

Exposure Draft

DISCLAIMER CLAUSES AND QUALIFICATION STATEMENTS

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Table of Contents

1.0	Introduction.....	1
1.1	Scope of this Guidance Paper	1
1.2	International Valuation Standards.....	1
2.0	Definitions.....	2
3.0	Legislation	3
3.1	Consumer Law	4
3.2	Corporations Law	4
4.0	Retainer Agreements.....	5
5.0	Qualifications	6
5.1	General Principles.....	6
5.2	Assumptions and Special Assumptions.....	6
5.3	Conditions.....	7
5.4	Limitations.....	7
5.5	Warnings.....	7
5.6	Drafting Principles.....	7
5.7	Situations when Qualifications should be considered	8
6.0	Third Party Disclaimers.....	9
6.1	General Principles.....	9
6.2	Third-party disclaimers and retainer agreements.....	9
6.3	Drafting Principles.....	10
6.4	Sample Third Party Disclaimer	11
7.0	Effective Date.....	11

EXPOSURE DRAFT

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* and "best practice" for Property Institute of New Zealand (*PINZ*) *Members* and New Zealand Institute of Valuers (*NZIV*) *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 *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 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

PINZ contact: standards@property.org.nz

EXPOSURE DRAFT

1.0 Introduction

1.1 Scope of this Guidance Paper

This *GP* provides guidance to *Institute Members* including *Institute Valuers (Valuers)* in relation to *third party disclaimers* and *qualification* statements and their inclusion in reports or other professional advice to clients.

Third party disclaimers are statements that restrict who the *Member* and the *client* have agreed can use the report or other written advice, what they can use the report or other advice for and who is not permitted to use the report or other advice.

Qualifications are statements which are used to bring to the attention of the user(s) of the report or other written advice any factors or issues which may affect the conclusions or opinions contained with the report or advice.

For the purposes of this *GP*, *qualifications* is the collective term for *assumptions*, *conditions*, *limitations* and *warnings* in reports or other written advice.

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

1.2 International Valuation Standards

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

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 and New Zealand law and practice.

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

2.0 Definitions

The definitions 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, their use in this *GP* is so limited.

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

Institute(s)	All references to <i>Institute(s)</i> mean, as the context requires, the <i>API</i> , <i>PINZ</i> and/or <i>NZIV</i> .
Member(s)	A <i>Member(s)</i> of the <i>API</i> and/or <i>PINZ</i> and <i>NZIV</i> .
Client	The entity/entities or person(s) for whom the report/advice is undertaken and are permitted to use of the report/advice based on the retainer agreement or instruction agreed between the <i>Member</i> and <i>client</i> .
Intended user(s)	Any entity/entities or person(s), including the <i>client</i> , identified by name as permitted to use the report/advice in accordance with the retainer agreement or instructions agreed between the <i>Member</i> and <i>client</i> .
Third Party	Any entity/entities or person(s), other than the <i>client</i> .
Others	Any entity/entities or person(s) other than the <i>Member</i> . This includes the <i>client</i> , <i>intended users</i> and any other <i>third parties</i> .
Qualification(s)	Statements in a report or advice that alert the reader/ <i>intended user</i> to any items or issues which may impact the conclusions, opinions or recommendations provided or that the <i>Member</i> wishes to highlight. They include <i>assumptions</i> and <i>special assumptions</i> , conditions, limitations, and warnings.
Third-Party Disclaimer(s)	A statement included in a retainer agreement (or similar) and subsequent report or advice that limits the reliance and/or use of the report or advice to named entities/entities or person(s), for a specified purpose and disclaims responsibility and liability to any other third parties or for any other purposes.

3.0 Commonly Used Terms relating to Third Party Disclaimers and Qualifications

Different terminology is often used when referring to *third party disclaimers* and *qualifications*.

Some terms and expressions are used interchangeably within the property industry. The list of ‘terms’ contained below is a non-exhaustive list of phrases, terms or expressions that are used to describe disclaimers and *qualifications*.

They are included in the *GP* to assist with the interpretation and understanding of concepts and guidance in this *GP*. Whilst a ‘term’ may also have a common meaning or interpretation, their use in this *GP* is so limited.

Where a ‘commonly used term’ is utilised in this *GP* it is shown in italics.

assumption(s)	An assumed fact(s) that is consistent with or could be consistent with facts(s) that exist at the date of valuation or other advice.
conditions	A form of <i>qualification</i> in a report or other advice that is included to alert the user(s) that the conclusion, opinion or recommendation provided is based on something occurring or having occurred.
limitations	A form of <i>qualification</i> included in a report or other advice to alert the user(s) that the conclusion, opinion or recommendation provided is restricted due to information or details specified in the report or other advice been limited or unavailable.
qualifying statements	A way of providing extra detail or description to make the statement less or more certain. Another word for <i>qualifications</i> .
special assumption(s)	An assumed fact(s) that is not consistent with or differs from a fact(s) that exists at the date of valuation or other advice.
warnings	A <i>qualification</i> contained in a report or other advice which serves to warn/alert the user(s) that caution is advised prior to using the report or other

4.0 Legislation

Members are reminded that legislative requirements may apply to the professional services undertaken and provided, including *third-party disclaimers* and *qualifications* in reports or advice.

4.1 Consumer Law

Members should be aware that they may still face potential liability under applicable legislation for example, the Australian Consumer Law (previously the Trade Practices Act) and the various State Fair Trading Acts in Australia, and the Fair Trading Act in New Zealand.

Attempting to avoid the provisions of Australian and New Zealand Consumer Law may not be possible in most cases.

4.2 Corporations Law

Third-party disclaimers and qualifications included in expert valuation reports and/or other written advice given as an “Expert” as defined under Corporations Law and other similar legislation, may be “struck down” as contrary to that legislation, and even by their inclusion, may be found to be “misleading and deceptive”.

It is not the intent nor purpose of this *GP* to do any more than generally alert *Members* to current legislation. *Members* should seek legal advice if undertaking “Expert” reports and/or other written advice pursuant to Corporations Law (and similar legislation) in the jurisdiction the professional services are provided.

Australian *Members* who undertake valuation reports and other written advice as “Experts” as defined under the Corporations Law and other similar legislation need to be aware that ASIC has provided Regulatory Guidelines to “assist and guide” those who provide such reports pursuant to, and in compliance with Corporations Law (and other legislation).

New Zealand *Members* are reminded that under present NZ Law (High Court Rules 2016) the definition of Expert “means a person who has specialised knowledge or skill based on training, study, or experience”.

5.0 Retainer Agreements

A retainer agreement or professional services agreement or engagement contact (or similar) is a contract between a *Member* and a *client* that creates a legally binding contract for the protection of both the *Member* and *client*.

A retainer agreement is simply an contractual agreement that outlines the services that the *Member* will provide as well as any payments for those services.

Retainer agreement should cover, amongst other things, the following:

- identify the *client*;
- identify other *intended users* who may use (or be expressly permitted to rely on) the report or advice;
- the scope of the professional services;
- the purpose to which the *Member* and *client* have agreed the report or advice can be used or relied upon, and by who;
- fees and payments for services;
- time period;
- dispute resolution mechanism; and
- liability

The *Institutes* recommend that the retainer agreement (or similar) includes a *third-party disclaimer* provision and that this is replicated in the report/advice, to protect *Members* from the risk of any *third party/parties* seeking to use or rely on the *Members* report or advice.

This is a complex area of contract law. The *Institutes* recommend that *Members* obtain legal advice relating to negotiating and drafting retainer contracts (retainer agreements, professional services agreements or similar) that contain contractual disclaimers.

6.0 Qualifications

6.1 General Principles

Qualifications are statements which are used to alert the *intended user* of the report or advice any items or issues which may affect the conclusions, opinions or recommendations contained with the report or advice. They are also used to highlight any specific or general items, issues or factors that the *Members* wishes the draw to the attention of the *intended user* of the report or advice.

As noted previously, qualification statements, clauses or disclosures include *assumptions* and *special assumptions*, conditions, limitations and warnings in reports or other advice.

Qualification statements should not be used as a substitute for a *Members* own reasonable enquiries, investigations and procedures including verification of information or other material used and relied upon by the *Member* in the provision of professional services.

Valuers are further reminded of the requirements under the *IVS* for all significant and/or material assumptions and special assumptions to be disclosed in valuation reports or other advice. The assessment of significance or materiality requires the professional judgement of the *Valuer*.

Valuers undertaking valuations in Western Australia (WA) are reminded of the requirements under Clause 25 (3) (g) of the WA Licensed Valuers Code of Conduct 2016, which states;

- “(3) A licensed valuer must include the following in a valuation report for a client –
- (g) a statement, under the heading of “Assumptions, Conditions and Limitations”, of all assumptions made in arriving at an opinion of value and all conditions, requirements or limitations arising from the client’s instructions or for any other reason”.

6.2 Assumptions and Special Assumptions

Members may be required to, or are instructed to, make an assumption or multiple *assumptions* relating to the asset(s) that is/are the subject of the report or advice. This could include, for example, assumed changes or differences to the physical or legal state/nature of the asset in a hypothetical exchange or the circumstances under which the asset is assumed to be exchanged.

An *assumption* may be classified as either;

- (a) assumed fact(s) that are consistent with or could be consistent with fact(s) that exist at the date of the valuation or other advice (*assumptions*).

They are used to alert the *intended user(s)* that the conclusion, opinion, or recommendation has relied upon information which the *Member* has not verified.

- (b) assumed fact(s) that are not consistent or differ from fact(s) that exist at the date of valuation or other advice (*special assumptions*).

They are used to highlight to *intended user(s)* of the report or advice that the conclusion, opinion, or recommendation provided is contingent on a change in the current circumstances for the asset or market, or that it reflects a different situation than participants would normally take as at the relevant date of the report or advice.

6.3 Conditions

A condition statement in a report or advice highlights to the *intended user(s)* that if a certain condition is met, or is assumed to be met, then the conclusion, opinion, or recommendation provided may be true. That is, the conclusion, opinion, or recommendation is based on something occurring or having occurred.

It is important when including a conditional statement in reports or advice that *Members* clearly state the condition/assumption that the conclusion, opinion or recommendation is based on first to reinforce that the result relies on the condition occurring.

6.4 Limitations

A limitation statement in a report or advice is included to emphasize the limits on the efficacy of the content of the report or advice as a result of information, investigations or procedures not been available or undertaken.

Members should clearly state any limitations or restrictions on their professional services or information that impact on the outcome of the report or advice.

6.5 Warnings

A warning statement is generally used within a report or advice to inform the *intended user* that;

- (a) the quality or reliability of the valuation report, or other written advice; and/or
- (b) information provided by the Member and referred to in the advice,

can be further clarified and or improved by highlighting any factor which may affect the quality or reliability of that report or advice.

A warning in a report or advice is typically included to bring to the attention of the *intended user* specific issues which the *Member* has had regard to when completing the report or advice.

They are included principally for the benefit of the *intended user(s)* of the report to allow an informed, or better, decision about what the *intended user* should do or needs to do before reliance or use on the report or advice is placed/made.

A well written warning statement will enable an *intended user(s)* to decide whether to proceed to use and rely on the report or advice, or not, and if so upon what basis.

6.6 Drafting Principles

An effective *qualification* statement will be one that is:

- (a) included at the beginning of, as well as in the body of, the report, or other written advice, immediately adjacent to the information which they are intended to qualify.
- (b) drafted to the appropriate and applicable *qualification* statements to the circumstances of the instruction and report and or other written advice.
- (c) not a slavish adherence to standard *qualification* statements that a *Member* may have access to in their practice. (This may have the effect of leading to an undermining of the effectiveness of such *qualification* statements).

- (d) uses clear wording to detail what is intended. ¹
- (e) positioned in close proximity to the content in the report or other advice to which the *qualification* is to be applied.
- (f) Uses clear, concise wording appropriate to the report or other written advice being undertaken to avoid ambiguity. Where there is ambiguity in the meaning, intention or interpretation of a *qualification* statement, clauses or disclaimer, a Court will almost always interpret such a *qualifying statement* in a manner which is least helpful to the party seeking to rely on that statement.

6.7 Situations when Qualifications should be considered

Common situations where qualifying statements are warranted:

- (a) Source of instructions
Members should take care when assessing/evaluating the value, correctness, reliability and probity of all information or advice received from a “person of interest” in the instructions or transaction to which the valuation or written advice is to apply.
- (b) Limitation on the Scope of the Member’s contract
Any limitation upon the *Member* to be able to investigate and research certain critical information or other advice the *Member* deems necessary to complete the instruction.
- (c) Limitations on Access
Any limitation or restrictions placed on the *Member* relating to access to the property or parts of the property.
- (d) Sources of Information
Information that is provided by *others* including tenants, solicitors, council officers, real estate agents and *other* experts.
- (e) Independent Verification
Extent to which the *Member* has independently verified information provided to them, or been permitted to undertake what is required, and/or recommended to complete that verification.
- (f) Obtaining information
The willingness or otherwise of a *client* or client’s agent to obtain and provide information and or advice sought by the *Member*, and which only the *client* or client’s agent can obtain.
- (g) Reports prepared by other experts
Reports prepared by *other* experts concerning matters outside the expertise of the *Member*. *Members* should never, unless in exceptional circumstances, adopt, verify, or otherwise agree with the truth, falsity, accuracy and/or reliability of *other* experts reports and/or advice or information which the *Member* has referred to, or had regard to, in undertaking the professional services. ²

¹ BT v Raine and Horne [1983] 3 NSWLR 221

² High Court of Australia Yorke v Lucas 61 ALR 307 to 309

7.0 Third Party Disclaimers

7.1 General Principles

The drafting of and inclusion of an effective *third-party disclaimer* is an important consideration for *Members* when providing professional services in the form of a written report or other advice.

The intention of a *third-party disclaimer* is to minimise the exposure risk to *third party* claims relating to the report or advice.

It is accepted and understood that *Members* owe a duty of care to the *client* in relation to a report or other written advice, however a *Member* can also owe a duty of care in relation to the same report or advice to a *third party* who receives and relies on it.

Members who do not wish to accept liability or responsibility to *third parties* relying on the report or other written advice, should seek to protect themselves from liability and exposure by including a clearly worded *third-party disclaimer* in any report or other written advice they issue which states the report or advice cannot be relied upon or used by any person(s) other than the *client* and agreed *intended users*, for any purpose other than that agreed in the instructions, without the *Members* prior written agreement.

A *Members* liability to a *third party* for the content of a report or advice may be able to be limited by including a limitation on who can use or rely on the report or advice and for what purposes. The intention of the “disclaimer” is to expressly state or have the effect of disclaiming legal responsibility if an unauthorised party relies on the report or advice or it is used for an unauthorised purpose by any party.

A report or advice provided which does not contain an appropriate *third-party disclaimer* poses an increased risk of the *Member* being found liable to a *third-party*, for the content of the report or advice, for whom they never intended to owe a responsibility or duty.

To be effective a *third-party disclaimer* must be brought to the attention of a third-party who comes into possession of the report or advice and make it clear to a reasonable person in the *third party's* position that the report or advice is not intended for them and that they should not rely or use the report or advice at all.

An effective *third-party disclaimer* should provide proper warning to *third parties* (including *intended users*) that it may not be safe to rely upon, or use, the report or advice, or that reliance or use is not to occur, at least without further recourse to the *Member*.

A *third-party disclaimer* in the form universally used by most *Members* (and as may be required by some Insurers) may not always provide the intended protection. ^{1 3}

7.2 Third-party disclaimers and retainer agreements

The *Institutes* recommend that *Members* include a *third-party disclaimer* provision in their retainer/professional services agreements as well as in all reports or other written advice. Whilst such a provision is only contractually binding on the *client* (parties to the contract), it may also assist the Member in the event of a negligent misrepresentation claim by an unauthorised party using or relying on the report or advice. The existence of such a provision, even if it is not known by the *third party* is a relevant factor for a Court's consideration in deciding whether it is “fair, just and reasonable” in all circumstances to impose a duty of care on the Member in relation to the third party's use or reliance on the report or advice.

In addition, a disclaimer provision included in a retainer/professional services agreement which states that the client does not reproduce, disclose, distribute, share or permit a third party/parties to use or rely on the whole or any part of the report or other written advice without the Members prior written consent may limit the Members liability to any such third party.

The recommendation for a disclaimer provision in the retainer/professional services agreement does not negate its inclusion in the report or advice. It is the inclusion in the report or other written advice that potentially provides greater protection for the Member by bringing the limits on the use or reliance to the attention of a third party who obtains access to the report or advice.

7.3 Drafting Principles

An effective third-party disclaimer will be one that is:

- (a) specifically drafted for the circumstances of the particular advice in the report, and or other written advice, and which thereby reflects the instructions, purpose and clearly articulates who are the intended recipients of the report/advice, to whom the Member accepts responsibility.^{3 4}
- (b) included in a prominent position in the report or other written advice, near or in close proximity to any conclusions, opinions or recommendations provided by the Member. Positioning at the beginning of the report or advice under a heading stating “Third-Party Disclaimer” or “Use of this Report” or similar in the same font size as the rest of the report content, or if smaller then in bold or italicized but still in a reasonably legible size will reinforce the importance and prominence of the disclaimer.

It should not be included “in small print at the foot” of a page in the valuation report or other written advice. The issue of “small print” and other issues relating to the positioning of disclaimers/limitations in reports/advice was discussed in the Butcher case.⁵

- (c) included in the instruction recital paragraph of the report or other written advice, and also located in near proximity to the content of the report/advice to which the disclaimer is to be applied.
- (d) adopt clear, concise wording appropriate to the report, or other written advice, being undertaken to avoid ambiguity. Where there is any ambiguity in the meaning, intention or interpretation of a disclaimer clause, a Court will almost invariably interpret such a clause in a manner which is least helpful to the party seeking to rely on that clause.

¹ BT v Raine and Horne [1983] 3 NSWLR 221
³ AFP Properties Pty Limited v Kestrel Holdings Pty Ltd [2007] FCA 1561
⁴ Derring Lane Pty Ltd v Fitzgibbon [2007] VSCA 79
⁵ Butcher and anor v Lachlan Elder Realty Pty Ltd (2004) 212 ALR 357 at [158] and [200]

7.4 Sample Third Party Disclaimer

The following is a sample third party disclaimer clause which can be included into the instruction paragraph for a valuation report:

Acting on the written instructions from [name of client representative] dated [date] on behalf of [name of client], we have inspected the property situated at [property address] for the purpose of assessing the current Market Value of that property for the purpose of [insert purpose].

This valuation can only be relied upon by [name of client] and no other, and then only for the above purpose and no other purpose.

The report has been prepared for the private and confidential use of the above-named party/parties and no other. It cannot be reproduced in whole or in part or relied upon for any other purpose or by any party/entity other than [name of client] without the express written authority of [Name of Firm]. [Name of firm] does not accept responsibility to any other party/parties relying on this report otherwise than in strict accordance with this clause.

Any request to rely upon this report for any reason whatsoever by any other person/party other than [name parties to whom reliance has been agreed], will only be considered if made in writing to [the author of the valuation].

8.0 Effective Date

This GP is applicable from DD MMMM YYYY. Earlier adoption is permitted and encouraged.

This GP replaces GP ## ##### which was in effect from DD MMMM YYYY and was withdrawn DD MMMM YYYY.