSUES RELATING TO COMPLAINTS STATISTICS

The enquiries databases used by services in the TAAP network do not record enquiries and complaints relating to RTDs. Tenants advocates on the State-wide Tenants' Hotline, and from TAAP services in regional New South Wales, report that they receive complaints and enquiries about RTDs daily.

4.2. ISSUES RELATING TO LISTING TENANTS ON RTDS

4.2.1. Unfair listings

TUNSW submits that legislation should prescribe who may be the subject of a listing, in what circumstances a listing may be made, and the reasons that may be specified in a listing. Legislative prescription is necessary to ensure the accuracy of information on RTDs and in the interests of justice for tenants.

Furthermore, these and other provisions of RTD legislation should apply to all RTD users and operators, and all persons who are listed or proposed to be listed. In particular, RTD legislation should cover the many thousands of people who are already listed on RTDs. Unfair listings affect tenants in the present and future, and complaints about such listings should be resolved regardless of when the information was first listed.

TUNSW recommends:

3. That a national regime of legislative regulation should apply to all operators of RTDs, all users of RTDs, and all persons who are the subject of a listing (including an existing listing) or a proposed listing.

4. That a person's information may be listed on an RTD in the circumstances only:

- the person was a tenant under a residential tenancy agreement as prescribed by the relevant State or Territory; and*
- the person's tenancy is terminated; and*
- the person has been notified by the member-subscriber of the proposal to list, and has been given an opportunity to review and respond to the proposed listing; and either*
- the tenancy was terminated by the relevant State tribunal on the grounds that the tenant caused damage to the property, and the cost of the damage as determined by the tribunal is in excess of the bond; or*
- the tenancy was terminated by the relevant State tribunal on the grounds that the tenant was in rent arrears, and the amount of arrears as determined by the Tribunal is in excess of the bond; or*
- the tenancy was terminated by the relevant State tribunal on the grounds that the tenant caused or threatened to cause injury to the landlord, the landlord's agent or another person lawfully on the premises.*

4.2.2. Non-disclosure of listings

Persons about whom a listing is proposed to be made should be informed of the proposal and given an opportunity to review – and refute – the information proposed

to be listed. When an RTD operator receives information about a person from a member-subscriber for listing, the RTD operator should contact the person and notify them of the listing. Also, where a listing results in a tenancy application being declined, the applicant should be informed by the RTD user of the reason for the decision and the contents of the listing. Each of these measures is necessary to ensure that all persons who are the subject of a listing have a reasonable opportunity to know what information is listed about them.

TUNSW recommends:

5. That where a member-subscriber of an RTD proposes to list a person's information, the member-subscriber should be required to notify the person and provide them with an opportunity to review the information and respond to the proposed listing.

6. That where an RTD lists a person's information, the RTD should be required to notify the person of the information listed.

7. That where a member-subscriber of an RTD declines a tenancy application, the member-subscriber should be required to give the applicant reasons for the decision, including the contents of any information provided by an RTD.

4.3. ISSUES RELATING TO THE MANAGEMENT OF RTDS

4.3.1. Accessing a listing

Persons should be able to freely access information about themselves held on RTDs. RTD member-subscribers can access listings instantly and, apart from their subscription fee, without cost – and there can be no suggestion on the part of RTD operators that a cost is incurred by them the more their databases are used.

TUNSW recommends:

8. That RTDs should be required to provide a person who is listed on the RTD with a copy of the information listed, without charge and without delay.

4.3.2. Dispute resolution issues

TUNSW submits that complaints about RTD listings and proposed listings are matters of access to housing and as such require urgent resolution in accessible forums. It is TUNSW's view that the tenancy tribunals of each State and Territory, such as the Consumer, Trader and Tenancy Tribunal of New South Wales, are best placed to provide quick, accessible resolution of these disputes. National legislation, including legislation by the Commonwealth, should ensure that these tribunals have the power to make binding, enforceable decisions not only on RTD users in their jurisdiction but also on the RTD operators themselves.

TUNSW submits that the grounds for dispute in relation to an RTD listing provided under the Residential Tenancies Act 1994 (Qld) provide a model for this aspect of RTD regulation, and our recommendations adopt these grounds with some minor modifications. These grounds would, in the first place, help to enforce the prescribed circumstances for listings, as recommended above, but also give persons a means of resolving problems with listings where the listing contains some inaccuracy or where the listing is causing injustice or excessive hardship for the person or their household.

TUNSW recommends:

9. *That the tenancy tribunal of each State and Territory be empowered to make urgent, binding, enforceable orders in relation to listings and proposed listings on RTDs.*

10. *That a person who is the subject of a proposed listing on an RTD should be able to seek urgent orders that a proposed listing must not be made, where the proposed listing would:*

- *be in breach of the prescribed circumstances for listing;*
- *contain inaccurate information; or*
- *cause injustice or excessive hardship to the person or their household.*

11. *That a person who is the subject of a listing should be able to seek urgent orders that a listing must be amended or removed, where the listing:*

- *is in breach of the prescribed circumstances for listing;*
- *contains inaccurate information; or*
- *is causing or may cause injustice or excessive hardship to the person or their household.*

4.3.3. Listing duration

TUNSW submits that where all listings should be required to be removed after two years. Where the reason for a listing is an outstanding debt, the listing should be required to be removed when the debt is paid, or after two years, whichever is the sooner. We note that the two-year period for listings was recommended by the Lavarch Committee, and an only slightly longer period (three years) is proposed by the New South Wales State Government in its draft Property Stock and Business Agents (Tenant Databases) Regulation.

TUNSW recommends:

12. *That where a listing is made for a reason other than an unpaid debt, the listing should be required to be removed after two years; and that where a listing is made for a unpaid debt, the listing should be required to be removed immediately upon payment of the debt, or after two years, whichever is the sooner.*