CURRENT DEVELOPMENTS: LAWYERS OPINIONS' IN BANKING TRANSACTIONS

SUZANNE CORCORAN

Lecturer, Department of Law
University of Adelaide

I have been asked to give a general sort of introduction or framework as background to a discussion of legal opinions. You have a piece of paper from me, an outline and you also have a sample opinion which comes from a very recent report of the International Bar Association.

The purpose of a legal opinion - why lawyers give legal opinions, is for assurance. The opinion confirms that a transaction is what it is meant to be from the legal point of view. That the legal relationships which are contemplated have been created and exist. The recipient of a legal opinion is looking for a professional judgment that the legal assumptions upon which he or she will base a decision with respect to a transaction are correct. It is not meant to be a guarantee although last night when we were talking with David he admitted that, in fact, what he was really looking for as a banker, was a guarantee. I think Tom is going to address that issue later on.

Any discussion of the issues related to legal opinions can be broken up into several groups and that is what I have done in the outline of discussion points. First of all there are issues related to the liability of lawyers giving opinions, issues related to the standard of care involved in giving an opinion. Questions such as whether or not there is a due diligence obligation here in Australia. If so, what are its parameters? What is the liability of the lawyer concerned?

Roland is going to speak at some length later about the position in the United States with respect to liability. There have been suggestions here in Australia that the liability of lawyers would be circumscribed by the courts. I do not really see any solid basis for that. I think that here in Australia professional liability is expanding, just as it is elsewhere. And, the legal principles with respect to giving advice, particularly advice for which you can contemplate reliance, is the same here. Those principles can be found in the numerous cases dealing with professional negligence.

A second set of issues are issues related to the relationship of the various parties. Usually a legal opinion in a banking transaction is given to a third party, that is, it is not the client of the lawyer who receives the opinion. There are questions which will arise, therefore, as to what is that relationship. Is the standard of care the same for someone who is not your client as it would be in a client relationship? (This question also ties into the whole area of assumptions and qualifications.) Another question is whether you can qualify your duty to a third party in a way that perhaps you could not qualify it to a client?

The third group of issues are issues relating to the form and content of an opinion and here there are also three major subdivisions: the assumptions, the qualifications and the actual opinions which are rendered. In many ways the assumptions and the qualifications could be considered as one group although in Australia they are traditionally set out as separate parts of an opinion letter.

The assumptions on which the opinion is based and qualifications to the opinion will be dealt with a little bit later by Tom. Personally, I think that with respect to that area, particularly with respect to qualifications, Australians have really run riot. The number of assumptions and qualifications in the opinions that I have looked at here can be very confusing. I have seen opinions that run for 8 or 9 pages of assumptions and qualifications. In the end it makes the actual opinion less meaningful; what becomes meaningful then are the assumptions and qualifications to the opinion. And those are very often harder for the non-lawyer client to understand.

Now, I would like to turn to the types of opinions rendered. But, first a point about facts versus the law. Generally the lawyer is entitled to rely on the client for facts. Factual matters are often done by way of certificates from the client's officers. However, there is an obligation upon the lawyer to inquire in a reasonable manner into relevant facts which are needed to support an opinion. Also if there are factual matters which are of a legal nature then such matters should not be simply put on an officer's certificate. In that regard, one should also be careful with respect to using such terms as "known to us" coupled with phrases such as "after a reasonable inquiry". Those types of situations suggest in fact that you have inquired into the factual matter and, if in fact you have not done an inquiry, such statements can be highly misleading.

Another area where one should be careful with respect to facts, is in opinions where you are giving an opinion which is technically correct but fails to acknowledge a closely connected adverse fact which might affect the willingness of the lender to go forward with the borrowing. There has been a California case on this point where the lawyer gave an opinion that there was in fact a general partnership and did not disclose that there were

certain partners who were contesting the partnership. The lawyer tried to get the action thrown out of court as not stating a case. The court refused to do so, finding that the factual matter was something that the lawyer had knowledge of and also that the lawyer had knowledge that the dispute about the partnership might have affected the transaction. (Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3rd 104.)

Types of Opinions

The typical opinions I have listed on the outline are opinions regarding corporate status, corporate power and corporate actions, due execution and delivery, lack of approvals, and remedies, jurisdiction and enforcement. The category "other opinions" includes such things as stamp duty, taxes, sovereign immunity and that type of thing. I will come back to the major categories in a minute.

But first there is a fourth possible major subdivision to an opinion letter. This would be the list of documents reviewed because the list of documents may in fact limit the scope of the opinion. For example, with respect to am Australian list of documents, it is important that the Corporate Affairs Commission's records should be included.

Other parts of the opinion which I do no intend to discuss, and I don't think my colleagues are going to discuss either, are such things as:

(1) The date and the addressee of the opinion - Such things have been considered and discussed at various forums in the United States and there are common opinions as to what the date should be and who the addressee should be.

(2) The description of the opining lawyer - Some people feel that it is necessary to ask for general counsel or special counsel. I think that the general opinion on that issue is that the "description" of the opining lawyer really is not important. Probably what is important is the actual knowledge of the opining lawyer. Therefore one might want to request that an opinion be given by general counsel since general counsel would normally have more knowledge of what was going on in a company.

(3) Scope of the opinion - I think everyone here is familiar with issues of scope. Most Australian lawyers render an opinion dated not at the beginning but at the end. The opinion is generally limited to current Australian law.

(4) The Signature List or Incumbency Certificate - This is an American peculiarity and Americans tend to ask for these.

I have mentioned the United States experience and the question of accepted meanings for typical opinion terminology. This is

because there have been several bar groups in the United States who have actually sat down and discussed the terminology of legal opinions. What happened in the course of those various discussions was that people realised there wasn't any common understanding or common interpretation of what were considered sacrosanct terms. Everyone was using these terms and everyone agreed that they wanted them in their opinions but, they did not agree as to what the terms meant. I think that today the United States has come a long way toward consensus with respect to opinion terminology. It is worth looking at that experience because the United States is largely responsible for exporting these types of opinions to Australia and to the United Kingdom. So here, not only do we use much of the terminology that was developed in the United States but we also have our own ideas as to what the various terms mean.

The four most important studies in the United States are listed on the outline. The New York so called "Tri-Bar" Report which was a joint effort of the various bar associations in New York. The State Bar of California which did the same thing several years later. The Massachusetts Bar Association which was one of the earlier reports. And lastly the International Bar Association report which came out about a month ago and deals only with legal opinions in international transactions, specifically financial transactions as distinguished from securities transactions.

Coming back to the typical kinds of opinion which are given I am going to be speaking now to the sample opinion which is in your papers and which comes from the International Bar Association report. I have just been told I have three minutes, so we will have to rush through this.

On what is page 19 you will see the opinion section - skipping over the qualifications, assumptions, list of documents and that type of thing. What I want to do is briefly go through the five most important ones leaving the other kinds of opinions aside. The first opinion is the corporate status opinion. That is, "that the borrower is a corporation duly incorporated, duly organised, validly existing and in good standing under the law of the borrower's country". Such language is typical for that kind of opinion. Normally you will find Americans requesting exactly that terminology in an opinion. From the Australian point of view with respect to "duly incorporated" one can search the CAC records and give that opinion. "Duly organised" in Australia would not really add anything to "duly incorporated" because it really applies to organisational matters which might be required for incorporation after the actual filing of a certificate of incorporation. In Australia everything that is required to set up the corporation itself would be required to be accomplished before the company was registered, for example, appointment of directors. "Validly existing" - validly has no meaning there, either the corporation exists or it does not. "In good standing" - that is used in the United States to refer both to good

standing in the state of incorporation and good standing to do business in other jurisdictions. Good standing, that is the on-going ability to carry on business, often depends on the payment of taxes in a jurisdiction. It does not have that technical meaning here in Australia although I think there is something of a good standing problem in Australia with respect to companies, particularly "registered foreign companies", which are "recognised" to do business in other jurisdictions. In other words the federal scheme that is here in Australia has some analogies with the American concept of good standing, at least in the federal multi-jurisdiction sense.

The Corporate Power and Corporate Action opinion - that the "execution, delivery and performance by the borrower of the credit agreement and the notes are within the borrower's corporate powers, and has been duly authorized by all necessary corporate action, and do not contravene (i) the Charter or By-Laws or (ii) any law, rule or regulation applicable to the Borrower." It is generally considered in the United States important to use the term "corporate powers" rather than just "powers" generally. I have noticed that in Australia people tend to use just "powers". The thought is that "corporate powers" addresses the issue of ultra vires (and that is really what this part of the opinion is about) and it does it more specifically.

"Have been duly authorised" - again "duly" in this context has no meaning it is just added for emphasis with respect to "authorised".

"Do not contravene the charter or by-laws" - I think that is an easy opinion to research. The second part, however, "any law, rule or regulation applicable to the borrower" - there you may have a problem because that can pick up <u>any</u> law, rule or regulation. Often lawyers will want to qualify that and exclude certain types of things such as municipal types of regulations.

Both with respect to the corporate status opinion and the corporate power and action opinion, in Australia we have the indoor management rule. In addition, we have the issues that Professor Ford was talking about yesterday with respect to assumptions which can be made under the Codes. So, there is some extra protection in Australia.

The third opinion, that "the credit agreement and the notes have been duly executed and delivered by the borrower" - contemplates two things, the intent to create a binding agreement or binding contract and also the authorisation which is required to actually execute and deliver. That opinion obviously cannot be given if counsel is not attending the closing and it would have to be restructured to refer simply to the authorisation to execute. Additional language would also be necessary if a power of attorney is to be used.

I have just been told that the time is up! So let me just say briefly that the fourth opinion, the no approvals opinion, refers

to anything that might render the agreement void or voidable in terms of enforcement. It has a direct bearing on the remedies opinion and is also connected to the problem of events of default which might occur in other agreements. Lastly, probably the most difficult opinion, the remedies, jurisdiction and enforcement opinion - that is that an agreement is "legal, valid, binding, and enforceable", often phrased as "legal valid binding and enforceable in accordance with its terms" the key words there are "binding and enforceable", the addition of "in accordance with its terms" is thought not to add much unless someone is looking for specific performance, in which case that should probably be stated in the opinion rather than left to inference from this kind of terminology. If you do use "in accordance with its terms" then you would normally also use the limitations with respect to bankruptcy and equitable principles. Finally the sample opinion deals with conflict of law and choice of law problems, that is the problem of which law will apply to the agreement, in three steps. The first step being whether there is any conflict of law, and if there isn't, whether there is any problem with having a choice of law clause in a contract. Then, you go on to the second step which is, if the general principle of choice of law in contracts is accepted in the jurisdiction, are there any limitations, that is, what kind of specific exceptions are there to that general principle? The last step is whether any of such specific exceptions might apply to the agreement.

OUTLINE OF DISCUSSION POINTS

I. The nature and purpose of a legal opinion in a banking transaction

II. Issues related to the liability of lawyers giving opinions

- Is there a due diligence obligation?

III. Issues related to the relationships of the various parties

IV. A Sample Legal Opinion for an international financial transaction

V. Issues related to the form and content of an opinion

A. Three major subdivisions: assumptions, qualifications and opinions
B. The assumptions on which the opinion is based
C. Qualifications to the opinion
D. Types of opinions rendered

1) Facts vs. law
2) Typical opinions

a) Corporate status
b) Corporate power and corporate action
c) Due execution and delivery
d) Lack of approval
e) Remedies, jurisdiction and enforcement
f) Other opinions

E. Possible fourth major subdivision - The list of documents

F. Other parts of the opinion

1) The date
2) The addressees
3) The description of the opining lawyer
4) Limitation of the scope of the opinion

G. Signature list or incumbency certificate

VI. The United States experience in coming to some accepted meanings for typical opinion terminology

A. The New York Tri-Bar Report:

"Legal Opinions to Third Parties: An Easier Path", (1979) 34 Business Lawyer 1893.
"An Addendum", (1981) 36 Business Lawyer 429.

B. The State Bar of California:

Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions (1982).

C. The Massachusetts Bar Association:

"Omnibus Opinions for Use in Loan Transactions" (1976) 60 Mass. Law Quarterly 193.

D. The International Bar Association:

Responses to US Opinion Requests - A Report on Legal Opinions in International Transactions. Subcommittee on legal opinions of Committee E of the Section of Business Law (1987).

LEGAL OPINIONS

SOURCES AND REFERENCES

American Bar Association Committee on Developments in Business Financing, "Legal Opinions Given in Corporate Transactions" (1978) 33 Business Lawyer 2389

Babb, Barnes, Gordon & Kjellenberg, "Legal Opinions to Third Parties in Corporate Transactions" (1977) 32 Business Lawyer 553

Baxt, "Liability For the Formation of Opinions - A Speck of Optimism in a Sea of Pessimism" (1982) 14 Commercial Law Association Bulletin 99

Berns, "The Expanding Domain of Negligent Misstatement" (1985) 8 University of Tasmania L.R. 127

Business Law Section of the State Bar of California, Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions (1982)

Report on Legal Opinion on Personal Property in Secured Transactions (1987)

Cann, "Legal Opinions of Foreign Lawyers" (1980) 7th Annual Proceedings of the Fordham Corporate Law Institute 237-59

Fitz Gibbon and Glazer, "Legal Opinions on Incorporation, Good Standing and Qualification to Do Business" (1986) 41 Business Lawyer 461

Freeman J.P., "Opinion Letters and Professionalism" (1973) 2 Duke L.J. 371

Fuld, "Legal Opinions in Business Transactions - An Attempt to Bring Some Order out of Some Chaos" (1973) 28 Business Lawyer 915

Fuld, "Foreign Legal Opinions in American Business Transactions" (1975) International Business Lawyer 15

Fuld, "Lawyers' Standards and Responsibilities in Rendering Opinions" (1978) 33 Business Lawyer 1295

Gruson & Kutschera, "Opinion of Counsel on Agreements Governed by Foreign Law" (1987) 19 Vanderbilt Journal of Transnational Law 515

Gruson, Contractual Choice of Law and Choice of Forum - Unresolved Issues, in Judicial Enforcement of International Debt Obligations (D. Bradlow & D. Sassoon ed. 1987)

Gruson, "American Lawyers and Legal Opinions of Foreign Counsel" (1976) 1975 Annual Proceedings of the Fordham Corporate Law Institute 296

Harries, "Bona Fide Reliance on Legal Opinions" (1985) International Business Lawyer 480

Janis, "The Lawyer's Responsibility for Foreign Law and Foreign Lawyers" (1982) 16 International Lawyer 693

Johnston, "The Use of Formal Legal Opinions in Australia" (1985) Australian Business Law Review 396

Keeler, "Paying for Mistakes - Professional Negligence and Economic Loss" (1979) 53 Australian L.J. 412

Meyrier, "Legal Opinions in Financial Transactions Involving Foreign Law" (1985) International Business Lawyer 410

Report by Special Committee on Legal Opinions in Commercial Transactions of the New York County Lawyers' Association, in Co-operation with the Corporation Law Committee of The Association of the Bar of the City of New York and the Corporation Law Committee of the Banking, Corporation and Business Law Section of the New York State Bar Association, "Legal Opinions to Third Parties: An Easier Path" (1979) 34 Business Lawyer 1891

"An Addendum - Legal Opinions to Third Parties: An Easier Path" (1981) 36 Business Lawyer 429

Segall & Arouh, "How to Prepare Legal Opinions" (1979) 25 Practical Lawyer 29

Subcommittee on Opinion Writing of the Massachusetts Bar Association, Committee on Corporate, Banking and Business Law, "Omnibus Opinions for Use in Loan Transactions" (1976) 60 Massachusetts Law Quarterly 193

Sutherland, "Solicitors' Liability for Negligence in Australia and the United Kingdom" (1984) 33 International and Comparative Law Quarterly 471

Teolis, "Legal Opinions in International Financial Transactions - A Canadian, US and UK Perspective" (1985) International Business Lawyer 360

Wood, Law and Practice of International Finance Chapter 18 "Legal Opinions" (1984) Clark Boardman Co. Ltd., New York