

DISCLAIMER CLAUSES AND QUALIFICATION STATEMENTS

Reference:	ANZPGP 201 – Disclaimer Clauses and Qualification Statements
Published Date:	20 April 2023
Effective Date:	1 July 2023
Exposure Draft Period:	Open: 19 October 2022 Closed: 18 November 2022
Review Date:	12-18 months after the effective date
Owner:	Manager Professional Standards

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	Commonly Used Terms relating to Third-Party Disclaimers and Qualifications	3
4.0	Legislation	4
4.1	Consumer Law	4
4.2	Corporations Law	4
5.0	Retainer Agreements / Professional Services Agreements	5
6.0	Third-Party Disclaimers	6
6.1	General Principles	6
6.2	Third-Party Disclaimers and Retainer Agreements	7
6.3	Drafting Principles	7
6.4	Sample Third-Party Disclaimers	8
6.4.1	Long Form Valuation Report	8
6.4.2	Restrictions on Use	8
6.4.3	Mortgage Valuation Report	9
6.4.4	Syndicated Lending Reports (Australia)	9
7.0	Qualifications	10
7.1	General Principles	10
7.2	Assumptions and Special Assumptions	10
7.3	Conditions	11
7.4	Limitations	11
7.5	Warnings	11
7.6	Drafting Principles	12
7.7	Situations when Qualifications should be considered	12
7.8	Sample Qualification Statements	13
7.8.1	Site Survey	13
7.8.2	Town Planning/Resource Management	14
7.8.3	Environmental/Contamination Issues	14
7.8.4	Improvements	16
7.8.5	Tenancy Details	16
7.8.6	Value As If Complete	16
7.8.7	GST Qualification	18
8.0	Effective Date	18

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 expert advice from others, which might include 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 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.

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 this Guidance Paper

This *GP* provides guidance to *Institute Members* including *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:

- (a) the use to which the report or other written advice may be put; and
- (b) the party or parties who may rely on the report or other written advice; and
- (c) the exclusion of any other party.

Qualifications are statements which are used to alert the reader or other *intended user(s)* of the report or other written advice of any *assumptions* and/or other factors or issues which may impact the conclusions, opinions or recommendations provided or that the *Member* wishes to highlight.

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, its use in this *GP* is so limited.

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

Client	The entity/entities or person(s) for whom the report/advice is undertaken and are permitted to use the report/advice based on the retainer agreement or instruction.
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> .
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> .
Member(s)	A <i>Member(s)</i> of the <i>API</i> and/or <i>PINZ</i> and <i>NZIV</i> .
Third Party	Any entity/entities or person(s), other than the <i>client</i> , or other <i>intended user(s)</i> .
Third-Party Disclaimer(s)	A statement included in a retainer agreement (or similar) and subsequent report or other written advice that limits the reliance and/or use of the report or other written 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.
Qualification(s)	<p>Statements in a report or other written 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.</p> <p>They include <i>assumptions</i> and <i>special assumptions</i>, <i>conditions</i>, <i>limitations</i>, and <i>warnings</i>.</p>
Valuer	<p>In <u>Australia</u>, means a <i>Member</i> who holds the certification of CPV, RPV or CPV (P&M).</p> <p>In <u>New Zealand</u>, means a <i>Member</i> who is a Registered Valuer under the <i>Valuers Act 1948</i>.</p>

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	An assumed fact that is consistent with or could be consistent with a facts existing at the date of valuation or other written advice.
conditions	A form of <i>qualification</i> in a report or other written 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 written 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 written 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	An assumed fact that is not consistent with or differs from a fact that exists at the date of valuation or other written advice. The conclusion contained in the report or other written advice is contingent on a change in certain circumstances or to reflect a different perspective than would normally be taken by market participants at the relevant date.
warnings	A <i>qualification</i> contained in a report or other written advice which serves to warn/alert the user(s) that caution is advised prior to using the report or other written advice.

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 other written advice.

4.1 Consumer Law

Members should be aware that they may still face potential liability to *clients*, *intended users* and *third parties* under applicable legislation (for example, Australian Consumer Law under the *Competition and Consumer Act 2010* (formerly the *1974*) and the various State based Fair Trading Acts in Australia, and the *Fair Trading Act 1986* in New Zealand).

It may not always be possible to limit one's liability under consumer law. *Members* may seek legal advice to ensure that any limitation of liability clauses are appropriately drafted for the circumstance they are intended for.

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).

5.0 Retainer Agreements / Professional Services 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*. Note, the terms retainer agreements and professional services agreements are interchangeable.

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

Retainer agreements 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 whom;
- fees and payments terms for services;
- time frame for delivery of services;
- 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 where applicable in any report/advice, to protect *Members* from the risk of any *third party/parties* seeking to use or rely on the *Members* report or other written 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 Third-Party Disclaimers

6.1 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 written advice.

The intention of a *third-party disclaimer* is to minimise the exposure risk to *third party* claims relating to the report or other written 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/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 other written 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 other written advice may be able to be limited by including a *limitation* on who can use or rely on the report or other written 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 other written advice or it is used for an unauthorised purpose by any party.

A report or other written 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 written 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 other written advice and make it clear to a reasonable person in the *third party's* position that the report or written advice is not intended for them and that they should not rely on or use the report or written 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 written 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, 2}

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

² AFP Properties Pty Ltd v Kestrel Holdings [2007] FCA 1561

6.2 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 *third party* using or relying on the report or written 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 written 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 written 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 written advice.

6.3 Drafting Principles

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

- (a) specifically relates to 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.^{2, 3}
- (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 written 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.⁴

- (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.

² AFP Properties Pty Ltd v Kestrel Holdings [2007] FCA 1561

³ Derring Lane Pty Ltd v Fitzgibbon [2007] VSCA 79

⁴ Butcher and anor v Lachlan Elder Realty Pty Ltd [2004] 212 ALR 357 at 158 and 200

- (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.

6.4 Sample Third-Party Disclaimers

The following are sample *third-party disclaimer* clauses that *Members* may consider including in retainer agreements and reports as appropriate for the circumstance. The sample disclaimers contained below are strictly that, sample disclaimers that may be used, modified, or adapted by *Members* to be fit for purpose for the specific circumstance. Any use or reliance on the sample *qualification* statements is a decision for the *Member*.

The *Institutes* accept no responsibility for any loss or damage suffered by *Members*, or any other party/parties in relation to the use of any of the sample *third-party disclaimers* statements and recommend that *Members* seek other expert advice, including legal advice as appropriate, in relation to the drafting of *third-party disclaimers* to ensure they are appropriate and applicable to the circumstance that they are intended for and should not rely on the content of this *GP* in isolation.

6.4.1 Long Form 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 is subject to the terms of [Name Firm]’s retainer. It can only be relied upon by [name of client] and no other person(s) or entity/entities, 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 person(s) or entity/entities. 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] accepts no responsibility nor liability to any other party/parties relying on this report. Any such reliance is entirely at that party’s own risk.

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

6.4.2 Restrictions on Use

“This report has been prepared for the private and confidential use of our client, [client name] and other intended users noted in the report, for the specified purpose and it should not be relied upon by any other party for any purpose. Neither the valuer nor the valuation firm shall have any liability to any other party who does so.

The report should not be reproduced in whole in whole or part without the express written authority of [name of valuation firm]. Our warning is registered here, that any party, other than those specifically named in this report should obtain their own valuation.”

6.4.3 Mortgage Valuation Report

“This valuation may only be relied upon by the agreed reliant parties as specified with this report (the Agreed Reliant Parties) for first mortgage purposes only. It is not to be used for any other purpose or by any other party or parties. Any use, reliance, distribution, publication of the report and/or any representations made relating to the content of the report is restricted solely to the Agreed Reliant Parties.

No responsibility is accepted by the Valuer and/or the Valuation Firm if the client or any Agreed Reliant Party uses, relies, distributes, publishes and/or otherwise represents anything contained in the report for any other purpose.

No responsibility is accepted by the Valuer and/or the Valuation Firm to any other party or parties who use, rely, distribute, publish and/or otherwise represent anything contained in the report for any other purpose.

The client, any Agreed Reliant Parties, or any *third party* or parties must not permit or make any representations that any additional party or parties may rely on the report other than the Agreed Reliant Parties specified in the report.”

6.4.4 Syndicated Lending Reports (Australia)

“This valuation may only be used and relied upon by the agreed reliant parties as specified within this report (the Agreed Reliant Parties) for first mortgage purposes only.

No responsibility is accepted by the Valuer and/or the Valuation Firm in the event that the instructing party or any Agreed Reliant Party relies, uses, distributes, publishes and/or otherwise represents anything contained in the valuation for any other purpose.

No responsibility is accepted by the Valuer and/or the Valuation Firm to any other party who receive, rely on or use the valuation for any purpose.

The Agreed Reliant Parties acknowledge and agree that may use and rely on the valuation for first mortgage purposes only on the following basis:

- (a) their interests are a joint interest under the applicable professional standards legislation, in all states and territories of Australia, and any claim by one of more of the parties will be dealt with as a single claim with the intention of joining all the Agreed Reliant Parties to a single claim where that claim was related to reliance for first mortgage purposes. For the avoidance of doubt, a joint interest cannot be split and are to be treated as a single claim. Only an Agreed Reliant Party is entitled to bring a claim for and on behalf of the Agreed Reliant Parties.
- (b) the interests of the Agreed Reliant Parties are a joint interest in a cause of action founded on the same act or omission and any claim by one or more of the Agreed Reliant Parties will be dealt with as a single claim including for the purpose of any applicable professional standards legislation.”

7.0 Qualifications

7.1 General Principles

Qualifications are statements which are used to alert the *client* and *intended user(s)* of the report or written advice any items or issues which may affect the conclusions, opinions or recommendations contained within the report or other written 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 other written advice.

As noted previously, *qualification* statements, clauses or disclosures include *assumptions* and *special assumptions, conditions, limitations* and *warnings* in reports or other written 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 written advice. The assessment of significance or materiality requires the professional judgement of the *Valuer*.

Valuers undertaking valuations in Western Australia are reminded of the requirements under Clause 25 (3) (g) of the 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”.

Registered Valuers undertaking valuations in New Zealand are reminded of the reporting requirements set out by the *NZIV*.

7.2 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 other written 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) an assumed fact that is consistent with or could be consistent with a fact existing at the date of the valuation or other written 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) an assumed fact that is not consistent or differs from a fact that exists at the date of valuation or other written advice (*special assumptions*).

They are used to highlight to *intended user(s)* of the report or written 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 or perspective than participants would normally take as at the relevant date of the report or other written advice.

7.3 Conditions

A *condition* statement in a report or other written 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 other written 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.

7.4 Limitations

A *limitation* statement in a report or other written advice is included to emphasize the limits on the efficacy of the content of the report or written 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 other written advice.

7.5 Warnings

A *warning* statement is generally used within a report or other written 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 other written advice.

A *warning* in a report or other written 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 other written advice.

They are included principally for the benefit of the *intended user(s)* of the report or other written advice 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 other written 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 other written advice, or not, and if so upon what basis.

7.6 Drafting Principles

An effective *qualification* statement in a report or other written advice will be one that:

- (a) is immediately adjacent to the information which they are intended to qualify.
- (b) is drafted to be appropriate and applicable to the circumstances of the instruction, report and or other written advice.
- (c) does not contain statements that are not relevant. That is, *qualifications* should be customized to the specific circumstances.
- (d) uses clear wording to detail what is intended.¹
- (e) 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.

7.7 Situations when Qualifications should be considered

Common situations where *qualifying statements* may be 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 others 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.

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

(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.⁵

7.8 Sample Qualification Statements

The following are a sample *qualification* statements that *Members* may consider including in reports as appropriate for the circumstance. The sample *qualifications* contained below are strictly that, sample clauses that may be used, modified, or adapted by *Members* to be fit for purpose for the specific circumstance that they are included in a report or other written advice. Any use or reliance on the sample *qualification* statements is a decision for the *Member*.

The *Institutes* accept no responsibility for any loss or damage suffered by *Members*, or any other party/parties in relation to the use of any of the sample *qualification* statements and recommend that *Members* seek other expert advice, including legal advice as appropriate, in relation to the drafting of *qualification* statements to ensure they are appropriate and applicable to the circumstance that they are intended for and should not rely on the content of this *GP* in isolation.

7.8.1 Site Survey

Member generally not qualified to certify.

Members are often requested/instructed to state that the improvements on a property are situated within the boundaries of the site. Generally, the *Member* is not qualified to make that certification, unless also qualified as a Surveyor.

The *Institutes* suggest that the following *qualification* may be appropriate, where it applies, for inclusion in reports or other written advice.

"A current survey has not been sighted. This report is made on the basis that there are no encroachment 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 impact on the conclusions or opinions contained within this report."

⁵ Yorke v Lucas [1985] HCA 65; (1985) 158 CLR 661

7.8.2 Town Planning/Resource Management

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 the property. In some locations it is not possible to obtain a 'zoning or planning area certificate' and obtaining written confirmation of zoning may take considerably more time than is generally available to the *Member* and/or the *client*.

It is therefore necessary to set out the extent and nature of 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 (NSW)."

7.8.3 Environmental/Contamination Issues

The awareness of environmental issues in the market has resulted in the requirement for *Members* reporting or providing advice on property to be conscious of factors which may impact the current or future use and/or value of a property at the time of the report or other written advice.

Some examples of *qualification* clauses or statements that may be relevant and used or modified by *Members* to fit the specific situation that they are reporting on include the following:

Environmental Issues

"Our enquiries 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 enquiries at [insert name of relevant authority] indicate that it is not aware of the existence of any site contamination. Whilst our visual inspection of the site surface has not revealed any evidence of site contamination, we have not investigated the site beneath the surface or undertaken vegetation or soil sampling, nor have we been provided with an environmental site assessment or similar. We have assumed that the property is not affected by site contamination. We reserve the right to review and if necessary, vary our report and opinions provided if any contamination or other environmental issues are identified."

“The site is (or has been) occupied by [insert description of land use] which, having regard to the nature of process or chemicals used or stored, has a potential to cause soil contamination.

Whilst our enquiries at [insert name of relevant authority – e.g. the Environmental Protection Authority] indicate that it is not aware of the existence of any site contamination, we have not investigated the site beneath the surface or undertaken vegetation or soil sampling, nor have we been provided with an environmental site assessment (or similar). We have assumed that the property is not affected by site contamination. We recommend that this *assumption* be confirmed prior to reliance or use on the report by obtaining a satisfactory environmental site assessment report from environmental consultants. If such site assessment report reveals that the property is affected by site contamination, [insert name of Member/Member’s firm] should be consulted to assess any effect on the opinions stated in this report.”

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. We have assumed that the property is not affected by site contamination. We recommend that you confirm this *assumption* by obtaining a satisfactory contaminated site assessment report from environmental consultants. If such site assessment report reveals that the property is affected by site contamination, [insert name of Member/Member’s firm] should be consulted to assess any effect on the opinions stated in this report.”

Asbestos

“Inspection of the improvements showed the use of asbestos products in the building. We have not sighted or been provided with an asbestos assessment report. 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 report is made on the *assumption* that there are no negative impacts, including health risks due to the presence of asbestos. As there is a risk of asbestos related health issues, we strongly recommend that this *assumption* is confirmed by obtaining a contamination site assessment report from suitably qualified environmental consultants. If such site assessment report reveals that the property is affected by asbestos contamination, [insert name of Member/Member’s firm] should be consulted to assess any effect on the opinions provided in this report.”

Pest Affectation (termites)

“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.”

Right to Review

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

7.8.4 Improvements

Extent of Investigations

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

“An inspection of all readily accessible parts of the improvements on the property has been carried out by the member. 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 to structural soundness of the improvements. Prospective purchasers or mortgagees would need to make their own enquiries in this regard.

We have not sighted a structural report on the property, nor have we inspected unexposed 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.”

7.8.5 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 of a stamped lease agreement by the parties, including referral back to the Valuer. 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 Valuer for sighting to confirm that the particulars of the document concur with those set out in this report.”

7.8.6 Value As If Complete

Requires a Variety of Assumptions

It is normal practice in valuing a proposed development to assess the market value of that development as though the property were completed at the date of valuation. An ‘As if Complete’ valuation requires a variety of *assumptions* to be made, which may include:

- (a) the proposed development completed in accordance with plans and specifications as at the date of the valuation.

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

Detail any Assumptions Made and Qualifying Clauses

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

These qualifying clauses may 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 (if applicable) 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 *client*.
- (g) The right to review and, if necessary, vary the valuation if there are changes in the project itself or leases details (if applicable).

An example of what could be stated follows:

"The 'As if Complete' value 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 valuation. The valuation reflects the valuer's view of the market conditions existing at the date of valuation and does not purport to predict the market conditions and the value at the actual completion date 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 client, on completion of the project. 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."

7.8.7 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 or 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 or 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.”

8.0 Effective Date

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

This GP replaces the existing GP, ANZPGP 201 – Disclaimer Clauses and Qualification Statements which was in effect from 1 July 2021 and withdrawn 30 June 2023.