



Tenants Union of Victoria  
response to

**Consumer Property Acts Review Issues Paper 1**

March 2016

Yes, what else but home?

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# Tenants Union of Victoria

The Tenants Union of Victoria (TUV) welcomes the opportunity to provide feedback to the Consumer Property Acts Review.

The TUV was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 16,000 private and public renters in Victoria each year. Our purpose is to improve the status, rights and conditions of all tenants in Victoria.

During 2014/15, the TUV handled more than 19,200 enquiries. TUV provided advocacy on behalf of tenants in almost 880 matters, represented tenants in over 225 hearings at VCAT or other Courts, undertook 350 outreach visits to 250 rooming houses, caravan parks and services.

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# Summary of Recommendations

- R1.** Property managers should be accredited and training requirements must be adequately comprehensive.
- R2.** Legislate compulsory annual CPD for estate agents and agents representatives, including compulsory units relating to property management.
- R3.** Outline clear roles and responsibilities for estate agents and representatives.
- R4.** Introduce a transparent and accessible complaints process through the establishment a real estate industry Ombudsman scheme to undertake dispute resolution for all consumers of estate agent services.
- R5.** The VCAT Act should be amended to provide a referral power from VCAT to the Consumer Affairs Victoria (CAV) Director where the Tribunal believes there has been professional misconduct.
- R6.** Any enforceable undertakings should be publically accessible on the CAV website and should include a summary and a copy of the signed undertaking.
- R7.** A requirement for any communications from tenants (or other interested parties) to be properly documented and recorded.

# The Victorian Rental Market

There are over 515,500 rental properties in Victoria, representing over a quarter of all households. As housing prices soar, private rental has become an increasingly long term housing solution for many. There are now more families and a higher number of older people in the rental market as many continue renting well into old age.

## **Estate Agents Act 1980**

The number of landlords using estate agents is on the rise. Currently 74 per cent of all rental properties are managed by an estate agent, this has increased from 60 per cent in 1996 (ABS 2011).

A large proportion of the population will deal with estate agents as property managers at one time during their life. Due to this crucial role it is critical that the *Estate Agents Act 1980* (EAA) provides clear and detailed legislation to regulate the estate agent industry effectively.

A person's home is one of the most foundational aspects to a happy and fulfilling life. Having access to a secure, affordable and appropriate home is a key enabler for participation in society and the local community.

In particular, low income households, single people and older people often face difficult competition in their attempts to secure accommodation. In this context property managers play a role as gatekeepers to the private rental market through both the tenancy selection process and ongoing management of tenancies.

We believe there is a continuing need to improve the professional conduct of property managers and that the current Act and Regulations, despite their breadth and detail, are failing to ensure basic consumer protections.

# Estate Agents and Conveyancers

## Licensing of estate agents and conveyancers

### Training and experience

#### **R1. Property managers should be accredited and training requirements must be adequately comprehensive.**

Through our telephone advice and tenant advocacy programs we receive a significant number of complaints about poor professional conduct by property managers. The most common of these complaints are detailed below:

- > Estate agents not responding to tenants requests for repairs or informing the tenant of the process to enforce repairs.
- > Estate agents disturbing tenants' quiet enjoyment of their home by entering rental properties without providing the tenant with the form of notice required by the *Residential Tenancies Act 1997* (RTA).
- > Estate agents pressuring tenants to make properties available for inspection an unreasonable number of times per week.

#### Case study

Sam moved in to a property and was given a six month lease as he was told the landlord would move in to the property after that time. Soon after they moved in, Sam was told that the property was being put on the market. During the two month period that followed Sam was subjected to eight open house inspections, 20 private inspections, and one auction. Sam objected to the number of inspections and asked the Estate Agent for compensation. The Estate Agent ignored the request but continued with the inspections.

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- > Estate agents advertising rental properties with a price range and encouraging rental bidding.

#### Case study

Thomas inspected a property at an open house inspection. Towards the end of the inspection he and his partner were approached by the Estate Agent who informed them that if they wanted a good chance of getting the property they would be advised to offer more than the asking price, as there were a number of people interested in the property. Thomas and his partner offered \$10 per week more, and ultimately were awarded the property, despite none of their references being called.

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- > Estate agents misrepresenting the law and bullying tenants to achieve a specific outcome.

### Case study

Gillian was on a periodic lease and had been in occupation of the property for over 10 years. She was informed that the rent had been increased from \$900 to \$1,400. The Estate Agent threatened that if Gillian didn't sign a new fixed-term tenancy agreement they would increase the rent in another three weeks.

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#### > Estate agents charging illegal fees.

### Case study

James was in a fixed-term tenancy agreement and was seeking to assign the property to a new tenant as he had experienced a change of circumstance and needed to move house. The Estate Agent informed James that it would cost him \$660 for the assignment fee (two weeks rent).

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Many of the complaints that we receive, and a proportion of our casework activity is the direct result of property managers not understanding the basic law of tenancy, irrespective of clear requirements under the *Rules of Professional Conduct*. Insufficient knowledge of responsibilities under the *Residential Tenancies Act 1997* and anti-discrimination law is widespread amongst property managers. This has the unfortunate consequence of misleading both tenants and landlords.

It would appear that this is due to inadequate training, both at the initial stage of a career in property management or real estate more broadly, and is compounded by a lack of Continuing Professional Development (CPD) requirements for estate agents and agents representatives in Victoria.

To become an agent's representative or property manager in Victoria the training requirement is a mere five day course, including only three units of study.

Arguably a five day course is not sufficient training to enable a representative to comply with the Estate Agents (Professional Conduct) Regulations 2008. This is particularly true of section 6 Knowledge of the law, which requires that:

*An estate agent and an agent's representative must have a working knowledge of-*

- (a) the Act and any regulations made under the Act; and*
- (b) any other laws relevant to the functions performed by the estate agent and agent's representative.*

It is our belief that this course does not provide adequate training to allow an agent or agent's representative to undertake their role as a property manager in a professional and competent manner. The RTA alone has hundreds of sections that the representative will need to have a working knowledge of. This is in addition to the provisions of the *Estate Agents Act* and Regulations, anti-discrimination laws, and general property manager responsibilities that also need to be covered in the training course.

To support better industry practice we believe a system of property management accreditation would be beneficial for both tenants and landlords. Any such system would ideally be linked to licensing. The current systems administered by the Real Estate Institute of Victoria (REIV) suffer from the fact that not all agents or agent's representatives are REIV members and the main sanction for non-compliance is withdrawal of membership.



### Case Study

Justine was renting a two bedroom unit. Justine contacted her Estate Agent numerous times to get her split system air conditioner fixed as it had started to leak water. After three months she was told that the agent no longer works there. Justine's house was reaching 35 degrees on a hot day, she had a young baby, the split system was leaking over 2-3 litres a day so could not be turned on. Justine was finally contacted by a new agent and told that she would be contacted by the maintenance company. Three weeks later she had still not been contacted by anyone.

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## Continuing professional development

### R2. Legislate compulsory annual CPD for estate agents and agents representatives, including compulsory units relating to property management.

As discussed above we frequently hear of issues with estate agent practice, sometimes resulting in serious negative consequences for tenants. Many of these problems are the product of a poor knowledge of the legal requirements relating to property management including the rules of professional conduct. Clearly these problems indicate that the current training and education requirements for estate agents are inadequate.

In multiple states and territories in Australia including New South Wales, Western Australia, and the Australian Capital Territory, estate agents are required to undertake CPD as part of their license requirements.

In NSW and the ACT agents are required to undertake 12 units of CPD each year. In WA agents must undertake three compulsory CPD units and seven elective units each year. It is noted that one of the required 2016 units is about property management and includes updates about amendments to Residential Tenancy legislations and regulation, best practice approach to completing condition reports and a review of the Code of Conduct.<sup>1</sup>

According to the Real Estate Institute of Australia after the introduction of CPD in Western Australia in 2009 there was a 70% reduction in complaints from the previous year, and an average reduction of 61% over the following three years.<sup>2</sup>

CPD should also include topics such as family violence, cultural and other diversity, mental health, disability and drug and alcohol issues to increase awareness of issues surrounding housing. It is likely that a property manager will come into contact with these issues and it is important that they know how to respond in an appropriate manner.

### Case Study

Susan was in a fixed-term tenancy and was a long-term victim of family violence. Her ex-partner had breached an Intervention Order on a number of occasions. After the final breach, which the ex-partner was charged for, Susan gave six weeks' notice in writing that she would need to leave the property due to her safety. Despite advertising and open inspections, the estate agent took a further six weeks after Susan vacated to find a suitable replacement tenant.

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<sup>1</sup> Government of Western Australia Department of Commerce, *Mandatory CPD – real estate*, January 2016, <https://www.commerce.wa.gov.au/consumer-protection/mandatory-cpd-real-estate>

<sup>2</sup> Real Estate Institute of South Australia, *Mandatory CPD Benefits Agents and Consumers*, August 2013, <http://www.reisa.com.au/news/mandatory-cpd-benefits-agents-and-consumers#.Vueaj319670>

Susan had attempted to apply for a reduction of fixed-term tenancy under section 234, but due to some errors with her support agency the application was not lodged with VCAT until after she vacated and was dismissed.

The landlord then pursued Susan for compensation of approximately \$3300 for lost rent, advertising costs and damage. The landlord and estate agent were unwilling to reduce their compensation claim despite their knowledge of the family violence issues and their knowledge of the family violence provisions designed to protect tenants in these exact circumstances. The estate agent was unwilling to negotiate with our office prior to the hearing despite our conversations regarding family violence being a reason for reducing a tenancy under the RTA.

The Member substantially dismissed the landlords claim, excluding some costs for repairs and 2 weeks rent for a period of time that the property was not cleaned, which the tenant accepted. Susan had a small part of her bond returned to her as a result.

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## **Roles and responsibilities of estate agents**

### **R3. Outline clear roles and responsibilities for estate agents and representatives.**

The roles and responsibilities of estate agents are detailed in the Estate Agent (Professional Conduct) Regulations 2008. Setting out clear roles and responsibilities of estate agents and representatives would have dual purpose to clarify this for all parties involved.

Clear statements regarding the role of estate agents and their representatives with respect to their duties and obligations to landlords and tenants would be beneficial to provide clarity to all parties.

It is important that provisions specifically relating to property management are included in the Rules and Professional Conduct. This should detail that both estate agents and their representatives must not:

- a) Engage in conduct that would result in a breach of the *Residential Tenancies Act 1997*;
- b) Engage in conduct that would discriminate against a tenant or potential tenant on any grounds prohibited under the *Equal Opportunity Act 2010*, *Age Discrimination Act 2004*, *Australian Human Rights Commission Act 1986*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*;
- c) Fail to inform a tenant or potential tenant of their rights under the *Residential Tenancies Act 1997* and any other relevant Act;
- d) Fail to act to promote/protect the legal rights of tenants and potential tenants;
- e) Engage in any conduct intended to pressure or intimidate a tenant into taking a course of action or refraining from taking a course of action;
- f) Enter or otherwise deal with rented premises in a manner that contravenes the *Residential Tenancies Act 1997* or other relevant Act.

Appropriate penalties must be enforced to ensure compliance with the Act and Regulations. Any disciplinary measures must include property management.

## **Compliance measures**

### **R4. Introduce a transparent and accessible complaints process through the establishment a real estate industry Ombudsman scheme to undertake dispute resolution for all consumers of estate agent services.**

There is a chronic culture of non-compliance and a major lack of enforcement under the EEA.

The Act and the regulations, particularly the Estate Agents (Professional Conduct) Regulations 2008 seem to have adequate provisions and are clearly written but are of little impact because there is no appreciable likelihood of being held to account for breaches of the Act or the Regulations, and there is often no discernible consequence for breaches.

Improved training and Continuing Professional Development will go some way to informing agents and agent's representatives of their obligations but this must be reinforced through a strong compliance and enforcement program that augments the consumer complaints driven system.

The current complaints process is inadequate. It is presently unclear how any consumer would complain about a breach of the Act or the rules of professional conduct and what action, if any, would be taken in relation to that breach.

We believe that a Real Estate industry Ombudsman scheme, to undertake dispute resolution for all consumers of estate agent services, would greatly enhance compliance and enforcement. Most such schemes have mandated roles in relation to addressing systemic issues in the relevant industry and can act as effective compliance monitors.

Tenants are in a unique situation as they do not directly engage the estate agent for their services or pay a fee directly to the estate agent. Rather, tenants pay for the service indirectly through their rent payments to the landlord, who in turn pays the fee. In this way the tenant is a consumer of the estate agent service whereas the landlord is the client.

Any scheme would need to be available to both consumers and clients to ensure that tenants are able to access any dispute resolution and that systemic issues of non-compliance in relation to property management are effectively identified and addressed.

The Ombudsman should be funded by scalable levies based on complaint numbers to ensure there is an appropriate price signal for poor quality practice and inadequate dispute resolution. As with other similar schemes, the Ombudsman's findings would be binding on the industry participant but not the consumer.

## **Penalties**

It needs to be emphasised that more prescriptive regulation of agent conduct will not result in enhanced consumer protection without an effective compliance and enforcement regime. Complaints directed through an Ombudsman scheme or to Consumer Affairs Victoria must be investigated thoroughly; instances of breach reported to the Estate Agents Council for adjudication; and appropriate penalties must be imposed for misconduct. These penalties should be directed at the agent's ability to provide real estate and property management services, and should involve suspension from practice; conditions imposed on capacity to practice (whether permanent or for a shorter fixed period); or revocation of licence and consequently the ability to provide real estate and property management services.

Where there is evidence of serious breaches of the Act or Rules there should be a strong response to deter such behaviour in the future.

We believe there are a couple of consequential actions that would encourage better compliance:

- R5. The VCAT Act should be amended to provide a referral power from VCAT to the Consumer Affairs Victoria (CAV) Director where the Tribunal believes there has been professional misconduct.**
- R6. Any enforceable undertakings should be publically accessible on the CAV website and should include a summary and a copy of the signed undertaking.**

### **Administrative issues and record keeping requirements**

- R7. A requirement for any communications from tenants (or other interested parties) to be properly documented and recorded.**

Proper documentation would better protect consumers and interested parties and enhance property management practice.

This is a common complaint from both tenants and landlords; that there is no record of critical communications such as requests for repairs. Whilst the current Act and Rules would probably require such practices we believe an express provision would help focus attention on this common problem.