Banking and Financial Services Law Association

Australian Banking & Finance "Closing" Legal Opinions
Principles of Etiquette
(December 2015)

In the interests of promoting good practice among Australian banking and finance lawyers when preparing or negotiating legal opinions, the association has developed model principles of etiquette for lawyers. The opinions under consideration are "closing" opinions in financing transactions that are addressed to financiers, whether on a first party basis or on a third party basis (**Opinions**).

It is expected the principles will generally apply, except in transactions where the client expressly instructs otherwise.

The association's suggested principles of etiquette for Opinions are as follows:

1. The relevant nexus for a lawyer to issue an Opinion is that, for the jurisdiction(s) in which the lawyer is qualified to practise:

   (a) the entity is incorporated, registered or resident in the relevant jurisdiction;

   (b) the contract is governed by the laws of the relevant jurisdiction; or

   (c) the contract pertains to, or affects, property in the relevant jurisdiction.

   If a nexus is not established, then there is unlikely to be any basis for requesting an Opinion from a lawyer in that jurisdiction.

2. A lawyer should not request an Opinion from another lawyer if the requesting lawyer would, in the same position as the opinion provider, be unable or unwilling to give the Opinion. In other words, if a lawyer would not be prepared to give an Opinion on a particular matter in the provider's shoes, the lawyer should not be requesting that Opinion from another lawyer.

3. A lawyer should not request an Opinion merely on the basis that the Opinion was given in a previous transaction (even if the previous transaction is similar or involved the same parties). In other words, the mere fact that an Opinion was given in a previous transaction is not, of itself, sufficient to create a precedent for the giving of that Opinion on a new transaction. This principle is intended to recognise the unique legal and commercial circumstances of each Opinion. This principle is not relevant to Opinions that are the subject of refresh or "bring down" requirements.

4. An opinion on enforceability should be regarded as an expression of professional judgment rather than as a guarantee that a court will reach any particular result.

5. It is acceptable, in relevant circumstances, for an Opinion to be expressed in terms such as "should", "is likely" or "on balance" where a more definitive view is not possible. These expressions could be relevant where the area of law is uncertain or in relation to revenue law. They are not appropriate for Opinions on enforceability where extensive qualifications are included as to the meaning of enforceable.

6. A lawyer should not request an Opinion from another lawyer on factual matters, including as to corporate benefit.

7. A lawyer should not request an Opinion from another lawyer on technical, non-legal matters, formulae, or financial matters including financial assumptions and financial models. Similarly, it is acceptable for a lawyer to decline to opine on matters not within his

or her competency or on which the lawyer has been instructed not to advise. A common example of this is matters relating to tax law.

8. If a customary statement is included in an Opinion to the effect that the lawyer is not aware of any assumption being incorrect, then it is acceptable for the statement to be limited to the partners and other senior lawyers with prime carriage of, or having a material involvement in, the matter or the relevant component of the matter.

9. A lawyer should not include an assumption in an Opinion that he or she knows to be incorrect or misleading.

10. It is acceptable, in relevant circumstances, for an Opinion as to enforceability to make the assumptions in s129 of the Corporations Act, as though the lawyer was having relevant dealings with the company. An Opinion should not make such an assumption if the lawyer knows a disqualifying circumstance in s128(4) of the Corporations Act applies or would apply to those notional relevant dealings.

11. Notwithstanding 10 above, it is a financier's decision whether it requires constitutions, minutes or extracts of minutes to be furnished and its lawyer to review them.

12. If a financier is separately represented by Australian lawyers, then the financier and its lawyer should generally not ask for an Opinion from the borrower's lawyer on the financing documents. This principle is not intended to apply to "project documents" and due diligence reports in a project financing or similar transaction. For a discussion of some of the issues that arise when a firm gives an Opinion to persons other than its own client, see the publication **Note on 'Across-the-table' Opinions** on the BFSLA website.

13. A lawyer should not decline to opine merely because the relevant document has been drafted by another party's lawyer.

14. It is acceptable for a lawyer to limit the persons or class of persons who may rely on an Opinion at a future point in time. A separate statement of market practice on "Reliance" will identify the applicable issues and principles in due course.

15. In an Opinion, it is acceptable for a lawyer to decline to opine on matters of current or future public policy. Possible exceptions to this are an Opinion in relation to the choice of governing law and a statement by a lawyer that he or she is not aware of any relevant principle of public policy that would be applicable at the date of the Opinion.

16. In issuing an Opinion, a lawyer is not expected to make any enquiries or do any due diligence within his or her own firm, beyond those partners and other senior lawyers with prime carriage of, or having a material involvement in, the matter or the relevant component of the matter. There may be exceptions to this principle under applicable securities laws.

17. Lawyers have a responsibility to request, draft and circulate draft Opinions in sufficient time and in a sufficiently complete state to allow them to be considered, responded to and finalised in a time frame that is reasonable and that does not cause delay to the financing.

18. If a lawyer must satisfy internal procedures before he or she can issue an Opinion or a draft Opinion (including a requirement that an Opinion or draft Opinion be vetted and approved by an "opinions committee"), it is the responsibility of the lawyer to manage those internal procedures to ensure that they do not cause delay to the financing.

19. A firm's decision to place a cap on its liability in an opinion is a matter for the individual firm.