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Law Risk on Financial Certificate

by John Doyle, Senior Solicitor, Law Claims

A common enquiry from practitioners in relation to their practice is what are the insurance implications of providing advice to a proposed guarantor and signing a solicitor's certificate.

Practitioners doing this type of work are reminded that in considering the undertaking of legal work involving the provision of a financial certificate to guarantors, that there is a 300% penalty excess applicable should a claim arise from the provision of the certificate. See clause 2.6 at page 29 in the Professional Indemnity Insurance Scheme document. http://www.lawsocietysa.asn.au/PDF/Scheme_2012.pdf

The reason for the increase in excess is that a solicitor's certificate in any transaction necessarily increases the risk of a claim being made against the practitioner because it positions the practitioner for liability if the security provider is able to challenge the content of the certificate.

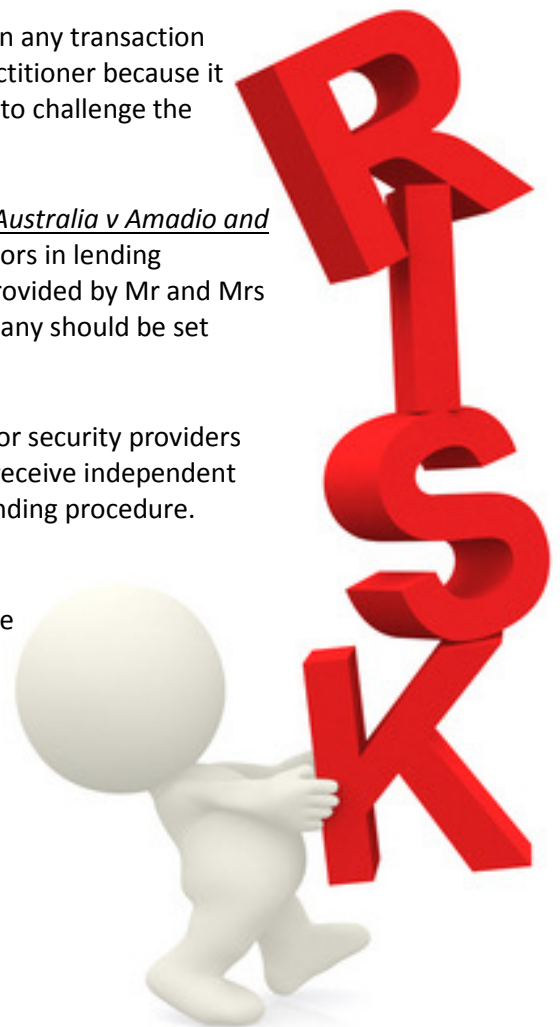
The leading authority in these type of cases is Commercial Bank of Australia v Amadio and Anor¹. In this landmark case impacting on the involvement of solicitors in lending transactions, the High Court held that a mortgage and guarantee provided by Mr and Mrs Amadio to support an overdraft facility to their son's building company should be set aside.

As a result of the Amadio case and others that followed, the need for security providers (including surety mortgagors, guarantors and direct borrowers) to receive independent legal advice in lending transactions has become a regular part of lending procedure.

Lenders commonly require that security providers receive independent legal advice from a legal practitioner before signing the documents and that the solicitor is required to sign a certificate confirming the advice given.

The result is that a large number of legal practitioners have been sued by both the security providers and lenders in respect of the advice given or the lack of it.

Claims experience reveals that acting for new clients, guarantors or third party mortgagors in a transaction are particularly high risk to the practitioner.



1 [1983] HCA 14

Key areas that a practitioner needs to consider if considering providing legal services in this area are:

- Open a file in the client's name(s).
- Insist on identification.
- Keep copies of the identification documents.
- Use an independent interpreter when appropriate.
- If there is more than one security provider, consider whether their interests are the same. Does one need to obtain independent advice?
- Advise any security provider independently of the borrower.
- Address the possibility of undue influence or duress.
- Do not provide financial advice – refer the client to a qualified accountant or financial adviser and ensure they have enough time to obtain this advice. Financial advice is not covered by the terms of the Professional Indemnity Insurance policy.
- Advise the client about the key elements of the documents and the worst case scenario.
- Ask the client why they are entering into the transaction and record the answer.
- Make a comprehensive file note of all attendances on your client, whether in your office or elsewhere.
- Check that your file notes
 - Are dated
 - Identify the author
 - Record the duration of the attendance
 - Record who was present or on the telephone
 - Are legible to you and someone else; and
 - Record the substance of the advice given and the client's response/instructions.
- Confirm your advice in writing and seek a signed acknowledgement from the client.

Make sure that your advice is complete. It is important to explain to clients in the simplest language possible important issues such as:

- Joint and several liability.
- That where a mortgage is involved that the mortgagors could lose their homes.
- That the amount the security covers can be more than the amount borrowed.

The client needs to understand the general nature and effect of the documents and what could happen in the worst case scenario. Asking your client at the end of your explanation what he or she understands to be the position and recording such responses is one way of ascertaining the degree of understanding. It is not sufficient evidence of understanding for the client to just nod and say "yes I understand". The client needs to state what he or she understands.

Finally, charge appropriate fees. When providing a solicitor's certificate Law Claims recommends that you charge a fee which reflects the risk as well as covers the necessary steps and precautions. This fee is likely to be more than anticipated by the client and should not be "a quick job" undertaken lightly or by an inexperienced practitioner.

Law Claims suggests only a very experienced practitioner should consider giving such advice because it is financially risky for the firm. The current excess (under 2012-13 policy) is \$3,000 per partner/director of a firm. With the 300% penalty excess provision, the total excess payable is currently \$12,000 per partner/director of the firm. A worst case scenario can be an excess payment of \$150,000 by the partners if a claim arises.

**For any queries about this or other Risk Management Services
offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano
on 8410 7677 or gdistefano@lawguard.com.au.**