



Session 1

# Risk Management

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# Program

- Understand your legal responsibilities
- What is “Duty of Care”
- Identifying potential risks
- Strategies to minimise potential risks
- Case studies

# Understand your Legal Responsibilities

Property Managers have two types of common law duties as a result of their agency relationship with their principal:

**Contractual duties:** to perform in accordance with the terms and conditions of the signed agency agreement

**Fiduciary obligations:** of trust and confidence in the relationship with the principal.

These obligations broadly are to:

- Comply with the principal's instructions
- Perform in accordance with their contractual duties
- Act in the principal's best interest
- Exercise due care, skill and diligence
- Preserve confidentiality
- Act with integrity in regard to the principal's money
- Never act deceptively
- Never mislead or misrepresent any party to a transaction.

## The role of the Property Manager

Some Property Management Departments operate with fully multi-skilled personnel who complete most or all requirements relating to a property. Others work on functional lines with a number of people dealing with different aspects of property management.

**The main tasks of the property manager in relation to letting and managing residential property are:**

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**A professional property manager will:**

- *Manage* the property, not just collect the rents
- Offer services to both landlords and tenants, greater than the opposition
- Keep their legal and market knowledge current
- Set high professional and ethical standards in dealing with the all persons involved in management of the property
- Be organised and attentive to detail
- Be consistent - apply the 3 “F’s” – Fair, Firm and Friendly service.

**A professional property manager will have knowledge in:**

- Property insurance
- Advertising
- Relevant Acts and Regulations

**Skills and attributes a professional property manager:**

- Effective communication skills, both oral and written
- Confidence and be assertive with a positive mental attitude
- Respect the rights of others and enjoy working with people from all walks of life
- Professional presentation skills
- Patience and tact
- Discretion
- The ability to cope with unusual demands of time and location
- Exceptional problem solving and time management skills
- High level of organisational skills
- Decisiveness
- A complete understanding of all relevant legislation
- Be conversant with all relevant taxation issues in relation to property investment
- Be a competent negotiator
- Have excellent conflict resolution skills
- Be computer literate
- Have a sense of humour.

These qualities amount to a property manager being an accountant, lawyer, counsellor, motivator, tradesperson, receptionist, salesperson and comedian. These attributes are usually difficult to find in one person, so staff selection and matching of skills in a property management department is vital.

## **Legislation, Regulatory Bodies and Industry Associations**

### **Property, Stock and Business Agents Act**

- Duties and obligations
- Types of agency
- Licensing and Registration
- Rules of Conduct
- Trust Account operations

### **Residential Tenancies Act**

The main impact of the Act is to specify or control various aspects of residential tenancies in the following areas:

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### **Anti-Discrimination Act**

You cannot discriminate against...

- Sexual Preference
- Religion
- Age
- Marital Status
- Race
- Disability / Medical Record
- Political opinion / Trade Union Activity

### **Privacy Act 1988**

- Collection of information
- Information use and disclosure
- Information/Data is kept up to date
- Information is secure
- Openness Policy clearly disclosed/on display
- Access to and correction of information
- Identifiers (codes use to identify kept confidential)
- Allow anonymity (not workable in our industry)
- Transborder Data Flows (info transfer)
- Sensitive information

### **Sensitive Information**

No record can exist on any document/file that relates to an individual's:

- Racial or ethnic origin
- Political opinions or membership
- Religious or philosophical beliefs/affiliations
- Membership of trade union or association
- Sexual preferences or practices
- Criminal Record

## **Trade Practices Act**

- It is Federal Legislation
- Applies to all business where a representation has been made to a consumer
- Includes representation made by post, telephone, internet/email, facsimile, television and radio

## **Legislated by - Trades Practices Act 1974**

- Encourages fair and ethical competition
- Efficiency in business
- Results are competitive goods and services for consumers in price, quality and service

## **Administered by:**

- The Australian Competitive and Consumer Commission (The ACCC)
- One of Australia's powerful legislative bodies

## **TPA Act has 2 parts of particular interest to the real estate industry**

- Part IV Restrictive Trade Practices
- Part V Consumer Protection

## **Part IV Unconscionable Conduct (Sec 51)**

- Term 'Unconscionable' not defined in the TPA
- Exploitation of a stronger party over a weaker party
- Goes beyond normal commercial dealing
- Goes over or affronts the concept of good conscience

Examples are

- Using pressure or unfair methods to induce a person to enter into a contract
- Taking opportunity of a person's poor education or language difficulties
- Placing extreme (onerous) conditions
- (for example-excessive late penalties)

## **Sec 52 Misleading and Deceptive Conduct**

- Businesses have an obligation not to engage in deceptive or misleading conduct
- If the conduct is *likely to mislead*, this is a breach of the TPA
- Good intentions not to mislead, or if no one was in fact mislead is irrelevant!

Further

- *Silence* may be misleading when required to disclose a matter, and a duty to speak out
- Making *False, Untrue or Predictive* Statements that did not become true

### **Office of Fair Trading**

- Promotes appropriate standards of conduct and competency
- Protects the interests of consumers
- Conducts public information and guidance programs
- Facilitates the resolution of disputes
- Administers licensing and registration
- Investigates complaints
- Administers the fidelity guarantee fund (compensation fund)
- Prosecutes for breaches
- Recommends policies to the Minister

### **Real Estate Institute of Australia (REIA)**

#### **Real Estate Institute – State**

#### **Property Council of Australia (PCA) - Commercial, retail and industrial**

#### **Institute of Strata Title Management (ISTM)**

#### **Stock and Station Agents Association of NSW (SSA)**

- Represent the real estate industry in specialised areas
- Develop and distribute data relating to the industry
- Establish high professional standards and ethics among members
- Many member firms
- Provide agency forms and products
- Provide training and professional development
- Industry accreditation scheme
- Access to property research
- Provide insurance services
- Specialist 'Chapters'
- Regular newsletters and bulletins
- Product discounts to members



# What is “Duty of Care”

## Negligence

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## Duty of Care

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## Duty of Care in Property Management

- A “Duty of Care” comes under Common Law
- Very broad and far reaching throughout all professions
- Affects a large part of the property management industry
- Greatly involved with the landlord and tenant relationship
- A person is entitled to compensation for injury or property damage if they can prove it was caused by someone else’s actions (negligence)

### **Landlord's duty of care**

- A landlord delegates their duty of care to the property manager under the terms of the management agency agreement.
- It is the landlord's duty of care to their tenant to keep and maintain the property in a reasonable state, free from hazards and dangers that might cause injury to the tenant.

### **Property manager's duty of care**

- It is a property manager's duty of care to advise landlords of risks associated with owning a rental property, and how these can be minimised, prior to managing the property and during the term of the management.
- It is the property manager's duty of care to act in their landlord's best interest at all times within legal boundaries.

### **Tenant's duty of care**

- It is tenant's duty of care to their landlord to keep and maintain the property in the same state or better than when they took possession of the property
- It is tenant's duty of care to their landlord to advise the landlord of any potential issues that may arise during the term of the tenancy, including repairs and maintenance

### **Key factors to fulfilling your duty of care**

- Be selective in the properties you choose to manage
- Conduct regular property inspections
- React quickly to tenant requests for maintenance work
- Put everything in writing
- Maintain a strict follow-up system
- Ensure your contractors have and maintain adequate insurance
- Advise your landlord to investigate all investment property insurances with an insurance broker
- Your first responsibility is to do whatever you can to minimise the loss. For example, having the property cleaned up and re-let as quickly as possible.
- Legal liability is not just about fulfilling your duty of care to your clients & customers, it's about protecting – YOURSELF & YOUR AGENCY

# Identify Potential Risks

## Risk Management

“The identification and implementation of procedures and practices that minimise the risk of liability or loss”

### You are at more risk of litigation today than 20 years ago

20 years ago	litigation levels were low the word ‘sue’ was not common
15 years ago	it was something that “happened in the United States”
10 years ago	it happened to “someone else”
Today	it is a threat to every Real Estate business and the risks affect everyone in the industry

### Some possible reasons for this attitude:

- Tough Consumer Protection Laws
- Consumers more aware of their rights
- Lawyers favour this type of legislation as there is a high chance of a successful prosecution!
- Real Estate agents have a high profile in society
- Increase of a more litigious attitude within society
- There is less respect for the professions than before
- Consumers look more critically at what they receive for a good or service
- Wanting to always shift blame; not take responsibility for their own actions
- Deregulated Legal System, No Win/No Fee
- Increased media exposure to claims (sells newspapers!)
- Lots of Money! Damages awarded to consumers can be substantial and worth the effort, whether their motive is pure...or not!

## What is the impact of increased litigation?

- Severe monetary risk of lawsuit
- Legal costs to defend action are substantial
- Time and effort to prepare
- 'P & I' Insurance Premiums rises
- Damaged relationships
- Stress!

## Where are you at risk in PM?

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## Facts and Figures

- In Queensland alone, claims in the last 3 years have tripled against sales agents, represent 60% of all claims nationally
- Property management lawsuits are less in number but damages awarded are higher!
- Half the cases involved were a breach of fiduciary duty (violation of management agreement between owner and agent)
- High percentage of claims involve a breach of the Trade Practices Act; particularly with Misleading and Deceptive Conduct
- Misrepresentation in advertising and promoting properties for sale or rent

## **Property Management Claims**

These claims represent approximately half of claims against agents:

- Condition of the property
- Property Damage
- Poor Maintenance
- Events occurring at the property
- Injury and Deaths (tripping, electrocution, drowning, dog attacks etc.)

## **Risk Management involves three components:**

- Identification of risk and/or potential risk,
- Assessment of this risk,
- Mechanisms put into place to control the risk and the likelihood of it occurring.

Most risk and potential risk can be minimised by the use of good office systems and procedures. If employees are aware of the guidelines within which they operate, the level of authority that they have and the correct systems to use, then consistent work functions occur throughout the office. A consistent approach reduces the opportunity for error and therefore minimises the risk factors involved.

In many situations risk can be practically eliminated by the creation of a procedures manual that is used consistently. A procedure and policy manual provides employers and employees with a framework of roles and responsibilities.

Continual assessment of the procedures being followed, along with constant monitoring of any grievances and complaints enables procedures to be updated and changed to reflect current practices and requirements.

The following template provides an example of how identification and assessment can take place.

## Risk Assessment Template

Organisation \_\_\_\_\_

Risk Assessor \_\_\_\_\_

**Legend**                      Likelihood = L                      Consequence=C

### How to determine the likelihood of Risk

Frequency	Description	Score
	Rare	1
	Unlikely	2
	Moderate	3
	Likely	4
	Almost Certain	5

### How to determine the Consequence of Risk

Measures	Score
High impact	3
Medium impact	2
Low Impact	1

### Risk Rating

Risk = Likelihood x Consequence

Score	Level of Risk
1- 3	Low, Acceptable
4 – 5	Medium, monitoring required
6 – 9	Medium, plan required
10 - 15	High, immediate plan required

Risk	Likelihood	Consequence	Risk rating (LxC)	Risk reduction strategy
Example: Tenant applications being refused due to Landlords' objections	4	3	12	Landlords need to be advised of the anti-discrimination laws and how they govern the selection of tenants. A policy needs to be written that complies with anti-discrimination legislation and this policy needs to be shown to all potential managements during the listing process.

# Strategies to Minimise Potential Risks

## “Prevention is better than a cure”

- Act promptly – when a tenant makes a request, take it seriously
- Do it right the first time
- Document everything – record name, time, date and discussion when ever you speak to a tenant or landlord about a matter
- Cover your backside at all times – use checklists, procedures, flow charts, computers or what ever it takes to ensure you don't forget the simplest of task that could result in litigation.

### Manage your time and prioritise your tasks

- Identify your routine duties
- Identify the required frequency & time
- Timetable these duties into times that suit & will allow you to met / exceed targets
- Initiate activities, show initiative and be decisive
- Follow through until complete
- Plan your activities to suit your work load
- Anticipate and resolve potential problems
- Minimise complaints to resolve

### Develop systems for routine activities

- Business Plan
- Job descriptions
- Targets / KPI's
- Policies, procedures, checklists
- Standard documentation & packs
- Monitor, review, & record results
- Improve inefficiencies

### Everyone must know:

- **Who** does it
- **What** to do
- **When** to do it
- **Where** to do it
- **How** to do it

### **Policies and procedures, standard forms, letters, checklists, scripts and dialogues**

- Consistency, clarity & accountability
- Resolve matters in colleagues absence
- Control
- Meet & exceed expectations
- Recognition of staff performance
- Increased staff morale & sanity levels
- Minimise slip ups & complaints
- Protection for staff, agency principal , landlords and tenants against activities requested or conducted outside of the agreed process / policy
- Ensure that property managers are suitably trained and qualified
- Train only to the systems
- Constantly improve and refine your systems

### **Technology**

- Improve your efficiency, accuracy, output and decrease stress
- Utilise your current technology or learn how
- MUST be backed up each night and kept off site (you can't back up hard copy!)
- Cheap, fast and not labour intensive
- Easy to locate information, without leaving your desk
- Reduce current expenses
- Less filing and storage

### **Handling Complaints**

- Construct and maintain a central complaints register; everyone to enter details and maintain.
- Ensure every complaint is followed up, forwarded to manager for accountability
- Act quickly on all complaints



## **Communication**

- Communication often gets:
  - Misconstrued
  - Miscommunicated
  - Forgotten
  - Lost
  - High risk and a waste of time!
- Keep clients informed of all breaches and serious situations
- Keep clients informed of all changes in tenancy; vacating, renewals etc.
- Client chooses prospective tenant on your information. **YOU DO NOT SELECT!**
- Detailed file notes on ALL communication with all clients, tenants and tradespeople

## **Documentation**

- All documents to be easily understood and in plain English
- Special conditions and forms are legally checked
- Copies retained on file- copies to landlords/tenants where required
- Files to be structured/organised
- Use electronic documents, where possible

## **Inspections by Prospective Tenants**

- Take Applications and identification before showing through prospective tenants (if property occupied by previous tenant)
- Must be accompanied by the Property Manager; **NEVER GIVE OUT KEYS!**
- Fully disclose expenses and special conditions; be aware!

## **Tenant Selection**

- 100 Point Identification Check
- Check references in systemised approach
- Confirm employment and Income
- Check National Tenant Data Base
- Disclosing Reasons
- Discrimination and Sensitive Information
- Destroy or return non-accepted applications
- Keep the tenant fully informed; confirm in writing acceptance of tenancy (with a guide)
- Promote landlord insurance (within guidelines) **DO NOT GIVE 'ADVICE'!**

## Lease Preparation

- Confirm new Lease terms with the Landlord and the Tenant (unless previously completed).
- All names to be spelt out in full (no initials)
- A Residential Tenancy Agreement is a legally binding document, therefore accuracy is critical.

Information obtained from

- Management Agency Agreement
- Tenancy Application Form
- Previous Lease Agreement
- Strata By-Laws
- Special Conditions
- Computerised notes

Remember to include:

- Rent increases & letter
- Existing bond number and amount for renewal
- Emergency tradespeople
- Date of Condition Report for lease renewal.

## Lease Sign Up Ceremony

- Take this seriously, you can avoid or minimise many potential issues by spending time with the tenant explaining the terms of the tenancy and agency upfront
- Have a “Welcome Pack” prepared well in advance, containing all the documentation to be issued and kept by the tenant
- Issue helpful information about leasing a property with your agency
- Include any forms that the tenant may require during the term of the tenancy agreement
- Arrange a mutually convenient time to sign the lease agreement, taking into consideration the anticipated duration of the meeting
- Advise the tenant what they are required to bring when they sign the lease, in advance
- Ensure all tenants named on the lease, sign the lease – preferably together
- Do not mail leases for signature
- Develop a checklist of items you must explain, complete and issue to the tenant. Ensure the tenant signs it in agreement
- Welcome and congratulate the successful tenants, start relationship building
- Give tenant opportunity to read the Agreement
- Explain the front page, major clauses and the Additional Terms of the Agreement
- Explain other documents and relevant agency processes
- Ensure the tenant is aware of their responsibilities as a tenant, those of the landlord and you as the managing agent
- Make copies of all documents signed by the tenant
- Train them early and how you want the tenancy to operate

### **Property Inspections**

- Detailed inspection reports, including recommendations issued to the landlord
- Identify safety risks and repairs required
- Ensure all properties booked for periodic inspections, as required
- Regular inspections allow monitoring of tenant performance and accountability
- Discourages illegal use
- Confirm terms of RTA are being met
- PDA

### **Rental Arrears**

- State your expectations clearly when the tenant signs lease
- Practice an 'Early Intervention' Policy
- All termination notices to be served on time; NO EXCUSES!
- Develop a ZERO TOLERANCE attitude

### **Rental Payments**

- Fortnightly/Monthly Payments
- Common Due Dates
- Payments on Same Date as Wage/Pension
- Direct Debit
- Direct Credit
- B Pay
- Internet
- Post Office
- Rent Payment Card (such as Rentpay)
- Automated, avoid "but I forgot/busy/away"
- Anytime, avoid "but the office was closed/I was at work"

### **Repairs & Maintenance**

- Ensure you employ only licensed tradespeople
- Establish public liability insurance register to ensure all tradespeople insured
- Induct all tradespeople on expectations
- Get in writing from tenants repair requests and educate them on "urgent repairs"
- Conduct repairs ASAP
- Always report to tradesperson in writing, use your software to generate work orders
- Follow up work not done regularly, use your software to generate status reports
- Discourage owner repairs, send the landlord a disclaimer in writing as to consequences

## **Keys**

- Established and maintain a key movement register
- No keys handed out until agreement signed and all monies paid
- Keys to be coded and secured
- Key Book to be well hidden - not in obvious place! Better still, computerised
- Never issue keys with an address on them, eg. On the tag or on the envelope
- Only issue or use keys when you have permission from the occupant of the property

## **Claims**

- Any signs of potential claims to be reported immediately to management and your PI insurer, especially if you hear 'I am going to sue you!' or 'See you in court!'
- Keep detailed documentation and file notes
- Don't admit liability, stay calm, don't try and defend yourself
- Don't handover documents to third party lawyers or assessors, copies only
- Ensure landlords or the agency principal review and approve everything including policy renewals.
- Confirm details for every action and communication made in writing

## **Advertising**

- Give only realistic and conservative rental appraisals – Rental Range
- Give appraisals based only on surrounding rental market examples
- Ensure all property advertising / descriptions are correct / accurate

## **Malicious Damage**

- Malicious damage means deliberate and wilful damage caused by any persons permitted on the property but does not mean damage caused by untidy, unclean or unhygienic living habits, lack of care, failure to control children or domestic pets.
- To qualify as being malicious or wilful ask yourself the question, would I be prepared to report this to the police. If you have no reservations in reporting it to the police then it is most likely a malicious damage claim.
- Contact the police immediately if you have a malicious damage or burglary / theft claim.
- Arrange for the Loss Adjuster to visit the property immediately if there is damage to the property that you expect will exceed \$1000 to repair. This applies to Fire, Burglary, Water damage etc. as well as Malicious Damage Claims.



# Case Studies (provided by Terri Scheer Insurance Brokers)

## Case Study One:

A tenant moves into a rental property in which there is a scattering of rubble in the backyard – full and broken bricks, ceramic tile remnants and timber pieces.

One afternoon the tenant trips over the rubble, falls and sustains facial injuries and bruising. The injuries leave residual scarring on his face.

The tenant consults a lawyer who makes a claim against the property owner alleging a breach in his general duty of care as a landlord. This is based on the landlord's failure to keep and maintain the property in a reasonable state and free from hazards or dangers that might cause injury to other persons.

Twelve months later, the matter is still unresolved. Full details of the tenant's injuries have not yet been determined, particularly the degree of permanent scarring, nor has the question of legal liability been resolved.

As the law stands, there is a good chance the landlord will be found liable for failing to keep the premises hazard free, despite the fact the tenant knew the rubble was there. While the tenant may be found in law to have contributed to the accident, it is unlikely this would account for more than a 15 to 20 per cent reduction in compensation.

Until the full medical picture is known, the end cost cannot be estimated accurately, but it is likely the legal costs alone will be in excess of \$6000 for both the landlord and the insurer. Add damages awarded to the tenant for pain and suffering, medical costs, time off work and general damages for scarring.

Final resolution from the date of the accident is estimated to take two years.

**Could this situation been avoided? Please provide details to support your answer.**

### **Case Study Two:**

In July a tenant reports to his landlord the slippery state of polished wooden stairs on the upper level of his rented property. He requests for non-slip, anti-skid strips or similar to be applied to the stair boards.

During the next month the landlord is slow to make inquiries about these safety measures.

One month later, in August, the tenant slips down the stairs, falls and sustains back injuries, including a fracture in one of his vertebrae.

The failure of the landlord to proactively attend to and fix the situation is likely to result in the landlord being found legally liable for the injuries.

While the tenant was aware of the reported hazard, this is not likely to diminish to any great extent the liability of the landlord for failing to rectify the situation quickly.

The tenant is a 31 year-old male tradesperson who has no training in clerical work.

As a result, his injuries are likely to lead to a significant loss of earnings. This will be calculated on actual past loss plus the potential future loss over the next 30 odd years, during which he will be unable to earn as much in an office role as he would have earned in his trade, but for being injured.

It will probably take three to five years before the matter is resolved.

General damages, medical costs and loss of income could amount to several hundreds of thousands of dollars if the landlord is found liable for the tenant's injuries.

Legal costs alone can reasonably be estimated at \$15,000 for each side.

**Could this situation been avoided? Please provide details to support your answer.**

### **Case Study Three:**

A landlord is aware that the mantelpiece affixed to the lounge room wall in his rental property is a bit loose, but does not consider it likely to fall.

A young child, one of the home's occupants, tries to climb up onto the mantelpiece. This force is sufficient for the mantelpiece to separate from the wall. The child falls to the floor and the mantelpiece then falls onto the child, who sustains significant injuries.

The landlord, quite reasonably, did not foresee what was going to happen, but at law he owned something which was, as it turned out, dangerous, and he failed to remove that danger.

Children generally heal more rapidly than adults, but what cannot yet be assessed is the level of physiological trauma the child has experienced and what impact this could have on their life ahead.

It is possible it could take up to 10 years before the situation is sufficiently clear to allow a court to determine an appropriate level of damages to be awarded to the child if the landlord is liable. Add the costs of parental caring, loss of parental income necessary as the result of inability to work during school years because of enforced home care needs, and medical costs.

**Could this situation been avoided? Please provide details to support your answer.**



## **Case Study Notes** (courtesy of Terri Scheer Insurance Brokers)

### **Case Study One**

#### **The tenant who tripped over the rubble:**

The property manager should have either refused to manage a property with rubble in the back garden, or stipulated that the rubble be removed before you agree to place a tenant in the property. In other words, “I am not putting anyone in there until you fix the problem”.

### **Case Study Two**

#### **The tenant who fell down the stairs:**

The property manager should have followed up the initial request for repair work with a second letter to the landlord. If that still had no effect, the property manager could have obtained a letter from their lawyer to advise that they accepted no responsibility for any bodily injury arising from the landlord’s failure to carry out their duty of care to the landlord.

### **Case Study Three**

#### **The child on whom the mantelpiece fell:**

Neither the landlord nor the property manager could have foreseen this outcome, so the only “out” for the property manager was to ensure they had advised the landlord to take out insurance and have written evidence of this.

- Be selective in the properties you choose to manage
- Conduct regular property inspections
- React quickly to tenant requests for maintenance work
- Put everything in writing
- Maintain a strict follow-up system
- Ensure all contractors have and maintain adequate insurance
- Advise all landlords to seek insurance advice

## Where to now?

[illegible]

Notes