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The contents of this publication are broadly stated to represent the law and relevant associated issues as at March 2005.

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Disclaimer

These guidelines are provided for the assistance of the members of the Australian Valuers' Institute. The authors strongly recommend that all those who read the guidelines consider whether or not to seek further or other advice in relation to matters raised in the guidelines, as it applies to each reader's particular professional and other circumstances.

Although not a legal text as such, the guidelines contain some reference to case law, legislation and other legal issues, and the date to which this applies is 28 May 2004.

Australian Valuers' Institute Risk Management Guidelines

Introduction

There are varying levels of awareness of AVI members about loss prevention/risk management issues and techniques, including the need for AVI members to understand the legal obligations they face in day-to-day practise.

These risk management guidance notes have been prepared to provide AVI members with an overview of risk management issues to be considered in relation to all aspects of AVI members' practices with a view to increasing and heightening the levels of awareness of risk management. It is hoped that in reviewing these guidelines, AVI members will have a raised awareness in relation to these issues.

Aims of the AVI's Risk Management Guidelines

These guidelines have not been prepared as mandatory guidelines for AVI members. The aim of these guidelines is to provide members with a 'best practice' formula for various areas of practice.

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1 Client Retainers and Instructions

The instruction stage is critical in the risk management process. Many claims against valuers could be avoided entirely by appropriate risk management at the instruction stage.

(a) Client selection

- 1.1 Client selection is a vital part of any risk management strategy.
- 1.2 Clients who understand property risks and demonstrate appropriate risk assessment are less likely to sue valuers. This is particularly the case in respect of lenders. The most common attribute of lenders who repeatedly sue valuers is poor lending practices.
- 1.3 Find out more about prospective clients prior to agreeing to carry out work for them. Do they carry on their own business in a professional, considered and risk-averse manner? Is the prospective client, or their representative, a person of integrity?
- 1.4 In the case of lender clients, do they have appropriate lending guidelines? Do they give adequate consideration to the ability of the borrower to repay the loan? Is their maximum LVR appropriate? Do they assess the property risk or just look at the valuation figure?
- 1.5 Beware of clients who:
 - 1.5.1 appear to be shopping for a particular valuation outcome;
 - 1.5.2 seek to exert pressure or influence the valuation outcome;
 - 1.5.3 are less than forthcoming with information required to complete the valuation;
 - 1.5.4 are more interested in your Certificate of Insurance than your CV.
- 1.6 Be wary of members of the public requesting a valuation who are reluctant to express the purpose for which they require the valuation.

(b) Retainer Agreements

- 1.7 Use an agreed form of 'standard instructions' to alleviate the need for repetition of terms for established clients. This is now common practice in the industry, particularly with larger institutions such as banks, building societies, mortgage insurers and the like. It is good practice to issue such instructions.
- 1.8 Acceptance of retainer terms without full consideration of the possible consequences is not appropriate. Valuers should always consider precisely what they are being asked to do and whether they are able to, or willing to, provide what is being requested.
- 1.9 Once such a retainer is in place, the issue of individual instructions is largely simplified as it may not be necessary to repeat the matters agreed in the retainer document each time a new instruction is issued.
- 1.10 Instructions should be accompanied by appropriate supporting information available to the instructing party. Standard instruction forms issued by the valuer can ensure relevant information in the possession of the client is always made available to the valuer.

- 1.11 Where such information is provided, the valuer (unless otherwise specified in the retainer) should ensure that appropriate steps are taken to verify it and, where this cannot reasonably be done, the valuer should consider the need to qualify the report.
- 1.12 A standard instructions form should be established and used for existing and new clients. Annexed and marked Annexure 'A' is a form which incorporates some information that may be appropriate to be captured in a standard instruction form.

(c) Receipt of instructions

- 1.13 Consider the purpose for which your valuation will be used. If undertaking a mortgage valuation, be aware as to whether it is to be used for a first, second or third mortgage loan (the latter two present a potentially higher risk for a claim to be made because of the greater possibility of loss to the lender after a mortgage default). Some valuation practices choose to provide valuations for first mortgage purposes only.
- 1.14 Consider the details of the particular valuation instruction being offered to determine whether it is acceptable in terms of the risk profile of the type of valuation. Valuers may be better off not accepting valuations which fall into high risk categories.
- 1.15 Consider at this stage whether the valuation task falls within the scope of your experience and expertise as a valuer. Valuers must carefully consider the types of valuations which they are qualified and experienced to undertake and the areas/localities within which they are willing to practise. They should ensure that they keep up-to-date with industry practice and market movements within those areas in which they hold themselves out as having appropriate experience and expertise and that they only accept instructions which fall squarely within such defined limits.
- 1.16 The valuer ought to carefully consider whether, at the particular time that the instruction is received, the valuer has sufficient resources and time to adequately perform the job.
- 1.17 It is important to institute procedures to ensure that work is appropriately allocated within any valuation practice to ensure that instructions are matched to valuers with appropriate skills and experience as well as the time to properly perform the task. Poor workflow management may lead employed valuers to cut corners.
- 1.18 On receipt of a valuation requisition it is regarded as good practice to check your system to see if this property has been valued within your business previously and, if so, to have previous valuation files available for reference. The use of the same valuer (where available), being privy to the content of previous reports and previous value determinations, maintains consistency, efficiency and should form part of an effective risk minimisation strategy.

(d) Legal status of contractual terms

- 1.19 The contract/retainer is the first most critical point at which a valuer may be able to limit liability for the work to be undertaken, by reaching agreement with the client as far as is possible as to the extent of that liability.
- 1.20 Obligations between parties to a contract arise from the terms of the agreement between the parties and only bind the parties to that agreement. Some of the relevant and necessary issues to have regard to in relation to the law of contract are as follows:

- 1.20.1 Contracts between a valuer and his/her client for the provision of a valuation/consultancy service need not be in any particular form. They can be written or oral, or both;
- 1.20.2 Terms to the contract can be:
- (a) express;
 - (b) implied;
 - (c) inferred; or
 - (d) determined by particular conduct;
- 1.20.3 Contracts should be *in writing* and correctly and accurately reflect the agreement between the valuer and his/her client as to the service to be provided, the extent of any liability accepted (or not accepted) and the fee agreed;¹
- 1.20.4 If instructions are received orally from a client, confirm those instructions in writing before commencing the valuation work;²
- 1.20.5 The terms of the contract/retainer are those that are agreed *before* the contract/retainer is entered into, not after;
- 1.20.6 Agree on the fee before commencing.³ If a pre-arranged fee has not been agreed, ensure that there exists a term and condition on the contract that is implied by law that the valuer would be entitled to a fee for the work carried out.

¹ Valuers practicing pursuant to the *Valuer's Registration Act 1975 (NSW)* in New South Wales should be aware that it is now a requirement of the regulations to that Act that all instructions are in writing.

² Refer NSW Valuers Registration Regulations.

³ A requirement for valuers practicing pursuant to the *NSW Valuer's Registration Act*.

2 Disclaimer/qualifications

Disclaimers, qualifications and definitions should be used to ensure clear communication and to invite further communication and inter-relationship between valuer and client. In many instances, greater post valuation communications might lead to less claims being made upon valuers.

(a) Misconceptions

2.1 The misconception of disclaimers as legal ‘add ons’ which protect against liability and do nothing else is based upon two prevalent myths:

2.1.1 The contractual term myth:

Disclaimers are **not** contractual terms. They are unilateral statements made by the valuer and do not by their own force bind the client or others who may obtain, read and rely upon the valuation report.

2.1.2 The independent effect myth:

Disclaimers have **no** ‘magic cure’ effect. That is, just because a disclaimer says that ‘I do not accept liability to you’ does not always mean that no liability will attach.

In order to be really effective, a disclaimer must actively qualify the information provided rather than merely attempting to assert a legal result. For this reason there is a preference to use the term ‘qualifications’ rather than ‘disclaimers’, although these terms are and could be used from time to time interchangeably.

2.2 There is no such thing as the ‘press button’ disclaimer clause. Every valuation report should be considered as a stand alone document and any third party disclaimer should be considered within the instructions, context and environment of the work required for that report.

2.3 Disclaimer clauses will not be effective as disclaimers in respect of any actions brought pursuant to the *Federal Trade Practices Act* and the various States’ *Fair Trading Acts* unless the disclaimer clause operates to qualify the information provided so that it is not misleading.⁴

2.4 Information obtained from sources where verification cannot be made or has not been completed, must not be adopted, but merely passed on. This is to cover situations where information is provided in good faith from a particular source without the valuer accepting the veracity and/or truthfulness/correctness of that information, and without doing any more than simply passing the information on⁵.

2.5 Any attempt to represent that a disclaimer has ‘force and effect’ in relation to any potential *Trade Practices Act* claim, is itself a misrepresentation under the Act.

⁴ *Benlist v Olivetti Australia Pty Ltd* (1990) ATPR 41 043

⁵ *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249 at 41,359; *Yorke v Lucas* (1985) 158 CLR 661; *Butcher and Another v Lachlan Elder Realty Pty Ltd* (2005) 212 ALR 357

(b) Why they are important

- 2.6 They are required for any one or more of the following reasons (and these may not be the totality of all the reasons), including:
- 2.6.1 Self protection as an aide to avoiding liability;
 - 2.6.2 Clear communication;
 - 2.6.3 Contractual/retainer requirements;
 - 2.6.4 Insurer requirements.
- 2.7 The most relevant reason for using such 'devices' is not as a 'negative' tactic (excluding 'good practice') in undertaking a valuation job but rather for the more 'positive' task of providing a better product. That is, more clearly communicating not only the base information but also other factors relevant to the client's full understanding of that information (including its reliability).

(c) The difference between disclaimers and qualifications

- 2.8 Valuers often use 'disclaimers' in an attempt to disclaim or exclude liability in terms, for example, 'we will not accept any liability for...'. As set out above, such attempts are generally not effective. A 'qualification' (that is, a statement which actively qualifies the information provided) is preferable in this context.
- 2.9 Qualifications highlight factors that affect the reliability of the information provided by the valuer.
- 2.10 Wherever the valuer is not able to obtain all the relevant information or to personally observe everything that is required, that valuer should ensure that the report is appropriately qualified so that the person requesting the valuation is left in no doubt as to the basis of the valuation.
- 2.11 Valuers must ensure that there is no conflict between the qualifications and any other part of a report. Qualifications should provide the reader with a warning as to certain concerns of the valuer.
- 2.12 Qualifications should be used to invite further instructions and/or communication of a client so as to fully inform the client of the shortfalls faced by the valuer in reaching a final 'conclusion' about the valuation, particularly where other information and/or expert advice is required.
- 2.13 Qualifications cannot be used to excuse a failure by a valuer to fulfil its duties (including contractual duties). Qualification should, therefore, only be used once the valuer has done everything within the scope of its duty to ensure the reliability of the information used. Only then is a qualification required to draw to the client's attention remaining risks relating to the reliability of any information relied upon or resulting from the intended use of the valuation by the client.
- 2.14 Disclaimers may be usually used to attempt to exclude responsibility to a third party, that is, a party other than the party or parties for whom the advice was given or a report provided. A measure of self protection can be achieved by attempting to limit those classes of persons who may constitute the class to whom a duty of care is owed.

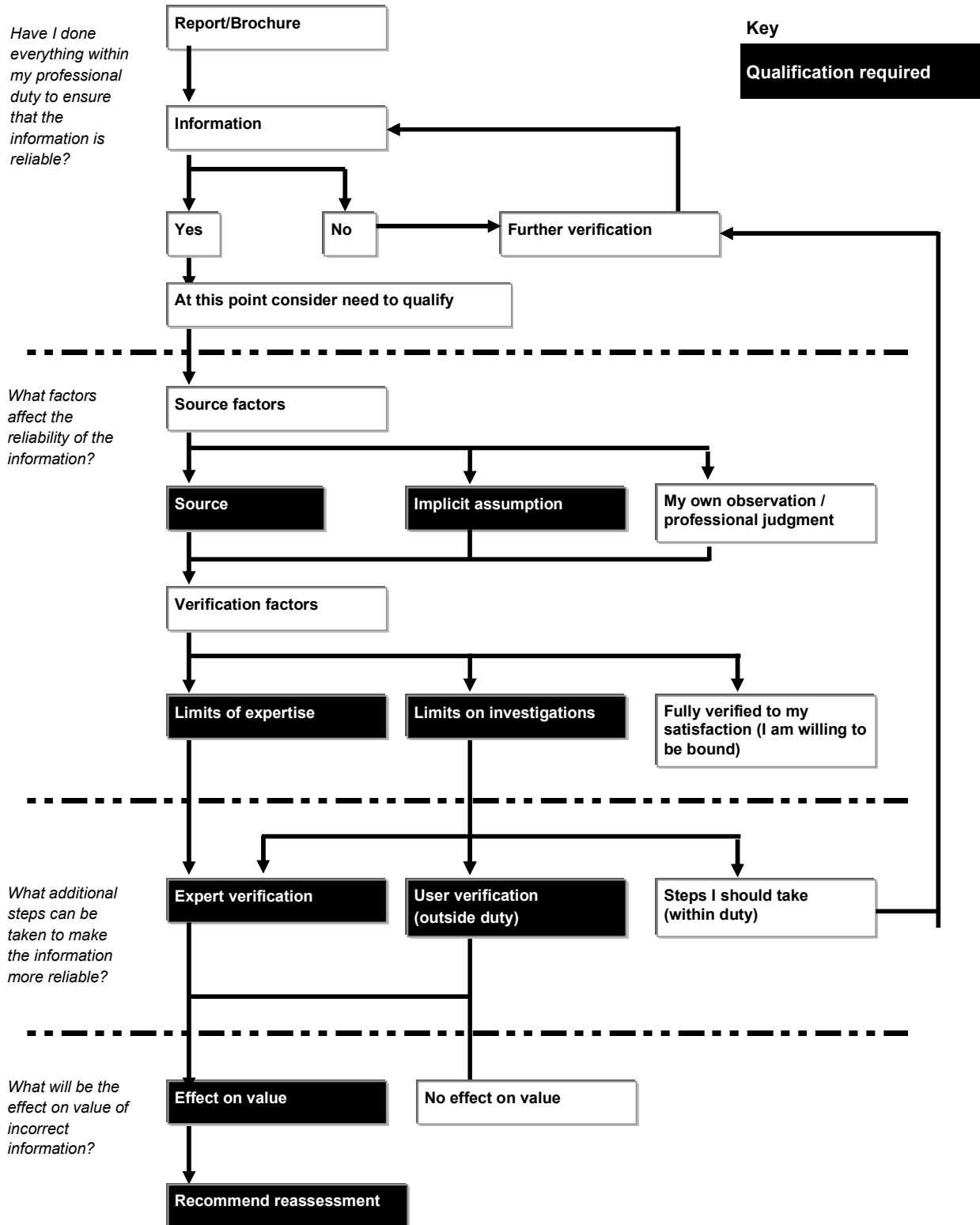
- 2.15 Even in this context, such clauses will be more likely to be effective if they qualify as well as disclaim responsibility. That is, they should explain why the valuer is not prepared to extend liability to such third parties (including factors which may make it unsafe or unreasonable for such parties to rely).

- 2.16 Third Party Disclaimers usually contain one or more of the following elements:
 - 2.16.1 The purpose for which the document was prepared;
 - 2.16.2 Identification of the person(s) for whom the document was prepared;
 - 2.16.3 A statement as to who can rely upon the information contained in the document;
 - 2.16.4 A statement that the author accepts/assumes no responsibility (that is, other than to his/her client or those specifically stated) for the document or its content.

(d) Flowchart

2.17 Set out below is a flowchart which will assist in considering what necessary information should be included in a report, in order to ensure that any statements made in the report are expressed in a manner which appropriately qualifies the information provided.

Qualification flow chart



3 The purpose and use of the valuation

A valuation report is the primary means by which the valuer communicates his or her expert conclusions to the client and others who may rely upon that valuation. The ability to draft a clear, concise and accurate report is a fundamental skill which valuers must develop in order to practice successfully. It is also this report on which a valuer will usually be judged.

(a) Importance of purpose

- 3.1 Good risk management practice requires that when selecting the appropriate methodology or valuation approach, the valuer considers the purpose for which the valuation is being relied on by the client.
- 3.2 Valuers are not manufacturers of products called valuations. They are consultants to their clients' businesses. Reports should be directed to the specific needs of the particular client for whom they are prepared.

(b) Restrictions on use (including Assignment)

- 3.3 At the outset, valuers must consider the terms of their professional indemnity insurance policy to ensure that it will cover them for any claim arising out of an assignment of a valuation. This is critical.
- 3.4 There are many reasons why a valuer might legitimately seek to restrict the persons who may rely upon a valuation report or the circumstances in which the report might be relied upon. The same report suitable for one client, may not be suitable for all clients or in all circumstances.
- 3.5 Valuers should supplement an appropriate third party disclaimer [refer paragraph 2.15 above] with an assignment policy to exercise effective control over the use of their reports. That policy should be reflected in the valuer's retainer by a term which highlights that only specifically authorised persons may rely on the report and reserves the valuer's right, at its absolute discretion, as to whether it will grant an assignment of the valuation to a third party.
- 3.6 When valuers are requested to assign a valuation report to a third party, they should carefully consider each of the factors listed below:

- 3.6.1 Identity of Assignee:

- Is the Assignee a person to whom the valuer is prepared to accept responsibility?
All the factors appropriate to Client Selection [refer 1(a) above] are also relevant, only more so, when asked to make an assignment.

- 3.6.2 Purpose:

- For what purpose was the valuation prepared? Is the valuation also appropriate to the Assignee's intended purpose?

- 3.6.3 Timing:

When was the valuation prepared? Is the valuer aware of any general market movements or other information which might affect the continued reliability of the valuation? If so, the valuer should not assign the valuation. As a general rule, valuers should not assign valuations after three months.

3.7 Assignment should only be given having regard to the requirements of a valuer's professional indemnity insurance policy and the exclusions contained therein so as to avoid the valuer not having cover if a claim is made.

3.8 Where the valuer agrees to provide an assignment, the form of assignment letter should be appropriately qualified. For example:

'The valuation is current as at the original date of issue only. The valuer has not carried out any further investigations or reinspection. The assignee acknowledges that this assignment does not constitute a representation as to the accuracy or reliability of the valuation as at any date other than the original date of issue.'

(c) Special use valuations

3.9 Adopting an appropriate valuation methodology is fundamental to good risk management practice.

3.10 Valuation methodologies include:

3.10.1 capitalisation of net income/earnings;

3.10.2 direct comparison with market evidence;

3.10.3 summation;

3.10.4 discounted cash flow (investment); and

3.10.5 discounted cash flow (development).

3.11 Good risk management practice would suggest that valuers consider at least two of the above valuation methodologies. Furthermore, if methodologies are not supportive of each other, valuers should question and review the outcome to establish reasons why this is the case. Peer review at this stage can be invaluable.

(d) Fitness for purpose

3.12 Good risk management practice requires that when selecting the appropriate methodology, the valuer considers the purpose for which the valuation is being relied on by the client.

4 Indemnities & Limitations on Liability

Valuers are required to provide their services with due care and skill, regardless of any indemnifying provisions.

(a) Limitations of Liability

- 4.1 As a general rule professional service providers may limit their liability in contract and tort.
- 4.2 In certain circumstances, valuers may also limit their liability arising from breach of warranties implied into their contract by the *Trade Practices Act 1974*, such as the term that the services will be provided with due skill and care. Liability for breach of such statutory implied terms can be limited to providing the services again or the cost of someone else providing the service.
- 4.3 However, valuers cannot limit their liability arising out of conduct which is in breach of other provisions of consumer legislation such as the *Trade Practices Act* and *State Fair Trading Acts*. As such, valuers are not able to limit their liability where the services which they provide are misleading or deceptive or likely to mislead.⁶
- 4.4 As many breaches of professional duty are capable of being brought pursuant to such provisions, the practical efficacy of limitation of liability (exclusion) clauses in the context of valuation practice is severely restricted. That is, in most cases a claimant will be able to avoid the operation of such clauses by bringing their action under the provisions of such consumer legislation which deal with misleading or deceptive conduct.

(b) Indemnities

- 4.5 Similarly, an indemnity from the person who has suffered loss as a result of conduct of the above type will not be effective where its practical effect would be to nullify such liability⁷.
- 4.6 Indemnities from third parties, where commercially available, will be enforceable⁸.
- 4.7 It is common practice for many valuers undertaking rent reviews to request an indemnity in relation to rent reviews. This is commonly referred to as a 'hold harmless' provision which would become a contractual agreement between the landlord, tenant and valuer, aimed at protecting the valuer against liability. Such clauses will be interpreted and applied in accordance with the same general principles discussed above. Whether they would ultimately be effective may depend upon the nature and circumstances of any breach by the valuer. However, there are arguably reasons why such clauses may have a greater chance of success in the rent determination context than in other areas of valuation practice.

⁶ In effect the *Trade Practices Act 1974* (Cth) ss74 and 82 prevent the operation of indemnities except in respect to third parties. Section 68 renders the provision void. Section 68A allows certain limitations to be imposed in respect of statutory implied terms in some circumstances.

⁷ *Qantas Airways Ltd v Aravco Ltd* (1996) 136 ALR 510

⁸ *ibid*

(c) Illustrative Wording

4.8 Below is a clause designed to provide for a limitation of liability and indemnity in favour of the valuer and the valuation practice. Clauses of this type are commonly used in a rent review context. They are provided as illustrations only and advice should be sought as to an appropriate clause for any particular contract or relationship.

Limitation of Liability & Indemnity

1. In consideration of [Valuer] accepting the appointment and agreeing to undertake the Rental Determination, [Lessor/Lessee] agrees to:
 - 1.1 hold and keep [Valuer] and [Valuation Practice] harmless from and against all liability which [Valuer] and/or [Valuation Practice] has or may have or but for the operation of this clause would have in connection with the Rental Determination and/or services provided in connection therewith.
 - 1.2 indemnify and keep indemnified [Valuer] and [Valuer Practice] from and against all liability, costs, expenses of damages (including without limitation the time of [Valuer] and/or [Valuation Practice]'s personnel) paid or incurred by [Valuer] and/or [Valuation Practice] in connection with any claim brought by or on behalf of [Lessor/Lessee] in respect of the Rental Determination and/or services provided in connection therewith.
2. Clause 1 shall apply to all conduct of [Valuer] and [Valuation Practice] whether or not such conduct constitutes a breach of contract, negligence and/or breach of any other standard prescribed by Statute. However, it shall not apply:
 - 2.1 in the case of fraud or wilful misconduct on the part of [Valuer] and/or [Valuation Practice];
 - 2.2 to the extent that it would be void or inoperative by reason of the *Trade Practices Act 1974*.
3. Liability of [Valuer] and [Valuation Practice] for a breach of a condition or warranty implied into the contract by the *Trade Practice Act 1974* is limited to, at the discretion of [Valuer] and [Valuation Practice],:
 - 3.1 the supplying of the services again;
 - 3.1 the payment of the cost of having the services supplied again.

5 Insurance

Valuers should understand the extent and width (or limitations) relating to the insurance policy.

(a) Professional indemnity insurance

- 5.1 Understand the extent and width (or limitations) relating to the insurance policy. This will include the amount of the sum insured, the specific area of coverage that the valuer is offered and any specific exclusions whereby the insurer indicates that it will not cover claims arising out of certain circumstances or events.⁹
- 5.2 At all times act under the advice of your insurance broker. Do not be afraid to ask questions and understand that the insurance broker is your agent, acting in your best interests to secure the most appropriate and affordable cover.
- 5.3 When requested to provide the name of their insurer/underwriter only provide the name of your insurance and insurer, with the consent of your insurer.
- 5.4 Ensure that the proposal form is completed fully and all questions answered thoroughly and accurately as requested in the form. Disclose everything required and also anything you know which you are aware is material to the insurer accepting the risk.
- 5.5 If in doubt about any matter/information sought in the proposal form, seek guidance/advice from your broker.
- 5.6 It is critical that you understand your role and rights as an insured. A valuer must have a good understanding of the contract of insurance into which the valuer is entering, the basis of the 'agency' involving the valuer and the broker, as well as the issues referred to more fully above.
- 5.7 Do not reveal to any of your clients the full extent or coverage of your professional indemnity insurance without first seeking the advice and guidance of your broker and/or insurer. Requests for Certificates of Currency of insurance to certain levels/limits are usually provided by brokers with the permission of the insurers/underwriters.
- 5.8 Be absolutely aware of the extent of your insurance coverage. To not do so may lead to exclusion of a claim made at a later time.
- 5.9 In entering into specific arrangements/contracts/retainers with clients, particularly in valuation of property for mortgage security purposes, make sure that it is not your professional indemnity policy which is, in effect, the security being provided for the lending (or other) transaction.

⁹ Insurers have excluded claims arising out of solicitor managed/controlled loans, non-bank finance loans and even in the event of claims that arise out of a failure by a valuer to inspect a property and take and keep all appropriate file notes/field notes. Additionally, some insurers have excluded claims arising out of assignments of valuations where that assignment has occurred after a certain period from the original valuation (say, three months), and the assignment has been provided without further inspection and/or further analysis and investigation.

(b) Policy structure (and typical wordings)

- 5.10 Valuers must be aware of the extent of coverage offered. It is critical that a valuer have the insurance broker explain the width of the coverage offered and, equally important, that you confirm in writing to your broker the extent of the coverage you require and the reasons why you require that coverage. Remember brokers are your agent.
- 5.11 Your professional indemnity policy will contain various important terms and conditions. An extensive list of the terms commonly found in professional indemnity policies is provided for you at Annexure 'B' to these guidelines entitled 'Glossary of Terms'. It is important that the entirety of the policy issued to you is reviewed and understood. Any questions you may have in relation to your policy should be addressed directly with your broker (or directly with your insurer if you have not retained a broker).
- 5.12 As a starting point, your policy will contain a **Coverage Clause**, which sets out in general terms what cover is afforded to you by your policy. This coverage clause will be subject to any other relevant terms and conditions in the policy. Generally, a coverage clause will provide cover in the following general terms:
- 'We [the insurer] will indemnify you [the Insured Valuer] against civil liability to pay compensation in respect of any claim first made against you during the period of insurance in respect of any civil liability incurred in the course of carrying on your professional business.'
- 5.13 The **Schedule** to your policy will provide important information, specific to you and your business, which is applicable to the insurance coverage you have obtained. Relevantly, the schedule will contain information recording details of:
- 5.13.1 a definition of 'Insured', including what subsidiary or associated entities are included in this definition and whether employees and contractors are included;
 - 5.13.2 the limit of indemnity afforded to you pursuant to the policy;
 - 5.13.3 your excess/deductible;
 - 5.13.4 the premium being charged;
 - 5.13.5 any applicable retroactive date in relation to the cover;
 - 5.13.6 any applicable extensions or exclusions relevant to your policy;
 - 5.13.7 professional business description;
 - 5.13.8 any other financial interests relevant to the policy;
 - 5.13.9 the interest insured;
 - 5.13.10 the applicable jurisdiction for the policy;
 - 5.13.11 the applicable policy wording for the cover being provided.
- 5.14 Upon receipt of your professional indemnity policy, it is important that the Schedule information is reviewed and checked for accuracy. Any amendments to this information should be brought to the attention of your broker (or insurer) directly.

- 5.15 Set out below are some common policy **Exclusions** for you to be aware of and consider when instructing your broker in relation to your professional indemnity insurance requirements and also when reviewing your policy wording (once issued):
- 5.15.1 death or bodily injury;
 - 5.15.2 failure to inspect/failure to keep file/field notes;
 - 5.15.3 claims by particular client types;
 - (a) non-APRA regulated lenders;
 - (b) solicitor lenders;
 - 5.15.4 failure to use particular qualifications including:
 - (a) prudent lender clauses;
 - (b) market movement clauses;
 - 5.15.5 assignments provided after three months (or some other set period);
 - 5.15.6 claims directly or indirectly connected with asbestos;
 - 5.15.7 prior claims or circumstances including claims made or threatened or in any way intimated against you prior to the relevant period of insurance.
- 5.16 Set out below are common policy **Conditions** for you to be aware of:
- 5.16.1 Notification of claims - most policies respond to claims made on the insured persons/entities during the Policy Period. It is a condition of most policies that the making of any claim to which the policy may respond must be notified to the insurer as soon as reasonably practicable;
 - 5.16.2 Admissions or settlements without consent – it will be a breach of most policies for the insured to make any admission or to settle any claim without the prior consent of the insurer. The policy may not respond to a settlement entered into without such consent.
 - 5.16.3 Alterations to risk – most policies require the insured to notify the insurer of any matter which material changes the risk of the insured's business. Sometimes the policy will specify a series of events which must be notified such as any act of liquidation or bankruptcy or any merger or takeover etc.
- 5.17 Policies also commonly provide a number of automatic or optional extensions. It is important to understand what optional extensions are available and ensure that appropriate options are taken up. Extensions may include such things as:
- 5.17.1 dishonesty of employees;
 - 5.17.2 fidelity;
 - 5.17.3 defamation, libel and slander;

- 5.17.4 infringement of copyright or patents;
- 5.17.5 indemnity for employees, consultants etc;
- 5.17.6 loss of or damage to documents;
- 5.17.7 Cover for Principal's previous business.

(d) Circumstances and claims

- 5.18 As referred to earlier, most policies require claims (usually defined as an assertion by a third party of a right to compensation) to be notified as soon as they are made (ie, communicated to the insured).
- 5.19 'Claims' are usually in the form of a statement of claim/writ or other legal document (cross claim) and they are served upon you (or your business) as commencement of a legal process.
- 5.20 Sometimes, valuers may become aware of facts which might give rise to a claim prior to any actual claim being made. Fact which might give rise to a claim may include:
 - 5.20.1 a complaint by a client;
 - 5.20.2 a statement by a client that it will or might suffer a loss;
 - 5.20.3 knowledge that a property valued was sold for a sum inconsistent with the valuation opinion provided;
 - 5.20.4 discovery of a calculation or other error in a valuation already issued.
- 5.21 Although most policies are not expressed to cover facts which might give rise to a claim, an insured will have rights to indemnity pursuant to s40(3) of the *Insurance Contracts Act 1984*, provided that such facts are notified to the insurer as soon as reasonably practicable and before the policy expires.
- 5.22 It is, therefore, extremely important that once a valuer becomes aware of facts or circumstances (an event, an incident etc) that could give rise to a claim upon them, that they notify that circumstance to their broker or insurer immediately. If a valuer fails to do so the valuer will be left without insurance because it will not be entitled to:
 - 5.22.1 the benefit of the right to be covered by the policy on foot when it first becomes aware of those facts (which right is provided by s40(3) of the *Insurance Contracts Act*);
 - 5.22.2 make indemnity under the policy in place when a claim is subsequently made against the valuer because claims arising out of prior known circumstances are invariably excluded from policies.
- 5.23 Where in doubt as to whether a particular fact or circumstance might give rise to a claim, valuers should obtain advice from their insurance broker. If a claim is made against you, consult your broker immediately and do not make any admissions or make any notes prior to discussions with/or attention of lawyers (either appointed by the valuer or appointed by the insurers). To do so may lead to that documentation being harmful/damaging and not being afforded legal professional privilege.

6 Litigation and Dispute Resolution

It is important for valuers to be aware of the standard of care that is expected of them and the resolution of disputes in the court process and the AVI's complaints procedure.

(a) Standard of care of a valuer

- 6.1 The valuer is required to exercise a degree of skill and judgment of the kind and, like any other professional person, he or she is bound to exercise due skill and diligence. He or she is not required to have an extraordinary degree of skill or highest personal attainment but he must bring to the task he undertakes the competence and skill that is usual among valuers.¹⁰
- 6.2 Valuers are expected to take reasonable steps to acquaint themselves with changes and new developments affecting their skill.
- 6.3 A valuer must ensure that he or she has a reasonable knowledge of areas which are so closely related to valuation practice that a reasonably competent valuer would be expected to have such knowledge.

(b) Letters of demand

- 6.4 A letter of demand or other letter of 'complaint' or grievance are circumstances giving rise to a potential claim. As are court documents. When correspondence or verbal communications between party/client (or other party who has relied upon a valuation) refers to the valuation or valuation advice and contains some or all of the following words (the list is not exhaustive), serious consideration should be given as to whether the letter of complaint does constitute a circumstance that may give rise to a claim:
 - 6.4.1 'error';
 - 6.4.2 'negligence';
 - 6.4.3 'mistake';
 - 6.4.4 'oversight';
 - 6.4.5 'fraudulent';
 - 6.4.6 'loss' (as has been sustained by the party raising the issue);
 - 6.4.7 'complaint';
 - 6.4.8 'concern' (when raised in the context about the valuation and how it was relied upon and how a loss may be sustained);
 - 6.4.9 'please explain the difference' (between valuation and sale price);
 - 6.4.10 'please explain basis upon which the valuation was approached and reasons why particular conclusions were reached'.

¹⁰ *National Australia Bank Limited v Hann Nominees Pty Limited* [1999] FCA 1262 per Ryan J

(c) Common claims against valuers

- 6.5 Breach of contract or retainer
- 6.6 Breach of duty of care (negligence)
- 6.7 Breach of *Trade Practices Act* and *Fair Trading Act*

(d) Court process

- 6.8 Proceedings are usually commenced by a Statement of Claim, Writ, Summons or Application in the following courts (at first instance):
 - 6.8.1 Federal Court of Australia;
 - 6.8.2 one or other of the Supreme Courts of the States or Territories of Australia;
 - 6.8.3 one or other of the District or County Courts in the States or Territories of Australia;
 - 6.8.4 one or other of the Magistrates or Local Courts in a State or Territory of Australia.
- 6.9 The Statement of Claim or other initiating legal process articulates the basis of the claim, setting out the conduct which has allegedly given rise to a cause of action in law, and stating how the valuer has been in breach of some law.
- 6.10 The Statement of Claim also sets out how damages/loss have allegedly flowed from the breach by the valuer. The damages/loss must be of a kind that have been caused by or contributed to by the valuer. In this regard, even if a valuer has been negligent, no basis for a claim exists until damage is sustained.
- 6.11 Some claims arise out of cross-claims or third party claims that join a valuer to proceedings between other parties who have already commenced litigation.
- 6.12 If the matter proceeds to a trial, the party bringing the claim (plaintiff) will present its case with its witnesses providing evidence in chief. Cross examination of the plaintiff by the valuer's lawyers will then occur.
- 6.13 The defendant valuer will then proceed to put his/her case and similar supporting evidence. The valuer will be cross-examined with that process sometimes taking many days to complete.
- 6.14 Following the summing up of both parties the case is decided by a judge or magistrate. Usually the judge/magistrate reserves his/her decision for many months (even years) after the hearing was completed.

(e) Alternative dispute resolution

- 6.15 Prior to any hearing taking place the courts will usually require some form of alternate dispute resolution such as mediation. This will be conducted by a mediator agreed to or appointed by the parties. The valuer will usually want to be in attendance or will be required to attend. The valuer's insurer will usually be present as well.
- 6.16 In the event of failure of the matter to be resolved by alternate dispute resolution the matter proceeds to be heard in Court and some cases can take weeks/months to be heard.

(f) Complaints against members

- 6.17 Valuers should consult the Australian Institute of Valuers' By-Laws in relation to the complaints procedures in place to regulate members.
- 6.18 Valuers should also be aware of the legislation which regulates their profession and which provides for disputes to be handled by the relevant licensing/registration authorities in each State. For example, in NSW this complaints system is administered by the Director General of the Department of Fair Trading.
- 6.19 Where valuers are also members of other professional bodies, they should consult those bodies in relation to the complaints procedures adopted by them.

7 Rental determinations

It is widely acknowledged that valuers acting in rent determination matters are subject to a significantly higher degree of risk as the parties to the determination, usually a landlord and tenant, are far more likely to be litigious in the determination outcome.

(a) Importance of lease

- 7.1 A valuer should be completely familiar with the lease document under which the rental is being determined.
- 7.2 Where the expert valuer is not able to interpret particular provisions of the lease or where the lease may be ambiguous in certain respects, the valuer should refer the document to independent legal experts acceptable to both the landlord and tenant for a decision as to the interpretation of the lease. The parties should be asked to abide by independent advice.
- 7.3 The valuer should also seek acceptance of this approach in an appointment letter and ensure he/she is paid in advance for other services which are needed to be obtained.

(b) Qualifications and area of expertise

- 7.4 Valuers undertaking rental determination or dispute resolution based valuation work wherein they are acting as an expert and not an arbitrator should adopt heightened risk management practices.
- 7.5 When undertaking rental determination work, valuers should be mindful of current practices by other determining valuers in accepting such instructions and in particular the content of appointment acceptance letters. Valuers who accept appointment should ensure they 'qualify' under the provision of the lease to be able to undertake the task. It has now become common practice for valuers when undertaking such valuation work to only accept the instruction subject to terms and conditions which they stipulate. The terms and conditions which are now commonplace in undertaking rental determination valuation work are discussed below.
- 7.6 Valuers should remember that when they are acting as 'experts' pursuant to their appointment to determine a rental dispute, they can be sued for negligence by the parties (absent a provision of the type referred to above).
- 7.7 A valuer must ensure that he or she has a reasonable knowledge of areas which are so closely related to valuation practice that a reasonably competent valuer would be expected to have such knowledge of.

(c) Procedure

- 7.8 Careful interpretation is necessary followed by review of comparable evidence and application given the directions to the determining valuer.
- 7.9 It is recommended practice to require the fees to be paid prior to handing down the decision.
- 7.10 Reserve the right to delay the delivery of the determination in the event that independent expert advice is required as to lease interpretational matters and/or in any delay in payment for this service.

- 7.11 Reserve the right to obtain independent legal (or other) advice, the cost of which would be borne by the parties to the lease.
- 7.12 Reserve the right to appoint an independent surveyor to determine lettable area in accordance with industry accepted standards (for example BOMA standards) where the parties cannot agree on the area. The cost of which would be borne by the parties to the lease.
- 7.13 Include a 'hold harmless' or indemnifying provision which would become a contractual agreement between the landlord, tenant and valuer.
- 7.14 Conduct the determination pursuant to the mechanism set out in the lease.
- 7.15 Ensure that in conducting the determination, where submissions are taken from the landlord's/tenant's valuer experts, that Natural Justice is applied. The rules of Natural Justice requires that the valuer treats each party equitably, fairly and equally in the determination process.
- 7.16 If in doubt as to how to properly conduct a determination, seek legal advice or not undertake the task at all.
- 7.17 A determining valuer would be within his/her rights if he/she requested submissions from the parties, as required under the lease, namely as experts not as advocates.

(d) Reasons or no reasons

- 7.18 Where the expert valuer is not able to interpret particular provisions of the lease or where the lease may be ambiguous in certain respects, the valuer should refer the document to independent legal experts acceptable to both the landlord and tenant for a decision as to the interpretation of the lease. The parties should be asked to abide by independent advice.
- 7.19 The valuer should also seek acceptance of this approach in an appointment letter and ensure he/she is paid in advance for other services which are needed to be obtained.

Annexure A: Information to be captured in standard instruction form

The following are suggestions for information that may be appropriate to be captured in a standard instruction form:

- 1 Confirmation that the instructions are issued pursuant to and in accordance with the terms of the existing client retainer.
- 2 Confirmation of the entities or persons the valuer is prepared to assume responsibility to and those who are entitled to rely on the valuation (being only those specifically identified in the instruction form and/or the report).
- 3 The nature of the work to be undertaken or not to be undertaken including identification of the property and the legal interest which is to be valued.
- 4 The purpose for which the valuation will be used and by whom (for example, first mortgage purposes only).
- 5 The amount to be charged or basis upon which these will be calculated.
- 6 The date by which the work is to be completed.
- 7 Any significant directives or qualifications relevant to the instructions (for example, where a forced sale value is required in addition to the market value or where a valuation on a 'bricks and mortar' valuation is required in addition to a 'going concern basis').
- 8 The need for any additional expert assistance (where appropriate), either valuation or professional advice.
- 9 A checklist of documents that are required in order for the valuation to be prepared, including title searches, section 149 certificates, original signed contracts, environmental reports and/or feasibility studies.

Annexure B: Glossary of Terms

(a) Glossary of terms

Insurance broker	An insurance broker is one who, acting as agent for the valuer, takes instructions from the valuer to place (and/or renew) professional indemnity insurance (and any other insurance) required by the valuer to enable that valuer to practice with appropriate professional indemnity insurance cover.
Insurer/Underwriter	The insurer/underwriter is the party who underwrites the risk, that is, provides the valuer with particular insurance cover.
Reinsurer	A reinsurer is, in effect, an insurer of insurers and depending upon the extent of policy coverage sought and obtained by a valuer, is unlikely to have any direct contact with a valuer in the event of a claim.
<i>Insurance Contracts Act (Cth) 1984 (ICA)</i>	This is the Federal legislation which governs insurance law within Australia, and as such governs the law attaching to professional indemnity insurance policies undertaken by valuers.
<i>Financial Services Act (Cth) 2002 (FSA)</i>	This is the Act that governs the law relating to the business of insurance brokers and agents.
Policy/Insurance policy	This is the document of insurance which sets out the totality of the cover, terms and conditions and exclusions as the insurance cover between the insurer/underwriter and the valuer.
Proposal/Policy proposal	This is the document that is completed by a valuer (or with the valuer's authority by the valuer's broker) in proposing for insurance with an insurer/underwriter.
Schedule/Policy schedule	This is the document that usually forms part of the insurance policy in which the specific and significant terms such as policy period, level of indemnity, level of excess/deductible, premium, relevant exclusions and details re retroactivity, are set out. There are other terms and conditions and issues raised in the policy schedule from time to time.
Premium	This is the amount that is paid by the valuer to the insurer/underwriter to effect coverage in consideration of the terms and conditions of the insurance coverage granted.
Policy deductible/Excess	This is the amount that a valuer agrees to meet in the event of a claim at the 'bottom end' of the indemnity limit, that is, the valuer has to pay this amount first prior to the insurer/underwriter being required to pay an amount pursuant to the indemnity under the policy.

Cost inclusive excess/ Deductible	This is when an excess/deductible under a policy operates in a way that a valuer must meet the cost and expenses of investigation in defence of a claim in advance of any amount that the insurer/underwriter has to pay to indemnify a valuer in respect of a claim.
Costs exclusive deductible/Excess	This is where the deductible/excess is only paid by the valuer, prior to any indemnity amount being paid by the insurer/underwriter, in the event of payment to settle a claim or meet a judgment by a court.
Retroactive date	This is the date in the policy before which an insurer/underwriter will not meet any claim as a result of an event (valuation) being the cause of the claim. For example, if a policy had a 'nil' retroactive period, the policy would cover claims arising out of any valuations undertaken by the valuer at any previous time, subject to all other policy terms and conditions.
Sum insured	This is the amount that the valuer agrees with the insurer/underwriter that the insurer/underwriter will indemnify the valuer for in the event of a claim.
Claim upon the insured	This is the term which is used when a client/third party brings a clearly compensable claim upon the valuer, and which the valuer should notify immediately to the insurer/underwriter (or broker as required).
Claim under the policy	This is a term that refers to the claim that is made by the valuer upon the insurer/underwriter under the policy, in the event of a claim upon the insured by a client/third party.
Claims made	Is a reference to the basis upon which professional indemnity insurance is agreed as between the valuer and the insurer/underwriter. That is, the policy responds only to claims made upon the Insured and then usually notified to the insurer during a particular policy period. This is to be contrasted with an 'occurrences' based policy (such as public liability policies), where the policy in force in the event of a claim by a third party, is the policy in existence at the time of the event that has given rise to the claim upon someone.
Circumstances that could give rise to a claim/ Occurrences that could give rise to a claim (upon the Insured valuer)	These are events, incidents, circumstances and/or the like of which a valuer becomes aware (or should become aware) of the type that could give rise to a claim upon the insured by a client/third party. It is critical to note that in deciding whether or not a circumstance has occurred, that could give rise to a claim, that notification be made immediately of such awareness and irrespective of whether or not the valuer considers that any subsequent claim upon him/her would be successful or not. THIS IS A CRITICAL MATTER TO UNDERSTAND.

Duty of disclosure	This is the duty that falls upon an insured to disclose all relevant information known to him/her that would be considered material for the insurer/underwriter to know for the purpose of offering insurance cover and, if so, upon what terms. Section 21 of the ICA is the relevant section.
Duty of utmost good faith	This is the 'concept' now enshrined in s13 of the ICA requiring both valuer and insurer/underwriter to act in good faith towards each other in their dealings as insured and insurer.
Terms, conditions and exclusions	Are there other specific provisions providing and detailing the extent and width of the cover that is offered under an insurance policy by an insurer/underwriter to a valuer.
Legal professional privilege	This is a legal concept in which an insured (valuer) can obtain the benefit of retaining privilege in documents. That is, in not revealing information to anyone else, in particular a claimant, such privilege arising generally to allow communications relevant to proceedings and impending proceedings where advice is being sought from a lawyer.