



## Acting for private lenders checklist

Checking off on the items in this checklist will help practitioners avoid the most common claims when acting for private lenders.

The items in this checklist are the minimum requirements which would usually apply when acting for a lender regardless of whether the loan is one off or for a more experienced private lender.

Based on the LPLC claims data high risk lending transactions include:

- acting for private companies or individuals who provide commercial loans, often short term on high interest or on an ad hoc basis
- loans between related or associated parties
- acting for the 'bank of mum and/or dad'.

For the purpose of this checklist 'private lenders' includes all of the lenders described above.

This checklist is for use where the practitioner is **not** providing a financial service. It is a breach of rule 41 of the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#) to conduct a managed investment scheme or engage in mortgage financing except under a scheme administered by the relevant professional association.

This checklist does not consider terms contract requirements as contained in section 29A – 29W of the [Sale of Land Act 1962 \(Vic\)](#).



## Conflict

Practitioners who act for multiple parties are often caught unaware by conflicts, which can be difficult to anticipate and arise before the danger becomes apparent. This leaves the practitioners exposed to allegations of breach of duty and breach of the conduct rules and preferring the interests of one client over another. In acting for more than one party, you create a minefield for yourself.

- Considered potential conflicts of interest in line with rules 10, 11 and 12 of the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#).

Refer to the LIV ethics [Conflict of Interest Guidelines \(PDF\) \(15 September 2016\)](#).

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- Not acting for any other party.
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- Requested any unrepresented parties sign an acknowledgment that the firm does not act for them, and that the lender has recommended that they obtain independent legal, financial and valuation advice.

## Retainer

Scope and documenting the retainer is important to avoid misunderstandings with your client about what you will and won't do.

- Provided written retainer that sets out:
- legal work which the firm will undertake
  - what the firm will not do

claims experience shows that lenders think you are either undertaking due diligence or checking the results of their own due diligence and/or confirming the value of any security property.

- what the client needs to do
  - the firm is not providing a financial service or giving financial or accounting advice.
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- Client authorisation form signed.
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- Verification of identity completed for the client.

## Referrals

Practitioners have ethical obligations in relation to referral fees being received or paid by a practitioner.

- Disclosed referral fees in accordance with the LIV ethics [Referral Fees Guidelines \(PDF\) \(27 July 2017\)](#).

## Financial service

Certain obligations are imposed on those providing financial services. For example, AFS licensees have an obligation to ensure their financial advisers comply with certain professional standards. Knowing whether your lender client has these obligations will help you give appropriate advice.

- Considered whether the client is providing a [financial service](#).  
An example of a financial service is operating a private investment practice which may include negotiating loans, being the main person seen by investors providing funds, being essential to the transaction occurring, being paid a fee.

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- Obtained details of the client's Australian financial services (AFS) licence where the client provides a financial service.

## National Credit Code

The National Credit Code imposes certain obligations on lenders and requirements on the documentation of loans specified in the Code. You need to consider if every loan is subject to the Code.

- Considered whether the [National Credit Code](#) applies, namely:
  - the lender is providing the loan in the course or furtherance of their business
  - a charge is or may be made for providing the loan
  - the loan is to be used:
    - wholly or predominantly for personal, domestic, or household purposes or
    - to purchase, renovate or improve residential property for investment purposes, or
    - to refinance credit previously provided for this purpose.

If the [National Credit Code](#) applies, we recommend that you **do not** act unless:

the lender holds the appropriate licence

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you have previously documented transactions where the Code applies

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the client has in place appropriate systems to ensure compliance with the Code

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you have a set of precedents that comply with the Code.

## Costs

Many clients have never retained a lawyer before and do not understand how costs are charged. This lack of understanding sometimes contributes to claims so it is important that firms get their costs estimates and disclosure right.

Does the cost reflect the amount of work that you are required to do and the risk that you are taking on?

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Sent costs disclosure to client and any associate third party payer pursuant to [s. 176 of the Uniform Law](#).

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Sent costs agreement.

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Received signed costs agreement.

## Warning

Where a third party such as a borrower is obliged to pay the lender's legal fees this third-party payer has rights pursuant to the Uniform Law including to have the costs assessed. [See s. 198 of the Uniform Law](#).

# Due diligence

It is important to explore due diligence issues with clients to enable the client to make an informed decision about whether to proceed with the loan advance.

- Obtained and considered information and searches about lender, borrower, mortgagor and guarantor which may include:
  - employment details
  - ABN lookup
  - company search
  - bankruptcy search
  - credit checks
  - Personal Properties Securities Register (PPSR) search
  - Title searches

Claims experience shows that searches provided by the lender and/or the borrower may be inaccurate or out of date. We recommend always doing your own fresh searches as far as possible.

- Considered any suspicious activity.  
For example, elder abuse, conduct of any attorney, undue influence.
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- Considered if lending might be unconscionable.
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- Determined whether any party is acting in a trustee capacity.  
It may be that the party needs to enter the transaction in their own capacity and in the capacity as trustee.
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- Determined that the client has capacity.  
LPLC [VOI Notes: Capacity, Authority and Identity](#)

- Determined that a party has authority.
- power of attorney - sighted original or a certified copy and checked the validity.  
We recommend that the principal / donor, not the attorney, signs any guarantee and indemnity.
  - relevant trust deed(s) gave power to enter into the transaction.
  - company search- showed instructions are from the director(s).

LPLC [VOI Notes: Capacity, Authority and Identity](#)

[LIV Verification of authority and right to deal checklist](#)

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- Undertaken Verification of Identity (VOI) of the client.

LPLC [VOI Notes: Capacity, Authority and Identity](#)

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- Undertaken VOI of any mortgagor pursuant to [s. 87A of the Transfer of Land Act 1958](#) (Vic).  
For a case about s.87A see [C & F Nominees Mortgage Securities Ltd v Karbotli & Ors \[2020\] VCC 987](#).  
LPLC article [Establishing Identity](#).
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- Determined that the mortgagor has the right to deal.

[LIV Verification of authority and right to deal checklist](#)

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- Considered any other relevant due diligence issues.

For example, in respect of a construction financing transaction this may include review of the building contract and review of exchanged presale contracts.

## Guarantor

A personal guarantee can protect the lender's position so in the event of a default, the lender can look further than the borrower who may be a two-dollar company for recovery.

- Considered need for a guarantor(s) and suitability of their assets.

- Prepared guarantee documents:
  - the guarantee and indemnity
  - an acknowledgment that they were told to seek independent legal advice; or
  - an acknowledgment that they obtained independent legal advice; or
  - a practitioner's certificate confirming independent legal advice had been obtained.

## Security

The security arrangements are often not taken seriously by the parties and when the security turns out to be inadequate, they sue their lawyers. Make sure you advise your lender client about security for the loan.

- Advised lender of security options.  
LPLC article [Private lending pitfalls](#)

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- Obtained title search of all security property.

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- Checked the title details:
    - the mortgagor is registered on title
    - any encumbrances which may affect the security property.

### Dealing with any prior interests

Dealing with any prior interests is an important part of acting for a lender and ensuring they have adequate security for their loan.

- Identified any prior mortgage on title or unregistered mortgage to go onto the title in priority to the lender client.
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- Identified any interests on the PPSR where goods taken as security.
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- Arranged necessary discharge / release for the security property as relevant.
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- Requested deed of priority in relation to any prior interests.

Arranged for title to be made available for settlement to enable mortgage to be registered over the security property.

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Paid any outstanding statutory amounts.  
For example, funds deducted from the loan amount to pay outstanding council rates or otherwise adjusted and paid where the security property is being purchased.

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Dealt with any registered charge affecting any security property.  
For example, funds deducted from the loan amount to pay land tax charge and a release obtained.

## Valuation

Ensuring your lender client has a clear understanding of the value of the security property is an important step in protecting their interests. Obtaining a formal valuation and carefully reviewing it is the best way to do this.

See LPLC article [Independent valuation is essential for lenders](#)

Advised the lender in writing to obtain a valuation of any security property.

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Instructed valuer. Considered independence of valuer.  
Claims experience shows that a valuer with a long standing association with the lender may just 'rubber stamp' a value necessary to enable loan to value ratio to be met.

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Received valuation.

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Received valuation:

- accurate description of the property
- valuation of the current condition
- considers lease terms and conditions
- addresses any relevant planning restrictions affecting the property's use or development.

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Sent valuation to lender and informed lender of the loan to value ratio considering any prior securities including any amount owing to a first registered mortgage to another lender.



# Practitioner certificate

Requiring certain borrowers and guarantors obtain independent legal advice is important to ensure your lender client is protected from allegations of unconscionable conduct. Practitioner certificates are a good way to confirm the advice has been obtained.

Advised lender if a practitioner's certificate should be obtained.

Be wary of recommending another practitioner to undertake this task for the security provider, as in some circumstances the referral might be taken as undermining the certificate giver's independence of the lender.

Factors to consider are:

- whether a guarantee is provided by someone obtaining no benefit from the loan (third party guarantor)
- A borrower is at any disadvantage and what the purpose of the loan is.
- See *Commercial Bank of Australia -v- Amadio and Anor* [1983] [HCA 14; \(1983\) 151 CLR 447](#) and LPLC [Managing Mortgage Risk](#) practice risk guide
- Used the LIV form of certificates in accordance with rule 11 of the [Legal Profession Uniform Legal Practice \(Solicitors\) Rules](#) 2015.

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Checked the signed practitioner certificate including that the certificate is properly executed.

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Considered the need to call the practitioner to confirm that they provided the certificate.

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# Documentation

Accurately documenting a loan transaction and the security arrangements is crucial to protecting your lender client's rights and ensuring they can effectively recover their money.

Documented transaction properly.

Warning

Be wary of using precedents from other, or unrelated matters that may not be fit for the job at hand.

- loan agreement
- national mortgage form
- other potential security documents.

For example, general or specific security deed, mortgage of lease, right of entry, multiparty deeds such as with a builder.

- Memorandum of common provisions (MCP)
- guarantee and indemnity
- National Credit Code declaration of business purpose

LPLC article [Ensure Business Purpose Declaration Precedents Are Up To Date](#)

- practitioner's certificate
- any ancillary documents.

For example, a disbursement authority.

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Checked appropriate execution clauses used.

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Road tested the drafting.

## Insurance

A lender should receive proof that the security property is insured and be noted on any insurance policies.

Informed lender of need to check that the security property is insured against building replacement and public liability insurance and any other relevant insurance.

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Informed lender of need to be noted on any insurance policy for any security property.

## Settlement requirements

Sometimes during a busy settlement period matters are missed resulting in a claim. Using a checklist will ensure action items are completed in sequence and without omission.

Executed documents received ahead of settlement and due execution confirmed.

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Received certificate(s) of title for land as security or made available if electronic.

- Arranged discharge of mortgage(s) where lender is to be registered as the first mortgagee.

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- Withdrawn caveat(s) which prevent registration of mortgage over the security property or caveator consent obtained.

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- Obtained PPSR release where relevant for any goods given as security.

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- Warned the client of the need to call before sending any funds to check account details and to be alert to the possibility that an email directing payment of funds may be sent by a fraudster.

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- Checked loan funds are in trust account before settlement.

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- Checked bank account details for settlement deposit independently of email.  
Always call the receiving party to double check account details before any loan funds are advanced.

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- Reported to [AUSTRAC](#) any cash payment received for \$10,000 or more.

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- All security interests registered.