

the leading lawyers to government



Australian Government Solicitor
50 Blackall Street Barton ACT 2600
Locked Bag 7246 Canberra Mail Centre ACT 2610
T 02 6253 7000 DX 5678 Canberra
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

OPINION

VALIDITY AND ENFORCEABILITY OF DEED OF GUARANTEE

28 November 2008

George Witynski
Deputy Chief General Counsel

File reference: 08084572

Office of General Counsel

OPINION

VALIDITY AND ENFORCEABILITY OF DEED OF GUARANTEE

1. I have been asked to advise on the validity and enforceability of the Deed of Guarantee in respect of the Australian Government Guarantee Scheme for Large Deposits and Wholesale Funding ('the Deed of Guarantee') dated 20 November 2008.

DEED OF GUARANTEE

2. The Deed of Guarantee was signed by the Treasurer of the Commonwealth of Australia ('the Commonwealth') on 20 November 2008 and subsequently posted on www.guaranteescheme.gov.au.
3. Under the Deed of Guarantee, the Commonwealth, amongst other things, guarantees to 'Beneficiaries' the payment by 'Eligible Institutions' of 'Guaranteed Liabilities'. A Beneficiary is a person to whom a Guaranteed Liability is from time to time owed. The expression 'Eligible Institution' has the meaning given in the rules of the Australian Government Guarantee Scheme for Large Deposits and Wholesale Funding published on www.guaranteescheme.gov.au ('the Scheme Rules'). Under the Scheme Rules, an Eligible Institution is an authorised deposit-taking institution (including a foreign ADI) within the meaning of the *Banking Act 1959* and listed in Schedule 1. A Guaranteed Liability is a liability that is the subject of an Eligibility Certificate. An Eligibility Certificate is a certificate issued in accordance with the Scheme Rules.
4. Under the Deed of Guarantee, the Commonwealth also separately undertakes to pay a Guaranteed Liability, in accordance with the Scheme Rules, where the Guaranteed Liability has not been paid by an Eligible Institution on the date on which it becomes due and payable and a claim is made in accordance with the Scheme Rules and following the expiry of an applicable grace period. This undertaking is subject to a requirement to obtain the written consent of the Commonwealth in relation to certain changes in relation to the Guaranteed Liability.
5. The benefit of the guarantee and other undertakings under the Deed of Guarantee inure to the benefit of each Beneficiary and its administrators, successors and permitted assigns.
6. The Deed of Guarantee is expressed to come into effect on 28 November 2008.
7. Without prejudice to certain accrued rights, the Deed of Guarantee terminates at midnight on the date which is 67 calendar months after the Final Application Date, which is a date determined by the Commonwealth in accordance with the Scheme Rules. However, the Commonwealth may extend the date of termination of the Deed of Guarantee at any time prior to its termination in accordance with the

Scheme Rules. Without prejudice to the interests of Beneficiaries in respect of any subsisting Guaranteed Liability (except as required by law), the Commonwealth may also amend the terms of the Deed of Guarantee at any time at its discretion by publishing such amendment on the website referred to in the Scheme Rules.

8. The Scheme Rules are expressed to be capable of amendment or supplementation by the Commonwealth at any time at its discretion by publication on the website referred to in the Scheme Rules, without prejudice to the interests of Beneficiaries in respect of any subsisting Guaranteed Liability (except as required by law).
9. The Deed of Guarantee is governed by, and is to be construed in accordance with, the law of New South Wales, Australia.
10. Prior to the execution of the Deed of Guarantee by the Treasurer, all necessary approvals were obtained under the *Financial Management and Accountability Regulations 1997* (Cth).

SUMMARY OF ADVICE

11. In my view:
 - 1) the undertakings by the Commonwealth under the Deed of Guarantee are valid and legally binding obligations of the Commonwealth;
 - 2) the execution of the Deed of Guarantee was not in violation of any Australian law;
 - 3) except as expressly stated in the Deed of Guarantee, the undertakings given by the Commonwealth under the Deed of Guarantee are unconditional;
 - 4) the Commonwealth's obligations under the Deed of Guarantee rank on an equal footing with its other debts and financial obligations;
 - 5) the Commonwealth's obligations under the Deed of Guarantee are enforceable in an Australian court of competent jurisdiction;
 - 6) in any suit in an Australian court the Commonwealth would not be entitled to any defence based on Crown or sovereign immunity;
 - 7) a judgment obtained in a foreign court in relation to the Deed of Guarantee would be enforceable in certain Australian courts under the *Foreign Judgments Act 1991* (Cth), subject to the conditions set out in that Act, and under the common law, subject to Australian private international law rules;
 - 8) any payments under the Deed of Guarantee in accordance with the Scheme Rules (including under any judgment) could be made under the authority of the standing appropriation in the *Guarantee Scheme for Large Deposits and Wholesale Funds Appropriation Act 2008* (Cth).

My conclusions are limited to Australian law and I express no view about the validity of the Deed of Guarantee under foreign law or its enforceability in courts other than Australian courts.

DETAILED ADVICE

Validity of Deed of Guarantee

12. While the powers of the Commonwealth are limited by the Australian Constitution ('the Constitution'), the Commonwealth had constitutional power to enter into the Deed of Guarantee.
13. The entry into a contractual arrangement, such as the Deed of Guarantee, involves the exercise of the Commonwealth's executive power. The extent of the Commonwealth's executive power broadly coincides with the Commonwealth's legislative powers, which are generally set out in s 51 of the Constitution. The powers that would support the provision of the guarantee and the other undertakings under the Deed of Guarantee include s 51(i) (trade and commerce with other countries), s 51(xiii) (banking) and 51(xx) (foreign corporations and trading and financial corporations formed within the limits of the Commonwealth).
14. The entry into of the Deed of Guarantee was therefore within the executive power of the Commonwealth. Moreover, it did not require prior approval under any Commonwealth legislation in order to be valid.
15. While the executive power of the Commonwealth may be abrogated by Commonwealth legislation, there is no current Commonwealth legislation which prevented the Commonwealth from entering into the Deed of Guarantee.
16. While, under s 81 of the Constitution, an amount payable by the Commonwealth under the Deed of Guarantee would need to be included in a valid appropriation by the Commonwealth Parliament, the availability or non-availability of such an appropriation at the time of the signing of the Deed of Guarantee would not affect the validity of the Deed of Guarantee or the legally binding nature of the Commonwealth's obligations under that Deed.
17. Moreover, in view of the responsibilities of the Treasurer under the current Administrative Arrangements Order, which distributes responsibilities among Commonwealth Ministers and their Departments, the Treasurer had power to sign the Deed of Guarantee on behalf of the Commonwealth.
18. In my view, therefore, the undertakings by the Commonwealth under the Deed of Guarantee are valid and legally binding obligations of the Commonwealth under Australian law.

Non-violation of Australian law

19. The *Financial Management and Accountability Regulations 1997* (Cth) impose certain requirements in relation to spending proposals, including the entering into of contracts involving potential expenditure by the Commonwealth and loan guarantees (see regs 9,10 and 14). While non-compliance with those requirements does not affect the validity of Commonwealth's contractual arrangements, all relevant requirements in relation to the entry into the Deed of Guarantee, including the obtaining of approvals, have been met.
20. In my view, therefore, the entry into the Deed of Guarantee was not in violation of any relevant Australian law.

Obligations under the Deed of Guarantee unconditional

21. Except as provided under the Deed of Guarantee, the obligations of the Commonwealth under the Deed of Guarantee are unconditional.

Obligations under the Deed of Guarantee rank equally

22. There is no Australian law that would cause a liability of the Commonwealth under the Deed of Guarantee to rank behind any other indebtedness or financial obligation of the Commonwealth.
23. In my view, therefore, under existing Australian law, the obligations of the Commonwealth under the Deed of Guarantee would rank on an equal footing with its other debts and financial obligations.

Enforceability of obligations under the Deed of Guarantee

24. In the hitherto unknown contingency of default by the Commonwealth in its financial obligations, a Beneficiary under the Deed of Guarantee could, by virtue of s 64 of the *Judiciary Act 1903*, sue the Commonwealth in like manner as the Beneficiary could sue any other subject. Section 64 constitutes a statutory waiver of the Commonwealth's common law Crown or sovereign immunity from suit. Jurisdiction to hear claims against the Commonwealth in contract is vested in certain Australian courts under s 56 of the *Judiciary Act 1903*.
25. Under s 65 of the *Judiciary Act 1903*, no execution or attachment shall be issued against the property or revenues of the Commonwealth. However, if any judgment is given against the Commonwealth, the Minister for Finance and Administration is obliged to satisfy the judgment out of money legally available, on receipt of a certificate of the judgment issued by an officer of a court in which such a judgment has been obtained (s 66).
26. In my view, therefore, the Commonwealth's obligations under the Deed of Guarantee are legally enforceable in an Australian court. The payment of money under the Deed of Guarantee, including pursuant to a judgment of a court of competent jurisdiction, would be subject to the ordinary constitutional requirement

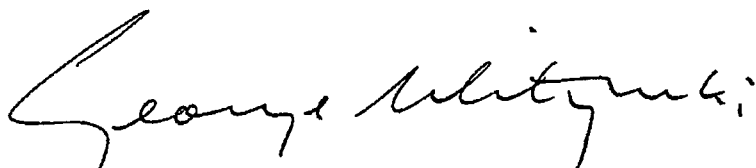
that no money may be paid out of the Consolidated Revenue Fund without an appropriation by Parliament (see further below).

Enforceability of foreign judgments

27. A money judgment obtained in relation to the Deed of Guarantee in a superior court of a foreign country could, in certain circumstances, be registered in the Federal Court of Australia or the Supreme Court of a State or Territory and enforced as a judgment of that Australian court, under the *Foreign Judgments Act 1991* (Cth). The circumstances include that the Act applies to the relevant foreign country on the basis of reciprocity of treatment in that country of money judgments given in Australian superior courts. Other circumstances mirror private international law rules concerning restrictions on the enforceability of judgments, for example, where the judgment has been obtained by fraud.
28. A foreign judgment obtained in relation to the Deed of Guarantee could also be enforced in the courts of the Australian States and Territories under common law rules relating to the enforcement of foreign judgments. The enforcement of foreign judgments on this basis would be subject to restrictions on the enforcement of foreign judgments contained in Australian private international law rules.
29. The payment of money under foreign judgments would also be subject to the ordinary constitutional requirement that no money may be paid out of the Consolidated Revenue Fund without an appropriation by Parliament (see further below).

Availability of appropriations

30. Under s 81 of the Constitution, no money can be paid out of the Consolidated Revenue Fund of the Commonwealth without an appropriation by the Commonwealth Parliament.
31. The *Guarantee Scheme for Large Deposits and Wholesale Funds Appropriation Act 2008* (Cth) contains a standing appropriation for the purpose of paying claims under the Deed of Guarantee in accordance with the Scheme Rules. In my view, therefore, there would clearly be authority for the payment of claims under the Deed of Guarantee in accordance with the Scheme Rules, including under any judgment.



George Witynski
Deputy Chief General Counsel