

Civil Law (Wrongs) Australian Property Institute Valuers Limited Scheme Amendment 2019 (No 1)

Disallowable instrument DI2019–232

made under the

Civil Law (Wrongs) Act 2002, sch 4, s 4.10 (Schemes are subject to disallowance)

1 Name of instrument

This instrument is the *Civil Law (Wrongs) Australian Property Institute Valuers Limited Scheme Amendment 2019 (No 1)*.

2 Commencement

This instrument commences on the day after notification, despite anything to the contrary contained in the attached ‘Instrument Amending the Australian Property Institute Valuers Limited Professional Standards Scheme’.

3 Notice

I give notice of the Professional Standards Council of New South Wales’ approval of the attached amendment to the Australian Property Institute Valuers Limited Scheme.

Gordon Ramsay MLA
Attorney-General
6 November 2019

Professional Standards Act 1994 (NSW)

**INSTRUMENT AMENDING THE AUSTRALIAN PROPERTY INSTITUTE VALUERS
LIMITED PROFESSIONAL STANDARDS SCHEME**

PREAMBLE

- A. The Australian Property Institute Valuers Limited ('APIV') is an occupational association.
- B. The APIV Professional Standards Scheme ('Scheme') commenced on 1 September 2016.
- C. This instrument of amendment is prepared pursuant to s 16A of the *Professional Standards Act 1994* (NSW) ('the Act') by APIV for the purposes of amending the Scheme.

AMENDMENTS TO THE SCHEME

- 1. This instrument is prepared under the Act by the APIV whose business address is:

6 Campion street
DEAKIN ACT 2600
- 1A. All references to the 'Australian Property Institute Valuers Ltd Scheme' in the Scheme are omitted and substituted with 'Australian Property Institute Valuers Ltd Professional Standards Scheme'.
- 2. Subclause 3.2 is omitted and the following subclause is substituted:
 - 3.2 If a person or corporation, who or which was at the time of the act or omission giving rise to occupational liability, a person or corporation to whom this scheme applied and against whom a proceeding relating to occupational liability is brought, is able to satisfy the court that such person or corporation has the benefit of a Professional Indemnity Insurance Policy:
 - (a) of a kind which complies with the APIV Insurance Standards,
 - (b) insuring such person or corporation against the occupational liability to which the cause of action relates, and

- (c) under which the amount payable in respect of that occupational liability is not less than the Monetary Ceiling relating to the class of person and the kind of work to which the cause of action relates, that person or corporation is not liable in damages in relation to that cause of action above the monetary ceiling specified in this scheme.

3. Subclause 3.3 is omitted and the following subclause is substituted:

3.3 The monetary ceiling (maximum amount of liability) required for the purposes of limitation of liability under this scheme at the time at which the act or omission giving rise to the cause of action occurred is:

- (a) in respect a cause of action relating to a Low Risk Valuation: \$1.0million;
- (b) in respect of any other cause of action, to be determined according to the following table:

| Class | Description | Upper End Value | Monetary Ceiling |
|-------|-------------------|------------------------------------|------------------|
| 1 | Category A Member | \$0.0 million to < \$3.0 million | \$1.0 million |
| 2 | Category B Member | \$3.0 million to < \$5.0 million | \$2.0 million |
| 3 | Category C Member | \$5.0 million to < \$10.0 million | \$3.0 million |
| 4 | Category D Member | \$10.0 million to < \$15.0 million | \$4.0 million |
| 5 | Category E Member | \$15.0 million to < \$40.0 million | \$5.0 million |
| 6 | Category F Member | \$40.0 million > | \$10.0 million |

4. Clause 5.1 is amended by:

- (a) adding the following definition after the definition of "APIV Insurance Standards":

"Binding Determination" means Valuation of Real Property undertaken for the purpose of making a binding determination acting as an expert pursuant to an agreement or deed where all relevant parties have agreed to indemnify, release or hold the valuer harmless in respect of any liability in connection with the valuation.

- (b) adding the following definitions after the definition of "Category F Member":

"Expert Evidence Valuation" means any Valuation of Real Property undertaken for the purpose of providing expert evidence in relation to a proceeding before a court or tribunal where the expert's primary duty is to the court or tribunal (excluding a Valuation of Real Property undertaken for resumption purposes).

"Financial Reporting Valuation" means any Valuation of Real Property undertaken for the purpose of the preparation and issue of financial reports by any entity in the general course of the entity's operations. It excludes special purpose financial reports prepared in respect of a specific transaction including any sale, merger, takeover or fundraising.

"Insurance Valuation" means any Valuation of Real Property undertaken for the purpose of advising on the insurable value or real property in connection with any proposed purchase of insurance.

"Low Risk Valuation" means any:

- a) Valuation of Real Property undertaken in the capacity as an arbitrator;
- b) Binding Determination;
- c) Expert Evidence Valuation;
- d) Financial Reporting Valuation;
- e) Insurance Valuation;
- f) Valuation of Real Property undertaken for the purpose of determining a rate or tax that applies in respect of the property; or
- g) Valuation of Real Property undertaken for Resumption purposes.

"Monetary Ceiling" means the applicable monetary ceiling specified in clause 3.3 of the scheme.

- (c) adding the following definition after the definition of "Professional Indemnity Insurance Policy":

"Resumption" means compulsory acquisition of land (including compulsory acquisition or appropriation of Crown land) under the provision of any Act of the Commonwealth or a State authorising compulsory acquisition or appropriation of land.

- (d) omitting the definition of “Upper End Value” and substituting:

“Upper End Value” means the highest Valuation of Real Property (excluding any Low Risk Valuation) performed by the relevant member in the most recent 12 month period.

- (e) adding the following definitions after the definition of “Upper End Value”:

“Valuation of Real Property” means valuation of any right, interest or benefit related to the ownership, occupation or use of real property including land and all things that are a natural part of the land as well as any improvements to the land.

COMMENCEMENT

5. This instrument, and the resulting amended Scheme, shall commence on the date which is two months after:

- (a) it has been published in the Gazette in each of New South Wales, the Northern Territory, South Australia, Tasmania, Victoria and Western Australia; and
- (b) notice has been given of the amendment in both the Australian Capital Territory and Queensland.

Professional Standards Act 1994 (NSW)

**THE AUSTRALIAN PROPERTY INSTITUTE VALUERS LIMITED
PROFESSIONAL STANDARDS SCHEME**

PREAMBLE

- A. The Australian Property Institute Valuers Limited (APIV) is an occupational association.
- B. The APIV has made an application to the Professional Standards Council (PSC), constituted under the *Professional Standards Act 1994 (NSW)* (the Act), for a scheme under the Act.
- C. The scheme is prepared by the APIV for the purposes of limiting occupational liability to the extent to which such liability may be limited under the Act.
- D. The APIV has furnished the PSC with a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented.
- E. The APIV has furnished the PSC with APIV insurance standards with which members must comply for purposes of this scheme.
- F. The scheme is intended to remain in force for five (5) years from its commencement unless, prior to that time, it is revoked, its operation ceases, or it is extended pursuant to Section 32 of the Act.

THE AUSTRALIAN PROPERTY INSTITUTE VALUERS LIMITED PROFESSIONAL STANDARDS SCHEME

1. Occupational association

- 1.1. The Australian Property Institute Valuers Limited Professional Standards Scheme (the scheme) is a scheme under the Act prepared by the APIV whose business address is:

6 Campion Street, DEAKIN
ACT 2600

- 1.2. The scheme is intended to operate in New South Wales, the Australian Capital Territory, the Northern Territory, Queensland, South Australia, Victoria, Western Australia and Tasmania.

- 1.3. The scheme is intended to limit occupational liability by insurance arrangements pursuant to s21 of the Act. The relevant insurance arrangements are the APIV Insurance Standards.¹

2. Persons to Whom the Scheme Applies²

- 2.1. The scheme applies to all members of the APIV. All members of the APIV are required to hold or have the benefit of a Professional Indemnity Insurance Policy against occupational liability that complies with the insurance standards of the APIV and the insurance requirements set out in Clause 3.2, unless exempted by the APIV.
- 2.2. This scheme also applies to all persons to whom the scheme applied under Clause 2.1 at the time of any act or omission giving rise to occupational liability.³
- 2.3. The APIV may, on application by a member to whom this scheme applies under Clause 2.1, exempt the member from the scheme.

3. Limitation of Liability

- 3.1. This scheme only affects the liability for damages⁴ arising from a single cause of action to the extent to which the liability results in damages exceeding \$1,000,000.

¹ These are published on the API website at <https://www.api.org.au/resources/apiv-limitation-of-liability-scheme-resources>.

² Sections 18 and 19 of the Act provide that if the scheme applies to a body corporate, the scheme also applies to each officer of the body corporate and if the scheme applies to a person, the scheme also applies to each partner of the person, and if the scheme applies to a person the scheme also applies to each employee of the person, provided that if such officer of the corporation or partner of the person or employee of the person is entitled to be a member of the same occupational association, such officer, partner or employee is a member of the occupational association. Section 20 provides that the scheme may also apply to other persons as specified in that section. Section 20A extends the limitation of liability of persons to whom the scheme applies by virtue of sections 18 to 20.

³ For the purposes of the operation of the scheme in New South Wales, "occupational liability" has the same meaning as it has in the Act and excludes any liability which may not from time to time be limited pursuant to the Act. Similarly, for the purposes of the operation of the scheme in other jurisdictions in which it applies, "occupational liability" has the same meaning as it has in the corresponding legislation of those jurisdictions and excludes any liability which may not from time to time be limited pursuant to that legislation.

Occupational liability is defined in s4(1) of the Act to mean 'civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by a member of an occupational association acting in the performance of his or her occupation'. However, s5(1) of the Act provides that the Act does not apply to liability for damages arising from the death of or personal injury to a person, a breach of trust or fraud or dishonesty. [Note: All jurisdictions other than NSW and WA exclude a lawyer acting in a personal injury matter.] Section 5(2) of the Act also provides that the Act does not apply to liability which may be the subject of proceedings under Part 13 or 14 of the *Real Property Act 1900* (NSW).

⁴ Damages as defined in section 4(1) of the Act means (a) damages awarded in respect of a claim or counter-claim or claim by way of set-off and (b) costs in or in relation to the proceedings ordered to be

- 3.2. If a person or corporation, who or which was at the time of the act or omission giving rise to occupational liability, a person or corporation to whom this scheme applied and against whom a proceeding relating to occupational liability is brought, is able to satisfy the court that such person or corporation has the benefit of a Professional Indemnity Insurance Policy:
- (a) of a kind which complies with the APIV Insurance Standards,
 - (b) insuring such person or corporation against the occupational liability to which the cause of action relates, and
 - (c) under which the amount payable in respect of that occupational liability is not less than the Monetary Ceiling relating to the class of person and the kind of work to which the cause of action relates,
- that person or corporation is not liable in damages in relation to that cause of action above the monetary ceiling specified in this scheme.
- 3.3 The monetary ceiling (maximum amount of liability) required for the purposes of limitation of liability under this scheme at the time at which the act or omission giving rise to the cause of action occurred is:
- (a) in respect a cause of action relating to a Low Risk Valuation: \$1.0 million;
 - (b) in respect of any other cause of action, to be determined according to the following table:

| Class | Description | Upper End Value | Monetary Ceiling |
|-------|-------------------|------------------------------------|------------------|
| 1 | Category A Member | \$0.0 million to < \$3.0 million | \$1.0 million |
| 2 | Category B Member | \$3.0 million to < \$5.0 million | \$2.0 million |
| 3 | Category C Member | \$5.0 million to < \$10.0 million | \$3.0 million |
| 4 | Category D Member | \$10.0 million to < \$15.0 million | \$4.0 million |
| 5 | Category E Member | \$15.0 million to < \$40.0 million | \$5.0 million |
| 6 | Category F Member | \$40.0 million > | \$10.0 million |

- 3.4 Clause 3.2 only affects liability for damages arising from a single cause of action to the extent to which the liability in damages exceeding such amount as is specified in Clause 3.1.

paid in connection with such an award (other than costs incurred in enforcing a judgment or incurred on an appeal made by a defendant), and (c) any interest payable on the amount of those damages or costs.

3.5 This scheme limits the occupational liability in respect of a cause of action founded on an act or omission occurring during the period when the scheme was in force of any person to whom the scheme applied at the time the act or omission occurred.

3.6 This scheme does not limit the occupational liability of a member in the event the member does not have the benefit of a Professional Indemnity Insurance Policy in accordance with Clause 3.2 at the time the act or omission occurred.

4. Conferral of discretionary authority

4.1. Pursuant to section 24 of the Act, this scheme confers on the APIV a discretionary authority to specify, on application by a member to whom the scheme applies, in relation to that person a higher monetary ceiling (maximum amount of liability) not exceeding \$20 million, in relation to the person either in all cases or in any specified case or class or case.

5. Definitions

5.1. Relevant definitions for the purposes of the scheme are as follows:

"APIV" means the Australian Property Institute Valuers Limited.

"APIV Insurance Standards" mean the insurance standards approved by the APIV.

"Binding Determination" means any Valuation of Real Property undertaken for the purpose of making a binding determination acting as an expert pursuant to an agreement or deed where all relevant parties have agreed to indemnify, release or hold the valuer harmless in respect of any liability in connection with the valuation.

"Category A Member" means a person who is a member of the APIV to whom the scheme applies and who is:

- a) a sole trader whose Upper End Value is less than \$3 million;
- b) an individual or corporation who is a member of a partnership whose Upper End Value is less than \$3 million; or
- c) a corporation whose Upper End Value is less than \$3 million;

"Category B Member" means a person who is a member of the APIV to whom the scheme applies and who is:

- a) a sole trader whose Upper End Value is \$3 million or more but less than \$5 million;
- b) an individual or corporation who is a member of a partnership whose Upper End Value is \$3 million or more but less than \$5 million; or
- c) a corporation whose Upper End Value is \$3 million or more but less than \$5 million;

"Category C Member" means a person who is a member of the APIV to whom the scheme applies and who is:

- a) a sole trader whose Upper End Value is \$5 million or more but less than \$10 million;
- b) an individual or corporation who is a member of a partnership whose Upper End Value is \$5 million or more but less than \$10 million; or
- c) a corporation whose Upper End Value is \$5 million or more but less than \$10 million.

"Category D Member" means a person who is a member of the APIV to whom the scheme applies and who is:

- a) a sole trader whose Upper End Value is \$10 million or more but less than \$15 million;
- b) an individual or corporation who is a member of a partnership whose Upper End Value is \$10 million or more but less than \$15 million; or
- c) a corporation whose Upper End Value is \$10 million or more but less than \$15 million.

"Category E Member" means a person who is a member of the APIV to whom the scheme applies and who is:

- a) a sole trader whose Upper End Value is \$15 million or more but less than \$40 million;
- b) an individual or corporation who is a member of a partnership whose Upper End Value is \$15 million or more but less than \$40 million; or
- c) a corporation whose Upper End Value is \$15 million or more but less than \$40 million.

"Category F Member" means a person who is a member of the APIV to whom the scheme applies and who is:

- a) a sole trader whose Upper End Value is \$40 million or more;
- b) an individual or corporation who is a member of a partnership whose Upper End Value is \$40 million or more; or
- c) a corporation whose Upper End Value is \$40 million or more.

"Expert Evidence Valuation" means any Valuation of Real Property undertaken for the purpose of providing expert evidence in relation to a proceeding before a court or tribunal where the expert's primary duty is to the court or tribunal (excluding a Valuation of Real Property undertaken for resumption purposes).

"Financial Reporting Valuation" means any Valuation of Real Property undertaken for the purpose of the preparation and issue of financial reports by any entity in the

general course of the entity's operations. It excludes special purpose financial reports prepared in respect of a specific transaction including any sale, merger, takeover or fundraising.

"Insurance Valuation" means any Valuation of Real Property undertaken for the purpose of advising on the insurable value or real property in connection with any proposed purchase of insurance.

"Low Risk Valuation" means any:

- a) Valuation of Real Property undertaken in the capacity as an arbitrator;
- b) Binding Determination;
- c) Expert Evidence Valuation;
- d) Financial Reporting Valuation;
- e) Insurance Valuation;
- f) Valuation of Real Property undertaken for the purpose of determining a rate or tax that applies in respect of the property; or
- g) Valuation of Real Property undertaken for Resumption purposes.

"Monetary Ceiling" means the applicable monetary ceiling specified in clause 3.3 of the scheme.

"most recent 12 month period" means the 12 months prior to the date and time of inception of the member's Professional Indemnity Insurance Policy.

"Professional Indemnity Insurance Policy" means a policy of insurance that provides cover for the member in compliance with the APIV Insurance Standards.

"Resumption" means compulsory acquisition of land (including compulsory acquisition or appropriation of Crown land) under the provision of any Act of the Commonwealth or a State authorising compulsory acquisition or appropriation of land.

"the Act" means the Professional Standards Act 1994 (NSW).

"Upper End Value" means the highest Valuation of Real Property (excluding any Low Risk Valuation) performed by the relevant member in the most recent 12 month period.

"Valuation of Real Property" means valuation of any right, interest or benefit related to the ownership, occupation or use of real property including land and all things that are a natural part of the land as well as any improvements to the land.

6. Duration

6.1 This scheme will commence on 1 September 2016 and will be in force for a period of five (5) years from the date of commencement.

- 6.2 In the event the scheme, or a Notice relating to the scheme, is published in the Gazette of any jurisdiction after the commencement date, the scheme will commence on such day 2 months after the date of its publication in that jurisdiction.

7. Miscellaneous

- 7.1 Notwithstanding anything to the contrary contained in this scheme, if in particular circumstances giving rise to occupational liability, the liability of any person who is subject to this scheme should be capped by both this scheme and also by any other scheme under Professional Standards legislation) whether of this jurisdiction or under the law of any other Australian state or territory) and if the amount of such caps should differ, then the cap on the liability of such person arising from such circumstances which is higher shall be the applicable cap.