



**LAW
INSTITUTE
VICTORIA**

T 03 9607 9311

F 03 9607 5270

lawinst@liv.asn.au

4 February 2016

Mr Steven Münchenberg
Chief Executive Officer
Australian Bankers' Association
Level 3 56 Pitt Street,
Sydney NSW 2000

Dear Mr Münchenberg

Australian Legal Practitioner Certificates

The Law Institute of Victoria (LIV), the Legal Practitioners' Liability Committee (LPLC) and the Victorian Legal Services Board + Commissioner (VLSBC) are concerned that some banks are:

- using certificates other than the LIV's Australian Legal Practitioner Certificates (Certificates)
- amending the Certificates

to be signed by Victorian solicitors who have been engaged to give advice to borrowers or guarantors.

The Certificates are attached as Attachment A. Victorian solicitors are only able to sign Certificates that are published by the LIV, and may be subject to disciplinary action if they do not use the Certificates published by the LIV without amendment (except to insert relevant details).

Solicitors in New South Wales are only able to sign Law Society of NSW's Declaration.

Background

The Legal Profession Uniform Law regime commenced on 1 July 2015 and regulates the legal profession in Victoria and New South Wales. The Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 (Practice Rules) were made under the Legal Profession Uniform Law and also commenced on 1 July 2015. The Practice Rules include a rule regarding loan and security documents which require Victorian solicitors to use Certificates published by the LIV when engaged to give advice to a proposed signatory that will be either a borrower or guarantor. The rule is attached as Attachment B.

The LIV is the peak body for the legal profession in Victoria and worked with the Law Council of Australia to develop the Practice Rules and the Certificates. The LPLC is the professional indemnity insurer to Victorian legal practices, and heavily focuses on managing risk for legal practices and practitioners. The VLSBC regulates the Victorian legal profession, and has a broad range of compliance and enforcement powers under the Legal Profession Uniform Law.

Issues

Under s298(b) of the Legal Profession Uniform Law, Victorian solicitors may be subject to disciplinary action brought by the VLSBC if they do not comply with rules made under the Legal Profession Uniform Law, including the Practice Rules. This means that Victorian solicitors engaged to give advice to borrowers or guarantors must use the Certificates referred to in rule 11.7 of the

Practice Rules without amendment (except to insert relevant details) to avoid exposure to disciplinary action. It follows that all Victorian solicitors must use the Certificates and cannot agree to any amendments to the Certificates proposed by banks to uphold their obligations under the Legal Profession Uniform Law.

We also draw to your attention rule 11.8 of the Practice Rules which provides:

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.

This means that solicitors acting in-house at banks or external solicitors engaged by banks will contravene rule 11.8 if they fail to use the Certificates and/or make or authorise amendments to the Certificates. They too may be subject to disciplinary action brought by the VLSBC for this contravention.

Further, section 39 of the Legal Profession Uniform Law (Victoria) (Uniform Law) provides that a person must not cause or attempt to cause or induce a law practice or a legal practitioner within a law practice to contravene the Uniform Law, the Legal Profession Uniform Rules (which includes the Practice Rules) or other professional obligations. Section 39 would apply to persons working within banks who are not legal practitioners. There is a penalty attached to breach of section 39.

Next steps

The LIV, LPLC and VLSBC will issue reminders to Victorian solicitors about their obligations under rule 11 of the Practice Rules, and will also write to various banks to reiterate that only the Certificates can be used and must not be amended.

We also request that the Australian Bankers' Association convey this same information to its member banks.

If you would like to discuss any of the above in further detail, please contact Karen Cheng at kcheng@liv.asn.au or Rebekah Farrell at rfarrell@liv.asn.au.

Yours sincerely



Nerida Wallace
Chief Executive Officer
Law Institute of Victoria



Miranda Milne
Chief Executive Officer
Legal Practitioners'
Liability Committee



Michael McGarvie
Victorian Legal
Services Commissioner

Attachment A

Certificates

FOR USE IN CERTIFICATION WHERE THE PERSON(S)
SIGNING IS THE DIRECT BORROWER FROM THE LENDER
OR A SECURITY PROVIDER REFERRED TO IN THE
DOCUMENTS AS THE BORROWER



**LAW
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(Schedule 1) July 2015

Australian Legal Practitioner's Certificate 1

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 borrower")

I HAVE BEEN PROVIDED WITH THE FOLLOWING DOCUMENTS:

(1)

(2)

(3)

(4)

(5)

(6)

PART B EXPLANATIONS GIVEN BY THE AUSTRALIAN LEGAL PRACTITIONER

I explained to the borrower, before the borrower signed the documents, the general nature and effect of the documents required to be signed by the borrower including the risk of loss of any security property and other assets owned by the borrower.

PART C EXCLUDED EXPLANATIONS

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

- the viability of the transaction; and
- the borrower's ability to make the required payments to you.

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

PART D STATEMENTS BY THE PERSONS SIGNING DOCUMENTS

FOLLOWING THE ABOVE EXPLANATIONS, the borrower stated to me:

- that he/she/they understood the general nature and effect of the 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 any other person.

PART E IDENTIFICATION OF PERSONS SIGNING DOCUMENTS

The identity of the borrower 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 borrower 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.

SIGNED: DATED:

CLIENT'S 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:

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



**LAW
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(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:



Certificate By Translator/Interpreter

THIS CERTIFICATE IS PROVIDED BY:

(name)

of

(address)

(occupation)

(1) On the

day of

20

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

DATED:

SIGNED:

Attachment B

11 Loan and security documents

11.1 This rule applies where:

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

11.1.1.1 a borrower, a grantor of a security interest, or a security provider referred to as a borrower (**a borrower**) in loan or security documents, or

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.

11.2 The solicitor providing the advice must verify the identity of the proposed signatory using the Verification of Identity Standard contained in Schedule 8 to the *Model Participation Rules* determined by the Australian Registrars' National Electronic Conveyancing Council as adopted and made by each jurisdiction pursuant to section 23 of the Electronic Conveyancing National Law.

11.3 The evidence of advice provided by a solicitor to a borrower must be in the form of:

11.3.1 Law Society of NSW Declaration by Borrower/Grantor of a Security Interest Schedule 1, 1A or 1B, or

11.3.2 Law Institute of Victoria Australian Legal Practitioner's Certificate 1 (Schedule 1).

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

11.4.1 Law Society of NSW Declaration by Third Party Mortgagor, Guarantor, Surety Mortgagor or Indemnifier for the Borrower/Grantor of a Security Interest Schedule 2 or 2A, or

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

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

11.5.1 the name of the interpreter or translator must be included on the relevant Law Society of NSW Declaration or Law Institute of Victoria Australian Legal Practitioner's Certificate, and

11.5.2 the interpreter or translator must be asked to complete a certificate in the form of:

11.5.2.1 Law Society of NSW Interpreter's Certificate Schedule 3, or

11.5.2.2 Law Institute of Victoria Certificate by Translator/Interpreter (Schedule 3).

- 11.6 The solicitor providing the advice must obtain the following documents for retention on the solicitor's file:
- 11.6.1 an acknowledgment in the form of:
 - 11.6.1.1 Law Society of NSW Acknowledgment of Legal Advice Schedule 4, 4A, 4B or 4C [which must not be provided by the solicitor to the lender], or
 - 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), and
 - 11.6.2 a copy of the relevant Law Society of NSW Declaration or Law Institute of Victoria Australian Legal Practitioner's Certificate, and
 - 11.6.3 a copy of Law Society of NSW Interpreter's Certificate Schedule 3 or Law Institute of Victoria Certificate by Translator/Interpreter (Schedule 3) (if applicable), and
 - 11.6.4 a list of the loan and security documents.
- 11.7 A solicitor who holds a practising certificate issued in:
- 11.7.1 NSW must use the forms referred to in paragraphs 11.3.1, 11.4.1, 11.5.2.1 and 11.6.1.1, as applicable, and
 - 11.7.2 Victoria must use the forms referred to in paragraphs 11.3.2, 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.