**Secured Opinion (December 2015)**

**1*. The objective of the BFSLA Opinions Project is to agree on standard forms of closing opinions for typical banking transactions that are acceptable to both the law firms involved in the project and the banks that are regular addressees of closing opinions. The BFSLA has also published "Principles of Etiquette" in relation to requests between lawyers for closing opinions.***

**2*. The closing opinion for each type of banking transaction should cover the issues that are relevant to that type of transaction in a way that is consistent with market expectations. The language used should be concise and clear.***

**3*. This is a closing opinion in relation to a single corporate obligor (except one whose insolvency or capacity is regulated by particular legislation, eg a bank or insurance company) that is incorporated under the Corporations Act, for a domestic secured loan facility governed by Australian law where the lender is acting through an office or branch in Australia. For issues to be considered when a firm is giving an opinion in relation to an individual obligor, see the publication “Issues for the opining firm to consider where an obligor is an individual."***

**4*. This closing opinion is prepared on the basis that it is addressed to the opining firm’s client. For issues to be considered when a firm is giving an “across-the-table” closing opinion where the opining firm has been instructed by their client to address an opinion to their counterparty or other third party, see the publication “Note on ‘Across-the-table’ Opinions."***

[***Law firm letterhead***]

[***Addressee***][[1]](#endnote-1) [***Date***]

[***name of Company***] [(ABN [●]) (**Company**)

[***Description of facility / transaction***]

Dear Sirs,

We have acted as your legal advisers in relation to the [***insert name of Agreement***] (**Agreement**) dated [●] between the Company and [***insert details of other parties***].

1. **DEFINITIONS**

In this opinion:

* + 1. **ASIC** means the Australian Securities and Investments Commission;
    2. **Corporations Act** means the *Corporations Act 2001* (Cth);
    3. **Document** means:
       1. the Agreement;
       2. [***list any general security deed and other document which by its terms expressly contemplates that it creates a PPSA Security Interest which is to be the subject of this opinion, other than the Agreement and any Mortgage;***][[2]](#endnote-2)
       3. [[a/the] Mortgage;]
       4. [***list any other document creating a non-PPSA Security Interest intended to be the subject of the opinion;***][[3]](#endnote-3) or
       5. [●];[[4]](#endnote-4)
    4. **law of a** **Relevant Jurisdiction** means the common law, principles of equity and laws constituted by legislation that is available to the public generally, in force in the Relevant Jurisdiction;
    5. [**Mortgage** means [***list each document creating a registrable Security Interest over real property***]];
    6. [**Power of Attorney** means the power of attorney of the Company dated [●]];
    7. **PPSA** means the *Personal Property Securities Act 2009* (Cth);
    8. **PPSA Security Interest** means a "security interest" as defined in the PPSA to the extent the PPSA applies to it;
    9. **Relevant Jurisdictions** means [***list states/territories***] and the federal jurisdiction of the Commonwealth of Australia;
    10. **Security Interest** means a PPSA Security Interest or any other mortgage, charge, pledge, lien or security interest; and[[5]](#endnote-5)
    11. [***insert other definitions if required***].

1. **DOCUMENTS**

We have examined and rely on:

* + 1. [an original / a pdf] copy of each Document;
    2. [an original / a pdf] copy of the Power of Attorney;]
    3. [[an original / a pdf] [certified] copy of the Company's constitution;][[6]](#endnote-6)
    4. [[an original / a pdf] [certified] copy of a verification statement under section 156 of the PPSA for each of the registrations set out in Schedule 3;][optional – see endnote [[7]](#endnote-7)] and
    5. [***others if required, eg authorisations***].[[8]](#endnote-8)

1. **SCOPE**

This opinion relates only to the laws of the Relevant Jurisdictions, as interpreted by courts of the Relevant Jurisdictions, at 9.00am ([***place***] time) on the date of this opinion.[[9]](#endnote-9)

Other than the opinion in paragraph 5(h), we express no opinion on the impact of any revenue laws.

[This opinion is given on the basis that it will be construed in accordance with the laws of [***state/territory***]. Anyone relying on this opinion agrees that this opinion and all matters (including, without limitation, any liability) arising in any way from it are to be governed by the laws of [***state/territory***] [and will be subject to the non-exclusive jurisdiction of the courts of [***state/territory***]].][[10]](#endnote-10)

1. **SEARCHES**

We have relied on:

* + 1. an extract of the public records of the Company produced by ASIC on [***date***][[11]](#endnote-11);
    2. [a search of the register kept under the PPSA on [***date***][[12]](#endnote-12) to confirm that the registrations set out in Schedule 3 have been made;][optional – see endnote [[13]](#endnote-13)]
    3. [a search at the [Land Titles Office] of [●] on [***date***];][[14]](#endnote-14) and
    4. [a search of the insolvency notices website maintained by ASIC in respect of the Company on [***date***]][[15]](#endnote-15).

We have assumed that the extract produced by ASIC is the same as information provided by the Company to ASIC. We have not examined any documents that the Company may have filed with ASIC[,other than where we have expressly stated otherwise in this opinion]. The information in the extract, or produced by the search[es], may not be correct, complete or up to date.

We have not conducted any other searches or investigations for the purposes of this opinion.

1. **OPINION****[[16]](#endnote-16)**

Our opinion is as follows, subject to the assumptions in Schedule 1 and the qualifications in Schedule 2.

* + 1. The Company is incorporated and exists under the laws in force in Australia.[[17]](#endnote-17)
    2. The Company has the corporate power to enter into and to perform its obligations under each Document.[[18]](#endnote-18)
    3. The entry by the Company into and the performance by the Company of its obligations under each Document, does not and will not breach any law of the Relevant Jurisdictions.[[19]](#endnote-19)
    4. Each Document [has been executed by the Company and] [[20]](#endnote-20) constitutes binding obligations of the Company, enforceable against it in competent courts of the Relevant Jurisdictions.[[21]](#endnote-21)
    5. The Company does not require any authorisation from any government agency of the Relevant Jurisdictions to enable it to enter into or to perform its obligations under a Document or to make its obligations under any Document binding, enforceable and admissible in evidence against it in competent courts of the Relevant Jurisdictions[, other than:
       1. the authorisations listed in paragraph 2[(e)]; and
       2. [●]].[[22]](#endnote-22)
    6. It is not necessary to file, register or record any Document [or Power of Attorney] with any government agency of a Relevant Jurisdiction to ensure a Document is binding, enforceable and admissible in evidence against the Company in competent courts of the Relevant Jurisdictions[, other than:
       1. registration of a financing statement under the PPSA to perfect each PPSA Security Interest created by a Document, unless that PPSA Security Interest is otherwise perfected by possession or control;
       2. [registration of [***describe any prior dealings required to be registered to enable the Company to become the registered proprietor/lessee before a Mortgage can be registered***] [and] [the/each] Mortgage with the [Land Titles Office] of [●];] and[[23]](#endnote-23)
       3. [●].][[24]](#endnote-24)
    7. The Company's payment obligations under the Documents rank at least equally with its unsecured and unsubordinated payment obligations, other than payment obligations that are mandatorily preferred by law.
    8. No stamp duty or other documentary tax is payable on any Document or in respect of any transaction effected by any Document[, other than any nominal duty] [and ad valorem mortgage duty in New South Wales on the [***list relevant Documents***]].
    9. Each Document creates the Security Interests that are expressed in it to be granted by the Company.[[25]](#endnote-25)
    10. [[Each financing statement referred to in Schedule 3 has been registered under the PPSA.] **OR** [You have instructed us to register each financing statement referred to in Schedule 3.]

Those registrations [perfect/ will perfect] the PPSA Security Interests granted by the Company under the Documents over the personal property described in the financing statements, to the extent the personal property subject to the PPSA Security Interests is within the collateral classes the subject of those registrations, except as noted in Schedule 3.] [optional – see endnote [[26]](#endnote-26)]

1. **BENEFIT**

We are providing this opinion for your sole benefit in connection with the Documents. It is not to be used or relied on by any other person or for any other purpose without our written consent.

This opinion is confidential. It may not be disclosed to any government agency or other person, quoted in any public document or otherwise referred to without our written consent, except that it may be disclosed (on a no-reliance basis):

* + 1. to any person who proposes to become a [Finance Party] under the Agreement;
    2. as required by law (including, without limitation, the rules of a recognised stock exchange) or to any regulator having jurisdiction over your affairs;
    3. to any person who in the ordinary course has access to your papers and records on the basis that the person makes no further disclosure; or
    4. as required in connection with any actual or contemplated legal proceedings relating to a Document or this opinion.

Yours faithfully

Schedule 1

Assumptions

1. All dates, signatures, seals and duty markings are authentic.
2. If we have reviewed a copy of a document, it is a correct and complete copy of the original.
3. If we have reviewed only a draft of a document, it has been or will be executed in the form of that draft.
4. No Document has been amended, released or terminated.
5. No person has engaged or will engage in unconscionable, misleading or deceptive conduct (by act or omission) that might make any part of this opinion incorrect. No person has engaged or will engage in any other conduct, and there are no facts or circumstances not evident from the face of the documents listed in paragraph 2 of this opinion, that might make any part of this opinion incorrect [including, without limitation, whether a Document or a transaction in connection with it will:
   * 1. financially assist a person to acquire shares in the Company (or a holding company of the Company) in contravention of section 260A (*Financial assistance for acquiring shares*)of the Corporations Act; or
     2. constitute a financial benefit to a related party of the Company in contravention of Chapter 2E (*related party transactions*) of the Corporations Act.[[27]](#endnote-27)][[28]](#endnote-28)
6. The Company enters into each Document in its personal capacity, and not as trustee or agent or in any other capacity.
7. Each of the assumptions set out in section 129 of the Corporations Act is correct in relation to each Document[, the Power of Attorney] and the Company.[[29]](#endnote-29)
8. [[The/Each] person who executed a Document on behalf of the Company held the position they purported to hold. The Power of Attorney has not been amended or revoked.[[30]](#endnote-30)
9. [The authorisations listed in paragraph 2[(e)] remain in effect.][[31]](#endnote-31)
10. Each Document:
    * 1. has been or will be validly authorised and entered into by each party to it other than the Company, and is binding on each such party under all applicable laws; and
      2. is binding on the Company under all applicable laws other than the laws of the Relevant Jurisdictions.
11. If a Document is to be performed in a jurisdiction other than [***list states/territories***], its performance will not be illegal under the laws of that jurisdiction.
12. The Company was solvent when and immediately after it entered into the Documents.[[32]](#endnote-32)
13. The Code of Banking Practice of the Australian Bankers' Association does not apply to a Document.
14. The Company has, or at the relevant time will have, sufficient rights in the property expressed to be subject to a Security Interest granted by it for the Security Interest to attach to the property. [In relation to the real property subject to the Mortgage, the title search referred to in paragraph [4(a)(iii)] discloses that the Company is the registered [proprietor/owner/lessee].] [[33]](#endnote-33),
15. [You have complied with your verification obligations under law or administrative practice in relation to the execution by the Company of each Mortgage].[[34]](#endnote-34) [***delete if no Mortgage***]
16. Any stamp duty or other documentary tax in connection with the Documents has been or will be paid.[[35]](#endnote-35)

We have not taken any step to investigate whether the assumptions in this opinion are correct, except as expressly stated in this opinion. However, without making any enquiries beyond the steps stated in this opinion, the people primarily responsible for the preparation of this opinion (being [***insert names of relevant individuals***]) are not actually aware that any of the assumptions are incorrect.[[36]](#endnote-36)

Schedule 2

Qualifications[[37]](#endnote-37)

1. A statement that an obligation is "binding" or "enforceable" means that the obligation is of a type and form that courts of the Relevant Jurisdictions will generally enforce. It does not mean that the obligation and the rights of a creditor with respect to it can be enforced, or that the obligation is binding, in all circumstances. For example:
   * 1. equitable remedies, such as injunction and specific performance, are discretionary;
     2. an obligation and the rights of a creditor with respect to it may be affected by laws relating to insolvency (including, without limitation, administration) or other laws that affect creditors' rights generally;
     3. an obligation and the rights of a creditor with respect to it may be affected by general law doctrines or statutory relief particularly in relation to matters such as fraud, misrepresentation, mistake, duress, unconscionable conduct, unfair contracts legislation, frustration, estoppel, waiver, lapse of time, penalties, courts retaining their ability to adjudicate, public policy or illegality;[[38]](#endnote-38)
     4. the exercise of rights, powers or remedies under, or in relation to, any Security Interests or the Documents (including, without limitation, the application of the proceeds of insurance, property, sale or enforcement) is subject to a number of general law or statutory restrictions, requirements and duties; and
     5. the laws of some jurisdictions limit a person's obligation to insure property, or may provide that the grant of a subsequent Security Interest cannot constitute a breach of an obligation or allow acceleration.[[39]](#endnote-39)
2. A court might decline to exercise jurisdiction (for example, if it considers that it is not the most appropriate forum, or if the subject matter is concurrently before another court).
3. The laws of the Relevant Jurisdictions may require that parties act reasonably or in good faith in their dealings with each other, including, without limitation, in exercising rights, powers or discretions or forming opinions.
4. We express no opinion on any provision of a Document that requires a person to do or not do something that is not clearly identified in the provision, or to comply with another document.[[40]](#endnote-40)
5. Laws in connection with sanctions, terrorism or money laundering may restrict or prohibit payments, transactions and dealings in certain cases.
6. We express no opinion on:
   * 1. the priority of any Security Interest or the extent to which a Security Interest may be defeated by, or postponed to, the claims of third parties if it is not perfected (by registration or otherwise);[[41]](#endnote-41)
     2. Security Interests to the extent they are affected by the laws of any jurisdiction other than a Relevant Jurisdiction (for example, this may occur if the property subject to a Security Interest is not in a Relevant Jurisdiction or is governed by a foreign law);[[42]](#endnote-42)
     3. the extent to which a grantor of a Security Interest may be able to dispose of, or otherwise deal in, the property subject to it despite a provision to the contrary in a Document, or the extent to which a third party is able to take the property, or an interest in it, free of a Security Interest;
     4. perfection of a Security Interest other than by registration; or
     5. any Security Interest over any property (such as crown lands, water rights, mining or petroleum titles or other statutory rights, or certain contractual rights) where:
        1. the property cannot be subject to a Security Interest; or
        2. the Security Interest needs to be in a special form or have a particular authorisation, consent or registration not referred to in this opinion or satisfy other particular requirements.

No property of that kind has been drawn to our attention [other than the following:[[43]](#endnote-43)

* + - 1. [●]; and
      2. [●]].

1. A PPSA Security Interest may vest in the grantor on insolvency if it is not perfected, or if it is perfected by registration but the registration is not completed within the time required by s588FL of the Corporations Act.
2. [The PPSA has radically altered the law in Australia relating to security over personal property and many of its provisions have not yet been authoritatively considered by courts in the Relevant Jurisdictions.]

**Schedule 3**[optional – see endnote [[44]](#endnote-44)]

**PPSA Registrations**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Grantor** | **Secured Party/Parties** | **Collateral class**  [ | **Registration Number** | **End time** |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |

1. A registration described above may be or become ineffective (and any affected PPSA Security Interest may not be perfected):

(a) if any information supplied or confirmed to us for the purpose of making the registration was incorrect or incomplete as at the date of registration, or if any information in the registration subsequently becomes incorrect;

(b) if it indicates that a PPSA Security Interest is, or is to be, a purchase money security interest (within the meaning of the PPSA) and the PPSA Security Interest is not a purchase money security interest (to any extent) at any time;

(c) in relation to aircraft (as defined in the Personal Property Securities Regulations 2010), if the registration is not made against its serial number; and

(d) after any end time stated in the relevant financing statement.[[45]](#endnote-45)

We are not responsible for updating or renewing a registration or advising of its imminent expiry.

2. We have not made any other registrations under the PPSA. There may be other PPSA Security Interests in the Documents in respect of which no financing statement has been registered. [In particular, on your instructions, we have not registered financing statements in relation to [***describe possible unregistered PPSA Security Interests***]].

3. [On your instructions we have not, in relation to the registrations described above, done any of the following in a registered financing statement:

(a) [indicated whether the security interest can be a purchase money security interest (within the meaning of the PPSA);]

(b) [included a serial number;] or

(c) [noted that the secured party has control of particular collateral for the purposes of Part 9.5 of the PPSA],

except to the extent (if any) disclosed above.[[46]](#endnote-46)]

1. This opinion is intended for a bilateral, secured, domestic transaction. It will need to be tailored to any specific circumstances relevant to the transaction, including, without limitation, addressees. [↑](#endnote-ref-1)
2. Only PPSA Security Interests should be listed in paragraph 1(c)(ii). Non-PPSA Security Interests should be listed in paragraphs 1(c)(iii) (ie any Mortgage as defined) and 1(c)(iv). [↑](#endnote-ref-2)
3. If any other document creating a non-PPSA Security Interest (such as security over water rights or mining tenements), is listed in paragraph 1(c)(iv), then the definitions and paragraphs, assumptions and qualifications relating to Security Interests should be carefully reviewed. [↑](#endnote-ref-3)
4. If a document is listed in paragraph 1(c)(v), the opining firm should carefully consider whether there are any embedded or other Security Interests in that document and, if so, the extent to which the opinion is to cover those Security Interests. The definitions and paragraphs, assumptions and qualifications relating to Security Interests should be carefully reviewed if a document is listed in paragraph 1(c)(v) and changes may be required depending on whether or not the opinion is to cover those Security Interests. [↑](#endnote-ref-4)
5. The drafting of the opinion assumes that this definition of "Security Interest" is used.

   Care should be taken if it is suggested that a different definition, such as the definition of "Security Interest" (or similar) in the underlying documents, be used instead, as that different definition may have a broader reach. In such circumstances the paragraphs, assumptions and qualifications relating to Security Interests should be carefully reviewed to ensure that they operate consistently with the definition, and that it is appropriate to give the opinion in relation to that broader term.

   This definition includes "deemed" security interests under section 12(3) of the PPSA. See also paragraph 2 of Schedule 3. [↑](#endnote-ref-5)
6. If the opining firm has reviewed board resolutions or constitutions, they should be listed here. [↑](#endnote-ref-6)
7. Include this paragraph if the opinion will identify PPSA Security Interests which have been perfected by registration (see paragraph 5(j)) and you want to rely on verification statements rather than search results to confirm the registrations which have been made in relation to those PPSA Security Interests. This language is optional as an alternative to specifying that the opining firm has relied upon searches as described in paragraph 4(b).

   Some firms prefer to advise on registration matters in a separate document. For that reason, this text (and the other text that relates to it) is optional. [↑](#endnote-ref-7)
8. While it is customary in banking opinions to identify whether additional authorisations (such as FIRB or ACCC) are required, it is not market practice to opine on whether any particular such authorisation is effective and sufficient. If the opinion is to follow the customary approach, refer to those authorisations in paragraph 5(e), not here. If you do need to opine on the effectiveness of additional authorisations, however, list them here. You may then need to include additional assumptions or qualifications. [↑](#endnote-ref-8)
9. Consideration should be given to whether there are any laws in force that may not have commenced full operation yet, and whether those laws should be excluded from the scope of the opinion. In some circumstances, it may be appropriate to include a qualification specifically addressing laws that are not in full operation or effect. [↑](#endnote-ref-9)
10. The law firm may choose its preferred alternative for the transaction. [↑](#endnote-ref-10)
11. A firm may wish to insert the time of the relevant search (for example, if it has conducted multiple searches on the same day, or if the opinion is addressed to parties in different time zones). [↑](#endnote-ref-11)
12. A firm may wish to insert the time of the relevant search, (for example, if it has conducted multiple searches on the same day, or if the opinion is addressed to parties in different time zones). [↑](#endnote-ref-12)
13. Include this paragraph if the opinion will identify PPSA Security Interests which have been perfected by registration (see paragraph 5(j)) and you want to rely on search results rather than copies of the verification statements to confirm the registrations which have been made in relation to those PPSA Security Interests. This language is optional as an alternative to specifying that the opining firm has relied upon verification statements as described in paragraph 2(d).

    Some firms prefer to advise on registration matters in a separate document. For that reason, this text (and the other text that relates to it) is optional. [↑](#endnote-ref-13)
14. A firm may wish to insert the time of the relevant search, (for example, if it has conducted multiple searches on the same day, or if the opinion is addressed to parties in different time zones). [↑](#endnote-ref-14)
15. This register was established under the *Corporations Regulations 2001* (Cth) – see regulation 5.6.75. It can be accessed at <https://insolvencynotices.asic.gov.au/> and can be searched by company name or ACN. Notices lodged on this register will make their way to the ASIC records which would appear on your ASIC search.  However, it is not clear whether notices may appear on the insolvency register earlier than the ASIC register. However, given the availability of this register and the ease of searching, it may be prudent to do so.

    A firm may wish to insert the time of the relevant search (for example, if it has conducted multiple searches on the same day, or if the opinion is addressed to parties in different time zones). [↑](#endnote-ref-15)
16. The opinion does not expressly comment on a number of matters that opinions have commonly addressed in the past:

    **Corporate action**

    In the past, it has not been uncommon for an opinion to include a paragraph along the following lines:

    "The Company has taken all corporate action for it to enter into each Document and to perform its obligations under it."

    That paragraph is unnecessary, as it is covered by the opinion that the Document is binding on the Company and enforceable against it. The party relying on the opinion is concerned whether the Document is binding and enforceable against the Company. Corporate authorisations are merely a step in the process of making them binding, but in Australia they are not a necessary step because of the operation of the statutory assumptions in section 129 of the Corporations Act.

    If in fact there was a missed necessary corporate authorisation (for example, because directors did not authorise entry into the Document), then the Document would not be binding on the Company, unless the other party could rely on the statutory assumptions, and the opining counsel would be held responsible under the "obligations binding" paragraph.

    Further, the traditional wording of the paragraph connotes a heavy degree of due diligence, which may go beyond merely checking the minutes or extracts of minutes sometimes seen by opining counsel. It deals with "all" authorisations, which can include all management processes and any necessary processes for the relevant directors' meeting to be effective, for instance, proper appointment of the relevant directors and all steps necessary to call a proper meeting. Opining counsel should only need to see whatever documents are sufficient for it to give the opinion that the Document is binding and enforceable, given the assumptions in section 129 of the Corporations Act.

    Where the opining firm or the opinion recipient has been provided with the board minutes or extracts of minutes then the opining firm must review them, but it is still necessary to include the statutory assumptions to cover issues that may not be apparent from the minutes or extracts.

    **Sovereign immunity**

    An opinion on sovereign immunity is not relevant in a domestic transaction where the borrower is incorporated under the Corporations Act. In offshore transactions, however, a paragraph could be given in these terms:

    "The Company is not entitled to claim sovereign or other general immunity from suit or execution for itself or its assets."

    If the opinion is given, it should refer to "general immunity" rather than just "immunity". For example, the Company might own some assets that are protected from execution by statute, and the opining firm should not be required to conduct an exhaustive investigation of all the Company's assets to determine whether this might be the case.

    **Governing law**

    It should not be necessary in an opinion on a domestic transaction to opine on the effectiveness of the governing law clause. In offshore transactions, however, a paragraph could be included in these terms:

    "Courts of the Relevant Jurisdictions will give effect to:

    (a) the choice of governing law specified in the Document; and

    (b) the submission by the Company in a Document to the jurisdiction of the courts specified in the Document."

    **Enforcement of foreign judgments**

    It should not be necessary in an opinion on a domestic transaction to opine on the enforcement of foreign judgments.

    However, if an asset subject to a Security Interest is known to be located outside Australia, and security over that asset is an important factor in your transaction, consider whether a paragraph relating to the enforcement of foreign judgments should be included. [↑](#endnote-ref-16)
17. An opining firm may be asked to state that the Company is "duly" incorporated, or "validly" existing, or both. These words (or similar) are not considered to add anything to the meaning of the opinion statement.

    An opining firm may also be asked to expand the paragraph to state that the Company is incorporated and existing under the Corporations Act "as a company with limited liability", or to go on to say that the Company "is capable of suing and being sued in its corporate name". These attributes are necessary incidents of the fact that the Company is incorporated under the Corporations Act, so additional wording along these lines will not add to the scope of the opinion statement. Also, whether or not the Company operates with limited liability should not impact on the Company's obligations under the Document, and so is not relevant for the purposes of the opinion.

    It may however be appropriate to include text along these lines in an opinion where the addressees are not familiar with Australian law.

    An opining firm may also be asked to expand this paragraph to state that the Company "has all requisite power to carry on its business and own its property". If this simply restated the principle that a company under the Corporations Act has all the powers of a natural person (and more), then this would be unobjectionable. However, it could be read as suggesting that the opining firm has undertaken a broader investigation of the Company's operations and assets, and of all the laws that apply to all the industries in which the Company is operating, to determine whether there are any regulatory restrictions on what businesses in that industry may or may not do. This is likely to be outside the scope of the opining firm's opinion-giving responsibilities. [↑](#endnote-ref-17)
18. This paragraph is limited to "corporate" power. The Company's power to enter into a Document and to perform its obligations under it under law generally is covered by paragraphs 5(c) and 5(e).

    An opining firm may also be asked to state that the Company has the power "to exercise its rights under each Document". This should not be necessary, as the addressees of the opinion should be interested in whether the Document is binding on the Company, not whether the Company is able to take full advantage of it.

    If the Company executes the Document under a power of attorney, the opining firm may be asked to include a reference to that power of attorney in this paragraph. It is not necessary to include reference to the power of attorney, as it is the mechanism through which the Company becomes bound by its substantive obligations under the Document, rather than being a source of those substantive obligations in its own right. [↑](#endnote-ref-18)
19. An opining firm may be asked to extend this opinion to refer to the Company's constitution. In the normal course, this should not be necessary, as parties will be entitled under section 129(1) of the Corporations Act to assume that the Company's constitution has been complied with, unless they know or suspect that this assumption is incorrect. [↑](#endnote-ref-19)
20. These words are strictly not necessary, as their content is covered by the remainder of paragraph 5(d). An opining firm may include them if requested.

    If a Document is being signed under a Power of Attorney, include the optional assumption 8 in Schedule 1 as well. [↑](#endnote-ref-20)
21. An opining firm may be asked to expand this paragraph to state that each Document constitutes "legal, valid and" binding obligations. These words have not been included because they do not add anything to the statement that the Document constitutes the Company's "binding obligations". If "validity" is included, the opining firm may need to amend Qualification 1 in Schedule 2 to refer to obligations being valid as well as binding and enforceable.

    An opining firm may also be asked to expand this paragraph to state that a Document is enforceable “in accordance with its terms”. Again, these words have not been included because they do not add anything and their meaning is unclear. [↑](#endnote-ref-21)
22. An opining firm may be asked to convert this paragraph into a statement in the positive, so that the opinion states that all necessary authorisations have been obtained. This should be outside the scope of the opining firm's responsibilities, as it would impose on the opining firm the obligation not just to determine what authorisations are required, but also to confirm as a matter of fact that the authorisations held by the Company are genuine and adequate and have been properly obtained.

    An opining firm may be asked to expand this paragraph to refer not just to “authorisations”, but also to similar terms such as “consents” or “approvals”. The word “authorisation” is intended to be broad enough to cover similar terms as well.

    In the same way, the phrase “government agency” is intended to cover the appropriate government bodies, and avoids the need to incorporate a corresponding defined term from the Document. [↑](#endnote-ref-22)
23. If appropriate, include the following additional text:

    “You have instructed us to so register [those documents/ [the/each] Mortgage].” [↑](#endnote-ref-23)
24. Consider also including a reference to any other specific registrations relevant to the property subject to the Security Interests on other registers such as with respect to intellectual property and mining rights. Consider including a reference to registering the Power of Attorney, if relevant, especially if the transaction involves dealings with real property signed under the Power of Attorney or jurisdictions where the registration of powers of attorney is required, such as Tasmania. [↑](#endnote-ref-24)
25. In complex documentation at the request of clients the opining law firm may add the following:

    "Amounts owing under the Agreement to a [Finance Party] are within the meaning of ["Secured Money"] in each [Security] [and the Security Trust Deed].].” [↑](#endnote-ref-25)
26. Some firms prefer to advise on registration matters in a separate document. For that reason, this text (and the other text that relates to it) is optional. [↑](#endnote-ref-26)
27. When dealing with a transaction that involves a managed investment scheme, this should also refer to Part 5C.7 of the Corporations Act which applies Chapter 2E (with modifications) to managed investment schemes. [↑](#endnote-ref-27)
28. If a transaction involves financial assistance or financial benefit, the relevant part of the assumption may not be able to be made. In those circumstances the assumption should be tailored to the transaction and evidence of compliance with financial assistance and financial benefit legislation received. [↑](#endnote-ref-28)
29. Strictly, it is the counterparty that relies on the assumptions, but the opining firm is asked to opine as to various statements that strictly rely on the same assumptions. An opining firm may be asked to expand this paragraph to say that the addressee may make the assumptions unless they "knew or suspected that the assumption was incorrect". As this merely restates the language in section 128(4) of the Corporations Act, the opining firm may be prepared to expand the paragraph accordingly. [↑](#endnote-ref-29)
30. Retain this text if the opinion is executed by the Company under a Power of Attorney. [↑](#endnote-ref-30)
31. If the opinion follows the customary approach of identifying whether additional authorisations (such as FIRB or ACCC) are required, refer to those authorisations in this paragraph. See also note 8. [↑](#endnote-ref-31)
32. Solvency is a question of fact. It is relevant to:

    (a) "corporate benefit" and to the use of s 187 of the Corporations Act; and

    (b) the impact of insolvency provisions under the Corporations Act (including, without limitation, the voidable transactions provisions in Division 2 of Part 5.7 of the Corporations Act, which look at insolvency at various times, not just when the transaction is entered into).

    This assumption has been limited to apply at the date of entry into the documents, allowing lenders to perform due diligence before entering into the documents to satisfy themselves as to the solvency of the Company as a factual matter. It can be argued that this assumption is not strictly necessary and is only there to reinforce the point that opining counsel is not examining this important fact, for the following reasons. The "corporate benefit" issue is covered by Assumption 7 in Schedule 1. In relation to the impact of insolvency provisions under the Corporations Act, Qualification 1(b) in Schedule 2 makes it clear that the opinion excludes laws relating to insolvency. Accordingly, opining firms may choose a different approach with this assumption. [↑](#endnote-ref-32)
33. Consider whether it will be necessary to register other dealings before the Mortgage or instrument can be registered. If so those dealings will need to be described, with suitable assumptions and qualifications.

    Consider whether any other type of property or instrument (for example, a transfer of a mining lease) needs to be referred to in this assumption. [↑](#endnote-ref-33)
34. A number of jurisdictions impose requirements on registered proprietors, mortgagees or others who sign a real property mortgage or other dealing relating to real property, to verify the identity of the mortgagor or others who sign the dealing. [↑](#endnote-ref-34)
35. It is rare for stamp duty or any other documentary tax to have been paid by the date the opinion is given. Stamp duty may also depend on questions of fact, like values or amounts secured. In more complicated transactions, stamp duty or other documentary tax may be the subject of separate advice or a separate specific opinion, not necessarily in the standard form closing opinion. The opining firm may wish to include an appropriate exclusion from this assumption if it is opining on stamp duty in this opinion. [↑](#endnote-ref-35)
36. If the opinion is being given to multiple addressees, the opining firm could consider including the following sentence at the end of this paragraph:

    "We have also assumed, with respect to each addressee of this opinion, that that addressee does not know or suspect that any of the assumptions is incorrect."

    Strictly, however, the sentence is not necessary – as the opinion firm is assuming that the matters set out in Schedule 1 are in fact correct, nothing is added by a further assumption that an addressee of the opinion is not aware of any assumption being incorrect. [↑](#endnote-ref-36)
37. It has been common practice in the past for opinions to include a (sometimes extensive) list of additional qualifications. The opinion is prepared on the "less is more" principle, and avoids the risk that a list of specific qualifications covering specific examples of generally applicable issues could raise questions as to whether other examples also need to be covered. Qualification 1 of Schedule 2 makes it clear that it applies generally. [↑](#endnote-ref-37)
38. The reference to "courts retaining their ability to adjudicate" recognises the fact that courts may reserve the right to adjudicate on matters such as whether the court should give full effect to: (a) an indemnity for legal costs; (b) a provision that states that a calculation, determination or certificate will be conclusive and binding; or (c) a provision that allows an illegal, invalid or unenforceable provision to be severed from a document.. [↑](#endnote-ref-38)
39. This is designed to cover (briefly) some general restrictions applying under statute law. In particular:

    Under s80(4) of the *Property Law Act* (Qld) the giving of a subsequent mortgage or charge cannot constitute an event of default or an event accelerating payment of a debt.

    Similarly, under s127A of the Transfer of Land Act 1893 (WA):

    (a) the registration of a subsequent mortgage does not require the consent of the existing mortgagee; and

    (b) the execution of a subsequent mortgage cannot constitute a breach of the existing mortgage, give rise to any forfeiture or penalty, or accelerate the time for payment.

    Under ss58 and 91(5) of the *Property Law Act* (Qld) a provision enabling a mortgagee or chargee to apply insurance proceeds in reduction of debt, rather than in reinstatement (if the policy is for reinstatement rather than insurable value) may not be enforceable without the consent of the insurer and the mortgagor or chargor. In the case of insurance relating to improvements on land, other parties having an interest in the improvements may be entitled to require that insurance proceeds be applied to reinstatement.

    Under ss91(6) and 91(6A) of the *Property Law Act* (Qld) any obligation of a mortgagor or chargor to insure or continue to insure the property expressed to be subject to a security interest granted by it in Queensland on a reinstatement or replacement basis will be suspended (but an obligation to insure for full insurable value will not be suspended) to the extent that it ceases:

    (a) to be possible to effect the reinstatement or replacement of the secured property;

    (b) to be lawful to use the secured property for a use to which, before such reinstatement or replacement, that property was being put; or

    (c) to be lawful to use the secured property for that use without the approval of the local authority, or any other authority having power to grant or withhold approval to that use, and such approval is withheld. [↑](#endnote-ref-39)
40. This is designed to cover general undertakings (for example, as to the conduct of its business, or to comply with other agreements). The extent of such obligations will not be possible to determine without extensive due diligence which is beyond the scope of the opinion. [↑](#endnote-ref-40)
41. It is now general practice in Australia not to opine on priority. This is also consistent with practice in other jurisdictions. However, if the opining firm is prepared to opine on priority in relation to Torrens Title security, an example opinion, assumption and qualification paragraphs are set out below.

    OPINION

    "To the extent it is over the Company's estate or interest in land under [**insert name of relevant Torrens Title statute**] (that estate or interest being the ***Mortgaged Property***),[the / each] Mortgage [has / will on registration under that Act have**] [*Insert 'has' if it is already registered*]** priority over all other Security Interests over the Mortgaged Property [except [●]]."

    ASSUMPTION

    "For the purposes of our opinion in paragraph [***Insert reference to paragraph containing Torrens Title priority opinion***].

    (i) The Company [is | will on registration be registered as] [[***delete words in square brackets if the Company on the opinion date is registered as proprietor / owner***]] the registered [proprietor / owner / holder] of the Mortgaged Property.]

    (ii) [No other Security Interest over the Mortgaged Property is or will be lodged for registration before the Mortgage[ and the Security Interests currently registered are released and the release registered]].

    (iii) The interest in the Mortgaged Property of [the/each] Mortgagee (as defined in the Mortgage) is and will be free of any personal equities affecting the Mortgagee and is and will be free of any constructive or other trust.

    (iv) [No Mortgagee is or will be / the Mortgagee is not, nor will be] guilty of fraud, or otherwise affected by fraud, within the meaning of [***insert name of relevant Torrens Title statute***]***.***

    [***Delete (i) and (ii) if the Mortgage is already registered****.*]

    QUALIFICATION

    "Our opinion in paragraph [***insert reference to paragraph containing Torrens Title priority opinion***]is also qualified to the extent that certain other Security Interests may have or obtain priority over [the / each] Mortgage:

    (i) by virtue of statute (eg, charges for certain rates and taxes); or

    (ii) because a mortgagee may in certain circumstances lose its priority." *[****Eg, over the holder of a subsequent Security Interest in respect of advances made after notice of the subsequent Security Interest; where the mortgagee agrees, or where the holder of a subsequent Security Interest incurs costs in preserving or realising collateral.****]*

    ***[The examples in (ii) may be added to the opinion sentence.]***

    ***[Insert the following additional qualification at the end of qualification 6.]***

    "(a) [the extent to which interests other than Security Interests might take priority over [the/a] Mortgage]." [↑](#endnote-ref-41)
42. If property which is subject to a Security Interest is known to be located outside Australia, and security over that property is an important factor in the transaction, the opining firm should consider whether this qualification should be amended. See also note 16. [↑](#endnote-ref-42)
43. It will be necessary for an opining firm to discuss with their client the extent of due diligence (if any) required in respect of the items mentioned in qualification 6(e) in Schedule 2. This paragraph may need amendment if a document creating a non-PPSA Security Interest is listed in paragraph 1(c)(iv) and is intended to be the subject of the opinion.

    If any relevant property is identified, then the opining firm will need to discuss with the client what steps will be required in respect of it. The opinion may need amendment. [↑](#endnote-ref-43)
44. Some firms prefer to advise on registration matters in a separate document. For that reason, this text (and the other text that relates to it) is optional. [↑](#endnote-ref-44)
45. If the secured party is a foreign company or entity with its name (or part of its name) in a foreign alphabet, it may be necessary to add the following as a further subparagraph:

    "In relation to [***insert name of party***], because it is not possible to register the relevant PPSA Security Interest with its exact name.” [↑](#endnote-ref-45)
46. If any purchase money security interest, serial number or control-based registrations have been made or if any text has been included in the free text field, additional columns for these matters should be added to the table. [↑](#endnote-ref-46)