The modern contract of guarantee

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The updated second edition of the original 1985 work starts by promising a detailed reappraisal of its core subject. As the authors imply in their *Preface* the intervening seven years have seen much more than the steady creep of changes in the law that other new editions of legal texts generally need to accommodate. Adding to the complexity of taking these changes on board is the fact that almost all of these changes have been by judicial pronouncement rather than by statute. The extent of the changes is admirably first explained as an economic, rather than a legal, phenomenon: '[t]he recession in Australia and elsewhere has made the position of guarantors particularly vulnerable, with creditors finding it necessary to enforce their collateral securities.'

In other ways, though, the second edition remains a continuation of the first. It remains the leading Australian text in the area of guarantees. Its comprehensiveness alone assures it this pre-eminent position. But also its cross-boundary subject matter - a splicing of contract law and equity - is unique amongst other Australian texts dealing with guarantees, which only deal with guarantees either as subsets of the law of contract, or equity.

The changes in the law since the first edition have mainly been to equitable doctrines affecting guarantees. The rewriting of the sections relating to undue influence and unconscionable bargains has been extremely thorough; the passage on the meaning of independent advice is new to the second edition and is particularly succinct and definitive. The sections on equitable remedies thus should be on top of the short reading lists of practitioners litigating to overturn guarantees. Indeed, the *Preface* to the second edition expressly welcomes such practitioners to the intended readership for the text.

But it almost goes without saying that the primary target audience was, and remains, those legal practitioners who are habitually the drafters of guarantees. Much of the text is essentially a drafting manual,

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with only the occasional acknowledgment that even state of the art drafting cannot always protect the lender's interests. Here, there has been no shift of emphasis, or extensive rewriting, between the first and the second editions. A consequent weakness of the second edition is that it fails to adequately integrate the applicable equitable doctrines with the rest of the text; instead it has a general emphasis on drafting as a near universal panacea with a separate and ancillary discussion of equitable remedies. As the text's own discussion on the expansion of equitable remedies shows, this approach, though realistic in 1985, has since become increasingly untenable. While it is acknowledged that the substantive integration of common law and equity is fraught with lofty doctrinal problems, keeping the contract law aspect almost completely separate from the applicable equitable doctrines diminishes the academic usefulness of the book. Conversely, this approach probably increases its usefulness as a ready reference to practitioners, on both the litigator and drafter sides.

As a point of both form and substance, the authors' continuing use of gender-specific language in their second edition is ungracious to their readership. In formal terms, avoiding gender-neutral language in this day and age in any academic publication is making an intransigent point in a debate long since over, whereas the same in 1985 could, conceivably, have been an accidental omission. But the flawed use of gender-specific language also affects the analysis of substantive legal issues. Especially given the recent revival of the *Yerkey v. Jones* principle in favour of wife guarantors (acknowledged in the text) and the emergent label of sexually transmitted debt (unacknowledged in the text), the guarantor's presumptively being a 'him' is a clumsy subterfuge in this highly gendered area of the law.

Deakin University

Deakin University is named after Alfred Deakin, Australia's first Federal Attorney-General and second Prime Minister. As Attorney-General, Deakin was responsible for much of the legislation passed by the first Federal Parliament. This covered subjects as diverse as the public service, defence, industrial arbitration and statutory interpretation. A prime example of his skill as a lawyer and parliamentarian was the enactment of the *Commonwealth Judiciary Act* in 1903 which established the High Court of Australia.

Deakin University is a large metropolitan and regional university with campuses at Burwood, Geelong, Rusden, Toorak and Warrnambool. It has approximately 26,000 students enrolled in courses at all levels and offered in both on-campus and off-campus modes of study. The university employs over 2,200 staff.

Since its inception, Deakin has had a strong commitment to off-campus teaching and in 1989 it was formally designated as one of the eight Distance Education Centres in Australia.

School of Law

Deakin University has adopted an administrative structure comprising five cross campus faculties. As part of this structure, the School of Law is located within the Faculty of Management together with the Schools of Economics, Accounting and Finance, Management and Marketing and Management Information Systems. This approach is consistent with the School's orientation towards commercial law and serves to reinforce the important links which exist between law and the other disciplines embraced by the Faculty. It is also consistent with the School's responsibility for teaching the law units forming part of the Faculty's BCom Degree. This interdisciplinary approach will enrich teaching and research within the School and enhance students' knowledge and understanding of the law and the commercial environment within which it operates.

Legal Education is available through the School in various modes. These include on and off-campus teaching and day, evening and part-time study. Currently, over 500 students are enrolled in the School's programs. The School employs 38 staff.