



# Guarantors – how to obtain independent legal advice on a guarantee

Taryn Hartley

Banks, financial institutions and other third parties may require a person to obtain independent legal advice regarding the person's obligations under a personal guarantee.

It is important that, as a guarantor, you understand your obligations in respect of obtaining legal advice and, in order to keep costs reasonable, you are well prepared to engage a lawyer.

## common circumstances where legal advice is required

There are a number of different circumstances where legal advice may be required to be obtained so it is important to identify what the circumstances are (and the requirements of

the third party beneficiary of the guarantee) before obtaining the advice so that you can adequately instruct a lawyer.

Some of the common circumstances where personal guarantees or corporate guarantees are provided include:

| Borrower                                 | Example of who may be the guarantor                 |
|--|---|
| Individual                               | Spouse, de facto, relative of the individual        |
| Individual                               | Company or related entity                           |
| Individual as trustee of a trust         | Individual or beneficiary of the trust              |
| Company with sole director               | Sole director, shareholder                          |
| Company with 2 or more related directors | Directors, shareholders                             |
| Company as trustee of a trust            | Directors, shareholders, beneficiaries of the trust |

## WHEN MIGHT LEGAL ADVICE (INDEPENDENT OR OTHERWISE) BE REQUIRED ?

Generally, a third party beneficiary of a guarantee will require that the guarantor obtain legal advice. As to whether or not the legal advice is required to be independent (i.e. from a lawyer who doesn't act for the borrower) will depend on factors such as:

- The parties involved – whether they are related (e.g. directors and shareholders are husband and wife) or not. Where the guarantors are related and are all involved in the borrower entity, independent legal advice may not be required, and legal advice from the lawyer acting for the borrower may be able to provide the advice.
- The requirements of the third party – independent legal advice is a way for the third

party to transfer risk to the borrower, guarantor and the person providing the advice. Sometimes the third party will insist that each guarantor obtains their own legal advice regardless of whether or not they are related – this can cause issues where there are a number of guarantors involved, and many independent lawyers need to be located. This can also cause significant costs to be incurred by the guarantors.

## are the terms of a guarantee negotiable?

Guarantors should consider whether there is an opportunity to negotiate the terms of the guarantee prior to signing the documents.

Some of the terms which may be negotiable include:

- The joint and several liability for the guarantors – could this be several and limited?
- The discharge of the guarantor once the debt has reduced to an agreed level – commercially this is unlikely.
- Capping of “extras” over and above the primary liability that is being secured – this includes interest, costs, etc. should the guarantee be called upon.

While these do not seem like significant matters, they can provide some limitation for the risk and exposure of the guarantor.

## what do you need to do to obtain independent legal advice?

Obtaining independent legal advice is not straight forward, there are a number of steps that a guarantor should take to assist the lawyer in providing the advice and ensuring that the advice that the guarantor receives is adequate.

These steps include:

- Providing the lawyer with a copy of the guarantee documents as well as any documents relating to the borrowing or other arrangements in advance of the meeting. The lawyer should have an opportunity to review the documents to fully understand the matters on which the lawyer is being asked to advise, the risks to the guarantor, etc. Each guarantor’s circumstances are different, so there is no “one size fits all” approach to independent legal advice.

- Bringing proper identification to the meeting – this could include a driver’s licence, passport, credit card, Medicare card, etc. The lawyer will need to confirm that the guarantor is the person named in the documents and there are different requirements to identify individuals for different purposes.
- Ensuring that it is only the guarantor that turns up to the meeting – if there is an individual who is the borrower (e.g. one spouse) and a separate individual guarantor (e.g. the other spouse), the borrower spouse should not attend the meeting. The lawyer needs to meet with the guarantor privately and in a setting which does not include the borrower.
- Set aside sufficient time to have the meeting with the lawyer – in order to properly advise a guarantor a lawyer needs to thoroughly discuss with the guarantor the risks involved in providing the guarantee, the risks of the borrower defaulting on the primary borrowing, the guarantor’s obligations under the guarantee, etc.
- Be prepared the listen to the advice and take on board the advice that is being provided. Whilst a guarantor may trust a borrower, the lawyer may be raising issues which the guarantor has not thought about and which, without further investigation, could increase the risk to the guarantor.

## What can mcinnes wilson lawyers do to assist guarantors?

McInnes Wilson Lawyers can provide assistance to borrowers who are negotiating with financiers and third parties who are requesting personal or corporate guarantees be provided to secure payment of monies or performance of obligations. This includes negotiating the terms of the securities and limitations which can assist in mitigating the exposure of related persons and entities to the debt or obligations.

McInnes Wilson Lawyers can also assist in providing independent legal advice to guarantors.

## Contact the article author for more info



## Taryn Hartley

Corporate and Commercial | Brisbane

T: 07 3014 6513

E: [thartley@mcw.com.au](mailto:thartley@mcw.com.au)