

SUBMISSION

CONSUMER PROPERTY ACTS REVIEW

Conduct & Institutional Arrangements - Issues Paper

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ABOUT REIV

The Real Estate Institute of Victoria has been the peak professional association for the Victorian real estate industry since 1936.

Over 2,000 real estate agencies in Victoria are Members of the REIV. These Members are located in city, rural and regional areas.

The businesses employ more than 10,000 people in Victoria in a market which handles over \$100 billion of transactions totalling 30 per cent of GSP.

Members specialise in all facets of real estate, including: residential sales, commercial and industrial sales, auctions, business broking, buyers agency, property management, owners' corporations management and valuations.

Introduction

The REIV is the peak industry association for the real estate industry in Victoria, representing the majority of the state's licensed sales agents, auctioneers and owners' corporation managers.

This issues paper – encompassing the Estate Agents Act 1980, Owners' Corporation Act 2006 and associated legislation – is of significant importance to our members as it impacts directly on their business practices.

With chapter committees dedicated to the sale of residential property, auctioneering and owners' corporation management, the REIV has undertaken extensive consultation with members in Melbourne as well as key regional centres.

The REIV has also sought input from its members on dated legislation and how it could be best updated to reflect modern practices.

Key areas of concern are Section 55 (selling to an associated party), Section 49A (entitlement to commission) and the training of estate agents and Agent's Representatives.

REIV Response

The following outcomes were gained from the Member consultation process.

Licensing of estate agents & conveyancers

1. Is the definition of an estate agent easy to understand and apply? How could it be improved?

As estate agency work continues to evolve and currently goes well beyond the business matters specified in the definition of 'estate agent or agent' in Section 4 of the Estate Agents Act 1980, the definition is not easy to understand or apply.

The REIV believes the definition of an 'estate agent or agent' needs to be revised to include those providing what amounts to estate agency work but, presently, exploiting the technicalities of the current definition to avoid compliance with the Act.

This includes vendor and purchaser 'advocates', namely people and businesses who offer to assist buyers and sellers of real estate in the selection of an agent and who may also claim that they will assist the vendor in dealing with that agent. It also includes service providers such as Airbnb, which facilitate property lettings and offer to collect and disburse rent.

The REIV suggests the definition could be improved to encompass what is current estate agency work and also that may become so in the future by revising the definition along the following lines –

'estate agent or agent' means a person, whether or not he or she carries on any other business, who on one or more occasions –

- a) Exercises, advertises or states to the public that they are willing to conduct estate agency work
- b) Includes a person who –
 - i. Recommends an estate agent to a person, or is in any way involved in the engagement or appointment of an estate agent
 - ii. Is in any way involved in the direction or supervision of an estate agent recommended, engaged or appointed as envisaged by sub-section (i) in carrying out estate agency work.

'estate agency work' includes –

- a) The selling, buying, exchanging, letting or otherwise dealing with or disposing of; or

- b) Negotiating for the selling, buying, exchanging or letting of; or
- c) The collection of rent or other monies in relation to; or
- d) Providing advice in relation to the marketing of or undertaking the marketing of;

any real estate or business on behalf of another person.

Furthermore, the REIV suggests existing exemptions to the Estate Agents Act 1980 – as set out in Section 5 – continue.

The definition needs to state that the properties that are the subject of the transaction are in Victoria. Currently the Act doesn't say whether the agent, client or property has to be in Victoria.

Other definitions of concern not addressed in this question are Agent's Representative and employ (in relation to the employment of any person as an Agent's Representative).

The REIV also believes the definition of "Agent's Representative" in Section 4 also requires addressing.

Under the Estate Agents Act, an Agent's Representative is an individual, unlike an estate agent who can also be a corporation. In addition, Section 16 of the Act makes it plain an Agent's Representative can only conduct estate agency work as an employee of an estate agent.

Unfortunately, sub-section (a)(i) of the current definition creates the impression an agent's representative does not need to be an employee. This is because the definition includes the phrase "... or who acts for or by arrangement with ...".

If an estate agent, for whatever reason, engages an individual, who has permission to work as an Agent's Representative, to "act for" or "by arrangement with" it in conducting estate agency work, other than as an employee, the individual can only do so as a self-employed contractor.

A self-employed contractor can only carry out estate agency work if they hold an estate agents licence. They cannot do so as an Agent's Representative.

For this reason, the REIV recommends the wording of sub-section (a)(i) be amended to rectify this is by deleting the phrase "... or who acts for or by arrangement with ...".

In addition, the REIV recommends the phrase "... clerks, cashiers or accountants ..." in sub-section (b) of the definition be re-worded in the course of modernising the language of the Act.

2. What problems have you experienced with unlicensed people who offer marketing or similar services to sellers or who run introduction or vetting services?

Unlicensed persons lack appropriate training, experience, and an understanding of contract law, estate agency law, sale of land laws and consumer protection laws.

Vendors and purchasers who unwittingly engage an unlicensed person suffer consumer detriment as they are afforded little consumer protection. For example, the protection of having their money deposited into a trust account.

It is often difficult for vendors and buyers to recover money accepted (unlawfully) by unlicensed persons. It is often deemed too costly to take legal action to recoup losses – financial or otherwise – on the basis there are no worthwhile assets to recover against. On the other hand, if a defalcation occurs, estate agents are covered by the Victorian Property Fund.

It is an issue – in 2015, the REIV reported 10 unlicensed traders/entities to the Victorian Government.

Unlicensed persons debase the credibility and reputation of the real estate industry as a whole. Marketing a property is one of the activities an agent undertakes in order to find potential buyers or tenants for a property. Introducing and vetting a buyer or a tenant are also part of an agent's role in the process of selling or letting a property. To suggest that these activities in some way do not require a licence is to avoid the important obligations that agents must meet.

3. Are there any persons or organisations that are inadvertently captured by or excluded from the need to be licensed as an estate agent?

A variety of groups are inadvertently excluded from the requirement to be licensed as an estate agent.

Financial planners and advisers are a prime example. If they are involved in promoting, or advising in relation to, real estate transactions, they should be required to hold an estate agents licence, to avoid people they advise suffering consumer detriment.

This is in spite of the Act, which has a definition of an agent including any person engaged in selling, buying or letting property. The REIV is also of the understanding that people

who are involved in granting residence rights for retirement villages (not retirement village owners or the employees of retirement village owners) are not required to hold an estate agents licence. Under the Act, these persons should also be required to hold an estate agents licence.

The REIV would like to see the BLA publish opinions – and guidelines for agents – on areas that are not defined by the legislation such as what constitutes an unlicensed person.

4. Are there any types of sales and leasing schemes that should specifically be referred to in the definition of an estate agent and why would they be included?

The leasing of short-term accommodation has become an issue. The REIV believes people who act as providers of short-term accommodation need to be licensed.

Essentially, short-term accommodation providers perform the role of a property manager because they undertake roles such as:

- conducting property inspections;
- preparing condition reports;
- collecting deposits for holiday accommodation months in advance from holiday makers;
- signing up of letting contracts;
- preparing exit reports;
- refunding deposits or deducting monies for loss or damage to the property when a letting comes to an end; and
- collecting and disbursing rent.

Lack of statutory accountability on the part of short-term accommodation providers, aside from the possibility of a consumer guarantee provided under Australian Consumer Law, is a prime example of consumer detriment. As these providers operate outside the ambit of the Residential Tenancies Act, there is no requirement to have a trust account. An aggrieved party's option to resolve a dispute is to refer the matter to VCAT or engage the services of a legal practitioner.

The REIV believes the Act needs to be broad (ie. it should not mention or reference specific leasing schemes) as it will otherwise cause legislation to become outdated in a relatively short time.

5. As this question relates to conveyancers – not real estate agents – the REIV has opted to not provide a response.

6. What is your view as to the present training for estate agents and/or conveyancers? Are there any additional training requirements that should be mandated? Are any of the current requirements unnecessary?

The REIV believes there is a significant need within the industry for higher qualifications for estate agents, particularly entry level training for Agent's Representatives. The REIV also believes the educational qualifications for Agent's Representatives are inadequate for the role that they are expected to perform.

Higher entrance standards would ensure Agent's Representatives are appropriately trained with a comprehensive understanding of legislation, regulations and best practice.

In addition to higher entry standards, the REIV believes Agent's Representatives should be required to complete a greater level of experience before being eligible to become a qualified estate agent. The REIV recommends a minimum of two years' experience be required.

To ensure agents remain informed of legislative changes, new technology and industry developments, the REIV believes the ongoing education and training of agents is required. While CPD is a component of REIV membership, mandating CPD industry-wide for all agents will improve the professionalism of the sector. The importance of CPD should not be underestimated, particularly at a time when the public has increasingly higher expectations of the industry.

Finally, feedback from REIV members suggests there is a need for a Diploma of Business, or equivalent, for Officers in Effective Control (OIEC). In addition to the traditional skill set of an agent, an OIEC needs to have a comprehensive understanding of business management, and human resources issues.

7. What are the potential costs of mandating higher entry standards for estate agents and/or conveyancers?

Mandating higher entry standards for Agent's Representatives will deliver an additional training period, and potentially fees, for those entering the industry.

Of all students who complete the REIV's Agent's Representative course at present, only a third enter the industry. The REIV believes that higher entrance standards may result in higher entry to, and retention within, the industry.

8. What are your views on the value and efficiency of the work experience requirements for conveyancers and estate agents?

As learning doesn't all take place in the classroom, practical experience is very important. For estate agents, on-the-job training represents significant knowledge and skill development.

As practical experience is gained over time, the REIV believes it is essential that Agent's Representatives have a minimum of two years' experience in the industry before they can become a licensed agent.

The current requirement – one years' experience – enables agents with little experience to become a licensed agent and potentially run an agency.

9. What is your view about the need for CPD for estate agents and/or conveyancers? If CPD was required, what type of development should be mandated?

The REIV believes CPD is central to increased professionalism of estate agents and Agent's Representatives.

As industry best practice and legislation is frequently updated, CPD related to those changes is important in ensuring agents remain informed and knowledgeable and best positioned to serve consumers.

The industry has changed dramatically in the past 10 years and will continue to do so, and mandated CPD will ensure agents remain up-to-date with current practices. This is vital at a time when consumers are focused on the professionalism of agents.

For this reason, the REIV supports mandating CPD as it currently is in NSW, Tasmania and Western Australia.

10. What are the costs of mandating CPD for all conveyancers and estate agents?

While mandating CPD would deliver an additional cost, it would be offset by vastly improved practices in the industry.

If CPD is to be mandated, the quality of real estate training being carried out by Registered Training Organisations (RTO's) will also need to be monitored. The quality of this training is currently variable across different providers, and needs to be of the highest quality.

11. What are your views on the current eligibility criteria for estate agents and conveyancers?

The REIV has views on the current eligibility criteria for Agent's Representatives as previously outlined.

A related issue of greater proportions is mutual recognition laws between Victoria and other states. This is a significant problem, given the increasing number of inadequate training providers in both New South Wales and Queensland.

The REIV believes existing regulation needs to be tightened to prevent these poorly trained agents from being able to practice in Victoria, without demonstrating basic competency and knowledge of Victorian legislation. The REIV is aware that in the past some interstate agents had claimed previous real estate experience at premises that did not exist.

12. What are the factors in favour of retaining the capacity for the BLA to grant permission to someone who is otherwise ineligible to hold a licence?

This 'out clause' for licensing should be reconsidered, as if a person is ineligible to hold a licence, this should stay. Only in extreme circumstances should a licence application from an ineligible applicant be considered by the BLA.

In addition, the REIV believes a person who has been trading as an unlicensed real estate agent should not be granted an estate agents licence as he/she has no regard for the law.

13. What barriers, if any, should be established in relation to the permission application process?

The REIV believes the current legislation excluding individuals convicted of serious indictable offences from holding an estate agent's licence is appropriate. These offences include violence, theft, habitual drug use and drug traffickers. While the existing appeals process is suitable, the BLA should only consider persons who have prior industry experience and a job offer in writing.

14. What are your views on the information required to be provided as part of the licensing process and what are the opportunities for red tape reduction?

In instances where legitimate circumstances can be proven, late payment of renewal fees for corporate and individual licences should be at the discretion of the BLA.

In general, any changes to create red tape reduction – such as streamlining police checks – would undermine the licence process.

15. As this question relates to conveyancers – not real estate agents – the REIV has opted to not provide a response.

16. What would be the impact of mandating professional indemnity insurance for all agents?

The REIV believes holders of an estate agents licence – individual or corporate – should be required to hold professional indemnity insurance unless they are working exclusively as the employee of another licensed estate agent or are non-practising.

The amount of professional indemnity cover is to be determined by the Director of CAV; however the REIV suggests a minimum cover of \$5 million for any one event or occurrence.

At present, the REIV requires members to hold a minimum cover of \$2 million per claim and not less than \$6 million in the aggregate for all claims made during the period of insurance.

Mandating personal indemnity insurance for all agents will enhance consumer confidence; in particular should a claim against the agency be lodged seeking financial compensation/damages, indemnity insurance could assist.

17. Is it really necessary to prescribe in legislation a management approach that requires an estate agent or conveyancer to physically manage the day to day operations at each place of business? If not, what, if any, office management requirements should be prescribed?

Given advances in modern technology, the REIV believes there is a need for legislation relating to the management of estate agencies to be updated to reflect current business practices and be flexible enough to cater for future developments, without the need to necessarily have to enact amendments.

The need for regular and substantial personal attendance of the OIEC at the office of the estate agent may no longer be required, and whether an estate agent might fulfil the OIEC role at more than one agency should be considered.

The manner in which an OIEC carries out his or her day-to-day statutory responsibilities should be at their discretion.

With this in mind, the REIV considers the Estate Agents Act should merely set guidelines, not prescribe their application.

As such, the REIV considers the existing requirements of Section 29B (2) could be amended to remove sub-sections (2a) and (2b) while retaining sub-sections (2c), (2d), (2e), (2f) and (2g).

OIEC responsibilities dovetail with requirements in the Estate Agents (Professional) Conduct Regulations 2008. For example: regulation 6 (knowledge of the law); regulation 8 (dispute resolution); regulation 11 (fairness and honesty) and regulation 13 (good practice of estate agents).

In single entity estate agencies with multiple branch offices, local branch managers report to an OIEC at a head office. Examples of this arrangement include pastoral houses Elders and Landmark. This differs from an arrangement between a franchisor and franchisees. Typically, franchisees are separate legal entities and each will have its own OIEC.

18. How could obligations on officers in effective control be improved to better facilitate the proper conduct of estate agency work and office procedures?

Implementing harsher penalties for OIEC who do not comply with their legal obligations will better facilitate proper conduct of estate agency work.

Under existing legislation, an OIEC who fails to comply with office management requirements is subject to a fine of 25 penalty units. In order to ensure compliance while providing greater flexibility in OIEC management, the REIV believes this fee should be increased to 100 penalty units.

On an offence being proven, the Director of CAV should be required to conduct an enquiry into whether that person is fit to hold an estate agents' licence.

A change in the licensing requirements for OIEC would also improve and facilitate the proper conduct of estate agency work and office procedures.

19. What are the risks for persons licensed as estate agents in not having or not immediately replacing an 'officer in effective control' and should these be addressed in the Estate Agents Act?

The Officer in Effective Control (OIEC) is a key role within an estate agency, providing guidance, support and supervision of Agent's Representatives and licensed agents employed by the business.

REIV members report that for certain periods some agencies may only have one licensed agent in the office. Should the OIEC suffer a long-term illness or be unexpectedly hospitalised, resign or decease this will undoubtedly cause a disruption to the running of the agency until a suitable replacement is found. At present, the absence of an OIEC does not provide grounds for automatic cancellation of a corporation's licence.

Given the important role of the OIEC in ensuring legislative compliance, this is clearly unsatisfactory. The REIV believes that in cases where corporations do not appoint an OIEC to commence duties within 30 days of the departure of the previous OIEC, the corporation's licence should be suspended. An extension beyond this period should be at the discretion of the BLA.

The REIV believes in these circumstances, it should be at the discretion of the BLA to appoint a locum agent where possible. The REIV has recently established a locum service, which member agencies can utilise.

20-21. As these questions focus on conveyancers - not real estate agents - the REIV has opted not to provide a response.

Conduct of estate agents

22. What would be the merits or otherwise in having some established principles about the role of estate agents in the Estate Agents Act and/or setting out the duties for the conduct of an estate agent in relation to sellers, buyers, landlords and tenants (i.e would it clarify expectations about the role of the agent and their conduct)?

The REIV does not see any merit in establishing guidelines around the role – and conduct – of an estate agent. Responsibilities are adequately catered for by the common law of agency and various statutes. For example, the Estate Agents Act, Estate Agents (Professional Conduct) Regulations, the Sale of Land Act and the Australian Consumer Law.

Victoria's estate agents have broad-ranging statutory responsibilities to consumers with whom they deal in the course of conducting their principal's business. They are not to engage in misleading or deceptive conduct, and to act fairly and honestly and to the best of their ability in performing their role as an estate agent. Litigation over an extended period has demonstrated their effectiveness.

An agent's primary responsibility is to represent to the best of their ability and to act in the interests of their principal.

This is fundamental to the principal-agent relationship. It is recognised by the common law of Victoria and the Estate Agents Act. It applies whether an agent is engaged by a vendor, buyer, landlord or tenant.

It is essential the principal-agent relationship is not 'muddied' by requiring an agent to assume statutory responsibilities, other than those mentioned above, to a person who is not their principal and has no responsibility for their remuneration or expenses.

To do otherwise will inevitably embroil estate agents in serious conflicts of interest, to the detriment of their principals and the intended beneficiaries of those duties, consumers.

23. What additional information should be included in the Estate Agents Act about the role estate agents play in property management, including in respect of duties and obligations should they be under to landlords and tenants?

Other than the requirements that already exist, no further information should be included in the Estate Agents Act as the role of property managers is covered in the Regulations.

24. What sanctions should be in place for estate agents who display poor behaviour in the property management space (for example specific offences, limited licence)?

The REIV does not believe the Estate Agents Act should create a multiplicity of offences for poor behaviour. Poor behaviour in any area of real estate practice – including property management – should carry general sanctions. Existing legislation requires agents to act fairly and honestly in their dealings with the public.

25. What are your views on the merits of clarifying and directly expressing in the Estate Agents Act, the duties and obligations, if any, that an estate agent may hold towards buyers of property?

The REIV sees no merit in attempting to clarify the duties and obligations of estate agents towards buyers of property, as it will only lead to greater confusion for both agents and the public. For estate agents, further clarification will conflict with their primary obligation to act in the best interest of their principal at all times. For the public, further clarification will falsely create the impression that the agent acts for them in addition to acting for the principal, despite the buyer having no obligation to pay the agent's remuneration or expenses.

This conflict of interest is highly undesirable from professional, ethical and legal perspectives. At present, under the Estate Agents Professional Conduct Regulations agents must 'at all times act fairly and honestly and to the best of the agent's knowledge and ability in the performance of the agent's functions as an estate agent'.

This requirement, in addition to obligations under the Australian Consumer Law which 'prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct' are adequate protections for buyers of property.

26. What would be the costs and benefits of regulating the conduct of estate agents in negotiating sales authorities and the content of those authorities?

The REIV does not believe legislation is required to regulate the conduct of agents when negotiating sales authorities. Under existing legislation, agents have a statutory obligation to inform clients that their fees and marketing expenses are negotiable.

The terms/conditions of the sale authority are a matter of contractual negotiation between vendor and agent. If vendors do not agree with the terms/conditions, it is their prerogative to negotiate better terms or engage another agent.

27. What are your views on the current level of information disclosed by an estate agent to a client about commission, fees, rebates and other outgoings?

Prior to vendors signing a sale authority, agents are required to disclose their commission rate, commission sharing arrangements, rebates to be factored and fees to potential clients. This should remain in place in its current form.

However, under Section 48B, agents can only charge clients for the amount paid for any outgoings. The REIV believes this legislation is out of step with current practice given the costs and structure of online advertising – the single largest cost in many marketing campaigns.

Agencies often pay subscription fees to online portals which entitle them to advertise on those sites for however long they wish to. As this cost is not billed on a per ad and time basis, it is difficult to determine the cost for advertising each property without going through a major and very costly reconciliation at the end of each year. There needs to be clarity in the Act around how to recover this potentially large cost to the agency.

28. What is your view of the appropriate consequence if an estate agent fails to meet the disclosure requirements? For example, should the estate agent be entitled to any commission or other monies?

Under Section 50 of the Estate Agents Act, an agent who fails to comply with the provisions of Section 49A has no entitlement to be paid, or if paid, retain commission and expenses.

The REIV considers the all-encompassing effect of these Sections to be draconian and inappropriate.

There needs to be a clear distinction between total failure to comply with the disclosure requirements and partial/technical non-compliance. For example, a failure to comply may result in no consumer detriment being suffered by a client, who is then unjustly enriched by not having to pay for services rendered or reimburse expenses incurred on their behalf.

The test to be applied to a failure to strictly comply with the requirements of section 49A is: has the failure resulted in a material disadvantage to the client? If there is no material disadvantage, the agent is entitled to be paid and recover expenses.

If there is a material disadvantage, the agent is not, *prima facie*, entitled to be paid or recover expenses but may contest this via a procedure similar to that available to a vendor who has not complied with Section 32 of the Sale of Land Act.

Further to this, full consideration needs to be given to whether the requirements of Section 49 (A) should apply in circumstances where an estate agent's client is a professional property developer.

The REIV queries whether agents should be bound by Section 49 (A) in this instance, as different dynamics apply. Under this scenario, there is no consumer detriment and Section 49 (A) should not apply.

29. Are there any circumstances where agreements between estate agents should be subject to disclosure requirements? If yes, please provide examples of potential detriment that disclosure could avoid?

The REIV believes the current disclosure requirements between agents, including commission sharing arrangements, are appropriate.

30. When should an estate agent disclose details of a person entitled to a commission? If the commission-sharing relationship arrangements change, what requirements of disclosure should apply?

At present, the Act requires commission sharing arrangements between agents to be disclosed to the vendor – and a commission-sharing declaration form provided to the vendor – prior to the signing of an exclusive sale authority.

Issues arise when a commission sharing arrangement is entered into after the sale authority has been signed. In these instances, the agent is currently required to immediately notify the client and create a new sale authority, which is unnecessary and convoluted.

Instead the REIV believes that the agent should only be required to create and provide the vendor with a commission-sharing declaration form.

The REIV therefore recommends section 48 (2) is amended to read, “Before sharing any commission to which he or she becomes entitled in respect of any estate agency work, the agent must ensure the person responsible to pay the commission is given a statement that complies with subsection (3).” (ie a commission-sharing declaration form).

31. What safeguards should be in place in circumstances where an estate agent or their representative or relative gains an interest in property the agent is selling?

The REIV believes the prohibition on estate agents and associates buying listings under Section 55 is overly restrictive. This legislation presents substantial risk management issues for both large metropolitan agencies with several hundred employees and smaller agencies operating in regional and rural Victoria.

While the previous amendment to Section 55 was designed to protect consumers, Victoria's current requirements are now out-of-step with other jurisdictions and need to be aligned. It is essential that the legislation balances the need to avoid conflict of interest with the fundamental right of estate agents to receive fair payment for their services.

The provision that the Section is not contravened if no commission or other reward is payable for the transaction causes significant loss of income, particularly to small, low volume agencies in regional towns. Some REIV member agencies have reported financial losses in excess of \$100,000 in unpaid commission in a 12 month period. Vendors in small regional towns are also financially disadvantaged whereby potential buyers may be excluded due to their association with the listing agency.

The REIV would like to see this legislation changed. Options include: Allow the Director of Consumer Affairs Victoria discretionary power to approve or modify the terms of sale. This would enable agents to make application for approval in specific cases. Alternatively, independent valuations on the property could be carried out and the sale price must not be lower than this valuation.

32. What distinction, if any, should there be between the estate agent personally buying a property, or their representatives or relatives buying a property that is listed with the agency?

The REIV would like to see the legislation amended to allow for greater flexibility insofar as relatives of the selling agent and colleagues from the same agency are concerned. In Melbourne, agencies with several hundred employees across multiple branches are financially disadvantaged when looking to sell a property to an associate of the agency, which may be in a different suburb or town.

Should the vendor accept the offer, the REIV believes the agency should be entitled to charge the vendor the agreed commission as per the terms of engagement.

33. Are there any circumstances where rebates could be permitted (for example, with appropriate disclosure requirements)?

A rebate is any discount or commission and includes non-monetary benefits. Under Section 48A of the Estate Agents Act, an agent is required to pass on any rebate they receive in relation to the sale, management or lease of a property to vendors and/or landlords.

Agents are not entitled to retain any rebate and must not charge vendors or landlords an amount for any expense that is more than the cost of those expenses. At present, agents who breach these provisions are subject to a fine of 60 penalty units.

If the legislation was amended to allow rebates in certain circumstances, the REIV believes this would lead to further misinterpretation and confusion in the industry surrounding rebates.

34. What appropriate remedies or alternative approaches to prohibiting rebates could be considered?

The REIV believes the current penalties relating to rebate breaches (60 penalty units) are appropriate.

35. Do the current arrangements in the Estate Agents Act sufficiently deal with rebates? In particular, should indirect benefits be included, and if so how should these be accounted for?

The REIV believes legislation relating to rebates needs to be strengthened as current provisions have been ineffective in ensuring all forms of rebates, or their monetary value, are passed on to vendors and landlords.

Online marketing also needs to be addressed in legislation as the passing on of subscription fees to clients is difficult to monitor and control.

The REIV does not believe agents should be able to claim a rebate on insurance services offered to landlords.

36-39. As these questions relate to conveyancers – not real estate agents – the REIV has opted to not provide a response

Compliance measures

40. What are your views about, and experience of, the current VCAT inquiry system? What are the opportunities to improve the VCAT process?

At present, the VCAT hearing system is time-consuming and there is a significant amount of inconsistency between members in relation to tribunal decisions. The REIV believes this could be improved if tribunal members were governed by regulation, rather than total independence.

41. Are the range of orders and penalties open to VCAT after conducting an inquiry sufficient and appropriate? If they are not, what changes would you recommend and why?

The REIV believes the review process at VCAT favours tenants, allowing tenants 14 days to appeal from when they learn of the decision. The REIV believes this should be amended to be 14 days from when the order is made.

REIV members have also expressed concern that there is no enforcement of orders available to landlords, except to engage a debt collector which only adds to the expense.

42. What are the merits of the proposed approaches which could operate in conjunction with existing enforcement approaches?

Proposed approaches could include a separate mediation process as well as lodgement fees and late lodgement fees for audit reports.

43. What additional suggestions do you have to address poor conduct?

The REIV believes the introduction of a two-tiered penalty system allowing for on-the-spot fines for breaches and poor conduct could assist in expediting hearing times at VCAT.

44. What factors should be considered as part of any review of penalties under the Estate Agents Act?

The REIV believes it is important that penalties reflect the impact the breach has on consumers. In instances where the breach has had no, or very little, impact on consumers, then the penalty needs to reflect this.

Trust accounting

45. What are your views on the overall effectiveness of the trust accounting requirements for estate agents and conveyancers?

At present, the Estate Agents Act and General Accounts & Audit Regulations do not permit agents to distribute deposit cheques to a vendor's legal representative, which is a frequent practice when the conveyancer or solicitor does not run a trust account.

To facilitate settlement, agencies are inadvertently breaching the provisions of the Act and Regulations by posting or hand delivering cheques to the respective representatives. If settlement does not occur, this places undue expectations on the agent, as they are responsible for all funds and are responding to legal instructions from the vendor.

46. In what circumstances would it be appropriate for estate agents to receive money from, or on behalf of, clients and hold that money on trust? What would be the potential risks of providing estate agents and conveyancers with greater flexibility to deposit trust money in accounts that pay interest to the parties to the transaction?

Agents are required to deposit all money they receive – which relates directly or indirectly to a real estate transaction – into the agency trust account.

It's appropriate for agencies to receive – and hold – money on behalf of clients in trust as they are acting as statutory stakeholders pending the completion of the real estate transaction (Section 59 of the Estate Agents Act).

The REIV believes there is no benefit – financial or otherwise – for agencies to further complicate their trust accounting procedures by depositing trust money in an interest-bearing account for clients.

At present, accounting for interest earned on monies held in the agency trust is not a requirement for estate agents. Introducing greater flexibility will be an administrative nightmare for agencies, with additional service fees likely to be passed on to clients. Greater flexibility also has the potential to result in an increase in trust account fraud.

47. As this question relates to conveyancers – not real estate agents – the REIV has opted to not provide a response.

48. What is your view about the appropriate sanction if an estate agent or conveyancer does not comply with the annual auditing requirements?

Agents who fail to meet their annual trust account reporting obligations (within three months of June 30) are currently subject to significant penalties. At present, this is the case irrespective of whether the statement declares a deficiency.

The REIV believes certain circumstances pertaining to the delay should be taken into consideration by CAV, such as when an illness has occurred.

49. How should offences relating to trust account deficiencies, misappropriation and deficient administration be framed for estate agents and conveyancers (i.e. what type of wrongdoing do we want to prevent)?

The REIV believes the existing penalties relating to trust account deficiencies are appropriate, with exceptions for some special circumstances (eg. illness) as above.

Administrative issues & record keeping requirements

50. As this question relates to conveyancers – not real estate agents – the REIV has opted to not provide a response.

51. Do you access public registers and if yes, for what purpose?

The REIV accesses public registers on a daily basis to confirm an agent's, agency or conveyancer's licence credentials. A public register is also beneficial for members of the public as it provides them with a credible source of licensed agents.

52. What is your view as to the required information for the registers, including whether information about ineligible persons should continue to be required?

The REIV would like to see the register developed to include further information such as the name of last agency worked, length of previous employment as well as position held. Any CAV enforcements should also be included.

53. How do the current requirements for physically displaying the licence by estate agents and conveyancers assist consumers?

Requiring estate agents to physically display their licence enhances consumer confidence, as it verifies the agent and agency's credentials.

Institutional arrangements

54. Do you believe that the functions of the BLA are clear, and if not, how could the legislation be improved to clarify the BLA's role?

The REIV believes the functions of the BLA need to be clearer. At present the BLA does not provide advice to agents on how they interpret legislation or formulate determinations.

55. Do you believe the role of the Director of CAV is clear and the functions are sufficiently articulated?

There needs to be greater clarity around the role of the Director of CAV. The REIV believes CAV should take into account all stakeholder views, including those not using the product. Regrettably, there is a perception within the industry that CAV does not deem landlords and vendors as consumers of real estate services.

56. Are the powers given to the Director and inspectors under the relevant Acts sufficient?

While powers given to the Director of CAV are appropriate,

the REIV believes inspectors' powers' should be increased to allow for on-the-spot fines.

57. What are your views as to the role of and the objectives for the Estate Agents Council?

The REIV believes that in order to fulfil their role as advisers to Consumer Affairs Victoria, there is a need for the Estate Agents Council to have greater independence. This separation of duties is vital to ensure the Estate Agents Council objectively represents the property industry.

Victorian Property Fund

58. What do you think of the current basis for compensation claims against the VPF?

This area is best covered by the Estate Agents Council, which overseas VPF compensation claims.

59. Should funds from the VPF be put towards education and training for estate agents, conveyancers and owners corporation managers?

The REIV believes money from the Victorian Property Fund should be utilised to improve the educational and training standards of estate agents and owners' corporation managers. Education is fundamental in increasing compliance.

Development of industry-specific CPD and training courses by highly qualified Registered Training Organisations (RTO'S), such as the REIV, should be supported by additional funding from the VPF. This will greatly enhance knowledge and professionalism within the industry.

60. Under what circumstances should commission received by an unlicensed estate agent be returned to the client or the VPF?

The REIV believes Section 94A of the Act should be amended to ensure monies that are the property of an unlicensed person's client cannot be forfeited – whether by agreement between the estate agent and CAV, or otherwise – to the Victorian Property Fund. The unlicensed person has entered into a contractual arrangement with the client by misrepresenting his or her status.

In particular, the REIV refers to the forfeiture of monies, which belonged to vendors and to which they had a legal entitlement, which occurred in the matters of Real Estate Logistics Pty Ltd and Biggin & Scott Carnegie Pty Ltd.¹

¹ CAV Annual Report 2008 – 2009

Modernisation of the legislation

61. What should the purpose of the Estate Agents Act include?

The current purpose of the Act is 'to re-enact – with amendments – the laws relating to agents and sub-agents'. The REIV would like the words 'sub-agent' to be replaced with Agent's Representatives.

62. What are the opportunities for modernising the Estate Agents Act and the Conveyancers Act?

The Estate Agents Act should be modernised to allow for documents to be sent electronically. Given changes to Australia Post's mail service, the dissemination of physical documents is no longer practical or relevant. At present, potential changes to Section 88 of the Residential Tenancies Act – which relate to dissemination of notices – is before Government and the REIV would like to see this also implemented in the Estate Agents Act.

Auction Authorities need to be updated to include an auction date.

63. What improvements can you identify to remove redundant provisions or duplication?

The REIV has identified several provisions within the Estate Agents Act which are presently covered by existing legislation such as the Australian Consumer Law. This includes Section 42 which relates to false and misleading advertising.

Improvements can also be made to Section 49A, specifically to exclude agent-to-agent agreements. The current sub-section 49A (1) is broadly cast to apply to "...any payment from a *person..." and, currently applies to a payment one agent is entitled to receive from another.

(*note as a 'person' is not defined in the Estate Agents Act, the definition of the term in the Interpretation of Legislation Act will apply, with the result 'person' includes a company and an individual even if it, or they, are an estate agent.)

To understand the need to exclude agent-to-agent agreements consider the following scenario. Agent A makes a verbal conjunctive agreement to share a commission with agent B on a 50/50 basis. This is approved by Agent A's client but otherwise does not affect her. She only pays commission to Agent A, and she is not a party to the verbal agreement between the agents.

When the time comes for Agent A to share his commission with agent B, agent A reneges and pays agent B 25%. Agent

B is forced to sue for the balance. When he does, agent A uses sections 49A and 50 to defend the claim.

Agent A says as agent B does not hold a written engagement or appointment signed by him, Agent A, and, taking into account section 50 (no entitlement to sue for any commission if no signed engagement or appointment), that is a complete defence to agent B's claim.

Although agent A's defence is entirely without merit it will succeed, on the current wording of section 49A.

The REIV suggests it is not the intent of the legislature that agent-to-agent agreements are within the ambit of Section 49A. It is a consumer protection measure. Its purpose is to ensure a member of the public is provided with essential information by estate agents, when they engage the agent to act for them.

Agent-to-agent agreements are made between people 'in the trade'. They do not need to be considered in the same light as a consumer who is a member of the public. There is an entirely different dynamic at work. The protections available to consumers are unnecessary for people 'in the trade', and for them, are just red tape.

PART B: Conduct of Owners' Corporation Managers

64. Are there any benefits in aligning the eligibility requirements for an owners' corporation manager to the extent practical with those of estate agents?

At present owners' corporation managers are subject to very few licensing or eligibility requirements, other than the need to register with the Business Licensing Authority and hold professional indemnity insurance. As owners' corporation managers in Victoria are responsible for property worth around \$300 billion and annual transactions of more than \$1 billion, the REIV believes the industry would significantly benefit from aligning entrance and educational standards with the Agent's Representative course.

In addition, knowledge of legislation is essential as owners' corporation managers are increasingly required to provide an informed opinion on a range of matters.

The REIV's two-day Introduction to Owners' Corporation Management course – or equivalent provided by other Registered Training Organisations – should become a minimum licensing requirement. Upon completion, owners' corporation managers should then be required to work under the supervision of a Principal or Director for at least a year before undertaking a Certificate IV equivalent.

65. What are your views on whether owners' corporation managers should be separately licensed or be part of an estate agent's licence?

While general knowledge of the legislation governing the sale and lease of real estate would be beneficial, the REIV believes the management of owners' corporations should be a separate qualification. The skills and knowledge required to effectively manage an owners' corporation are specialised and specific to the role of an owners' corporation manager.

For existing licensed estate agents, the owners' corporation qualification could be implemented as an adjunct to the current licence.

66. Is it appropriate to extend the current regulatory criteria to include serious criminal offences?

The REIV believes it is important that regulatory criterion for owners' corporation managers is increased to include the same exemptions as those that currently apply to Agent's Representatives, including serious criminal offences.

The REIV supports the previously proposed 2014 Bill, whereby persons convicted of serious criminal offences (including fraud and dishonesty) punishable by imprisonment of three months or more, and within the last 10 years, would be ineligible to work as an owners' corporation manager.

67. What would be the benefits and costs of placing requirements on owners' corporation managers to hold professional indemnity insurance as a condition of practice?

To be registered with the BLA, owners' corporation managers are required to hold professional indemnity insurance with a minimum coverage of \$1.5 million. The REIV believes it is crucial that this requirement remains in place as it protects clients and employees.

Given the size and scope of some owners' corporations, the REIV believes the level of professional indemnity coverage should vary depending on the number of units under management. For example, managers with up to 100 units under management should be required to hold a minimum of \$5 million coverage.

68. In your experience what is the current practice of owners' corporation managers in relation to disclosure of commissions?

At present insurance commissions, fees and charges are disclosed in owners' corporation contracts. Disclosure of other commissions and benefits, which are not currently

being captured or disclosed to clients, should already be governed by the S176 of the Crimes Act 1958.

The REIV believes existing disclosure requirements could be enhanced by requiring insurance commissions and fees to be disclosed in a dollar amount. If insurers were required to disclose the dollar amount for commissions and fees on all insurance quotations and policy schedules for new business and renewals, owners' corporations would find it considerably easier to make sensible comparisons. At present, only some insurers disclose the dollar amount of commission paid.

Greater education for owners' corporations and lot owners around the insurance process - and commissions - would also improve transparency and understanding.

69. Do commissions and discounts have an adverse impact on premiums for insurance, and if so, how does this manifest?

The REIV does not believe commissions and discounts have an adverse impact on premiums for insurance, rather they assist in keeping management fees down.

Currently, insurance commissions account for around 20 per cent of management fees. If insurance commissions were no longer approved under the Act, this would cause management fees to increase significantly to offset the monetary loss.

70. What are the non-regulatory approaches that could be considered to ensure commissions and other payments do not distort the market?

The most common commissions relate to insurance and these are already disclosed in owners' corporation contracts. In instances where other arrangements with service providers exist, the REIV believes these should be disclosed. As disclosure is often an ethical matter, the REIV does not believe a non-regulatory approach is the answer. In order to ensure long-term compliance, regulation and punitive measures are required.

71. What are the main concerns about unfair contract terms in management contracts?

There are several terms and/or conditions in owners' corporation contracts that the REIV deems unfair including duration and size of contracts. The REIV believes owners should be free to choose their own owners' corporation manager, however, at present new developers are selling the management contracts management. This common practice

commits new owners for up to 25 years and artificially inflates the cost of management for these sites. The REIV believes the practice of selling contracts rather than going to the open market to seek an appropriate deal on behalf of the owners' corporation seriously limits the rights and opportunities of the subsequent owners within any development. The REIV would support the establishment of a standard management contract to prevent developers from receiving kickbacks on these contracts.

In addition, the REIV believes provisions that require a notice period of more than three months to terminate a management contract should be removed.

72. Are there other types of unfair terms that should be considered? If so, what are they and how common are they? Why might they be unfair?

The REIV is aware of contract clauses that only allow change of manager to be discussed at an AGM. These clauses favour the owners' corporation manager by limiting opportunities for owners to remove them.

A less frequent practice is where the contract has a clause requiring a unanimous resolution to change the manager.

73. Should any distinction be drawn between the required contractual terms for initial and subsequent management contracts? If so, why? How would such a distinction be drawn?

The REIV would like to see standard contractual terms implemented for initial management contracts while subsequent contracts should be open to negotiation between the manager and the owners' corporation.

The REIV suggests a maximum of three years for initial contracts and five years for subsequent contracts.

74. What is your view as to contractual terms for the renewal of management contracts? For example, should there be any rules about terms such as automatic renewals or renewals at the prerogative of the manager only?

Renewal of contracts should be by mutual agreement unless the owners' corporation abdicates its right to participate by remaining silent; in that case the manager should be able to rely upon a rollover clause.

Under existing legislation, the rollover cause is only valid for a one year period. The REIV believes this is appropriate.

75. Are there other issues that require a regulatory response relating to long-term management contracts?

None at present.

76. How can concerns about managers' influence on voting be addressed?

Owners rely upon their manager to be an informed party upon whose advice they can rely. A potential solution to address concerns relating to their influence on voting is the introduction of proxy votes, which could be given by the owner to the manager.

77. How can concerns about fraudulent financial conduct be addressed? Would it be preferable in the context of financial transparency and accountability to require separate owners' corporation funds to be kept in separate accounts?

Whether accounts are separated or not, all should have their own financial reporting so it is unlikely that this measure will adequately deal with fraudulent financial conduct. The REIV believes separate accounts would be preferable, as it allows for financial transparency.

78. What proportion of managers still use pooled accounts, and what would be the realistic costs and time required to transition to the use of separate accounts? Where possible, include the basis for these estimates.

The REIV has no quantitative data on the proportion of managers using pooled accounts but believe individual accounts are the preferred method for many owners' corporation managers.

Summary

As a long-term advocate of real estate agents in Victoria, the REIV believes:

- The definition of estate agent is no longer appropriate and requires significant improvements in order to capture a myriad of unlicensed persons operating on the fringes of estate agency practice
- Unlicensed persons are an issue in Victoria, debasing the credibility and reputatuon of the real estate industry
- Comprehensive entry-level training of Agent's Representatives and continuous professional development of estate agents is crucial in improving the industry's standards of professionalism
- Agent's Representatives should be required to complete two years' industry experience before they can undertake the licence course
- CPD should be mandated industry-wide to ensure agents remain up-to-date with current best practice and legislation
- Mutual recognition laws between Victoria and other states is a major issue
- Professional indemnity insurance should be mandated for all agents who hold an estate agents licence, unless they are non-practising
- Legislation relating to the management of estate agencies needs to be updated to reflect current business practices and advances in technology
- Section 48B is out of step with current practice given the costs and structure of online advertising
- The all-encompassing effects of Section 50 and 49A are draconian and inappropriate - there needs to be a distinction between total failure to comply and partial non-compliance
- Section 55 is overly restrictive and needs to be aligned with legislation in other jurisdictions
- There is a significant amount of inconsistency between members at VCAT hearings
- Penalties under the Estate Agents Act should reflect the impact the breach has on consumers
- Monies that are the property of an unlicensed person's client should be returned, as the client is legally entitled to the money
- The Estate Agents Act should be modernised to allow for documents to be sent electronically
- Section 42 is redundant as it is presently covered by existing legislation such as the Australian Consumer Law
- Section 49A should exclude agent-to-agent agreements
- Entrance and educational standards for owners' corporation managers should be aligned with the Agent's Representative course
- The level of professional indemnity insurance held by owners' corporation managers should vary depending on the number of units under management
- Disclosure requirements for owners' corporation managers could be enhanced by requiring insurance commissions and fees to be disclosed in a dollar amount
- Standard contractual terms should be implemented for initial owners' corporation management contracts

The REIV appreciates the opportunity to provide this submission to the Victorian Government. We look forward to liaising with the Government throughout the ongoing Consumer Property Acts review.

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