

**Issues for the opining firm to consider where an obligor is an individual
(March 2016)**

The BFSLA opinions assume all Obligor are corporate entities. However, occasionally individuals may be required to execute documents (for example, directors may give personal guarantees). If this is the case, the opining firm will need to tailor the opinion for the transaction. The following matters, at least, will need to be dealt with:

- If there are both corporate and individual obligors, the opinion will need to distinguish between them and include appropriate definitions (for example, “Individual Obligor”).
- If you conduct a bankruptcy search at the Australian Financial Security Authority (www.afsa.gov.au) in respect of an Individual Obligor add to paragraph 4 (Searches):

“() the results of a bankruptcy request search at the Australian Financial Security Authority in respect of #insert name of Individual Obligor# conducted on #insert date# at #insert time# (#insert place eg Sydney# time)”.
- Include additional assumptions in Schedule 1 to cover matters of fact which may not be able to be verified from a review of documents:
 - legal capacity (for example, they have mental capacity, are not a minor and are not subject to any guardianship orders) and immunity; and
 - potential challenges on the basis of the common law argument of non est factum:

“[The/Each] Individual Obligor party to a Document:

 - (a) has full legal capacity to enter into the Document, has no sovereign, diplomatic or other immunity and is not subject to an order restricting their power to enter contracts or deal with their assets; and
 - (b) understands the Document and the effect of signing it.”
- If the persons preparing the opinion have reason to doubt the legal capacity of the individual Obligor or suspect that an immunity may be available to them (e.g. foreign sovereign immunity, diplomatic immunity or membership of visiting foreign forces) or that they are subject to a limiting order (e.g. guardianship) then it is necessary to consider whether it is appropriate to give any opinion at all in respect of the individual. In any event do **not** include an opinion that the individual Obligor is not entitled to claim sovereign or other general immunity from suit or execution for itself or its assets.
- Insert a reference to “or bankruptcy” after “insolvency” in Qualification (b) in Schedule 2.

Where an individual Obligor is involved the opining firm will also need to consider laws and industry codes which have specific application to individuals (for example, consumer credit legislation and the Code of Banking Practice). The opinion may need to be further tailored to address relevant issues.