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Department of **Commerce**
Consumer Protection

Mandatory CPD 2015

Case Studies and Compliance Exercises

Real Estate

Property Managers

MODULE TWO: Distance Learning Participant Workbook



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Instructions for Participants

This session is comprised of a series of case studies.

The aim of the case studies session is to get you to apply knowledge gained in the earlier parts of the 2015 CPD session in relation to the law, best practice and industry practice in real estate.

Case studies will allow you to apply this knowledge in a practical, real-world way, with the aim of enhancing your understanding of the topics covered.

You are required to read the case studies and then answer the separate evaluation quiz. All of the questions can be answered quite easily provided you have read the case studies and the discussion notes that relate specifically to each case study.

Please note your work will be marked to ensure your understanding, so it is in your best interest to read all of the notes before attempting to answer the questions.

Please complete the separate evaluation quiz and return it to the provider per the instructions provided with this Distance Learning Pack.

Case Study One – Conducting a routine inspection

A landlord has become quite angry and vocal with his property manager following a routine inspection. The landlord is complaining that the small scratches and indents to the polished timber floors, as well as some minor damage to various internal walls, which was noted in the routine inspection report, constitute a breach of the residential tenancy agreement. He has instructed the property manager to get a quote for re-sanding and refinishing the timber floors. The landlord insists that the tenant must receive a breach notice and pay for this work as the floorboards are less than two years old.

Note: Questions 10 and 11 in the quiz relate to the above case study.

Case Study Two – Conducting a final inspection

A tenant has been in occupation of a rental property for two and a half years. At the end of the tenancy agreement there is a dispute over the bond because the property manager claims that the carpets have not been appropriately cleaned, all the interior walls need painting and two of the bedrooms require carpets to be replaced because of wear and a few very minor stains.

One particular wall in the main bedroom has several large black scuff marks and chips in the plaster, likely caused by someone kicking the wall. It has been conveniently hidden behind the bed.

Review of the file reveals that the agency has been managing the property for over 10 years. The property was brand new when the agency started managing it and it has not had any floor coverings replaced, or any painting done since the agency began managing it.

The lessor of the property instructs the property manager not to sign the bond disposal form unless the tenant agrees to replace the carpets in two rooms and paint the interior walls of the property. The tenant is angry claiming replacement of the carpets and painting the interior walls is the responsibility of the lessor.

The tenant advises the property manager he is prepared to take legal action if necessary to get his bond back.

Note: Questions 12 - 16 in the quiz relate to the above case study.

Case Studies One and Two – Issues to consider

Firstly, consider the requirements of the legislation.

Before conducting inspections, property managers must be aware of the requirements of the *Residential Tenancies Act 1987* (the RT Act). Section 46(4) of the RT Act provides that the property manager must give appropriate notice of the intention to inspect thus allowing for negotiation with the tenant on a suitable time and date for the inspection.

As you have learned from previous mandatory CPD sessions, section 27C of the amended RT Act requires property managers to complete a Property Condition Report (PCR) at the beginning and at the end of a residential tenancy.

Property managers can reduce the likelihood of disputes arising about fair wear and tear at the end of a tenancy by properly and thoroughly completing a PCR at the commencement of the tenancy noting all damage and deterioration. The PCR can include photographs as evidence of the state of fittings and fixtures at various stages of the tenancy.

Property managers may conduct up to four property inspections a year, including routine inspections. A routine inspection allows the property manager to note any maintenance required on the PCR and ensure that the tenant is looking after the property.

However, it is worth delving a little deeper into what the property manager should be looking for at such an inspection. There is a well-held belief amongst some in the property management industry that the inspection exists to check up on the tenant, to catch them doing the wrong thing. While this may hold true in some instances, the vast majority of tenants are just trying to live their lives and have the best intentions for the property. Living in a property, any property, occupied by any tenants or lessors, will result in some wear and tear. A lot of problems in the property management industry can be traced back to misunderstandings, miscommunications and unreal expectations when it comes to fair wear and tear.

Routine inspections should be used to record fair wear and tear, which should then be reported to the lessor as part of every PCR. It is unrealistic to suggest that a property will remain in exactly the same condition as when it was new, but of course a lessor may not give this fact any thought. A failure to mention wear, results in unrealistic expectations from the lessor. Where realistic reports are provided throughout a tenancy, the lessor is likely to be more realistic upon vacation by the tenants.

Considerations in resolving a dispute such as that in case study one, would begin with determining what constitutes fair wear and tear and how that is different from lack of care, neglect or even wilful damage.

The questions that a property manager would need to consider for case study one above could include:

- Would it be reasonable that small scratches and indents could occur as part of normal use?
- Could the quality of the finish on the timber floor make it difficult to use the floor without resultant damage?
- Is the minor damage to interior walls simply wear and tear or is it the result of neglectful damage by the tenant?
- Does the lessor need to be educated to the fact that when something is 'brand new' the evidence of wear and tear is going to be more obvious than when something is showing signs of age already?
- Is the rest of the property showing signs of damage or just a particular floor type?

Similarly, with respect to case study two, a property manager would need to consider the following:

- Is it reasonable to assume that over time the carpets are going to become worn as part of normal use?
- Is it also reasonable to assume that if interior walls are not repainted for 10 years they are going to be due for a fresh coat of paint?
- Would the scuff marks and chips in the plaster in the main bedroom constitute negligent damage for which the tenant should be liable?
- Does the agency need to educate the lessor about fair wear and tear and encourage them to 'freshen up' the property periodically, with a fresh coat of paint, new floor coverings etc.

What constitutes 'fair wear and tear'?

Fair wear and tear can be defined as anything that occurs through ordinary day-to-day use. This would include operation of natural forces such as sun and rain. Wilful and intentional damage, or negligence, is not fair wear and tear.

There are two parts to the meaning of 'fair wear and tear'. The first part, 'fair' relates to the cause of the damage. For damage to be excused it must have occurred in the course of fair use of the property for residential purposes. (i.e. carpet is worn in a high traffic area such as a hallway). The second part 'wear and tear' refers to the effect of the damage and limits the severity of allowable damage. For example a large red wine stain on plush white carpet would likely be considered more than wear and tear, even though such a stain could have happened in the course of fair use.

Source: Tenants Union ACT Inc.

Other examples of fair wear and tear would include:

- A lock breaking because it is old and worn out.
- Paint flaking because it is old or not applied correctly.
- Curtains fading from sunlight – sometimes this could extend to fabric becoming so weak that it 'tears'.
- Garden mulch breaking down over time.
- Paint fading or discolouring over time.
- Minor scuff marks on floor coverings or paintwork.

What is the difference between fair care and fair wear and tear?

The difference between the two is not scientific and therefore cannot be clearly defined; however it must be acknowledged that when something gets used it shows signs of use. When we hire a car, it gets minor chips and marks; the hire company records these marks as wear and tear. When we stay in a hotel room, we leave it dirtier and messier than when we arrived, occasionally having dripped some tea from a wet tea bag or dropping crumbs onto the carpet. The hotel treats these things as use and wear and tear. After all, we were paying for the right to use and occupy.

The same rational must be applied to rental properties. It is part of the property manager's role to educate lessors about fair wear and tear. Tenants in WA pay substantial rents to occupy rental properties. Part of what they pay for is the right to use and occupy. Using and occupying results in evidence of use, which is what fair wear and tear is all about.

However, tenants also have a responsibility to take care of the properties they are renting. Under section 38 of the RT Act, tenants have a responsibility to:

- Keep the property reasonably clean (section 38(1)(a));
- Advise the lessor, as soon as practicable, if there is any damage to the property (section 38(1)(b)); and
- Make sure that they don't cause or allow damage to be caused, either on purpose or by being negligent (section 38(1)(c)).

If a tenant has adhered to these three responsibilities, they may be able to argue that the lessor is responsible for fixing any damage as outlined in section 42 of the RT Act.

When determining fair wear and tear it may be useful to give consideration to information about the property under the following headings.

a. Length of Tenancy

The longer a tenant is in occupation of a property, the more wear and tear. It should also be noted that the more people who move into and out of a property, the more evidence of wear and tear on the property. When people move large items of furniture through a property, accidental damage can result, so a longer-term tenant can often be a better option for a lessor.

b. Number and age of occupants

The age and number of occupants in a residential tenancy may have an impact on the extent of wear and tear over the term of the tenancy. More occupants will often result in more wear and tear as scuffs and scrapes are a normal part of family life. Similarly, a residential tenancy with three small children is likely to show more evidence of wear and tear than a tenancy in which a single person lives alone.

c. Wear and Tear vs Accidental Damage vs Neglect

Fair wear and tear, accidental damage and neglectful damage are not defined in the RT Act.

A property manager may look to the PCR for a general definition of fair wear and tear. The PCR provides that *fair wear and tear* is a general term for anything that occurs through ordinary use such as the carpet becoming worn in frequently used areas. Wilful and intentional damage, or damage caused by negligence, are not fair wear and tear.

Accidental damage is often the result of a sudden, unexpected event and may include events outside of the tenant's control. Examples of accidental damage may include storm or hail damage. In most cases, the lessor is responsible for repairs that are caused by accident.

Neglectful damage can occur in a rental property if the tenant fails to take proper care of the property and its contents. Examples of neglectful damage for which the tenant is liable include:

- tears in the curtains caused by a pet;
- stains or burns from things that have been dropped or placed on carpets;
- a lock that was broken when the tenant forgot the key and broke into the house; and
- mould formed because the tenant didn't properly air the property.

d. Quality of the Property

Older properties that are tired and worn will show greater wear and tear, accumulated over a number of years. In contrast, signs of wear and tear in a newer property may be more obvious, because as soon as somebody lives in a brand new place, it is not brand new anymore – just like driving a brand new car out of the sales yard.

Where a tenant is in occupation of premises for an extended period, say over 2-3 years it may be worth working with the lessor to freshen up the property as the tenancy goes along. Upgrading or enhancing the property as time passes is the responsibility of the lessor, not the tenant. In older properties, the need for repairs is more likely to result from fair wear and tear and therefore, unless it is obvious that the tenant has caused damage, the lessor will be liable for these repairs.

Be sure to give consideration to the length of time since the property was painted or had floor coverings replaced etc. The longer the time gap between upgrades, the more wear and tear will be visible.

e. Dealing with Damage

A tenant cannot be charged for fair wear and tear to a property or the property chattels. Under section 42(2) of the RT Act, where actual damage occurs and can be reasonably repaired, the tenant is required to meet the repair costs.

If any damage is caused by a third party not connected to the tenant, such as a tradesman, then it becomes the lessor's responsibility to repair the property. This can also include damage caused by a burglar or a storm.

If burns or stains occur (e.g. to a carpet) the property manager must take into account factors such as the age of the carpet, its general condition and the degree of damage. Where replacement is required, the property manager must allow for depreciation as part of calculating the cost of replacement. This basically means that a tenant cannot be expected to replace 'new for old'.

The amount of depreciation is determined by the Australian Taxation Office who set depreciation rates for residential property and chattels.

Note:

Section 42A of the RT Act and Taxation Ruling TR97/23 –a deduction can be claimed for the cost of repairs to a rental property or business premises if they do not involve substantial reconstruction or substantial repair or the replacement of an entire structure like a fence.
<http://law.ato.gov.au/atolaw/view.htm?DocID=TXR/TR9723/NAT/ATO/00001>

<https://www.ato.gov.au/individuals/Dealing-wth-disasters/in-detail/Damaged-or-destroyed-property/When-your-property-is-damaged-or-destroyed/>

Case Study 2: Further issues to consider

The information provided in case study two would suggest that carpets and interior walls in the property are showing evidence of fair wear and tear. It is noted in the case study that over a ten year period, the carpets have not been replaced and the interior walls have not been repainted. As such, the lessor may not be justified in expecting the tenant to replace the carpets and paint the interior walls at their own expense.

However, the scuff marks and chips in the plaster of the wall in the main bedroom appear to be an example of neglectful damage for which the tenant should be liable.

It would be unreasonable for the lessor to expect the tenant to pay for the full costs of repainting all the interior walls and replacing the carpets in two rooms. It would however be reasonable for the tenant to share some of the cost in repairing the damaged wall in the main bedroom. The department recommends the property manager negotiate with the tenant on what they believe is fair and reasonable as the cost to cover the damage caused in the main bedroom or share in the cost to repair and paint.

Bond money can be used to pay for any costs for which the tenant may be liable at the end of the tenancy e.g. damage to the property, outstanding water charges or unpaid rent. In this case, some of the bond money could be held back to pay for the damage to the wall in the main bedroom, however it would seem unreasonable for the lessor to expect that the tenant is not entitled to receive any of their bond back.

The most likely outcome in such a scenario.

In this case study, if the property manager, tenant and lessor are unable to amicably resolve the issue, the tenant may choose to take action in the Magistrates Court to get their bond money back.

If it is necessary to seek a court order, a *Form 6 Application for Disposal of Bond Money* (available from the Magistrate's Court) should be completed. Depending on the situation, either the tenant or the landlord can begin this process.

Once the form is lodged, the court will send a copy to the other party, however the Applicant can choose to serve the notice to the other party. The Respondent has three options:

- agree to settle the dispute;
- dispute the application by lodging a Form 5 Notice of Intention to Dispute Application for Disposal of Bond Money (available from the Magistrate's Court) within seven days, when the matter is set down for hearing before a magistrate; or
- ignore the notice, the court may then issue an order for the release of the bond after seven days.

If a dispute goes to court at the end of a tenancy, the magistrate will make an order as to how the bond money is paid out.

Case Study Three – Risk management and personal safety during a final inspection

“Phew!”, sighed Jenny, relieved that Steven, the world’s worst tenant had finally vacated. All that was left was the final inspection and disposing of the bond, then she would never have to see or speak with Steven again.

Steven and Penelope had seemed like a really nice couple when they moved in, but once Penelope left, Steven seemed to have become more and more argumentative. Jenny had experienced several heated conversations with him during routine inspections and was really not looking forward to this final inspection; particularly given the fact that Steven had made it clear he intended to exercise his right to be present during the final inspection.

Jenny got there early so that she could do as much of the inspection as she could before Steven arrived. She heard him drive up and took a deep breath as she heard Steven’s car pull up behind hers in the driveway. “He’d better not give me a hard time”, she thought to herself.

Steven had a smile on his face as he walked through the door, or was that a smirk? He started with his smartass comments shortly after he walked in. Jenny could feel the tension in her throat and her chest as she pointed out the weeds in the garden beds, the mould in the corners of the shower and carpets that had clearly not been cleaned by anybody who knew what they were doing.

Steven snarled at Jenny, so she snapped back. The tension was building – Jenny just kept thinking that once he left today she didn’t have to put up with his attitude anymore, “If he wants his bond back, he’ll just have to pull his head in”.

Steven started pacing back and forth, “like a caged lion”, Jenny thought to herself. Suddenly he swung around, screaming abuse and swearing as he launched himself towards her. Jenny had no idea what had happened as he stormed out of the laundry door. Confused, bewildered and terrified she realised that he had hit her in the face pretty hard. She was aware of him now, in the back garden punching and kicking things around the patio. She was also aware of blood dripping from her face.

Everything in her being screamed ‘get out of here’, except for the bit that was worried about the property, the security, the lessor and the new tenant who was due to move in two days from now.

Jenny struggled momentarily then headed out of the front door. Jenny stopped in her tracks; Steven’s car was parked behind hers! What was she going to do now?

Note: Questions 17 – 19 in the quiz relate directly to case study three.

Case Study Three: Issues to consider...

When does a problem like this begin?

Jenny's problem probably began when Steven's girlfriend, moved out and Steven started to become argumentative.

It should be acknowledged that there is the potential for significant disputes to arise during the final inspection of a property.

Property managers should endeavour to develop relationships with tenants that are based on mutual respect and maintain these throughout the tenancy. If issues arise between a tenant and property manager during a tenancy and are not resolved, they could escalate into problems that become unmanageable and potentially unsafe, particularly at the time of final inspection.

What are the warning signs with a problem like this?

It is apparent that Jenny was not expecting a smooth and pleasant final inspection. This raises several different points of discussion, the first and obvious one being could Jenny have avoided her horrible encounter if she had acted upon some of the obvious warning signs. Arguably, if she had acted upon the warnings signs earlier, she could have avoided the very dangerous situation she found herself in during the final inspection.

Some of the warnings signs Jenny could have acted upon are listed below, as are the references to these taken from the case study (in italics).

- The tenant became argumentative – *"He seemed to have become more argumentative"*
- There were heated conversations at previous routine inspections – *"Jenny had experienced several heated conversations with him during routine inspections"*
- Jenny was clearly uncomfortable that the tenant may elect to attend the inspection but failed to acknowledge her gut feelings – *"Jenny was not looking forward to this final inspection"*
- Her tension was increasing – *"Jenny knew Steven intended to be present for the inspection"*
- The moment Steven started pacing back and forth during the final inspection.

How can we do things differently to reduce the risk of such a horrible encounter?

We can consider this question from two angles:

1. Preventative strategies

What can we do to reduce the likelihood of a situation like this from occurring in the first place?

2. Reactive strategies.

In the unfortunate event that you find yourself in this situation, what should you do?

Preventative strategies:

Let's explore some preventative strategies you and your agency *can put in place* to ensure your personal safety during property inspections. You may find some or all of these are already in place in your agency. If not, perhaps it is something you can discuss with your colleagues and licensee.

1. Consider developing a risk management strategy and/or plan for your agency

A property manager should never have to fear for their personal safety as part of their work. But what should happen in a perfect world and what does happen in the real world are not necessarily the same. It is a fact of life that we all face risks to our personal safety; facing and acknowledging this fact, then behaving accordingly, can go a long way to minimising the risks that we face.

It is probably fair to say we need to consider risk management and mitigation strategies on day one of a new tenancy.

Does your agency have a risk management plan and/or strategy in place when it comes to conducting inspections?

If not, perhaps you could consider developing one? If you are in a small agency, perhaps a bullet point guide or a regular discussion about risk management and preventive measures is all you need! What is important is that you have given due consideration to the potential problems that could occur whilst conducting an inspection and have some risk mitigation strategies in place.

Listed below are some key issues to consider in the formation of a risk management plan:

- Keep proper records of any abusive, argumentative or aggressive encounters with a tenant and make sure you report these to your licensee.
- Make sure any staff that are likely to have dealings with a problematic or difficult tenant are informed of the tenant's previous behaviour.
- Once a dispute has occurred and a tenant's potential for aggression has been flagged, the property manager needs to exercise caution in dealing with that tenant in the future.
- Precautions may include:
 - involving the Licensee in discussions with the tenant;
 - not attending inspections at the specific property alone; and
 - if necessary, sending another property manager along to conduct an inspection if a personality clash is an issue.
- Do not ignore conflict and disputes.
- Work in a respectful and courteous manner to resolve issues with tenants.
- Be aware of parking your vehicle in such a way that does not allow you easy access to leave the property quickly, if necessary.
- Always remember that for the unskilled negotiator, abuse, aggression and violence may be the only way they know to win an argument or get their own way. Do not challenge their behaviour with more aggression.
- Trust your gut feelings – if a situation does not feel right, do what you can to leave safely.

The **Worksafe** Division of the DoC has produced a *Guidance Note* that explains the occupational safety and health laws that apply to people who work alone (referred to in the regulations as 'isolated' employees). It covers general requirements in the *Occupational Safety and Health Act 1984* (the OSH Act) and specific regulatory requirements where they exist. In the absence of a formal risk management strategy/plan in your agency, you may like to refer to this *Guidance Note* for more information on working alone. The *Guidance Note* is available on the DoC website via the following link: http://www.commerce.wa.gov.au/sites/default/files/atoms/files/working_along.pdf

2. Try to create a climate of mutual respect between you and the tenant

When people are transacting in real estate, whether as lessors, tenants, buyers or sellers, they are likely to be experiencing a level of stress. Stress can make people irrational, emotional and prone to saying and doing things that they might not say or do in less stressful situations.

If we, as property managers are able to build solid relationships with tenants, based on mutual respect and open transparent communication, we immediately start to reduce our own stress and we start to minimise risks. Property managers should be mindful of their responsibilities under *section 7 and 9 of the Code of Conduct* to act fairly and with due skill, care and diligence in their interactions with the tenants.

The risks we minimise include the extreme example of an assault, as given in the case study, but might also include the risks of a tenant damaging a property out of frustration or spite, the risks of a tenant feeling disrespected and the risks of a tenant being disrespectful to us. At the end of the day we are all just people and we all like to feel valued, respected and worth something. As human beings, we all behave better when we feel that we are being listened to rather than ignored, spoken with rather than spoken at and involved in a conversation rather than being berated or told off.

3. Consider training for you and staff in your agency

Consider the need for training in risk management, stress management, occupational health and safety for you and staff in your agency.

Reactive strategies

So you may or may not have the above practices in place in your agency, but you now find yourself in a dangerous situation in which your personal safety is in jeopardy ... what are you going to do?

The number one consideration in a scenario like the case study provided must be the personal safety of the property manager (number two would be the security of the property!).

1. Look for the warning signs.

If you read back over the case study, you can see that the relationship between the tenant and the property manager had broken down some time ago. Evidence of this is in the statement: *'since his girlfriend left, Steven seemed to have become more and more argumentative.'* 'Jenny had experienced several heated conversations with him during routine inspections'.

From a risk management point of view, these are events that should start to ring alarm bells!

There are going to be the odd few tenants who may never respect you regardless of your attempts to connect and empathise with their situation. Some people are just not going to work out as tenants. Sometimes we will come across people like Jenny's difficult tenant in the case study. So how do we deal with this sort of behaviour?

Let's look back at the warning signs Jenny encountered in the case study....

"Jenny could feel the tension in her voice and her chest. Steven snarled so she snapped back. The tension was building..."

If you find yourself in this situation:

1. **Stop!** You do not need to turn this into a debate and even if the tenant wants to, you don't need to win!
2. Putting your safety first may mean being a little more conciliatory than you are used to. But that is ok as long as you walk away safely from the situation.
3. Be aware of your personal safety all the time! Do not park on driveways or in other situations where you can end up trapped.
4. Remember, personal safety is number one, the property is number two. You may both be insured but rebuilding a property is far more viable than rebuilding you.

It is important to remember that conflict rarely erupts from nowhere! There will usually be a source or reason that will provide some explanation for the conflict. The source could be purely environmental, the person is very stressed because they have lost their job, their relationships are broken, they are under financial pressure etc.

From our business perspective property managers can empathise with people's problems, but they cannot solve them. However from our personal safety point of view, we need to be very, very aware of when their behaviour starts to suggest that their problems could become the cause of our next problem.

In a general sense, this will come down to acknowledging conflict when it exists and dealing with it in a constructive manner, rather than allowing it to slowly fester and inflame. Property managers should endeavour to be proactive in resolving issues rather than ignoring them and hoping they will go away.

2. Arrange for a colleague to conduct an inspection if you feel a problem may arise.

As a property manager, if and when you become aware of a tenant's tendency to be aggressive, you need to take that knowledge seriously. Arrange for a colleague to attend inspections with you; do not put yourself in a situation where you are at risk.

Resources

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