



New South Wales

## LEGAL PROFESSION ACT 1987

### Additional Solicitors' Rule

The Council of the Law Society of New South Wales, on 3 October 1996, resolved, pursuant to its powers under section 57B of the Legal Profession Act, to make, as a Solicitors Professional Conduct and Practice Rule, the Rule which follows:

#### 45. INDEPENDENT SOLICITORS' CERTIFICATES OF EXPLANATION OF LOAN DOCUMENTS

##### 45.1. APPLICATION OF THIS RULE

45.1.1 This Rule applies where the proposed signatory is a natural person or a corporation that will be:

- the borrower, or a security provider referred to as a borrower ("the borrower") in the documents to be signed; or
- a third party mortgagor, guarantor, surety mortgagor or indemnifier ("the guarantor") providing security for the borrower; and

whether or not the documents relate to the provision of credit to which the Consumer Credit Code applies.

45.1.2 This Rule applies only where the solicitor has been asked to give a solicitor's certificate.

##### 45.2. INDEPENDENCE OF THE CERTIFYING SOLICITOR

45.2.1 The solicitor must be independent of the lender in the transaction to which the documents relate.

45.2.2 Where there is any conflict between the interests of two or more borrowers, all borrowers must be advised separately by different firms of solicitors.

- 45.2.3 A solicitor acting for a borrower or guarantor must not give advice to the lender in the same transaction.
- 45.2.4 Where advice is being given to a guarantor, the solicitor must, as well as being independent of the lender, be independent of the borrower, and the advice given by the solicitor must be in the absence of the borrower.
- 45.2.5 Where there is any conflict between the interests of two or more guarantors, all guarantors must be advised separately by different firms of solicitors.
- 45.2.6 Where a corporation is a party to the documents or the transaction to which they relate, and any director or other officer of the corporation will provide security over any property of that director or officer, the solicitor independently advising the director or officer must not advise or act for the corporation.

45.3. **IDENTIFICATION OF PROPOSED SIGNATORIES OF DOCUMENTS**

- 45.3.1 The solicitor must do everything reasonably necessary to identify any proposed signatory as the person described in the documents.

45.4. **ADVICE**

- 45.4.1 The solicitor should advise a proposed signatory of those matters that the solicitor, in exercising the professional skill and judgment called for in the circumstances of the particular case, considers appropriate.
- 45.4.2 Without limiting the generality of 45.4.1, when advising a borrower the solicitor should, at least, advise the borrower that:
  - 45.4.2.1 by signing the documents the borrower will be liable for regular payments of interest and repayment of the amount of the loan at the due date;
  - 45.4.2.2 if the borrower fails to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;

- 45.4.2.3 if the borrower fails to comply with any of the terms and conditions of the loan including the obligations to pay principal or interest, the lender can sue the borrower personally, and the lender may take possession of the borrower's property and, after notice, sell it to recover the amount owing together with interest and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the property and, if the proceeds of sale of the borrower's property are insufficient to satisfy the debt to the lender, the lender can sue the borrower for the deficit;
- 45.4.2.4 where the Consumer Credit Code applies, the extent (if any) to which the advice given by the solicitor requires to be modified, and the remedies that may be available under the Code;
- 45.4.2.5 the solicitor does not profess any qualifications to give financial (as distinct from legal) advice; and
- 45.4.2.6 if the borrower has any questions about any financial aspect of the transaction or the documents, the borrower should consult an accountant or other financial counsellor of the borrower's choice before signing the documents.

- 45.4.3 Without limiting the generality of 45.4.1, when advising a guarantor, the solicitor should, at least, advise the guarantor that:
  - 45.4.3.1 if the borrower fails to make any payment on time, the guarantor will be liable to remedy that failure, and that could involve the guarantor in payment to the lender of all amounts owed by the borrower to the lender including principal, interest, default interest and the lender's costs of rectifying the default;

- 45.4.3.2 if the guarantor fails to remedy any failure by the borrower to comply with the terms and conditions of the loan in any way, including the obligation to pay principal, interest, default interest, or other charges, the lender can sue the guarantor personally, and can take possession of the guarantor's property secured to the lender and sell it to recover the amount owing together with interest and other costs, including solicitor's costs, the costs of selling the property and the costs of maintaining the property and, if the proceeds of sale of the guarantor's property are insufficient to satisfy the debt to the lender, the lender can sue the guarantor for the deficit;
- 45.4.3.3 the lender can exercise its rights against the guarantor even if it has not pursued the borrower;
- 45.4.3.4 the liability of the guarantor is limited to a specified sum, or is unlimited (whichever is the case);
- 45.4.3.5 where the Consumer Credit Code applies, the extent (if any) to which the advice given by the solicitor requires to be modified, and the remedies that may be available under the Code;
- 45.4.3.6 the solicitor does not profess any qualification to give financial (as distinct from legal) advice; and
- 45.4.3.7 if the guarantor has any questions about any financial aspect of the transaction or the documents, the guarantor should consult an accountant or other financial counsellor of the guarantor's choice before signing the documents.

#### 45.5. CONTENTS OF THE CERTIFICATE

- 45.5.1 Any certificate provided by a solicitor for the borrower must be in the form approved and published by the NSW Law Society from time to time.
- 45.5.2 Any certificate provided by a solicitor for a guarantor must be in the form approved and published by the NSW Law Society from time to time.

45.5.3 Where an interpreter is present at the conference when a signatory is advised by a solicitor instructed independently of the lender, the name of the interpreter must be included in the solicitor's certificate, and the interpreter must be asked to complete a certificate in the form approved and published by the NSW Law Society from time to time, before the conference is concluded.

#### **45.6. ACKNOWLEDGMENT BY SIGNATORY**

45.6.1 The NSW Law Society recommends that a certifying solicitor should ensure that an acknowledgment is signed by each signatory for retention on the solicitor's file. A suggested form of acknowledgment could read:

“The undersigned ..... (signatory) acknowledges that, before I signed them, the loan and security documents bearing my signature were explained to me by ..... (solicitor), and, in particular, the matters mentioned in paragraph 4 of the Solicitors' Rule, *Independent Solicitors' Certificates of Explanation of Loan Documents*”.

45.6.2 The acknowledgment to be signed by each signatory should be in the form approved and published by the NSW Law Society from time to time.

This Rule commences one (1) month after its publication in the NSW Government Gazette.