

Solicitor's Certificates – Tips and traps

Irrespective of whether the certificate is being sought by “walk-in” or long-standing clients, practitioners need to be diligent in their review of the relevant documents, the advice provided to the clients and their own file management. This may be difficult given time and costing limitations, not to mention the pressure from clients to “simply sign off” on what they may view as just another administrative loan document. This session will highlight some of the common – and serious – errors made by practitioners as well as provide useful tips on how to minimise risk exposure and avoid being caught up in another Amadio-style dispute. It will also refer to the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 and recent changes to the forms.

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Solicitor's certificates

BACKGROUND – WHAT ARE THEY?

1. Following the High Court decisions in *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 (12 May 1983) and in *Garcia v National Australia Bank Ltd* [1998] HCA 48; 6 CCL 81; 194 CLR 395; 155 ALR 614; 72 ALJR 1243 (6 August 1998), the Banks in Australia needed an insurer to claim against when their indefeasible mortgages suddenly became unenforceable.
2. As a result, lenders try to put the responsibility on to the borrower's solicitor for:
 - a. Explaining the loan to the borrower/guarantor, and
 - b. Identifying the people signing the mortgage documents.
3. This is done by requiring the borrowers to produce:
 - (i) A Certificate of Explanation of the loan documents signed by a solicitor to the effect that the solicitor explained the documents to the borrowers, who appeared to understand them.
 - (ii) A Certificate of Identity signed by a solicitor whereby that solicitor certifies that the people signing the mortgage documents are one and the same as the borrowers.

4. These certificates are clearly designed to defeat a claim by the borrower against the lender to the effect that the borrower did not understand what they were signing.
5. These certificates are fraught with risk for the lawyers who are executing them.
6. The problem now is that the Banks are protected; however aggrieved borrowers are still claiming that they did not know what it was that they were signing! As the banks have an indefeasible, registered mortgage, and proof that the borrower was warned of the risk, the banks are being allowed to enforce their mortgages.
7. The borrower is then left to join the solicitor to the bank's claim for enforcement of the mortgage. This means that the LPLC will be left to carry the can (after the lawyer pays the deductible). It is no wonder that our professional indemnity insurance premiums continue to rise, and the LPLC web site is full of advice about what to do and what not to do when asked to complete a Solicitor's Certificate.
8. Here is a link to the LPLC checklist about solicitor's certificates.
<http://lplc.com.au/key-risk-checklist-solicitors-certificates-for-borrowers-or-surety-providers/>
9. I attach the check list as Schedule 1.

10. I recommend that you read through the check list carefully, and tick off each item as you go when a client asks you to complete a Solicitor's Certificate.

Introduction

11. It goes without saying that irrespective of whether the certificate is being sought by "walk-in" or long-standing clients, you need to be diligent in your review of the relevant documents, the advice provided to the clients and your own file management.
12. With that in mind, to advise a client about the terms of a commercial mortgage requires a significant investment of time by both lawyer and client. The client must be made aware that this is simply not a scenario in which you, as their lawyer, can "simply sign off" on what they may view as just another administrative loan document. If you don't comply with your duty to advise the client properly, and they lose money as a result, you will be the first person blamed.
13. You must therefore resist pressure from clients to sign a certificate without actually doing the work required and without actually advising the client. If the client is not prepared to pay for your time for that advice, **DO NOT BE BULLIED INTO GIVING THE CERTIFICATE.**
14. Another point of interest to note is that there are now standard forms of Certificate provided by LIV. The LPLC's mantra is only to use that standard format. If the Bank in question has their own form of Certificate, **DO NOT USE IT.** Use the form available on the LPLC web site.

New ID laws now apply in Victoria

15. To compound matters, strict requirements for mortgagees to take positive steps to verify the identity of borrowers were introduced in Victoria on 24 September 2014. Similar requirements were already in place in Queensland, New South Wales, South Australia and Western Australia.
16. The *Transfer of Land Amendment Act 2014* (Vic) received Royal Assent on 23 September 2014 and commenced the following day. It amended the *Transfer of Land Act 1958* (Vic) to **require a mortgagee to properly verify the authority and identity of a mortgagor by taking ‘reasonable steps’ before the execution or variation of a mortgage**. Failure to do so will prevent lenders from obtaining the benefit of indefeasibility and the mortgage will be void.
17. The amendments also purport to limit the amount of interest that a mortgagee who suffers a loss as a result of fraud can recover from the Registrar of Titles.
18. I have attached as Schedule 2, a summary of the amendments and some commentary by Bill Rimmer of counsel.

LPLC WAR STORIES

19. On the LPLC web site, there are a number of sobering war stories.

20. In “In Check” Issue 64, there is an example of a real estate scam reported in July 2015 where a **house in Canberra was sold without the owner’s knowledge**.

21. The sale was arranged without any face-to-face meetings and was done using email and posted documents because the purported owner was overseas.

22. For something closer to home see *XPAK Pty Ltd v Scibilia & Ors* [2013] VCC 1260 where a **lawyer was duped by fraudulent clients**. The entire judgment of Judge Anderson is very interesting reading!

23. Paragraph 1 of the judgment reads:

Michael Scibilia, the first defendant, borrowed \$180,000 from the plaintiff in June 2012 to pay business debts. The plaintiff would only lend the money if security were given by charging two properties in the names of both Mr Scibilia and his wife, Mrs Carmel Scibilia. Mrs Scibilia, the fifth defendant, refused her husband’s request to execute loan documents. Mr Scibilia then arranged for an unidentified woman to pose as his wife and to forge her signature on the documentation. The documents were executed before a solicitor employed by the fourth defendant, a firm of solicitors in Glenroy. The solicitor certified the due execution of the documents, believing the woman with Mr Scibilia to be his wife.

24. In *Provident Capital Ltd v Papa* [2013] NSWCA 36, the New South Wales Court of Appeal had to determine a solicitor’s liability in another mortgage dispute.

25. The relevant part of the head note reads:

On 5 April 2007, the respondent, Mrs Gina Bortolin **Papa** ("Mrs **Papa**"), mortgaged to the appellant, **Provident Capital Ltd**, the premises in

which she lived and conducted a business selling children's and babies' clothes. She gave the mortgage to secure an advance to her by Provident of \$700,000, obtained primarily to assist her son, Mr Peter Bortolin, in relation to equipment and working capital for a gymnasium business recently acquired by Mr Bortolin's company, Luxury Enterprises Pty Ltd. A further advance of \$125,000 in April 2008 was also applied to the gymnasium business. In respect of both advances, Provident required Mrs **Papa** to obtain independent legal advice regarding the loan and security documents. She obtained this from Mr George Caramanlis, a solicitor.

Following the failure of the gymnasium business, Provident brought the present proceedings for possession of Mrs **Papa's** property. Mrs **Papa** claimed that the loan agreements were unjust contracts within the meaning of s 7 of the Contracts Review Act 1980 and also cross claimed against Mr Caramanlis, alleging that he had breached his professional duties to her.

At first instance, Fullerton J upheld Mrs **Papa's** Contracts Review Act contention and reduced Mrs **Papa's** liability to Provident by the amounts that were applied to the gymnasium business. In doing so, her Honour imputed to Provident the knowledge of its loan introducer. Her Honour dismissed Mrs **Papa's** cross-claim against Mr Caramanlis.

Provident appealed against the finding against it and Mrs **Papa** cross-appealed against the dismissal of her cross-claim against Mr Caramanlis.

Held: (allowing the cross-appeal) (1) (per Allsop P; Sackville AJA agreeing) **If a solicitor's retainer is to give legal advice, depending on the circumstances, that may (as it did here) extend to explaining the practical consequences of the legal obligations arising from the relevant document in the known circumstances ([2]).**

(per Macfarlan JA; Allsop P and Sackville AJA agreeing) **While it is well established that solicitors are not ordinarily required to advise upon the wisdom of transactions in relation to which they act, a reasonable solicitor in the position of Mr Caramanlis would have formed the view that Mrs Papa's home, and the business which constituted her livelihood that she conducted from it, would be significantly endangered by her entry into the transactions with Provident and in giving her independent legal advice would have recommended that she obtain financial advice, independent of her son, concerning that business. A solicitor's obligation is not simply to explain the legal effect of documents but to advise his or her client of the practical implications of the client's entry into a transaction the subject of advice ([75], [80]).**

26. These examples should be enough to deter most solicitors from giving Solicitor's Certificates to lenders on behalf of walk up clients!

The LPLC is particularly concerned about SMSF solicitor's certificates

27. Changes to the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* some years ago allowed self-managed superannuation funds (**SMSFs**) to make borrowings of a limited recourse nature for the purposes of purchasing real estate.

28. In addition to security being provided by way of a mortgage over the property being purchased, some SMSF financiers have required guarantees from the directors of the SMSF trustees. Practitioners acting in relation to the purchase of the property have been asked to provide solicitor's certificates in relation to explanations given to the guarantors.

29. The LPLC refers to one instance where the certificate **looked like** the LIV / ABA approved form of solicitor's certificate but it contained an annexure listing the documents provided and then stated at the bottom:

'In addition to the explanations mentioned below I explained the relevant requirements of the Superannuation Industry (Supervision) Act 1993 (Cth), in particular the requirements for a superannuation fund and the consequences of the Superannuation Fund not being or ceasing to be a complying superannuation fund.'

30. Another example quoted by the LPLC required the guarantor to sign a certificate which included a statement that the guarantor had received legal advice regarding:

'...the loan and security documents referred to in paragraph 2, the duties as director of the trustee of the superannuation fund regulated under the Superannuation Industry (Supervision) Act 1993 (Cth) and related

legislation and compliance with the legislation of the investment and borrowing transactions.’

31. The advice required to satisfy these certifications is very broad and extensive and in some instances not possible to properly fulfil, particularly for the standard remuneration practitioners usually receive.
32. The LPLC recommends that the broad statements referred to above (and any others like them) be deleted from the certificate before it is signed.
33. These types of certificates often go beyond mere certification of advice given and become opinion letters.
34. The certificate can provide that the practitioner has reviewed certain documents including the loan documents, deed constituting the superannuation fund and bare trust deed. The practitioner is often required to certify that the superannuation fund, has been validly constituted and complies with the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**).
35. There is some argument that the effect of the wording of this type of certificate is that a practitioner is advising both the lender and borrower. This may give rise to a conflict. See Rule 8.5.5 of the *Professional Conduct and Practice Rules 2005*.

36. A practitioner is usually not in a position to comment on whether or not the fund has been validly constituted and complies with the SIS Act. It is more appropriate that compliance matters be referred to the client's auditor.
37. A practitioner is also unable to advise on matters beyond their control. For example, a certificate may require the practitioner to certify that on completion the bare trustee will be the registered proprietor of the real estate. The lender will have the control of the transfer of land following settlement and so should not require the practitioner to certify such a matter.
38. Other matters may be known only to the borrower, and the borrower should provide any necessary certification in relation to these matters. One example is the requirement to certify that the loan funds will be used to acquire the real estate.
39. The opinion required in many of these certificates should more properly be given by the financiers' legal advisors.

MY OWN EXPERIENCES

40. I have acted in a number of claims against the Registrar of Titles by victims of fraudulent transactions.
41. The Registrar takes the view that he cannot simply pay a claim because a victim claims to have been defrauded, even when (in one case) the perpetrator of the fraud swore an affidavit that he had done it! The Registrar says he will only pay

when there is a judgment against him. That judgment can be by consent, when the evidence is compelling, but be aware that the Registrar will not make things easy for claimants.

42. Some examples:

The son – Mrs A

43. The son of my elderly, widowed client forged her signature on a loan application, and mortgage. He arranged for my client's title to be transferred into a fictitious name (for which he held false id), mortgaged the property to the Commonwealth Bank, obtained the loan money, and spent it.
44. Eventually, the son was arrested and returned to jail (he had previously been convicted of fraud and was on bail at the time of the later fraud!).
45. Interestingly, the original fraud for which he went to jail involved the son forging my client's signature and obtaining a loan of money secured by mortgage, which the Registrar had to reimburse.
46. In the second (new) claim (that I was involved in), the Registrar suspected my client's involvement in the fraud. How could she not have known that her (convicted fraudster son) would not try and steal money from her (and an unsuspecting mortgagee)?

47. As it turned out, my client had lodged a caveat to protect against such a scenario. However, the son outsmarted the Commonwealth Bank and convinced its manager that his mother had signed the withdrawal of caveat, that he was the (unrelated) person applying for the loan as a part of his purchase of the property, and that his (fake) id was real.
48. In this case, there was no Solicitor's Certificate. However, if the (fake) id convinced the Bank Manager, it would probably have convinced an unsuspecting solicitor into signing such a Certificate if the lender had required one.
49. The son became registered as proprietor of his mother's unit by fraud, and therefore he did not obtain indefeasible title (in accordance with the exception in section 42 of the TLA).
50. As the CBA was not involved in the fraud, it did obtain indefeasible title as registered mortgagee, and it intended to sell the property due to the default on its mortgage.
51. Eventually, the proceeding resolved and the Registrar agreed to pay compensation to my client as defrauded registered proprietor under section 110, so that she could pay out the mortgagee and the title could be transferred back to her name.

The son and daughter-in-law – Mrs L

52. The son and daughter-in-law (apparently) of my widowed client forged her signature on the loan application, the mortgage and the guarantee. They obtained the loan money, and fled interstate (last seen somewhere in New South Wales). The mortgagee, not aware of the fraud, sought repayment of the loan from my client, which was the first time she had heard of the lender.
53. A claim for possession by the mortgagee was defended and a counterclaim for discharge of the mortgage was filed and served. In the alternative, a counterclaim was made against the Registrar for compensation under section 110 of the *Transfer of land Act*, 1958.
54. In this case, there was also no Solicitor's Certificate. As fraudsters, the son and daughter-in-law would no doubt have come up with a scenario to convince an unsuspecting solicitor into signing such a Certificate if the lender had required one.
55. The Registrar apparently (again) suspected that my (different) client was involved in the fraud somehow, and insisted on the matter being referred to the fraud squad of Victoria Police.
56. The fraud squad (eventually) obtained forensic evidence that confirmed that the widow's signature was forged. They were unable to trace the exact whereabouts of the son and daughter-in-law. Eventually, the Registrar agreed to pay the widow enough compensation to pay out the mortgagee and the mortgage was removed from the title.

The solicitor

57. In an apparently widespread fraud, my clients were two victims.
58. They were Victorian brothers, who temporarily lived and worked in the United Arab Emirates. For “safekeeping”, the two brothers left the title to each of their (un-mortgaged) properties with their solicitor in the Northern suburbs of Melbourne.
59. Without their knowledge or agreement, the (now no longer practising) solicitor apparently mortgaged each property and used the loan proceeds for his own purposes.
60. One of my clients returned (temporarily) to Melbourne and worked out that something was amiss, so he asked for both his and his brother’s title back. The solicitor had to arrange urgently for the discharge of the mortgages, and so after a short delay, the original titles were returned to my client and his brother.
61. Unfortunately, my client then returned overseas.
62. The solicitor in question wrote to the Registrar and claimed that the original title in each case had been lost.

63. The Registrar of Titles issued new certificates of title for each of the 2 properties.
64. The fraudster/solicitor then proposed to mortgage the new titles to separate mortgagees.
65. Both prospective lenders required a Solicitor's Certificate from a solicitor who was independent from the borrower as a part of their suite of security documents.
66. The fraudster was prepared for this: someone produced (false) identification documents (a Medicare Card and a Driver's licence/passport in the case of each proposed mortgage), and he (or his unknown accomplice) attended another (unsuspecting?) solicitor as a 'walk up' client seeking a Solicitor's Certificate.
67. I have copies of my clients' real Medicare cards, drivers' licences and passports. The photos on the fake id's are not of my clients.
68. The (unsuspecting?) solicitor gave a Solicitor's Certificate certifying that he had met and identified my clients, and explained the loan documents to them.
69. The loans proceeded; the properties were each mortgaged; the fraudster obtained the loan money and spent it.

70. Naturally, my clients, who knew nothing of the loan and mortgage, defaulted.
71. Upon my clients' return to Australia, one brother found that his property had recently been sold at a mortgagee auction. The other brother's property was not far behind.
72. It was too late to stop the first mortgagee sale.
73. However, proceedings were issued to restrain the mortgagee of the second property from selling and the mortgagee counterclaimed for possession of the property.
74. As the lender was not involved in the fraud, and as a result had an indefeasible title as registered mortgagee, the lender faced no real difficulty in obtaining an order for possession of the security property. It had a Solicitor's Certificate that certified that he had explained the mortgage to my client, and my client understood the mortgage.
75. The Fidelity Fund apparently denied a claim made on it on the basis that the solicitor did not hold the title to the property in question on trust. There was no defalcation as such (just theft).
76. The LPLC was unlikely to pay any claim against the solicitor who provided the Certificate, as he had sighted the (fake) id documents.

77. Eventually, the Registrar of Titles agreed to pay the second brother enough compensation to pay out the mortgagee and the mortgage was removed from the title.

78. The Registrar agreed to pay the first brother the amount of his loss arising the mortgagee sale.

As an aside, it took the Legal Services Commission quite a long time to stop the fraudster/solicitor from practising! He had self reported his actions (presumably as a part of a future plea), and nothing happened for several months.

79. Over 2 years have passed since my clients settled with the Registrar of Titles; I believe that the solicitor is yet to be charged with fraud! Apparently, there are at least 26 victims of this fraudster.

OTHER TYPES OF SOLICITOR'S CERTIFICATES

80. You should also bear in mind that lenders are not the only people requiring solicitor's certificates.

81. Other examples of Solicitor's Certificates include:

Certificate in support of an application to remove a caveat

82. When a person interested in land affected by a caveat seeks its removal under section 89A by the Registrar of Titles, the application must be supported by:

Section 89A(2) (b)

... a certificate signed by a person for the time being engaged in legal practice in Victoria, referring to the caveat and stating his opinion that, as regards the land and the estate or interest therein in respect of which the application is made, the caveator does not have the estate or interest claimed by him.

When financial agreements between spouses are binding

83. When a party to a financial agreement wants to ensure that it is binding, section 90G of the *Family Law Act*, 1975 provides, it will be binding if, and only if (among other things):

- (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
- (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
- (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and

Prospective franchisee

84. Under the Franchising Code of Conduct it provides in schedule 1 – clause 10(2), among other things:

Before a franchise agreement is entered into, the franchisor must have received from the prospective franchisee:

- (a) signed statements, that the prospective franchisee has been given advice about the proposed franchise agreement or franchised business, by:
 - (i) an independent legal adviser ...

Legal Profession Uniform Legal Practice (Solicitors) Rules 2015

85. Under the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015, the following rule appears:

Loan and security documents

11.1 This rule applies where:

11.1.1 a solicitor is engaged to give advice to a proposed signatory that will be:

11.1.1.1 a borrower, a grantor of a security interest, or a security provider referred to as a borrower (“a borrower”) in loan or security documents; or

11.1.1.2 a third party mortgagor, guarantor, surety mortgagor or indemnifier (“a guarantor”) providing security for the borrower; and

11.1.2 the solicitor has been asked to provide evidence of the advice.

11.2 The solicitor providing the advice must verify the identity of the proposed signatory using the Verification of Identity Standard contained in Schedule 8 to the Model Participation Rules determined by the Australian Registrars’ National Electronic Conveyancing Council as adopted and made by each jurisdiction pursuant to section 23 of the Electronic Conveyancing National Law.

11.3 The evidence of advice provided by a solicitor to a borrower must be in the form of:

11.3.1 Law Society of NSW Declaration by Borrower/Grantor of a Security Interest Schedule 1, 1A or 1B; or

11.3.2 Law Institute of Victoria Australian Legal Practitioner’s Certificate 1 (Schedule 1).

11.4 The evidence of advice provided by a solicitor to a guarantor must be in the form of:

11.4.1 Law Society of NSW Declaration by Third Party Mortgagor, Guarantor, Surety Mortgagor or Indemnifier for the Borrower/Grantor of a Security Interest Schedule 2 or 2A; or

11.4.2 Law Institute of Victoria Australian Legal Practitioner’s Certificate 2 (Schedule 2).

11.5 Where an interpreter or translator is present while the advice is being provided:

11.5.1 the name of the interpreter or translator must be included on the relevant Law Society of NSW Declaration or Law Institute of Victoria Australian Legal Practitioner's Certificate; and

11.5.2 the interpreter or translator must be asked to complete a certificate in the form of:

11.5.2.1 Law Society of NSW Interpreter's Certificate Schedule 3;
or

11.5.2.2 Law Institute of Victoria Certificate by
Translator/Interpreter (Schedule 3).

11.6 The solicitor providing the advice must obtain the following documents for retention on the solicitor's file:

11.6.1 an acknowledgment in the form of:

11.6.1.1 Law Society of NSW Acknowledgment of Legal Advice Schedule 4, 4A, 4B or 4C [which must not be provided by the solicitor to the lender]; or

11.6.1.2 Law Institute of Victoria Form of Acknowledgment given by a Borrower or Surety to the Certifying Australian Legal Practitioner (Schedule 4); and

11.6.2 a copy of the relevant Law Society of NSW Declaration or Law Institute of Victoria Australian Legal Practitioner's Certificate; and

11.6.3 a copy of Law Society of NSW Interpreter's Certificate Schedule 3 or Law Institute of Victoria Certificate by Translator/Interpreter (Schedule 3) (if applicable); and

11.6.4 a list of the loan and security documents.

11.7 A solicitor who holds a practising certificate issued in:

11.7.1 NSW must use the forms referred to in paragraphs 11.3.1, 11.4.1, 11.5.2.1 and 11.6.1.1, as applicable; and

11.7.2 Victoria **must** use the forms referred to in paragraphs 11.3.2, 11.4.2, 11.5.2.2 and 11.6.1.2, as applicable.

11.8 A solicitor (e.g. a solicitor acting for the lender) must not aid, abet, counsel or procure any other solicitor to provide evidence otherwise than in conformity with this rule.

86. These Rules makes it abundantly clear that Solicitors who are providing certificates for their borrower clients are only to use the standard forms.

Conclusion

87. Solicitor's Certificates are in very common use with lenders, and are used as a form of spreading the risk, or gaining additional security in the form of access to the lawyer's insurer in the event of a later dispute about the validity or enforceability of the relevant mortgage/loan/guarantee documents.

88. Solicitor's Certificates are now sought by a number of other people in a range of different areas.

89. Due to the new Verification of Identity requirements, solicitors who provide certification of their client's identity should satisfy themselves thoroughly about the identity that they are certifying.

Dated 2 March 2016

WG Stark

Hayden Starke Chambers

SCHEDULE 1

LPLC Key Risk Checklist: Solicitor's certificates for borrowers or surety providers

- Allocate only one person in the office to give solicitor's certificates.
- Confine the provision of a solicitor's certificate to existing clients.
- Where the client receives the security documents before you, request they send you the documents well in advance of your meeting to give you sufficient time to read them.
- Where you receive the security documents before the client, provide a copy of the documents to the client prior to signing to give them sufficient time to read them.
- If there is more than one client, consider whether their interests are the same. Does one need to obtain independent advice or will advising them separately be sufficient?
- Never act for both the borrower and a third party security provider.
- Always advise the security provider client without the borrower present.
- At the start of the first meeting insist upon identification and do not proceed unless it is produced. Keep copies of the identification documentation.
- Use an independent interpreter when appropriate. Never use the person who is seeking to gain from the provision of the security as interpreter.
- Advise the client about the key elements of the documents and the worst case scenario.
- Ask the client to tell you what they understood your explanation to mean and record their response.
- Address the possibility of capacity, undue influence or duress.
- Ask your borrower client why they are borrowing the money.
- Ask your security provider client why they are entering into the transaction and record the answer.
- Do not provide financial advice.
 - Advise your borrower client of the interest rates applicable to the transaction. Advise them in strong terms to obtain independent financial advice about the loan and the investment for which they are borrowing the money. Refer your client to a qualified accountant or financial adviser

and ensure they have enough time to obtain this advice.

- Advise your security provider client in strong terms they should obtain independent financial advice about the ability of the borrower to repay the loan. Refer your client to a qualified accountant or financial adviser.

Ensure they have enough time to obtain this advice.

- Make a comprehensive file note of all attendances on your client, whether in your office or elsewhere.
- Check 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
 - record the substance of the advice given and the client's response/instructions
 - are a note to the file rather than a note to you.
- Use the LIV/ABA solicitor's certificate even if the financier has provided a different form of certificate.
- Confirm your advice in writing and seek a signed acknowledgment from the client.
- Keep files indefinitely.

Unrepresented surety mortgagors or guarantors

- Advise any security providers in writing that you are not acting for them and they should seek independent legal advice.
- Do not prepare answers to requisitions on the security provider's behalf.
- Never use the borrower as an agent to reach the security provider.
- Ensure the security provider signs the disbursement order and you bill the borrower directly.
- Be clear about who you are acting for in your correspondence with the other side.

SCHEDULE 2
AMENDMENTS TO THE *TRANSFER OF LAND ACT*, 1958
AND COMMENTARY

Section 87A:

1. Requires mortgagees, at the time of execution of a mortgage or a variation of a mortgage, to take **reasonable steps** to ensure mortgagors with whom they are dealing are the Registered Proprietor's of the land being offered as security.
2. Compliance is deemed if mortgagees follow the procedures declared by the registrar of titles under s.106A of the TLA or set out in the participation rules for electronic conveyancing.
3. If the registrar is satisfied that the Registered Proprietor did not execute or authorise the mortgage or variation of mortgage, and the mortgagee did not comply with s.87A, the registrar may refuse to register the mortgage (if not already mortgaged) or **remove the mortgage from the register**. The mortgagee then **loses indefeasibility of title for the mortgage**, and the mortgage (or variation, as the case may be) is void.
4. Note: the registrar had not made a declaration as of late 2015, but had advised¹ that the requirements will be the same as in the Electronic Conveyancing Participation Rules, adapted where necessary for paper instruments.

Section 87B

5. Similar provisions apply to a transferee of a mortgage who does not either ensure the mortgagee took reasonable steps to identify the mortgagor as the Registered Proprietor of the property, and the mortgage ultimately turns out not to have been granted by the Registered Proprietor.

¹ Customer Information Bulletin October 2014

6. Comment on ss.87A & 87B: The power conferred on the Registrar to remove a mortgage from the title and render it void is remarkable; it must be subject to Administrative Law review, but it should really be a decision made by a judge after a full trial with sworn evidence, not a bureaucrat!

7. Section 87C

8. The creation variation or surrender of a lease or the creation or variation of an easement or covenant will not bind a mortgagee unless the mortgagee has consented in writing to it.
9. Comment: this probably codified the law as it was, but it is handy to have an easy source to rely upon for that law now.

10. Section 87D

11. If land has been mortgaged fraudulently, the registered proprietor is not party to that fraud, and the registered proprietor is entitled to be indemnified under s.110(1) of the TLA, the mortgagee is limited in the amount it can require to be paid for a discharge of mortgage to the principal amount together with any interest, the rate of which must not exceed the Bank Accepted Bills rate. Section 110(3)(c) of the Act has been amended likewise to provide that where the mortgagor has been defrauded and the mortgagee complied with ss. 87A or 87B of the Act, the mortgagor cannot recover more under the indemnity in s.110(1) of the Act than the principal amount together with any interest, the rate of which must not exceed the Bank Accepted Bills rate.
12. Comment: These provisions are designed to protect the Registrar. If a mortgagee did not comply with s.87A and 87B, the mortgage would be liable to be removed under those sections. If the mortgagee did the right thing, however, the mortgagee is **still limited to recovering the reduced amount** provided for in s.110(1)(c) of the Act.

13. Section 87E

14. If land has been mortgaged fraudulently, the registered proprietor is not party to that fraud, the registered proprietor is entitled to be indemnified under s.110(1) of the TLA and the land is sold in a mortgagee sale under s.77 of the TLA, the mortgagee is **limited in the amount it can retain from the proceeds of sale** to the principal amount together with any interest, the rate of which must not exceed the Bank Accepted Bills rate.

15. Section 88A

16. As an adjunct to s.87C, a mortgagee may apply to the Registrar to reinstate the Register to its former state, if the mortgagee has not consented in writing to a lease, variation of lease or surrender of a lease and the mortgagee is exercising a power of sale under s.77 of the TLA. This provision is unlikely to have much operation as leases are rarely registered in Victoria. In this case, at least, the Registrar is required to give notice to the tenant affected by the application and the tenant may give evidence of the consent in writing, on which the Registrar will rule.
17. There is no role given to the Courts in the event of a dispute, but presumably a remedy would exist under the *Administrative Law Act* 1978 if the Registrar acted improperly in the exercise of the adjudicative power conferred under this section. Note: s.116 would not apply, as that section only enables a Registrar's decision to *refuse* an application to be made the subject of judicial review under that section.

18. Section 88B

19. Likewise, a mortgagee may apply to the Registrar for the reinstatement of the Register to its former state if the mortgagee has not consented in writing to the creation, variation or removal of an easement or restrictive covenant, and the mortgagee is selling the affected land in a mortgagee sale under s.77 of the TLA. Again, the section gives the person adversely affected by the application to provide evidence of the consent in writing, on which the Registrar will rule.

20. Comment: One wonders how the draconian provisions in ss.87A - 87E made it through Parliament without substantial opposition from the banks. Of course, they are mostly directed towards lenders of last resort and not the banks. Nonetheless, there is no provision for a mortgagee to be given the opportunity to show cause, or any caveat procedure to prevent the Registrar from exercising the power to remove the mortgage of the kind provided for in s.26R of the TLA, no requirement even for the Registrar to tell the mortgagee that it has lost its mortgage.
21. Presumably at least Parliament acknowledges that the Registrar is required to observe the rules of natural justice and so be amenable to review under the *Administrative Law Act* 1978.
22. It is a sorry state of affairs for the rule of law in Victoria, however, when an administrative official can extinguish substantive property rights summarily and (on paper at least) secretly. Such draconian powers are not conferred on the Registrar under other provisions in the Act where decisions are made to affect substantive property rights (eg vesting orders under s.62, in respect of which notice must be given and a caveat may be lodged under s.61).