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Via email: EPSC@nt.gov.au

Dear Mr Sievers

Thank you for your email dated 20 March 2018 in regards to the Inquiry into the Residential Tenancies Amendment Bill 2018 that the Economic Policy Committee is conducting.

Please find attached a response from my agency to the questions raised by the Economic Policy Scrutiny Committee in that email.

Don't hesitate to contact my office on 8936 5610 if you require further information.

Yours sincerely

Natasha

NATASHA FYLES

10 APR 2018

NORTHERN TERRITORY GOVERNMENT

ECONOMIC POLICY SCRUTINY COMMITTEE

Residential Tenancies Amendment Bill 2018

RESPONSES OF THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE TO WRITTEN QUESTIONS FROM THE COMMITTEE

1. What consultation was undertaken prior to the introduction of the Bill?

AGD RESPONSE

The Model Provisions were based on a regulatory framework established by Queensland in 2003 following its identification of issues associated with the lack of control over what information was listed in databases and an absence of a dispute resolution process. A number of separate reviews on the operation of residential tenancy databases ensued on a state basis, culminating in the development of national Residential Tenancy Database Model Provisions by the former Standing Committee of Attorneys-General (now the Council of Attorneys-General).

Consultation was undertaken at the Territory level by the then Department of Justice, as part of the coordinated national consultation program on the Model Provisions that ran between November 2009 and December 2010.

Since then, a number of local stakeholders have, over the years, re-expressed their position both publicly, and through direct representations to government.

Database listings

2. NAAJA has expressed concern of the scope of personal information that may be listed on a database.

a. Can you please outline the extent to which the Bill prevents the listing of irrelevant personal information?

AGD RESPONSE

Under section 128, information that can be listed is limited to:

(a) the name and other information that identifies the tenant;
(b) noting that the tenant breached the tenancy agreement, and that the breach had resulted in either:
    i. the tenant owing the landlord an amount of money that exceeded the security deposit; or
    ii. the NTCAT making an order to terminate the tenancy; and
(c) clearly and unambiguously indicating the nature of the breach that gave rise to (b)(i) or (ii) (for example, the tenant was in rent arrears and the arrears were more than the security deposit, or there was damage to the property).

For a listing to be made, there needs to be substance behind it. Personality clashes between a landlord and tenant, for example, would not meet the test of there being a breach that resulted in a debt payable to the landlord that exceeds the security

deposit. Under section 128, it has to be established that there was in fact a breach of the tenancy agreement, and that it was the tenant that breached it.

For example, the matter of *Amos v Knights and Ors* [2012] QCAT 88 considered a landlord's intent to place tenants on a database as part of his claim for lost rent and damages following the tenants' forced vacation of the premises under order of the Brisbane City Council following that Council's condemning of the building. The Tribunal noted that the landlord/tenant relationship "was certainly not one of convivial chats" as the landlord had "created an environment of intimidation". Finding that the building's dilapidation predated the tenants' occupation, the Tribunal concluded at paragraph 19: "Finally, as Mr Amos has threatened to place the Knights on the TICA list or "black list", I will make an order that Mr Amos is not to place the Knights on the TICA database, or any other similar database, arising out of the tenancy".

Likewise, claims for unsubstantiated debts would not pass the test. For a listing to note a debt, that debt must exceed the security deposit, which would require the necessary finding by the NTCAT of that fact, or agreement of the tenant, before it could be considered to be accurate, complete and unambiguous.

The need for the landlord to substantiate a claim before listing a tenant can be seen in *Leverington v Marley Duncan Real Estate* [2016] SACAT 10. In that case, a listing was made notwithstanding the Tribunal's orders to remove a previous listing in relation to the same lease and same circumstances as the landlord's claim had not been substantiated. Per Senior Member Johns at para 14: "As I said in the order I made on 11 February 2015, in my view the intent of Section 99F(1)(c) of the (South Australian) Act is to permit tenancy database listings only when it is clear on an objective assessment that the tenant owes more than the bond... or the tenant has agreed that they owe more than the bond."

3. A number of submissions raised concern that a co-tenant who had ceased their co-tenancy could be listed as a result of the subsequent actions of their former co-tenant.

a. Is it permissible under the Bill for a former co-tenant to be listed for actions taken after they have left the tenancy?

AGD RESPONSE

When a person ceases to be recorded on a tenancy agreement, that person ceases to be legally responsible for performing the obligations of the agreement from that point on. Likewise, that person also ceases to be legally responsible for breaches of responsibilities under the agreement from the time they cease to be recorded as a party to the agreement.

Formally leaving a tenancy agreement before it has come to its official end does not, however, excuse someone from liability for performance of the agreement while the person was a party.

Where a breach of the tenancy agreement has occurred after a person has left the tenancy (and is no longer named as a tenant on the agreement), that person could not have breached the tenancy agreement as the person was not named as a tenant.

Under the circumstances, if a landlord or database operator lists the former co-tenant as having breached the agreement, the landlord or database operator may be subject to a penalty of up to 20 penalty units.

If the breach occurred while the person was a co-tenant (i.e. before the person left and was removed from the tenancy), the landlord or database operator would have to establish that the co-tenant was the person that breached the agreement.

If the landlord or database operator cannot establish that the co-tenant breached the agreement, the landlord or database operator may be subject to a penalty of up to 20 penalty units if they list that co-tenant.

In the Territory, the requirement to establish the liability of a former co-tenant may be seen in the matter of Chamberlain -v- Tukaki & Staite [2015] NTRTCmr 22. In that case, then Commissioner of Tenancies Delegate Bruxner (now Judge Bruxner, President NTCAT), stated that it is incumbent upon the landlord to establish that the former co-tenant was legally responsible for issues that arose prior to the former co-tenant's departure.

Thus, if it cannot be established that a former co-tenant was liable for the breach, section 128 will preclude the listing of that person on a database for that breach.

b. ***What can a person do if they are listed for actions taken by their former co-tenants after they have left the tenancy?***

AGD RESPONSE

The crucial aspects are that in order for a listing to be made:

1. the person must have been a tenant at the time a breach of the tenancy agreement occurred;
2. the landlord must then establish that the person was responsible for the breach; and
3. the landlord must then further establish that the breach resulted in:
   a) a (proven or agreed) debt that exceeded the bond; or
   b) an order by the Tribunal terminating the tenancy agreement because of the breach.

A landlord and database operator will only legally be permitted to list a person on a database where all three elements above have been established.

If a landlord does decide to list a person, landlords and database operators will be required under section 129 to provide a copy of what is intended to be listed on a database before it is listed.

If a person disagrees with what is intended to be listed, the person has 14 days to make a submission to the landlord or database operator either objecting to the listing being made, or in relation to its accuracy, completeness or clarity.

The landlord and database operator must then consider the tenant's submissions before making the listing.

This is a process that applies to both landlords and database operators, meaning that even if a person has raised issues with the landlord, and those issues have not been addressed, the person may seek redress through the database operator.

If the person is still not satisfied about the listing, the person may seek review of the listing through NTCAT under section 134.

If a landlord or database operator is not able to satisfy the criteria for listing under section 128, but nevertheless lists a person on a database, the landlord and database operator are open to prosecution and may be subject to a 20 penalty unit fine.

c. *What is the situation for a co-tenant who leaves the premises but doesn't formally remove themselves from the tenancy agreement?*

AGD RESPONSE

A co-tenant who leaves the premises but remains formally on the tenancy agreement (i.e. doesn't have their name officially removed), remains legally responsible for the performance of obligations under the lease, such as paying rent.

However, under section 128, for a listing to be made, it needs to be established that there was a breach of the tenancy agreement, and that it was the co-tenant that breached it.

In the context of a co-tenant's liability for the actions of another co-tenant, tribunals are generally prepared to go behind the contractual arrangement and assess the matter on the facts of a particular situation.

An example of this in the Territory may be seen in *Chamberlain -v- Tukaki & Staite* [2015] NTRTCmr 22 (noted in the response to Question 3(a) above). This is also displayed in the more recent matter of *Nsimire v Vailis & Biringanine* [2017] NTCAT 89, where, a co-tenant sought to terminate a tenancy agreement on the grounds of hardship, and having already vacated the premises due to domestic violence occasioned by another co-tenant.

A further example may be seen in *LNN v MGV & WKI* [2016] SACAT 4, where presiding Senior Member Johns stated at 13: "...any claims made by the landlord at the end of the tenancy as a result of the property not being returned in a reasonable condition and reasonably clean should be made only against the tenant WKI due to the circumstances of domestic violence and the fact that he remained in the property for more than one month after LLN vacated. *Nothing in this order prevents the landlord*

from pursuing the tenant WKI in relation to any breach of his obligations to return the property in a reasonable condition and reasonably clean at the end of the tenancy." (italics supplied).

The *LNN* matter also shows that for a listing to be made, it needs to be established that not only was there was a breach of the tenancy agreement by the former co-tenant, but that breach had to have resulted in the former co-tenant owing the landlord an amount in excess of the bond: Senior Member Johns stating at para 12: "I will make no order about an entry on a tenancy data base... there are no amounts outstanding in excess of the bond and so the landlord would not be entitled to make such an entry."

4. A number of submissions noted that the Bill does not include a time limit for creating a listing after a tenancy agreement has ended.

a. Why does the Bill not limit the time in which a listing can be made?

AGD RESPONSE

Under section 128, for a listing to be made, it needs to be established that there was a breach of the tenancy agreement, that it was the tenant that breached it, and that breach had resulted in either:

i. the tenant owing the landlord an amount of money that exceeded the security deposit; or
ii. the NTCAT making an order to terminate the tenancy.

This is not an instantaneous process. For a listing to be validly made, it needs the necessary finding by the NTCAT of those facts, or agreement of the tenant, before a listing could be considered to be accurate, complete and unambiguous.

As it is not an instantaneous process, it is not possible to prescribe a time in which a listing must be made, lest incorrect listings be made to circumvent the timeframe.

There has been some suggestion that a landlord might not necessarily pursue action in relation to lease breaches or database listing in a timely manner.

Generally landlords offer rental accommodation on a commercial basis – that is, individual landlord financial arrangements aside, the object is to derive a level of income from renting. The absence of income occasioned through a tenant's breach of a lease would generally be expected to see a landlord seek recourse in a timely manner.

While there is some possibility that a landlord may be slow in addressing such matters, such action is constrained by the need for a landlord to mitigate its loss in relation to a claim for loss or damages.

This duty to mitigate loss is expressed in section 122(3)(e) of the Act, whereby a person seeking compensation must take reasonable steps to minimise their actual loss notwithstanding that the loss has arisen through the actions of another.

In the context of a landlord mitigating loss of rental income from a tenant abandoning a lease or vacating early, the NTCAT has, in matters such as *Kent & Nimmo v Alice Realty (NT) Pty Ltd T/A Professionals Alice Springs* [No.2] [2016] NTCAT 423 and *Gatty & Darcey v Nou* [2016] NTCAT 249, held that the landlord must endeavour to secure replacement tenants.

The principle of the duty to mitigate loss transmits to other actions, including the promptness of recovery and ancillary actions, such as seeking Tribunal orders for compensation. This principle is reflected in the limitation imposed on when one can commence legal proceedings under the *Limitation Act*.

Delayed listing does not appear to be something that has been considered by tribunals elsewhere. If anything, it appears from the case law that, if a landlord were mindful to list someone, that listing has occurred prematurely, before the relevant criteria have been established (see for example: *Leverington v Marley Duncan Real Estate* [2016] SACAT 10 (discussed in response to Question 2(a) above)). It is therefore considered unlikely that a landlord would delay the listing of a person once the threshold to list someone has been attained.

b. Is there any reason not to make the date by which personal information must be removed under proposed section 133 three years after the termination of the relevant tenancy rather than three years after the listing?

AGD RESPONSE

Unless the tenant agrees that they owe the landlord a debt that is greater than the bond, establishment of that fact is not an instantaneous process. Therefore, there may be some time between the breach and the actual listing.

Having a three year limitation on the period of listing from when the listing is made provides a reasonable balance between the rights of a tenant to have accurate history recorded about it, the interests of a risk adverse landlord, and the processes required to be undertaken to satisfy the statutory criteria of when a listing can be made.

5. A person can be listed on a tenancy database if the person breached a tenancy agreement and because of the breach, the person owes more than the security deposit amount. It has been suggested that there should be a requirement for the amount to have been substantiated by an order from NTCAT or by the person's own admission.

a. What ensures that the amount a landlord claims is owed is actually the amount owed by the person?

AGD RESPONSE

Under section 128, listings may only be accurate, complete and unambiguous, having arisen through a breach of the tenancy agreement, and that breach having resulted in a debt payable to the landlord that exceeds the security deposit.

As the security deposit is the tenant's money, any claim against it by the landlord must be verified by an application to NTCAT in accordance with sections 112 and 122. For a listing to note a debt, that debt must exceed the security deposit, which would require the necessary finding by the NTCAT of that fact, or agreement of the tenant, before it could be considered to be accurate, complete and unambiguous.

This has been recognised in many tribunal decisions around Australia. For example, in *Robson v Realize Properties* [2016] SACAT 17, Executive Senior Member Stevens stated at 13: "In my view, a matter cannot properly be listed on a database (without verification). In the absence of a finding and order of the Tribunal establishing that the tenant owes money to the landlord for repairs or cleaning or the like, it has not been established that such amount is owed. The mere claiming of the amount does not suffice." See also *LLN v MGV & WKI* [2016] SACAT 4 discussed at Question 3(c).

b. What recourse does a tenant have if they disagree with an outstanding debt asserted by the landlord?

AGD RESPONSE

Currently under the Act, if a tenant disagrees with a landlord's assertion that they owe money under the lease, and the landlord refuses to release the tenant's bond, the tenant will need to apply to NTCAT under section 113 for return of the bond. The proposed amendments do not change this.

In relation to any proposed database listing, landlords and database operators will be required under section 129 to provide a copy of what is intended to be listed on a database before it is listed. As noted above under Question 5(a), that listing can only be made following a finding of NTCAT, or agreement of the tenant, that the tenant owes the landlord a debt that exceeds the amount of the bond.

If a tenant disagrees with what is intended to be listed, the tenant has 14 days to make a submission to the landlord or database operator either objecting to the listing being made, or in relation to its accuracy, completeness or clarity.

The landlord and database operator must then consider the tenant's submissions before making the listing.

This is a process that applies to both landlords and database operators, meaning that even if a tenant has raised issues with the landlord, and those issues have not been addressed, the tenant may seek redress through the database operator.

If the tenant is still not satisfied about the listing, the tenant may seek review of the listing through NTCAT under section 134.

6. **The equivalent NSW legislation only allows a database operator to make a listing at the request of a landlord or their agent.**

   a. ***Is there any reason that such a provision has not been included in the Bill?***

AGD RESPONSE

The Bill replicates the model provisions to ensure consistency with the nationally agreed framework. The New South Wales provisions were enacted in June 2010, prior to the national model being settled.

While a database operator lists the information that a landlord has provided it, the database operator and the landlord are both effectively making a listing.

Applying the requirements to both landlords and database operators builds in a 'redundant backup': in the event that a landlord or real estate agent elects to risk a 20 penalty unit fine ($3,060) by not complying with listing requirements, the database operator's requirements to comply will likely trigger notification of a listing and potential prosecution of the landlord/agent.

Including database operators within the listing requirements also enables actions to be taken, or orders to be made, directly against the database operator, negating the need for separate and potentially legally challenging enforcement proceedings against the database operator.

7. **It has been suggested that the Bill should contain provisions to enable a person listed on a database to apply to a database operator to have the listing changed.**

   a. ***How can a former tenant fix a listing that they consider to be inaccurate?***

AGD RESPONSE

A person can find out at any time whether they have been placed on a database by contacting database operators and requesting a copy of any information the operator may have.

A person may also find out about listings at the time they apply to rent a premises and the landlord or agent conducts a database search. Under section 127, the landlord or agent must advise the prospective tenant that they have been listed, and provide information about the database which has the listing and how to go about reviewing and changing it.

Under section 129, landlords and database operators will also be required to provide a copy of what is intended to be listed on a database before it is listed.

If a tenant disagrees with what is intended to be listed, the tenant has 14 days to make a submission to the landlord or database operator either objecting to the listing being made, or in relation to its accuracy, completeness or clarity.

The landlord and database operator must then consider the tenant's submissions before making the listing.

This is a process that applies to both landlords and database operators, meaning that even if a tenant has raised issues with the landlord, and those issues have not been addressed, the tenant may seek redress through the database operator.

If the tenant is still not satisfied about the listing, the tenant may seek review of the listing through NTCAT under section 134.

b. Can they approach the database operator directly? If so, what ensures that the operator responds appropriately?

AGD RESPONSE

A person can approach a database operator at any time and enquire as to whether they have a listing or not.

Access to information stored by businesses, including tenancy database operators, is governed by the *Privacy Act (1988)* (Cth). That Act sets out a number of binding principles that apply in relation to the collection, storage, use and access to, personal information.

Australian Privacy Principle 12.1 provides that where an organisation holds personal information about an individual, that organisation must give the individual access to that information when requested.

Under the *Privacy Act (1988)* (Cth), the Australian Information Commissioner may investigate and enforce breaches of the Australian Privacy Principles, including the seeking of compensation or civil penalties against database operators for, amongst other things, failing to provide reasonable access to information about an individual to that individual on request.

In addition, the tenant may also apply to NTCAT under section 134 for an order that they be given access to any listing they may have.

8. Information in a listing becomes 'out-of-date' when it relates to an amount owing that was repaid within three months, whereas information becomes 'inaccurate' when it relates to an amount owing that was repaid after three months. Out-of-date information must be removed from a database, while inaccurate information must be amended.

a. Why is there a distinction between how a listing is dealt with based on when a debt was repaid?

AGD RESPONSE

The distinction reflects the balance between what could arguably be a minor breach – that is a small debt that is resolved shortly after termination (i.e. repaid within three months), as against a more significant breach (e.g. it took over a year to repay); and the risk profiles that those respective situations pose.

9. **While there is no indication that the Department of Housing and Community Development makes listings in tenancy databases, it has been suggested that the Department should be prohibited from listing tenancy breaches from these tenancy agreements.**

   a. ***Does the Department of Housing and Community Development make listings on residential tenancy databases?***

AGD RESPONSE

The Department of Housing and Community Development does not, to our knowledge, list tenants on commercial databases.

   b. ***Is there any reason why the Bill should not be amended to prohibit this?***

AGD RESPONSE

There is a level of public policy justification in prohibiting the Department of Housing and Community Development from listing tenants, however equally, there are counter arguments to that.

On the one hand, public housing is often a last resort, with the associated considerations thereof. However, the counter relates to the risk profile private landlords may face.

As with all landlords, it is a matter of personal consideration whether or not to list a tenant on a database; there being no legal requirement to do so. To specifically exclude one landlord – government – raises the question of why government should be treated differently.

Notification of a listing

10. **If information to be listed on a database is already publically available from court or tribunal records, the landlord or database operator is not required to provide the tenant an opportunity to review and object to the listing. It has been suggested that proposed subsection 129(3) be removed from the Bill as a person may not be aware the matter has proceeded to a court or tribunal.**

   a. ***Why is a landlord or database operator not required to make the information available to the person and afford them the otherwise prescribed procedural rights?***

AGD RESPONSE

The security deposit is the tenant's money, and any claim against it by the landlord must be verified by an application to NTCAT in accordance with sections 112 and 122.

Having paid the bond, the tenant would ordinarily be expected to have an interest in seeking its return. This is therefore a question that concerns engagement of the tenant in the overall processes associated with ending a lease, rather than the database listing process itself.

In order to access the bond (or claim compensation or seek termination of the lease for a breach by the tenant), the landlord must notify the tenant of such an intent. Tribunals and courts have consistently held that merely sending a copy to the last known address is not sufficient. More extensive endeavours are required to bring it to the tenant's attention.

Having been notified, and going through litigation in relation to a breach (regardless of whether or not the tenant actively engaged in the litigation), and presumably that breach being found to have occurred, the tenant should be well aware of the event, the outcome, and ramifications, and has the right of review of that decision.

It is not clear what benefit would be obtained by adding another layer of notification procedures following the conclusion of the court/tribunal process.

In the situation where a tenant has sought early termination of the lease on the grounds of hardship under section 99, the cases noted above clearly demonstrate that a listing cannot be made not withstanding there being a Tribunal order, as such an order is not an order stemming from a breach on the part of the tenant. Rather it is an order in the interests of both parties that lawfully brings the lease to a premature end.

b. Would there be any reason not to remove this provision?

AGD RESPONSE

Having been determined by a court or tribunal that the lease had been breached, and that that breach resulted in a debt in excess of the security deposit and/or termination, there seems little scope for a tenant to challenge a listing on the grounds of inaccuracy, incompleteness or ambiguity.

It would seem more preferable that the tenant engage in the initial court/tribunal process to protect the tenant's interests, as opposed to providing a post event rear-guard review that has little to no prospect of success.

If a listing were made due to early termination of the lease on the grounds of hardship under section 99, such a listing would be illegal, having not complied with the requirements of section 128 (there being no breach), and the landlord and database operator would be liable to prosecution and a penalty of up to 20 penalty units.

11. **It has been suggested that proposed section 129 could be strengthened by increasing the person's response timeframe from 14 to 28 days, and requiring for the notice to include information on appeal rights.**

    a. ***Is there any reason why these provisions should not be included in the Bill?***

AGD RESPONSE

Section 127(2)(d) (notification that a person is listed) requires a landlord to provide notice of how and in what circumstances a potential tenant can have personal information on a database amended or removed.

Section 129 (proposed listing) requires the landlord and database operator to notify of the intent to list and provide opportunity for objection. It would seem reasonable to include information as to how to object in that notification.

The Commissioner of Consumer Affairs is developing guidance material for landlords and tenants and on that basis, regulatory requirements do not appear necessary at this point.

In respect of the period a person has to review and respond to a proposed listing, and with regard to the Committee's concerns around the timeframe for transition, the objective is to provide a relatively quick process for resolution of disagreements over listings. To increase the review period would be somewhat counterintuitive to quick resolution.

Fees for information

12. **Proposed section 132 allows landlords and database operators to charge a fee to provide a copy of a listing, however the fee "must not be excessive".**

    a. ***Why is a fee allowed for a person to get a copy of their own listing?***

AGD RESPONSE

Access to information stored by businesses, including tenancy database operators, is governed by the *Privacy Act (1988)* (Cth). That Act sets out a number of binding principles that apply in relation to the collection, storage, use and access to, personal information. Australian Privacy Principle (APP) 12.8 provides that where an organisation charges a person to view/obtain a copy of personal information, that charge must not be excessive.

APP 12.8 does not prohibit or make it unlawful to charge a fee. In the absence of such prohibition, it is therefore deemed to be lawful under Commonwealth law (i.e. *Privacy Act (1988)* (Cth)).

Section 132 of the Bill reflects APP 12.8. To do otherwise, such as prohibiting the charging of a fee to access the information, would likely result in that prohibition being found constitutionally invalid.

Section 109 of the Constitution provides that "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." While section 109 does not apply to the Territory, as the Territory is not a State, the principle of the paramountcy of Commonwealth law over inconsistent Territory law still applies.

This is so by virtue of the fact that the Territory is a legislative creation of the Commonwealth through section 122 (territories power) of the Constitution, as manifested through the *Northern Territory (Self-Government) Act 1978* (Cth) (Self-Government Act).

As the Self-Government Act does not contain an express provision that Territory law may override Commonwealth law, it is therefore beyond the legislative capacity of the Legislative Assembly of the Northern Territory to include a section in the Bill that prohibits the charging of a fee to obtain a copy of personal information that may be held on a database.

Section 132 (and APP 12.8) only applies when a person approaches a landlord or database operator to see if they have any information about the person.

However, if a landlord uses a database to check a potential tenant's history, and the database has information about the prospective tenant, section 127 requires the landlord to advise the tenant in writing (without charging a fee):

(a) that personal information about the potential tenant is in a database;
(b) the name of the database(s) the landlord used;
(c) the name of the people who listed the information in the database (if it is recorded); and
(d) how that person can have the information amended or removed from the database.

This requirement is necessary to ensure that the use of databases is open and accountable.

To further enhance transparency and natural justice for tenants, if a landlord or database operator proposes to list personal information about a tenant in a database, section 129 further requires the landlord and database operator to provide that person with a copy of the information they propose to list. Landlords and database operators must not charge a fee for providing this information.

b. How is it determined if a fee is excessive?

AGD RESPONSE

As discussed in relation to Question 12(a) above, APP 12.8 and proposed section 132 provide that where an organisation charges a person to view/obtain a copy of personal information, that charge must not be excessive.

Determining whether a charge is excessive or not is a subjective test that would necessarily turn on the individual circumstances surrounding a request to access information.

Primary considerations could well include the person requesting access' capacity pay, against the cost incurred by the database operator in retrieving and presenting the information. Such considerations require a level of insight and assessment that do not necessarily translate to the individual situation.

As is the case with outright prohibition of charging, that APP 12.8 permits charging within the bounds of reasonableness, any regulation that attempted to set a fee or otherwise determine the reasonableness boundaries or considerations, is likely to be open to challenge for being beyond the legislative capacity of the Legislative Assembly of the Northern Territory by imposing an objective test or parameter on what has been deemed by APP 12.8 to be a subjective test.

The cost for a person to check what is listed on a database varies from operator to operator, and the mode of the search. For example:

(a) TICA:
    i. online account ($55.00 per annum);
    ii. fax/email ($33.00 per search);
    iii. telephone ($5.45 per minute); and
    iv. mail ($19.80).
(b) Equifax National Tenancy Database:
    i. National Tenancy Database online request (free – 10 day turn a round); or
    ii. Tenancy Check online request ($38.50 – 'ASAP').
(c) Trading Reference Australia:
    i. online request ($22.00 per search);
    ii. fax/email/mail (free).
(d) Datakatch:
    i. online account ($22.00 – 6 months access).

Powers of Tribunal

13. A number of submitters have recommended the inclusion of an 'unjust clause', similar to those in NSW, Queensland, Tasmania and the ACT, to provide guidance when a tribunal is considering making an order.

a. Without such a clause, what discretion does the Tribunal have to require the removal of a listing that is legal but it considers unjust in the circumstances?

AGD RESPONSE

As the Committee has noted, New South Wales, Queensland, Tasmania and the Australian Capital Territory have made reference to whether a listing would be unjust. In considering whether a listing may be unjust, the respective tribunals are to have regard as to:

(a) the reason for the listing;
(b) the tenant's involvement in any acts or omissions giving rise to the listing;
(c) any adverse consequences suffered, or likely to be suffered because of the listing; and

(d) any other relevant matter.

South Australia and Victoria have not included such a provision, and the proposed section 134 is generally reflective of those states' conferral of power on their respective tribunals to consider database matters.

As noted above in the discussion on co-tenant liability under Question 3, NTCAT has broad discretionary power to enquire into matters and to fully inform itself as it sees best. Where a listing or proposed listing is found wanting, NTCAT may prohibit the listing, or order its removal or amendment.

As those cases demonstrate, section 128 will require NTCAT to enquire into the reason for the listing, and the tenant's involvement in any acts or omissions that may give rise to a listing, and other relevant matters, including consequences of listing.

b. Was consideration given to including similar provisions?

AGD RESPONSE

Consideration was given, however a general conferral of power was preferred to enable the NTCAT to establish its own processes and jurisprudence, as opposed to a prescriptive conferral that may inadvertently limit the NTCAT.

c. Is there any reason to not include such a provision?

AGD RESPONSE

Some stakeholders suggested inclusion on the basis that it is unjust for tenants to be listed due to personality clashes, unsubstantiated claims or domestic violence situations. Listings due to personality clashes and unsubstantiated claims are, as discussed under Question 2(a), prohibited.

Of the jurisdictions that do specifically direct their Tribunal to consider unjustness, only the Australian Capital Territory and Queensland specifically include guidance on what may constitute an unjust setting, and limit domestic violence as an example to property damage.

Domestic violence in a tenancy setting is a matter that has been acknowledged at the Territory and national level, however there is presently no uniform approach across jurisdictions. The broader complexity associated with its impacts on leasing matters generally has necessitated consideration of this issue outside of the subject of whether to regulate databases. Domestic violence implications are being considered on the broader scale as part of a general review of the Act.

d. What recourse does a person have if they are listed as a result of a situation where they are a victim of domestic violence?

AGD RESPONSE

Section 12 of the *Residential Tenancies Act* makes a tenant liable for damage to the rental premises caused by people who are not tenants, but are on the premises with the tenant's consent. The exception to this is where the person who caused the damage is in a domestic relationship with the tenant and the damage arose through an act of domestic violence. Under such circumstances, section 12(3) reverses the position, whereby the tenant is not liable.

This reflects the general position that the tenant is responsible for, and has general control over, the premises, and thus should keep visitor behaviour in check. The domestic violence exception reflects the reality that in such circumstances, the tenant has no control over the situation, and therefore should not be held responsible for the actions of the perpetrator.

Under such circumstances, the tenant cannot be listed, as the tenant is not legally responsible for the breach/damage.

Where the domestic violence situation occurs between co-tenants, the matter becomes more complicated as both tenants are notionally jointly and severally liable, however as outlined above under the general discussion of co-tenants, the case law discussed in response to Questions 2 and 3 show that tribunals are prepared to go behind the contractual arrangement and assess the matter on the facts of a particular situation, even without specific provision.

e. Do other jurisdictions make special provision for domestic violence victims?

AGD RESPONSE

There are no specific provisions legislated in any jurisdiction in relation to the prohibition or other restriction in relation to listings that have a domestic violence element. Queensland and the Australian Capital Territory do, however, reference damage caused by a partner in a domestic violence setting as an example of what may constitute an unjust listing, however that is subject to consideration of all the circumstances.

The Territory is one of a number of jurisdictions that has some level of protection for tenants who have been the victim of domestic violence (see section 12 of the Act and section 23 of the *Domestic and Family Violence Act*), though there is presently no uniformity across jurisdictions. The complexity associated with its impact on leasing matters generally necessitates consideration outside of the question of whether to regulate databases.

Transitional provisions

14. Concerns have been raised that the transitional provisions delay a person who was listed on a tenancy database prior to the commencement date from challenging a listing for three months.

a. What was the rationale behind drafting the transitional provisions in this way?

AGD RESPONSE

Aside from reflecting the national approach to transition of this regulatory framework, the transitional provisions were drafted to provide a balance between tenant and landlord/database operator needs by providing immediate cover for listings made after commencement, while allowing database operators to retrospectively apply the requirements to existing listings. This was applied in recognition that database operators may face technical and timing issues in identifying and reviewing historic listings.

While a prospective tenant may be subject to an historical listing greater than three years old at commencement, the prospective tenant is now gaining the immediate benefit of being notified of the fact that they are listed, and the opportunity to address it with the landlord and/or database operator in the knowledge that it will need to be addressed within that three month window, otherwise the landlord and/or database operator will be liable.

15. It has been suggested that an alternative means of transitioning would be to treat all listings equally but prescribe that penalty provisions do not apply for the first three months.

a. Would this give sufficient time for industry to transition to the changes without delaying the rights of listed persons to have their listings corrected?

AGD RESPONSE

There is a risk that the diverting of resources from transition to address specific objections may have the unintended consequence of delays occurring and the existence of non-compliant listings at the end of the transition period. Not only would such a situation see prospective tenants disadvantaged by remaining on a list that they ought not to be on, it would expose database operators to potential prosecution for failing to comply with listing obligations.

Regardless of that risk, if an avenue did lie immediately with the NTCAT, it is likely that the matter would not be resolved within that three month transition window, even if the prospective tenant was notified of a listing on the day of commencement.

The transitional provisions do not necessarily disadvantage tenants over landlords/database operators, or vice versa. Rather, they provide a balanced approach to competing priorities.

Non-compliance

16. **A number of submissions have advocated for the inclusion of non-compliance penalties for landlords and database operators under proposed sections 130, 131 and 132. Non-compliance penalties have been included in the equivalent sections of legislation in a number of jurisdictions.**

    a. ***Is there a reason why non-compliance penalties have been included for other provisions in the Bill but not 130, 131 and 132?***

AGD RESPONSE

Sections 130 and 131 relate to ensuring the quality of listings once information has been placed on a database. Section 130 requires a landlord to notify the database operator of inaccurate, incomplete, ambiguous or out-of-date information within 7 days of becoming aware of the fact. Section 131 requires a database operator to amend or remove the information within 14 days of being notified by the landlord.

Section 132 requires a landlord or database operator to provide a copy of personal information that they may have in relation to the tenant.

Access to information stored by businesses, including tenancy database operators, is governed by the *Privacy Act (1988)* (Cth). That Act sets out a number of binding principles that apply in relation to the collection, storage, use and access to, personal information. Australian Privacy Principle (APP) 12.1 provides that where an organisation holds personal information about an individual, that organisation must give the individual access to that information when requested.

Under the *Privacy Act (1988)* (Cth), the Australian Information Commissioner may investigate and enforce breaches of the Australian Privacy Principles, including the seeking of compensation or civil penalties against database operators for, amongst other things, listing incorrect personal information, refusing to correct or remove that information, or otherwise dealing with personal information in an inappropriate manner.

Unlike the issue surrounding the regulation of fees, the APPs do not preclude the Territory from enacting complimentary processes for the correction of personal information listed in a residential tenancy database as such processes are not specified in the APPs.

Sections 130, 131 and 132 compliment the APPs by providing an alternative dispute pathway through the NTCAT where a tenant objects to either the listing, or accuracy of personal information. Where it is found that the information is inaccurate, incomplete, ambiguous or out-of-date, NTCAT may prohibit its listing, or order its removal or amendment. If the requested information is not provided, NTCAT may order its provision.

Offences are not prescribed for a landlord or database operator's non-compliance with sections 130, 131 or 132 as the *Northern Territory Civil and Administrative*

Tribunal Act prescribes a penalty of 100 penalty units for breach of an order of the Tribunal.

The objective of sections 130, 131 and 132 is to provide quick resolution of a disputed listing, rather than seeking criminal or other sanction in the first instant. It was considered preferable that resolution be prioritised rather than sanction. In the event that sanction were required for non-compliance, it was considered preferable that that be considered following independent review of the dispute by NTCAT or the Australian Information Commissioner.

This is in contrast to the offence provisions in sections 126, 127, 128 and 129, which are designed to prevent disputes in the first place, by regulating what information may be placed on databases, and dissuading the use of inaccurate, incomplete or ambiguous information by criminalising such behaviour.