

Australian Property Institute (**API**) and
Property Institute of New Zealand (**PINZ**)

TECHNICAL INFORMATION PAPER – LEASING AGENT SERVICES

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Technical Information Papers (TIPs)

The principal objective of a Technical Information Paper (**TIP**) is to clarify professional and industry processes, best practices and procedures and to discuss their use and implementation. A Technical Information Paper is designed to be of assistance to **Members** and those who use **Members'** services.

The intention of a **TIP** is to:

- Provide information on the characteristics of different types of assets that are relevant to the advice.
- Provide information on appropriate practices and their application.
- Provide information that assists **Members** in exercising the judgements they are required to make in specific situations.
- Convey elements of what is considered “competent professional practice” for Australian Property Institute (**API**) **Members** and “best practice” for Property Institute of New Zealand (**PINZ**) **Members**.

A **TIP** is not intended to provide comprehensive training, instruction or prescriptive practices and procedures, or direct that a process, professional approach or method should or should not be used in any specific instruction or situation.

The **Member** is responsible for choosing the most appropriate approach in a matter based upon the task and instruction. Whilst **TIPs** are not mandatory, they serve as a guide and measure of acceptable professional practice and conduct of a **Member**.

Case law and relevant legislation may change over time and whilst the **API** and the **PINZ** consider this **TIP** current at the time of publication, **Members** and those who use **Members'** services should have regard to legislative changes and new rulings and if necessary, seek further advice prior to having regard to the **TIP**.

If any **Member** considers any information or advice in this **TIP** to not be accurate or up to date, or wish to raise any issue for consideration arising from the contents of this **TIP**, please refer this to standards@api.org.au or standards@property.org.nz.

Leasing Agent Services

1.0 Introduction

This **TIP** applies to **Members** providing **Leasing Agent Services**. **Members** providing **Leasing Agent Services** must do so to the standard of professionalism and skill required and consistent with membership of the **API** and **PINZ** and in compliance with the law.

This **TIP** should be read in conjunction with any other relevant **TIPs**, Guidance Notes , Practice Standards and any other relevant **API/PINZ** publication.

The **API** and **PINZ** do not warrant that anything contained in this or any **TIP** is the definitive or final statement on any issue. **Members** must perform their own work pursuant to their own professional expertise and experience and if required, seek additional advice which might include legal advice . **Members** have the responsibility of deciding when it is inappropriate to follow a **TIP**.

A court or tribunal may take in to account the contents of any relevant **TIP** or other document relating to a recommended professional practice published by the **API** and/or the **PINZ** in deciding whether the **Member** acted to a standard required by law.

Where **Members** depart from the practices recommended in this **TIP** , it is recommended reasons for not complying are recorded. **Members** are advised to seek legal and/or other advice before departing from practice recommended in a **TIP**.

1.1 Definitions

The definitions immediately below, or elsewhere in this **TIP**, have been included in this **TIP** for the interpretation and understanding of the meaning of certain stated terms. All definitions in this **TIP** are identified in bold font.

Client	Means (as the context requires) the lessor, lessee, sub lessor, sub lessee, or their appointed representatives.
Leasing Agent Services	Means those services that are provided by a Leasing Agent when advising or providing information on issues relating to the leasing of real property, and/or taking all reasonable steps to lease real property on behalf of a Client or Potential Client .
Leasing Agent	Means a person, being a Member of the API and/or PINZ and also where appropriate, is registered or licensed as required, who provides Leasing Agent Services .
Member	Is a current financial Member of the API or the PINZ and in certain circumstances, may also be a reference to an employer or employee of a Member where, for example, that employer or employee is the party entering into a contract to provide Leasing Agent Services to a Client ,or otherwise providing information ,assistance and/or advice to a Potential Client .
Potential Client	Means a person and/or business entity that a Leasing Agent may from time to time provide Leasing Agent Services to, although not in the capacity of an appointed agent, who upon entering into an agency agreement would then become a Client .

2.0 Professional Conduct

2.1 Codes of Professional Conduct

Members must at all times conduct themselves in accordance with the requirements set out in the **API** Code of Professional Conduct and the **PINZ** Code of Ethics and Rules of Conduct as it applies to them.

2.2 Legislation and licensing to act

The **Member** must act, at all times, ethically and in accordance with any law and or statutory or other provision relating to registration or licensing to act as a **Leasing Agent**.

2.2.1 Requirements for API Members

When undertaking the activities outlined in the **TIP**, **API Members** should consider whether they will require a licence under applicable Commonwealth, State and or Territory legislation.

- *Agents Act 2003 (ACT)*
- *Property, Stock and Business Agents Act 2002 (NSW)*
- *Property Agents and Motor Dealers Act 2000 (QLD)*
- *Agents Licensing Act (NT)*
- *Real Estate and Business Agents Act 1978 (WA)*
- *Land Agents Act 1994 (SA)*
- *Estate Agents Act 1980 (VIC)*
- *Property Agents & Land Transactions Act 2005 (TAS)*

If in any doubt, **API Members** should seek appropriate advice.

2.2.2 Requirements for PINZ Members

When undertaking the activities outlined in the **TIP**, **PINZ Members** should consider whether they will require a licence under the Real Estate Agent Act 2008 (REAA 2008) and Regulations. If in any doubt, **PINZ Members** should seek appropriate advice.

The Act defines "Real Estate agency work" as follows:

Real Estate agency work or agency work:

- (a) *means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and*
- (b) *includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but*
- (c) *does not include*
 - (i) *The provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or*
 - (ii) *the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or*

- (iii) *the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or*
- (iv) *the lending of money on mortgage or otherwise; or*
- (v) *the provision of investment advice; or*
- (vi) *the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006*

The Act defines a "transaction" as:

Transaction means any one or more of the following:

- (a) *the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land;*
- (b) *the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies);*
- (c) *the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952;*
- (d) *the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003; or*
- (e) *the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).*

3.0 Client relationship

3.1 Clients Instructions and Best Interests

Members must at all times act in the best interests of the **Client** and in accordance with the **Client's** reasonable and proper instructions. **Members** must also adhere to any legal and or any relevant statutory requirements, and applicable professional guidelines, **TIPs** and relevant publications, as also referred to in paragraph 1.0 of this **TIP**.

3.2 Confirm instructions in writing

Upon appointment to act for the **Client**, the **Member** should immediately confirm the following in writing to the **Client**:

- the basis of the appointment;
- the scope of **Leasing Agents Services** the **Member** will provide to the **Client**;
- the basis of the fee structure for those services; and
- such other requirements for the appointment as required by law and or statute and /or compliance with membership requirements of the **API/PINZ**.

3.3 Frequent and regular communication

The **Member** shall on a frequent and regular basis, or as required by law and or statute and or as agreed between **Member** and **Client**, communicate with the **Client** regarding the progress being made in respect of any instructions issued to the **Member**. It is recommended that **Members** make a comprehensive written record of these communications.

3.4 Act promptly and efficiently

The **Member** shall at all times act reasonably, promptly, efficiently, and in good faith in providing **Leasing Agent Services** to **Clients** under an agency agreement and comply with all of its contractual obligations under that agreement.

3.5 Notice of illegal or unethical concerns

If a **Member** receives an instruction from the **Client** and has reason to believe or perceives a possible instruction from a **Potential Client**, is:

- illegal and or unethical and or unreasonable; or
- incapable of being carried out by the **Member**;

the **Member** should do one or any of the following as soon as possible:

- communicate their concerns to the **Client** or **Potential Client** in writing; or
- decline the instruction and or refuse to accept an instruction from a **Potential Client** to enter into an agency agreement, and take any other appropriate steps.
- otherwise seek appropriate advice as to what future course the **Member** should take in the circumstances

3.6 Requirement to be aware of all relevant law and statutes regarding leasing

Members are responsible for being fully aware of all relevant laws, statutes and regulations relating to their obligations and requirements in carrying out **Leasing Agent Services** as well as adhering to the requirements for membership of the **API/PINZ**. For example, particular attention should be given to responsibilities of disclosure of energy efficiency ratings, as these differ between jurisdictions.

4.0 Leasing Agency appointments

4.1 Claim to act

A **Member** shall only claim to act for a **Client** if they are appointed to do so in writing.

4.2 Methods of acting

The **Member**, when accepting an appointment to act as **Leasing Agent** for the **Client** shall act generally by one of the following methods:

- Sole agency or exclusive agency appointment
- Co-ordinating or joint agency
- General or open agency appointment

4.3 Acting for a Lessee

Where a **Member** is appointed to act for a lessee, their **Client** will exclusively be the lessee. The **Member** shall not seek a fee from any other party and shall disclose to all parties that they act solely for the lessee.

4.4 Acting for a Lessor

Where a **Member** is appointed to act for a lessor, their **Client** will exclusively be the lessor. The **Member** shall not seek a fee from any other party and shall disclose to all parties that they act solely for the lessor.

4.5 Contact with Agent

A **Member** who is not appointed as a **Leasing Services Agent** must only introduce potential parties to the lease through the appointed sole, exclusive, or joint co-ordinating agent.

4.6 Joint co-ordinating Agent

Where appointed as a joint co-ordinating agent, the **Member** will confer with their joint agent on all relevant matters, including prior to accepting any nominations from outside agents.

4.7 Conflict of interest

The **Member** must disclose to their **Client** and/or a **Potential Client**, any actual, or as far as it is to be able to reasonably identify, potential conflict of interest that may arise as a result of their appointment. **Members** should seek legal advice if they are unsure of any matter related to a conflict of interest.

4.8 Consent for inspection

No **Member** shall inspect a property without the consent of either the **Client** or the appointed agent.

4.9 Commercial viability of prospective Lessees

A lessor **Client** should be advised when a **Member** has reasonable grounds for questioning the ability of a potential lessee to meet obligations and commitments under a potential lease. Such advice to the **Client** should possibly include a recommendation that the **Client** seek other specialist advice in this regard. It would be prudent for a **Member** to include a specific provision in the agency agreement which imposes a contractual duty on the lessor **Client** to establish to their satisfaction, the financial ability and viability of the lessee to meet all obligations and commitments under the lease, so as to negate as far as is lawfully possible any risk of the **Leasing Agent** being held liable for so questioning any concerns about a lessee meeting obligations and commitments. In such a situation it is recommended a **Member** consider seeking legal advice as to the drafting of such a provision.

5.0 Other Issues For Leasing Agents to consider

5.1 Confidentiality

In the absence of any specific confidentiality provision within the agency agreement, a **Member** should not issue any press release, advertising, or any information relating to or referred to in a lease without first obtaining the written approval from the **Client**.

5.2 Reliance on Client and /or third party information

In undertaking **Leasing Agent Services**, **Leasing Agents** should consider all relevant information and/or advice provided to them and reference and/or acknowledge sources of any information used.

Leasing Agents should include an appropriately worded disclaimer, limitation, qualification, assumption and or warning (**Disclaimer**) in any document that makes reference to information or advice. Any **Disclaimer** should make it clear that:

- the **Leasing Agent** does not make any representations as to the accuracy of any information submitted by a prospective lessee and or other third party to the **Leasing Agent**;
- the **Leasing Agent** does not warrant the accuracy of any information and has not taken any steps to verify the accuracy of the information supplied by a prospective lessee and or third party, and passes it on for what it is worth; and
- the lessor must satisfy itself as to the creditworthiness of the prospective lessee.

Relevant considerations when drafting a **Disclaimer** should at least include:

- the style and content of a **Disclaimer** in a document;
- the intended purpose of the **Disclaimer**;
- the proximity of a **Disclaimer** to the information or advice to which they apply; and
- the text size of the **Disclaimer**. The font size of a **Disclaimer** within documents has previously been the subject of judicial commentary.

Leasing Agents should also have regard to other **TIPs** that deal with the wordings of a **Disclaimer**. It is also recommended that **Members** seek legal advice as to the wording of a **Disclaimer**.

5.3 Representations by Leasing Agents

Leasing Agents must be aware that the making of statements and/or the giving of advice whether orally or in writing (a **Representation**), may induce a **Client** or **Potential Client** to rely on a **Representation** during the provision of **Leasing Agents Services**.

Therefore, **Leasing Agents** must always have a reasonable basis for making a **Representation**. There is potential liability under Federal and State Australian consumer laws for (among others) **Leasing Agents** who engage in misleading and deceptive conduct. Consequently, the scope of the **Leasing Agent's** retainer described in the agency agreement, and subject to law, the inclusion of a **Disclaimer** excluding liability for factual changes which subsequently render a **Representation** incorrect, are vital for protecting **Leasing Agents** against potential **Client** and/or **Potential Client** claims.

It is important to understand that any attempt to contract out of liability for misrepresentations, is very likely to be in breach of the law and/or legislation. Accordingly the agency agreement should make it clear that all **Representations** made by a **Leasing Agent** are only made by reference to facts and circumstances subsisting as at the date the **Representation** is made. This is a complex legal area and as such if in any doubt **Members** acting as **Leasing Agents** should seek legal advice.

Leasing Agents must correct any prior **Representation** (which they have made either orally or in writing) when they subsequently become aware of a change in any fact, issue and or circumstance (a **Change**), which would or might render that prior **Representation** to be incorrect, false and or misleading and/or deceptive.

Therefore, **Members** must avoid any repetition of **Representations** made in the agency agreement and or in any oral communications when they become aware that a **Change** subsequently occurs. **Leasing Agents** must notify the **Client** or **Potential Client** of a **Change** promptly and as soon as reasonably possible after they become aware of a change.

For example, it is not uncommon for **Leasing Agents** to make representations about tenancy mix, customer traffic, construction timetables, lease commencement dates, and occupancy details to a **Client** or **Potential Client** upon their formal engagement or even during the lease term. In such a situation, a **Leasing Agent** must provide an update as to the impact or likely impact of a **Change**.

By doing so **Clients** and or **Potential Clients** can make informed decisions based upon the most factually up to date and correct information available at the time.

6.0 Effective Date

This TIP is effective from 1 July 2019 in Australia. Earlier adoption is permitted. It replaces ANZRPNG 10 – Leasing Agent Services.

In New Zealand the existing Guidance Note (ANZRPNG 10 - Leasing Agent Services) remains current.