

Victorian
Law Reform
Commission

Residential Tenancy Databases Report

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Preface

This is the Victorian Law Reform Commission's second community law reform report. Minor law reform projects of this kind can be initiated by the commission without a reference from the Attorney-General. The commission undertook this project at the suggestion of the Tenants Union of Victoria.

The commission acknowledges the valuable contribution of Vishal Devraj and Natasha Stojanovich, who worked as student interns as part of the Victoria Law Foundation's Legal Policy Internship Program. Natasha and Vishal were principally responsible for the research and writing of this report. Merelle DuVé, another intern, diligently checked footnotes.

We thank the Victoria Law Foundation for its initiative in the internship program. We also gratefully acknowledge the assistance of the Tenants Union of Victoria, particularly David Imber, Policy and Liaison Worker, and Brian Beecham, Senior Policy Advisor, Consumer Affairs Victoria. The views expressed in this report are those of the commission and are not necessarily those of the organisations with which we have consulted.

The report is the responsibility of the commission as a whole.



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Abbreviations

ACT	Australian Capital Territory
ch	chapter
Cth	Commonwealth
div	division
eg	example
ibid	in the same place (as the previous footnote)
ie	that is
MP	Member of Parliament
n	footnote
NPP	National Privacy Principle
NSW	New South Wales
NTD	National Tenancy Database
pt	Part
Qld	Queensland
r	regulation (rr pl)
s	section (ss pl)
sch	schedule
TICA	Tenancy Information Centre Australasia
VCAT	Victorian Civil and Administrative Tribunal

Scope of Report

One of the functions of the Victorian Law Reform Commission is to examine any relatively minor legal issues which are of general community concern and will not be a burden on the commission's resources.¹

Community Law Reform reports are broad overviews which identify policy objectives which the commission believes should underpin reform of the law.

Residential tenancy databases are currently unregulated in Victoria. Many problems and complaints arising from the operation of the databases have been brought to our attention by the Tenants Union of Victoria.

This report examines the way these databases function and makes general recommendations for their regulation.

The report explains what residential tenancy databases are, who uses and operates them, and their function in the residential tenancy market. We also examine recent legislative reforms in other jurisdictions aimed at regulating the operation of residential tenancy databases.

The issues that we examine have particular significance for tenants and their access to housing in the private rental market. However, the commission believes that ensuring accuracy and procedural fairness in the operation of the databases would be beneficial for the whole community.

The commission believes that national regulation is appropriate to address the specific issues raised in this report. However, if this is not feasible, we propose that amendments be made to the Victorian *Residential Tenancies Act 1997*.

1 *Victorian Law Reform Commission Act 2000* s 5(1)(b).

Chapter 1

Background

ORIGINS OF THIS REPORT

1.1 In May 2005, the Tenants Union of Victoria approached the Victorian Law Reform Commission to discuss the operation of residential tenancy databases in Victoria.

1.2 The union expressed a number of concerns about the operation of databases and the problems experienced by tenants. These problems are examined in more detail in Chapter 3. In this chapter we outline the context in which they arise.

OUR PROCESS

1.3 In addition to consulting the Tenants Union of Victoria about the matters addressed in this report, the commission invited submissions from the Real Estate Institutes of Australia and Victoria, the two largest residential tenancy database operators, Tenancy Information Centre Australasia (TICA) and National Tenancy Database (NTD), the Office of Housing, Consumer Affairs Victoria and the Law Institute of Victoria. In particular, we sought the views of these organisations on:

- the importance of residential tenancy databases for real estate agents and landlords;
- what content is appropriate for inclusion in database listings;
- what safeguards are implemented by database operators to ensure the accuracy of listings;
- the extent of complaints that arise in relation to residential tenancy databases;
- the efficacy of legislation introduced in Queensland and New South Wales to regulate residential tenancy databases in those states.

1.4 The Tenants Union of Victoria notified other community legal centres and organisations about the project, and as a result, the Homeless Persons' Legal Clinic at the Public Interest Law Clearing House provided a submission.

1.5 Appendix 1 contains a list of the submissions received by the commission.

1.6 The reference team also met with Michael Levine, Deputy President, and other members of the Victorian Civil and Administrative Tribunal (VCAT), and Brian Beecham, Victoria's representative on the working party established by the Ministerial Council on Consumer Affairs and Standing Committee of Attorneys-General to investigate and report on the operation of residential tenancy databases in Australia.

WHAT ARE RESIDENTIAL TENANCY DATABASES?

1.7 Residential tenancy databases are electronic databases operated by private companies. Information about tenants and their rental history is collected, stored and made available to real estate agents to search for listings of potential tenants as part of their responsibilities as property managers. Database listings are created on the basis of information provided by real estate agents to database operators. The purpose of such databases is to enable real estate agents to assess 'business risk' on behalf of the property owner.

1.8 Residential tenancy databases are a relatively recent phenomenon and the first sizeable database was established around 1987.² They are separate and distinct from credit reporting agencies (see Chapter 4). Residential tenancy databases emerged from the regulation of credit rating agencies and the resulting need for real estate agents to 'have their own specialised tenancy database when the industry lost the ability to access credit information'.³

1.9 The databases generally include listings collected from across Australia and can be accessed nationally.

1.10 The operation of residential tenancy databases is not regulated by Victorian legislation. The federal *Privacy Act 1988* imposes limited controls on their operation. The real estate industry and major database operators do, however, have a stated commitment to fairness and accuracy in the operation of databases and compliance with their obligations under the *Privacy Act*.⁴

2 Barbara Adkins et al, *Tenancy Databases in the Context of Tenure Management: Risk Minimisation and Tenant Outcomes in the Private Rental Sector* (2003) 1.

3 The TICA Group, *History of TICA* (2005) <www.tica.com.au/ihistory.htm> at 14 July 2005.

4 Submissions 2, 3, 4, 5. See also National Tenancy Database, *Privacy Policy* <www.ntd.net.au/non_member/ntd/privacy/PRIVACY%20POLICY.pdf> at 12 January 2006, and TICA, *What a Tenant Needs to Know about TICA* <www.tica.com.au/iinfo.htm> at 12 January 2006.

USE OF CONSENT FORMS

1.11 Since they contain personal information, residential tenancy databases are subject to the private sector provisions of federal privacy legislation.⁵ This requires real estate agents to obtain tenants' consent before their information can be passed on to third parties for 'secondary purposes'.⁶ It is common practice for real estate agents to require tenants to sign consent forms about the release of their information to databases. However, such forms are usually presented as standard documents that are required to be signed if tenants wish to obtain rental properties.

1.12 Prospective tenants are typically asked to sign tenancy application forms for assessment of their suitability for properties. Generally, prospective tenants sign the bottom of application forms, which also gives their consent to the information being checked on a tenancy database, and to their details being listed on a tenancy database if they default on their agreement. Prospective tenants may not be aware of, or may not understand, the implications of providing their consent.

1.13 One of the major tenancy database operators, the NTD, has prepared a consent form for use by real estate agents who subscribe to its services. The form seeks tenants' consent to the release of their personal information to a range of organisations, including NTD. The form concludes by stating:

If your personal information is not provided to **ntd**, the real estate agent/property manager will **not** be able to carry out their professional responsibilities and will **NOT** be able to provide you with a lease/tenancy of the premises.⁷

WHO OPERATES RESIDENTIAL TENANCY DATABASES?

1.14 The operators of residential tenancy databases are private companies. These companies trade in the commodity of personal information about tenants. They have a vested commercial interest in ensuring that the information is a marketable commodity.

5 The *Privacy Amendment (Private Sector) Act 2000* (Cth) amended the *Privacy Act 1988* to extend coverage of National Privacy Principles to private sector organisations; however, they do not apply to 'small businesses'. See Chapter 4 for a discussion of the impact of privacy legislation on the operation of residential tenancy databases.

6 National Privacy Principle 2.1, *Privacy Act 1988* (Cth) Sch 3.

7 National Tenancy Database, *Tenant Privacy Statement*, <www.ntd.net.au/non_member/ntd/privacy/200404%20Consent%20Clause.pdf> at 12 January 2006.

1.15 The two largest database operators are TICA Group⁸ and NTD.⁹ Other database operators include the Barclay Group,¹⁰ thelandlord.com.au,¹¹ RP Data,¹² Trading Reference Australia¹³ and Tenant Check.¹⁴



Database Operators

According to its website, NTD is Australia's 'largest tenant database'. NTD has over one million tenant records on file, and has over 4000 members (many of whom are licensed real estate agents) who can access these files.¹⁵ The NTD listings can only be accessed by registered members and listings can only be added by registered members.

According to its website, TICA Group is one of the largest database operators in Australia, with thousands of members and over 55 000 tenant inquiries per month.¹⁶ Membership of TICA is limited to real estate agents, residential unit managers, caravan park proprietors, housing cooperatives and government departments.¹⁷ According to TICA, the provision of its service of collecting information on tenants 'has been able to reduce the hardships that were previously faced by property managers and reduce their clients' exposure'.¹⁸

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- 8 The TICA Group (2005) <www.tica.com.au> at 7 February 2006.
- 9 National Tenancy Database <www.ntd.net.au> at 7 February 2006.
- 10 Barclay MIS, Barclay MIS Fasttrack Database (2005) <www.barclay.com.au/products/dba.php> at 28 July 2005.
- 11 thelandlord.com.au (2004) <www.thelandlord.com.au> at 29 July 2005. This operator has two databases: the Defaulting Tenant Database and the Recommended Tenant Database.
- 12 RP Data, *RP Data Tenant Information* (2005) <www.rpdata.net.au/tenant.htm> at 7 February 2006.
- 13 Trading Reference Australia (2005) <www.tradingreference.com/tra/home.asp> at 7 February 2006.
- 14 Tenant Check (2001) <www.tenantcheck.co.nz> at 7 February 2006.
- 15 National Tenancy Database, *Tenant Checking* <www.ntd.net.au/non_member/ntd/check/index.html> at 7 February 2006.
- 16 The TICA Group, *History of TICA* (2005) <www.tica.com.au/ihistory.htm> at 7 February 2006.
- 17 The TICA Group, *Membership Information* (2005) <www.tica.com.au/imember.htm> at 7 February 2006.
- 18 The TICA Group, *Why Choose TICA* (2005) <www.tica.com.au/ichoose.htm> at 7 February 2006.

PURPOSE OF DATABASES

1.16 The principal users of residential tenancy databases are real estate agents. Real estate agents in Victoria routinely use residential tenancy databases to assess the 'risk' of prospective tenants. As real estate agents and their property-owner clients are both keen to ensure a return on their investment, it is in their interests to avoid tenants who might damage the property, abscond, or fall behind on rental payments. It is for this reason that real estate agents conduct risk assessments and investigations into potential tenants. Melbourne property managers Hocking Stuart, for example, argue that they have a duty to thoroughly assess the credentials of every tenancy applicant to safeguard the interests of landlords.¹⁹

1.17 Real estate agents routinely conduct enquiries into personal aspects of the lives of people applying to rent properties in order to assess their suitability as tenants. For example, an agent will often require details about an individual's income, employment history, previous rental history and landlord reference checks.

1.18 As the Queensland Government's report into the operation of database operators highlighted, the need to collect these personal details is justified on the grounds that '[a] lessor has a legitimate entitlement to take reasonable steps to protect their property investment by undertaking checks on tenants'.²⁰ The following statement from a group which represents the interests of landlords expresses this sentiment:

Most of us have had the unfortunate and extremely bitter experience of a Tenant not paying rent, damaging your property, doing a runner, or all of the above and more! Most of us are mortgaged to the hills [*sic*] and need the rent paid and paid on time to cover re-payments let alone forking out money to fix damage or chase a Tenant for monies owed.²¹

1.19 NTD stated in its submission that it believes that residential tenancy databases, properly operated, play an important role in ensuring the continued provision of rental accommodation:

19 Hocking Stuart Real Estate, Submission to the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General
<www.consumer.gov.au/html/Residential/submission%20downloads/Hocking_Stewart_Real_Estate.pdf>
at 2 February 2006.

20 *Report of Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases*,
Lavarch Committee Report, Queensland (August 2002) 6.

21 thelandlord.com.au, *About Us* <www.thelandlord.com.au> at 19 January 2006.

NTD does not believe that the tenant should be either victimized or marginalized in any way by the use of a database by real estate property managers. What NTD does believe is that honesty and transparency in reporting and the acceptance of industry standard risk management practices should be the norm, to ensure that individuals willing to supply housing for the community should be able to do so with the aid of fair risk management strategies that protect their investment, and in fact encourage them to continue on the practice of investing in real estate for the benefit of the community.

1.20 According to the Real Estate Institute of Australia, the peak representative body of real estate agencies, residential tenancy databases 'are an effective risk management tool against defaulting tenants that have been listed'.²²

1.21 It is also worth noting that some real estate agents claim they rely heavily upon residential tenancy databases because their rights are not adequately protected under residential tenancy law.²³ One operator of tenancy databases, TICA, expresses the problem in the following way:

Unfortunately due to consumer protection or tenancy legislation an asset can very quickly become a liability by approving the wrong tenant. Unfortunately, even with a court or tribunal order in hand the chances of recouping owed monies is very low.²⁴

1.22 For real estate agents, the consequences of an incorrect adverse listing are relatively minor as it might simply lead them to reject potential tenants. However, listings have a disproportionate impact on potential tenants because an inaccurate listing may prevent them having access to appropriate housing and therefore put them at risk of homelessness.

1.23 This imbalance in the impact of a listing extends beyond situations when the listings are incorrect to situations where the reasons for listing are relatively minor. Given this imbalance, there is a particular responsibility to ensure that the information listed is accurate.

WHAT KIND OF INFORMATION IS LISTED?

1.24 Databases contain a range of information about tenants, including details of past tenancy agreements, adverse listings and sometimes positive recommendations. At

22 Real Estate Institute of Australia, 'Submission to Inquiry into Residential Tenancy Databases', Ministerial Council on Consumer Affairs (2004) 2 <www.reia.com.au/documents/REIA_Submission_to_Inquiry_into_RTDs_Feb_04.doc> at 7 February 2006.

23 Mission Australia, *Residential Tenancy Database Study* (2004) 15.

24 TICA, *Why Choose TICA?* (2005) <www.tica.com.au/ichoose.htm> at 7 February 2006.

present, allegations contained in adverse database listings need not be substantiated or proven by the reporting real estate agent or landlord. The lack of regulation of the content of listings can potentially result in tenants being listed for reasons which are not related to their tenancy history (eg on the basis of a personal disagreement rather than a breach of the tenancy agreement).²⁵

1.25 Tenants can be listed on a database for a variety of reasons, for example:

- when a 'breach of duty' notice is sent out (by the real estate agent);
- for non-payment of rent;
- for damage to property;
- for abandonment of a property;
- at the conclusion of a tribunal hearing;
- for breach of a tribunal order;
- on the basis of a personal disagreement;
- for keeping an unauthorised pet on the premises;
- for using the property for an unlawful purpose;
- for interfering with the privacy of neighbours;
- as a recommended tenant;
- for an unspecified reason (often listings simply state 'refer to agent').



National Tenancy Database Listings

The following are listing codes and definitions adopted by the NTD.²⁶

- **Recommended tenant**—a positive recommendation of the tenant.
- **Previous tenant**—tenant listed after end of tenancy with no further comment.
- **Unclaimed money**—when tenants' money is being held in trust because their whereabouts are unknown.

25 In its submission, NTD stated that its system only allows for the recording of verifiable information, and there is no capacity for personal comments by agents to be included in the listing. TICA stated that its database no longer includes any adverse information about tenants, and only identifies the agents through whom the tenant has previously rented.

26 Submission 2.



National Tenancy Database Listings

- **Irregular rent payments**—where a tenant has been consistently late with payment of rent. Details of payment history must be available for review by tenant.
- **Broke conditions of lease (non-monetary, no tribunal order)**—eg where a tenant assigned the lease without authority, or kept an unauthorised pet that caused damage to property.
- **Broke conditions of lease (monetary, no tribunal order)**—where the tenant has breached the terms of the lease and funds must be paid from the bond to cover the cost of repairs or cleaning.
- **Tribunal/court order or judgment**—where an order against a tenant has been made in relation to the tenancy. Unpaid debts may be referred for debt collection.
- **Monies owing in excess of bond (no tribunal order)**—where order for possession of premises has been made and damage to property or unpaid rent is subsequently identified. Must be supported by documentation.
- **Clearout/skip**—where a property has been abandoned with or without moneys owing.

WHO CAN BE LISTED?

1.26 Any person whose information is available to a real estate agent can be listed on a residential tenancy database in Victoria. The real estate agent making the listing does not need to prove that the individual to be listed was in fact a tenant or party to a residential tenancy agreement.

HOW LONG DO LISTINGS LAST?

1.27 There is no automatic removal of listings when the matter in dispute is resolved.

1.28 Listings can be of indefinite duration. In practice, this means that tenants can effectively be 'listed for life'. Some database operators, however, have self-imposed time limits for listings. An example of this is thelandlord.com.au's recommended and defaulting tenant databases, on which listings remain for five years and are then automatically removed.²⁷ The operator of these databases states that if tenants can

27 thelandlord.com.au, *Tenant FAQ* <www.thelandlord.com.au> at 19 January 2006.

provide evidence that listings on the Defaulting Tenant Database are not correct, their details will be removed immediately.²⁸

GOVERNMENT ACTION

1.29 The first government investigation into residential tenancy databases was initiated on 18 April 2002, when the Queensland Government established the Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases, known as the Lavarch Committee.²⁹ The purpose of the committee was to review key issues in the operation of residential tenancy databases in Queensland and to provide recommendations to put in place good public policy for their continued operation. The investigation undertaken by the Lavarch Committee was limited to residential tenancy database issues specific to Queensland and resulted in recommendations for reform of legislation.³⁰

1.30 Problems with the operation of residential tenancy databases are currently being investigated at the federal level. In August 2003, the Ministerial Council on Consumer Affairs agreed to establish a joint Residential Tenancy Database Working Party with the Standing Committee of Attorneys-General.

1.31 The formation of a national residential tenancy database working party was intended to clarify if tenants in other Australian states and territories were experiencing difficulties with databases similar to those experienced in Queensland. The working party was requested to:

- investigate and report on the role and operation of residential tenancy databases and the extent of their use in Australia;
- examine the existing regulatory framework, highlighting key issues relevant to tenants, database operators, real estate agents and landlords;
- develop, where necessary, options for a nationally-consistent regulatory framework.

1.32 In November 2003, the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General released an issues paper for public comment.³¹ The paper aimed to prompt stakeholder input on issues relating to the role

28 Ibid.

29 Chaired by Linda Lavarch MP.

30 Lavarch Committee Report (August 2002) above n 20.

31 Ministerial Council on Consumer Affairs and Standing Committee of Attorneys-General, *Residential Tenancy Databases: Issues Paper* (November 2003).

and operation of residential tenancy databases in Australia, particularly key identified problems. Issues on which submissions were sought included:

- the extent of the use of residential tenancy databases;
- the process for listing a tenant on a database (including notification of tenants, categories of breaches that may justify a listing);
- tenants' access to listings;
- dispute resolution;
- duration of listings;
- alternatives available to property managers and landlords for minimising risk in relation to rental properties;
- the effectiveness of industry self-regulation;
- the effectiveness of the existing regulatory regimes.

1.33 The working party requested submissions from all interested parties to develop an approach to regulate residential tenancy databases. The closing date for submissions was 24 December 2003.

1.34 The enquiry received 50 submissions from interested parties and stakeholders and the commission has drawn on many of the submissions in the writing of this report. At the time of writing, the submissions to the working party had closed and the matter was under consideration.³²

32 Ibid.

Chapter 2

Residential Tenancies in Victoria

PRIVATE RENTAL MARKET

2.1 As residential tenancy databases operate within the private rental market, it is worth examining the trends and features of this market in the context of the Australian housing market more generally.

2.2 Throughout the 1990s, the role of the private rental market within the broader housing market has taken on greater significance in Australia.³³ According to the latest census data, approximately one in four Victorian households is a rental household,³⁴ meaning that in Victoria alone there are approximately 328 176 households in the private rental market. Analysed historically, these figures indicate that although once seen as transitional tenure, renting has become the long-term option for many households who are unable, or choose not to, purchase their own home.

2.3 Available data also suggests that the Australian private rental market is divided, catering for two distinct groups: providing choice for the more affluent and constraint for the poor.³⁵

2.4 There is evidence that some households which are in a position to exercise market choices 'trade down' in private rental, paying cheaper rent for less amenity, and effectively squeezing out low-income households which are reliant on the private rental market for long-term housing.³⁶ This means that there is increased demand within the private rental market and increased competition for private rental properties at the lower-cost end of the market.

2.5 According to national research conducted into the availability of low-cost housing covering the period 1986–96, private rental market stock declined by 28%,

33 Tim Seelig, 'Private Rental Housing Provision in Australia: A Structural Analysis' (Paper presented at the 2001 National Housing Conference, Brisbane, October 2001).

34 Australian Bureau of Statistics, *Census of Population and Housing in Victoria* (1996).

35 Terry Burke, *Private Rental in Australia* (1999).

36 Judith Yates and Maryann Wulff, 'W(h)ither Low Cost Private Rental Housing?' (2000) 18(1) *Urban Policy and Research* 45–64.

while at the same time, there was an increase in low-income households renting privately.³⁷ In Victoria, this resulted in a shortfall of 36 000 low-cost properties across both metropolitan and rural areas.³⁸

2.6 According to the Affordable Housing National Research Consortium, private tenants are the group most likely to be dealing with housing affordability issues.³⁹ When low-income households spend 30% or more of their income on housing costs, they are deemed to be experiencing 'housing stress'.⁴⁰ This means that their housing costs are the direct cause of financial hardship and even poverty. Research indicates that 54% of private renting households are experiencing housing stress. This is twice as high as households who are buying their homes, and six times higher than those living in public housing.⁴¹

2.7 Another measure of affordability in the private rental market can be drawn from Commonwealth rent assistance data. Rent assistance is a non-taxable income supplement payment added on to the pension, allowance or benefit of eligible income support recipients who rent in the private rental market. Data provided by the Department of Family and Community Services indicates that over one-third (35%) of rent assistance recipients experience housing stress, despite the additional income represented by the payment.⁴²

2.8 Recent research indicates that low-income and marginalised households are spending long periods of time in private rental,⁴³ often in housing stress.⁴⁴ Those who find themselves unable to access the private rental market sometimes slip into even more marginalised forms of housing such as rooming houses and caravan parks. Other research indicates that many people in low-income households are forced to rent

37 Maryann Wulff, Judith Yates with Terry Burke, *Low Rent Housing in Australia 1986 to 1996: How it has changed, what does it work for and who does it fail* (March 2001) 10.

38 Judith Yates, 'The Limits to Choice in the Private Rental Market' (2002) 25 *Just Policy* 32–48.

39 The consortium is a national committee comprising representatives from the housing, building and development industries, trade unions and not-for-profit organisations.

40 More specifically households in the lower 40% of income distribution.

41 Affordable Housing National Research Consortium, *Affordable Housing in Australia: Pressing Need, Effective Solution* (2001) 6.

42 Department of Family and Community Services [Australia], *Annual Report 2004–2005* (2005) Table 2.29.

43 Andrew Beer, 'Housing Investment and the Private Rental Sector in Australia', (1999) (36)2 *Urban Studies* 255–69.

44 Yates and Wulff (2000) above n 36.

properties that have particularly low standards of amenity, sacrificing physical and material comforts such as heating, because they cannot afford better quality housing.⁴⁵

RESIDENTIAL TENANCIES: DISPUTE RESOLUTION FRAMEWORKS

2.9 There are formal legal processes for the investigation and mediation of disputes between tenants and landlords (and real estate agents) in Victoria. The rights and obligations of both tenants and landlords are set out in residential tenancies legislation.⁴⁶ The most important among these is the *Residential Tenancies Act 1997*, which is concerned with the rights and obligations of tenants and landlords in rented premises, rooming houses and caravan parks. The Act also sets out procedures for the inexpensive and quick resolution of disputes, a centralised system for the administration of rental bonds, and regulation of caravan parks and movable dwellings. Both Consumer Affairs Victoria and VCAT have a role in applying residential tenancy legislation.

RESIDENTIAL TENANCIES LEGISLATION

2.10 Victorian residential tenancies legislation has developed over time to regulate rental housing and protect the rights of tenants and property owners. Increasingly, recognition of the unequal bargaining power between tenants and landlords has resulted in a trend towards defining the rights and responsibilities of landlords and tenants in legislation.

2.11 The *Residential Tenancies Act 1980* came into force in 1981. It aimed to reduce the incidence of disputes between landlords and tenants. The Act clarified uncertainties, specified additional rights and obligations and provided a new, low-cost means of resolving disputes—the Residential Tenancies Tribunal.

2.12 The Act was repealed in 1997 and was replaced by the current Act. A year after the introduction of this Act, Victoria's tribunals, including the Residential Tenancies Tribunal, were consolidated into a single structure: VCAT.⁴⁷ The Act establishes the tribunal's jurisdiction

Jurisdiction is the scope of a court or tribunal to determine disputes, which may be limited by geography or law.

45 Terry Burke, 'Housing and Poverty' in Ruth Fincher and John Nieuwenhuysen (eds), *Australian Poverty: Then and Now* (1998) 165–83.

46 There are two Acts which cover the area of residential tenancy in Victoria: the *Residential Tenancies Act 1997* and the *Landlord and Tenant Act 1958*.

47 VCAT was established on 1 July 1998 and merged 15 previously existing boards and tribunals. It deals with disputes about credit, purchase and supply of goods, discrimination, domestic building works, guardianship and administration, residential tenancies, legal profession services and retail tenancies and some areas of dispute between individuals and government. For more information, see <www.vcat.vic.gov.au>.

and contains provisions relating to residential tenancies, rooming houses and caravan parks. Broadly speaking, the Residential Tenancies Act outlines:

- the rights and obligations of tenants and landlords;
- the mechanisms for ending a tenancy;
- rights for compensation;
- rights to seek compliance orders (where a breach of obligations has occurred).

2.13 A review of the Act by the Residential Tenancies Legislation Working Group, established by the Victorian Government in 2000, noted that:

... a balance needs to be struck (by residential tenancies legislation) between not discouraging investment and providing protection for the most vulnerable members of society. Reduced investment, which would lead to low vacancy rates and high rents, would clearly disadvantage tenants. However, a system that provides balance and certainty for landlords and tenants is a fairer system for all.⁴⁸

2.14 As the report points out, one of the most challenging issues in the establishment of a fair system is the need to balance tenants' need for tenure security against the rights of landlords to secure their property interests: '[t]enants and residents want security and stability, while owners want to be sure that they can quickly recover their property if necessary'.⁴⁹

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

2.15 VCAT has the power to make orders directing the parties to a dispute in much the same way as a court. The tribunal is presided over by tribunal members, rather than judges or magistrates. VCAT decisions can be appealed to the Supreme Court in limited circumstances.

2.16 The tribunal is divided into three divisions: civil, administrative and human rights, which are then divided further into lists within the divisions. The residential tenancies list is in the civil division. It deals with disputes between landlords and tenants and can also hear from rooming house owners and residents, caravan park owners, caravan owners and residents, and other people VCAT approves.

48 Victorian Residential Tenancies Legislation Working Group, *A Review of the Residential Tenancies Act 1997* (2001) 9.

49 Ibid 10.

2.17 The residential tenancies list aims to provide a quick cost-effective way to resolve disputes concerning residential tenancies. It is able to hear and determine applications made under the:

- *Residential Tenancies Act 1997*;
- *Fair Trading Act 1999*;
- *Landlord and Tenant Act 1958*.⁵⁰

2.18 VCAT does not currently have jurisdiction to hear complaints about the operation of residential tenancy databases.⁵¹

CONSUMER AFFAIRS VICTORIA

2.19 Consumer Affairs Victoria offers residential tenancy services for tenants, landlords and real estate agents. While VCAT makes orders under the Act, Consumer Affairs has responsibility for providing information and administering the rental bond system. Its services include:

- provision of information and advice about the rights and obligations of landlords and tenants;
- an estate agents' resolution service that aims to conciliate minor disputes between tenants and real estate agents;
- administering the lodgement and maintenance of residential tenancy bonds and ensuring that proper procedures are followed;
- inspection of goods left behind by tenants;
- ensuring that tenants and landlords provide forwarding details;
- providing relevant advice about considering the needs of tenants from diverse backgrounds.⁵²

2.20 Consumer Affairs does not currently address concerns about residential tenancy databases. However, it could potentially assist in the provision of information about parties' rights and dispute resolution services if residential tenancy databases were regulated.

50 VCAT, *Residential Tenancies* (2005) <www.vcat.vic.gov.au> at 7 February 2006.

51 VCAT does, however, have general powers to make determinations in respect of disputes arising out of tenancy agreements: *Residential Tenancies Act 1997* ss 446, 452, 472.

52 Consumer Affairs Victoria, *Renting* <www.consumer.vic.gov.au> at 7 February 2006.

Chapter 3

Problems in Victoria

INTRODUCTION

3.1 Our research and consultations have revealed there are many problems which arise from the operation of residential tenancy databases in Victoria. This is despite the stated commitment of the real estate industry and major residential tenancy database operators to fairness and accuracy in the operation of databases.⁵³

3.2 We have identified the following problems, which are discussed in this chapter:

- dispute resolution issues;
- correcting database listings;
- removal and duration of listings;
- access to listings;
- relationship to residential tenancy law;
- disproportionate impact upon tenants (such as homelessness and increased reliance upon crisis accommodation);
- unspecified listings; and
- discrimination.

DISPUTE RESOLUTION ISSUES

3.3 Tenants may dispute the reasons real estate agents give for making database listings. In situations where the listing is based on an incorrect claim or where the dispute has been resolved, tenants' concerns may be justified. However, as databases are unregulated, tenants must rely on real estate agents and residential tenancy

53 In its submission, NTD stated that 'in our 18 years of operation there have been less than a handful of complaints regarding NTD's services through the Office of Fair Trading and all of these have been resolved amicably and to the satisfaction of all parties'.

database operators to resolve disputes about incorrect or unfair listings. Both NTD and TICA offer avenues for resolving disputes about listings.⁵⁴

3.4 Reliance on this form of ‘self-regulation’ is problematic. It fails to ensure procedural fairness, as there is no neutral arbiter to mediate disputes, nor are there any established guidelines. As Mission Australia points out in its study of residential tenancy databases, ‘database operators often act as mediators in disputes—a potential conflict of interest as they are in a contractual agreement with the agent at the time’.⁵⁵

CORRECTING DATABASE LISTINGS

3.5 Tenants who are listed on residential tenancy databases are generally not advised of entries at the time of listing. This means that they have little opportunity to respond to allegations made by real estate agents.

3.6 If tenants believe that database listings are false or misleading, they have few avenues to seek amendment or removal of listings. A tenant may contact the database operator or the real estate agent who made the listing to request that it be changed or removed. However, under existing legislation, tenants are unable to require that listings be changed or removed.⁵⁶

REMOVAL AND DURATION OF LISTINGS

3.7 The lack of time limits for listings is in contrast to other equivalent services, such as credit reporting agencies, which must remove default listings after five or seven years depending on the type of information included.⁵⁷ The potential for residential tenancy listings to be life-long means that listings could last longer than some criminal convictions.

54 National Tenancy Database, *Tenant Privacy Statement* <www.ntd.net.au/non_member/ntd/privacy/200404%20Consent%20Clause.pdf> at 12 January 2006; TICA, *What a tenant needs to know about TICA* <www.tica.com.au/iinfo.htm> at 12 January 2006.

55 Mission Australia (2004) above n 23, 6.

56 See Chapter 4 for a discussion of the National Privacy Principles and the powers of the federal Privacy Commissioner.

57 *Privacy Act 1988* (Cth) s 18F.



CASE STUDY

Danny contacted the Tenants Union of Victoria after being continually knocked back for properties despite good references from real estate agents and employers. He and his two young children had been effectively barred from the rental market and were at serious risk of homelessness.

With the assistance of the Tenants Union, Danny found out he had been listed 15 years prior for a debt of under \$250 that had allegedly been incurred at the property his brother still rented. Neither the real estate agent who had listed him, nor the database provider could verify the debt. He was eventually removed from the database.⁵⁸

ACCESS TO LISTINGS

3.8 Under federal privacy law, database operators are obliged to provide tenants with access to the personal information they hold about them.⁵⁹ However, in practice tenants may have difficulty finding out whether they are listed on residential tenancy databases.



CASE STUDY

Rose keeps having her applications for rental properties rejected. She suspects that this is because of a database listing but doesn't know for sure. One of the agents she is dealing with won't tell her whether or not they have listed her. She has attempted to obtain information from one of the major database operators, but was put on hold and found the process of dealing with them too difficult and time-consuming.

58 The case studies in this report have been taken from the Tenants Union of Victoria's submission to the Ministerial Council on Consumer Affairs, Inquiry into Residential Tenancy Databases. They are based on real cases.

59 See Chapter 4.



CASE STUDY

Rose is aware of a dispute with her landlord in the past, however, she feels that it was resolved. Even though she had moved from the rental property in question, Rose's name was still on the lease agreement and her former housemate broke the lease. Rose resolved the dispute before the matter was taken to the tribunal so she feels there should be no reason for a listing. Rose is facing significant difficulties in simply finding out if she has been listed or not. She is still trying to find out from a previous agent whether she has been listed by them and is getting the run-around.

COST OF ACCESS

3.9 Tenants are generally required to pay a fee if they wish to obtain access to or copies of their listings on residential tenancy databases. If individuals wish to search multiple databases for listings or wish to check their listings multiple times, costs can mount up.

3.10 The NTD provides access to information held on their files by request through their online application form. They charge \$15 as an administration fee for this service if an immediate response is requested. They also offer a free service that may take up to 10 working days.⁶⁰

3.11 If tenants want to perform searches of TICA's listings, they can either phone the TICA 'tenant helpline', at a cost of \$5.45 per minute (\$327 per hour), or apply by post, at a cost of \$14.30. TICA also offers free access for tenants who apply by post with the provision of a self-addressed envelope, however, this service may take up to 28 days.⁶¹

3.12 Some tenants have also experienced difficulty searching for variations of their own names. See for instance the following case study of a tenant trying to access his own file.

60 See National Tenancy Database, *About ntd* <www.ntd.net.au/non_member/index.html> at 7 February 2006.

61 The TICA Group, *What a tenant needs to know about TICA* (2005) <www.tica.com.au/iinfo.htm> at 7 February 2006.



CASE STUDY

Bill paid one of the major database operators to conduct a search for any listings under his name. However, when the search results were returned to him, he discovered that they had only searched for 'Bill' and had not searched for 'William'. When Bill brought this to the database operator's attention and requested that they search for William also, it refused and demanded additional payment for a new search.⁶²

RELATIONSHIP TO RESIDENTIAL TENANCY LAW

3.13 Another concern which has been raised by the operation of the current system is that tenants may be fearful of asserting their rights under the Residential Tenancies Act because they fear being 'blacklisted' by their landlord or real estate agent. This has the potential to undermine the effectiveness and the purpose of the legislation and distort the power balance in the landlord–tenant relationship.

3.14 As the Tenants Union of Victoria has observed:

Left unregulated, Residential Tenancy Databases have the potential to undermine existing regulation. In some regional centres in Victoria where there are low vacancy rates, tenants are afraid to request repairs or exercise their rights for fear that they will be listed. This is particularly an issue where the database has no process for removing listings ... RTDs should not be used by agents to circumvent the tribunal through threats, punitive listings or listings prior to tribunal decisions.⁶³

DISPROPORTIONATE IMPACT UPON TENANTS

3.15 An adverse listing on a residential tenancy database has potentially drastic consequences for those reliant upon the rental market for accommodation. Research conducted by Mission Australia indicates that 'it is extremely difficult for a person to rent housing through a real estate agency once they are listed'.⁶⁴ This means that tenants who have been blacklisted on residential tenancy databases are at risk of homelessness. Even if not rendered homeless, tenants may be forced into substandard

62 Ministerial Council on Consumer Affairs and Standing Committee of Attorneys-General, above n 31, 1.

63 Tenants Union of Victoria, 'Submission to the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General', available from www.consumer.gov.au/html/Residential/submission%20downloads/Tenants_Union_of_Victoria.pdf at 2 February 2006.

64 Mission Australia (2004) above n 23, 3.

accommodation, crowded accommodation with friends or family, or emergency housing. The disproportionate severity of consequences for tenants was touched upon by the Lavarch Report, which concluded that:

If ... 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 prohibited.⁶⁵

HOMELESSNESS

3.16 Research conducted by the Public Interest Law Clearing House concluded that there is a 'direct causal relationship between RTDs and homelessness'.⁶⁶ A report conducted by Mission Australia similarly found that there is a 'significant link between databases and homelessness'.⁶⁷

3.17 The Victorian agency WAYSS Ltd has also expressed concerns about the operation of residential tenancy databases. WAYSS Ltd provides housing and support services in the outer south-east of Melbourne, particularly for young people and women escaping family violence. In its submission to the Standing Committee of Attorneys-General Inquiry into Residential Tenancy Databases, WAYSS raised concerns about the impact of the databases on victims of domestic violence, pointing out that women escaping domestic violence may be listed because of the actions of their partners.⁶⁸

3.18 WAYSS Ltd also raised concerns about the impact of residential tenancy databases on young people:

There is no defined time limit as to how long a person remains on a database. This is problematic for adults but in the case of young people it has far reaching implications for their future housing options. As young people mature, increase their life skills and access employment their personal situation can change dramatically. Real estate agents when

65 Lavarch Committee Report, above n 20, conclusion 3.9, 23.

66 Eloise Curry and Phil Lynch, *Homelessness and Residential Tenancy Databases: Submission to the Ministerial Committee on Consumer Affairs and the Standing Committee of Attorneys-General Inquiry into Residential Tenancy Databases* (December 2003) 5, Public Interest Law Clearing House, <www.pilch.org.au/html/getFile.asp?table=tbl_TCA_Article_Files&field=image&cid=271> at 7 February 2006.

67 Mission Australia (2004) above n 23, 29.

68 WAYSS Ltd, *Submission to the Ministerial Committee on Consumer Affairs and the Standing Committee of Attorneys-General Inquiry into Residential Tenancy Databases* (January 2004) Ministerial Council on Consumer Affairs <www.consumer.gov.au/html/Residential/submission%20downloads/WAYSS.pdf> at 29 November 2005.

making an assessment for private rental, particularly when the individual has a listing on a database, do not generally consider these factors.⁶⁹



CASE STUDY

Marike is a tenant who had a dispute with her landlord about rent arrears. She was asked by the agent to sign and confirm a list of arrears that she did not agree she was responsible for. When she refused, she was threatened with legal action.

The dispute was resolved at VCAT with the landlord getting orders for approximately half of what was claimed. However, Marike noted that the agents representing the landlord were dissatisfied. She was not told that she was going to be listed on a database as a result of the dispute. She did notice that her applications for rental properties (through various real estate agencies) subsequently kept being rejected. The real estate agencies in question refused to explain why she kept being rejected.

Marike eventually requested assistance in obtaining housing from an organisation which assists tenants experiencing difficulty finding rental properties. With the help of the organisation, she discovered that she was listed on a database. Marike then asked the agent with whom she had the dispute to remove the listing but was told that they were unable to do so; she was not given any reasons why. As a consequence, Marike moved to emergency housing for a period of time before securing a tenancy with a private landlord.

EMERGENCY AND CRISIS ACCOMMODATION

3.19 Database listings are also having a flow-on effect in the provision of emergency and crisis accommodation. Mission Australia has found that listings are ‘forcing clients into less secure housing or emergency and supported housing services’.⁷⁰ The agency points out that, in terms of consequences for government, this may result in increased

69 Ibid.

70 Mission Australia (2004) above n 23, 3.

reliance upon and ‘additional strain placed on emergency and supported housing agencies’.⁷¹

UNSPECIFIED LISTINGS

3.20 Unspecified listings on databases such as ‘refer to agent’ or ‘tenancy history only’ do not need to be substantiated with reference to any details. Additionally, such vague and non-specific listings are open to abuse by real estate agents and leave room for discrimination.

DISCRIMINATION

3.21 Forms of discrimination are a barrier to many people seeking access to the private rental market. While equal opportunity legislation provides some protection from discrimination, such protection is only available where discrimination is linked to a protected characteristic (eg race, gender or disability).⁷² The equal opportunity dispute resolution process is slow and may not result in access to housing. It may also be difficult to prove discrimination where there is an unspecified listing such as ‘refer to agent’.

3.22 It is worth raising the question of what constitutes a ‘bad’ or ‘high-risk’ tenant. For instance, tenants may have had a good record but then found themselves in difficult circumstances beyond their control (for instance a relationship breakdown, unemployment or domestic violence).

CASE FOR ABOLISHING RESIDENTIAL TENANCY DATABASES

3.23 Some tenant advocates and community groups have argued for the complete abolition of residential tenancy databases. The Tenants Union of NSW, for example, recommends that the use and operation of residential tenancy databases should be prohibited by federal, state and territory governments.⁷³ The Tenants’ Union of Queensland also does not agree that tenant databases are a legitimate debt reduction or

71 Ibid.

72 *Equal Opportunity Act 1995* pt 2, s 6.

73 Tenants Union of New South Wales, *Submission to the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General* (December 2003) Ministerial Council on Consumer Affairs, <www.consumer.gov.au/html/Residential/submission%20downloads/Tenants_Union_of_NSW.pdf> at 2 February 2006.

risk management tool because of the severe consequences of a database listing and their effect of undermining tenancy law.⁷⁴

3.24 However, submissions by the Real Estate Institute of Victoria, landlord groups, estate agents and property managers argue that residential tenancy databases are an effective risk management tool to guard against defaulting tenants as well as in assisting recommended tenants to obtain suitable accommodation. They consider residential tenancy databases to be a useful system for tenants with good records because their members are able to register an individual as a 'recommended tenant'. NTD emphasises that because of this feature of their databases, they should not be considered to be a 'black list'.

3.25 The commission believes that while the abolition of residential tenancy databases may address problems faced by tenants in the short-term, it is likely that in the long-term new services would emerge to fill the 'market gap'. It is clear that the key stakeholders in the residential tenancy market consider the tenant information contained on databases valuable. If they are unable to obtain this information through the use of residential tenancy databases, it is more than likely that they will find other means of obtaining it. The commission does not believe that abolishing residential tenancy databases will provide a lasting solution.

74 Tenants' Union of Queensland, *Submission to the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General* (January 2004) Ministerial Council on Consumer Affairs, <www.consumer.gov.au/html/Residential/submission%20downloads/Tenants_Union_of_Queensland.pdf> at 7 February 2006.

Chapter 4

Privacy Legislation

INTRODUCTION

4.1 There is privacy legislation in force both federally and in Victoria. The Victorian *Information Privacy Act 2000* applies only to information held by public bodies such as Victorian government agencies and local councils.⁷⁵ The federal *Privacy Act 1988*, however, applies to personal information handled by the federal government, large private sector organisations, private sector health providers and some small businesses.⁷⁶

FEDERAL PRIVACY LEGISLATION

4.2 The federal Privacy Act established the Office of the Privacy Commissioner. The Act provides for 11 Information Privacy Principles governing the collection, use, storage, access to, maintenance and disclosure of an individual's personal information held by Australian government agencies.⁷⁷

4.3 In late 1998, the federal government announced its intention to legislate to support and strengthen privacy protection in the private sector. After widespread consultation, the *Privacy Amendment (Private Sector) Act 2000* was passed.⁷⁸ It established a single comprehensive national scheme governing the collection, holding, use, correction, disclosure and transfer of personal information by private sector organisations.⁷⁹ It does so by means of 10 National Privacy Principles (NPPs) (and

75 See sections 1 and 9 of the *Information Privacy Act 2000*.

76 See *Privacy Act 1988* s 6-6F.

77 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (March 2005) 27.

78 Commencing 21 December 2001. See *ibid* 28.

79 *Ibid*.

additional provisions allowing organisations to adopt approved privacy codes).⁸⁰ Organisations must comply with the NPPs.⁸¹

4.4 The NPPs establish the principle that individuals should be informed of what personal information an organisation has about them and how it intends to use this information. The organisation must not collect information unless it is necessary for one or more of its functions or activities.⁸² Whether the information is collected directly from the individual or indirectly from a third party, the organisation should 'take reasonable steps' to tell the individual the purposes for which the information was collected, who the organisation usually discloses such information to, and any consequences of not providing it.⁸³

4.5 Generally speaking, the organisation cannot use or disclose the information for a purpose other than that for which it was collected (a secondary purpose) unless:

- the purpose is related (or directly related if the information is sensitive information) to the primary purpose and the individual would reasonably expect the organisation to use it for such a purpose; or
- the individual has consented to the use or disclosure.⁸⁴

4.6 Organisations must take reasonable steps to ensure that the personal information they collect is 'accurate, complete and up-to-date'.⁸⁵ If an individual can establish that the information is not accurate, complete or up-to-date, the organisation must take reasonable steps to correct the information.⁸⁶ If the organisation and individual disagree about whether the information is accurate, the individual may ask the organisation to include a qualifying statement. The organisation is required to take reasonable steps to make such an annotation.⁸⁷ Organisations must provide individuals with access to the personal information they hold about them.⁸⁸ If an organisation charges a fee for providing access to the information, the fee must not be excessive.⁸⁹

80 See *Privacy Act 1988* div 3, ss 16A–F; Office of the Privacy Commissioner (March 2005) above n 77, 28.

81 See *Privacy Act 1988* div 3, s 16A.

82 NPP 1. See *Privacy Act 1988* sch 3; Office of the Privacy Commissioner (March 2005) above n 77, 81.

83 NPP 1.3 and NPP 1.5. See *Privacy Act 1988* sch 3; Office of the Privacy Commissioner (March 2005) above n 77, 81.

84 NPP 2.1 (a)–(b).

85 NPP 3.

86 NPP 6.5.

87 NPP 6.6.

88 NPP 6.1.

89 NPP 6.4.

4.7 The federal Privacy Act is administered by the Privacy Commissioner. Tenants with concerns about database listings can make a complaint to the Privacy Commissioner.⁹⁰ Under the Privacy Act, tenants can make a claim for compensation for loss or damage they suffer as a result of the issue they have made a complaint about.⁹¹

SMALL BUSINESS EXEMPTION

4.8 There is an exemption for small businesses under the Privacy Act which means that small business operators with an annual turnover of less than \$3 million are free from obligations under the Act.⁹² In the four determinations about residential tenancy databases made by the Privacy Commissioner in 2004, TICA was considered to be an 'organisation', and thus within the jurisdiction of the Privacy Act, despite having an annual turnover under \$3 million. This is because TICA trades in personal information, which is an exception to the small business exemption.⁹³



Determinations by the Privacy Commissioner

In April 2004, the (then) federal Privacy Commissioner, Malcolm Crompton, made rulings on four cases concerning residential tenancy databases. He found TICA, a database operator, to be in breach of the Privacy Act. The commissioner held that:

- tenants should not be charged a fee for checking whether they are listed;
- tenants' listings should be accessible for a reasonable fee; and
- listings should be accurate and subject to removal or amendment if they are not.

90 *Privacy Act 1988* s 36.

91 *Privacy Act 1988* ss 52(1)(b)(iii), (1A).

92 The *Privacy Act 1988* applies to organisations which are defined to exclude small businesses: s 6C(1).

93 See *Privacy Act 1988* s 6D(4)(c)–(d); Office of the Federal Privacy Commissioner, *Complaint Determination No 3 of 2004* (April 2004) 36 <www.privacy.gov.au/act/casenotes/comdeter0403.html> at 22 December 2005.



Determinations by the Privacy Commissioner

The commissioner also suggested that:

- a standard set of reasons for listings be established; and
- listings be removed after four years.⁹⁴

4.9 In its submission to our review, TICA advised that it has altered its practices following the Privacy Commissioner's determinations, and its 'tenancy default database' has been replaced by a 'tenant history database' which is intended only to contain information about which particular agent a tenant rented through. According to TICA, the database simply enables an inquiring agent to contact another agent who has previously dealt with a prospective tenant. However, in the opinion of the Tenants' Union of Queensland, in practice, real estate agents tend only to refer defaulting tenants to be listed on the database.⁹⁵ At the time of writing, TICA's change of approach was not reflected in the information published on its website, which continued to promote its 'default tenancy control system'.⁹⁶

REVIEW OF THE PRIVATE SECTOR PROVISIONS OF THE PRIVACY ACT

4.10 In August 2004, the federal Attorney-General asked the Privacy Commissioner to review the operation of the private sector provisions of the Privacy Act. The government released the Privacy Commissioner's report, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* in May 2005.

4.11 The report highlighted concerns about the effect of the private sector provisions of the Privacy Act on the operation of residential tenancy databases in a number of areas. These included the lack of national consistency in privacy regulation,⁹⁷ the limited circumstances in which an individual's consent to the collection and use of personal information is required⁹⁸ and the powers of the commissioner to ensure compliance.⁹⁹

94 Office of the Federal Privacy Commissioner, *Complaint Determination No 3 of 2004* (April 2004) 60 <www.privacy.gov.au/act/casenotes/comdeter0403.html> at 22 December 2005.

95 Penny Carr, Tenants' Union of Queensland, personal communication, 2 August 2005.

96 TICA, *About TICA*, <www.tica.com.au/iabout.htm> and *Why Choose TICA*, <www.tica.com.au/ichoose.htm> at 12 January 2006.

97 Ibid 72–3.

98 Ibid 82.

99 Ibid 136.

4.12 The report acknowledged that when applying to rent a property, a prospective tenant will be expected to provide personal information for disclosure to a tenancy database and has little choice but to consent.¹⁰⁰ In the report, the Tenants' Union of Queensland was reported to have noted in its submission that:

Through one signature, individuals' consent is gained for a range of matters, and without this they will be denied the tenancy. By gaining this consent, the collecting organisation has a greater ability to use and disclose the information. The uneven bargaining power means consumers have little or no power to resist the invasion of privacy and are pressured to consent to a range of things they may not really agree with.¹⁰¹

4.13 The report noted that the experience of tenants' unions in other states has been similar, and that the Tenants Union ACT had argued that 'a prospective tenant has no real choice about handing over their personal information, so the protection that would otherwise be provided by the NPPs is lost to them, that is, the NPPs do not work'.¹⁰²

4.14 The report also noted that the Privacy Commissioner lacked the power to issue binding codes or the capacity to address systemic concerns outside the context of resolving an individual complaint.¹⁰³

4.15 The recommendations in the report include making the Privacy Act apply to all residential tenancy databases and amending the Privacy Act to provide a power for the commissioner to make a binding code that would apply to residential tenancy databases.¹⁰⁴ At the time of writing, none of the commissioner's recommendations has been implemented or acted upon.

CREDIT RATING AGENCIES: AN EQUIVALENT SERVICE

4.16 Credit rating agencies are comparable in many ways to residential tenancy databases. For instance, both industries are run by private companies which trade in personal information. Both also store listings in electronic databases and charge fees to access the information. Potential lenders and service providers will generally use credit rating agencies to check prospective clients and assess the level of risk. If there are negative listings, lenders may decide not to lend or alternatively may only lend at a

100 Ibid 87.

101 Tenants' Union of Queensland, *Submission 69*, Office of the Privacy Commissioner, <www.privacy.gov.au/act/review/revsub69.pdf> at 30 November 2005.

102 Office of the Privacy Commissioner (March 2005) above n 77, 87.

103 Ibid 136.

104 Ibid 73.

higher interest rate. The two major credit rating agencies active in Victoria are Baycorp Advantage and Dun and Bradstreet.

CONTENT OF LISTINGS

4.17 The content of credit rating listings is more limited than that of residential tenancy databases. Standard entries include personal information such as name, date of birth, residential address, gender and driver's licence number. Items which can be included in a credit reference listing are:

- late payments (where overdue for more than 60 days);
- court judgments;
- dishonoured cheques;
- paid defaults;
- records of current loans;
- records of previous credit applications;
- bankruptcy information (including debt agreements);
- clear-out listings or 'serious credit infringements' (where an individual has left without paying the debt and is not contactable).¹⁰⁵

DURATION OF LISTINGS

4.18 Credit rating listings are of finite duration. Most listings, for example credit applications, overdue accounts and court judgments, will expire after five years. More serious listings such as bankruptcy orders, debt agreements and clear-outs can be listed for seven years.

ACCESS TO LISTINGS

4.19 Credit rating agencies are obliged to provide a free copy of a listing within ten days of receiving a written request.¹⁰⁶ The two main operators in Victoria also offer an express option for faster service, which requires payment of a fee. For instance, if

105 *Privacy Act 1988* (Cth) pt IIIA, s 18E.

106 Pursuant to the Credit Reporting Code of Conduct issued by the Privacy Commissioner under s 18A of the *Privacy Act 1988* (Cth): Office of the Privacy Commissioner
<www.privacy.gov.au/publications/p6_4_31.doc> at 3 January 2006.

someone wants to obtain a copy of their credit file within 24 hours, Baycorp charges \$27 and Dun and Bradstreet \$25.¹⁰⁷

AMENDING LISTINGS

4.20 To get a listing corrected, changed or updated, the individual listed needs to write to the credit reporting agency and the business which listed the debt. There is also the option of applying to the relevant industry ombudsman (if applicable), for example, the Banking and Financial Services Ombudsman.

4.21 The listed individual can take a complaint to the Privacy Commissioner, however, the commissioner requires the individual to complain to the lender first.¹⁰⁸ Under the Privacy Act, individuals also have a right to request alteration of information in credit reporting agency files and reports. If the agency does not amend the relevant information in accordance with the individual's request, it must note the correction or amendment sought in the individual's file or report.¹⁰⁹

107 See Baycorp Advantage, *Frequently Asked Questions* (2006) <www.mycreditfile.com.au/faqs/frequently_asked_questions_default.aspx#HLITIHIMCF> at 3 January 2006; Dun & Bradstreet, *Credit Risk: Individuals, Frequently Asked Questions* (2006) <secure.dnb.com.au/ccb/AU/faqs.asp#howccf> at 3 January 2006.

108 *Privacy Act 1988* (Cth) s 36. The Credit Reporting Code of Conduct specifies that consumers should first address their complaints to the complaints section of the relevant bank, finance company, credit provider or credit reporting agency: Principle 3.16, paras 86–7.

109 *Privacy Act 1988* (Cth) s 18J.

Chapter 5

Other Jurisdictions

STATE AND FEDERAL JURISDICTIONS

5.1 Most Australian states and territories rely on the federal Privacy Act (see Chapter 4) and industry-based self-regulation to monitor the use of residential tenancy databases. However, Queensland and NSW have both recently regulated the use of the databases through legislative reform at the state level. The ACT also has a Bill before parliament which regulates the use of residential tenancy databases. The experience of these jurisdictions suggests that the protections offered by the Privacy Act are inadequate. The commission believes that further regulation is required at the federal level.

QUEENSLAND

5.2 Subsequent to the recommendations of the Lavarch Report, the Queensland Government introduced regulation of residential tenancy databases due to concerns about their operation, 'such as unfair and inaccurate listings, the lack of any controls about what information is listed and the lack of any dispute resolution procedures'.¹¹⁰ There was also great concern about the difficulty of tenants 'accessing housing due to inaccurate or unjust listings on a tenancy database'.¹¹¹ The reforms aimed to 'complement the federal privacy legislation to determine what is lawful collection and storage of personal information'.¹¹²

110 Explanatory Memorandum, Residential Tenancies and Other Legislation Amendment Bill 2003 (Qld) 2.

111 Ibid.

112 Queensland, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, Residential Tenancies and Other Legislation Amendment Bill 2003 (Qld), 13 May 2003 (Hon RE Schwarten, Minister for Public Works, Housing and Racing) 1709.

RESIDENTIAL TENANCIES ACT

5.3 Residential tenancy databases in Queensland are regulated by amendments to the *Residential Tenancies Act 1994* (Qld).¹¹³ The amendments inserted a new chapter into the Act to specifically address the use of tenancy databases.¹¹⁴

Expansion of Jurisdiction

5.4 One key feature of the Queensland reforms was an expansion of the jurisdiction of the Small Claims Tribunal to cover residential tenancy databases. The reforms empowered the Small Claims Tribunal to:

- hear complaints about database listings; and
- make a variety of orders, including orders for compensation, and impose fines.

Duties Imposed on Real Estate Agents

5.5 The new regulations also prescribe that real estate agents must:

- inform tenants if they intend to list them on databases;¹¹⁵
- give tenants a reasonable opportunity to respond to allegations;¹¹⁶ and
- only list tenants who had residential tenancy agreements, and where the agreements have ended.¹¹⁷

Time Limits

5.6 Tenants who wish to claim that their rights have been breached by residential tenancy databases must do so within six months from the date they became aware of the breach.¹¹⁸

Reasons for Listings

5.7 The Residential Tenancies Regulation 2005 (Qld) specifies approved reasons for listing information about a tenant on a tenancy database.¹¹⁹ A tenant may be listed because:

113 *Residential Tenancies and Other Legislation Amendment Act 2003* (Qld).

114 *Residential Tenancies Act 1994* (Qld) ch 7A.

115 *Residential Tenancies Act 1994* (Qld) ch 7A, s 284C(1)(d).

116 *Residential Tenancies Act 1994* (Qld) ch 7A, s 284C(1)(e).

117 *Residential Tenancies Act 1994* (Qld) ch 7A, ss 284C(1)(a),(b).

118 *Residential Tenancies Act 1994* (Qld) ch 7A, s 284D(2).

119 Residential Tenancies Regulation 2005 (Qld) pt 4, div 2.

- the tenant has failed to comply with a notice to pay unpaid rent;¹²⁰
- the tenant owes money under a conciliation agreement or tribunal order and the time for payment has passed;¹²¹
- the tenant has abandoned the premises and owes money to the landlord;¹²²
- the tenancy has been terminated by reason of objectionable behaviour by the tenant;¹²³
- the tenancy has been terminated due to repeated breaches of the tenancy agreement by the tenant.¹²⁴

If the reason relates to an amount owing under the tenancy agreement, the tenant can only be listed if the amount owed is more than the amount of the rental bond being held.¹²⁵

5.8 Section 284E(3)(b) of the Act gives the tribunal discretion to take into account the personal circumstances of the tenant which may have led to the listing. The tribunal is empowered to remove or amend a listing where '[t]he inclusion of that tenant's name or other personal information about the tenant in the database is unjust in the circumstances'.¹²⁶ This may include for instance, a situation where a victim of family violence is listed because of damage caused by her partner. The following is an example (provided within the Act) of where this discretion could be exercised.



Family Violence

Yasmin is listed on a tenancy database for damage caused to the premises by her spouse in the course of a family violence incident. Because of the listing, Yasmin cannot obtain appropriate and affordable accommodation.¹²⁷

120 Residential Tenancies Regulation 2005 (Qld) s 18.

121 Residential Tenancies Regulation 2005 (Qld) s 19.

122 Residential Tenancies Regulation 2005 (Qld) s 20.

123 Residential Tenancies Regulation 2005 (Qld) s 21.

124 Residential Tenancies Regulation 2005 (Qld) s 22.

125 Residential Tenancies Regulation 2005 (Qld) s 17.

126 *Residential Tenancies Act 1994* (Qld) ch 7A, s 284E(3)(b).

127 *Residential Tenancies Act 1994* (Qld) ch 7A, s 284E(3)(b).

Problems

5.9 While the Queensland Regulations have made progress in reforming the previously unregulated operation of residential databases, several limitations in the Regulations have emerged.

5.10 The Tenants' Union of Queensland has indicated the most apparent holes in the Regulations are:

- lack of prescribed time limits for the duration of listings;
- lack of obligation on the part of real estate agents to inform tenants where their unsuccessful rental applications are due to listings on databases;
- lack of a requirement for a court or tribunal order before a real estate agent is authorised to list a tenant;
- rooming house tenants are not covered by any of the provisions.

5.11 Another observation of the Tenants' Union of Queensland is that the amount of the rental bond is the benchmark for deciding whether rent in arrears is a reason for listing a tenant. An implication of this aspect of regulation is that for the same amount owed in rent arrears or breach, the tenant with the lower rental bond is more likely to be listed on a residential tenancy database than a tenant with a higher rental bond, because where a higher bond has been paid, the bond is likely to cover any rent in arrears. This has the potential to disproportionately affect low-cost rental properties and consequently low-income tenants.

5.12 The research conducted by Mission Australia also indicated that there have been attempts to avoid complying with the legislation through 'selling information deleted from databases directly to agents to place on their own internal databases',¹²⁸ as internal databases are exempt from the legislation.¹²⁹

5.13 The Queensland provisions have been criticised by TICA and NTD on the grounds that they allow tenants to obtain a new property before the previous landlord is able to have them listed on a database, which exposes landlords to unacceptable risks.¹³⁰

128 Mission Australia (2004) above n 23, 7–8.

129 Ibid.

130 Submissions 1, 2.

NEW SOUTH WALES

PROPERTY, STOCK AND BUSINESS AGENTS REGULATIONS

5.14 Since 15 September 2004, residential tenancy databases in NSW have been regulated under the Property, Stock and Business Agents Regulation 2003. The amending Regulations were introduced in light of growing community concern about the unregulated use of residential tenancy databases and aim to specify rules of conduct for the operation of the databases. The amendments do not apply to database listings made before 15 September 2004. These listings remain unregulated.

5.15 The rules apply to real estate agents engaged in property management and on-site residential property managers as well as their employees. The Regulations do not directly apply to the operators of the residential tenancy databases, but rather regulate the real estate agents who use them.

Duties Imposed upon Real Estate Agents

5.16 The Regulations prescribe that real estate agents must:

- inform tenants if they intend to list them on a database (and the reason for doing so);¹³¹
- give tenants a reasonable opportunity to respond to allegations;¹³²
- only list people who were in fact tenants under a residential tenancy agreement;¹³³
- notify the database operator within seven days, if a debt has been paid, so that the listing can be updated.¹³⁴

Reasons for Listings

5.17 The Regulations also require that listings must fall within one of five discrete categories. These are:

- the tenant has failed to pay rent under a residential tenancy agreement;¹³⁵
- the tenant owes money due to intentional or reckless damage to the property;¹³⁶

131 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, r 4(1)(d).

132 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, r 4(1)(e).

133 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, r 4(1)(a).

134 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, rr 5, 6(a)(i), 6(a)(ii).

135 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, r 4(2)(a)(i).

136 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, r 4(2)(a)(ii).

- the tenant has failed to comply with an order by the Consumer, Trader and Tenancy Tribunal to pay money;¹³⁷
- the tenancy agreement has been terminated by the Consumer, Trader and Tenancy Tribunal because the tenant has seriously or persistently breached the tenancy agreement;¹³⁸
- the tenancy agreement has been terminated by the Consumer, Trader and Tenancy Tribunal because the tenant has caused serious injury or damage, as outlined in section 68 of the *Residential Tenancies Act 1987* (NSW).¹³⁹

Penalties for Breach

5.18 Real estate agents who breach the rules can be fined and their licence suspended.¹⁴⁰

AUSTRALIAN CAPITAL TERRITORY

RESIDENTIAL TENANCIES AMENDMENT ACT

5.19 The ACT has recently introduced legislation to regulate the use of residential tenancy databases. The relevant sections of the *Residential Tenancies Amendment Act 2005* will come into effect on 1 March 2006.¹⁴¹ The Act will amend the *Residential Tenancies Act 1997* (ACT) and the Residential Tenancies Regulation 1998 (ACT).

5.20 According to the explanatory statement that accompanied the Residential Tenancies Amendment Bill, the amendments aim to specifically address problems such as:

- consumers not being aware they have been listed;
- limited opportunities for tenants to access, correct or update information concerning their rental history;
- substantial costs to tenants for querying information held on databases;
- tenants remaining listed for unacceptably long periods;
- tenants being required to give wide consents regarding the use of databases;

137 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, rl 4(2)(b).

138 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, r 4(2)(c).

139 Property, Stock and Business Agents Regulation 2003 (NSW) sch 6A, r 4(2)(d).

140 Property, Stock and Business Agents Regulation 2003 (NSW) r 11(4).

141 Australian Capital Territory Residential Tenancies Amendment Commencement Notice 2005, Commencement Notice CN2005-24, 20 December 2005.

- the potential adverse impact of disadvantaged tenants' ability to access housing in the private rental market.¹⁴²

5.21 The new provisions largely mirror those adopted in Queensland.

EXPANSION OF JURISDICTION

5.22 The new provisions in ACT will also give the Residential Tenancies Tribunal jurisdiction to hear complaints from tenants about the accuracy of listings and require them to be updated or removed.¹⁴³

COMPENSATION

5.23 The Act will also provide for the tenants to apply for compensation of up to \$5000 for loss or damage suffered due to the inclusion of personal information on databases.¹⁴⁴

142 Explanatory Memorandum, Residential Tenancies Amendment Bill 2005 (ACT) 7.

143 *Residential Tenancies Amendment Act 2005* (ACT) s 107E.

144 *Residential Tenancies Amendment Act 2005* (ACT) s 107H.

Chapter 6

Summary and Recommendations

NEED FOR REGULATION

6.1 Residential tenancy databases contain information about tenants and their rental history and are routinely used by real estate agents in their assessment of prospective tenants in the private rental market. The databases are operated by private companies which trade in the commodity of personal information and are currently unregulated in Victoria. The federal Privacy Act has limited application.

6.2 In conducting this community law reform project, the commission has sought feedback from tenants' advocacy groups, real estate agent representative bodies and database operators on the function of residential tenancy databases (see Appendix 1 for a list of submissions received). Some tenants' advocacy groups argue for the complete abolition of residential tenancy databases; real estate agents consider them a vital tool in assessing the suitability of prospective tenants.

6.3 While the commission recognises the importance to real estate agents and landlords of minimising the risk associated with letting properties, we also believe that safeguards need to be introduced to protect the rights of tenants and ensure procedural fairness in the operation of databases. The commission recognises the inherent power imbalance in the landlord and tenant relationship and the importance of ensuring that access to housing is equitable.

6.4 The commission believes that the minimalist model of relying upon federal privacy laws and self-regulation is ineffective and problematic. It is also likely that if residential tenancy databases are abolished, other unregulated mechanisms for distributing information about tenants' rental histories would emerge. The commission believes that reform is needed to ensure stricter guidelines on what information can be included in databases, the accuracy of the information, and to provide tenants with access to listings about themselves.

NATIONAL CONSISTENCY

6.5 While residential tenancy databases are currently unregulated in Victoria, they are now regulated in NSW, Queensland and the ACT. Databases generally contain

information about tenants from multiple states and territories and are available nationwide.

6.6 The problems concerning the operation of residential tenancy databases are currently being investigated at the federal level by a Residential Tenancy Database Joint Working Party made up of representatives of the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General.

6.7 The role of the commission is limited to recommending changes to Victorian law. Nevertheless, given the national relevance of databases, the commission strongly urges states and territories to cooperate in ensuring consistency in regulation. In their submissions to our review, both the Real Estate Institute of Australia and database operator TICA expressed support for a nationally-consistent framework for the regulation of residential tenancy databases.

6.8 Pending introduction of a national framework for the regulation of residential tenancy databases, the commission recommends the Residential Tenancies Act be amended to regulate the operation of databases in Victoria. It is not intended that the legislation apply to internal records kept by a real estate agency solely for its own use in the ordinary course of operating its business, but rather to the systematic collection of information about tenants for release to or exchange with other parties.

- ! RECOMMENDATIONS**
1. States and territories should work together to ensure a level of national consistency in the regulation of residential tenancy databases.
 2. Pending introduction of a national framework, the *Residential Tenancies Act 1997* should be amended to regulate the operation of residential tenancy databases in Victoria.
 3. Residential tenancy databases should be defined in any new legislation to include databases:
 - containing information about a person's occupation of residential premises under a tenancy agreement; and
 - established and operated in-house by real estate agents for the purpose of exchanging information about a person's rental history with other parties; or

! RECOMMENDATIONS

- established and operated by individuals, organisations or agencies on a commercial or not-for-profit basis as a service for landlords, property managers and/or real estate agents; or
- established and operated by any public or community organisation providing rental accommodation.

PROCEDURE FOR MAKING LISTINGS

6.9 There is currently no restriction on the content of residential tenancy databases, which commonly contain a range of information about tenants' rental histories, nor are there any obligations on real estate agents or database operators to give tenants an opportunity to dispute the content of a listing. Databases may contain information which is inaccurate, out-of-date or about an incident for which the individual tenant was not responsible. In order to ensure greater accuracy and procedural fairness, the commission recommends that controls be introduced on the content of listings and the process by which a listing may be made.

6.10 Our recommended procedure for the making of a database listing is illustrated in the chart which appears at the end of this chapter.

WHO SHOULD BE LISTED?

6.11 The commission believes that only people who have legal status as tenants should be able to be listed on residential tenancy databases. This would prevent listings being made against people who are not subject to the obligations that arise from a tenancy agreement.

! RECOMMENDATION

4. Listings on residential tenancy databases should be limited to information about tenants who are parties to residential tenancy agreements.

CONTENT OF LISTINGS

6.12 The commission recommends that the content of listings be restricted to situations where VCAT has made an order against a tenant for a breach of a provision of the Residential Tenancies Act or of the tenancy agreement. This would preclude the inclusion of generic comments, such as 'refer to agent', on a database but would

permit listings about a broad range of defaults such as unpaid rent, damage to property and failure to vacate the premises in compliance with a notice to vacate.¹⁴⁵ It would ensure that listings are verifiable according to court records, thereby avoiding further disputes about their accuracy. This could be achieved by requiring real estate agents to provide copies of VCAT orders to database operators when requesting that a new entry be made about a tenant.

6.13 In some cases the landlord or agent will only discover that the tenant has committed a breach after the tenant has left the rental premises. The tenant may have absconded without paying rent for the remainder of the term of the lease, or may have left the premises in a state of disrepair. If the tenant is unable to be located the landlord or real estate agent should obtain an order from VCAT before a listing about the tenant can be created. In such circumstances the agent or landlord should be required to attempt to serve a default notice or application on the tenant in accordance with the Residential Tenancies Act or *Victorian Civil and Administrative Tribunal Act 1998*. VCAT can hear an application against a tenant where a notice or application has been sent to the tenant at the last known place of residence or business.¹⁴⁶ VCAT has jurisdiction to hear *ex parte* applications about defaults by tenants, that is, applications where the respondent cannot be located and is therefore not present at the hearing.

WHEN LISTINGS CAN BE MADE

6.14 If VCAT makes an order against a tenant and the order specifies a period of time in which the tenant must rectify the breach, the real estate agent or landlord must wait for that time period to elapse before asking a database operator to record the default on the database. If the tenant rectifies the breach within that period, no listing about the breach should be permitted. If the tenant does not rectify the breach within the time specified, the real estate agent should be required to certify that this is the case, so that the database operator can be certain that the listing is being made in accordance with the legislation.

6.15 If the landlord obtains an order for payment out of the bond because the tenant has left the premises and rent is owing or there has been damage to the

145 The *Residential Tenancies Act 1997* sets out the circumstances in which VCAT is able to make orders against tenants: see s 472 (General power of Tribunal to make determinations), Part 5 (Compensation and Compliance), Part 7 (Regaining Possession - Possession Orders) and Part 10 (Bonds and the Residential Tenancies Bond Authority).

146 *Residential Tenancies Act 1997* s 506; *Victorian Civil and Administrative Tribunal Act 1998* s 140.

property,¹⁴⁷ a listing should only be made in respect of such an order if the amount of the bond is insufficient to satisfy the landlord's claim.

6.16 If the tenant successfully appeals against an order, the database operator should be required to delete any reference on a database to the alleged default or VCAT's initial order.

6.17 According to VCAT, it usually takes three weeks for a residential tenancy application to be heard.¹⁴⁸ It is possible that some defaulting tenants could apply for new rental accommodation before a VCAT order is made and information about the default is able to be listed on a database. Although this may mean that a new landlord will be unaware of the details of the tenant's recent tenancy history, for reasons expressed earlier in this report, the commission believes the balance must lie in favour of ensuring accuracy and fairness to tenants.

- ! RECOMMENDATIONS**
5. The listing of a tenant on a residential tenancy database may only be made if VCAT has made an order against the tenant for breach of the Residential Tenancies Act and/or a tenancy agreement.
 6. A listing may only relate to a breach of the Residential Tenancies Act and/or a tenancy agreement that has been the subject of an order by VCAT.
 7. If a real estate agent or landlord is unable to locate the tenant, the agent/landlord should seek an order from VCAT before listing the tenant on a database.
 8. A real estate agent should provide a copy of the VCAT order to the database operator when requesting that a new entry be made about a tenant.

147 See Part 10 of the *Residential Tenancies Act 1997*.

148 Victorian Civil and Administrative Tribunal, *How long does VCAT take to resolve disputes?* <[www.vcat.vic.gov.au/CA256902000FE154/Lookup/miscellaneous_pdfs/\\$file/time_taken_to_resolve_disputes.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/miscellaneous_pdfs/$file/time_taken_to_resolve_disputes.pdf)> at 12 January 2006. In some cases, an application must be heard within 5 days after it has been made: *Residential Tenancies Act 1997* s 209A.

! RECOMMENDATIONS

9. Generic comments, such as 'refer to agent', should be prohibited on residential tenancy databases.
10. If the order made by VCAT specified a period of time in which the tenant must rectify the breach, a listing should not be able to be made until that period of time has elapsed.
11. If a tenant complies with the VCAT order within the time period specified in the order, a database operator should be prohibited from making a listing about the tenant in respect of that breach.
12. If a tenant does not comply with the VCAT order within the time specified in the order, the real estate agent requesting that a new entry be made should certify by statutory declaration that the tenant has not complied with the order.

NOTIFICATION

6.18 Tenants are commonly unaware they have been listed on residential tenancy databases and therefore have little opportunity to respond to allegations made by real estate agents. By restricting listings to situations where an order has been made against a tenant, the procedural steps that operate under the Residential Tenancies Act and the VCAT Act would apply. In most cases, applicants are required to initially serve a breach of duty notice and then a copy of the VCAT application on the respondent before the dispute can be heard.¹⁴⁹

6.19 We recommend that breach of duty notices, applications and orders relating to breaches or alleged breaches by tenants include, or be accompanied by, notices advising tenants that orders against them may result in their being listed on databases. We also recommend that all tenancy agreements should contain a standard clause explaining the circumstances in which a listing on a database may occur. In this way tenants would be on notice that if they are found to be in breach of their tenancy obligations they are at risk of being listed on databases and would have the opportunity to rectify any breach or to dispute the allegations before VCAT.

149 Eg *Residential Tenancies Act 1997* s 208.

! RECOMMENDATIONS

13. Notices of default, VCAT applications and orders served on the tenant should be accompanied by a notice that an order made by VCAT may result in the tenant being listed on a residential tenancy database.
14. All tenancy agreements should also include a clause notifying the tenant of the conditions under which a listing on a database may occur.

NOTIFICATION OF SEARCHES

6.20 Real estate agents should be required to notify a tenant if they have conducted a search of a residential tenancy database and have found information about the tenant. The tenant may not be aware of the listing if it was made in another jurisdiction where controls do not apply, or if it was made following a VCAT order in circumstances where the tenant was unable to be located. As real estate agents are commercial entities, the commission believes that financial penalties should apply for failure to notify tenants of any listings.

! RECOMMENDATIONS

15. If a real estate agent conducts a search for a prospective tenant, there should be an obligation to advise the tenant of any information found.
16. A real estate agent must inform a prospective tenant of a listing and provide the tenant with a copy of the listing if the tenant's application for a tenancy is refused on any grounds.
17. Failure of a real estate agent to comply with the above should result in civil penalties.

ACCESSIBILITY OF LISTINGS

6.21 Access to listings on residential tenancy databases is governed to a certain extent by the NPPs established under the Privacy Act. For the sake of clarity and enforceability, the commission believes that these principles should be reflected in Victorian legislation. Any new regulation of residential tenancy databases will need to

be consistent with federal privacy legislation. If a tenant makes a request for information, database operators should be required to provide the tenant with copies of any listings relating to the tenant. We also recommend that this should occur within a reasonable time period, that information should be made available to tenants for minimal or no charge, and that such information should not be provided to any third parties. In addition, the commission believes that application procedures for access to information about listings on tenancy databases should be readily available, uncomplicated and written in plain English.

! RECOMMENDATIONS

18. If a tenant or prospective tenant seeks a copy of their listing from a database operator, the database operator must provide the copy:
 - for minimal charge, if requested to be supplied urgently (within 48 hours);
 - free of charge, if requested to be supplied more than 48 hours after the request; and
 - only to the tenant in question or to his or her nominee.
19. An application form for access to information on residential tenancy databases should be readily available, uncomplicated and written in plain English.

REMOVAL AND CORRECTION OF LISTINGS

6.22 The commission also believes that any legislation introduced providing tenants with rights to have database entries corrected should be retrospective, to ensure that tenants currently listed can access and, if necessary, amend or remove inaccurate listings. If a listing has been made without a prior order from VCAT (because it was made before the introduction of our recommended process) and a tenant can show that the listing is incorrect or misleading, it should be removed from the database immediately. Similarly, if tenants can show the breach referred to in the listing was beyond their control and they present no current risk to prospective landlords, the listing should be removed. If a database operator refuses to remove a tenant from the database, the tenant should be able to apply to VCAT for an order that the listing be removed.

! RECOMMENDATIONS

20. A tenant or prospective tenant may apply to the database operator to have a residential tenancy listing removed where, for example:
 - the listing is inaccurate and/or misleading;
 - there has been compliance with tribunal orders and resolution of the dispute or rectification of the breach;
 - the breach was beyond the control of the tenant and presents no current risk to prospective landlords.
21. If, on the application of a tenant based on the grounds above, the database operator refuses or fails to remove a listing, the tenant may make an application to VCAT and seek an order for compliance.
22. Failure of database operators to remove listings in the above contexts should result in civil penalties.
23. Legislation regulating the content of listings on residential tenancy databases should apply to listings made prior to its introduction.

TIME LIMITS ON LISTINGS

6.23 There are currently no time limits on listings on residential tenancy databases. The commission believes that listings should not be of indefinite duration, as otherwise tenants can effectively be listed for life. We believe that three years is a reasonable period.

! RECOMMENDATIONS

24. Residential tenancy database listings should automatically expire after a fixed period of three years.
25. Civil penalties should apply to the database operator where residential tenancy listings are not removed within the stipulated period.

COMPENSATION

6.24 The commission believes that tenants should receive some financial compensation from database operators if a database operator lists them in contravention of the provisions recommended above. The compensation should be calculated as a nominal daily fee, payable for each day that an unauthorised listing remains in place.

! RECOMMENDATION

26. If a database operator lists a tenant on a database where:

- no VCAT order has been made; or
- the period for compliance with the VCAT order has not elapsed; or
- a statutory declaration has not been received from the real estate agent regarding the tenant's failure to comply with a VCAT order; or
- the listing remains in place more than three years after it was created,

the database operator should be liable to pay to the tenant a nominal fee for each day that the unauthorised listing remains in place.

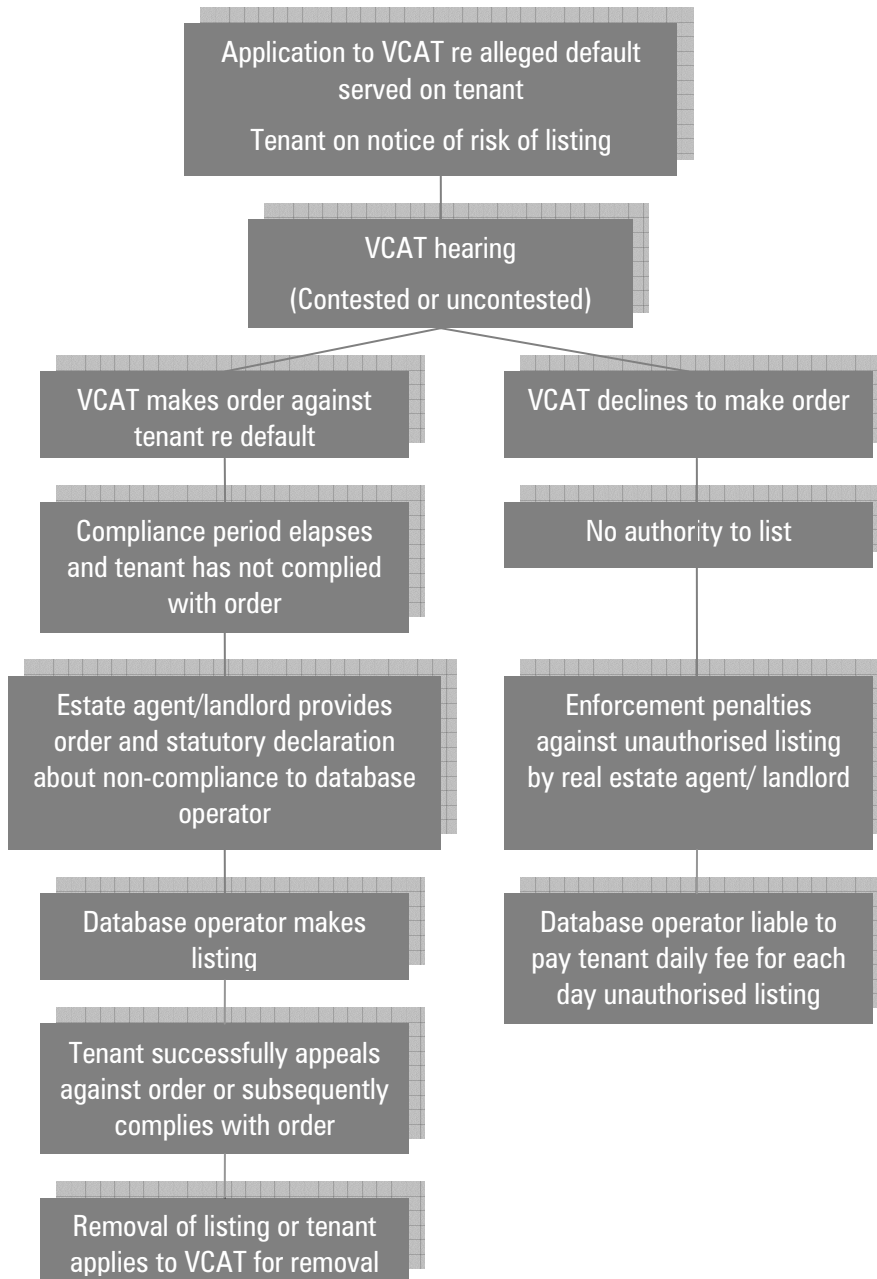
PENALTIES

6.25 In order to ensure compliance with regulation, the commission believes it is desirable that enforcement mechanisms are made available to VCAT and should be applicable to database operators and real estate agents.

! RECOMMENDATIONS

27. There should be fines or other appropriate penalties for non-compliance of database operators with regulations.
28. Real estate agents who submit false and or misleading information to residential tenancy databases should be subject to fines and/or other appropriate penalties.

RECOMMENDED PROCESS



Appendix 1

Submission	Author	Date Received
1	TICA Default Tenancy Control Pty Ltd	22 August 2005
2	National Tenancy Database (Commercial in Confidence)	29 August 2005
3	Real Estate Institute of Australia	30 August 2005
4	Real Estate Institute of Victoria Ltd	8 September 2005
5	PILCH Homeless Persons' Legal Clinic	12 September 2005
6	Department of Human Services (Office of Housing)	19 October 2005

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- Disputes Between Co-owners: Discussion Paper* (June 2001)
- Privacy Law: Options for Reform: Information Paper* (July 2001)
- Sexual Offences: Law and Procedure: Discussion Paper* (September 2001)
- Failure to Appear in Court in Response to Bail: Draft Recommendation Paper* (January 2002)
- Disputes Between Co-owners: Report* (March 2002)
- Criminal Liability for Workplace Death and Serious Injury in the Public Sector: Report* (May 2002)
- Failure to Appear in Court in Response to Bail: Report* (June 2002)
- People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care: Discussion Paper* (June 2002)
- What Should the Law Say About People with Intellectual Disabilities Who are at Risk of Hurting Themselves or Other People? Discussion Paper in Easy English* (June 2002)
- Defences to Homicide: Issues Paper* (June 2002)
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