



REIV THE STANDARD  
FOR SUCCESS

# SUBMISSION

DISPUTE RESOLUTION  
RTA ISSUES PAPER

June 2016



# 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.

A key component of the REIV membership is the property management sector. The REIV represents the majority of property managers (PMs) in Victoria. The REIV's property managers, in turn, represent a significant number of residential landlords across the state.

Besides property management, members specialise in a range of real estate fields, including: residential sales, commercial and industrial sales, auctions, business broking, buyers agency, owners' corporations management and valuations.

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## Introduction

The Residential Tenancies Act (RTA) and the associated legislation is of significant importance to our members. More than 1,200 of our members belong to the REIV Property Management Chapter, dedicated to the management of residential rental premises.

In response to the Dispute Resolution issues paper, the REIV has consulted an RTA Working Group comprised of senior property managers.

The REIV has also sought input from its broader membership for this submission.

## General Comments

The REIV believes this issues paper in the RTA review - along with its predecessors - heavily focuses on socially disadvantaged tenants. This is despite social housing only representing a minority of all tenancies in Victoria. At 3.4 per cent of all housing stock, Victoria has the lowest proportion of social housing of all states in Australia.

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## REIV RESPONSE

### Dispute Resolution: RTA Review

The REIV, with input from property managers, has collated the following responses to the issues paper.

#### 1. What characteristics of the residential tenancies sector (if any) are relevant to its dispute resolution system?

The key characteristic that is relevant is the clear imbalance between landlords and tenants – with a wide array of dispute mechanisms assisting tenants, with little or no structured support for landlords. In this way, the majority of dispute resolution methods, such as Frontline Resolution (FLR), are only available to tenants and residents. In addition, tenants have access to knowledgeable third parties, such as the Tenants Union of Victoria, who are also experienced with the formal dispute resolution process. Empirical evidence from REIV members indicates that property managers often liaise with tenants and provide them with information as well.

It is important to note that landlords are providing a substantial financial asset in the transaction. The majority of landlords are carrying a mortgage, with 73 per cent of all property investors only owning one rental property. It's important that any revised legislation does not further hinder these investors. Breaches of the Act (such as damage and rent arrears) can cause significant financial distress for landlords.

Dispute resolution methods which would assist landlords include, but are not limited to, a binding mediation system and a property management Ombudsman. A specialist phone support service for landlords would also greatly enhance the resolution of issues. Further details on these are included later in this paper.

#### 2. What are the key outcomes that a residential tenancies dispute system should aim to provide for?

The REIV considers the most important outcome of a dispute resolution system is to provide a definite – and binding – decision. At present, the majority of dispute resolution methods are unclear, non-binding and virtually impossible for landlords to enforce. An effective dispute resolution system should be fair, consistent and affordable for landlords and property managers. It is also important to stress that the dispute resolution process should be conducted in a timely fashion, especially in rent arrears cases, which make up a large percentage of VCAT hearings. It can take months to gain a resolution, with the tenant still residing in the property, leaving the landlord substantially out of pocket.

#### 3. What features do you consider important for effective residential tenancies dispute resolution mechanisms?

The REIV considers the following features to be crucial for effective residential tenancy dispute resolution mechanisms: fairness, consistency, binding, enforceable decisions, timeliness and low cost.

#### 4. How would you rank the importance of these features?

The REIV considers equal and fair treatment of all stakeholders – particularly landlords who struggle for equity – to be paramount. The dispute system must also be consistent, binding and timely.

#### 5. How effective are the information and advice services provided by CAV, DSCV, TAAP and other agencies as tools for parties to independently resolve disputes?

The REIV considers the Consumer Affairs Victoria (CAV)

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website to be extremely informative for all stakeholders. The site had more than 1.2 million visits in 2014-15 and is available in multiple languages and formats, such as video and audio. However, as CAV provides consumer advice on a vast number of industries – from sex workers to car retailers - its phone advice for property management enquiries can be inconsistent. Feedback from REIV members suggests CAV often refers the public to the Real Estate Institute of Victoria (REIV) Information Service, and is particularly reluctant to give any advice that can form the basis of a legal challenge or response.

Other information and advice services currently available to landlords are woefully inadequate. Landlords and landlord representatives account for the overwhelming majority (around 70 per cent) of disputes brought before VCAT. Yet, outside of VCAT, landlords have very little access to alternative dispute resolution methods. In comparison, tenants have access to a number of free advice and other support and resolution services. However, disputes raised by tenants account for a marginal number of all residential tenancy disputes -The Tenancy Advice and Advocacy Program (TAAP) was only utilised by about 100 tenants a week while the Dispute Settlement Centre (DSCV), which includes 14 offices throughout Victoria, only took 442 advisory service calls over the entire year.

#### **6. How could the existing services be improved?**

At present, landlords have very little access to support and resolution methods outside of VCAT. Landlords account for almost 70 per cent of cases heard at VCAT – significantly more than any other resolution process for either stakeholder. The REIV considers it crucial that more initiatives are available to landlords and would support the introduction of a specific CAV phone service for landlords. It is important to note that REIV property managers report that VCAT decisions often place an emphasis on tenants' needs, rather than those of landlords.

#### **7. What alternative or additional tools or initiatives could assist parties, including vulnerable and disadvantaged**

#### **tenants, to independently resolve disputes?**

The REIV believes all stakeholders - not just vulnerable and disadvantaged tenants - are entitled to have a dispute resolved in a timely matter. In this way, balanced initiatives that deliver effective, binding, fair outcomes for all stakeholders are required. These are outlined separately in this paper.

#### **8. How effective are the third-party assistance mechanisms provided by CAV, TAAP agencies and DSCV in dealing with residential tenancies issues?**

As the majority of these third-party assistance mechanisms are only available to tenants, the REIV considers them ineffective in providing balanced outcomes. Also, many of these mechanisms are primarily advice-focused and are not able to produce binding decisions. It's also worth noting that the proportion of residential tenancy matters handled by the DSCV is relatively insignificant when compared with the number of cases brought before VCAT by landlords and landlord representatives – more than 40,000 in 2014-15.

#### **9. What other relevant services of this kind are available to assist with residential tenancies disputes?**

Professional property managers provide advice and assistance to both landlords and tenants, as does the REIV Information Service.

#### **10. What aspects of the third party assistance mechanisms work well?**

The CAV website, as stated earlier, is very useful to residential tenancy stakeholders. CAV inspection activities are also working well, however, there needs to be more inspectors available. Other third-party mechanisms are not available to landlords.

#### **11. What alternative or additional tools could assist parties, including vulnerable and disadvantaged tenants, to resolve disputes quickly and informally, and**

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### **to prevent their escalation?**

As outlined earlier, better binding resolution systems would assist all parties. In addition, the REIV considers attendance and involvement by all parties as vital. Requiring both parties to attend any dispute resolution process would assist in preventing disputes from escalating and would also assist in reducing the number of appeals. This is vital to the effective, efficient resolution of all VCAT cases.

### **12. How effective are CAV's inspections activities in facilitating both independent resolution of disputes and resolution of disputes at VCAT?**

Feedback from REIV members indicates CAV inspectors are one of the best third-party resources for dispute resolution in residential tenancy matters. Once CAV inspectors are involved in the dispute, both parties can be assured of a well-researched and balanced outcome. The main issue is the delay in CAV carrying out inspections with the process sometimes taking up to eight weeks. If the process was timelier, the REIV believes this service would be better utilised by stakeholders.

### **13. How could CAV's inspections activities be improved?**

As above, CAV inspections would be greatly improved by being more time efficient. The main delay is due to a need for more inspectors, as only nine are currently employed for the whole state. Feedback from REIV members indicates that some objections, including to small rent increases, are frivolous. If a tenant abandons a property, CAV inspectors are also required to make a decision relating to whether the abandoned goods are valuable and need to be stored. However, the REIV believes the availability of cheap furniture should negate any abandoned furniture being deemed valuable. This would allow inspectors to focus on more pressing matters.

### **14. How could CAV's inspections activities be of greater benefit to vulnerable and disadvantaged tenants?**

As stated earlier, a faster turnaround and more inspectors would assist all stakeholders – including vulnerable and disadvantaged tenants.

### **15. What (if any) alternative or additional areas of dispute would be appropriate for the Director of CAV (or another agency) to have powers to intervene?**

In instances where a CAV inspector has not been able to resolve a dispute between parties, the Director of Consumer Affairs Victoria could assist in making an independent judgement.

### **16. How effective are the Alternative Dispute Resolution (ADR), hearings and other services provided by VCAT?**

Feedback from REIV members indicates ADR services provided by VCAT are not effective. While both parties have a chance to mediate before a VCAT hearing, in the majority of instances there are no professional mediators available. In addition, mediation is time-consuming and does not result in a binding outcome. An example from an REIV property manager involves a tenant agreeing to pay compensation to the landlord after several hours of mediation. On the way out of the building, the tenant turned to the landlord and said 'good luck in getting that money'. Landlords would prefer to take a case to VCAT, which can then be converted or registered in the Magistrates Court.

### **17. How could VCAT's services be improved?**

The REIV considers that a major shortcoming of VCAT is its lack of consistency. A further shortcoming is that unlike traditional courts, decisions are not binding. The REIV considers it vital that landlords be able to use precedent when presenting cases.

There is further inconsistency as Tribunal Members' decisions are often unpredictable, and the enforcement of determinations can be extremely difficult for the successful party. VCAT services would be improved if Tribunal Members were required to fully report and explain their decision – which is not the case at present

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unless a party specifically requests it. An internal review process would also improve the inconsistency between Tribunal Members. Feedback from REIV members suggests many would pay an additional fee to have a case reheard before a different Tribunal Member. If VCAT decisions were consistent it would provide stability and certainty to stakeholders.

The delay in VCAT hearing cases also needs to be addressed. REIV members report that it can take up to four weeks to have a case heard and then if the tenant defaults on an arrangement, it can be an additional four-weeks before the case is re-opened. The REIV believes VCAT services would be greatly enhanced if an open case could be reheard within five business days.

The REIV also considers the process in Queensland - whereby property managers/landlords are not required to apply to the Tribunal to claim bond monies in instances where the tenant owes rent and/or cleaning costs - has substantial merit in reducing the number of cases before VCAT. Under this system, the rental bond authority sends a copy of the claim form to the tenant and if the bond authority does not receive a response within a specified period, the claimed amount is dispersed to the property manager or landlord.

#### **18. What are the obstacles (if any) to tenants or landlords in taking appropriate matters to VCAT?**

VCAT statistics show the majority of applications are made by landlords or landlord representatives. Tenants often do not show for the hearing - without providing a valid excuse - and then further waste court time by seeking multiple re-hearings, which they also do not attend. The REIV understands that the right to review a VCAT order sits with the tenant and it is much more difficult for landlords or property managers to be granted a review.

The delay in hearing cases can also result in property managers and landlords waiting at VCAT for hours before having their case heard. The process is time-consuming and its lack of enforcement means more landlords are relying on insurance claims to disperse VCAT orders rather than pursuing awarded compensation from the

tenant. This ultimately has to have a significant impact on insurers and, potentially through increased premiums, on landlords.

Inconsistency of VCAT decisions and lack of enforcement are also major obstacles for landlords taking matters to VCAT. Feedback from REIV members indicates Tribunal members often use their 'discretion' to make judgements that are not supported by the RTA and lack common-sense - a denial of natural justice. This creates instability in the market as landlords cannot rely on a fair hearing and sensible decisions. One example involves a long-term tenant (13 years) who was more than two months in rent arrears and the VCAT member allowed the tenant to remain in the property for a further month under the proviso that her daughter was going to assist her with payments. The daughter reneged on this arrangement and the landlord was left even further in arrears. The property manager had to reappear before VCAT to gain possession of the premises, however, as the bond was well-below current market rates the landlord was left substantially out of pocket.

#### **19. What barriers or obstacles are there to enforcing VCAT orders, and how can these be improved to achieve compliance with orders?**

At present, enforcing VCAT determinations is extremely difficult, and often involves further expenses for the aggrieved party. Once an order has been made at VCAT, there are no mechanisms to recover compensation through the Tribunal. Aggrieved parties must then register the order at the Magistrates Court, and employ a debt collector to recover compensation awarded to them. The REIV believes compliance could be improved if VCAT orders were immediately recognised, rather than needing to be registered or converted at the Magistrates Court.

The appeals process is another obstacle, as the costs of taking the matter before the Court system - especially the Supreme Court - are prohibitive and can only be done so on a point of law.

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**20. What particular or additional barriers or obstacles are there for vulnerable and disadvantaged tenants in accessing or utilising VCAT's services, or defending cases that have been brought to VCAT against them, and how can these be addressed?**

Vulnerable and disadvantaged tenants already have access to a range of independent third party advice, including the Tenancy Advice and Advocacy Program. Vulnerable and disadvantaged tenants can also seek representation in VCAT from the Tenants Union of Victoria. It's important to note that 'independent' private landlords (including those who are represented by a property manager) do not have the same level of assistance. Feedback from REIV members indicates many private landlords aren't sophisticated in their knowledge of residential tenancy legislation and require equal representation at VCAT – especially when the tenant is being represented by an experienced and professional individual. REIV property managers have also reported that on occasions the tenant has been represented by a barrister, who has a greater understanding of the law and can leverage Tribunal proceedings.

Legislation in other Australian states, such as Queensland, does not permit either party being represented in a Tribunal hearing by a legal representative. This creates a level environment for all parties, especially as property managers and landlords generally have little or no legal training (ie are not lawyers).

**21. How effective are the compliance and performance functions provided by CAV?**

Feedback from REIV members indicates CAV's level of compliance and enforcement functions are relatively low and ineffective. REIV members are not aware of CAV ever enforcing VCAT determinations on behalf of landlords, despite the level of defaults by tenants being significantly higher than any landlord-related issues.

**22. How could CAV's compliance and enforcement functions be improved?**

CAV's compliance and enforcement functions could be improved through greater education and promotion of these services. The REIV considers it crucial that the process is balanced and that CAV also pursue non-compliant tenants who do not abide by VCAT orders. At present, landlords who want to enforce VCAT orders must have the determination recognised in the Magistrates Court (which is an additional cost to the landlord) before being passed on to debt collectors.

**23. What are the problems, issues and gaps (if any) that impact the effectiveness (comprehensiveness, coherence and efficiency) of the overall system for dispute resolution in residential tenancies?**

An important issue in the effectiveness of the overall dispute resolution system is the current lack of balance. The majority of dispute resolution methods are not available to landlords – who account for half of the residential tenancy relationship and have a significant financial investment and ongoing financial commitment. Even at VCAT, Tribunal decisions often favour tenants and rarely consider how tenant breaches can result in financial hardship for landlords. In instances where VCAT award an order against the tenant, landlords are often required to spend more money to recoup any awarded compensation. At present, a high level of inconsistency at VCAT is causing instability in the market with landlords unable to rely on a fair hearing.

**24. What additional information or data would assist in evaluating the effectiveness of the residential tenancies dispute resolution mechanisms and the system as a whole?**

Knowing the number of VCAT applications that are made and then withdrawn would indicate the number of disputes which were resolved prior to a Tribunal hearing. The REIV considers it important to note that professional property managers also provide advice to both parties and resolve many disputes before they escalate to formal proceedings. The REIV would also be

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interesting in obtaining data which outlines the number of uncontested cases at VCAT, and of those cases, how many then request a rehearing. The effectiveness of dispute resolution systems could be further assessed by establishing how many VCAT orders are then re-registered at the Magistrates Court, and the number of insurance claims made by landlords over the past five years would also be beneficial.

**25. What changes or improvements to the residential tenancies dispute resolution system would better enable vulnerable and disadvantaged tenants to engage in the processes and have their disputes resolved?**

As stated previously, the REIV believes there are sufficient independent third-party services to assist vulnerable and disadvantaged tenants in having their disputes resolved. As these tenants account for only a small percentage of all tenancies in Victoria, the REIV considers it essential that existing legislation is not overhauled extensively to cater for a small number of tenants.

**26. What alternative or additional mechanisms used by other jurisdictions or sectors (or aspects thereof) would be suitable for residential tenancies dispute resolution in Victoria?**

The REIV believes the facilitated self-resolution model (in New Zealand) holds considerable merit, however, the system would need to be aligned with VCAT to allow for a fast-tracked reopening of the case before VCAT (within five days) if either party defaults on the agreement. Feedback from REIV members also suggests the establishment of an Ombudsman and complaints service would assist in adding certainty to the dispute resolution process. As there are very few avenues to appeal a VCAT decision at present (outside of the Supreme Court), an Ombudsman would need to be balanced and have powers to overturn Tribunal decisions.

**27. What would be the advantages and disadvantages of adopting any of the dispute resolution models or**

**mechanism described in this section for residential dispute resolution in Victoria?**

The REIV believes the implementation of the above systems will result in disputes being resolved in a more timely manner. Allowing a fast-tracked re-opening of a case at VCAT would encourage more landlords and property managers to consider mediation as the first step. An Ombudsman would also allow redress for inconsistent VCAT decisions. The REIV considers British Columbia's Civil Resolution Tribunal to have many advantages, including timeliness and binding decisions.

**28. What features and considerations would be important for a compulsory mediation or conciliation step to be effective in resolving residential tenancies disputes?**

Feedback from REIV members indicates mediation is not effective. The REIV believes neither would compulsory mediation in its current form, as it is time consuming and agreements cannot be enforced.

## CONTACT US

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