

RENT DETERMINATIONS

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Guidance Papers

Objectives

The principal objective of a Guidance Paper (*GP*) and Resource Pack (if applicable) is to clarify professional and industry processes, best practices, and procedures and to discuss their use and implementation.

A *GP* is designed to be of assistance to *Members* and those who use *Members'* services. They serve as a guide and measure of acceptable professional practice and conduct of a Member.

The intention of a *GP* is to:

- a) provide information on the characteristics of different types of assets that are relevant to the advice;
- b) provide information on appropriate practices and their application;
- c) provide information that assists *Members* in exercising the judgements they are required to make in specific situations';
- d) convey elements of what is considered "competent professional practice" for Australian Property Institute (*API*) *Members*.

A *GP* 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.

Member Obligations

The *Member* is responsible for choosing the most appropriate approach in a matter based upon the task and instruction. It is a matter for each *Member* to decide the appropriate practice in any situation, and if they are unclear, seek legal advice. *Members* have the responsibility of deciding when it is appropriate to depart from the guidance and practices contained in a *GP*.

The *API* does not warrant that anything contained in this, or any *GP* 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 expert advice from others.

Court or Tribunal Reliance

A court or tribunal may consider the contents of this *GP* in deciding whether a *Member* acted to a standard required by law.

Currency of Publication

This *GP* is current at the time of publication, based on current case law and legislation.

Departure or Non-Compliance

Where a *Member* considers that a circumstance exists that warrants the departure from or non-compliance with any of this *GP*, the *Member's* report (or other advice) should include a statement that outlines:

- a) the reasons for the departure or non-compliance with this *GP*; and
- b) any impact the *Members* departure or non-compliance may have on the content of the report.

Enquiries

If any *Member* considers any information or advice in this *GP* to not be accurate or up to date, or wish to raise any issue for consideration arising from the contents of this *GP*, please refer this to

API contact: standards@api.org.au

1.0 Introduction

1.1 Scope of this Guidance Paper

The objective of this GP is to provide information, commentary, and guidance to *Members* who are involved in a market rent review process either as an *advocate*, *expert Valuer*, determining *Valuer* or *Arbitrator*.

Rental advice provided by *Members* in relation to a rental dispute between a landlord and a tenant involves:

1. a *Valuer* acting as an *advocate* for a client.
2. a *Member* acting as an expert for a client.
3. a *Member* providing a rental submission to a determining *Valuer* acting as an *advocate* for a client.
4. a *Member* providing a rental submission to a determining *Valuer* acting as an expert.
5. a *Valuer* appointed to determine the rent in accordance with a lease.

Members providing *rental advice* must do so to the standard of professionalism and skill required and consistent with membership of the *API* and in compliance with the law.

This *GP* should be read in conjunction with any other relevant *GPs*, professional standards papers, and any other relevant professional guidelines published or adopted by the *API*.

Members involved in providing advice in relation to a rental dispute are encouraged to have consideration for the concepts, principles and guidance relating to assessing *rent* provided in AVGP 301 – Rental Advice.

For the purpose of this *GP* the word 'landlord' is interchangeable with 'lessor' and the word 'tenant' is interchangeable with 'lessee'.

1.2 International Valuation Standards

International Valuation Standards (*IVS*) published by the International Valuation Standards Council (*IVSC*) are adopted by the *API*.

It is the *Valuers* responsibility to comply with the *IVS* applicable at the date of valuation, keep informed of any changes and apply them appropriately and consistently when providing valuations.

This *GP* is also intended to be consistent with the concepts and definitions contained in the latest version of *IVS*, however, there may be departures from the *IVS* to reflect Australian law and practice.

This *GP* refers to and uses *IVSC* definitions to promote consistency.

2.0 Definitions

The definitions contained below and used in this *GP* are applicable to this *GP* and have been included to assist with the interpretation and understanding of terms used within this *GP*.

Whilst a defined term may also have a common meaning or interpretation, its use in this *GP* is so limited.

Where a defined term is included in this *GP* it is shown in italics.

Advocate	A person advocating a client's opinion/position that may be different from an opinion if acting as an <i>expert Valuer</i> .
Arbitrator	A person to whom the power to settle or judge an arbitration subject to the rules of arbitration applicable in the jurisdiction.
Expert Valuer	A <i>Valuer</i> providing independent, objective opinion in relation to rent, and specifically excludes advocating a client's position.
Lease	A contractual agreement whereby the landlord grants the right to a tenant to occupy, or use specified real property, for an agreed period of time, in return for payment or a series of payments or other consideration.
Market Rent (IVS)	The estimated amount for which an interest in real property should be leased on the valuation date between a willing lessor and a willing lessee on appropriate lease terms in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.
Member	A <i>Member</i> of the <i>API</i> .
Rent	The payment by a tenant to a landlord for the right to occupy or use specified real property for a defined period in accordance with a <i>lease</i> .
Rent Review	A periodic review of rental under a <i>lease</i> using a method specified in the <i>lease</i> .
Rental Advice	The assessment of <i>rent</i> and/or providing advice to assist in <i>rent</i> or <i>lease</i> negotiation. The assessment of <i>rent</i> undertaken by a <i>Valuer</i> in accordance with <i>IVS</i> . <i>Rental advice</i> also includes a <i>Member</i> advocating a client's position in a <i>rent</i> or <i>lease</i> negotiation matter.
Valuer	A <i>Member</i> of the <i>API</i> who holds CPV or RPV.

3.0 Instructions

3.1 In Writing

Instructions must be agreed and be in writing prior to the *Member* beginning work, and clearly outline the professional services agreement between the *Member* and the client(s).

It is critical when agreeing the instructions to establish precisely which professional service is to be provided (See Section 4.2). That is when the *Member* is acting as an *advocate* or *expert Valuer*.

There must be no ambiguity in the client's instructions. Where the *Member* perceives ambiguity, the instructions must be referred to the instructing party/client(s) to resolve the ambiguity.

Any variations to instructions during the course of the work must also be in writing.

Valuers must obtain instructions in writing that cover items listed in **IVS 101 – Scope of Works paragraph 20.3**.

3.2 Accepting Instructions to act for a Single Party

Prior to accepting an instruction relating to:

- a) providing a rental valuation to one of the parties to a *lease*; or
- b) acting as an *advocate* by providing a submission or response submission;

the *Member* must possess the necessary skill, knowledge, and experience to provide the *rental advice* unless the *Member* obtains fully informed written consent from the client to provide the *rental advice*, or they undertake the professional services in conjunction with another *Member* having the required competence. The client must provide written consent prior to the *Member* commencing the professional service in conjunction with another *Member* having the required competence.

The required competence includes being fully cognisant of court precedents relating to *rent reviews* and, if in any doubt, the *Member* should seek legal advice.

3.3 Accepting Instructions to Undertake a Single Valuer Rent Determination

Prior to accepting an instruction, the *Valuer* must possess the necessary skill, knowledge, and experience to provide the rent determination. The *Valuer* is solely responsible for the rent determination and the task cannot be delegated.

The *Valuer* should also ensure that their letter of appointment with the parties to the *lease* includes:

- a) the timing of each step in the rent determination process including provision of submissions and response submissions; and
- b) the resolution mechanism for any situation where the rental dispute strays into areas other than valuation, including disagreement or ambiguity of lease terms or other legal and similar matters; and
- c) an indemnity and cross indemnity from the parties; and
- d) that the rent determination will be subject to a third-party disclaimer.

The *API* recommends that the letter of appointment states that the rent determination fee is either:

- payable in full before the rent determination is commenced; or

- that the rent determination will only be released to the parties upon full payment of the fee by both parties.

The second option may still expose the *Valuer* to the risk that the fee may not be paid in full, even though that means the rent determination is not released.

Where appropriate *Valuers* should seek legal advice relating to the drafting of the *Valuers* letter of appointment.

3.4 Accepting Instructions to Undertake a Joint Valuer Rent Determination

Where a *lease* requires each party to appoint a *Valuer* to attempt to jointly determine the *rent*, a *Valuer* appointed to undertake the joint determination is acting in the same capacity as the single *Valuer* determination, that is, as an *expert Valuer* not an *advocate*.

A *Member* can act as an *advocate* in a matter however must not then accept appointment as a joint determining *Valuer*.

In many leases where the jointly appointed *Valuers* are unable to agree on the *rent* a third *Valuer*, often referred to as the umpire, may be appointed as a single determining *Valuer*.

4.0 Rent Determinations

4.1 What are Rent Determinations?

An objective judgement, normally binding the parties to a *lease*, to resolve a rental dispute in accordance with the *rent review* provisions of the *lease*.

4.2 Roles of the Member in a Rent Determination Process

There are four (4) different roles where a *Member* may be involved in a rent determination.

1. A *Valuer* providing an expert opinion to one of the parties to a *lease*, as part of that party's submission to a determining *Valuer*.
2. A *Member* acting as an *advocate* for their client in providing a submission or response submission to the appointed determining *Valuer* in a rental dispute.
3. A *expert Valuer* appointed as the determining *Valuer* in a rental dispute.
4. A *Valuer* appointed as an *Arbitrator* in a rental dispute.

Members are cautioned that they may be in breach of the API Rules of Professional Conduct if they undertake the role of an expert and an *advocate* in the rent determination process.

Members are required to be fully cognisant of the terms and conditions in the *lease* relating to *rent reviews*. Where interpretation of any *lease* terms and conditions is outside the determining *Valuer's* expertise, the *Valuer* should seek appropriate advice (e.g., legal advice).

5.0 Reports related to Rent Determinations

5.1 Valuation to One of the Parties

A rental valuation consistent with a rental assessment report as discussed in AVGP 301 Rental Advice.

5.2 Submissions to a Determining Valuer (Advocacy)

Submissions and response submissions should be in writing and should address, in a factual manner, information and details that support any contention made.

There may also be a requirement to make a response submission to the other party's submission.

A response submission is to address only those matters contained in the submission and should not introduce further evidence or opinion. To this extent, the response submission may be distinguished from a valuation review which can add further opinion or evidence.

A *Member* acting as an *advocate* should identify to all parties involved in the rent determination process that their role is that of an *advocate*, not an *expert Valuer*.

5.3 Rent Determinations as an Expert Valuer

A rent determination report should have regard to the requirements contained within **IVS 103 Reporting**.

Reports must satisfy any requirements contained within the *lease* or as otherwise agreed between the *Valuer* and the instructing parties, and any applicable legislation and/or law such as retail leases legislation that exists in the jurisdiction.

Reports should contain the following minimum information:

- Reference to the instructions received;
- Details of the asset that is the subject of the rent determination;
- Limitation of the purpose to which the report may be used;
- Identification of the clients (the parties to the *lease*) and any other parties who can use or rely on the rent determination;
- An appropriately worded third party disclaimer;
- Valuation date, inspection date and date of issue of the report;
- A precis of the *lease* including definition of *rent* and provisions of the *lease* definition;
- Comprehensive discussion of submissions from the parties, in particular the extent to which there is agreement or disagreement with individual contentions (if applicable);
- The valuation approach(es) selected and/or method(s) applied;
- Supporting evidence for comparison purposes;
- The *rent* determined and details of the matters taken into consideration, including an explanation of the rationale used in forming the *rent* determined, having regard to the instructions in the *lease*;
- Any other information or opinion to be provided by the Valuer as required in the *lease*;

- The treatment of GST; and
- Details of any limitations, conditions, or qualifications on the rental assessment.

When considering submissions care should be taken not to give weight to offers made “without prejudice”. To do so is to risk the rent determination been set aside.

Whilst a *lease* or the law may require the determining Valuer to have regard to submissions, the determining *Valuer* is appointed to provide their own opinion, and hence must ensure adequate evidence is sourced, analysed and applied in forming their opinion.

Regardless of the submissions received, the determining *Valuer* is acting as an *expert Valuer* and must undertake the rent determination on the basis that the *Valuer* was independently instructed to provide their opinion of the *rent*.

5.4 Rent Determinations as an Arbitrator

Members undertaking an arbitration should have the requisite training, knowledge and experience.

A rent determination as an *Arbitrator* is a process under the Act that specifically details arbitration in the relevant jurisdiction.

The report contents would normally contain similar details to an expert rent determination (as noted above) albeit subject to the commercial arbitration agreement.

A rent determination as an *Arbitrator* is normally limited to the submissions and does not permit any independent investigation of market evidence.

6.0 Nominations and Appointments

Many organisations, including the *API* and statutory authorities, may nominate an individual *Valuer* to determine the *rent* under a *lease* when the *rent* is in dispute.

The nomination of a *Valuer* is not an appointment by the nominating organisation or authority.

The appointment of the determining *Valuer* can only be made by the parties to the *lease*.

The following outlines the general steps involved in the nomination of a *Valuer* by the nominating party to the appointment of the determining *Valuer* by the parties to the *lease*.

1. The organisation or authority will contact the potential determining *Valuer* to ascertain whether the *Valuer*.
 - has no real, perceived or potential conflict of interest; and
 - has the capacity, including the skill, knowledge, and experience to undertake the determination within the time frame stipulated in the lease or associated legislation.
2. On the basis the *Valuer* confirms the above, the organisation or statutory authority may advise the parties to the *lease* of the *Valuer's* acceptance of the nomination. The nominated *Valuer* will be simultaneously advised.
3. The nominated *Valuer* formally advises in a letter of appointment to the parties to the *lease* the terms and conditions on which the *Valuer* is prepared to undertake the rent determination. These terms and conditions should consider the matters previously referred to in this *GP*.
4. The parties to the *lease* must jointly or severally agree to the terms and conditions of the rent determination proposed by the *Valuer*, as set out in the letter of appointment. Agreement to all the terms and conditions, must be agreed in writing by all parties.

7.0 Effective Date

This *GP* is applicable from 1 July 2023. Earlier adoption is permitted and encouraged.

This *GP* replaces part replaces AVGP 301 Assessing Rent and Rent Determinations which was in effect from 1 July 2021 and was withdrawn 30 June 2023.