

DISCLAIMER CLAUSES AND QUALIFICATION STATEMENTS

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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'; and
- d) 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 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 professional advice from others, or contact the Institute(s). Members have the responsibility of deciding when it is appropriate to depart from the guidance and practices contained in a GP.

The Institute(s) do 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 additional advice which might include legal advice.

Court or Tribunal Reliance

A court or tribunal may consider the contents of any relevant GP or other document relating to a recommended professional practice published by Institute(s) in deciding whether the member acted to a standard required by law.

Currency of Publication

Case law and relevant legislation may change over time and whilst the Institutes(s) consider this GP 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 this GP.

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) must 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.

Members are advised to seek legal and/or other advice before departing from practice recommended in a GP.

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

1.0 Introduction

1.1 Scope of Guidance Paper

This Guidance Paper is to provide advice to members in the drafting and notifying disclaimer clauses and qualification statements when reporting to clients.

1.2 Status of Guidance Papers

Guidance Papers are intended to embody recognised 'good practice' (Australia) best practice (New Zealand) and therefore may (although this should not be assumed) provide some professional support if properly applied. While they are not mandatory, it is likely that they will serve as a comparative measure of the level of performance of a Member. They are an integral part of the Valuation and Property Standards Manual.

1.3 International Valuation Standards

This Guidance Paper recognises the International Valuation Standards by the International Valuation Standards Committee, and it is intended to be consistent with the concepts and definitions contained in those standards, however, there may be departures from IVSC Standards to reflect Australian & New Zealand law and practice.

1.4 Unlikely Instructions if Seek Exemption

Members are unlikely to be given instructions to value or give advice on property if they seek exemption from liability to their clients.

1.5 Protect from Unrelated Third Parties

They may, however, wish to protect themselves from unrelated third parties by attempting to limit the class of person to whom a duty of care may be owed. For that purpose, members will often, and indeed, may be required by their professional indemnity insurer to use a variety of third party disclaimers.

1.6 Qualification Statements

Similarly, a Member may wish to include qualification statements in a property report to bring to the attention of the reader assumptions and/or other issues concerning factors which might affect the property, and ultimately its value and any other conclusions in the report.

2.0 Third Party Disclaimer Clauses

2.1 Third Party Disclaimer Clauses

Third Party Disclaimer Clauses can take many forms, but would usually contain one or more of the following components:

- (a) the purpose for which the valuation was prepared.
- (b) the person for whom the report was prepared.
- (c) a statement as to who can rely on the information contained in the report.
- (d) a statement that the signatory/firm accepts no responsibility (other than to the client) for the document or its contents.

2.2 Not Able to Exclude Liability

A disclaimer will not, of itself, be able to exclude a member's liability in negligence where such a liability would otherwise exist. [Refer Barwick C.J in the *Evatt's case* and *Allen J in Burke and Ors v Forbes Shire Council* (1987), *Supreme Court of New South Wales*, *Australian Torts Reports* 80-122].

2.3 Disclaimer Clause May be Effective

However, despite those rulings a disclaimer clause may be effective. The presence of such a clause is one factor which could be considered relevant in establishing whether there was a sufficiently close relationship between the parties, whether it was reasonable, in the circumstances, for the third party to rely upon the information set out in the report.

2.4 Legislation

Similarly, under the various legislation e.g. *Federal Trade Practices Act* and the various *State Fair Trading Acts* in Australia, and the *Fair Trading Act* in New Zealand, it is not possible to avoid liability to third parties simply by stating that the member does not accept responsibility to that person.

2.5 May be Effective Where Limitation Reasonable

A disclaimer may be effective to avoid liability under these acts where the limitation upon liability to third parties sought to be created by the member is reasonable having regard to all the circumstances including the instructions provided, the purpose of the report, the intended circulation of the report (who is likely or intended to receive and rely upon it) and the clarity of the disclaimer.

2.6 Sufficient Warning to Third Parties

In such circumstances, the third-party disclaimer will be effective because it provides a sufficient warning to third parties that it may not be safe to rely upon the report without further recourse to the author. A report containing such a third-party disclaimer may be held not to be misleading or deceptive to a person of the class of third parties to which liability has been disclaimed.

2.7 Specifically Drafted

Accordingly, at both common law and under the Trade Practices Act and state Fair Trading Acts in Australia, and the Fair Trading Act in New Zealand, the most effective third party disclaimer will be one that is specifically drafted for the circumstances of the particular report and which, thereby reflects the instructions, purpose and intended recipients of the report.

2.8 Most Impact at the Beginning of Report

Generally, the clause is more likely to be effective if included at the beginning of the report.

2.9 Ambiguity

Where there is any ambiguity in the meaning of the clause, a Court is likely to interpret the disclaimer in a manner which is least helpful to the party relying on that clause. It is therefore necessary to carefully consider each set of instructions and to adopt clear, concise wording appropriate to the particular valuation or property report being undertaken.

2.10 Inappropriate Disclaimer

Members should also note that the use of a third-party disclaimer, where the disclaimer is inappropriate to the instructions, purpose and intended recipients of the report, could itself constitute misleading or deceptive conduct in breach of the Federal Trade Practices Act or State Fair Trading Acts in Australia, and the Fair Trading Act in New Zealand.

2.11 Instruction Paragraph Details

Ideally, the instruction paragraph should set out the details of the party issuing the instruction, the date of their written instructions, the party to whom the report is addressed, the names of any other parties to whom liability is extended under the report and the purpose of the report. For example:

Acting on written instructions from ... dated ... on behalf of ..., we have inspected the property situated at ... for the purpose of assessing the current Market Value of that property for mortgage security purposes.

This valuation may only be relied upon by ...

The report has been prepared for the private and confidential use of the above parties and it should not be reproduced in whole or in part or relied upon for any other purpose or by any party other than ... without express written authority.

3.0 Qualification Statements

3.1 Highlight Factors Affecting Reliability

Qualification statements should be used whenever the quality of the information provided by the member can be improved by highlighting any factor which may affect the reliability of that information.

3.2 Clearly Inform the Reader

Qualification statements should clearly inform the reader of:

- (a) any factors which might affect the reliability of information in the report.
- (b) any additional steps which the reader should take to make the information more reliable.
- (c) the potential effect on the value if the information is not correct.

3.3 Not a Substitute - Highlight Limitations

Qualification statements should not be used as a substitute for the member's own reasonable enquiries and verification of information. They do, however, have a legitimate role in highlighting aspects of the instructions, limitations upon the extent of enquiry, which the member is reasonably able or expected to carry out, and/or limitations in expertise.

3.4 Most Impact Adjacent Information Intended to Qualify

Qualification statements will have the most impact on the reader if they are included in the body of the report immediately adjacent to the information which they are intended to qualify. Where qualification statements (including assumptions) are of central importance to a particular property report, it may be good practice to repeat those qualification statements in a prominent place such as adjacent to the conclusion or statement of valuation opinion.

3.5 Meld to the Circumstances

While it is useful to have a standard set of commonly used qualification statements to act as a reminder or 'trigger', members should take care to meld the appropriate qualification statements to the circumstances of each report.

A slavish adherence to standard qualification statements may undermine the effectiveness of those statements.

3.6 Appended Page Less Useful

Similarly, a page of qualification statements appended to a property report may not assist the reader of the report to focus on the issues and may be less useful in assisting the Member to resist allegations of negligence and/or misleading or deceptive conduct.

3.7 Must Inform the Reader

Qualification statements do not have any 'magic' effect. To be of assistance in minimising liability they must inform the reader in a way that allows the reader to assess the information provided by the property report in a balanced and informed manner. By doing so qualifications will assist the member to meet his or her duty of care and avoid information in the property report creating a misleading or deceptive impression.

3.8 Examples Relevant to Situations

Some examples of qualification statements which may be relevant to situations commonly encountered by members are set out below. The way these examples are designed to address limitations in the member's role, instructions or expertise should be noted. They may assist to draft specific qualification statements to address circumstances or reports, however they should be used as a guide only.

Disclaimer clauses should be specifically designed to suit instructions as appropriate.

3.9 Site Survey

Member Generally not Qualified.

The member is often asked to state that the improvements on a property are located within the boundaries of the site. Generally, the Member is not qualified to make that certification, unless also qualified and registered as a Surveyor.

3.10 Survey Qualification

The Institute suggests that the following qualification may be appropriate for inclusion in reports.

'A current survey has not been sighted. The valuation is made on the basis that there are no encroachments by or upon the property and this should be confirmed by a current survey report and/or advice from a Registered Surveyor. If any encroachments are noted by the survey report, the member should be consulted to reassess any effect on the value stated in this report.'

3.11 Town Planning/Resource Management

Verbal Enquiries

In most instances a member will only make verbal enquiries of the Local Authority or the State Planning Department as to the zoning or planning area of a property. In some locations - it is not possible to obtain a 'zoning or planning area certificate' and obtaining written confirmation of zoning can take considerably more time than is generally available to the Member and/or the client.

3.12 Extent and Nature of Enquiries

It is therefore necessary to set out the extent and nature of the enquiries made in ascertaining the zoning and development requirements of the subject property. For example:

Town planning information was verbally obtained from offices of the Town Planning Department. Council, however, we recommend that this zoning or planning area should be verified by application to Council for the issue of a zoning certificate pursuant to Section 149 of the Environmental Planning and Assessment Act, 1979. (Australia)

3.13 Environmental/Contamination Issues

Increased Awareness

An increased awareness of environmental issues in the community today has brought about a need for members reporting on property to be conscious of influences which may affect the value of a particular property at the time of reporting or at some time in the future.

Those issues may include:

- (a) contamination - through petroleum or chemical products.
- (b) nutrient management for properties adjacent to rivers/ streams or over underground water supply sources.
- (c) conservation - including rare flora and fauna species.
- (d) Native title claims.

Some examples of clauses relevant to this issue include the following:

- (a) Environmental Issues

Our enquiries at Council indicate that the site has not previously been utilised for any industrial or manufacturing use or for the storage (either above ground or underground) of any chemical substance.

Our verbal enquiries at EPA indicate that the Authority is unaware of the existence of any site contamination. Whilst our inspection of the site surface confirms the results of these enquiries, we have not investigated the site beneath the surface or undertaken vegetation or soil sampling. This valuation is therefore subject to a satisfactory contaminated site assessment report from environmental consultants.

or

The site is (or has been) occupied by an undertaking which, having regard to the nature of process or chemicals used or stored, has a potential to cause soil contamination.

Whilst our enquiries at EPA indicate that the Authority is unaware of contamination, we recommend a site inspection by an Environmental Consultant.

(b) Petroleum products

The subject property is operated as a service station and workshop and therefore fuels, oils, and other products capable of causing contamination are used on the site as part of the operation. There are no visible signs of any pollution on the property; however, we are unable to certify that there is no contamination of the property beneath the surface of the soil.

(c) Asbestos

Inspection of the improvements showed the use of asbestos products in the building. We must point out that we are not experts in this area and therefore, in the absence of an environmental consultant's report concerning the presence of any asbestos fibre within the subject property, this valuation is made on the assumption that there is no health risk from asbestos within the property. Should it subsequently transpire that an expert report establishes that there is an asbestos related health risk we reserve the right to review this valuation.

(d) Pest Affectation

The subject property is located in an area considered susceptible to termite infestation. Inspection of the subject improvements did not reveal any apparent termite infestation. This should, however, be confirmed by a certified pest control firm.

(e) Right to Review

The right is reserved to review and if necessary vary the valuation figure if any contamination or other environmental hazard is found to exist.

3.14 Improvements

Extent of Investigations

In describing the improvements to a property, and their condition, it is important to highlight in the report the extent of the member's investigation as to the structural integrity of the building and its plant and equipment. For example:

- (a) An inspection of all readily accessible parts of the improvements on the property has been carried out by the member.

- (b) We have not sighted a qualified engineer's structural survey of the improvements, or its plant and equipment. The member is not a building construction and/or structural expert, and is therefore unable to certify as
- (c) to structural soundness of the improvements. Prospective purchasers or mortgagees would need to make their own enquiries in this regard.
- (d) We have not sighted a structural report on the property, nor have we inspected unexposed.
- (e) or inaccessible portions of the premises. We therefore cannot comment on the structural integrity, defect, rot, or infestation of the improvements nor can we comment on any knowledge of the use in construction of material such as asbestos or other materials now considered hazardous.

3.15 Tenancy Details

Extent of Investigation of Lease Details

In reporting the specific lease details of a property, it is important to advise the extent of the investigation of lease documents and other supporting documentation undertaken by the Member.

Valuation of a Proposed Development

On occasions, particularly when undertaking an 'as if complete' valuation of a proposed development, lease negotiations or preparation of documentation may not have been concluded. In those circumstances it is necessary to specify in the report that the valuation is subject to satisfactory conclusion of those lease negotiations and the sighting by the member of a stamped lease agreement by the parties. For example:

This assessment of Market Value assumes that the proposed lease agreements outlined earlier in this report are all executed, signed and stamped.

Upon being stamped those documents should be referred to the member for sighting to confirm that the particulars of the document concur with those set out in this report.

3.16 Value As If Complete

Requires a Variety of Assumptions

In Australia it is normal practice in valuing a proposed development for mortgage security purposes to assess the market value of that development as though the property were completed at the date of valuation. Such a process requires a variety of assumptions to be made, which may include:

- (a) construction and development costs.
- (b) in accordance with plans and specifications at the time of valuation.
- (c) the impact of existing and future competition.
- (d) the level of sale prices; and
- (e) in the case of income properties, the likely level of rents, the lease-up period, rental concessions and commissions, capitalisation rates, discount rates, etc.

3.17 Set Out in Detail Assumptions Made and Qualifying Clauses

It is therefore imperative that the Member, in undertaking an 'As If Complete' valuation, sets out in detail the assumptions made and inserts a qualifying clause in the valuation report stating that the valuation is subject to the assumptions outlined in the report,

particularly where those assumptions are based on purported lease negotiations or pre-sale contracts. These qualifying clauses could include:

- (a) Satisfactory completion of the improvements in accordance with the plans, specifications and details as provided.
- (b) An inspection by the valuer following practical completion of construction.
- (c) Confirmation or variation of the original valuation figure relevant to the original valuation date, following an inspection of the project and any leases after practical completion.
- (d) Issue of all relevant approvals including a satisfactory building completion certificate under the appropriate legislation.
- (e) Sighting of any reports from other experts who have provided advice in aspects of the construction of the buildings.
- (f) Such other matters/issues that the valuer is of the opinion should be drawn to the attention of the lender.
- (g) The right to review and, if necessary, vary the valuation if there are changes in the project itself or leasing.

An example of what could be stated follows:

'The Value As if Complete assessed herein is the Market Value of the proposed improvements as detailed in the report on the assumption that all construction had been satisfactorily completed in all respects at the date of this report. The valuation reflects the valuer's view of the market conditions existing at the date of the report and does not purport to predict the market conditions and the value at the actual completion of the improvements because of time lag.

Accordingly, the 'As if Complete' valuation must be confirmed by a further inspection by the valuer, initiated and instructed by the lender, on completion of improvements. The right is reserved to review and if necessary, vary the valuation in this report if there are any changes in relation to the project itself or in property market conditions and prices.

4.0 GST Qualification

In analysing the sales and/or leasing evidence referred to herein, it is noted that we have attempted to ascertain whether the sale price/rental is inclusive or exclusive of Goods and Services Tax (GST). In relation to sales evidence, it is emphasised that Land Titles Offices in Australia and the Land Registry Offices in New Zealand do not currently differentiate between or record whether the sale price is inclusive or exclusive of GST.

Where we have not been able to verify whether GST is included in the sale price or rental, we have assumed that the record of sales price or the rental is inclusive/exclusive of GST. Should this not be the case for any sale or letting used as evidence, we reserve the right to reconsider our valuation.

Effective Date

This GP *ANZPGP 201* is applicable from 1 July 2021. Earlier adoption is permitted and encouraged.

This GP replaces *ANZRPGN 1* effective 1 October 2009 which is withdrawn from 30 June 2021.