Practice notes for solicitors signing certificates of independent legal advice

This practice note details the required practice and procedures for Queensland solicitors when preparing a certificate of independent legal advice. This note includes a link to the prescribed form of those certificates and some practical tips to consider when providing the advice to which those certificates relate.

1. Introduction

1.1. Why do lenders ask for certificates of independent legal advice?

Often lenders ask for certificates of independent legal advice to help them mitigate the risk that a loan given by them or a guarantee or security granted in their favour may be set aside by the courts.

1.2. When may a loan, security or guarantee be set aside?

There are a number of grounds on which a loan, security or guarantee may be set aside by the courts. They include where the lender's conduct is found to constitute either unconscionable conduct, duress or undue influence.

Unconscionable conduct has been held to exist where:

(a) a borrower or guarantor has a "special disadvantage" – that is, something that seriously affects their ability to make a judgement as to their own best interests: *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462. The courts have inferred a special disadvantage from "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary": *Blomley v Ryan* (1956) 99 CLR 362 at 405;

(b) the lender has a "superior position or bargaining power" and has knowledge of the borrower's or guarantor's special disadvantage; and

(c) the lender unconscientiously exploits the borrower's or guarantor's special disadvantage. See *Blomley v Ryan* (1956) 99 CLR 362 at 415 per Kitto J; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

A certificate of independent legal advice may help a lender defend its position if a loan made by them or a guarantee or some security given in their favour is challenged and sought to be set aside.

1.3. Could a solicitor be liable to a lender to whom it has given a certificate of independent legal advice?

Yes, especially if the statements in their certificate have been negligently made, are factually inaccurate, or are misleading and deceptive. This can result in significant claims being made against the solicitor, particularly if the borrower or guarantor later seeks to have a court avoid or set aside their obligations to the lender. Further, a claim against the solicitor may not be covered by their professional indemnity insurance in circumstances where false and misleading statements are contained in their certificate.

1.4. Can a solicitor admitted in Queensland sign the lender's form of certificate of independent legal advice?

No. It is now a practice rule requirement that a solicitor admitted in Queensland can only give a certificate of independent legal advice in one of the forms prescribed by QLS. See practice rule [6.2].

You will be in breach of your practicing certificate if you issue a certificate in a different form and may also be subject to disciplinary proceedings.

Download the prescribed forms from the QLS website.

1.5. What forms of certificate have been prescribed by QLS?

Two forms of solicitor's independent legal advice certificate are now available on the Queensland Law Society's website – one for where you are providing independent legal advice to a borrower (Schedule 1 – insert hyperlink) and another for where you are providing independent legal advice to a guarantor (Schedule 2 – insert hyperlink).

A form of translator / interpreter certificate (Schedule 3 – insert hyperlink) is also available on the Queensland Law Society's website.

2. Some practical tips

2.1. General

2.1.1. Should the practice be doing this type of work?

Consider whether your practice is appropriately skilled and experienced to be advising borrowers / guarantors and issuing the certificates of independent legal advice in respect of loans. Also consider the risk appetite of your practice – although the fees charged for providing the certificates are often relatively modest, the risks involved can be significant.

If your practice is appropriately skilled and experienced to be advising borrowers / guarantors, designate one or more solicitors in your office to be responsible for advising borrowers / guarantors and issuing the certificates of independent legal advice. The advice may only be given by a solicitor with a valid current practicing certificate. Ideally, they should be a senior practitioner who is experienced in providing such advice.

Caution should be exercised where the solicitor who issues the certificate is on a restricted practicing certificate. The solicitor should be appropriately trained to provide the advice, and have good precedents and guidance readily available to them, along with a good understanding of the firm's conflicts position.

2.1.2. File management

Open a separate file for each certificate you are asked to provide, even if it is a repeat client.

Consider who is paying your fees and how the borrower or guarantor was referred to you. You must ensure that you are truly "independent".

Fees and charges should be made according to the time required to give comprehensive and adequate advice, and quotes and costs estimates should be formulated on this basis.

2.1.3. Who should you advise

In general, you should not act for:

(a) more than one guarantor; or

(b) both the guarantor and borrower,

in the same transaction.

Each party should obtain its own advice from its own independent lawyers.

There may, however, be some limited circumstances where separate advice may not be required. For example, where:-

(a) there is plainly no conflict of interest between the guarantors;

(b) the borrower is a company and all guarantors have substantial shareholdings in the borrower and are actively involved in its management; or

(c) all guarantors are experienced in the giving of guarantees and mortgages.

Each case should be considered in light of its own particular circumstances. You should, for example, exercise caution if you are asked to provide a certificate by a new client (especially one who has "walked in off the street") and you do not have knowledge of the context of the transaction. Remember that by signing the certificates you are certifying that you have given the required advice to the guarantor or borrower (and not just that you have witnessed their execution of the documents). You also have a duty to ensure that your client understands the advice you have given.

2.1.4. Communication with parties

Be clear with all parties who you act for, and who you do not act for (e.g. which borrower, which guarantor etc.). Recommend that the parties that you do not act for obtain their own independent legal advice. Confirm in writing where possible.

Do not answer queries or requisitions from or between the parties, or act as a messenger for communications between them. It may confuse which parties you represent.

Do not allow one party to procure the signatures of another party on any of the documents (e.g. the borrower procuring a guarantor's signature on a guarantee).

2.2. Before the meeting

2.2.1. Documents and information

Ask for the documents to be sent to you before the meeting so that you have time to read them.

Read the documents and consider:

(a) what are the key terms;

(b) what are the key risks for your client; and

(c) what is the worst case scenario for your client?

Insist that your client reads the documents (or translations of them) fully before attending your office or (at a minimum) before they are bound under the terms of the loan or guarantee (as applicable).

The National Credit Code and Banking Codes of Practice may apply to certain aspects of a loan or guarantee or indemnity. Consider if these apply to the transaction. If they do, consider their effect

on your client's rights and obligations and whether you should refer the borrower or guarantor to any other information. For example, if the guarantee is regulated by the National Credit Code, refer the guarantor to the Form 9 Information statement entitled "Things you should know about Guarantees". Explain that form to them.

2.2.2. Assess need for translator / interpreter

Assess your client's ability to understand English. If there is any doubt, arrange for a translator / interpreter to attend the meeting.

Given the nature of these transactions, practitioners should ensure that a certified translator / interpreter attends and signs a certificate in the form of Schedule 3 at the interview. Ask the translator / interpreter to provide you with evidence of their qualifications (to translate the documents[1] and what is discussed at the meeting) and keep a copy of that evidence on file. A copy of those qualifications will also need to be attached to the translator / interpreter's certificate. Never rely on another party involved in the transaction (or on a family member, employee of your practice, or friend of your client) to interpret / translate.

The documents and a certificate in the form of Schedule 3 should be sent to the translator ahead of the meeting. Sufficient time should be allowed for the documents to be translated and provided to your client before your meeting with them.

If a translator / interpreter is not in attendance and should be, practitioners should not proceed with the interview or sign the certificate. That would be contrary to the purpose of these certificates (that is, that the advice has been given and has been understood). A directory of accredited translators and interpreters can be found at www.naati.com.au

2.2.3. Remote advice

If the meeting is to be conducted remotely (that is, via teleconference or videoconference), carefully assess whether the circumstances are such that the meeting should be conducted in person. When you are unable to see your clients in person, video conferencing has obvious benefits over a phone call as it gives you visual cues as to whether they have heard and understood what you have said, or whether they want to ask a question.

It is important to remember that using video conferencing to verify identity is not part of ARNECC's safe harbour steps.

It may also be more difficult to assess a person's capacity or other factors (for example, factors indicating undue influence, duress, elder abuse, or domestic and family violence) via teleconference or videoconference.

2.3. At the meeting

2.3.1. Consider who is present and whether they should be

If you are providing independent advice to the guarantor, usually neither the borrower nor any representative of the borrower (nor any other person who is otherwise interested in the contemplated transactions) should be present when the guarantor is receiving that advice. In certain circumstances their presence may, however, not be objectionable (for example, where the borrower is the wholly owned subsidiary or holding company of the guarantor).

If you are providing independent advice to the borrower, usually no other person who is otherwise interested in the contemplated transaction should be present when the borrower is receiving that

[1] It is prudent to check that the translator/ interpreter has the necessary qualifications to translate the relevant legal documents involved. For example, check that they are a NAATI Specialist Legal Interpreter. See https://www.naati.com.au/become-certified/certification/.

advice. In certain circumstances their presence may, however, not be objectionable (for example, where the guarantor is the wholly owned subsidiary or holding company of the borrower).

If you are providing advice via teleconference or videoconference, it may be difficult to determine who is present when the borrower or guarantor is receiving the advice.

2.3.2. Verification of identity

You should require proof that the person signing the guarantee or loan (as applicable) is, in fact, the guarantor or borrower named in the document. In this regard, have regard to the evidence of identity required in conveyancing transactions – see Schedule 8 to the Model Participation Rules determined by the Australian Registrars' National Electronic Conveyancing Council and Part 61 of the Land Title Practice Manual (Queensland). You should retain copies of any evidence of identity provided to you at the meeting.

2.3.3. Decision-making capacity

You should proactively test whether anything indicates that the capacity of the guarantor or borrower might be questionable (e.g. confusion, disorientation, inconsistencies, poor memory or general awareness, medical conditions, embarking on a transaction that is not in their best interests). Ask open ended questions and take detailed file notes. If in doubt, do not proceed; consider rescheduling the meeting and/or requiring further action (e.g. obtaining a written opinion from a medical practitioner).

2.3.4. Giving independent legal advice to a person who is considering becoming a guarantor

It is not sufficient for you to read out the documents or to confirm that your client has read though the documents.

2.3.4.1. Explain the general nature and effects of the documents

As required under Part B of the Schedule 2 certificate, explain to the guarantor the general nature and effects of the documents and that:

(a) if the borrower defaults in payment or in other obligations owed to the lender, the guarantor would be liable to make good the default. That could involve the guarantor being liable for all amounts owed by the borrower to the lender including interest and costs;

(b) in certain circumstances the guarantor would be liable even if the borrower is not liable to pay the lender; and

(c) the giving of a guarantee involves considerable risk (including the risk of losing any asset or property over which the guarantor has granted security in favour of the lender) and requires very careful thought.

2.3.4.2. Some specific issues to consider and explain

When explaining the general nature and effects of the documents, some of the issues to consider and explain include:

(a) (**Capacity**) the capacity in which they will be entering into the guarantee. Often if a guarantor is signing on behalf of a trust, the terms of the guarantee/indemnity will bind them as trustee and personally as well;

(b) (**Scope of liabilities being guaranteed**) in a "worst case" scenario, what liabilities will the guarantor be liable for? What monies are being guaranteed? For example, are they:

(i) all monies owed by the borrower to the lender at any time? These are known as "all monies" guarantees. They are often used where the lender and borrower

intend to enter into a series of transactions with each other. These types of guarantees are open ended; or

(ii) only monies owed by the borrower to the lender in connection with a specific transaction or under certain documents; or

(iii) limited by amount. For example, the guarantee may be limited to the principal amount payable by the borrower. Other aspects of the guarantee may, however, not be limited and (if that is the case) you should advise the client of that fact. For example, the guarantor's liability to pay the lender default interest or enforcement costs under the terms of the guarantee may not be limited;

(c) (**Increase of liabilities being guaranteed**) could the guaranteed monies be increased without notice to the guarantor? Usually they can be. Often a guarantee will include a clause that confirms that, in such circumstances, the liability of the guarantor will continue and be unaffected by that change;

(d) (**When a demand can be made against guarantor**) when can the lender make a demand against the guarantor and whether the lender will have to:

(i) notify the guarantor if the borrower defaults (usually lenders do not need to give such notice); or

(ii) take action against the borrower before it makes a demand against the guarantor (usually lenders do not need to take any action against anyone else before making a demand against the guarantor);

(e) (**Who is liable if more than one guarantor**) if there is more than one guarantor, whether they will be jointly and severally liable for the whole amount guaranteed? If they are, explain what "joint and several liability" means - that is, that the lender can demand the full amount from one of the guarantors and then that guarantor will need to seek contribution from the other guarantors, if available. The guarantor needs to be comfortable (on a continuing basis) that the other guarantors will be in a position to pay their contribution and they should consider obtaining financial advice to help them make that assessment;

(f) (**Scope of security and when can be enforced**) if the guarantor will also be granting security in favour of the lender, what obligations will be secured, what assets and property will the security be granted over, when will the lender be able to enforce that security and what will be the consequences of that enforcement;

(g) (**What happens if guarantee breached**) what will happen if the guarantor signs the guarantee and breaches its terms? Check the terms of the guarantee and any security granted by the guarantor. Typically, if a guarantor breaches the guarantee the beneficiary will be entitled to:

(i) sue the guarantor; and /or

(ii) enforce any security granted in their favour (including any security granted by the guarantor). That may involve the beneficiary being allowed to sell the guarantor's assets and apply the proceeds of that sale to repay the money owed to it;

(h) (**Risk of set-off**) if the guarantor has a bank account with the lender, the risk that the lender may set off amounts in that account against the monies owed to it under the guarantee. That right of set-off may be in the guarantee or in the terms and conditions that govern the bank account;

(i) (**Key rights**) what are some of the key rights of the guarantor? Often those rights include a right to:

(i) be paid back by the borrower if the guarantor is required to pay any monies to the lender under the guarantee;

(ii) prove (as an unsecured creditor) in the borrower's insolvency;

(iii) stand in the shoes of the lender and exercise the rights that it has against the borrower (including under any security granted in favour of the lender). This is known as the "right of subrogation"; and

(iv) seek any of the other guarantors to contribute their share of the amounts payable under the guarantee. This is known as the "right of contribution".

Often the guarantee will include clauses that require the guarantor to agree that these rights will be deferred (or are only able to be exercised with the beneficiary's prior consent) until all monies owed to the beneficiary by the principal have been paid in full. Check the terms of the guarantee and explain these rights and limitations to your client and when they will be able to be exercised;

(j) (**Revocation of guarantee**) if and when the guarantor has an express right to revoke the guarantee by notice to the lender. If it does, explain to the guarantor:

(i) when they can exercise that right;

(ii) what liability (if any) will they continue to have under the guarantee if they give a notice of revocation;

(iii) (if applicable) the impact of the Code of Banking Practice or National Credit Code; and

(iv) any conditions that must be met before the revocation notice can be given. For example, it may be a condition that the guarantee cannot be revoked unless and until a replacement guarantee has been provided by a new guarantor who has been approved by the lender.

This list is not exhaustive.

Consider and explain to the guarantor all other key terms of (and unusual clauses within) the documents. Use plain English, and explain what could go wrong (e.g. “you could lose your home”).

Consider and explain to the guarantor the effect of giving the certificate sought by the lender (e.g. that the guarantor may not be able to later claim misunderstanding of the documents or their clauses to seek to avoid or set aside their obligations).

2.3.4.3. Advise and explain to the guarantor what you are not opining or giving advice on

Advise and explain to the guarantor that you are not opining on or giving them advice on:

(a) The commercial aspects of the transactions contemplated under the documents and the viability of the transaction/s; or

(b) the borrower’s ability to make the required payments to the lender and to otherwise comply with the terms of the documents; or

(c) the guarantor’s ability to make payment to the lender.

2.3.4.4. Tell the guarantor you cannot provide financial advice

Tell the guarantor that as a solicitor you cannot give them financial advice (as distinct from legal advice) and that the guarantor should:

(a) carefully consider the financial risks involved in giving the guarantee and entering into the documents and in particular:

(i) the level of risk that the borrower will default; and,

(ii) the ability of the guarantor to make good any default including arrears of interest and costs which might significantly exceed the current size of the debt;

(b) make enquiries about the:

(i) risk involved in any business the borrower is undertaking with the proposed loan;

(ii) risk of the borrower defaulting;

(iii) possible extent of any default which the guarantor may have to meet; and,

(iv) adequacy of any security being given by the borrower or others and the likely level of exposure of the guarantor,

(c) if the guarantor has any doubt as to the level of financial risk involved, obtain independent financial advice before signing (or becoming bound by) the documents to which the guarantor is a party;

2.3.5. Giving independent legal advice to a person who is considering becoming a borrower

It is not sufficient for you to read out the documents or to confirm that your client has read though the documents.

2.3.5.1. Explain the general nature and effects of the documents

As required under Part B of the Schedule 1 certificate, explain to the borrower the general nature and effects of the documents. In doing so, some issues to consider and explain include:

(a) (**Capacity**) the capacity in which they will be entering into the document. Often if a borrower is signing documents on behalf of a trust, the documents will state that they are also personally bound;

(b) (**Scope of liabilities**) in a “worst case” scenario, what liabilities will the borrower be liable for?

(c) (**Scope of security and when can be enforced**) if the borrower will also be granting security in favour of the lender, what assets and property will the security be granted over, when will the lender be able to enforce that security and what will be the consequences of that enforcement;

(d) (**What happens if the documents are breached**) what will happen if the borrower signs the documents and then breaches their terms?

(e) (**Risk of set-off**) if the borrower has a bank account with the lender, the risk that the lender may set off amounts in that account against the monies owed to it under the documents. That right of set-off may be in the documents or in the terms and conditions that govern the relevant bank account;

Consider and explain to the borrower all other key terms of (and unusual clauses within) the documents. Use plain English, and explain what could go wrong (e.g. “you could lose your home if you breach the terms of the documents”).

Consider and explain to the borrower the effect of giving the certificate sought by the lender (e.g. that the borrower may not be able to later claim misunderstanding of the documents or their clauses to seek to avoid their obligations).

2.3.5.2. Advise and explain to the borrower what you are not opining or giving advice on

Advise and explain to the borrower that you are not opining on or giving them advice on:

(a) the viability of the transaction; or

(b) the borrower’s ability to make the required payments to the lender and otherwise comply with the terms of the documents.

2.3.5.3. Tell the borrower you cannot provide financial advice

Tell the borrower that as a solicitor you cannot give them financial advice (as distinct from legal advice) and that the borrower should:

(a) carefully consider the financial risks involved in signing the documents

(b) make enquiries about the:

(i) risk involved in any business the borrower is undertaking with the proposed loan;

(ii) risk of the borrower defaulting;

(iii) adequacy of any security being given by the borrower or others and the likely level of exposure of the borrower,

(c) if the borrower has any doubt as to the level of financial risk involved, obtain independent financial advice before signing (or becoming bound by) the documents to which the borrower is a party.

2.3.6. Assess if guarantor / borrower is entering into documents freely

Ask your client if they have been subjected to any duress, undue influence or commercial pressure to enter into the documents. If the answer is "yes", you should not sign the certificate and should recommend that your client should not sign the documents.

Satisfy yourself that your client freely makes the statements referred to in their certification at the end of the certificate and appears to have the understanding referred to in that certification. If it appears to you that your client does not have that understanding you must not sign the certificate.

If there are circumstances placing you on enquiry, further enquiry must be undertaken to ascertain the true position. See *Jams 2 Pty Ltd v Stubbings (No 3)* [2022] HCA 6.

The client should be advised that it is not necessary at all for them to sign the documents and to enter into the transactions contemplated under them.

If (following your advice) the client wishes to proceed with signing the documents (and has certified that they understand the advice and confirmed that they do not wish to obtain any independent financial advice), you should witness that signing.

Ensure that:

(a) your client signs the certification at the bottom of the certificate; and

(b) any translator / interpreter signs a certificate in the form of Schedule 3 (and attaches evidence of their qualifications to that certificate).

2.4. After the meeting

2.4.1. File note

Keep a comprehensive file note of the verbal advice provided, and the questions you asked and answers that were given to test the understanding of that advice. Make sure that your file note states:

(a) the date;

(b) who was present at the meeting; and

(c) details of what advice was given and the client's response / instructions.

The file note should be prepared in the meeting and finalised immediately after it.

2.4.2. Evidence

Keep a copy of all evidence of identity obtained from the client at the meeting.

2.4.3. Confirm the advice

Promptly confirm your verbal advice in writing to the client. Keep a copy of your written advice on file. Where possible, have the client sign an acknowledgement that they received and understood your advice.

2.4.4. Keep a copy of the certificate

Keep a copy of the completed, signed and dated certificates on file.