

RESOURCE PACK – PROPERTY ADVISORS

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Resource Pack

The contents of this resource pack are provided as a guide only and should be read in conjunction with the Guidance Paper (GP) titled *Property Advisors* and Guidance Paper titled *Acting As An Expert Witness*. The current version of the resource pack links to the above-mentioned GP and may assist you in the application of the information contained in the GP.

For example, practitioners will need to ensure currency of the relevant Court Rules at the time of accepting instructions and subsequent provision of expert evidence at court.

Similarly, in Australia practitioners need to be aware of the *Evidence Act 1995*, whilst in New Zealand the *Evidence Act 2006* applies.

Joint Reports

- a) Identify any pre-existing relationship with any party to the litigation.
- b) experts are to ensure that any joint conference is a genuine dialogue between the experts in a common effort to reach agreement upon,
- c) the matters the experts disagree upon,
- d) reasons for disagreement and agreement,
- e) reasoning process to reach their position,
- f) no outside influence.
- g) include any evidence in reply,
- h) give written notice to the Court and the party instructing them if for any reason they anticipate that they cannot comply with the Court directions,
- i) facilitate a clear understanding of the final position of the experts about the matters in issue and the reasoning process they used to reach those positions,
- j) all experts are to sign and date the JER, and
- k) experts are to file and serve their JER in the Court.

Points of Consideration for a Joint Expert Report

Set out below is a guide only and experts should be free to construct their Joint Reports in any reasonable manner. For example, some Joint Reports can simply be a single page showing opposing opinions and reasons, with alternate approaches (following the other experts' methodology in case the Court prefers that methodology),

- a) Title page – JER – type, Expert's names, Proceedings Number, Parties, Addressed to the LEC, Date of JER,
- b) Court Directions, the timeframe and whether tasks were completed in accordance with the
- c) Court Directions, Expert Witness Code of Conduct acknowledgement, any Statement of Facts acknowledgement,
- d) Abbreviations used in the JER - experts names reduced to initials (this tends to remove personalities and potential conflict between the experts); parties, relevant documents i.e. town planning instruments, government departments reduced to initials or mnemonics,
- e) Erratum: Correct any error contained within any earlier Statements of Evidence or Evidence in Reply.
- f) Issues upon which the experts agree (and why they agree),

- g) A summary of each expert's position, and supporting evidence in brief,
- h) In valuation matters - elements of what each Valuer expert gains from the previous non-Valuer expert JERs; and for other experts, what they have gained from other experts' JERs. For example, a Town Planning JER may rely on evidence from a Flooding JER.
- i) Issues Disagreed. Provided in a landscape "point and counter point layout" displaying the respective differences and reasons for those differences between the experts. This simplifies the adjudication process and makes it easier for the Judge (or Commissioner or Member) to discern a preference over competing arguments. This is the Issues Not Agreed Between Experts area. Using a logical sequence in the Issues Disagreed.
- j) For valuation matters: Sales Evidence: Add an opinion on the hierarchy of sales evidence (primary evidence relied upon, secondary or supporting evidence, and tertiary evidence - background evidence), if appropriate.
- k) Statement if "no opinion" can be expressed on an issue, or whether further investigation is required, or whether an opinion is not a concluded opinion (awaiting further facts).
- l) Any matter that may be useful for the Court to consider, or a recommendation for any matter that the experts consider would be of assistance to the Court if submitted to them.
- m) Conclusion of opinion by each Expert.
- n) Objections or notations for the Court to consider. For example, the addition of late evidence by the other expert.
- o) Signature Blocks.

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

PINZ contact: standards@property.org.nz.

Case Study # 1 (Australia) - Purchasing an Investment Property

A client wants to purchase a direct commercial property for investment or owner occupation and decides to appoint a property adviser to assist them.

Where a member is appointed in this role it is important not to offer any advice on related matters such as asset portfolio allocation (e.g. shares verses listed or direct property). The advice should only be for direct property. Some questions that could help qualify the requirements of the client might include:

Question 1 - Have they consulted a Financial Planner to advise on an Asset Portfolio allocation (shares, property, etc.) resulting in their property investment decision and budget allocation?

Question 2 - Are they experienced property investors, or will this be their first or only property asset?

Question 3 - What is their investment criteria (type of property, timing, risk, location, etc.)?

Question 4 - Will the property adviser be fully retained by the client to provide independent advice?

The property advisor should only act where they have been retained by the client and they should not accept the brief where there is any conflict of interest. The appointment should be in writing, including the scope, timing, fee basis, etc. The fee proposal should be counter signed by the client confirming the appointment. Following the appointment, it would be usual to undertake detailed market research and identify suitable properties either through agents or by direct contact with owners. This may include a Market Brief to agents setting out the property requirements of the client including location, size, yield, price, etc. If the Property Advisor is directly involved in negotiations acting on behalf of the client, they also need to be a licensed agent.

When a list of suitable properties has been found, these are generally reviewed with the client to determine which ones best suit their requirements. It is usual to short list at least three of the preferred properties in order to ensure there is a competitive negotiation process involved. The Property Advisor would undertake some preliminary due diligence in this process and a more detailed analysis on the final property. This may include the use of other specialist consultants in some circumstances. It is best to make provision for the appointment if required of other consultants in the original fee proposal. When final terms are agreed some due diligence may overlap with similar investigations by the client's solicitor. Care should be taken to ensure no matters are overlooked.

Some examples of due diligence are shown below.

Due Diligence (Also See GP)

- Market Analysis
- Leases & Vacancies
- Layout & Efficiency, Floor Plate Size, etc.
- Main Entry
- Quality & Functionality
- Structural
- Building Code of Australia (BCA) compliance
- Finishes

- Car parking
- Services -Electrical (capacity), Mechanical (type), Hydraulic (water tanks), Lifts capacity/speed), Communications, Security (latent & active), BMS, etc.
- Amenities -coffee shop, showers, gym,
- Safety, Security, Accessibility
- Environmentally Sustainable Development (E.S.D) And Property is Purchased

Case Study # 2 (Australia) Property Advisor - Property Syndicate

A syndicate of ten (10) private investors decides it wants to purchase a run-down property to refurbish, re-mix the tenancies, and hold for a 5-year period and then re-sell. They decide to appoint a property advisor (asset or syndicate “manager”) to manage this process on their behalf.

The scope of this brief is complicated and involves a variety of roles and various licenses may be needed, including an Australian Financial Services License (AFSL).

ASIC has a Policy Statement 77 which sets out the circumstances for giving relief under the Corporations Act for “small property syndicates” (defined as 15 or fewer members). This document has important guidelines on the composition, structure and timing of Syndicates. For example, persons who are not the holder of an AFS licence and are involved in offering for issue or sale a Syndicate interest, must hold at least 5% of the total value of the Syndicate Interests for the duration of the Syndicate. If the Syndicate Property is not contracted to purchase a property within 6 months, or title is not held within 9 months, the Syndicate Agreement can be terminated at the request of any investor and the monies returned. It is important to have a detailed working knowledge of the ASIC Policy Statement 77 and usually professional advice is required before undertaking the role of a Syndicate Manager (“Manager”). Assuming this has been done, the following is an example of how a Syndicate can work.

Setting up the Syndicate

It is often the case that a private syndicate will assemble their equity in unequal portions. It is important there is a balanced and equitable agreement to ensure fairness in all decisions. It is usually the role of the Financial Planner to sort out this issue including the amount of equity, gearing and external funding requirements. It is also common market practice for the syndicate to be set up in a company or trust as a Special Purpose Vehicle (SPV) for the purpose of the investment, with the property to be sold after an agreed term.

The Financial Planner, mortgage broker, etc. may seek some input from the Manager in advising on the total funds required to purchase, servicing capacity of the property, etc. in this process. It can be the role of the Manager to instruct accountants, solicitors, valuers, etc. in setting up the syndicate structure and agreements.

Finding the Direct Property Investment

It is mainly the role of the Manager to find a suitable property investment that meets the syndicate requirements. This is likely to follow the process detailed in Case Study #1. When a property is found, the Manager is likely to be involved in the negotiations for the purchase of the property. Depending upon the terms of their appointment or if they have an equity share, they may need an agent’s license to do this. They will also be responsible for managing due diligence prior to purchase.

Refurbishment & New Tenant Mix

Once the property has been purchased the Manager would commence the process of refurbishing the property and changing the tenant mix. This may involve getting council approvals, appointing a builder, etc. Unless they have an “owner’s interest” in the syndicate, they may also need to be a licensed agent if they are handling the day-to-day property management including rent collection.

“Owners” Role

The Manager usually undertakes the “owner’s role” on behalf of the syndicate during the life of the Syndicate. This would include making ongoing decisions on leases; repairs and maintenance; compliance with changing legislation such as the BCA, fire and accessibility; and monitoring the market so that timing for a disposal of the property is favourable to the syndicate. They are also likely to be involved in periodical income distributions to the Syndicate members and ensuring budgets are agreed, approved and monitored.

Disposal of Property

The syndicate agreement generally has a pre agreed date for disposal. When it becomes time to sell, the Manager would review pricing and marketing strategy and make recommendations to the syndicate group. The Manager would ensure the property is ready to go to market (see Preparing Property for Sale GP). The process would also involve reviewing which agents are active in the relevant market and obtain marketing submissions from say the 3 best agents. These will be considered according to the recommended method of sale, marketing budget, timing, commission and finally the experience of each agent. The agent would be appointed, or in some circumstances it may be a joint agency where the skills of separate agents are considered to be complementary. The best method of sale will depend upon market conditions. Where there is the possibility of a potential dispute by any individual syndicate members as to the market price achieved, a sale by auction may be the preferred method as it is more transparent than private treaty negotiations.

Terminating the Syndicate

When the property is sold, the proceeds are distributed to the investors and the syndicate SPV can be wound up.

This case study shows there is a complex range of roles being carried out and specialist knowledge and care needs to be exercised by a Member undertaking this type of work.

Financial Advisors in Australia

Regulatory Authorities

There is some over lapping of jurisdiction covering financial advisors and products between different Commonwealth and State regulatory authorities as follows:

- Australian Competition and Consumer Commission (ACCC)
- Australian Securities and Investments Commission (ASIC)
- State and Territory Consumer and Competition legislation

The primary regulators of advice in relation to direct real property are the ACCC and State Agencies. These regulations particularly relate to deceptive and misleading conduct, or unconscionable conduct.

ASIC's jurisdiction is concerned with direct investment in real property in specific circumstances described in the Corporations Act 2001 (**Corporations Act**) (e.g. financial product advice, financial services licensing, the Australian Securities and Investment Commission Act 2001 (**ASIC Act**), e.g. misleading representations regarding financial services/products, including credit and the National Consumers Protection Act 2009 (**NCCP Act**), e.g. licensing and responsible lending. Some relevant ASIC regulations and reports include:

RG36- Licensing: Financial product advice and dealing- details the difference in providing factual advice and financial product advice.

PS77- Property Trusts & Property Syndicates- This sets out the policy on relief from the Corporations Law (Law) for property trusts and fixed term property syndicates, including "small property syndicates" of 15 or less investors.

RG175-Licensing: Financial product advisors – conduct and disclosure- explains the difference between general information and financial product advice. It provides several examples of different types of financial product advice. There are explanations in relation to suggestions or representations about financing or gearing a property and how they are treated in relation to advice (see also RG234)

RG203- Do I need a credit licence? - Licensing and responsible lending obligations can be triggered where someone assist or suggests someone to enter into a regulated credit contract, including credit for investment in residential property. Credit for commercial property is not currently regulated.

RG244- Giving Information general advice and scaled advice- deals with the difference between "general" and "scaled" advice. You do not need to hold an AFS licence to give factual information to clients.

Definition: "Factual information is objectively ascertainable information, the truth or accuracy of which cannot reasonably be questioned".

RG234- Advertising financial products and advice services (including credit) - deals with representations and dealings with respect to credit and gearing.

Report 337 SMSF's - Improving the quality of advice given to investor- this is relevant particularly where a recommendation is made to a trustee of an SMSF to purchase real property through the SMSF. This is because the vehicle through which the underlying investment is made is an SMSF and an interest in an SMSF is a financial product. It does not matter that the underlying vehicle of investment, such as real property, is not a financial product. In this case a recommendation to purchase would usually require a real estate license. However, if the property is not being specifically marketed to SMSF's, or if the agent does not carry on the business of recommending that SMSF's be used to purchase real property, there is unlikely to be a requirement to also have an AFS licence.

Financial Advisors in New Zealand

New Zealand has an authorisation, registration and licensing regime that applies to people who provide advice about "financial products". Land and other real estate are generally not a financial product and advising on acquiring or disposing of land will not be covered by the financial adviser regime unless the investment falls within the definition of "financial product".

If a person does provide advice about a financial product, they will need to be an Authorised Financial Adviser, a representative of a Qualifying Financial Entity or a Registered Financial Adviser. These three categories have varying authorisation, registration, and licensing requirements.

There is a specific exemption for registered valuers, licensed real estate agents and specified other professionals who provide financial advice in the ordinary course of business.

The following section is intended to provide information on the regulation of financial advisers in New Zealand. The advice or services you provide may be different from those discussed below. If you are unsure if you are required to comply with the financial advisers' regulations in New Zealand, please seek legal advice.

Financial Adviser Regulation in New Zealand

People who provide "financial adviser services" in New Zealand are subject to the Financial Advisers Act 2008 (**FAA**). The Financial Markets Authority regulates financial advisers in New Zealand.

The FAA applies to any person who provides a "financial adviser service" to a client in New Zealand (regardless of where the financial adviser is located) in relation to a "financial product". The definition of "financial adviser services" and "financial products" are discussed below.

Financial Adviser Services

A person provides a "financial adviser service" if, in the ordinary course of business, the person gives financial advice, provides a discretionary investment management service, or provides an investment planning service.

The definition of "financial advice" in the FAA is wide:

A person (**A**) gives financial advice if A makes a recommendation or gives an opinion in relation to acquiring or disposing of (including refraining from acquiring or disposing of) a financial product.

For the purposes of the FAA, it does not matter how the advice is given or communicated.

Financial Products

"Financial products" are defined by reference to category 1 (complex) and category 2 (simple) financial products. The list of category 1 products includes securities, futures contracts, and land investment products. Category 2 products include bank deposits; co-operative company shares general insurance contracts.

Land itself is not a financial product but some land-related products will be financial products. For example, an interest in land that will be managed by a third party and is intended to provide an investment return to the client.

In addition, there is the "financial adviser service" of providing investment planning services where a person advises on a client's financial goals.

Authorisation to provide "financial adviser services".

Financial advisers are regulated by the Financial Markets Authority.

There are three types of financial adviser:

- **Authorised Financial Advisers (AFAs)** are individual advisers who have met the prescribed qualification and education requirements and obtained a license from the Financial Markets Authority. AFAs must comply with the Code of Professional Conduct for AFAs and have the most extensive conduct and disclosure obligations.
- **Qualifying Financial Entity (QFE)** are entities (rather than individuals) who issue or promote their own financial products. QFEs apply for a license under the FAA that enables specified employees and agents to advise customers about their financial products on their behalf. QFEs are responsible for ensuring their employees and agents comply with the relevant conduct and disclosure obligations; and
- **Registered Financial Advisers (RFAs)**. RFAs are individuals who register on the Financial Service Providers Register and must comply with disclosure and conduct obligations but none of the authorisation requirements.

The FAA requires that the only people who can give personalised financial advice to retail clients about category 1 products are AFAs or (in limited circumstances) people who work for a QFE. AFAs can also provide advice to wholesale clients (experienced investors, large entities etc) and provide class advice (non-personalised advice).

RFAs can provide advice to wholesale clients and class advice but only provide personalised advice on category 2 products.

All three types of financial adviser must also register on the Financial Service Providers Register and comply with the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSPA**). Advisers who provide services to "retail clients" must join an approved New Zealand dispute resolution scheme.

Exemption for Registered Valuers and Licensed Real Estate Agents

There is a specific exemption from parts of the FAA for:

- registered valuers who are registered under the Valuers Act 1948; and
- licensed real estate agents who are licensed under the Real Estate Agents Act 2008.

Along with lawyers and accountants, registered valuers and licensed real estate agents have an exemption from providing "financial adviser services" if they are providing the relevant service "in the ordinary course of business of that kind".

The Financial Markets Authority has provided guidance, in the context of real estate agents, to the effect that the person will need to carefully consider whether any services they provide that include investment advice or planning could sensibly be considered as part of a real estate agent's job.

General Exemptions

If the occupation-based exemptions did not apply, there are some general exceptions from the definition of "financial advice" that may be relevant. A person does not give "financial advice" if they only:

- provide information (for example, the cost or terms and conditions of a financial product); or
- make a recommendation or giving an opinion relating to a class of financial products; or
- make a recommendation or giving an opinion about the procedure for acquiring or disposing of a financial product; or
- transmit the financial advice of another person (unless A gives A's own financial advice in doing so or holds out the transmitted financial advice as A's own financial advice); or
- recommend that a person consult a financial adviser.

- Effective Date of the Property Advisor ANZPGP 202.1 Resource Pack is 1 July 2021.