

Risk Management Advice for Agents

How to prevent claims



Endorsed by



About Realcover

You need an insurer that really knows your business – that's Realcover

Protection for you and your business

Professional indemnity insurance is essential for all real estate agents, protecting you and your business against potential claims alleging breach of professional duty. Without it, you're putting your business and personal assets at risk.

You need an insurer that really knows your business. Realcover is the only real estate industry-owned professional indemnity insurer in Australia, established by real estate agents, for real estate agents.

Your industry's insurer

In 2004, a group of real estate agents decided that it was time to take control of rising premiums and cover restrictions that were an unwelcome result of the HIH collapse.

Since then, Realcover's primary objective has been to contribute to a more stable insurance market and provide agents with certainty regarding their professional indemnity insurance needs.

Today, the Realcover Board of Directors includes a mix of experienced real estate agents and insurance professionals – so you can be confident we understand both the industry and your business.

Jardine Lloyd Thompson is the appointed agent for Realcover. JLT works closely with Realcover to share information and developments within the industry to ensure agents have the most comprehensive cover available.

A true success story, Realcover is here to support agents in the long term.

Industry owned and endorsed

Realcover is 100% owned by the Real Estate Institute of New South Wales and is the only professional indemnity insurance policy recommended by REINSW, REINT, REISA, REIT and REIV.



The following articles have been prepared by Nancy Rainbird Claims & Compliance Manager at Realcover.

	<h3>Nancy's Biography</h3> <p>Prior to joining the Realcover management team in 2005, Nancy practised for 11 years as a solicitor for both major law firms and in-house for large insurance companies. Nancy has practised exclusively in the area of insurance, predominantly liability litigation claims.</p> <p>nrainbird@realcover.com.au</p>
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REALCOVER'S DISCLAIMER

While care has been taken in preparing this article, and the information in it has been obtained from sources that Realcover believe to be reliable, Realcover does not warrant, represent or guarantee the accuracy, adequacy, completeness or fitness for any purpose that the article may be used. Realcover accepts no liability for any loss or damage (whether caused by negligence or not) resulting from the use of this article.

Topics

Realcover's advice to Sales Agents	5
Land size and misleading & deceptive conduct claims	6
Top tips for Sales Agents to reduce professional indemnity claims	7
Property Managers and Inspection Reports – Agents are not experts	8
Tips for Property Managers to avoid professional indemnity claims	9
Top Tips summary	10
Trust account fraud and fidelity claims	11

Realcover's advice to Sales Agents

Realcover recommends that all marketing material contain a disclaimer, including on-line marketing and advertisements that can be printed by consumers.

There is no perfect disclaimer as such. However, there are several legal authorities, including a High Court case, that are of assistance. When designing your disclaimer you should consider including these elements:

- It is very important that an agency does not give the impression to a consumer that the information that is being passed on is that of the agent. The agency should expressly disclaim personal responsibility for what it conveys. For example, "this is a lovely quiet street"...instead... "the vendor told me that he has enjoyed living here as it is a lovely quiet street"
- Wherever possible, communicate the source of the information. i.e. the vendor, RP Data, etc
- The agent should not expressly or by implication state a belief as to the truth of the information. Interested parties should verify the accuracy and currency of the information, the agent cannot attest to the correctness of the information. For example, "there are plans drawn for the second storey extension, so when you build up you will get views from upstairs"... instead "the vendor has told me he has plans drawn for a second storey extension, to the best of my knowledge they have not be submitted to Council, you should make inquiries with Council if this is something you are interested in, let me know how you get on at Council".
- Interested parties should make their own independent inquiries to satisfy themselves as to the accuracy of the information. For example, "we are passing this on for what it is worth, you should make your own inquiries, though."
- Disclaimers should not be blurry or in very small print. Make sure people can read it. It should be the same font and size.
- Do not incorporate someone else's information into the agency marketing material. An example where this may occur is with a survey document. However, it would be fine if you pass on a copy of the Contract for Sale and within that document there was a survey.
- The terms "approx." and "STCA" is no shield for the agency against misleading statements that appear in the marketing material. Particularly, be aware if there is a significant interest in a prospective purchaser relying on the information. For example, a family wishes to purchase a home and build a legal granny flat on the land. The property is advertised as 455sqm (approx). The purchaser communicates their proposal to the Agent prior to purchase. After the settlement, the purchaser discovers the true land size is 440sqm. However, the State Environmental Planning Policy (SEPP) requires a minimum block size of 450sqm. The purchaser is likely to show they relied on the agent's inducement and misleading information and would likely litigate.

Land size and misleading & deceptive conduct claims

Realcover has seen a large number of claims in relation to misleading and deceptive conduct arising from the incorrect advertising of land size of properties for sale.

In all cases the Agents have relied on information that has been provided to them via third parties and on-line portals which has proven to be incorrect and the Agents have not adequately protected themselves against the claims via the use of suitable disclaimers.

Although the basic principle of property law is “buyer beware” there is little doubt that an Agent will be held responsible for any loss flowing from the misrepresentation as to the land size. Agents must always use caution when making reference to land sizes and dimensions and any other information regarding the property which may impact on the sale. Agents must verify the accuracy of the information provided.

The advice we have given to agents to help avoid a claim is to use disclaimers that reflects more clearly that information has been obtained from third party sources. Suggested wording is:

“We have obtained all information in this document from sources we believe to be reliable; however, we cannot guarantee its accuracy. Prospective purchasers are advised to carry out their own investigations...”

Further, disclaimers should be printed in the same font size and should also be included on all documents such as brochures, flyers, sign boards and on any online advertising of a property. Where possible have the vendor or their solicitor verify the details of the property in writing prior to the marketing campaign.

Always be vigilant to avoid errors that expose Agents to the risk of a claim against them.

Top tips for Sales Agents to reduce professional indemnity claims

1. Ensure you have a valid Sales Agreement and a complete contract before any marketing of the property is commenced.
2. Do not make statements about the property that cannot be independently verified.
3. We do not recommend you list properties without first ensuring the exact title details of the property (as to ownership)
4. Obtain written sign off from vendors as to the advertising on all sales and be sure you don't breach copyright provisions when using images.
5. Never rely on measurements for land/building areas obtained from data companies. Confirm in writing from the vendor and/or vendor's solicitor.
6. Always ensure you obtain written instructions from your vendor as to all actions that you undertake on their behalf
7. Take contemporaneous and detailed file notes of any verbal instructions and follow up those in writing. Good record keeping is often the key to a successful defence!
8. Use disclaimers in your advertising. Despite repeated calls agents are still not using disclaimers in their advertising!
9. Do not provide investment return forecasts unless provided by a quoted independent third party.
10. Do not release trust funds without uniform written instructions from both parties.
11. Point out obvious hazards to the owner that could result in potential buyers injuring themselves during open house inspections.

Property Managers and Inspection Reports – Agents are not experts

Realcover has seen a number of claims regarding the adequacy of issues noted in inspections reports. For example, the decking of their property requires expensive repair and/or demolition and the owner alleges the Property Manager should have picked up on the defects during their routine inspection of the area a lot earlier or even before the event of a structural collapse.

Realcover recommends regular inspections be carried out during the course of the tenancy and of course, your written report detailing your findings must be sent every time to the owner. Never rely on giving verbal advice or instructions.

The key issue is that Real Estate Agents are not engineers, builders, plumbers or experts and liability must be placed back to owners when they refuse to invest in repairs and/or maintenance.

Realcover suggests that this key point be spelt out clearly to all owners when you forward your inspection report by inserting something like:

This tenancy inspection report is a visual one carried out by (insert Agency) to assess the manner in which the tenant is maintaining your property. As your Property Manager, our role is to manage the tenancy, we are not qualified to assess the structural aspects of areas such as staircases, decking and balconies, or ensure that plumbing, electrical or gas fixtures or fittings, glass windows, doors and balustrades, smoke alarms, asbestos, swimming pool safety barriers (and associated fittings) comply and operate in accordance with applicable building/council codes and/or laws and regulations. The inspection does not include the moving of furniture, lifting of floor coverings, inspecting the interiors of roof spaces or under flooring, or inside of cupboards or tenants' goods or other belongings. (insert Agency) recommends that all Landlords have regular inspections carried out by suitably qualified, licensed and insured contractors and experts in the appropriate areas when necessary. (insert Agency) also recommends that all Landlords hold adequate insurance, including landlords insurance.

Remember that complete paperwork and documentation is the key to a successful defence in any court proceedings.

Tips for Property Managers to avoid professional indemnity claims

There have always been a number of claims arising from property management, most recently a rise in claims involving railing and balcony collapses. Others include slips and falls during open for inspections and agents acting outside the scope of their Management Agreements.

As Realcover's Claim Manager, I have seen many claims that can be easily avoided by taking a few simple measures. Here is a summary of some claim examples and my top tips for avoiding liability.

Balcony and railings

There has been a marked increase in the number of reported injuries due to faulty and collapsed railing and balconies. As it is the owner's responsibility to ensure the integrity of the structure and it is not always easy to detect rotten, decaying structures Agents should be very vigilant about regular inspections and following up on any complaints. Any suspect areas should be investigated by an appropriate expert – write to the owner recommending this course of action be undertaken. If there is any chance of injury to tenants or visitors the area should not be used and the owners told that immediate rectification is necessary.

Keep a paper trail of all emails to the tenants, tradespersons and owners and making sure you follow up on your requests promptly is the key to a successful defence.

Realcover has seen a number of claims where the agent is waiting back on repair quotes and in the meantime an accident has occurred. Agents need to ensure the area is not used and if the owner won't co-operate you should consider ending the Management Agreement.

Windows and locks

Public awareness of this issue has been highlighted due to a number of children falling from windows. NSW property managers should be aware that Parliament has passed legislation regarding the implementation of safety devices on windows in residential strata buildings. Owners Corporations have been given until 13 March 2018 to install window safety devices under new legislation passed by Parliament. They must install window safety devices on windows above the ground floor in residential strata buildings so they do not open more than 12.5cm when the lock is engaged.

In the meantime Agents need to recommend that owners install locks in all residential premises with children resident at the property.

Slip and falls

Slips and falls at tenanted properties and during open house inspections should generally be the owner's responsibility, but it does not stop third parties joining Agents to the proceedings.

Be sure to point out any obvious hazards to the owner, ensure that owners have their own public liability insurance and never cross out the indemnity clause in your Agreements.

Top Tips summary

- Follow up on all requests for maintenance. Pass this on to the owner and recommend the use of experts for suspect structural areas
- Complete paperwork and documentation is the key for a successful defence in any court proceedings so make sure it is in writing or detailed file notes are kept
- Place liability back to owners when they refuse to invest in repairs and/or maintenance by recording your recommendations in writing
- If a landlord continually refuses to undertake repairs consider terminating your Agreement with them
- Ensure owners, contractors and handymen all have their own Public liability insurance so it does not come back on your own professional indemnity policy. Make sure all certificates of insurance are updated annually
- Stick to your scope under your Management Agreement –you are not accountants and/or tax advisers – all owners should make their own enquiries and ascertain their liability for land tax and statutory charges
- Don't cross out indemnity clauses in the Management Agreement – it makes for a good defence if a claim is brought against you to offset your liability to the owner
- Ensure you have procedures and checklists in place to monitor all aspects of property management.

Trust account fraud and fidelity claims

Realcover encounter many occasions where a fraud goes undetected for far too long because of inadequate internal controls over the activities of seemingly “trusted” employees. Just a few simple controls can significantly reduce the risks that this will happen to your practice.

If you are a Principal, we recommend the following strategies to minimise your risk of trust fraud:

1. Do a rental bond reconciliation each quarter. This task should be completed by someone who isn't responsible for bond lodgements or bond claims. We see far too many examples of bonds being misappropriated because it's such an easy target for fraudsters. Match tenant details to the Bond Board Report and investigate differences.
2. Don't just sign the bank reconciliation each month. Check and confirm the following first:
 - Check that the balance on the bank statement matches the balance on the bank reconciliation.
 - If there are outstanding deposits on the bank reconciliation, check that they have been banked the next day and appear on the bank statement.
 - If there are adjustments on the bank reconciliation, find out what they are and what is being done about them. Don't just leave adjustments on your reconciliation from month to month. The money belongs to someone!
3. Ask your Property Manager or trust accountant to explain what is being done about “unknown deposits” or Suspense Account transactions because these unidentified amounts need to be receipted. The funds belong to someone!
4. If you must take cash from tenants (which we strongly urge you not to do), please make sure that the receipting and banking functions are done by different staff members.
5. Keep an eye out for cheques that remain unrepresented for several months. Cancel and reissue if necessary.
6. Send your unclaimed money to the Office of State Revenue or state equivalent as soon as it is two years old at 30 June each year. Unclaimed monies are easy pickings for the entry level fraudster.

Quite often, it's the perception that you are being vigilant that will save you from trust fraud. Better yet, follow the above steps and keep asking the questions until you are satisfied with the answers. Don't become complacent.



TO OBTAIN A PROFESSIONAL INDEMNITY QUOTE

Please complete the online application at realcoverinsurance.com.au/application

Call Realcover on 1800 990 312 or email realcover@jlta.com.au