



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

Mandatory CPD

Property Managers

MODULE ONE: Distance Learning Participant Manual

2015

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Government of **Western Australia**
Department of **Commerce**
Consumer Protection

IMPORTANT

This workbook and the accompanying presentation have been prepared for educational purposes only as part of the Department of Commerce Compulsory Professional Development Program.

It is not, and should not be construed as, legal advice.

Any person in doubt as to their legal rights and obligations should seek the advice of a suitably qualified and competent legal practitioner.

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Welcome to Mandatory CPD for 2015

The Department of Commerce (the DOC) welcomes you to the Compulsory Professional Development (CPD) program for 2015.

The purpose of the CPD program is to assist industry members in updating and developing their knowledge and skills in the areas of industry practice and legislative requirements.



The Commissioner for Consumer Protection (the Commissioner) has determined the subject matter for all Mandatory sessions in 2015.

Any questions arising out of this training may be addressed to the Consumer Protection Division of the DOC by contacting the Consumer Protection Contact Centre on **1300 304 054** or by sending an email to consumer@commerce.wa.gov.au.

Do you receive e-Bulletins?

The DOC uses electronic bulletins (e-bulletins) as a means of updating the industry with important information including changes to and compliance with legislation and policy.

If you are not registered to receive e-bulletins, please email: pinews@commerce.wa.gov.au to be added to the distribution list.

E-Bulletins

<http://www.commerce.wa.gov.au/publications/real-estate-bulletins>

Newsletters

<http://www.commerce.wa.gov.au/publications/real-estate-news>

Introduction

The Compulsory Professional Development (CPD) program is designed to increase your knowledge and skills.

The program aims to increase consumer protection and promote consumer confidence in the real estate industry.



This session is in three parts:

1. overview of regulation and legislation;
2. real estate contracts; and
3. real estate practice - statute law, contract law and industry practice.

The first part of the session gives an overview of the DOC's role in regulating the real estate industry and of the different ways legal requirements impact on real estate agencies.

This part of the session will assist property managers to better understand the different types of legal responsibility they have.

The second part of the session will deal with general principles of contract law that may apply in relation to real estate contracts, for example:

- the Appointment to Act;
- the Residential Lease; and
- commercial leases and contracts.

The third part of the session will look at some individual issues that show the interaction between:

- statute law;
- contract law;
- industry practice; and
- 'best' practice.

This is intended to improve industry awareness of practices required by law, and highlight the risks of practices that are non-compliant.

The pros and cons of some industry practices that are not required by law will be considered.

The benefits of adopting a 'best practice' approach will be discussed.

To provide examples and learning points we will consider a number of alternate approaches to some common issues and look for input from you.

The session is limited by time to some of the most topical or commonly misunderstood points raised by industry groups as being topical or of particular concern.

The course material does not constitute legal advice. Participants should contact the DOC for general information or should seek their own legal advice if they have specific questions.

QUICK QUIZ: How much do you know? Only Residential Property Managers to complete

Review the following table. Note the number(s) for relevant laws, the letter(s) for the authority that might enforce the law. Consider what the risk is to the agency. **NB: the direct risk is to owners in some of these cases, however agents may be implicated.**

A smoke alarm in a tenanted property had flat batteries – fire broke out.		1. Residential Tenancies Act	a. State Administrative Tribunal
Tenants vacated a property due to health issues. The home was later sold without disclosure or rectification. It was contaminated.		2. Real Estate and Business Agents Act	b. Department of Commerce
A sales person filmed a property using a drone (UAV). A tenant was filmed sunbathing.		3. Common law	c. Privacy Commissioner
Repairs to a pool gate at a managed property were delayed by owners - an accident happened.		4. Building Act 2011 and Building Regulations 2012	d. Australian Competition and Consumer Commission
Lease condition 23.1 was amended to require tenants to advise of damage to the property within 3 working days.		5. Australian Civil Aviation Safety Regulations 1998	e. Court system – civil claim
		6. Contaminated Sites Act	f. Department of Environment Regulation
		7. Privacy Act	g. Civil Aviation Safety Authority
		8. Fire and Emergency Services Act 1998	h. DOC - Energy Safe
		9. Surveillance Devices Act 1998	i. Department of Fire and Emergency Services
		10. Fair Trading Act 2010	j. Local Government
		11. Criminal Code Act Compilation Act 1913	k. WA Police
			l. ACCC

QUICK QUIZ: How much do you know? Only Commercial Property Managers to complete

Review the following table. Note the number(s) for relevant laws, the letter(s) for the authority that might enforce the law. Consider what the risk is to the agency. **NB: the direct risk is to owners in some of these cases, however property managers and/or agents may be implicated.**

Fire equipment in a managed commercial property was not maintained and did not work when a fire broke out.		1. Commercial Tenancy (Retail Shops) Agreements Act 1985	a. State Administrative Tribunal
Tenants vacated a shop that had been a drycleaners due to health issues. It was sold without disclosure (or any other action). It proved to be contaminated.		2. Real Estate and Business Agents Act	b. Department of Commerce
A business broker disclosed a seller's confidential financial information to a competitor without permission.		3. Common law	c. Privacy Commissioner
An agent filmed a property using a drone (UAV). A neighbouring tenant was filmed sunbathing.		4. Building Act 2011 and Building Regulations 2012	d. ACCC
A property manager did not arrange repairs to stairs in a partly vacant retail building, after being given written notice – someone was injured as a result.		5. Australian Civil Aviation Safety Regulations 1998	e. Court system – civil claim
		6. Contaminated Sites Act	f. Department of Environment Regulation
		7. Privacy Act	g. Civil Aviation Safety Authority
		8. Fire and Emergency Services Act 1998	h. DOC – WorkSafe
		9. Surveillance Devices Act 1998	i. Department of Fire and Emergency Services
		10. Fair Trading Act 2010	j. Local Government
		11. Occupational Safety and Health Act 1984	k. WA Police
		12. Criminal Code Act Compilation Act 1913	l. ACCC

1. Overview of regulation and legislation

1.1 Overview of Department of Commerce responsibilities

The Commissioner for Consumer Protection is empowered to administer a large number of Western Australian (WA) laws that impact on real estate agencies, and has primary responsibility for the regulation of the real estate industry in WA.



The DOC carries out these functions, administering WA laws relating to real estate transactions and acting to protect consumer rights.

The Consumer Protection division of the DOC also promotes fair trading by:

- developing legislation and regulations to protect consumers;
- providing information to consumers and agents about their rights and responsibilities;
- helping consumers resolve disputes with agents;
- investigating complaints about unfair trading practices;
- regulating and licensing agents and property developers;
- prosecuting agencies for significant breaches of the laws the DOC administers.

The licensing system administered by Consumer Protection is used to try to ensure only qualified people who are of good character are allowed to operate in the real estate industry.

The proactive compliance area of the DOC assists agencies to comply with legislation, by identifying areas where non-compliance is a risk, and by advising agents on rectification.

The DOC investigates complaints about agencies, follows up breaches identified in compliance visits and looks into anomalies identified by auditors' in agencies annual audits.

Some laws that impact on real estate agencies and are overseen by DOC are listed below:

- *Real Estate and Business Agents Act 1978 (REBA Act)*
- *Residential Tenancies Act 1987 (RTA)*
- *Commercial Tenancy (Retail Shops) Agreements Act 1985 (CTRSA)*
- *Fair Trading Act 2010 (FTA)*
- *Australian Consumer Law (WA)*
- *Disposal of Uncollected Goods Act 1970*
- *Electricity Act 1945 and Electricity Regulations Act 1947*
- *Minimum Conditions of Employment Act 1993*
- *Occupational Safety and Health Act 1984 (OSH Act)*

This is not an all-inclusive list (there are other Acts and also Regulations in force for each Act), but it shows that the DOC's powers relate to many aspects of agency and lessor operations, not just to the obvious areas covered by the REBA Act and the RTA.

While the DOC has wide ranging powers to investigate, prosecute and penalise, it aspires to improve agency and lessor conduct through education, to avoid the need for punitive action.

1.2 Overview of legal framework

The practice of real estate is regulated by a range of laws, covering not just the agency's obligations to their principals when letting or selling property, but also their conduct in relation to consumers, employees, rental applicants / tenants and even competitors. For an agency to be compliant, agents and agency employees need to understand the legal environment in which they work.

Statute law (Legislation)

Statute law is legislation (and Regulations) that have been enacted by Parliament – i.e. that have been passed from being a Bill (a draft law) to being an Act. The terms 'statute' and 'legislation' are used interchangeably.

Statute law is mostly applied by administrative decision makers, who help to draft the laws and are then charged with interpreting and administering them, as the DOC does. Where interpretations are unclear, or are challenged, or where laws are breached, legal practitioners become involved and court decisions and judgements can help to clarify the laws further.

Statute law is usually binding on courts (unless later superseded or ruled unconstitutional) but the judgements of higher courts can cause interpretations to change. Australian courts do not always interpret laws literally. They usually interpret the law to achieve the stated purpose of the legislation and/or to comply with common law principles.

Subsidiary legislation (Regulatory Law)

Matters that need updating more often than the Act itself (for example rules that include dollar amounts) are often dealt with in subsidiary legislation – i.e. Regulations and Codes.

Law-making powers can be delegated to allow regulators like the DOC to create enforceable regulations covering everyday issues, such as how much an option fee can be.

Subsidiary laws like the *REBA Code of Conduct for Agents and Sales Representatives* and the *Residential Tenancies Act Regulations 1989* are binding in law, but the Act takes precedence, so regulations are interpreted in a way that is consistent with the relevant Act.

Subordinate laws cannot extend or alter the scope or objectives of an Act. It can override another Act if it clearly states that this is intended.

Commonwealth versus state law

The states and territories control real estate law because the Australian Constitution allows this. Commonwealth laws also impact real estate agents either directly (e.g. tax laws) or by impacting on property owners and buyers.

Some new or changing Commonwealth laws to be aware of (not covered here in detail but worth monitoring for future reference) include the:

- *Privacy Act 1988*
- *Building Energy Efficiency Disclosure Act 2010*
- *Personal Property Securities Act 2009*
- *Proceeds of Crime Act 2002*
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006.*

Interpretation

Interpretation of the law is not always straightforward – the language can be complex, terms can have different legal or technical meanings from their ‘plain English’ meanings, and at times different parts of a law may seem to contradict each other (or two laws are at odds).

This can be daunting and can lead to breaches if meanings are misunderstood, so government departments like the DOC produce publications and provide advice lines to help business and the public in interpreting the legislation they administer.

Other Acts (e.g. the *Strata Titles Act 1985*) are administered by other departments or agencies. The WA government publishes a list of Acts with Administering Portfolios and Public Sector Agencies at: https://www.slp.wa.gov.au/legislation/statutes.nsf/main_tablesacts.html

Property Managers should keep abreast of changes using guidance notes and bulletins published by the DOC. They do not normally need to interpret the law themselves – they can seek guidance from their employer in the first instance - the agent may help them or suggest that they seek further advice from the DOC if needed. Agents may seek legal advice for specific questions, e.g. if legislation seems ambiguous.

All laws are subject to interpretation by the courts, so some questions cannot be answered categorically by the agent, the DOC or by legal advisers. Property management disputes are heard in the magistrate’s court. Its decisions are not published and may be inconsistent.

Common law

The Australian legal system is underpinned by the English concept of ‘common law’ (law developed over hundreds of years, based on customary law and court decisions).

A person whose interests are harmed can bring action under common law. If they prove to a court that another person caused harm to them (or their property), the court may order:

- damages to compensate for the harm suffered; and/or
- the other person stops causing the harm.

Common law has been superseded by statutory law in many areas, however it still fills gaps in legislation, as well as guiding the interpretation of Acts and their application to specific cases. The common law can be applied where no statute law contradicts it.

Industry insurers report many claims that are potential common law cases, for example:

- negligence *e.g. retail property manager did not check current use was permitted;*
- breach of statutory duty – *e.g. breach of a law re trust accounting caused damage;*
- misrepresentation – *e.g. an applicant was not informed of a brothel next door;*
- breach of confidence – *e.g. a property manager revealed an owner’s plans to neighbours;*
- defamation – *e.g. a property manager made false statements in a reference check;*
- trespass (land) – *e.g. a property manager entered a property legally but did not leave when asked to;*
- trespass (personal) – *e.g. a property manager physically escorted a squatter from a property;*
- interference with vested property rights - *e.g. agency locked a tenant out;*
- private nuisance (interference with enjoyment of another’s land) – *e.g. neighbours dealing drugs at all hours, neighbour’s dogs barking incessantly, or neighbour’s activities polluting your property (agencies can be involved where they manage both properties).*

An agent will usually be vicariously liable for an employee’s actions. The employee can also be liable, especially where they act contrary to their employer’s policies and/or instructions.

Common law is often used to pursue a negligence claim if someone is injured at a property.

One important way regulatory action interacts with common law, is that it can provide a basis for a consumer to seek damages. For instance, if the DOC pursues an agency over a breach, there may be a reprimand and/or a relatively small penalty. The matter may then be taken up by a consumer who suffered damage, in a common law claim for damages.

Precedent

Legislation and common law co-exist. Principles of common law are used to interpret new or ambiguous legislation, based on *precedent*. The doctrine of precedent is that similar cases are decided using similar logic, so as to give similar and predictable outcomes. Judges follow the underlying rationale of past decisions.

A precedent established in a previous legal case can be either *binding* on or *persuasive* for a court or tribunal in deciding subsequent cases with similar issues or facts. Judges in lower courts generally follow the rationale of decisions made by higher courts.

The decisions made by the High Court of Australia are binding on lower courts, including the WA Supreme Court. A precedent from the Full Bench of the Court of Appeal in WA is binding on other WA courts. Judges may choose to take into consideration non-binding decisions of lower or equal courts and courts from other jurisdictions.

Unfortunately the main court for tenancy matters in WA (the Magistrates Court) is not a court of record, so property managers cannot look up past precedents to get an idea of how a tenancy matter is likely to be decided. They can look at cases from the higher courts.

Precedent can be complex so non-lawyers should be wary of researching precedent themselves in any case. Some precedents are superseded by newer cases or over turned on appeal and decisions are often made on facts unique to the case.

NB A court ruling that appears to disagree with a regulator's interpretation will not always change the way the regulator interprets the law for regulatory purposes.

Enforcement

Legislation may authorise regulators to take action against individuals and businesses. For example, the DOC can seek to revoke an agency's licence or a property manager's registration, close down an agency, impose financial penalties, or to take other legal action.

The DOC only takes disciplinary action where an Act has specific wording that allows for this, usually where there are repeated or serious breaches.

Practice

The purpose of much of the law is to legally preclude wrong-doing and provide the means to restore equity if one party is wronged by another. If the spirit and letter of the law are observed in practice then enforcement becomes unnecessary.

This is why the DOC invests in CPD training, their call-centre, bulletins and public education campaigns. If both real estate practitioners and the public are aware of their rights and duties and comply, the need for court enforced law becomes less and public confidence in the real estate industry grows.



Activity 1: Residential property managers only

In 2014 a WA Supreme Court judge found that a Bunbury real estate agent was not guilty on two charges of false and misleading advertising, in spite of a DOC appeal. One charge was for advertising a Cookernup property as being in Harvey. The second charge was for advertising a property in a price range of \$1.5 to \$2.5 million, when the owner would not accept under \$2.2 million.

This case related to a property for sale but has parallels in property management.

Does this decision mean future court decisions on the same issues must be decided the same way?

YES / NO

Why (or why not)?

Does this case mean that agencies can now:

- a) routinely advertise property under a location different from what is shown on title?

YES / NO

- b) advertise a 'from price' lower than the seller will accept?

YES / NO

Why (or why not)?

a)

b)



Activity 1: Commercial property managers only

A long-term tenant (a tenant's rights activist at a market), was given 14 days to accept a fixed term lease at a higher rent. He was terminated as a tenant when he did not complete paperwork correctly. He said he had been previously threatened with losing his stall if he did not stop his tenant advocacy and claimed to have been treated unconscionably. The SAT found this conduct was not unconscionable.

Does this decision mean that future court decisions on the same issue must be decided the same way?

YES/ NO

Why (or why not)?

What do you think was risky about the lessor's/ property manager's alleged conduct?

2. Real estate contracts

2.1 General principles of contract law

This overview is not legal advice and does not cover all the possibilities and permutations that can arise. It is an overview of basic concepts only.



Contract law includes all laws used to enforce or regulate contracts. It is a complex topic.

In WA, legislation is important in regulating most leases (except for general commercial leases), particularly in relation to consumer protection. General principles of contract law can apply to leases and other contracts agencies such as property management agreements.

Formation of a contract

Agreement

A lease is a contract. The first requirement for a valid contract is agreement, which normally consists of an 'offer' and an 'acceptance' (although the parties may not use these terms). There should be mutual understanding of the contract between the parties – if a contract is ambiguous and the parties don't agree on what it means, this may undermine this requirement.

Consideration

The second requirement for a valid contract is consideration. Consideration is the price that is asked in exchange for a promise. This is usually money, but can be some other valuable, gift, right or benefit, such as occupancy. In a real estate lease, the rental price is the consideration.

Intention to create a legal relationship

For a contract to be enforceable the parties must intend to create a legal relationship. The onus is on the party seeking to prove the contract to demonstrate this intention.

Capacity

Parties must have the legal capacity to make a contract, for the contract to be enforceable. People who were legally incapable of forming clear intent, e.g. due to a mental disorder or intoxication, have successfully had contracts set aside.

Minors (under 18 years) can avoid most contracts, but can be held to a lease if over 16.

Bankrupts are restricted in making contracts. Some contracts they sign can be revoked.

At common law a person acting for a **company** can only contract to the extent allowed by the company constitution. Under the Corporations Act however, if a contract is signed by someone representing a company it may be enforceable, even if they act outside their authority.

When a **trust** is involved, it is important to ensure that the trustee has the power to contract on behalf of the trust (per the trust deed). The contract should show that the person enters into the lease as trustee of the trust e.g. *SMT Pty Ltd A.C.N. 456 789 123 ATF Smythe Family Trust*. Errors can create extra duty liability.

Legal formalities

Contracts for the sale of land and leases over three years must be **in writing** under the *Property Law Act 1969* (WA). Both the CTRSA and the RTA allow for a tenancy agreement to be entered into orally. *Although agencies should not arrange such leases they may inadvertently give a tenant rights through what they say and do.* A property lease should be fully **executed** in writing to ensure it is enforceable i.e. 'signed', dated by the parties and witnessed as required.

Terms and Conditions

Under common law the terms of a lease determine the rights and obligations of the parties. This is especially important with general commercial leases as they have no Act to regulate them.

With retail and residential leases the Acts are very important - lease terms that are at odds with legislation become void. For residential leases the **standard terms** of Form 1AA apply in law even if they are crossed out.

Express terms are terms that are clearly agreed, usually in the lease. At times *pre-contractual verbal statements* can be deemed to be express terms or 'representations'. Terms not expressly written can be **implied**, either due to the conduct of a party, usual practice, or by statute; e.g. consumer warranties provided for in the Australian Consumer Law.

Terms in a lease may be expressed as **conditions** (i.e. the lease is 'subject to' a condition or depends on the condition). If a condition is not fulfilled, the contract may be void or 'voidable' (i.e. a party must take steps, such as giving notice by an agreed time, to end the contract). Conditional terms are sometimes used in commercial leasing.

A **contingent condition** is a condition the parties can't control— e.g. a local government approval or a key anchor tenant being confirmed. If the condition is not fulfilled, one or both parties may be entitled to end the contract. If a lease has a contingent condition, parties should remember that:

- there is an implied duty to do everything reasonably possible to fulfil the condition;
- if they do not do this, they may not be able to exercise the condition.

If subjective wording is included in a contingent condition e.g. 'subject to *satisfactory* cleaning', it can complicate matters. Using precise language, referring to independent standards and/or registered people (e.g. *'front door lock to be upgraded to AS 5039-2008'*) and setting legally definable time limits (e.g. *'2 business days'* not *'48 hours'*) can all help to avoid disputes.

A **promissory condition** is a condition intended to be binding. Breaching a promissory condition breaches a lease but will not usually end the lease (unless the lease says it will have that effect) but usually entitles the other party to damages if it is not fulfilled.

Terms of lesser importance are **warranties**. If a warranty is breached this does not mean a party has the option to bring the lease to an end, but the injured party can seek damages.

Some general rules for contracts and leases

Some common law terms are implied in every contract (and lease). For example, that parties must do whatever is reasonable and necessary to enable the agreement to be performed.

If a party has partly fulfilled a contract based on a promise, they may be able to enforce the contract even if they did not comply with a formality (the *equitable doctrine of part performance*).

A contract that does not comply with formalities can still proceed by agreement.

Only parties to a lease are bound by the lease. Conditions requiring a third party to do something (e.g. *'lease subject to the neighbour getting rid of their pet pig'*) are usually unenforceable.

Parties are usually bound by a contract they sign regardless of whether they have understood it – but exceptions apply.

'Extrinsic' evidence of other terms (e.g. alleged oral agreements prior to signing) cannot usually be enforced, but again some exceptions apply. These are explored in the following section.

Termination

Some issues that can mean a lease or contract never really begins

Revocation of the offer

Revocation (withdrawal) of an offer can be communicated by words or conduct and is effective on receipt. Under common law an applicant can revoke their offer to lease (or an owner can revoke their counter-offer) any time prior to acceptance except if an option fee has been paid to keep the offer open for an agreed time.

Rejection

Rejection or a counter-offer on different terms terminates an offer once it is communicated.

Time lapse

If an offer stipulates a time for acceptance, the offer lapses after that time (although an extension could be formally granted). If no time is stipulated, the offer lapses if not accepted within a reasonable time. 'Reasonable time' is not defined, and depends on circumstances.

Death

The death of a party who has made an offer to lease will generally terminate the offer once the offeree is aware of it.

Failure of a condition

An offer may stipulate that it will terminate if a particular condition is (or is not) satisfied.

Acceptance is not communicated

For acceptance to be effective it must be communicated. Under the 'postal rule' acceptance is effective on posting but if it is faxed / emailed and not received, there may be no agreement.

Other issues that may mean a lease can be rescinded, terminated or voided

Uncertainty

If a lease agreement is uncertain, ambiguous, or illusory or if essential terms (like rent) are incomplete, it will usually not be binding or enforceable.

Misleading conduct

Misrepresentation may provide common law grounds to terminate a lease.

Mistake

Mistake can be used to avoid a lease, usually only where there is improper conduct.

Duress

Common law permits a lease entered into under duress to be avoided.

Undue influence

Undue influence may render a lease voidable – e.g. when a weaker party felt they had no choice but to accept a contract with a stronger party.

Unconscionable conduct

If one party has taken advantage of a 'special disadvantage' the contract may be voidable. Consumer law or tenancy law offers an easier legal remedy for several of the above.

Illegality or contract contrary to public policy

Where a lease requires something illegal, it may be unenforceable.

Non performance

If essential lease obligations are incomplete, one party may seek to end the lease.

Discharge by agreement

Parties are free to terminate a lease by mutual agreement.

Discharge for breach

A major breach of a lease may give the non-breaching party a right to terminate.

Discharge by frustration

A lease may end because of an event beyond the control of the parties – e.g. if the property is destroyed (the Form 1AA lease confirms this expressly).

Death

Although contractual liabilities pass to a deceased person's estate, for leases under the RTA, a tenant's interest in a tenancy ends if they die.

The lease continues with surviving tenants. For commercial leases, a tenant's death usually transfers their interests and obligations under a lease to their estate. If a lessor dies the agency agreement can continue with the estate.

Some issues may make part of a contract unenforceable

Unfair terms

Australian Consumer Law protects against unfair terms in standard form consumer contracts. If the unfair term is not essential it may be severed and the contract continue.

Terms that contradict other terms

If two terms in a lease contradict one another, the more specific clause will usually prevail, unless legislation precludes one of the terms.

Terms that breach a statute:

- if a lease has terms that breach (or contract out of) the RTA those terms become void;
- if an agent or property manager does not disclose their interest in a property: their contractual agreement re fees becomes unenforceable under the REBA Act;
- if a Retail Shop Lease has terms that attempt to contract out of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* - those terms become void;
- a term that requires retail tenants to pay the owner's entire strata levy (which includes management fees) as an outgoing is void.

Common law in residential tenancy disputes

Common law is not often used in residential tenancy disputes because the RTA usually prevails, (the RTA can apply even if there is no written agreement between tenants and the lessor, or the written agreement is not with all parties).

Common law principles may be relevant where disagreements between tenants are not covered by the RTA (e.g. if one tenant is being held liable under 'joint and several' liability for the failure of another to pay rent, or for their breaking the lease). The common law 'implied contract' between all the co-tenants may then be important.

Occupants who are not protected by the RTA may also seek redress or be pursued under common law.

Other considerations

A lessor's position is always best protected by a combination of a well written lease, fair and reasonable terms, prompt and clear communication (e.g. of acceptance) and all parties acting in good faith.

Both parties are vulnerable if tenancy applicants do not understand what they have agreed to, agree to pay more than they can afford, or enter into a lease before they are sure they can commit. Pressing applicants to 'sign now' if they are not ready, can be detrimental.

If things go wrong, how the contract is worded and how the parties and the property manager conducted themselves can be important.

Contract law principles apply to all the agreements an agency facilitates or enters into.

This includes:

- Appointments to Act
- Tenancy Agreements
- Employment contracts
- Contracts with suppliers.



2.2 Appointment to Act

The Appointment to Act is a contract between the agency and the owner of a property. It is not a prescribed form, however to be valid and enforceable it must comply with the requirements of the *Real Estate and Business Agents Act 1978*. It is also subject to the common law and consumer law, so claims of negligence or misrepresentation can affect its enforceability.



QUICK QUIZ	Appointment to Act – <u>is it invalid?</u>	True/False/Maybe
The agent or PM has not yet completed CPD this year		Yes / No / Maybe
One owner signed the authority document for both owners		Yes / No / Maybe
The document was printed off and signed by an owner overseas who then scanned and emailed the document back to the agency		Yes / No / Maybe
Remuneration field says "9% of gross rentals" - no dollar amount is shown		Yes / No / Maybe
Due to a printer malfunction the section on how to seek assistance from DOC if in dispute with the agency is very hard to read.		Yes / No / Maybe



Activity 2

Assuming all the basics of a valid Appointment to Act are in place, what can a property manager do at the time of listing a property to reduce agency risk?

Choose one of the following scenarios and consider what type of 'best practice' action at the time of signing the agency agreement could have helped to avoid the problem.

Scenario 1

You are invited to list a vacant shop. The lessor is an old friend.

The shop is quite a distance away from where you normally work, but your friend insists he wants you to manage the property.

He has set a rent range - your research confirms it is fair. You let the property to a tenant who wants to expand into that area.

He later complains that he should have been told that the property was used as a drug kitchen by bikies and a violent murder was committed there. You were not aware of these facts.



Source: The Age

Scenario 2

The owners of a rental property you manage have complained to DOC about unauthorised expenditure at the 25 year old home.

The property manager acted under a clause in the management agreement allowing the agency to carry out repairs that are 'urgent'.

She tried to contact the owners first, but they were travelling overseas and did not respond in time.

You believe the PM has done nothing wrong, but the client is furious. The expenses are for repairing the air-conditioner and the swimming pool gate.



2.3 Conflict of interests

REBA Code of Conduct for Agents and Sales Representatives 2011

12. Conflict of interest

- (1) An agent must not accept an engagement to act, or continue to act, where to do so would place his or her interest in conflict with that of the principal.*
- (2) An agent shall not without the prior written consent of the principal, directly or indirectly, purchase or take on lease or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any real estate or business which the agent is engaged to sell or lease.*
- (3) An agent who directly or indirectly purchases or takes on lease or is in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any real estate or business which the agent is engaged to sell or lease shall not demand, retain or receive a commission unless the principal has agreed in writing to pay the commission at the same time as or following the signing of the consent referred to in section 10(2).*



Activity 3

Case Study – conflict of interest

An elderly woman wanted to rent out her villa to reliable tenants. She listed it with a local agent who appraised it moderately as it was dated.

The agent's son worked as a sales representative for the agency and his girlfriend needed a place. The agent showed her through without advertising it and recommended her to the owner, saying that she was 'a friend of my son's' and would be a good tenant.

The owner accepted the application, signed a disclosure form that was included with the other paperwork and paid the usual fees. There was no discussion of the disclosure.

Later the girlfriend broke the lease. The bond was insufficient to cover lost rent.

Was the agent's conduct technically compliant with the REBA Act and Code?

YES / NO

Do you think there are any possible breaches of common law or consumer law in the agent's conduct?

YES / NO

Explain.

What would best practice have been in this situation?

Fiduciary duty and conflict of interests

In common law a fiduciary may gain some protection by making full disclosure of a conflict of interest and/or by resigning their fiduciary duty. Partial disclosure is not sufficient, and disclosure should never be used as a safety-net for wrong doing. It does not allow an agent (or a property manager) to act against their principal's interests.

'Fiduciary obligations are strict. The essence of fiduciary obligations is that the fiduciary is precluded from acting in any other way than in the interests of the person to whom the duty to so act is owed. In short, the fiduciary obligation is one of 'undivided loyalty':'

R Flannigan, 'The Strict Character of Fiduciary Liability' (2006) New Zealand Law Review 209.

'A fiduciary will not be permitted to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.'

'Agents are obliged to communicate information they have in their possession to their principal: ... failure to do this will be a breach of fiduciary duty if non-disclosure amounts to a preference in favour of the agent's own interests.' Radan and Stewart *Fiduciary Obligations*, Chapter 9.

Disclosure of a conflict may be technically compliant but if the fiduciary (or their employee) goes on to act against their principal's interests, and the principal suffers a loss, the disclosure may offer little protection in law from the consequences of that breach.

2.4 Residential Tenancy Agreement

The *Residential Tenancy Agreement* is a binding legal contract (provided it is properly prepared and executed) unless the parties agree to vary or end the agreement, or a court decides to modify or set it aside. Most of the wording is prescribed by legislation – Part B cannot be changed.

All usual protocols for signing legal agreements apply, as well as the requirements of the relevant Acts. Some of the pre-contractual issues to consider include:

The property:

- Is it available for the term offered and will it be vacant on the date agreed?
- Are there legal impediments to it being let as a residence (e.g. faulty locks, no smoke alarms / no RCDs)?
- Is it reasonably clean, and in reasonable repair considering its age and style?
- Is it in the same condition as when inspected by the applicant?

The people:

- Has the identity of the person authorised to grant the lease been verified?
- Are the applicants over 16 years of age and able to understand what they are signing?

The agreement:

- Is it a new lease or a renewal? *Different rules apply.*
- Does the lease agree in principle with the tenancy application?
- Have the parties asked for any special conditions – if so, has an agreement been reached that is acceptable to both the lessor and the tenant?
- Is there a compliant Property Condition Report prepared with all required information?

Appendix 2 may be a useful refresher on completion of a Form 1AA Tenancy Agreement.



Activity 4 Case study – tenant profiling

You list a 3 bedroom suburban property. The garden is scruffy, and the paintwork faded. The owner is not interested in upgrading and wants a relatively high rent so it is slow to let, but you finally secure an application from two single women in their late twenties with a dog, for a 12 month lease. They pay regularly and ask to renew the lease early.

The owner seems happy (in principle) to offer a renewal but wants to inspect the property with you first. On the day of the inspection you find the property in good condition.

The owner seems pleased until he notices that the second bedroom is an office (the tenant is working there as you inspect) and the third bedroom is set up as a nursery. The owner asks the tenant if there is a child living there. She explains that her partner is expecting a baby in a month's time. That is why they are keen to renew.

After you leave the owner instructs you to advise them the property is not available as he will not let to 'people like that'.

What should you do?

What laws might impact the situation?

2.5 Amending lease agreements – residential and commercial

Some of the principles that apply to every contractual agreement (including leases) that an agent or any agency employee facilitates between other parties have already been highlighted.

This next section presents an opportunity to highlight the issues when amending leases or contracts.

Requirements with respect to amending leases or contracts

As discussed earlier, a contract is only formed when both parties agree, so offers and counter-offers are not amendments, they are stages in a negotiation.

It is however not uncommon for parties to want to vary the terms of an agreement after it has been signed, for instance to extend the end date, change the names of occupants, transfer a bond, or to reduce the rent if amenity has reduced. Sub-letting may also be agreed to in a variation.

There are a number of ways parties to a lease can vary it. Letters, deeds, emails, signed alterations on the document itself, and even handshakes have all been used at times. Often the method is not legally watertight, but the agreement holds because the parties act in good faith.

That said, knowing how to prepare a simple lease variation and appreciating that the lessor may need legal advice for significant variations can help you to avoid potential liability.

The first point to note is that a variation is at law a contract in itself, so it must meet all the same requirements of any other contract.

Here are some points to consider to try to ensure this is the case.

Lawfulness

A variation providing for something illegal (e.g. to avoid taxes) will not be enforceable.

What the contract allows for

If a lease has provisions for how it may be varied, you should comply with these.

Deed of amendment or variation

Variations relating to tenancy agreements should be done in writing if the original agreement was written. A new agreement may be best, but a deed of variation may also be effective. If the variation is significant, lessors should seek legal advice.

Expiry

If a lease has already expired, it cannot be varied. A new lease is required.

Consistency

If a lease was originally signed by two lessors and two tenants, then all four parties must sign for any variation. If it is a corporate lease, check authority levels before signing. Any variation should make sense in the context of the remainder of the wording in the lease.

Permission

Consider whether consent is required from 3rd parties such as mortgagors or guarantors.

Licences

The right to occupy premises can be granted by either a lease or a licence. A lease confers exclusive possession and control on the occupier. There is usually no exclusive possession under a licence e.g. for storage, car parking. Care is needed with variations of leases or

licences. There can be serious consequences if you do not do it in an enforceable way. Although the case study below is a commercial situation similar principles can apply with residential tenancies.

Case Study

A commercial lease was properly signed with three directors who gave personal director's guarantees. The business went 'belly up'. The lessor claimed \$1.3 million owed from the guarantors.

A variation had been signed to allow a slightly different use of the property adding two more guarantors.

Because it did not include a guarantee clause, had some titles incorrect and not all signatures properly executed, all the guarantees (including those properly executed in the lease) were unenforceable.



2.6 Commercial leasing

Commercial leasing and property management are too complex to cover in a session of this length, however a few key points are included.

The value of a commercial building is impacted by any leases that are in place.

A lease with a blue-chip tenant can add considerable value. A lease with a failing tenant (or a long lease where a buyer wishes to redevelop) can detract from value. A building owner's medium to long term objectives must be considered when leasing commercial buildings.

A commercial lease is a complex, legally binding contract

It is advisable that legal advice is sought in drafting a commercial lease. The parties should seek advice and understand all terms and conditions before signing. Agents should be able to explain the lease. If managing a property with a lease you were not involved in drafting, always read it closely. Many disputes arise from agencies misinterpreting lease conditions and charging for items not permitted under retail laws e.g. strata management fees and legal costs.

Advise applicants to seek legal advice before they commit to a lease, take on an assignment or incur any tenancy obligations e.g. by paying a deposit or occupying leased premises.

The terms for a commercial lease are generally by negotiation, except where the *Commercial Tenancy (Retail Shops) Agreements Act 1985* applies to limit terms in some ways. Although some aspects of consumer law do not apply to commercial transactions, the requirements of the REBA Act apply to all transactions.

Be aware of the *Personal Property Securities Act 2009* – it applies particularly to broking but has applications in many other situations where equipment or chattels are included in a lease.



Activity 5 Case study – commercial

Complete the following case study

1. Case study - commercial

You are involved in managing a shop in a suburban strip. It is newly refurbished and has a 6 year lease with a blue-chip tenant.

- a) **What is one important lease term that if not sufficiently detailed could expose a retail shop owner at the end of the lease?**

Why

The shop's location is highly desirable. The owner may well want to sell the property in the future.

- b) **What can the owner do to protect the value of the tenancy?**

Why

3. Real estate practice

3.1 Real estate practice

Real estate practice evolves over time in response to a complex array of statutory requirements and commercial imperatives such as costs, expertise, market forces, competition, the economy and business goals.



What is often understandably most important to the owner of the business is profit - without that there is no business. Yet the agency must also carry out business in a compliant way, or risk a variety of negative outcomes. Property managers have a part to play in this.

Non-compliance can lead to an agency and property manager being caught up in a regulatory investigation, and to reprimands, penalties, or de-registration. Clients or consumers may also take legal action. So while agency profit and personal reward are the main game, non-compliance is a serious risk to the agency and a threat to a property manager's livelihood.

Compliance can be frustrating and at times seem impractical. Interpreting what is required can be confusing – your employer and even the DOC cannot always give a black and white answer as to the right way to balance compliance with practicality.

3.2 Industry practice

So how should you decide what to do when the law does not cover every point in detail?

Every agency has standards and practices – a body of knowledge and ways of doing things that have evolved over years. Some practices are widespread, others may be unique to the agency.

Some practices are based on laws (these should be reviewed when laws change to ensure they are still current), some on personal beliefs (usually well intentioned, but sometimes at odds with legal requirements).

Other practices arise from business pressures, such as the need to grow the business, to control costs or to get work done efficiently.

The following quick quiz considers whether some common practices have a basis in law.

QUICK QUIZ Industry Practice	Legally Required / Not Required / Best Practice
Set up passwords for absentee owners	Legally Required / Not Required / Best Practice
Issue a copy of by-laws to strata tenants	Legally Required / Not Required / Best Practice
Negotiate inspection times with tenants	Legally Required / Not Required / Best Practice
Take photos for the initial PCR	Legally Required / Not Required / Best Practice

So why do practices that are not required by law evolve? It is usually because they are seen as:

- a) necessary for practical reasons / efficiency / to keep costs down;
- b) likely to add value for clients or to help in growing the agency business;

- c) helpful to reduce risk to the agency and/or their clients;
- d) necessary for compliance.

Your employer will review practices from time to time to ensure they are still compliant and effective. It is important to give input if you think that agency practices need updating.

3.3 Best practice

So what is Best Practice?

Best practice is usually considered to be *'commercial or professional procedures that are accepted or prescribed as being correct and are also highly effective.'* It has become a business buzzword, often associated with standards and processes, yet hard to pin down exactly.

Some professions have a written collective 'body of knowledge' about the best ways to do things, in the form of best practice guidelines. Many real estate agencies also have their own internal standards.

So are these agency practices 'best practice'? That depends on several factors, including:

- how well the practices work for the agency and their clients;
- whether they are legal and fair for consumers and clients;
- whether they are reviewed regularly to ensure they are up to date; and
- whether they give the agency a competitive edge.

'Best practice' should not be a set book of rules that never change – it should be a way of thinking that aims to keep improving.

Agency practices must keep changing to take into account all the many changes in the business environment, from energy efficiency requirements to cyber security threats.

'Best practice' in an agency also means having a way of making sure that you keep up with changes to any standards that legally apply, whether they are laws, regulations or Australian Standards. Agencies need to be ready to adapt when new regulations are introduced.

Whether an agency policy exists to reduce risk, to comply with a law, to satisfy clients or to help the agency to be known for doing things the 'best' way, give feedback if you can see a better way to do things.

'Best practice' should help the agency to work smarter, not harder and help you to be more successful.

3.4 Decision making and risk

Some areas of the real estate industry have highly developed risk management processes. Real estate property developers for instance are very aware of risk management, as every business venture they undertake is a calculated risk with very large stakes.

Many larger businesses know that research shows that better compliance leads to higher profits because it reduces risk. This can work for smaller businesses and individuals too.

The agent you work for will need to make many decisions about risk. They may decide to upgrade to more of a 'best practice' approach in the future, if they are not doing this already. This can be done while still balancing realities like budgets and time constraints.

It is easier for the agency to achieve improvements if you are motivated to support this goal.



Risk and reward

Do you know how compliant you are?

Do you take risks occasionally (or put your clients or agency at risk of non-compliance)?

If so are they 'calculated' controlled risks or 'accidents waiting to happen'?

How often do you review what you are doing and consider reducing risks?

We can't discuss all the different property management risks in this session, however we hope to start you thinking about how you do things, and about aiming for 'best practice' in what you do.

The following matrix gives just a few examples to give you a new way of weighing up the possible risks of non-compliance. The issues we've chosen may not be your top priorities, but this way of thinking about compliance can be applied to other issues.

NB: Property management issues cause many of the most expensive claims in agencies. Issues where owners are liable are included because where owners are sued they often try to pass on liability to the agency.



Activity 6

Complete one of the following exercises using one of the three matrices on the following pages.

PCRs

Look at the practices in the matrix and self-assess your agency's approach.

Are you achieving minimum compliance? YES / NO

Have any of your practices been listed as potentially risky? YES / NO

Identify one best practice issue you would like to focus on in future.

Smoke alarms

Look at the practices discussed in the matrix and consider these questions. *If you manage commercial property consider the equivalent commercial application for fire safety devices.*

Are you achieving minimum compliance? YES / NO

Are any of your practices potentially risky? YES / NO

Identify one best practice issue you would like to focus on in future.

Swimming pool and spa safety

Look at the practices discussed in the matrix and consider these questions. *If you manage commercial property consider the equivalent commercial application for a pool in a.*

Are you achieving minimum compliance? YES / NO

Are any of your practices potentially risky? YES / NO

Identify one best practice issue you would like to focus on in future.

MATRIX 1: Issue: Completion of initial Property Condition Report (PCR)	
Legal compliance (minimum)	<p>Residential Tenancies Act 1987 Section 27C</p> <p>A <u>lessor must</u> prepare a property condition report (PCR) and give 2 copies to tenant(s) within 7 days after occupation of a property <i>under a residential tenancy agreement</i>.</p> <p>RTA Regulations Regulation 10AC - The PCR must include all information set out in Schedule 1 Form 1 of RTA Regulations. Form 1 also requires that before tenancy begins, a lessor / PM should:</p> <ol style="list-style-type: none"> 1. inspect the premises; 2. indicate if each item is clean, undamaged, working using "Y" or "N", <u>adding comments as needed</u>; 3. record the dates when the property was last painted / floor coverings were renewed; 4. <u>sign the 2 copies of the PCR before giving them to the tenant</u>. <p><i>Photos/videos are not required but if used it is <u>recommended</u> they are signed / dated by all parties.</i></p> <p>OTHER RELEVANT COMPLIANCE ISSUES:</p> <p>Residential Tenancies Act S 42 (2) <u>Lessors must</u> maintain properties in reasonable repair (given their age and character) and m comply with any other written law that applies (buildings/ OSH).</p> <p>REBA Code S 4, 9, and 10 - <u>Agents must</u> act in the best interests of their principal, exercise due skill, care and diligence, ascertain / verify material facts, disclose material facts to those affected.</p> <p>Common law - <u>Agents should</u> carry out services diligently. If loss, harm or damage is suffered by a 3rd party due to a failure of the agent / their employee, this could give rise to legal action.</p>
Common Industry Practice	<p>Most agencies comply by completing an initial PCR (either in-house or via an outsourced service) with all required information from Form 1 and issue the PCR within 7 days of the tenancy starting. PCR processes in many agencies include:</p> <ul style="list-style-type: none"> • some extra aspects of the property not covered by Form 1 being reported on e.g. other rooms; • photos / comments re some noteworthy items; • record kept of the original PCR and any amendments returned by tenants. <p>Many other practices exist, but are not consistent from agency to agency.</p>
Best practice	<p>Best practice reported includes doing all of the above <u>plus</u>:</p> <ul style="list-style-type: none"> • completing the PCR <u>prior to tenant's move in date</u>; • list <u>all</u> items even if not required by Form 1 e.g. appliances, outdoor features, fixtures, small items; • extensive photos and comments describing anything brand new or damaged / not working; • a record of painting, floor coverings, professional cleaning, pest control, window cleaning etc.; • covering letter explaining the process to the tenant to encourage return of Form 1; • sign off process for photos (hard copy or disc); • follow-up process if changes are made by tenants e.g. to check accuracy / work needed.
Potentially risky practices	<ul style="list-style-type: none"> • not completing an initial PCR or not completing a PCR by the due date; • not taking photos / video or not dating the images or having no sign-off process for images; • omitting some areas / items from report or not noting damaged and worn items / new items; • not noting functionality of compliance items such as pool fencing, smoke alarms, RCDs; • not marking Y or N in relevant boxes (required even if photos/comments are provided); • no comments completed, not no dates re painting and floor coverings; • completing PCR after tenants move in (damage done before PCR may not be claimable); • outsourcing PCRs to offshore report writers without considering Privacy laws; • accepting changes from tenants without verifying their accuracy; • not signing the PCR prior to giving it to tenants; • emailing PCRs (commercially practical, but view of magistrate's court is still unclear); • not communicating issues noticed to owners or not acting on urgent or dangerous issues; • taking images of personal information or not handling such images compliantly (Privacy law).

MATRIX 2: Issue: Smoke alarm compliance	
Legal compliance (minimum)	<p>Building Regulations 2012 <i>Regulations 55, 56,57, 58, 59, 60, 61 and 62</i></p> <p><u>Seller / lessor must</u> ensure before title transfer / rental occupancy that smoke alarms are installed in compliance with Regulations / Australian Standard 3786, that alarms work and are either connected to mains power or have a 10 year life non-removable battery. An alarm must not be expired (i.e. over 10 years old). After May 2014 , multiple alarms must be interconnected <u>when replaced</u> and <u>in new buildings</u>. Maintenance is not mandated – for best practice see Appendix 1.</p> <p>OTHER RELEVANT COMPLIANCE ISSUES:</p> <p>Residential Tenancies Act Section 42 (2)</p> <p><u>Lessors must</u> maintain properties in reasonable repair (given their age and character) and must comply with all requirements for buildings / OSH, under any other written law that applies.</p> <p>REBA Code Sections 9 and 10</p> <p><u>Agents must</u> exercise due skill, care and diligence and make every effort to ascertain material facts of each transaction. <u>Agents must</u> disclose material facts to those affected by them.</p> <p>Common law</p> <p><u>Agents should</u> carry out professional services diligently. If loss, harm or damage is suffered by a 3rd party due to a failure of the agent's employee, this could give cause for legal action.</p>
Common Industry Practice	<p>Sales listings:</p> <ul style="list-style-type: none"> visually inspect to see if smoke alarms are present when listing or advise sellers of the legal requirement to have alarms installed before selling. <p>Property Management:</p> <ul style="list-style-type: none"> check to see if smoke alarms are present and/or advise owners of the legal requirements; include in lease that tenants should test smoke alarms and tell the agency if they don't work; suggest owners pay for an annual service to test the alarm / replace back-up batteries.
Best practice	<p>Sales listings:</p> <ul style="list-style-type: none"> ask sellers to disclose in writing whether smoke alarms are fitted / functional; if no alarms are installed, advise seller in writing of the legal requirements. <p>Property Management:</p> <ul style="list-style-type: none"> ask owners to disclose in writing whether smoke alarms are fitted and functional; if no alarms are installed, advise lessors in writing of the legal requirements; keep written evidence of all steps to ensure compliance on file require tenants to fill in a form confirming they have dusted and tested the alarm; test alarms during each inspection; strongly recommend an annual service to test alarms / replace batteries; have a calendar system for back-up batteries / 10 year replacement; advise owners in writing of the need to have multiple alarms interconnected on replacement.
Potentially risky practices	<p>Sales – no visual check, no notice to owners re responsibilities, no disclosure of non-compliance</p> <p>Property Management</p> <ul style="list-style-type: none"> No arrangements for inspection, testing or maintenance of smoke alarms. No diary system for back-up battery replacement / alarm replacement / testing of alarms. Owners maintaining smoke alarms themselves between tenancies All responsibility with tenants to inspect, test, replace batteries including aged / vulnerable tenants. Telling owners that it is a legal requirement that they pay for an external service to test alarms. Agency never checking alarms or checking the work of outside contractors. Not being familiar with WA government guidance note on Smoke Alarms http://www.dfes.wa.gov.au

MATRIX 3: Issue: Swimming pool and spa safety	
Legal compliance (minimum)	<p>Building Act 2011 and Building Regulations 2012 and Australian Standard AS 1926.1-1993</p> <p><u>Owners must</u> ensure that pools or spas installed after 5 November 2001 have a compliant isolation fence. Pools or spas installed before that date must have restricted access from the house, neighbours, and road. Barriers / doors must be compliant with Australian Standard 1926.1 - 1993.</p> <p>OTHER RELEVANT COMPLIANCE ISSUES:</p> <p>REBA Code Section 4, 9, and 10</p> <p><u>Agents must</u> act in the best interests of their principals and follow instructions (unless unreasonable/improper to do so), exercise due skill, care and diligence and make every effort to ascertain / verify material facts of each transaction. <u>Agents must</u> disclose material facts to those affected by them.</p> <p>Residential Tenancies Act Section 42 (2)</p> <p><u>Lessors must</u> maintain properties in reasonable repair (given their age and character) and must comply with all requirements for buildings / OSH, <u>under</u> any other written law that applies.</p> <p>Common law</p> <p><u>Agents should</u> carry out every professional service <u>or</u> duty diligently. If loss, harm or damage is suffered a third party to whom they owe a duty of care (e.g. a tenant) due to a failure of the agent's, this could give cause for legal action to recover damages.</p>
Common Industry Practice	<p>Sales</p> <ul style="list-style-type: none"> ask sellers whether pool/spa is compliant; make disclosure to buyers if sellers disclose that the pool/spa is not compliant. <p>Property Management</p> <ul style="list-style-type: none"> ask owners whether pool/spa is compliant; ask owners of non-compliant pools/spas to ensure compliance prior to letting.
Best practice	<p>Sales - as above <u>plus</u>:</p> <ul style="list-style-type: none"> ask seller for written disclosure including a statement about whether pool/spa is compliant; recommend in writing that pool/spa is made compliant prior to marketing if it is not already; ask sellers for a copy of the local government certificate of compliance for buyers <u>or</u> make written disclosure to buyers if pool/spa is not compliant; consider pool safety at home opens. <p>Property Management - as above <u>plus follow agency policies e.g. to</u>:</p> <ul style="list-style-type: none"> not let properties with non-compliant pools/spas; require <u>all</u> owners to provide a local government certificate of compliance prior to letting; treat <u>all</u> repairs to pool fences/ gates, doors / windows opening onto pool areas as urgent; check that pool/spa fences / gate locks are sound and functional at every inspection.
Potentially risky practices	<p>Although pool safety is not a legislated agency obligation in WA, any agency action (or lack of action) that could contribute to a death or serious injury, has potential to lead to many negative outcomes for the agency, as well as being tragic. Risky practices include:</p> <ul style="list-style-type: none"> selling or letting a property with a non-compliant pool or spa; not asking for certified proof of compliance from an owner; allowing tenants to move in before a pool or spa is compliant; not checking that a pool at a rental property remains compliant over time; delaying pool gate or pool fence repairs for any reason.

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Activity answers

QUICK QUIZ How much do you know? Residential Property Managers

Review the following table. Note the number(s) for relevant laws, the letter(s) for the authority that might enforce the law. Consider what the risk is to the agency. **NB: the direct risk is to owners in some of these cases, however agents and property managers may be implicated.**

A smoke alarm in a tenanted property had flat batteries – fire broke out.	1b 4j 3e	1. Residential Tenancies Act 2. Real Estate and Business Agents Act 3. Common law 4. Building Act 2011 and Building Regulations 2012 5. Australian Civil Aviation Safety Regulations 1998	a. State Administrative Tribunal b. Department of Commerce c. Privacy Commissioner d. Australian Competition and Consumer Commission e. Court system – civil claim
Tenants vacated a property due to health issues. The home was later relet without disclosure or rectification. It was contaminated.	1b 6f 3e 10b	6. Contaminated Sites Act 7. Privacy Act 8. Fire and Emergency Services Act 1998 9. Surveillance Devices Act 1998 10. Fair Trading Act 2010 11. Criminal Code Act Compilation Act 1913	f. Department of Environment Regulation g. Civil Aviation Safety Authority h. DOC - Energy Safe i. Department of Fire and Emergency Services j. Local Government k. WA Police l. ACCC
A sales person filmed a property using a drone (UAV). A tenant was filmed sunbathing.	5g, 9k 7c, 3e* <i>*No legal precedent</i>		
Repairs to a pool gate at a managed property were delayed by owners - an accident happened	1b 2b 4j 3e		
Lease condition 23.1 was amended to require tenants to advise of damage to the property within 3 working days	1b		

QUICK QUIZ How much do you know? Commercial Property Managers

Review the following table. Note the number(s) for relevant laws, the letter(s) for the authority that might enforce the law. Consider what the risk is to the agency. **NB: the direct risk is to owners in some of these cases, however agents and property managers may be implicated.**

Fire equipment in a managed office property was not maintained and did not work when a fire broke out.	4j 11h 3e	1. Commercial Tenancy (Retail Shops) Agreements Act 1985 2. Real Estate and Business Agents Act 3. Common law	a. State Administrative Tribunal b. Department of Commerce c. Privacy Commissioner d. ACCC
Tenants vacated a shop that had been a dry cleaner due to health issues. It was relet without disclosure (or any other action). It proved to be contaminated.	2b 6f 11h 3e	4. Building Act 2011 and Building Regulations 2012 5. Australian Civil Aviation Safety Regulations 1998	e. Court system – civil claim f. Department of Environment Regulation g. Civil Aviation Safety Authority
A business broker disclosed a seller's confidential financial information to a competitor without permission.	2b 3e	6. Contaminated Sites Act 7. Privacy Act 8. Fire & Emergency Services Act 1998	h. DOC – WorkSafe i. Department of Fire and Emergency Services
An agent filmed a property using a drone (UAV). A neighbouring tenant was filmed sunbathing.	5g, 9k 7c*, 3e *No legal precedent	9. Surveillance Devices Act 1998 10. Fair Trading Act 2010	j. Local Government k. WA Police l. ACCC
A property manager did not arrange repairs to stairs in a partly vacant retail building, after being given written notice – someone was injured as a result	1b 11h 3e	11. Occupational Safety & Health Act 1984 12. Criminal Code Act Compilation Act 1913	

Activity 1 Residential property managers only

In 2014 a WA Supreme Court judge found that a Bunbury real estate agent was not guilty on two charges of false and misleading advertising, in spite of a DOC appeal. One charge was for advertising a Cookernup property as being in Harvey. The second charge was for advertising a property in a price range of \$1.5 to \$2.5 million, when the owner would not accept under \$2.2 million.

This case related to a property for sale but has parallels in property management.

Does this decision mean future court decisions on the same issues must be decided the same way? NO

Why (or why not)? This case was decided on unique facts. It was not a binding legal precedent as it was not decided in the High Court, or by a full bench of the Supreme Court. Other courts may take the judgement into account but are not bound by it.

Does this case mean that agencies can now:

- a) routinely advertise property under a location different from what is shown on title? NO
- b) advertise a 'from price' lower than the seller will accept? NO

Why (or why not)?

- a) The case was decided this way because an interactive map corrected the misleading impression made by the incorrect locality. The law has not changed, nor has the DOC interpretation –agencies can still be prosecuted.
- b) The decision was due to lack of prosecution evidence. Again the DOC's view of the law has not changed.

Activity 1 Commercial property managers only

Consider the following case and answer the questions.

A long-term tenant (a tenant's rights activist at a market), was given 14 days to accept a fixed term lease at a higher rent. He was terminated as a tenant when he did not complete paperwork correctly. He said he had been previously threatened with losing his stall if he did not stop his tenant advocacy and claimed to have been treated unconscionably. The SAT found this conduct was not unconscionable.

Does this decision mean that future court decisions on the same issue must be decided the same way? NO

Why (or why not)?

This case was decided in 2010 in the SAT under the *Commercial Tenancy (Retail Shops) Agreements Act (CTRSA)*. It was not a binding legal precedent as it was not decided in the High Court, or by a full bench of the WA Supreme Court. The unique facts were important (e.g. all the tenants were offered the same deal). With a different judge, or slightly different facts, the outcome may have changed – there have also been new precedents since then.

What do you think was risky about the lessor's/ property manager's alleged conduct?

If a property manager threatened a tenant with losing their tenancy if they did not stop their tenant advocacy, they would risk a breach of section 12D of the CTRSA which provides that a landlord is not to treat a tenant less favourably because they form or join a tenants association 'or similar'.

QUICK QUIZ	Appointment to Act – <u>is it invalid?</u>	True/False/Maybe
The agent or PM has not yet completed CPD this year		Yes / No / Maybe
One owner signed the authority document for both owners		Yes / No / Maybe
The document was printed off and signed by an owner overseas who then scanned and emailed the document back to the agency		Yes / No / Maybe
Remuneration field says “9% of gross rentals” - no dollar amount is shown		Yes / No / Maybe
Due to a printer malfunction the section on how to seek assistance from DOC if in dispute with the agency is very hard to read.		Yes / No / Maybe

Activity 2

Assuming all the basics of a valid Appointment to Act are in place, what can a property manager do at the time of listing to reduce agency risk?

Choose one of the following scenarios and discuss what type of ‘best practice’ action at the time of signing the agency agreement could have helped to avoid the problem.

Scenario 1

You are invited to list a vacant shop. The lessor is an old friend. The property is quite a distance away from where you normally work, but your friend insists he wants you to manage the property. He has set a rent range - your research confirms it is fair.

You let the property to a tenant who wants to expand into that area. He later complains that he should have been told that the property was used as a drug kitchen by bikies and a violent murder was committed there. You were not aware of these facts.



Seeking detailed written disclosure from the seller would have better protected the tenant and the agent from the risk of non-disclosure of a stigma that may have impacted the tenant’s decision.

Scenario 2

The owners of a rental property you manage have complained to DOC about unauthorised expenditure at the 25 year old home. The property manager acted under a clause in the management agreement allowing the agency to carry out repairs that are ‘urgent’. She tried to contact the owners first, but they were travelling overseas and did not respond in time. You believe the PM has done nothing wrong, but the client is furious. The expenses are for repairing the air-conditioner and the swimming pool gate.



The property manager did not act illegally - in fact they have acted to be compliant - but could have avoided a dispute by better explaining the terms of the management agreement and the underlying reasons for them (RTA requirements) at the time the management agreement was signed. Asking owners to nominate a person to be consulted when they were uncontactable would also have helped.

Activity 3

Case Study – conflict of interest

An elderly woman wanted to rent out her villa to reliable tenants. She listed it with a local agent who appraised it moderately as it was dated. The agent's son worked as a sales representative for the agency and his girlfriend needed a place.

The agent showed her through without advertising it and recommended her, saying to the owner that she was 'a friend of my son's' and would be a good tenant. The owner accepted the application, signed a disclosure form that was include with the other paperwork and paid the usual fees.

There was no discussion of the disclosure. Later the girlfriend broke the lease. The bond was insufficient to cover lost rent.

Was the agent's conduct technically compliant with the REBA Act and Code?

YES in relation to disclosure, possibly not in other areas such as acting in the client's best interests and being diligent.

Do you think there are any possible breaches of common law or consumer law in the agent's conduct?

YES it is likely a claim could be made under common law given what is stated about the case

Explain.

The agent may have been negligent when she chose not to advertise the property. It is possible she did not reference check diligently because she knew the applicant – if so this could also have been negligence.

The lessor's consent was not 'informed consent' – no one explained what the conflict meant to her. This may have breached consumer law i.e. by not disclosing something material to the transaction.

The agent did not act in the principal's best interests and the principal suffered a direct loss as a result – the agency may be liable under common law.

What would best practice have been in this situation?

To not have the conflict e.g. to set and follow an agency policy that staff and their relatives, close friends and de-facto partners do not take an interest in listed properties.

At the very least the agent should have explained the conflict fully, advertised the property so the owner had options other than the girlfriend, pointed out in writing that the principal could take other advice, and rebated the letting fee.

Activity 4 Case study – tenant profiling

You list a 3 bedroom suburban property. The garden is scruffy, and the paintwork faded. The owner is not interested in upgrading and wants a relatively high rent so it is slow to let, but you finally secure an application from two single women in their late twenties with a dog, for a 12 month lease. They pay regularly and ask to renew the lease early.

The owner seems happy (in principle) to offer a renewal but wants to inspect the property with you first. On the day of the inspection you find the property in good condition.

The owner seems pleased until he notices that the second bedroom is an office (the tenant is working there as you inspect) and the third bedroom is set up as a nursery. The owner asks the tenant if there is a child living there. She explains that her partner is expecting a baby in a month's time. That is why they are keen to renew.

After you leave the owner instructs you to advise them the property is not available as he will not let to 'people like that'.

What should you do?

Clarify the issue. If the owner objects to the tenants doing business from home in breach of their lease, there may be grounds to do as instructed. If the owner objects to the tenants' apparently being in a relationship or to a child living there, you should explain that these are not valid grounds to refuse a renewal and could attract a complaint under the Equal Opportunity Act.

You should guard against discrimination and the perception of discrimination.

What laws might impact the situation?

Residential Tenancies Act 1987 and Equal Opportunity Act 1984

Activity 5

Case study – commercial

Complete the following case study

1. Case study - commercial

You are involved in managing a shop in a suburban strip. It is newly refurbished and has a 6 year lease with a blue-chip tenant.

- a) **What is one important lease term that if not sufficiently detailed could expose a retail shop owner at the end of the lease?**

The make-good clause.

Why?

For retail leases, under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* a clause requiring a tenant to refurbish leased premises is void unless the clause details the nature, extent and timing of the refit – again a schedule with photos is helpful.

Generally, if no detailed record is kept of the condition of premises at the start of a lease, it is hard to enforce the tenant's make good obligations at the end. A clause that refers to a detailed schedule with supporting photographs can prevent disputes.

The shop's location is highly desirable. The owner may well want to sell the property in the future.

- b) **What can the owner do to protect the value of the tenancy?**

Register the lease

Why?

An unregistered lease for a term in excess of five years is destroyed on transfer of the freehold of the land to a third party.

Part of the resale value of this property is the secure lease with a blue-chip tenant, so owners should consider registering the lease as it is over five years.

A recent case where the sale of a property fell over because the seller could not prove to the buyers that the leases were secure supports this (*Primewest Mandurah Pty Ltd*).

QUICK QUIZ Industry Practice	Legally Required / Not Required / Best Practice
Set up passwords for absentee owners	Legally Required / Not Required + Best Practice
Although it is not legally necessary to set up passwords for absentee owners the DOC has strongly suggested that diligent agents will make this part of their property management procedures	
Issue a copy of by-laws to strata tenants	Legally Required + Not Required / Best Practice
<p>At the time of writing lessors are not compelled to give tenants a copy of by-laws under the Strata Titles Act (STA) yet this is arguably an indirect legal requirement under the REBA Code and contract law.</p> <p>Owners need to ensure that tenants comply with the by-laws, or the strata company may issue penalties for non-compliance. Penalties are levied on owners if their tenants do not comply, as the strata company has no legal relationship with the tenant. By not issuing by-laws, agent expose owners to the risk of penalties.</p> <p>By-laws become extra 'terms' of the lease and under contract law, terms must be made known before the contract is signed. Property managers should provide the by-laws up front or they are placing the owner's interests at risk (a breach of the REBA Code in itself). If tenants don't get a copy of the by-laws before the lease is signed they can argue they are not bound by them.</p> <p>There is also a legal imperative to disclose material facts under consumer law. Section 10 of the REBA Code requires the agent to make 'all reasonable efforts to ascertain or verify the facts material to the transaction' and to communicate those facts to any person affected.</p>	
Negotiate inspection times with tenants	Legally Required / Not Required / Best Practice
Under section 46 of the RTA the lessor (or anyone representing the lessor <u>must make a reasonable attempt to negotiate a day and time for that entry that does not unduly inconvenience the tenant.</u>	
Take photos for the initial PCR	Legally Required / Not Required / Best Practice
<p>Although photos are not required under the RTA it could be argued that an agent / property manager would not be acting in the best interests of their principal under the REBA Code (Section 4) if they did not take photographs. Photographs also protect the tenant by providing a record of existing damage.</p> <p>Words can describe a property adequately in some respects but what is considered 'clean' is a value judgement and when items are worn or damaged it can be hard to prove that further damage has taken place if this is only described rather than images being provided. Photographs allow more objectivity and help protect the owner against tenants who may claim the property was dirtier or more damaged when they moved in than is factual.</p> <p>In the absence of photographs it is hard for an owner to prove what the original condition of the property was, if a tenant leaves it in poor condition.</p>	

Activity 6

Complete one of the following exercises using one of the three matrices on the following pages.

PCRs

Look at the practices in the matrix and self-assess your agency's approach.

Are you achieving minimum compliance? YES / NO

Have any of your practices been listed as potentially risky? YES / NO

Identify one best practice issue you would like to focus on in future.

Smoke alarms

Look at the practices discussed in the matrix and consider these questions. *If you manage commercial property consider the equivalent commercial application for fire safety devices.*

Are you achieving minimum compliance? YES / NO

Are any of your practices potentially risky? YES / NO

Identify one best practice issue you would like to focus on in future.

Swimming pool and spa safety

Look at the practices discussed in the matrix and consider these questions. *If you manage commercial property consider the equivalent commercial application for a pool in a.*

Are you achieving minimum compliance? YES / NO

Are any of your practices potentially risky? YES / NO

Identify one best practice issue you would like to focus on in future.

No answers provided for this activity as it depends on individual experience and agency practices.

Appendix 1 - Smoke Alarm Laws

Renting, hiring or selling your home?

You need mains-powered smoke alarms



DFES
Department of Fire &
Emergency Services

The Building Regulations 2012 (the Regulations) require the owner of a dwelling to have compliant smoke alarms installed:

- prior to the transfer of ownership;
- where a dwelling is rented under a residential tenancy agreement or made available for such rent;
- where a dwelling is made available for hire.

What is a compliant smoke alarm?

To comply with the Regulations, owners must ensure that the smoke alarm(s):

- (a) are in accordance with the Building Code of Australia ('BCA') that is applicable at the time of installation of the alarms. (Note: dwellings that were approved for construction prior to 1 May 2015 do not have to comply with the BCA requirement for interconnection of smoke alarms where there is more than one); and
- (b) are not more than 10 years old at the time of transfer of ownership or making the dwelling available for rent or hire; and
- (c) are in working order; and
- (d) are permanently connected to consumer mains power.

What types of dwellings need to comply?

The laws apply to existing residential properties that are subject to sale, transfer of ownership, rental or hire and which fall within the following residential building classes as broadly defined in the BCA:

Class 1a: A single residential dwelling, being a detached house or row houses, duplexes, town houses, terrace houses or villa units where attached dwellings are separated by a fire resisting wall.

Class 1b: includes the following:

- Boarding houses, guest houses, hostels or the like in which not more than 12 people would ordinarily be resident and with a total area of all floors not exceeding 300 square metres;
- or four or more single dwellings located on one allotment and used for short term holiday accommodation.

Class 2: Individual units such as apartments and flats.

Class 4: A residential unit in a non residential building e.g. a caretaker's residence

Is there a requirement to maintain smoke alarms?

An owner who makes their dwelling available for rent or hire must, to the extent practicable —

(a) ensure that each alarm installed in the dwelling is in working order; and

(b) if an alarm was, at the time of its installation, required to be connected to the mains power supply, ensure that the alarm —

- (i) is permanently connected to the mains power supply; or
- (ii) if the alarm is to be installed at a location in the dwelling where there is no hidden space in which to run the necessary electrical wiring and there is no appropriate alternative location - has a 10 year life battery that cannot be removed; or
- (iii) if, in relation to the alarm, the use of a battery powered smoke alarm has been approved under regulation 61 - has a 10 year life battery that cannot be removed; and

(c) ensure that each alarm installed in the dwelling -

- (i) has not reached its expiry date if one is provided on the alarm; or
- (ii) is not more than 10 years old if no expiry date is provided on the alarm.

It may be useful for people involved in the rent or hire of a dwelling to document when the smoke alarms will need replacing.

How do I maintain smoke alarm/s?

For smoke alarms to remain in working order, they should be tested and maintained regularly.

The Department of Fire and Emergency Services recommends the following smoke alarm maintenance routine:

- Testing once per month to ensure the battery and the alarm sounder are operating
- Replacing batteries annually, where appropriate mains powered smoke alarms have back-up batteries

Renting, hiring or selling your home?

You need mains-powered smoke alarms



- Check your smoke alarm for a build-up of dust and cobwebs and clean with a vacuum cleaner at least every six months
- Vacuum with a soft brush attachment around the smoke alarm vents
- Use a surface insect spray around the smoke alarm to prevent insects nesting inside
- Smoke alarms should never be painted

* Always refer to the manufacturer's guide when selecting batteries and following testing procedures

Are battery powered smoke alarms permitted?

The laws do permit the installation of battery powered smoke alarms in limited circumstances. In those circumstances local government approval is required unless:

- There is no hidden space in which to run the necessary electrical wiring and there are no appropriate alternative locations for the smoke alarm, and
- Where a building is not connected to the mains power electricity supply network.

It is unlawful to install battery powered smoke alarms just because it is more convenient to do so.

For example, where a two-storey dwelling is permitted the use of a battery powered smoke alarm because the first floor is concrete, the owner must not (for the sake of convenience) install a battery powered smoke alarm on the second floor where the ceiling has sufficient roof space to run the electrical wiring

Do smoke alarms need to be interconnected if there is more than one?

Only dwellings that are approved for construction on or after 1 May 2015 need to have interconnected smoke alarms. Existing dwellings (i.e. those constructed or approved for construction prior to 1 May 2015) that are subject to sale, transfer of ownership, rent or hire do not need to have interconnected smoke alarms.

How many smoke alarms are required?

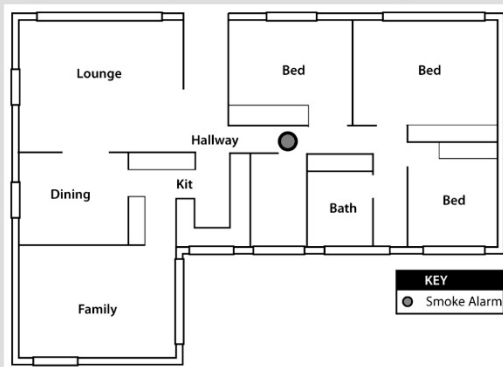
The number of smoke alarms required will depend on the class, size and layout of your property.

Class 1a buildings (house, duplex, villa or town house) Class 2 (flat or apartment) Class 4 (residential unit inside a building of another class)

Smoke alarms must be installed in a Class 1a building on or near the ceiling in:

- any storey containing bedrooms—
 - between each part of the dwelling containing bedrooms and the remainder of the dwelling; and
 - where bedrooms are served by a hallway, in that hallway, and;
- any other storey not containing bedrooms. (see Fig. 3 for multilevel)

Figure 1 - Class 1a, Class 2 and Class 4 buildings



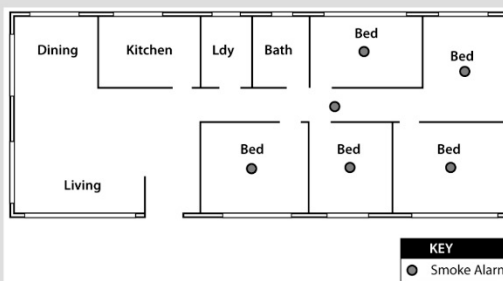
Class 1b (boarding/guest house or hostel where up to 12 persons can reside)

In a Class 1b building, smoke alarms must be installed on or near the ceiling—

- in every bedroom; and
- in every corridor or hallway associated with a bedroom, or if there is no corridor or hallway, in an area between the bedrooms and the remainder of the building; and
- on each other storey. (see Fig. 3 for multilevel)

(Source: Building Code of Australia, 2012)

Figure 2 - Class 1b buildings



Renting, hiring or selling your home?

You need mains-powered smoke alarms



Multilevel homes and properties

In multi-level properties, a smoke alarm is required in every storey, even if it consists only of carparking, bedrooms, laundries and the like.

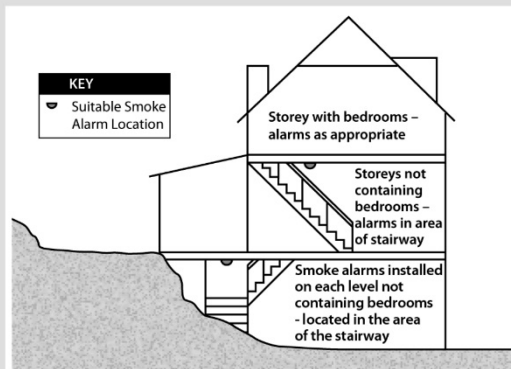
In storeys not containing bedrooms, smoke alarms should be installed in the area of the stairway between each level, e.g. if the bedrooms are on the first floor, then an alarm should be positioned near the area of the interconnecting stair at ground level.

This location is favoured as it is the path that people will most likely take to evacuate the building. It ensures that an alarm will be raised before smoke makes the common exit path impassable. If the other storey is not connected to the remainder of the dwelling (for instance a ground floor garage), the alarm should be centrally located in the lower area.

Multilevel homes and properties

Smoke alarms should be installed in each bedroom, in corridors and hallways that lead to exits and the living area. If you are installing smoke alarms in a multilevel home or property you should have an additional alarm in the stairway between each level. Often, people sleep with their bedroom doors closed at night and only a smoke alarm installed in that room will detect a fire fast enough to get out safely.

Figure 3 – Multilevel homes and properties



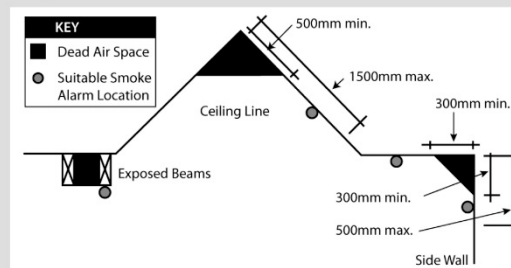
Installation of smoke alarms

Smoke alarms should be installed on or near the ceiling, with special care taken to avoid installation in the following areas:

- the apex of cathedral ceilings
- the corner junction of walls and ceilings
- between exposed beams, where there may be a dead air space

If it is not practical to install the smoke alarm on the ceiling, then it may be installed on the wall. The recommended position in this situation is between 300mm to 500mm below the ceiling. For cathedral ceilings, the recommended position should be between 500mm and 1500 mm from the apex to the top of the alarm.

Figure 4 – Installation of smoke alarms



Installation of smoke alarms

Smoke alarms are very sensitive and may detect smoke and moisture created by common household activities, such as burning toast or steam from a bathroom.

Smoke alarms should not be located near:

- Cooking appliances
- Heaters or fireplaces
- Doorways to bathrooms, laundries or other humid areas
- Heating and cooling duct outlets
- Ceiling fans, doors and windows (excessive air movement may prevent smoke from reaching the smoke alarm)
- Fluorescent light fittings (to avoid the effect of electrical 'noise' or 'flicker') or doorways and windows where barbecues and incinerators are located.

Renting, hiring or selling your home?

You need mains-powered smoke alarms



Which smoke alarm is best?

A mains powered photoelectric smoke alarm is best with a fixed rechargeable battery that does not need to be changed for the life of the smoke alarm. This type of alarm can detect smoke faster and more types of smoke than other models. This means you will be alerted to a fire earlier giving you more time to escape safely. All smoke alarms should comply with Australian Standard 3786.

Are there penalties involved?

Yes. Where the dwelling does not comply with the smoke alarm requirements under the Regulations, a local government may issue an infringement notice under the Criminal Procedure Act 2004, which attracts a penalty of \$1,000 for a prescribed offence; or the local government may prosecute an owner for non-compliance resulting in a penalty of up to \$5,000 for a prescribed offence.

Want more information?

Contact the Department of Fire and Emergency Services on 9395 9816, visit www.dfes.wa.gov.au, contact your local government or access the laws (Building Regulations 2012) at www.slp.wa.gov.au

The information contained in this publication is provided voluntarily as a public service by the Department of Fire and Emergency Services (DFES). This publication has been prepared in good faith and is derived from sources believed to be reliable and accurate at the time for publication. Nevertheless, the reliability and accuracy of the information cannot be guaranteed and DFES expressly disclaims liability for any act or omission done or not done in the reliance on the information and for any consequences whether direct or indirect, arising from such act or omission. This publication is intended to be a guide only and readers should obtain their own independent advice and make their own necessary inquiries. Published April 2014.

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Appendix 2 – Key factors to remember

Part A

Lessor – Include full surname and given names for each lessor (not just Mr and Mrs. Smith) Use agency name and address. Notify tenants in writing within 14 days if this changes.

Tenant – Include full surname and given names for each tenant plus contact details.

Property Manager – Show name of lessor's property manager (if any) and full contact details.

Term of Agreement - Define type of lease by deleting 'periodic' or 'fixed'. Show start date only if the lease is periodic. Show both a start and finish date if it is 'fixed' term.

Residential Premises – Show exact address of property plus any building / development name. N.B. anything that was in the property when viewed but is not included or not working must be noted as an exclusion. Also note improvements / extras that have been agreed on.

Maximum number of occupants – this number should agree with the application form.

Rent - Show weekly rent, payment cycle and method of payment. Rent cannot be required more than 2 weeks in advance. Monthly payment is permitted at tenant's request, but not shown on the lease. If renewing a lease the new rent will not apply for the first 30 days. *NB Rent-card fees cannot be passed on to tenants. Offering only one payment method may breach consumer laws.*

Bond – Up to 4 weeks rent unless rent is >\$1200 per week. Pet bond is only allowed if a pet will be kept that has parasites affecting humans (e.g. dog, cat) - but not for an approved Assistance Dog.

Rent increase - The process for calculating a rent increase during a tenancy must be clear - a set dollar amount or % is best. If referring to CPI, clarify the source of data (e.g. ABS, WA Treasury), the index (e.g. Perth All Groups or CPI Housing) and for what period (e.g. past quarter, past year). Any data source referred to must be publicly available and easily understood.

Water/ Utilities - Show how billing will be calculated if not individually metered.

Strata - Strata by-laws should be disclosed as they impact on the tenant's use of the property.

Pets - If a dog is allowed, note the breed. NB Lessors may choose not to allow dangerous dogs and/or restricted breeds such as pit bull terriers – if they are allowed, special conditions should be added to the lease indemnifying owners / the agency and providing for compliance with local government requirements for signs, ID collars, secure enclosure etc.

Right of Tenant to affix / remove fixtures - If neither is deleted tenant can affix or remove fixtures, with lessor permission

Tenant may / may not assign/sublet - If neither is deleted tenant can assign/sublet with permission.

PCR – explain process, need to return with changes within 7 days or PCR becomes legal record.

Part B – NB this cannot be changed

Part C - The RTA allows for extra terms to be added to the agreement in Part C provided:

- both the lessor and tenant agree to the terms; and
- the terms are fair and do not conflict with the RTA, or any other law; and
- terms do not conflict with the standard terms of the Form 1AA agreement.

Care is needed in drafting other special conditions, to ensure they do not breach the RTA. For example asking tenants to agree to additional fees (such as rent-card fees) that are not permitted under the RTA is a breach of Section 27.1 of the RTA. Penalties can apply.

Part C can also be used to document the variation in rent for the first 30 days of renewed leases.

DISCLAIMER:

The information provided in this publication was adapted from material prepared by the Department of Commerce and the Real Estate Institute of Western Australia, with reference to various other sources described in the bibliography.

This material is presented in good faith but is not warranted in any way. It is not a statement of law. The courseware and bibliography provide references to sources of further information. REIWA and the Department of Commerce strongly recommend that you seek legal or expert advice if you are uncertain about your obligations or need more information.