‘Across-the-table’ Opinions

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1 What is an ‘across-the-table’ opinion?

1.1 This memorandum considers the issues and risks when a law firm acting for a borrower, guarantor or other obligor in a financing transaction is asked to issue a closing opinion in favour of the financier. It also makes certain recommendations.

1.2 Sometimes a financier will ask the borrower, guarantor or other obligor to procure that the law firm acting for them issues an opinion to the financier as a condition precedent to funding (either as well as or instead of an opinion from the financier’s own firm). These are sometimes described colloquially as ‘across-the-table’ opinions, an expression that evokes physical settlements where the obligor’s counsel would literally hand their opinion ‘across-the-table’ to the other side at settlement or financial close. They may be distinguished from ‘own client’ opinions, where the opinion is provided by counsel acting for the financier.

1.3 Across-the-table opinions are counter-intuitive, particularly in wholly domestic transactions where the financier is independently advised. The explanation for their existence is partly historical. The practice developed in the context of cross-border transactions where an offshore financier wanted comfort in relation to an Australian borrower or guarantor but did not have (and did not want to incur or pass onto the borrower the cost of briefing) its own Australian counsel; to save time and cost the Australian obligor would ask its own counsel to provide the opinion to the financier. Traditionally, the comfort related to a limited number of very specific and relatively uncontroversial matters such as corporate existence, power, authority and due execution.

1.4 From there the practice migrated over into wholly domestic transactions and, due to commercial pressures and an undisciplined approach by both financiers and law firms over time, the content expanded to include an increasing list of matters so that across-the-table opinions became almost indistinguishable from own client opinions.

1.5 Even today, the question as to which firm, as between the financier’s and the obligor’s, is to issue the closing opinion is often settled at the terms sheet stage before the lawyers become involved, or is settled between the lawyers without a full appreciation of the distinction and the attendant issues.

2 The crucial distinction between ‘opinion’ and ‘advice’

2.1 Across-the-table opinions raise a host of issues, but the most contentious is one which is not often identified or confronted, and can be missed in the heat of a transaction. It has been highlighted with the advent of the *Personal Property Securities Act 2009* (Cth) (**PPSA**) but is not limited to that context. It is the crucial distinction between ‘opinion’ and ‘advice’.

2.2 Strictly speaking, and in keeping with their origins, across-the-table opinions should be no more than status reports, certifying in short, direct form, in language that is more or less customary, that a series of legal matters to do specifically with the subject company and the transaction documents are in order. In an ideal situation, they would be limited to matters that are readily and conclusively verifiable by straightforward due diligence such as ASIC searches and, if the parties require it, a desktop review of constitutions, extracts of board minutes, powers of attorney and such, as well as a review of the transaction documents themselves.

2.3 Advice, on the other hand is a more narrative task, involving subjective and qualitative assessments of the law as applicable to the addressee and its particular circumstances, usually based on instructions and information provided by the addressee. Very often it

involves advising the addressee of risks and how they can or should be mitigated, and actions that may be taken in enforcement. Usually, it involves a mindset that is focused on the best interests of the addressee.

2.4 To test this opinion v advice distinction in relation to any given legal matter, visualise the following scenario: in the course of face-to-face negotiations where both borrower and financier are present and separately represented, the financier turns away from their own lawyer and asks the borrower's lawyer, on the other side of the table, to advise them in relation to a matter of law that cannot be independently verified by, say, a search of public records (see the examples in paragraph 6 below). Clearly that would be inappropriate and the lawyer would be within his or her rights to reply 'You are independently represented and you should seek and rely on the advice of your own counsel'. But it is not the presence or otherwise of separate counsel that is determinative in this situation; the real issue has to do with a potentially perilous mix of duties, conflicts and liabilities, and these are discussed below.

2.5 Difficulties can arise if lawyers are not alert to this dichotomy, particularly where 'scope creep' happens. Sometimes, a financier presented with a draft across-the-table opinion will ask the issuing firm some general questions on the reasons behind a particular statement of opinion or a qualification (eg a particular provision of the Corporations Act, or something to do with PPSA or, quite commonly, regulatory matters such as whether they will need to be registered or licensed in Australia under any particular legislation). This can happen quite often if the financier is foreign and not familiar with the Australian landscape. Courtesy dictates that a brief response might be appropriate in most cases but sometimes this can lead to further questions and clarifications and can quickly escalate into a request for advice (even if not expressly framed as such), either in correspondence or to be included in the across-the-table opinion.*

3 Risks for both the issuing firm and its client

3.1 Issues arise in relation to across-the-table opinions whether they contain advice or not; the issues are exacerbated where advice is involved.

Conflicts

3.2 First and perhaps most importantly, an across-the-table opinion can put the issuing firm in a position of actual or potential conflict with respect to its own client, particularly (although not only) where advice is involved. At the most obvious level, since the parties are on opposing sides the firm may find itself in a difficult situation where it is asked to advise (under the guise of a request for something to be included in the opinion) the other side of a matter that is not necessarily in the client's best interests or, worse, is directly contrary to the client's interests, eg enforcement options.

3.3 Secondly, the opinion may compromise the firm's ability to take a particular point in later negotiations or litigation with the financier that is inconsistent with the contents of the opinion.

3.4 Thirdly, it may compromise the firm's ability to advise its client or to act in its defence in that litigation if any of the defences might involve an argument that is inconsistent with or contradicts something stated in the opinion, eg whether a crucial document was duly authorised or executed, or is enforceable.

3.5 Fourthly, the firm may become a defendant in that litigation if it is sued on the opinion and so may be precluded from acting for the client in it.

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* A common example arises where the draft opinion mentions a statutory provision that the foreign addressee is not familiar with, eg a reference to the statutory assumptions in section 129 of the *Corporations Act 2001*. This often gives rise to a request for explanation which can constitute advice.

3.6 While many conflicts can be resolved by consent, that consent needs, of course, to be fully informed. This requires the firm to explain to the client these potential consequences and how the client may be disadvantaged by them.

Duties to addressee

3.7 As a related matter, an across-the-table opinion may also create risks for the issuing firm around the nature and scope of the duties it may have towards the addressee. A range of duties (including tortious and statutory, eg not to mislead or deceive) arises in any case by the mere fact that the firm is issuing an opinion knowing that it is going to be relied upon, but the risk is exacerbated if the opinion contains advice. Questions include:

(1) precisely what is the scope of the firm's duties, and liability, to an addressee who is not a client and with whom the firm will not have exchanged a contractual retainer?

(2) what is the firm's duty of disclosure, if any, as to matters relevant to the opinion and how can that duty, if it exists, be reconciled with duties of confidentiality to the client?

(3) what is the standard of care, skill and diligence that should apply?

(4) is the firm in any kind of fiduciary relationship with the addressee, given that they may find themselves in an adviser/advisee relationship?

(5) what if the addressee is otherwise a client of the firm (most banks and financers have large panels)?

(6) what if the addressee, while not the client in the transaction at hand, is otherwise a significant client of the firm under a detailed global retainer agreement – do the terms of that retainer apply?

3.8 Market practice has raced ahead of our understanding of where the answers to these difficult questions lie. While some of these issues can be managed by including express provisions in the body of the across-the-table opinion, that does not appear at present to be universal practice (and in any case might not be a complete solution). A suggested form of words to include in the introductory part of the opinion is as follows:

> We are legal advisers to [name of Borrower/Guarantor] and provide this opinion to you on their instructions. Our responsibility to you in connection with this opinion and the transactions it contemplates is strictly limited to the express terms of this opinion. We owe you no fiduciary duty, nor are we in a solicitor/client relationship with you, in connection with this opinion and those transactions, even if you are a past or present client of this firm. Any retainer between us does not apply in connection with this opinion and those transactions.

Limited value to addressee

3.9 In any case, it is fair to query the value of an across-the-table opinion to the addressee. Given the limitations and uncertainty around the duties that may be owed by the issuing firm to it, it would be unwise for the addressee to regard such an opinion as a substitute for conducting its own due diligence investigations and seeking advice on matters of importance from its own counsel.

4 The special case of the PPSA

4.1 The opinion v advice distinction became apparent as firms readied themselves and their forms of opinion for the advent of the PPSA.

4.2 Most things to do with the PPSA, except perhaps objectively verifiable information that appears on the PPS Register, are matters for advice and may not be appropriate for across-the-table opinions. The PPSA radically changed the law and introduced a range of new and quite fundamental concepts that make it a much more complex regime than those which it replaced. Much of the legislation remains untested and different firms have different views on a range of matters and are advising their clients accordingly. It would be

unwise for a firm, when acting for the grantor, to allow itself to become involved in a debate over what is the correct advice to give to a financier to protect their interests under the PPSA; correspondingly, it would be inappropriate for the firm acting for the financiers to insist that they do.

4.3 The PPSA raises many questions for a secured party, such as:

(1) whether a document contains a security interest and if so, of what kind (eg PMSI, turnover trust, PPS lease);

(2) what should a secured party do in relation to perfection, control and other matters to give themselves the best possible security and priority position; and

(3) enforcement options.

4.4 Further, the registration process is more complex than under pre-PPSA regimes. A series of decisions needs to be made and instructions given for selecting options when completing a financing statement. As a matter of practice, grantor's counsel will not be (and indeed should not be) responsible for effecting registrations against its own client. The decision whether to register and how to do so will be matters of risk management for the secured party, based on detailed advice from their own lawyers. It follows that grantor's counsel should not opine on registrations effected by the financier's counsel.

4.5 Finally, the material yielded by a search of the PPS Register will often require explanation and advice to the persons seeking to rely on it.

4.6 However, as a matter of market practice exceptions have evolved and these are dealt with in the next paragraph.

5 Challenging situations

5.1 It is acknowledged that it is not always easy to distinguish between opinion and advice or to avoid giving advice in an across-the-table opinion. Not all lawyers, and even fewer financiers, are alert to these issues and undisciplined but established market practices can make resolution difficult. There are certain challenges which interfere with the purity of the opinion v advice distinction in an across-the-table context:

(1) some matters in the past became conventional in across-the-table opinions even though they perhaps ought not be;

(2) in some markets (eg debt capital markets, securitisation and some project financing) it is established practice for a single firm to issue a 'deal opinion' to all parties, including both clients and others. In secured transactions in these markets the parties will naturally expect the opinion to deal with some PPSA issues. It may not be an appropriate response for the issuing firm to say to non-client addressees "go seek your own advice". It may be too late or too hard to change that practice in those markets;

(3) in an amendment or refinancing transaction where the original opinion was given by the obligor's counsel, they will usually be expected to give the opinion and it would be difficult for them to omit matters that were included in the original opinion;

(4) if an obligor's firm refuses to include a requested 'opinion' which is in the nature of advice commercial pressure can be applied by the financier on the obligor who, in turn may apply that pressure to the firm so as to get the deal done; refusal can make the firm seem obstructive and unhelpful. This commonly happens where the financier does not have separate Australian counsel (eg is foreign, or is domestic but is not using external lawyers) and it would be impractical or expensive to brief one. In this situation the firm may need to explain the issues to the client, particularly the conflict issues highlighted above, and seek appropriate waiver or consent in relation to conflicts before providing the advice.

6 Examples of opinions that may engage the opinion v advice debate

6.1 The following opinions (not all of which appear in the BFSLA model opinions) engage the opinion v advice debate:

(1) opinions going to whether and when the security documents create security interests in respect of the particular property described in them (eg attachment);

(2) opinions going to registration or any other mode of perfection of security;

(3) opinions going to priority of security;

(4) opinions going to enforcement options;

(5) opinions going to whether the financier needs to be licensed, registered or otherwise authorised in Australia to enter into the documents, to perform their obligations or to exercise or enforce their rights under them; and

(6) opinions going to whether the financier is carrying on business, or a financial services business, in Australia.

6.2 Nevertheless, it is acknowledged that some firms are comfortable giving across-the-table opinions on some of these matters principally because they will include assumptions and qualifications that reduce the effective content of the opinions down to the point where they represent mere statements of the law, without the subjective and applied content that is implicit in advice.