

Solicitors' Certificates and Guarantee Advice

Presented by: **Jamie McCallum** | Prevention and Risk Manager, LPLC



Acknowledgement of traditional owners and country

This session is being held on the lands of the Wurundjeri people of the Kulin Nation and on behalf of LPLC I wish to acknowledge them as the traditional owners of the land.

I also acknowledge the traditional owners of the lands which all of those joining us online today are living, learning and working on.

I would also like to pay my respects to their Elders past and present, and any Elders of other communities who may be present today.



Why is it important?

Solicitors' certificates and guarantee advice can lead to:

- Claims
- Stress
- Reputational damage
- Unforeseen costs



Risky Business?

- Risk transfer by lenders to solicitors
- Different risk profile for guarantors compared to the borrower
 - And different risk profiles for different guarantors
- Circumstances surrounding guarantee advice
 - Urgent for the guarantor or borrower
 - Sophistication of the guarantor
 - Time, cost, and relational pressures



Poll | Share your thoughts

What is your firm's typical time-period between receiving initial instructions and then providing the solicitor's certificate?

- a) Same day
- b) 24 hours
- c) 48 hours
- d) 3-5 days
- e) Longer than 5 days



The regulatory framework

Rule 11 of the Legal Profession Legal Practice (Solicitors) Rules 2015

- Governs how a solicitor's certificate and guarantee advice is given
- Do you know the rules?

Are you complying with **all** of the applicable rules?



The regulatory framework

11.1 This rule applies where:

11.1.1 a solicitor is engaged to give advice to a proposed signatory that will be...:

11.1.1.2 a third party mortgagor, guarantor, surety mortgagor or indemnifier (**a guarantor**) providing security for the borrower, and

11.1.2 the solicitor has been asked to provide evidence of the advice

Importance of face to face VOI

- Rule 11.2 requires you to verify the guarantor's identity under the VOI Standard in schedule 8 of the [ARNECC Model Participation Rules](#) ('ARNECC Rules')
- Sometimes referred to as the 'safe harbour' rules
- Face to face and in person VOI is mandatory (see clause 2 of the ARNECC Rules)
- **This means no 'reasonable steps' and no remote VOI**



Importance of face to face VOI

Case law on identify fraud and incorrect VOI:

Issa v Owens & Ors [2023] QSC 4

Solicitor never witnessed signatory of a director and guarantor, received a suspended 6-month sentence, and struck off from practising.

XPAK Pty Ltd v Scibilia & Ors [2013] VCC 1260

Lawyer 50% liable for damages with first defendant (who engaged in the actual fraud), because the lawyer failed to do proper identification of the 'borrower'.



The required documents

Rule 11.4 - requires the evidence of the advice provided by a solicitor to a guarantor must be in the form of:

r 11.4.2 Law Institute of Victoria Australian
Legal Practitioner's Certificate 2
(Schedule 2)



The required documents

FOR USE IN CERTIFICATION WHERE THE PERSON(S) SIGNING IS A THIRD PARTY, GUARANTOR, SURETY MORTGAGOR OR INDEMNIFIER FOR THE PRINCIPAL BORROWER


(Schedule 2) July 2015

Australian Legal Practitioner's Certificate 2

PART A

TO:

THIS CERTIFICATE IS PROVIDED BY:

An Australian legal practitioner holding a current practising certificate under the Legal Profession Uniform Law (Victoria) and not acting for you in this transaction

I HAVE BEEN ASKED TO INTERVIEW:

(called "the guarantor")

I HAVE BEEN PROVIDED WITH THE FOLLOWING DOCUMENTS:

(1)

(2)

(3)

(4)

(5)

(6)

PART B EXPLANATIONS GIVEN BY THE AUSTRALIAN LEGAL PRACTITIONER

I CERTIFY that in the absence of the borrower and before the guarantor signed the documents, I EXPLAINED to the guarantor:

- the general nature and effects of the documents required to be signed by the guarantor;
- that if the borrower defaults in payment or in other obligations to you the guarantor would be liable to make good that default which could involve all amounts owed by the borrower to you and substantial arrears of interest; and
- that the giving of a guarantee involves considerable risk, including the risk of losing any security, property and other assets and requires very careful thought.

PART C EXCLUDED EXPLANATIONS

I INFORMED the guarantor in very clear terms that I was not expressing any opinion nor advising on:

- the viability of the transaction which the borrower was undertaking;
- the borrower's ability to make the required payments to you; and
- the client's (guarantor's) ability to make payment to you.

I FURTHER INFORMED the guarantor that if in any doubt on those aspects the guarantor should obtain independent financial advice before signing the documents.

PART D STATEMENTS BY THE PERSONS SIGNING DOCUMENTS

FOLLOWING THE ABOVE EXPLANATIONS, the guarantor stated to me:

- that he / she / they understood the general nature and effect of the documents and the obligations and risks involved in signing those documents. It appeared to me that they did have such understanding;
- that he / she / they were signing these documents freely, voluntarily and without pressure from the borrower or any other person.

PART E IDENTIFICATION OF PERSONS SIGNING DOCUMENTS

The identity of the guarantor has been verified in accordance with rule 11.2 of the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*

PART F TRANSLATION/INTERPRETATION

An independent interpreter, was present at this interview with the guarantor and interpreted the statements made by all parties. A certificate by the interpreter is held by me.

AUSTRALIAN LEGAL PRACTITIONER'S CERTIFICATE

I CERTIFY the above information. The borrower was not present during my interview with the guarantor.

SIGNED: DATED:

CLIENTS CERTIFICATE

I CERTIFY that:

- I have been handed a copy of this certificate.
- I have read this certificate.
- I am the client named.
- The above information is true.

SIGNED: DATED:



The required documents

Rule 11.5, requires: Where an interpreter or translator is present while the advice is being provided:

- r 11.5.1 the name of the interpreter or translator must be included on... the relevant... Law Institute of Victoria Australian Legal Practitioner's Certificate, and
- r 11.5.2 the interpreter or translator must be asked to complete a certificate in the form of:
- r 11.5.2.2 Law Institute of Victoria Certificate by Translator/Interpreter (Schedule 3) [*also known as Certificate 3*].

CERTIFICATE BY TRANSLATOR / INTERPRETER


LAW INSTITUTE VICTORIA
(Schedule 3) July 2015

Australian Legal Practitioner's Certificate 3

VOID

THIS CERTIFICATE IS PROVIDED BY: _____
(name)

of _____
(address)

_____ (occupation)

(1) On the _____ day of _____
I attended a meeting at the office of _____
Present at the meeting were _____
and _____

(2) I spoke to _____
in the _____
language and I established that is their customary language.

(3) I am fluent in the English language and the _____
language and I am competent to translate between both those languages.

(4) In the presence of _____
and _____
before any documents were signed, I translated the explanations by the Australian legal practitioner and the statements made by _____
from the English language to the _____
language and from the _____
language to the English language.

(5) It was stated by _____
that they understood the matters translated and they did appear to me to so understand.

(6) I am independent of and not related to _____

SIGNED: _____ DATED: _____

ELV300-3

The required documents

- Rule 11.6, requires: The solicitor providing the advice must obtain the following documents for retention on the solicitor's file:
 - r 11.6.1 an acknowledgment in the form of:
 - r 11.6.1.2 Law Institute of Victoria Form of Acknowledgment given by a Borrower or Surety to the Certifying Australian Legal Practitioner (Schedule 4) [also known as *Certificate 4*]

and....

Australian Legal Practitioner's Certificate 4

VOID

THIS ACKNOWLEDGMENT IS PROVIDED BY ME: _____
(name)

of _____
(address)

_____ (occupation)

to (certifying Australian legal practitioner) _____
(called "the Australian legal practitioner")

of _____
(firm name and address)

I ACKNOWLEDGE THAT:

- The Australian legal practitioner has signed a certificate at my request;
- My name and address is correctly recorded above and on the certificate given by the Australian legal practitioner and I have provided proof of my identity in the manner recorded in the certificate;
- I did attend the office of the certifying Australian legal practitioner on the date recorded in the certificate for the purposes of receiving legal advice on the nature and effect of the documents referred to in the certificate;
- I have received the explanations referred to and have stated to the Australian legal practitioner that I understand those explanations;
- The matters recorded in the certificate are true and correct;
- I confirm these matters by my signature to this acknowledgement and to the certificate;
- A Translator was present and translated all written and spoken words to me and my responses; or
- A Translator was not required by me as I have an adequate command of the English language.

SIGNED: _____ DATED: _____

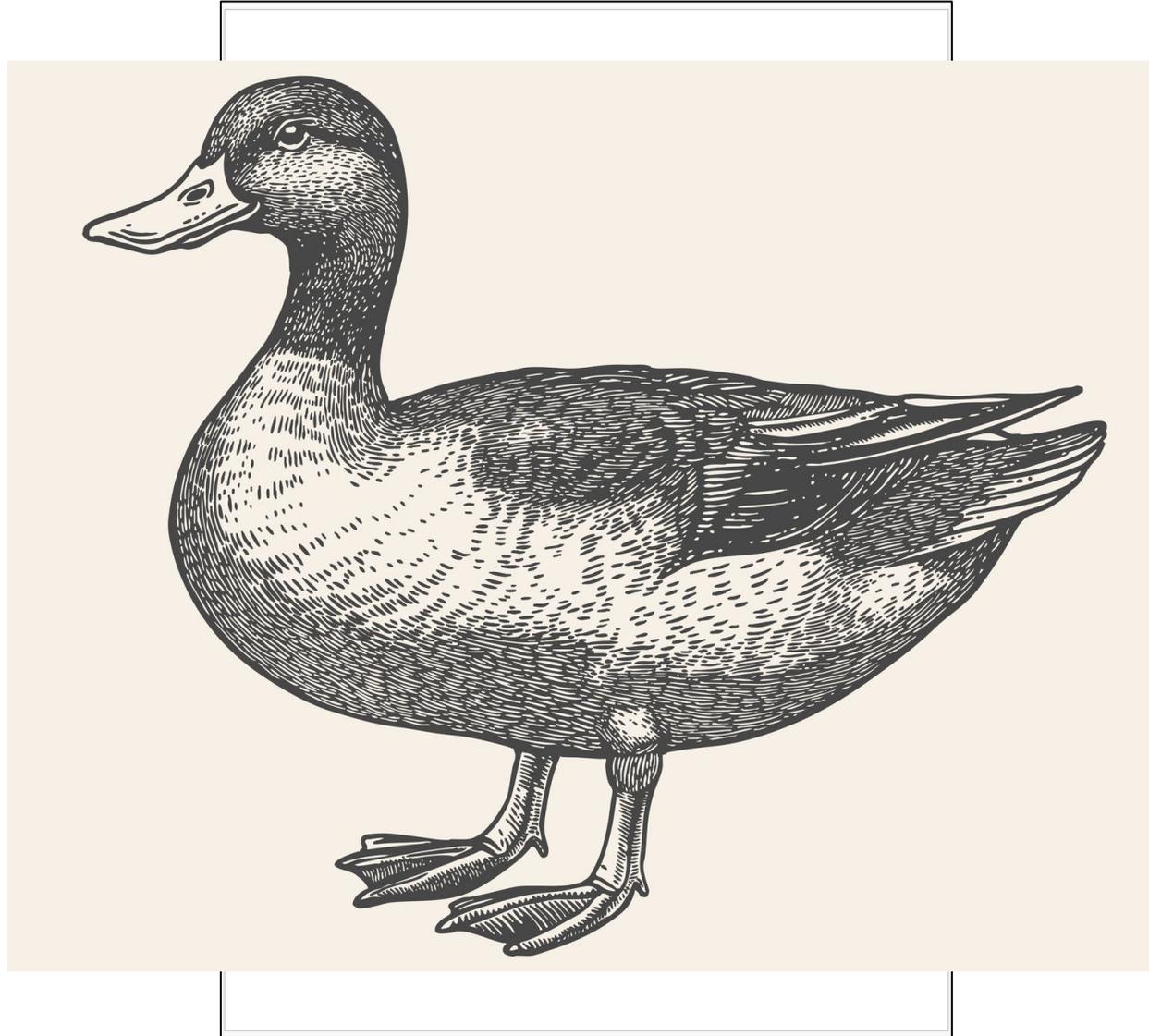
I ACKNOWLEDGE THAT:

- The Australian legal practitioner has signed a certificate at my request;
- My name and address is correctly recorded above and on the certificate given by the Australian legal practitioner and I have provided proof of my identity in the manner recorded in the certificate;
- I did attend the office of the certifying Australian legal practitioner on the date recorded in the certificate for the purposes of receiving legal advice on the nature and effect of the documents referred to in the certificate;
- I have received the explanations referred to and have stated to the Australian legal practitioner that I understand those explanations;
- The matters recorded in the certificate are true and correct;
- I confirm these matters by my signature to this acknowledgement and to the certificate;
- A Translator was present and translated all written and spoken words to me and my responses; or
- A Translator was not required by me as I have an adequate command of the English language.

Documents on the file

- Copy of the Solicitor's Certificate 2 (r 11.6.2)
- Acknowledgment given by a Borrower or Surety to the Certifying Australian Legal Practitioner (Schedule 4) (r 11.6.1.2),
- If applicable, a copy of Certificate by Translator/Interpreter (Schedule 3) (rule 11.6.3), and
- A list of the loan and security documents (r 11.6.4) (*recommend that you retain copies of the actual documents*)
- VOI documents
- [File notes](#)
- Letters of advice
- Emails, and any other relevant documents

Lender provided documents?



Lender provided documents?

- Rule 11.7 A solicitor who holds a practising certificate issued in:
 - r 11.7.2 Victoria **must** use the forms referred to in paragraphs... 11.4.2, 11.5.2.2 and 11.6.1.2, as applicable.
- 11.8 A solicitor (eg a solicitor acting for the lender) must not aid, abet, counsel or procure any other solicitor **to provide evidence otherwise than in conformity with this rule.**

Lender provided documents?

Also see section 39, Part 3.2 of Schedule 1 of *Legal Profession Uniform Law Application Act 2014 (Vic)*, which states:

39 Undue influence

‘A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations’.

Penalty: 100 penalty units.



Common issues



Conflicts and multiple parties



Guarantor not understanding the nature of the guarantee

Common issues

Who is the client? - Your firm should not:

- Act for the borrower and the guarantor
- Provide guarantee advice to multiple guarantors:
 - Guarantor solicitors' certificates for all directors of the company borrower
 - Husband and wife guarantors
- Act as the VOI identity agent for the lender



Common issues

You have a **duty** to avoid conflicts

- See [Part 2, rule 10 and 11 of the Legal Profession Uniform Australian Solicitor's Conduct Rules 2015](#)



Common issues

Why the client might not understand the nature of the advice:

- Time constraints
- Vulnerability of client
- Sophistication of the client
- Relationship between guarantor and borrower
- Financial pressures or conveyancing pressures
- Confirmation bias of the client



Key areas to cover in guarantee advice

- Default provisions under the loan agreements, mortgages, guarantees, etc (financial v non-financial defaults)
- Interest rates under the loan agreement
- Joint and several liability between guarantors
- How is the guarantee secured?
- Lender's recovery rights under the guarantee
- Scope of assets that may be recovered by the lender
- Amounts recoverable under the guarantee
- How to get out of the guarantee

Key areas to cover in guarantee advice

Explain to the client:

- The consequences of a default by the borrower
- Provide examples of those consequences, such as the client could lose their home or go bankrupt
- That you **cannot** provide financial advice
- Any red flags or serious concerns that you have about the guarantee, loan or borrower...



Key areas to cover in guarantee advice

Case law on solicitors' obligations when providing advice

- In *Provident Capital Ltd v Papa* [2013] NSWCA 36

[Provident Capital Ltd v Papa \[2013\] NSWCA 36 \(28 February 2013\)](#)

[para 80] “... a reasonable solicitor in the position of Mr Caramanlis would have formed the view that Mrs Papa's home, and the business which constituted her livelihood that she conducted from it, would be significantly endangered by her entry into the transactions with Provident”.

Key areas to cover in guarantee advice

In *Provident Capital Ltd v Papa* [2013] NSWCA 36...continued:

*“A reasonable solicitor giving her [Papa] independent legal advice in relation to the transaction would not in my view have failed to draw to Mrs Papa’s attention, in **strong terms**, that her home and livelihood was dependent upon the viability and prospects of the gymnasium... and to recommend, again in **strong terms**, that **she obtain financial advice**, independent of her son, concerning the capacity of the business to service the loan.*

*A solicitor’s obligation is not simply to explain the legal effect of documents but to advise his or her client of the **obvious practical implications of the client’s entry into a transaction the subject of advice**”.*



Tips to minimise the risk

Filtering:

- Assess if there is a conflict or multiple guarantor parties and refer clients for independent legal advice where necessary
- When should you refuse to act?
- Price appropriately for difficulty and skill involved



Tips to minimise the risk

- Written advice provided **before** the meeting
 - This advice should recommend that the client seek independent financial advice about the loan, capacity of the borrower to repay the loan, and the capacity of the client to repay any monies owing under the guarantee, before signing the documents
- **Detailed file notes** taken during the solicitor's certificate meeting
 - What was said to the client, and by the client?
 - What you observed about the client's demeanour?
- **Ask the client to explain to you what financial due diligence they have obtained**
- **Ask the client to tell you in their own words what happens if the guarantee is called in (open questions)**

Tips to minimise the risk

Systems, procedures, and risk management:

- Training of staff
- Appropriate expertise
- Precedents – advice letters and checklists
 - Consistency and quality of advice
 - Turnaround of advice
- Policies on guarantee advice?
- Top up insurance?



Tips to minimise the risk

Further suggestions?

- Post meeting written advice (in addition to pre-meeting written advice)?
- Video or audio recording of the meeting?
- Three-day process:
 - Review the documents, and draft letter of advice (*day 1*)
 - Provide written advice to the client (*day 2*)
 - Attend in person and face to face meeting with the client to confirm advice and provide solicitor's certificate (*day 3*)



Resources

Did you know?



The LPLC's website has free conveyancing resources, checklists and guides

Visit: www.lplc.com.au/risk-advice/securities/solicitors-certificates



Conveyancing, Mortgages, Solicitors Certificates, Verification of Identity
Establishing identity



Reflections

- Learn from past experiences
- Reflect on how you have previously provided guarantee advice and solicitors' certificates
- Consider what you could do to improve how you provide guarantee advice and solicitors' certificates



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