



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

# Mandatory CPD

## Sales Representatives

**MODULE ONE: Distance Learning Participant Manual**

2015

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## 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](mailto: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](mailto: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 DOCs role in administering the real estate industry and of the different ways legal requirements impact on real estate agencies.

This part of the session will assist real estate practitioners 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 Offer and Acceptance;
- 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 allowing 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 Sales Representatives 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 and sales representatives may be implicated.**

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

### QUICK QUIZ: How much do you know? Only Commercial & Business Sales Representatives 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 sales representatives 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 2. Real Estate and Business Agents Act	a. State Administrative Tribunal b. Department of Commerce
Tenants vacated a shop that had been a dry cleaner, due to health issues. It was sold without disclosure (or any other action). It proved to be contaminated.		3. Common law 4. Building Act 2011 and Building Regulations 2012	c. Privacy Commissioner d. ACCC
A business broker disclosed a seller's confidential financial information to a competitor without permission.		5. Australian Civil Aviation Safety Regulations 1998 6. Contaminated Sites Act	e. Court system – civil claim f. Department of Environment Regulation
An agent filmed a property using a drone (UAV). A neighbouring tenant was filmed sunbathing.		7. Privacy Act 8. Fire and Emergency Services Act 1998	g. Civil Aviation Safety Authority h. DOC – WorkSafe
A sales representative did not arrange repairs to stairs in a partly vacant retail building, after being given written notice—someone was injured as a result.		9. Surveillance Devices Act 1998 10. Fair Trading Act 2010 11. Occupational Safety and Health Act 1984 12. Criminal Code Act Compilation Act 1913	i. Department of Fire and Emergency Services j. Local Government k. WA Police 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)*
- *Retirement Villages Act 1992*
- *Auction Sales Act 1973*
- *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)*
- *Business Names Act 1962 and Business Names (Commonwealth Powers) Act 2012*

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 has been enacted by Parliament – i.e. that has 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*
- *Foreign Acquisitions and Takeovers Act 1975*
- *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) 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](https://www.slp.wa.gov.au/legislation/statutes.nsf/main_tablesacts.html)

Sales representatives 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. *a buyer was not informed of a brothel next door;*
- breach of confidence – e.g. *sales person revealed a seller’s financial situation to a buyer;*
- defamation – e.g. *an agent made statements harmful to the reputation of another agent;*
- trespass (land) – e.g. *a sales person entered a property to remove a competitor’s sign;*
- trespass (personal) – e.g. *an agent 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 Magistrate's 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 sales representative'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, its 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 sales representatives 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.*

**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 agents and sales representatives 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 & business sales representatives only

**Consider the following case and answer the questions.**

*A sales representative sold a shop on the basis that it was returning 10%. His agency was not managing the property and he was unaware that the tenant had been offered sizeable incentives (including a 3 month rent-free period which was still ongoing). The rent quoted to buyers was illusory. The tenancy ended in eviction as the tenant did not pay the rent. The buyer succeeded in a claim against the seller but the agent was not found liable.*

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

YES/ NO

**Why (or why not)?**

**Can legal consequences always be avoided if you make sure that you don't find out inconvenient facts?**

YES/ NO

**Why (or why not)?**

---

## 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 land sales and leases (except for general commercial leases), particularly in relation to consumer protection. General principles of contract law can apply to contracts agencies enter into with clients or facilitate when selling or leasing property.

#### Formation of a contract

##### Agreement

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 O&A, the purchase 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 (this is stated in the trust deed). The contract should show that the person enters into the contract 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 3 years must be **in writing** under the *Property Law Act 1969* (WA). Both the CTRSA and the RTA allow for circumstances where a tenancy agreement has been entered into orally. A property contract should be fully **executed** in writing to ensure it is enforceable i.e. 'signed' and dated by the parties and witnessed as required.

## Terms and Conditions

Under common law a contract's Terms 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 writing. 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 contract may be expressed as **conditions** (the contract is 'subject to' a condition, i.e. the contract depends on the condition). If a condition is not fulfilled, the contract may be 'voidable' (i.e. a party must take steps, such as giving notice by an agreed time, to end the contract).

A **contingent condition** is a condition the parties can't control— e.g. the approval of finance, zoning or licenses. If the condition is not fulfilled, one or both parties may be entitled to end the contract. If a contract has a contingent condition, parties should keep in mind 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' finance*, it can complicate matters. Using precise language, referring to independent experts (like licensed pest controllers or builders) and setting legally definable time limits (e.g. '2 business days' not '48 hours') may help to avoid disputes.

A **promissory condition** is a condition intended to be binding. Breaching a promissory condition breaches the contract but will not usually end the contract (unless the term states that 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 contract to an end, but again the injured party can seek damages.

## Some general rules

Some common law terms are implied in every contract. For example, the common law implies a term requiring parties to do whatever is reasonable and necessary to enable the contract to be performed. This does not have to be written into the contract to be effective.

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 contract are bound by the contract. Conditions requiring a third party to do something (e.g. *'purchase subject to the neighbour getting rid of their pet pig'*) are usually unenforceable – this is known as privity of contract.

Parties are usually bound by a contract that they sign, regardless of whether they have read and understood the terms – but some exceptions apply.

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

## **Termination**

### **Some issues that can mean a 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. Courts seem to support an offeror's right to revoke any time prior to acceptance, even if they promised to keep an offer open until a particular time, 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**

Generally the death of the offeror will terminate an 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, the 'postal rule' doesn't apply, so there may be no contract.

### **Other issues that may mean a contract can be rescinded, terminated or voided**

#### **Uncertainty**

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

#### **Misleading conduct**

Misrepresentation may provide common law grounds to terminate a contract.

#### **Mistake**

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

#### **Duress**

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

### **Undue influence**

Undue influence may render a contract 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 contract requires something illegal, the contract may be unenforceable.

### **Non Performance**

If contractual obligations are incomplete, one party may seek to end the contract.

### **Discharge by agreement**

Parties are free to terminate a contract by mutual agreement.

### **Discharge for breach**

Breach of contract may give the non-breaching party a right to terminate a contract. Minor or technical breaches will generally not allow the non-breaching party to terminate.

### **Discharge by frustration**

A contract may end because of an event beyond the control of the parties – e.g. if the property is destroyed (the Joint Form of General conditions confirms this expressly).

### **Death**

Although contractual liabilities pass to a dead person's estate, this is not practical if a sale is incomplete. A deceased seller can't transfer title and a deceased buyer can't pay a purchase price. A new contract between the estate and the buyer is possible.

For lease agreements under the RTA a tenant's interest in a tenancy ends if they die. The lease continues with any surviving tenants. For commercial leases a tenant's death usually transfers their interests and obligations under a lease to their 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 contract contradict one another, the more specific clause will usually prevail. If a term contradicts the Joint Form of General Conditions, the contract term prevails.

### **Terms that breach a statute**

- A lease has terms that breach (or contract out of) the RTA: those terms become void
- An agent does not disclose an interest in a property: their contractual agreement re commission becomes unenforceable under the REBA Act.
- A Retail Shop Lease has terms that attempt to contract out of the *Commercial Tenancy (Retail Shops) Agreements Act 1985*: those terms become void.
- Forms 28 and 29 are not provided in a strata sale: the contract becomes voidable.



## Multiple counter-offers

With real estate contracts subject to multiple counter-offers, it is not easy to say what is 'offer' and what is 'acceptance'. Each counter-offer may technically be a new offer. If a court looks at the matter, it will evaluate circumstances and conduct of the parties to decide.

It is important that all parties sign all changes on each counter-offer and date offers. Once an offer is accepted, acceptance must be communicated.

## Other considerations

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

Both parties are vulnerable if buyers, sellers or tenancy applicants do not understand what they have agreed to, contract for more than they can fulfil, or enter into a contract before they are sure they wish to commit. Pressing buyers, sellers or tenancy applicants to go beyond their means or '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 sales representative conducted themselves can be important.

**Contract law principles apply to all the agreements a sales representative facilitates or enters into.**

This includes:

- Appointments to Act
- Offer and acceptance contracts
- 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 sales representative 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 “2% of sale price” - 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 sales representative 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 with residence. The seller is an old friend. The shop is in a country town having a growth spurt due to a new government facility opening nearby.*



*You are not a local but your friend insists he wants you to sell the property. He has set a price. Your research confirms it is fair.*

*The property is sold to an investor from your database who later complains that it cannot be let for love or money, in spite of a strong market. He has discovered 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.*

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## Scenario 2

*The owners of a strata unit in an older building listed the unit for sale.*

*The sales representative was given a copy of the strata plan and by-laws by the sellers and gave copies to prospective purchasers with Forms 28 and 29.*

*There were costly repairs needed that the sales representative was not aware of (and so did not disclose) and there was no sinking fund or other provision for the work that needed to be done.*

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## 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 interests

**Choose one of the following cases and answer the questions**

1. *An agent appraised and listed a rural property. The seller was desperate for a quick sale. His son-in-law's company was willing to buy the land. They had regular dealings with the agency, buying and selling property. The agent provided a disclosure form disclosing the personal relationship with the buyer in a pile of other papers –the seller signed it along with everything else. They did not discuss the form. The property was sold, then resold at a much higher price a few months later.*

**Was the agents 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?**

YES / NO

**Explain.**

**What would best practice have been in this situation?**

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- 
2. 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 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 agents conduct technically compliant with the REBA Act and Code?**

YES / NO

**Do you think there are any possible breaches of common 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 their employee) 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

Sales representatives can act as property managers in WA so must be aware of good practice. 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 requirements of the relevant Acts. A checklist appears in Appendix 2. 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 use as a residence (e.g. faulty locks, no smoke alarms)?
- 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?
- Is there a compliant Property Condition Report prepared with all required information?



### Activity 4 Case study – tenant profiling

*You list a three 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 Offer and Acceptance – residential and commercial

The *O and A* is a binding legal contract (provided it is properly prepared and executed). Unlike the lease, the wording is not prescribed by legislation. All the usual protocols for signing legal agreements apply, as well as the requirements of the relevant Acts.

We have already highlighted some principles that apply to every contractual agreement an agent or any agency employee facilitates between other parties in the section on contract law. We will also take this opportunity to highlight the issues when amending *O and A* contracts.

### Requirements with respect to amending contracts

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

It is however not uncommon for parties to want to vary the terms of an existing contract after it has been agreed, for instance to change a settlement date. This must be handled with care.

There are a number of ways parties to a contract can choose to vary the contract. 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 vary a contract legally can help you to avoid potential liability if one party does not act as agreed or misunderstands the agreement, with unwanted results.

A variation is at law a contract in itself, so it must meet all the same requirements of any other contract for the sale of land.

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

#### Lawfulness

If there is a problem such as a change of heart as to whose name should be on the contract as buyer, this may not be able to be effectively fixed by using a variation, because of duty issues. Buyers should seek legal advice or advice from the Department of Finance.

#### What the contract allows for

If a contract has a clause or provisions for how the contract may be varied, comply with this (e.g. s8 of the JFGC allows for variation of settlement date where a property is badly damaged).

#### Deed of amendment or variation

Because the Property Law Act states that *'no interest in land is capable of being created or disposed of except by writing signed by the person creating or conveying the interest'*, contract variations relating to the sale of land must be done in writing. A deed is best as it does not require consideration (some courts have refused to uphold contract variations with no consideration).

#### Expiry

If a contract has already expired, it cannot be varied. A new contract is required. An attempted variation after expiry will not be enforceable.

### **Consistency**

If a contract was originally signed by two sellers and two buyers, then all four parties must sign for any variation. If it is a corporate contract check authority levels before resigning.

Any variation should make sense in the context of the remainder of the wording in the contract. For instance, make sure special conditions still work – they may need to be changed or removed if they no longer apply.

### **Permission**

Parties should consider whether any consent or approval is required from third parties such as mortgagors.

There can be serious consequences if you vary a contract but do not do it in an enforceable way. For instance agents who have agreed to alter settlement dates based on emails between the parties, have been burned and ended up carrying penalty costs.

Emailed variations to management agreements have also often proven unenforceable. Taking time to execute variations formally can help prevent disputes and claims against the agency.

Appendix 3 provides a useful reference when completing Offer and Acceptance contracts.



## 2.6 Commercial leasing

Commercial leasing agreements are too complex to cover in a session of this length, however a few key points that link with our themes of contract law and best practice are worth noting.

**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 if the 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 sale.



### Activity 5 Case study – commercial & business broking

#### Complete one of the two case studies

##### 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**



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## 2. Case study – business broking

*You are involved in the sale of a small business that sells and hires out coffee machines. It has taken a long time to find a buyer and you want to ensure a smooth settlement and avoid delays.*

**What checks and searches could you carry out or request early, to ensure paperwork is correct and that there are no surprises at settlement in relation to what is included in the sale?**

**Discuss issues that can delay settlement but could be identified early by these searches.**

**What risks do these issues present?**

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## 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. Sales representatives have a part to play in this.

Non-compliance can lead to an agency and sales representative 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 sales representative'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
	Always initial every page of the O and A	<b>Legally Required / Not Required / Best Practice</b>
	Issue a copy of by-laws to strata tenants	<b>Legally Required / Not Required / Best Practice</b>
	Carry out new Title search if renewing a listing	<b>Legally Required / Not Required / Best Practice</b>
	Take photos for the initial PCR	<b>Legally Required / Not Required / Best Practice</b>

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 understand that research indicates that better compliance leads to higher profits, and 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 sales 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 matrix following 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 are included not only because registered sales representatives can act as property managers but because these cause many of the most expensive claims in agencies and there is overlap when sales people sell managed properties. Issues where owners are usually primarily liable are included because these often affect agents, when owners facing a claim seek to pass on liability.*



## Activity 6

**Complete one of the following exercises using one of the four matrices on the following pages.**

### Residential

Choose a topic from the following pages (Matrix 1, 2, 3 or 4) 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.

### Commercial

Look at the smoke alarm practices discussed in Matrix 2 and consider the equivalent commercial practices 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.

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**Business broking**

Look at the seller ID practices discussed in Matrix 1 and consider the benefits of 100 point ID processes as a 'best practice' in business broking.

Are you using 100 point ID checks on buyers and sellers? YES / NO

If not, could doing this remove some risks? YES / NO

Consider how buyer and seller identity impacts on the sale of businesses e.g. confidentiality issues.

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## MATRIX 1: Issue – Identification of sellers

<p><b>Legal compliance (minimum)</b></p>	<p><b><i>Real Estate and Business Agents Act 1978, Code of Conduct for Agents and Sales Representatives</i></b></p> <p><i>A sales representative must on receiving instructions to offer real estate for sale, obtain a copy of the certificate of title for the property to get the name(s) of the registered proprietor(s). The sales representative must then make all reasonable efforts to verify the identity of each person who claims to be the owner, or to act for them.</i></p> <p><b>OTHER RELEVANT COMPLIANCE ISSUES:</b></p> <p><b>REBA Code</b> Sections 4, 9, and 10</p> <p><u>Sales representatives 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><b>Common law</b></p> <p><u>Sales representatives must</u> carry out every professional service or duty diligently. If loss, harm or damage is suffered a 3rd party to whom they owe a duty of care (e.g. a seller) due to a failure of the agent's, this could give cause for legal action based on negligence to recover damages.</p> <p><b>Privacy Act</b></p> <p><u>Sales representatives should</u> only collect personal information they need and should give a Privacy Notice stating:</p> <ul style="list-style-type: none"> <li>• why they want to collect the information and who it will be disclosed to;</li> <li>• any consequences if it is not provided;</li> <li>• that the person can access the personal information and can complain about its handling.</li> </ul> <p><b>DOC Guidance notes</b> suggest that <u>agents should</u> confirm the identities of each owner (or person claiming a legal right to sell a property) via a 100 point check, face-to-face, using original documents. If the person is not directly accessible, ensure that documents used for 100 point check are verified as true copies of originals by a suitable independent witness. <u>If sales representatives deviate from this method, then the onus is on them to prove they have taken reasonable steps to confirm the person's identity.</u> Sales representatives should retain copies of all documents obtained in the process.</p>
<p><b>Common Industry Practice</b></p>	<p>Most agencies ask for 100 points of identification from sellers and take a copy of it.</p> <p>Many do this 100% of the time, even where the seller is known to them.</p> <p>The DOC are satisfied there is a high level of compliance with the REBA Code in this area.</p> <p><i>There may not be such high compliance with the Privacy Act.</i></p>
<p><b>Best practice</b></p>	<ul style="list-style-type: none"> <li>• Ask for 100 points of ID from every seller. There is some discretion if the seller is known to the agent.</li> <li>• Ask for permission to take a copy of ID – if permission is not given, sight the ID, ensure appearance and signatures match and note the unique number of the ID.</li> <li>• Issue a compliant Privacy Notice and keep personal information secure.</li> <li>• Have an internal process to destroy personal information records after they are no longer needed.</li> <li>• Have appropriate procedures to check Power of Attorney is legitimate with Landgate.</li> <li>• Have appropriate procedures when companies are transacting.</li> </ul>
<p><b>Potentially risky practices</b></p>	<ul style="list-style-type: none"> <li>• Not completing the 100 point check. Not issuing a Privacy Notice (potential Privacy breach).</li> <li>• Not comparing the documents provided with the person's appearance and signature.</li> <li>• Keeping documents with personal information when they are no longer needed (Privacy breach).</li> <li>• Using a mobile phone to copy personal information - (potential Privacy breach if 'cloud' is overseas).</li> </ul>

<b>MATRIX 2: Issue: Smoke alarm compliance</b>	
<b>Legal compliance (minimum)</b>	<p><b>Building Regulations 2012</b> <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). <b>After May 2014 multiple alarms must be interconnected <u>when replaced and in new buildings</u></b>. Maintenance is not mandated – for best practice see Appendix 1.</p> <p><b>OTHER RELEVANT COMPLIANCE ISSUES:</b></p> <p><b><i>Residential Tenancies Act 1987</i></b> 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><b>REBA Code</b> 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><b>Common law</b></p> <p><u>Sales representatives 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>
<b>Common Industry Practice</b>	<p>Sales listings:</p> <ul style="list-style-type: none"> <li>visually inspect to see if smoke alarms are present when listing or</li> <li>advise sellers of the legal requirement to have alarms installed before selling.</li> </ul> <p>Property Management:</p> <ul style="list-style-type: none"> <li>check to see if smoke alarms are present and/or advise owners of the legal requirements;</li> <li>include in lease that tenants should test smoke alarms and tell the agency if they don't work;</li> <li>suggest owners pay for an annual service to test the alarm / replace back-up batteries.</li> </ul>
<b>Best practice</b>	<p>Sales listings:</p> <ul style="list-style-type: none"> <li>ask sellers to disclose <b>in writing</b> whether smoke alarms are fitted / functional;</li> <li>if no alarms are installed, advise seller <b>in writing</b> of the legal requirements.</li> </ul> <p>Property Management:</p> <ul style="list-style-type: none"> <li>ask owners to disclose <b>in writing</b> whether smoke alarms are fitted and functional;</li> <li>if no alarms are installed, advise lessors in writing of the legal requirements;</li> <li>keep written evidence of all steps to ensure compliance on file;</li> <li>require tenants to fill in a form confirming they have dusted and tested the alarm;</li> <li>test alarms during each inspection;</li> <li>strongly recommend an annual service to test alarms / replace batteries;</li> <li>have a calendar system for back-up batteries / 10 year replacement;</li> <li>advise owners <b>in writing</b> of the need to have multiple alarms interconnected on replacement.</li> </ul>
<b>Potentially risky practices</b>	<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"> <li>No arrangements for inspection, testing or maintenance of smoke alarms.</li> <li>No diary system for back-up battery replacement / alarm replacement / testing of alarms.</li> <li>Owners maintaining smoke alarms themselves between tenancies.</li> <li>All responsibility with tenants to inspect, test, replace batteries including aged / vulnerable tenants.</li> <li>Telling owners that it is a legal requirement that they pay for an external service to test alarms.</li> <li>Agency never checking alarms or checking the work of outside contractors.</li> <li>Not being familiar with WA government guidance note on Smoke Alarms <a href="http://www.dfes.wa.gov.au">http://www.dfes.wa.gov.au</a></li> </ul>

### MATRIX 3: Issue: Swimming pool and spa safety

<b>Legal compliance (minimum)</b>	<p><b>Building Act 2011 and Building Regulations 2012 and Australian Standard AS 1926.1-1993</b></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><b>OTHER RELEVANT COMPLIANCE ISSUES:</b></p> <p><b>REBA Code</b> Section 4, 9, and 10</p> <p><u>Sales representatives 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>Sales representatives must</u> disclose material facts to those affected by them.</p> <p><b>Residential Tenancies Act 1987</b> 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><b>Common law</b></p> <p><u>Sales representatives should</u> carry out every professional service <u>or</u> duty diligently. If loss, harm or damage is suffered a 3rd 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>
<b>Common Industry Practice</b>	<p>Sales</p> <ul style="list-style-type: none"> <li>ask sellers whether pool/spa is compliant;</li> <li>make disclosure to buyers if sellers disclose that the pool/spa is not compliant.</li> </ul> <p>Property Management</p> <ul style="list-style-type: none"> <li>ask owners whether pool/spa is compliant;</li> <li>ask owners of non-compliant pools/spas to ensure compliance prior to letting.</li> </ul>
<b>Best practice</b>	<p>Sales - as above <u>plus</u>:</p> <ul style="list-style-type: none"> <li>ask seller for <b>written disclosure</b> including a statement about whether pool/spa is compliant;</li> <li>recommend <b>in writing</b> that pool/spa is made compliant prior to marketing if it is not already;</li> <li>ask sellers for a <b>copy of the local government certificate</b> of compliance for buyers <u>or</u></li> <li>make <b>written disclosure to buyers</b> if pool/spa is not compliant;</li> <li>consider pool safety at <b>home opens</b>.</li> </ul> <p>Property Management - as above <u>plus follow agency policies e.g. to</u>:</p> <ul style="list-style-type: none"> <li>not let properties with non-compliant pools/spas;</li> <li>require <u>all</u> owners to provide a local government certificate of compliance prior to letting;</li> <li>treat <u>all</u> repairs to pool fences/ gates, doors / windows opening onto pool areas as urgent;</li> <li>check that pool/spa fences / gate locks are sound and functional at every inspection.</li> </ul>
<b>Potentially risky practices</b>	<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"> <li>selling or letting a property with a non-compliant pool or spa;</li> <li>not asking for certified proof of compliance from an owner;</li> <li>allowing tenants to move in before a pool or spa is compliant;</li> <li>not checking that a pool at a rental property remains compliant over time;</li> <li>delaying pool gate or pool fence repairs for any reason.</li> </ul>



## MATRIX 4: Issue: Completion of initial Property Condition Report (PCR)

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



# Bibliography

## Articles and Papers

Buyer and tenant beware - registration of leases in WA - *Brian Pass & Fabrice Lincoln DLA Piper* 2013  
<http://www.mondaq.com/australia/x/249740/landlord+tenant+leases/Buyer+and+tenant+beware+registration+of+leases+in+Western+Australia>

Consequences of defective execution clauses - *Peter Beekink - Lavan Legal* April 2012  
[http://www.lavanlegal.com.au/index.php/publications/publicationdetail/consequences\\_of\\_defective\\_execution\\_clauses](http://www.lavanlegal.com.au/index.php/publications/publicationdetail/consequences_of_defective_execution_clauses)

Contract Law—*Julie Clarke*  
<http://www.australiancontractlaw.com>

Did you know? Amending contracts - tips to avoid common mistakes *Ben Cansdale Clayton Utz* 2009  
<http://www.claytonutz.com/publications/newsletters>

Good decision-making for government - Interpreting legislation - *Clayton Utz* 2006  
[http://www.claytonutz.com/docs/GDMG\\_InterpLeg.pdf](http://www.claytonutz.com/docs/GDMG_InterpLeg.pdf)

Make good, 'fixtures' and the impact of the PPSA *Rob Jarvin - Dibbs Barker* May 2013  
[http://www.dibbsbarker.com/publication/Landlord\\_and\\_Tenant\\_alert\\_Make\\_good\\_fixtures\\_and\\_the\\_impact\\_of\\_the\\_PPSA.aspx](http://www.dibbsbarker.com/publication/Landlord_and_Tenant_alert_Make_good_fixtures_and_the_impact_of_the_PPSA.aspx)

Networked Knowledge Law Lectures – Contract Law *Dr Robert N Moles*  
<http://netk.net.au/Contract/06Termination.asp>

Precedent – Report on Australia - *The Honourable Justice Michael Kirby* July 2006  
[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_17jul06.pdf](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul06.pdf)

Unconscionability and good faith in business transactions *Paul Vout - Dawson Chambers* 2013  
<http://www.law.monash.edu/centres/commercial-law-group/unconscionability-and-good-faith-in-business-transactions-paul-vout.pdf>

Vendor's IM – Get it wrong, pay the damages bill - *Jaele Berkovits - Allen's Linklaters* April 2014  
<https://www.allens.com.au/pubs/realstate/cure8apr14.htm>

## Government Publications

### Government of Australia

Australian Law Reform Commission *Overview of Current Law - Existing common law causes of action*  
[http://www.alrc.gov.au/publications/3-overview-current-law/existing-common-law-causes-action#\\_ftn49](http://www.alrc.gov.au/publications/3-overview-current-law/existing-common-law-causes-action#_ftn49)

Productivity Commission 2013, *Regulator Engagement with Small Business Research Report*, Canberra  
<http://www.pc.gov.au>

### Government of Western Australia

Department of Commerce - *Consumer Protection Part II Enforcement and Prosecution Policy*  
*Renting a home in Western Australia – A tenant's guide - Rules for Pools and Spas*  
<http://www.commerce.wa.gov.au>

Environmental Defender's Office of WA *Common Law: Trespass, Nuisance and Negligence*  
[http://www.edowa.org.au/files/factsheets/iel\\_commonlaw.pdf](http://www.edowa.org.au/files/factsheets/iel_commonlaw.pdf)

Small Business Development Corporation *Leasing Commercial Property*  
<http://www.smallbusiness.wa.gov.au/leasing-commercial-property>

## Activity answers

### QUICK QUIZ How much do you know? Only Residential Sales Representatives 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 and sales representatives may be implicated.**

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

## QUICK QUIZ How much do you know? Only Commercial & Business Sales Representatives 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 sales representatives may be implicated.**

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

## Activity 1 Residential sales representatives 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.*

**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 agents and sales representatives 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's interpretation –agents 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 & business sales representatives only

**Consider the following case and answer the questions.**

*A sales representative sold a shop on the basis that it was returning 10%. His agency was not managing the property and he was unaware that the tenant had been offered sizeable incentives (including a 3 month rent-free period which was still ongoing). The rent quoted to buyers was illusory. The tenancy ended in eviction as the tenant did not pay the rent. The buyer succeeded in a claim against the seller but the agent was not found liable.*

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

**Why (or why not)?**

**This judgement was made on the facts of the case in another jurisdiction – the seller had set out to conceal the situation from the selling agent. Given slightly different facts the outcome may have changed. In another case where incentives given to the anchor tenant were not disclosed, the plaintiff won in court under common law. Under WA law, there may have been a breach of the Code of Conduct.**

**Can legal consequences always be avoided if you make sure that you don't find out inconvenient facts? NO**

**Why (or why not)?**

**Because the Code of Conduct requires diligence in ascertaining the facts about a property.**

QUICK QUIZ	Appointment to Act – <u>is it invalid?</u>	True/False/Maybe
	The agent or sales representative has not yet completed CPD this year	Yes / No / <a href="#">Maybe</a>
	One owner signed the authority document for both owners	Yes / No / <a href="#">Maybe</a>
	The document was printed off and signed by an owner overseas who then scanned and emailed the document back to the agency.	Yes / <a href="#">No</a> / Maybe
	Remuneration field says "2% of sale price" - no dollar amount is shown	<a href="#">Yes</a> / 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 / <a href="#">Maybe</a>

## Activity 2

Assuming the basics of a valid Appointment to Act are in place, what can an agent do at the time of listing a property to reduce agency risk? Choose one of the following scenarios and discuss what type of 'best practice' at the time of signing the agency agreement could have helped avoid the problem

### Scenario 1

*You are invited to list a vacant shop with residence. The seller is an old friend. The property is in a country town having a growth spurt due to a new government facility nearby. You are not a local but your friend insists he wants you to sell the property. He has set a price. Your research confirms it is fair.*

*The property is sold to an investor from your database who later complains that it cannot be let for love or money, in spite of a strong market. He has discovered 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 buyer and the agent from the risk of non-disclosure of a stigma that may have impacted the buyer's decision.**

**Notoriety will not always devalue a property but is dangerous if not disclosed.**

### Scenario 2

*The owners of a strata unit in an older building listed the unit for sale. The sales representative was given a copy of the strata plan and by-laws by the sellers and gave copies to prospective purchasers with Forms 28 and 29.*

*There were costly repairs needed that the sales representative was not aware of (and so did not disclose) and there was no sinking fund or other provision for the work that needed to be done.*

**Material facts that impact buyer decisions must be disclosed, so seller disclosure should have been sought. The agent could also have searched via Landgate.**

**The strata company is another source – they must allow you to sight AGM minutes if you have owner permission, so recent resolutions and by-law changes are known.**

**Relying on seller's records alone is a risky approach as sellers may be unaware of resolutions at meetings they did not attend, or may choose not to disclose a problem.**

## Activity 3

## Case study – conflict of interests

**Choose one of the following cases and answer the questions**

1. An agent appraised and listed a rural property. The seller was desperate for a quick sale. His son-in-law's company was willing to buy the land. They had regular dealings with the agency, buying and selling property. The agent provided a disclosure form disclosing the personal relationship with the buyer in a pile of other papers – the seller signed it along with everything else. They did not discuss the form. The property was sold, then resold at a much higher price a few months later.

**Was the agents conduct technically compliant with the REBA Act and Code?**

**YES but only technically - the business relationship should also have been disclosed.**

**Do you think there are any possible breaches of common law or consumer law? YES**

**Explain.** Disclosure signed by the principal may satisfy the REBA Act but there may be a breach of consumer law if the principal doesn't understand the potential impact of the conflict (a material fact) and their other options (e.g. using a different agent) i.e. if the principal's consent is not 'informed consent'. The principal has a legal right to expect the agent to act in the principal's best interests – the consent form authorises the agent to continue to act, but does not remove the principal's rights or the agent's fiduciary duties. If an agent acts against a principal's interests they may be liable under common law even with signed consent to act on file.

**What would best practice have been in this situation?**

**Not to have the conflict e.g. set an agency policy that staff do not take an interest in listed properties. At the very least explain the conflict honestly, recommend in writing that the principal take other advice, and rebate commissions if they proceed with your agency.**

2. 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 agents conduct technically compliant with the REBA Act and Code?**

**YES re the 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 in the agent's conduct? YES**

**Explain.** The agent may have been negligent when she chose not to advertise the property and it is possible that she did not reference check diligently which could also have been negligence. The lessor's consent was not 'informed consent' – no one explained what the conflict meant. 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 loss as a result – the agent may be liable under common law.

**What would best practice have been in this situation?**

**To not have the conflict e.g. follow an agency or personal 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 explained that fees could be waived.**

## Activity 4

## Case study – tenant profiling

*You list a 3 bedroom suburban property. The garden is scruffy, and the paintwork is 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' 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**

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## Activity 5

## Case study – commercial & business broking

Complete one of the two case studies

### 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 3rd 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 5 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*).

### 2. Case study – business broking

*You are involved in the sale of a small business that sells and hires out coffee machines. It has taken a long time to find a buyer and you want to ensure a smooth settlement and avoid delays.*

**What checks and searches could you carry out or request early, to ensure paperwork is correct and that there are no surprises at settlement in relation to what is included in the sale?**

- Search of the Personal Property Securities Register
- ASIC search – Business/Company name registration, ownership, disqualifications
- Check of licenses if applicable/ leases / compliance of land use

**Discuss issues that can delay settlement but could be identified early by these searches.**

- PPSR: a 3rd party may have registered interests over stock or equipment that is part of the sale
- Registered business name / company name/ address may be differ from what sellers gave you causing contract to contain errors
- Some leases or licenses may have expired or may not be transferable
- Property use may not be approved or permission may be needed to continue a non-compliant use.

**What risks do these issues present?**

If discovered at settlement these issues can delay settlement or cause a sale to fall over.

If discovered after settlement legal action or claims of misrepresentation might ensue.

## QUICK QUIZ

## Industry Practice

## Legally Required / Not Required / Best Practice



Always initial every page of the O and A	<del>Legally Required</del> / Not Required + Best Practice
<p>Although it is not necessary for a contract to be enforceable, initials are helpful if a signatory later disputes a term or detail of the contract. The initials show that the parties saw every page of the contract at the time of signing – this makes it much harder to argue that a condition was not agreed to.</p> <p>Initialling each page also prevents a page being changed after signing.</p>	
Issue a copy of by-laws to strata tenants	Legally Required + <del>Not Required</del> / 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. Agents must provide the by-laws up front or the owner’s interests are 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. S 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>	
Carry out new Title search if renewing a listing	<del>Legally Required</del> / Not Required + Best Practice
<p>Although not required this may help to avoid settlement delays by picking up recent changes such as a new caveat on a property about to be sold (this is not common but can happen where a debtor hears of a sale and wants to ensure payment, or where there is a marriage breakdown and the property has been held in one name only).</p> <p>Many agencies do more than one title search when a property takes a long time to sell, when it is a valuable property, or where the seller has used the property to secure a series of loans.</p>	
Take photos for the initial PCR	<del>Legally Required</del> / Not Required + Best Practice
<p>Although photos are not required under the RTA it could be argued that an agent / PM would not be acting in the best interests of their principal under the REBA Code (S 4) if they do not take photographs.</p> <p>Words can describe a property adequately in some respects but what is considered ‘clean’ is a value judgement and worn or damaged items are hard to describe.</p> <p>Photographs allow more objectivity and help protect the owner against tenants who claim the property was dirty or damaged when they moved in. 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



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**Complete one of the following exercises using the matrix on the following pages.**

**Residential**

Choose one of 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.

**Commercial**

Look at the smoke alarm practices discussed in the matrix and 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.

**Business broking**

Look at the seller ID practices discussed in the matrix and consider the benefits of 100 point ID processes as a 'best practice' in business broking.

Are you using 100 point ID checks on buyers and sellers? YES / NO

If not, could doing this remove some risks? YES / NO

Consider how buyer and seller identity impacts on the sale of businesses e.g. confidentiality issues.

**No Answers provided for this activity as it depends on individual experience and agency practices**

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## Appendix 1 - Smoke Alarm Laws

### Renting, hiring or selling your home?

You need mains-powered smoke alarms



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



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- 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?

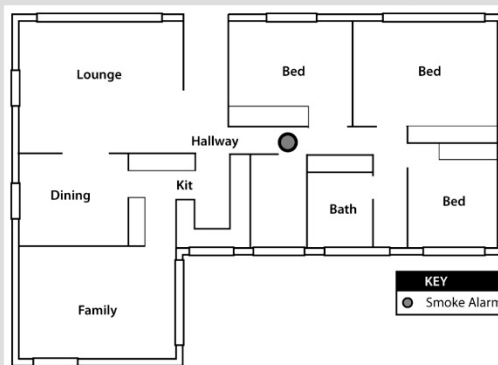
The number of smoke alarms required will depend on the class, size and layout of your property.

### 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



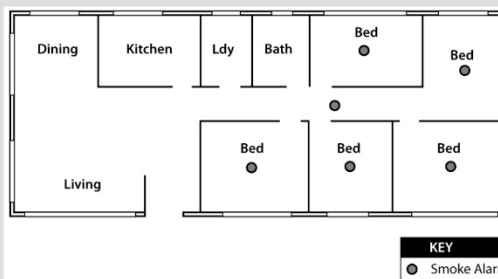
### Class 1b (boarding/guest house or hostel where up to 12 persons can reside)

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





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## 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.

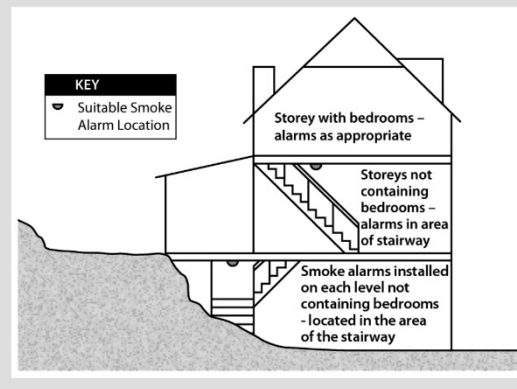
In storeys not containing bedrooms, smoke alarms should be installed in the area of the stairway between each level, e.g. if the bedrooms are on the first floor, then an alarm should be positioned near the area of the interconnecting stair at ground level.

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



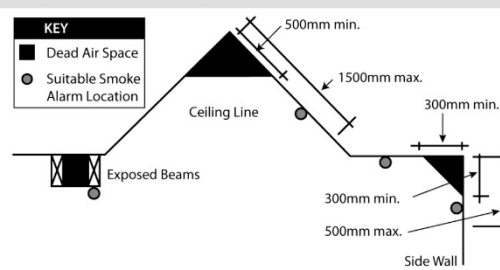
## Installation of smoke alarms

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?

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## 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](http://www.dfes.wa.gov.au), contact your local government or access the laws (Building Regulations 2012) at [www.slp.wa.gov.au](http://www.slp.wa.gov.au)

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## Appendix 2 – Key factors to remember (post course reading)

### 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. NB 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.

## Appendix 3 - Checklist for Offer and Acceptance

The Contract for Sale of Land or Strata Title by Offer and Acceptance form, commonly called the O





& A; and the *Joint Form of General Conditions for the Sale of Land* (JFGC) are used together to constitute the standard contract for the sale of real estate in Western Australia.

Like the Appointment to Act, The O & A must obviously be accurately completed and correctly executed or the contract may be called into question. These 'basics' include:

Complete **full names of all parties** i.e. (JOHN SMITH and MARY SMITH not JOHN AND MARY SMITH) and their addresses. Cross out either *Joint Tenants* or *Tenants in Common*.

State each person's share for **Tenants in Common** i.e. '*X number of undivided shares*'.

Check the validity of any **Power of Attorney** used with Landgate.

If someone is '**acting as agent**', check they hold instructions to avoid duty implications.

Enter **correct property details**: full street address, suburb, postcode, full title description.

Complete **deposit amount** in full. Allow extra time if a bank transfer to the Trust Account is used.

Insert deposit holder's name and bank details or attach cheque.

Insert the full **purchase price** that the buyer will pay.

Unless it is a 'cash sale', recommend a **settlement date** that allows time for finance approval, mortgage discharge etc. – discourage short settlements to avoid the risk of penalty interest.

List all **property chattels** to remain with the property – if necessary use an annexure. List any fixtures or fittings not included as **exclusions**.

There are two **Finance Clause** boxes. One box must be signed. If the lender is not known the "FINANCE IS APPLICABLE" box can be left blank – if the box is signed the clause applies. If no date is nominated, explain that the latest time to exercise the clause is 4pm on the day 15 Business Days after the Contract Date. Parties should read and understand the finance clause.

Insert any **special conditions**. e.g. 'subject to finance'. Conditions must make it clear who must do what by when, who pays, and what the consequences are of each possible outcome. Use legally defined timeframes e.g. '2 business days' not '48 hours'.

**Buyer/s sign** - signatures are witnessed and dated. *No party to the contract can be a witness. Witnesses must be over 18 and must see the parties sign.*

On agreement by the **seller/s**, their signature/s are applied, witnessed and dated. All owners of the property must sign the contract unless there is a person acting under Power of Attorney.

**If a corporation is buying or selling** ensure the method of signing complies with S 127 of the *Corporations Act 2001*- (usually 2 directors or a director and company secretary must sign). If this process is varied in accordance with the company's constitution, Landgate may require a true copy of the constitution to be attached to verify that the person can execute the contract.

**Give ALL parties copies of the O & A and the Joint Form of General Conditions** (they should sign acknowledging receipt). If it is a Strata property ALL parties to the purchase must receive Form 28 and 29 **Strata Disclosure** and sign to acknowledge receipt prior to signing.

**Conveyancer**. Insert details of the settlement agents or legal representatives for each party.

**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.

