

Sexually-transmitted/ emotionally-transmitted debt

'Sexually-transmitted debt' (STD) typically refers to a situation where legal liability is spread from the principal debtor to his partner. While this may occur within a range of relationships and situations, the cases and commentaries mapped here relate to wives (and after 1998 also de facto partners) taking on economic liability for their husbands' business borrowings or debts of the family company. The main concern is that the spouse takes on obligations due to the circumstances of the relationship, rather than an awareness of the liability or because she receives some benefit. The cases typically arise where there is company insolvency, husband bankruptcy or a relationship breakdown. Often the spouse liability results in the loss of a family home that has been provided as security. This part of the project maps cases, feminist commentary and law reform related to the recognition of STD within contract law and corporations law. We provide a summary of relevant cases and cite feminist academic commentary of the cases where available, noting whether this commentary is neutral, positive or negative. We also identify relevant law reform reports and industry or legislative intervention. In the map, we have identified women judicial officers in red text where known, and links to cases are provided if they are publicly available. This text is up to date to December 2014.

Feminist academics have identified that STD can arise in a range of situations that tend to particularly impact upon women. These situations include where debts are incurred as a result of:

- family violence ([Anrows 2015](#)) or uneven power balance within the relationship;
- a wish to maintain relationships and to protect family;
- the impact of women's traditional roles in the private space, such as the male assuming control of family finances; and
- a lack of opportunity to gain requisite business education or experience.

Feminists have also identified inequalities in the treatment of women by financial institutions (particularly until the early 1990s) where they were assumed to be financially incompetent or simply discriminated against.

However, there is no consensus as to how the law ought to recognise and address these issues. Debate has tended to centre on whether an attitude of sameness or difference of women/wives should be adopted. On the one hand, there is an argument for formal equality - we should assume and allow women to have equal ability to make financial decisions or to participate as directors in family companies. Generalised assumptions about women's abilities or attributes are essentialist and can be regressive. So we should treat women and men alike. On the other hand, women are still overwhelmingly those likely to provide support for their partner's financial endeavours for little or no personal financial gain and are subject to the impact of sex discrimination and entrenched gendered roles. Therefore, some feminists argue that to achieve

substantive equality the law must be able to recognise gendered differences – hence the need for a specific difference rule. Others have complicated this argument by pointing out that this recognition should not focus on perceived ‘women’s problems’ but be sufficiently nuanced to take account of and address the real factors which produce unfair results like systemic gendered economic inequality.

Our map of STD in Australian contract law and corporations law

There are three parts to our case study mapping judicial notice of the concept of, and use of the phrase, STD. It maps how it arises in cases:

- applying equitable doctrines of undue influence and unconscionable dealing for relief from spousal guarantees;
- using statutory avenues for relief from spousal guarantees; and
- conducted under corporations law concerning wives as directors of family companies.

This study is confined to these areas where STD has been most used in the courts and noticed by commentators. We also note the use of like phrases such as emotionally transmitted debt or relationship debt in cases in this map.

Undue influence and unconscionability claims regarding spousal guarantees

Contract law has adopted the liberal idea of the private family in which the law ought not to intervene or to regulate. Feminists have critiqued this approach as disproportionately disadvantaging women (eg. [Frug 1984](#)) and also as a legal fiction ([Graycar & Morgan](#), Ch 2). Nevertheless, the equitable doctrines of undue influence and unconscionability have long recognised that contractual obligations might be undertaken in situations of inequality or unfairness and provided relief in some cases. Thus equity has a role to play in remedying the harshness of legal assumptions that those contracting are autonomous, self-interested and consenting. Yet, this map reports feminists’ concern about the application of these equitable doctrines to the situation of wives/partners guaranteeing their husband’s/partner’s debts. While equity provides a legal basis to draw attention to the impact of relationship pressures, feminists have pointed out that the outcome of these cases is often substantially influenced by inappropriate judicial attributions to women about feminine passivity and selflessness. This has been identified as a particular problem for gaining relief where courts assume unity of economic interest with a male partner. The map traces how feminists have influenced judicial decision-making, and critiqued it, regarding STD in spousal guarantees. The map is divided into sections according to the limbs which need to be established and where feminists have identified gendered effects from judicial approaches to facts:

- that the wife suffered undue influence or was mistaken about the transaction; and
- she received no benefit from the transaction (was a ‘volunteer’); and
- the lender did not provide adequate explanation or no adequate explanation was received from another advisor.

There is another evidential difficulty in applying these doctrines to spousal guarantees. Where a third party is involved, such as a bank lending to the husband, it must be shown that the third party either knows about undue influence of the husband or takes advantage of a wife's misconception itself. However, in 1939, Australian law adopted a 'special' evidential rule about wives providing guarantees for their husbands' personal or business loans. This rule does not make such transactions automatically invalid but simply extends responsibility to the lender for any undue influence by the husband or a lack of understanding of the transaction by the wife guarantor. The map shows the influence of feminist scholarship in the development of this principle: from recognising feminist scholarship in decisions, to intense judicial scepticism of this difference approach and then adopting a special rule with treats husbands and wives as the same and contemplates other intimate relationships.

From 1994 until 2007, a series of reports have pointed to the need to introduce other structural reforms which address information deficits and reduce the impact of relationship pressure around the time of signing a guarantee. [The Code of Banking Practice \(2013\)](#) has introduced many of these recommendations. While this Code has no force of law (but may have contractual force), the map provides cases where it has been considered as evidence as to whether a transaction is unconscionable or unfair. Thus a failure to follow good industry practice may be a strong factor in a successful claim for relief and may have prophylactically reduced key contributors to STD in spousal guarantees.

Statutory claims for relief of spousal guarantees

Feminists have continued to point to courts' privileging of the interests of banks and economic freedoms such that a 'woman's problem' of STD needs to be addressed fleetingly and with little expense. By and large, law reform has tracked this approach introducing protections which either primarily cover small transactions of a consumer nature (thereby ignoring frequent situations of STD) or simply require more information to be provided. As the mapping of statutory claims (under provisions of the [Trade Practices Act 1974](#) (Cth) or later the [Australian Consumer Law \(2011\)](#)) shows, there is always a difficulty in guarantee cases because the impact of the relationship needs to be linked to the bank to receive relief. An exception to this is the NSW [Contracts Review Act 1980](#) (NSW). A section of this map traces cases where its provisions have provided another basis on which wives (in that State) can argue that the guarantees they have signed are harsh or unfair that goes beyond common law relief.

A map of STD in Australian corporations law

Feminist commentators and law reform reports have noted that STD may also arise in the context of the operation, or often the insolvency, of a family company. Corporations legislation used to require any company to have at least two directors and shareholders. Feminist scholarship pointed to the specific impact on women of this requirement: wives were frequently prevailed upon to become a director for reasons of pure compliance; or women establishing companies were compelled to request a spouse to participate in their company. The [First Corporate Law Simplification Act 1995](#) (Cth) abolished this requirement and, when introducing the Bill to Parliament, the then Attorney-General referred to specific law reform objectives of

addressing STD in family companies. The cases mapped here show that, since that time, the law adopts a strictly formal equality approach to directors (in similar roles).

However, as [Belinda Fehlberg's](#) work showed, there remains a range of situations where STD can arise in family companies. The first is where the wife is persuaded to provide a personal guarantee of the company borrowings usually secured by her only major asset– the family home (see cases in earlier part of this map). Another is where a wife becomes a director and is unable to access information or make decisions about the company because of relationship pressures. Indeed, feminist commentators in the 1990s noted that judges often assumed that the wife director will be non-participating but consenting to the husband controlling the company. Nevertheless, Australian law has increasingly imposed upon directors core duties of financial literacy and to monitor company progress. While the reality may be quite different, the assumption of sameness of all (like) directors is difficult to rebut because of limited statutory defences and narrow judicial interpretation. Legal blindness to continued systemic power imbalances is cause for concern. However, many scholars express caution about adopting a special rule for certain directors or even making it easier to establish defences. There is a strong policy rationale for making directors accountable for the company - particularly that it can pay its debts. The concern is that directors have an incentive to act recklessly or against creditor interest in the pursuit of shareholder profits. In order to address this, the law lifts the corporate veil to make directors potentially liable for certain breaches of the [Corporations Act 2001](#) (Cth) (such as trading when insolvent). The consequence of this is to privatise most issues internal to the company - like STD - and to make these circumstances beyond the concern of the law.

Note: This mapping has revealed that the concept of STD, or the phrase, has been applied in other legal contexts from time to time where there is a question of a lack of decision making power due to relationship effects. These issues naturally arise in the context of family law disputes but have not been mapped here. As noted earlier, this study is confined to the areas of law – contract and corporations law - where STD has been most used in the courts and noticed by commentators. Here are three other examples:

For a criminal law context, see for instance:

- ***Gameau v DPP*** (Cth) [1998] SASC 6615 | [austlii](#)
Supreme Court of South Australia: Mullighan J

Mullighan J

“It appears from that observation that the learned Magistrate was prepared to act on the report in a way favourable to the appellant and in fact did so. After referring to the appellant's relationship with her partner, it appears that the learned Magistrate accepted that the features of that relationship which had been mentioned led to her committing the offences. She used a colloquial expression that ‘this is a case of what is often termed a “sexually transmitted debt”.’ She accepted that the prospects of rehabilitation were good and that it is unlikely that she would re-offend. She had regard to the reparation payment.”

For a consideration of family violence leading to transfer of property, see for instance:

- ***Farmers' Cooperative Executors and Trustees Ltd v Perks*** (1989) 52 SASR 399
South Australian Supreme Court: Duggan J

The Court held that a memorandum of transfer of a property interest from a wife to a husband was executed under duress or as a result of actual undue influence. The defendant husband had been convicted of murdering his wife and the action was brought by her executor. In evidence, detailed accounts of the history of his violence towards her were given, including evidence from their children and a family friend. The sons gave evidence of their father's extreme brutality towards their mother. The family friend attested that the husband had "declared on more than one occasion that a woman should not own more land than her husband, that it wasn't fair, wasn't right". He had said this in the context of demanding that she "square up" and "sign on the dotted line". There was no consent provided in the context of extreme physical violence.

Duggan J

"[T]hat the defendant subjected the deceased to violence and abuse which was so much a part of everyday life in the household that the children did not regard it as unusual until they discussed it in later years with friends at school. The only conclusion I feel able to draw from the deceased's decision to remain with the defendant over the years is that she too came to accept it as part of her everyday life. In my view, the defendant dominated his wife by the constant employment of actual and threatened violence and it is against this background that the events more directly concerned with the transfer of her share in the property fall to be considered."

For over-payment of a government allowance, see for instance:

- ***White; Department of Family and Community Services*** [1999] AATA 534 | [austlii](#)
Administrative Appeals Tribunal of Australia: Senior Member A.D. Allen

Senior Member Allen

"[i]n this matter, it is clear and it is important to note that the respondent is indeed the innocent victim in all of this and her own honesty and integrity are not in doubt. Indeed it is a case, which in other circumstances, has been referred to rather inelegantly as a sexually transmitted debt. What has happened is because of the statements by the man King, the respondent received payments, she received payments to which she was not entitled and the Act makes provision that they must be repaid unless of course there are special circumstances" (at [5]).

In 1939, the decision of Dixon J in [*Yerkey v Jones*](#) introduced into Australian law a 'special principle' applying to wives guaranteeing husbands' transactions with a third party – often called 'wives' special equity'. His Honour found that, while there is no presumption of undue influence by a husband over a wife, such transactions attract 'an invalidating tendency' in equity if the transaction is either induced by the influence of the husband or there is a lack of understanding by the wife, and the transaction does not provide any direct benefit to the wife. What is 'special' about the approach from *Yerkey v Jones* is that the wife need only show that the bank was aware that she was married to the borrower to pass on responsibility for vitiating factors flowing from the spousal relationship. She does not have to prove that but for an understanding of the transaction or the influence, she would not have provided the guarantee. This evidential assistance is provided to wives in this context only. The lender can displace this 'tendency' towards relief by showing either that she had received legal advice about the transaction or the bank had explained it to her (unless there was actual undue influence).

Many State courts during this period demonstrated a strong antipathy to any principle based on sexed or gendered difference, even while, after the *Equality Before the Law Report* in 1994, they accepted evidence about STD continuing to occur within marriages and cited feminist commentary. In the United Kingdom, the House of Lords decided [*Barclays Bank Plc v O'Brien*](#) (in 1993) in which it refused to follow *Yerkey v Jones* and put banks 'on inquiry' for any relationships of 'trust and confidence.' While *Barclays* does not represent the law of Australia, many Australian courts cited *Barclays* and its policy reasons for rejecting 'wives' special equity', with approval. Courts' concern culminated in a decision by the NSW Court of Appeal in [*Akins v National Australia Bank*](#) (1994) to not follow *Yerkey v Jones*. Many subsequent courts in NSW and other jurisdictions followed suit, leaving wives to fulfil the difficult onus of proof of the actual or constructive knowledge of the bank about the husband's undue influence or some taking advantage of her misunderstanding. The Victorian Supreme Court continued to apply the *Yerkey v Jones* principle. Unsurprisingly, most guarantee cases under the general law principles did not succeed. This section only contains cases in which a court directly considered the appropriateness of Australian law retaining the principle from *Yerkey v Jones*.

- ***The Bank of Victoria Ltd v Mueller* [1925] VLR 642**
Supreme Court of Victoria: Cussen J

This case concerned the effect of the 'trust and confidence' that a married woman placed in her husband. The Court found there was a failure to adequately explain the transaction to her and no immediate economic benefit to the wife. The guarantee was set aside. Cussen J referred to equitable principles dealing with large voluntary donations by a wife to a husband as voidable if misunderstood by the wife.

Cussen J found that the guarantee was unenforceable for the reason,

"... that the husband in procuring and pressing for such consent misrepresents in a material respect what is proposed to be the nature of her liability as guarantor, and that, by reason of such misrepresentation, the wife in respect of

such matter does not understand the true nature of her liability as expressed in a form of guarantee signed by her.”

- **Yerkey v Jones** (1939) 63 CLR 649 [austlii](#)

High Court of Australia: Latham CJ, Rich, Dixon, McTiernan JJ

A wife was bound by a mortgage she gave over her property to secure the purchase by her husband of a poultry farm. She alleged undue influence on the part of the plaintiffs and her husband acting together and also on the part of her husband separately. She alleged various fraudulent misrepresentations and certain non-disclosures. She contended that the mortgage which she actually signed was of a different nature from that which was represented to her and from that which she understood it to be. The Supreme Court of South Australia held against the husband but dismissed the action against the wife upon the evidence which supported the defence of mutual mistake or misrepresentation. However, the High Court upheld an appeal and found that she did not act under the undue influence of her husband or was positively deceived by him or that her will was improperly overborne by him.

Dixon J

"In the first place, there is the doctrine, which may now perhaps be regarded as a rule of evidence, that, if a voluntary disposition in favour of the husband is impeached, the burden of establishing that it was not improperly or unfairly procured may be placed upon him by proof of circumstances raising any doubt or suspicion. In the second place, the position of strangers who deal through the husband with the wife in a transaction operating to the husband's advantage may, by that fact alone, be affected by any equity which as between the wife and the husband might arise from his conduct. In the third place, it still is or may be a condition of the validity of a voluntary dealing by the wife for the advantage of her husband that she really obtained an adequate understanding of the actual nature and consequences of the transaction. It will be seen that all three of these matters must have a special importance when the transaction in question is one of suretyship and the wife without any recompense, except the advantage of her husband, saddles herself or her separate property with a liability for his debt or debts" (at p. 675-6).

"... if a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima-facie right to have it set aside" (at p. 683).

Feminist commentary

Neutral assessments

“The *Yerkey* principle has, depending on one’s interpretation of ‘equality’, both assisted and inhibited the struggle to achieve that goal. Some scholars have argued that the special wives’ equity, by acknowledging that women are different from men and may exhibit greater vulnerability to exploitation, has furthered women’s equality. Others have seen equality as being achieved only when women are treated the same as men: the differential treatment of wives leads not to equality but to the perpetuation of stereotypes that are demeaning of women.” (Wright 2006, p.69)

Positive assessments

“In many cases, the *Yerkey* principle has served to protect wives from being exploited and having their interests neglected. The degree of the exploitation and neglect varies from one case to another.” (Wright 2006, p.68)

Negative assessments

“The concept of the ‘ignorant’ and ‘subservient’ wife, on which the *Yerkey* decision was certainly based, is now very much ‘outmoded and offensive’. ... [A] woman wishing to claim relief on the basis of the *Yerkey* principle must argue that she was, at the time she acted for surety for her husband’s borrowings, subservient to him and suffered financial ineptitude. Consequently, the principle in practice can be demeaning to women.” (Wright 2006, p.68-69)

“Two objections to protection depending exclusively on married status are: (1) the immediate exclusion of those involved in de facto relationships; and (2) failure to acknowledge the increasing social, domestic and economic equality of parties entering marriage today. To these objections it seems necessary to add the sex discrimination inherent in the rule in *Yerkey v Jones*. Although, at the time of its formulation, the social attitudes and values were such that it would have been unthinkable that at some time in the future it would be extended by being reformulated in gender neutral language.” (Fisher 1996, p.41)

- ***European Asian of Australia Ltd v Kurland and Another*** (1985) 8 NSWLR 192
Supreme Court of New South Wales: Rogers J

Negative to *Yerkey* principle

A husband and wife gave their personal guarantees in respect of a company obtaining a loan with security of a second mortgage over their home. The house was registered in the name of the wife, Mrs Kurland, alone. The Supreme Court found there was evidence that all documents relating to the loan transactions were procured off Mrs Kurland by her husband and she signed them without knowing anything about the nature of the documents or the liability they imposed on her. She relied on the principle from *Yerkey v Jones* in order to release her from the guarantee. However, the Court held that

the contracts were enforceable. The 'invalidating tendency' did not apply as the Court decided that she stood to benefit equally with her husband by virtue of their equal shareholding in the company and thus the transaction was not unconscionable.

Rogers J indicated that in assessing the 'special disability' of the guarantor in order to fulfil an aspect of the unconscionable dealing doctrine, he "encountered great difficulty in attempting to describe Mrs Kurkland in a way which avoids giving offence." He described Mrs Kurkland as "an archetype of a female with a total lack of interest in anything outside her household" (p. 197).

Despite this factual conclusion about the case before him, Rogers J expressed the following strong concerns about the principle from *Yerkey v Jones*:

"I feel compelled to say that in the year 1985 it seems anachronistic to be told that being female and a wife is, by itself, a sufficient qualification to enrol in the class of persons suffering a special disadvantage. . . . Were this to be correct, it would affix a badge of shame to this branch of the law. . . . That being a female spouse should place a person shoulder to shoulder with the sick, the ignorant and the impaired is not to be tolerated."

Feminist commentary

Negative assessments – regarding approach to Yerkey principle

"This judgment sees gendered differences as an anachronism. This view fails to see the inequalities in power associated with sex." (Otto 1992, p.818)

"[G]ender inequality has not been considered to be an appropriate basis for equitable relief [footnoting *Kurkland* and *Warburton*]. As the cases on sexually transmitted debt reveal, classifications on the basis of gender are increasingly considered to be 'anachronistic', and gender-neutral doctrines such as the *Amadio* doctrine of unconscionable dealing are seen to be consistent with the promotion of gender equality." (Dunn 2000, p.439)

"Many judges have voiced fervent opposition to the ready assumption made by some legal counsel that wives exhibit especial vulnerability to influence. Rogers J in *European Asian of Australia Ltd v Kurkland* asserted that this assumption placed married women 'shoulder to shoulder with the sick, the ignorant and the impaired'." (Wright 2006, p.68)

"In these situations, the legacy of traditional gender roles is clearly evident" and yet unrecognised by the court. (Baron 1995, p.28)

Negative assessments – regarding approach to evidence

“Although the binding force of [‘special equity theory’] has been recognised and subsequently applied, in recent years the trend has been to narrowly interpret the ratio and distinguish the case to avoid its application” [citing this case]. (Bailey 1999, p.1014)

“The standards against which the behaviour of women is compared seem to vary from case to case. Some women appear to have their behaviour judged by comparing it to an active masculine standard. For example, Mrs Kurland had a tertiary education and her failure to become involved in financial matters affecting her was measured against the involvement that a reasonable person (man?) with a tertiary education would have had.” (Howell 1995, p.100)

“In some cases where the facts have suggested the rule could apply, the response has not been so circumspect. This is demonstrated by Rogers J in *European Asian of Australia Ltd v Kurland ...*” (Fisher 1996, p.40)

- ***Broadlands Finance v Sly*** (1987) 4 BPR 9420; [1987] ANZ ConvR 328; (1987) NSW ConvR 55-342

Supreme Court of New South Wales: Foster J

Positive to *Yerkey* principle

In this case, there was undue influence exercised over Mrs Sly, the wife, by her husband, Mr Sly, through his domination in the relationship, and applied when procuring her signature on a guarantee for a loan to buy a hotel. The Court was satisfied that she played no part in the transaction or servicing the mortgage except when signing. The Court described the loan as an ‘ordinary transaction’ except for the haste in which it was executed. While there was no actual knowledge of the lender, the Court found there was constructive knowledge so as to render the contract unconscionable.

Foster J

“I am satisfied that Mrs. Sly's education in no way fitted her for participation in any business enterprise. I am equally satisfied that during what seems to have been a fairly lengthy period of residence at Gunnedah, although she was, in a broad way, aware of the financial ups and downs of the farming enterprise, she played no part in the day to day running and management of the business and, in particular, had no real knowledge of or participation in the financial aspects of its operation. ... Mrs. Sly, I am quite satisfied, played no part in these matters, had no real understanding of them, and, indeed, had no interest in them. Indeed, she left all financial matters of any consequence to her husband, including matters such as "things like Medicare applications". Apart from house-keeping money provided by her husband, Mrs. Sly had no income other than a pension she received in respect of her war service. This was paid into her bank

account at a local bank, from which account she made minor expenditures on behalf of herself and her grand-children" (at [17]).

"As already indicated, she left all matters of business to him. She trusted him. She readily deferred to him in any commercial matter. She did not regard herself as stupid but she considered herself to be dominated by him. In any mutual dealings between them, she was obviously at a complete disadvantage. He was obviously both in a position of advantage and also of influence over her" (at [45]).

Foster J, commenting on applicability of Dixon J's comments in *Yerkey* in 1939, stated:

"Although the "present day" of which his Honour spoke was the day of 1939, and although the words could not be thought to have the same universal application in the social and economic world of today, it is not difficult to apply them to the situation of a woman of the age and background of Mrs. Sly" (at [46]).

- ***Warburton v Whiteley*** (Unreported, 1989 - BC8902562)
Court of Appeal New South Wales: Kirby P, McHugh, Clarke JJA

Not positive to *Yerkey* principle

In this case, Whiteley was entitled to invalidation of her separate personal liability on the basis that her husband had procured her execution of the guarantee to the knowledge of the creditor who had no reasonable ground to believe that she fully comprehended the transaction and freely entered into it. The Court of Appeal considered whether the principle in *Yerkey* was obsolete. The Court held the principle in *Yerkey* is the law to be applied in New South Wales until altered by legislation or varied by the High Court of Australia. The Court found in favour of the wife (pursuant to *Yerkey*), even though she failed to prove that she had no shareholding in the company. Nevertheless, she was not considered to be a substantial beneficiary as the Court accepted that the company guaranteed was "the pup" of her husband.

Kirby J

"The general advance in the education and economic involvement of women does not prevent the conclusion that, in a particular case, the woman in question suffers a relevant special disadvantage. In the present case Mrs Warburton had no education past her intermediate certificate. She was absent from the workforce and business world for a substantial period whilst rearing her children. She was always subordinate to her husband in their common business affairs. She took no part in the business affairs of the companies. She was unaware of the details of her husband's association with the companies and with the creditors generally. In sum, the evidence paints a picture of a

woman in a significantly unequal relationship with her husband, at least in relation to business affairs and the incurring of debts” (at 631).

Literature cited by Kirby J evidenced the continuing inequality experienced by women in a range of aspects of their lives from employment to access to banking:

- Thornton 1986;
- Deery and Plowman 1985;
- New South Wales Anti-Discrimination Board 1986.

Feminist Commentary

Positive assessment

“By contrast with the muddled reasoning and scant regard for the doctrine of precedent in *Akins*, the earlier decision of a differently-constituted Court of Appeal in *Warburton v Whiteley* is a model of clarity and intellectual rigour. While acknowledging the policy considerations favouring a revision of the rule in *Yerkey v Jones*, the Court of Appeal on this occasion concluded that it was bound by this High Court authority and proceeded to apply it to the facts of the case. Indeed, in technical terms, the ratio decidendi of *Warburton v Whiteley* was that *Yerkey v Jones* remains applicable until the High Court itself overrules that decision.” (O’Donovan 1996, p.323)

- ***Carrington v Confirmers Pty Ltd v Akins*** (Unreported, 23 April 1991)
Supreme Court of Victoria: Giles J

Not positive to *Yerkey* principle

Two married women (Mrs A and Mrs D) sought relief in respect of mortgages and guarantees they had given to support business loans to their husbands. The Court rejected their claims and yet held that the principles in *Yerkey v Jones* must be applied even if now ‘anachronistic as founded on an outmoded view of the husband and wife relationship.’ The Court found that while mere directorship of the company by the wife may not of itself constitute a benefit so as to remove possible relief, in this case the income of the family company was what the family lived on. Therefore the transaction could convey a substantial benefit to the wife. On the other grounds, there was no undue influence by the husband. To obtain relief on the ground of unconscionable conduct of the creditor, it would be necessary to show that the creditor had actual knowledge of the special disability of the other party and that it entered too readily into an improvident transaction placing a real burden on the other party. Where a wife guarantees the debt of a company by which her husband conducts business and the creditor does not know the precise arrangements between them or the benefits falling to the wife, more must be shown than knowledge of the creditor of the fact of the relationship. Finally the *Contracts Review Act* requires that it

be established that the contract was unjust at the time when it was made, and whether there is injustice requires attention to the position of both parties. Relief refused on all grounds.

Giles J

"... It is not essential that the benefit to the wife be through an interest in the debtor company. That can not be the test, since otherwise it is hard to see why a half interest in the debtor would suffice to exclude *Yerkey v Jones* wholly. ... In the present case the mortgages and guarantees were for the benefit of Mrs Akins in a real sense, in that they supported the business conducted by Mr Akins through various companies from which came the family income which she enjoyed." (at [47])

Feminist commentary

Negative commentary

"By contrast with the muddled reasoning and scant regard for the doctrine of precedent in *Akins*, the earlier decision of a differently-constituted Court of Appeal in *Warburton v Whiteley* is a model of clarity and intellectual rigour..." (O'Donovan 1996, p.323)

- ***Barclays Bank Plc v O'Brien*** [1994] 1 AC 180; [1993] [UKHL](#) 6
House of Lords: Lord Templeman, Lord Lowry, Lord Browne-Wilkinson, Lord Slynn of Hadley, Lord Woolf.

Not positive to *Yerkey* principle

A married couple granted the bank a second charge over the family home as security for the overdraft facility of a company in which the husband had an interest. The wife signed the document without reading it and because of her husband's misrepresentation that their liability was limited when it was not. The bank took no steps to have the documents explained to the wife nor did it suggest that the wife should get independent legal advice. The wife sought to set the charge aside on the grounds that it was the result of the husband's misrepresentation and undue influence. Only the misrepresentation defence was relied upon in the House of Lords, but the Court considered the doctrine of undue influence and the steps required for a bank to have an enforceable contract in cases where there are guarantees by intimate partners.

Lord Wilberforce accepted that there was a greater risk of undue influence "than in the ordinary run of cases where no sexual or emotional ties affect the free exercise of the individual's will" (at p. 191). At the same time, he rejected the broad proposition that wives should be accorded special rights in relation to surety transactions; rejecting the idea of "a special equity applicable only to such persons engaged in such transactions" (at p. 195). Lord Wilberforce

emphasised that the same principles apply “to all other cases where there is an emotional relationship between cohabitees” (at p. 198).

Lord Browne-Wilkinson

“Therefore in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband’s debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction”.

- ***Akins v National Australia Bank*** [1994] 34 NSWLR 155
Court of Appeal New South Wales: Clarke, Powell, Sheller JJA

Not positive to *Yerkey* principle and refused to follow it

Mrs Akins appealed from a judgment enforcing a personal guarantee of her husband’s business loan. Mrs Akins had no substantial assets of her own at the time of the marriage and between that time and 1988 she remained unemployed and was financially dependent upon her husband. However, the trial judge believed that she had information about her liability and was not “made incapable by emotional confusion, distractions of children, or other matters from appreciating her position.” It was also found on appeal that she had “not inconsiderable benefits” which flowed indirectly her from the husband's companies. She sought relief under undue influence and unconscionable dealing, relying on *Yerkey* principles and provisions of the *Contracts Review Act 1980*. The Court of Appeal held, dismissing the appeal, that the principle of *Yerkey* is anachronistic and inconsistent with the common law approaches.

Feminist commentary

Positive assessments

“[I]n *Akins*, the fact that the wife had a professional background and appeared educated and competent appeared to be at odds with the notion that she ‘relied’ on her husband in any sense of her conduct being beyond her control... she did not fit the pattern of the ‘down-trodden, uneducated wife, subservient to her husband and his wishes and unable to understand financial matters or to take practical business-like decisions’. Her decision to leave business decisions to her husband could be viewed as a rational choice to delegate responsibility to someone with a successful history in business affairs, rather than evidence of any disability or undue influence... to urge or require independent advice *in a case such as Akins* would therefore simply have the effect of imposing unnecessary and costly constraints on lending.” (Richardson 1996, p.377)

Negative assessments

“In *Akins v National Australia Bank*, the New South Wales Court of Appeal considered that *Barclays Bank v O'Brien*, and the content of Lord Browne-Wilkinson's speech, provoked the need for it to reconsider whether it should continue to apply *Yerkey v Jones*. With the greatest respect, this is attaching too much weight to a decision of the House of Lords which is merely a persuasive authority. Whatever sympathies one may have with the *O'Brien* approach, it is simply not open to the New South Wales Court of Appeal to adopt it in defiance of the different approach taken by the High Court in *Yerkey v Jones*.” (O'Donovan 1996, p.322)

“The preference of Australian courts to deal with *Yerkey* cases under the broad heading of unconscientious dealing was indicative of a broad trend away from a special wives equity. This trend was clearly evidenced in *Akins*.” (Hepburn 1997, p.107)

“The result of this legal debate is, for women in Australia, quite unsatisfactory. The principle of *Yerkey v Jones* is narrow and outmoded but nonetheless it is an important remedy for married women. If the approach in *Atkins* is applied generally in Australia *Yerkey v Jones* is no longer available. However, the protection it provided has not been replaced by a more appropriate form of protection. Women are required instead to rely on the doctrines of unconscionable conduct and undue influence which ... do not easily or adequately recognise the experiences and position of women in Australia” (*Equality before the Law*, chapter 13).

- ***ANZ Bank v Dunosa Pty Ltd*** [1995] ANZ ConvR 86
Supreme Court of Victoria: Hansen J

Follows *Yerkey* principle – no expressed view

Various guarantees were given for loans by the bank for business transactions of a family company, including personal guarantees secured by the family home. Dunosa had little education but she did have some business experience. Hansen J found of Dunosa: “She impressed me as a person of reasonable acumen and intelligence who would have been unlikely not to have been aware of the occasion and purpose for which documents were required or have been able to understand their nature and effect, even in general terms, if explained to her” (at p. 62). Dunosa claimed not to know about one of the companies granted a loan and the family trust, and that she had no involvement in the family business. The Court found she understood the nature of the contracts she signed, and was advised at the bank. No misrepresentation or influence by the husband was found. His Honour held that if the company is effectively the husband's this may be taken into account. In this case, it was found that the company was not the ‘alter ego’ of the husband and the loan supported the “business from which came the family income which she enjoyed” (at p. 61). No relief was granted.

Hansen J

"I was, perhaps, invited to consider whether the principle in *Yerkey* should now be regarded as subsumed in the area of unconscionable conduct, having regard in particular to the role and equality of women in society and the responsibilities of directors of companies... . However, until the High Court states otherwise I am bound to regard *Yerkey* as binding and as stating a separate principle based on the invalidating tendencies, and I note this view has been taken in several cases in New South Wales" (at p. 57-58).

- ***Budget Stationery Supplies Pty Ltd & Ors v National Australia Bank Ltd*** (Unreported 4303 of 1993) [1996]

Supreme Court of New South Wales: Santow J

Negative to *Yerkey* principle

A company owned by a husband and wife received a loan and overdraft account secured by several joint and personal guarantees of the couple. Mrs Dudley, with a limited education, was found to have an administrative role but not a decision making role in the company. The case for relief was argued on a range of bases. The judgment describes Mrs Dudley as 'quite unsophisticated and rather passive' and 'not someone who would have pressed for a fuller explanation' of the loan and guarantee (at 32-3). Nevertheless, the Court found that she had a 'rudimentary' understanding such that she appreciated the basic workings of the guarantee and mortgage on her home, and that 'her husband was quite clear on that matter and no doubt she followed her husband without greatly questioning what was going on' (at 93). This was not a case of actual undue influence or misrepresentation by the husband to the wife; there was evidence of some understanding of the contractual liability by the wife. The Court found that the wife was under a 'special disability' known to the bank but she received an explanation. No relief was granted.

Santow J

"Only in [*Barclay's Bank*] was the lender visited with constructive notice of the husband's undue influence in procuring the guarantee, though only aware of the marital relationship and of the improvidence of the guarantee. It was recognised that the relationship of husband and wife, like parent and child, rendered the wife more vulnerable to her will being overborne through those close ties of affection and family dealing, in the absence of independent advice. Importantly, emphasis is placed on that kind of relationship, not on any stereotype about women as such, an approach consistent with that adopted by the High Court in relation to the exploitation of an infatuated male by unconscientious dealing in *Louth v Diprose* (1992) 175 CLR 621. The discussion of "Policy Considerations" in *Barclays Bank plc v O'Brien* (supra) at 188 per Lord Browne-Wilkinson, seeks to avoid gender stereotypes, while

recognising the frequent occurrence still of wives being inveigled to give improvident guarantees. Lord Browne-Wilkinson warns that if the position were made too onerous for lenders, the family home will in practice be sterilised as an asset to borrow against. ...

[T]he approach laid down for a trial judge in cases of this kind is simply to determine as a question of fact, whether a person has the knowledge and/or experience or capacity to understand a financial transaction such as a guarantee or gave it as a result of undue influence. Where that person is a married woman, there is no presumption or inference drawn merely from that person's matrimonial relationship with her husband as to these matters. Rather, though those may be relevant factors, such factual findings should be approached having regard to all the relevant circumstances of the transaction and relationship. Such an approach accommodates the multiplicity of close relationships ranging from the marital to the de facto or, parent and child" (at [95] and [97]).

- ***Teachers Health Investments Pty Ltd v Wynne*** (1996) 2 ACCR 424; ***Burnswood and Others v Wynne***

Court of Appeal New South Wales: Mahoney P, **Beazley JA**, Waddell AJA

Negative to *Yerkey* principle; no longer applies in NSW

Wynne provided a mortgage on her home as security for a loan for her husband and his company. The wife and husband had a history of poor marital relations. The court accepted evidence of the husband's continuing dishonesty, frequent separations from the family and his overbearing tactics. The trial judge found that, at the time of entering into the mortgage, the respondent was in a vulnerable position (mental health issues causing her anxiety) which the husband took advantage of in contriving to secure her entry into the mortgage. The trial judge held that Wynne was entitled to relief under *Yerkey*. However, he found that the lender's conduct was not unconscionable in the circumstances and that the mortgage transaction was not unjust within the meaning of the *Contracts Review Act 1980*(NSW).

On appeal the Court of Appeal held that the equitable presumption in *Yerkey* no longer represents the law in New South Wales as the principles of unconscionability provide adequate grounds of relief to wives who act as sureties for their husband's debts. The Court also held that the two matters which must be established to demonstrate unconscionable conduct were present in this case: that the respondent was under a special disability due to her highly vulnerable state and the appellant should have known of the respondent's special disadvantage and have been on notice that the transaction was perilous from the principal debtor's point of view and improvident from the respondent's point of view. The Court found the bank should have told her to obtain advice relating to the propriety of the transaction

from her point of view. Failure to do so rendered its conduct unconscionable. The contract was also unjust within the meaning of the *Contracts Review Act 1980* (NSW).

Feminist commentary

Positive assessments

“In many cases, the *Yerkey* principle has served to protect wives from being exploited and having their interests neglected. The degree of the exploitation and neglect varies from one case to another. For example, in *Teachers Health Investments Pty Ltd v Wynne*, where the husband used the threat of divorce to persuade his wife to act as guarantor, the court held that the wife was highly vulnerable and her will had been overborne.” (Wright 2006, p.68)

Negative assessments

“The outcome of *Wynne*’s case is more sensitive to the relevant concerns. The trouble is that the decision assumes the fact situation to have been an isolated one. If the court had recognised its recurrent nature, it would hardly have rejected the case for a special rule.” (Duggan 1997, p.226)

- ***Hepburn v McLaughlins Nominee Mortgage Pty Ltd*** (Unreported 4239 of 1996)
Queensland Court of Appeal: Davies JA, Thomas and Fryberg JJ

Did not apply *Yerkey* principle

A loan was made to a company controlled by a man who was bankrupt but which was guaranteed by his wife, Hepburn. She testified that her agreement to sign the security was procured by physical force and intimidation by her husband, and a promise to release her from it within a short time. She did not know about the company or that she had been made a director of it. The Court applied the NSW *Contract Review Act 1980* to the facts of the case. Argument was also made on common law grounds of undue influence and duress. Despite Hepburn’s evidence, the Court of Appeal did not find that she was under duress when she signed and there was no evidence of constructive or actual notice by the lender of any undue influence by the husband. The appeal was dismissed and the mortgage enforced.

Fryberg J

“[Counsel] argued that duress and undue influence could be established on the basis described in the judgment of Dixon J in *Yerkey v Jones*. Whether that judgment ever established an independent principle capable of founding a defence in these circumstances may be doubted. In any event, there are two reasons why the argument must fail. First, the Supreme Court of New South Wales has held that the principle in *Yerkey v Jones* ought no longer be applied

in New South Wales, and this guarantee is one the proper law of which is that of New South Wales. Second, on the evidence an equitable defence must fail, having regard to the considerations already referred to in the context of the refusal of discretionary relief under the CRA” (at p. 25).

- **Alexander Gregg v Tasmanian Trustees Ltd** [1997] FCA 128 | [austlii](#)
Federal Court of Australia: Merkel J

Negative to *Yerkey* principle

Mr and Mrs Gregg granted a mortgage over their home to secure a loan to a business in which the husband was a director. This case was pleaded on ss 51AA and 52 of the *Trade Practices Act 1974* (Cth) that her husband made misleading representations about the nature of the loan and did so as an agent for the lender. This argument failed. However, the Court found that there was a material misrepresentation by the other directors of the company to Mrs Gregg. The court also found that it was unconscionable conduct by the lender in the circumstances knowing of the misrepresentation, and granted relief under the Act. The Court considered whether the principle from *Yerkey* had been overruled.

Merkel J

“It is quite clear from the decision in *Yerkey v. Jones* itself that the presumption was applied in the context of the statutory and sociological framework that existed in relation to married women in Australia in the late 1930's. World War II led to fundamental changes in the role of women in the Australian workforce. During and after the War, women's, especially married women's, participation in the paid workforce rose steadily. As historian Professor Marilyn Lake recently wrote, far from being under a post-war "condition of house arrest", that participation led to post-war pressure to provide married women with a right to work in the Federal Public Service and the banking sector as well as rights to equal pay and work opportunities. As a consequence of such pressures, over time, the role and economic independence of married women changed. The present framework is different to that of the late 1930's in many fundamental respects. It is, and is accepted as, commonplace that married women are likely to be employed in all sectors of the workforce and in all occupations and professions. In doing so it is expected that married women might occupy positions of legal, financial or corporate responsibility. Equal pay for equal work has now been long accepted as a right for all women. Affirmative action programs have been undertaken, as a matter of public policy, in order to assist that outcome for all women. Equal opportunity legislation protecting women from discrimination, inter alia, in relation to employment on the grounds of gender, pregnancy or marital status has been enacted throughout the Commonwealth... . Whilst the present reality is that gender inequality in the workforce may still persist the assumptions which formed the very basis and

rationale for the presumption in *Yerkey v. Jones* in favour of a *married woman* can no longer be made or regarded as applicable to present Australian society. These factors do not lead me, as a Judge at first instance, to decline to follow or apply *Yerkey v. Jones*. Rather, they lead me to the conclusion that the equitable presumption as to a matter of fact in *Yerkey v. Jones* is not applicable as a precedent in the fundamentally different legal and factual environment which exists in Australia today.”

However, his Honour continued:

“However, the judicial deconstruction of the laws "tender treatment" of married women should not lead to sight being lost of the true rationale for that treatment. ... Relationships of confidence and trust of the kind which gave rise to the presumption in *Yerkey v. Jones* abound in many intimate personal relationships in which emotional dependence or influence leaves one party particularly vulnerable to the other, who using the language of Dixon J, has the "opportunity of abusing the confidence". That situation was succinctly summarised by the Australian Law Reform Commission in its discussion on "sexually transmitted debt" ... Further, development of the law in this area should not lose sight of the social context in which the problem of 'sexually transmitted debt' arises. In her article on "Sexually Transmitted Debt - A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers" (1995) 4 *Feminist Law Journal* at 93 Nicola Howell....”

Feminist literature cited by Merkel J:

- ALRC 1994;
- Howell 1995.
- ***Farrow Mortgage Services Pty Ltd v Grezlo* [1997] ANZ ConvR 226**
Supreme Court of Queensland: Thomas J

Negative to *Yerkey* principle and not followed

Grezlo, who had the care of her three children, was the owner of a property. Michael Kralj formed an association with her and moved into her house in February 1989. He was at that time involved in a large development project in Victoria, in conjunction with others, which was financed by Farrow. During a holiday at Maroochydore, Grezlo introduced Kralj to Maria and Lazlo Toth and they devised a joint development project. Ms Grezlo was persuaded to provide personal security for a loan providing a mortgage on her house. She was appointed a director of the company. When the security was called upon, Grezlo asked for relief from the contract and relied on *Amadio* citing unconscionable conduct of the creditor. Farrow had notice of the de facto relationship between Grezlo and Kralj, but the Court found she was not 'a person totally ignorant of business affairs' (at 26) and documents had been

sent to her solicitor. While the Court accepted that there had been physical violence in the relationship, it found the documents were not executed under this threat. No relief was provided.

Thomas J

“It was held [in *Akins*] that ... there is no room to resort to the so-called special rules in *Yerkey*. Powell JA did not consider that *Yerkey* established any principle in any event, and regarded the more recent High Court decisions as holding the field. Of course the fact that [the common law] provides wider tests covering the field does not necessarily mean that the creditor cannot be held responsible for subsequent unfair dealings without proof of agency. Imputed responsibility may still be found, but on broader notions of accountability and good conscience. I agree with Clarke JA's statement

where ... a creditor leaves it to the debtor husband to procure the execution of the guarantee and takes no steps to ensure that the wife understands the responsibility and liability that she is undertaking, or that she is independently advised, the view may well be open, depending on the particular facts of the case, that the creditor should be held to be aware of the possibility that the wife was in a position of special disadvantage

and that ‘if this be correct it is difficult to support the existence of a special rule applying to wives who sign guarantees in respect of their husband's debts’.” I also consider that as a question of fact rather than legal presumption, a spouse or de facto spouse may be able to demonstrate by only slight evidence that financial decisions were as a matter of course left to the dominant partner and that sufficient trust and confidence was reposed in that person in relation to their financial affairs to justify an inference of undue influence. ... It is unnecessary for me to express a view on what might be thought to be dangerous generalisations. I do accept however that in the fact-finding process a sensitivity is necessary to the influence that a dominant partner in a relationship with another person may easily exercise when that partner wants a particular financial outcome.” (at pp. 28-30)

- ***Joyce Ruby Miles v Shell Company of Australia (ACN 004 610 459)*** [1998] FCA 625 | [austlii](#)

Federal Court of Australia: Sundberg J

Negative to *Yerkey* principle

The case arose as a request for the court to exercise its discretion to refuse a sequestration order under the *Bankruptcy Act 1966* (Cth). The wife and her husband were directors and each held one of the two issued shares in a company which applied for a line of credit. The directors guaranteed the company's obligations arising from its use of the credit. The wife claimed that

she was not aware that she had ever signed a guarantee, although she did sign various documents in her capacity as a director. Although she was a director, she had no part in the day to day running of the company, and was a director only because her husband told her she had to be because a company had to have two directors. She has always done what her husband asked her to do as regards financial matters and always trusted him. She said that if she did sign the guarantee, its contents were not explained to her and she received no independent legal advice about it. The Court held the applicant had a substantial “beneficial” interest in the company. So she could not rely on *Yerkey* principles as she was not a volunteer. Nor could she receive any relief under unconscionable dealing because, even if she was under any special disadvantage, the respondent did not know of it. Her application was dismissed.

Sundberg J

“... there is no majority support for Dixon J’s proposition [of ‘wives’ special equity’]. I am not therefore no bound to apply Dixon J’s proposition in *Yerkey*”.

1939 - 1997: Development of undue influence and unconscionable dealing in spousal guarantee cases

During this period, there were several key High Court cases concerning the equitable doctrines of unconscionable dealing and undue influence. The facts of each case raise issues regarding gendered roles in intimate/family relationships. The approach in these High Court cases therefore fed into the debates about how the law should recognise and address STD within marriage and other close relationships. While a common law distinction between undue influence and unconscionable dealing was made in 1983 in [CBA v Amadio](#), the spousal guarantee cases mapped tend to plead both doctrines.

Despite judicial concerns about the *Yerkey v Jones* principle, there were a number of cases in which a wife succeeded in gaining relief (usually by having the guarantee set aside). Some judges expressly considered the concept of STD and feminist secondary commentary.

However, many courts during the period considered the facts before them in ways which made it very difficult to satisfy the equitable tests, or produced different results with like facts. Feminist commentators argued that this was often a result of the application of gendered stereotypes. One limb of the *Yerkey* principle – that the wife receives no benefit from the transaction – was particularly difficult to satisfy and is specifically mapped below.

Three High Court key cases

- ***Blomley v Ryan*** (1956) 99 CLR 362; [1956] HCA 81 | [austlii](#)
High Court of Australia: Taylor, McTiernan, Fullagar and Kitto JJ

Blomley entered into a contract to purchase a farm from Ryan. At the time, Ryan was elderly and suffering the effects of prolonged and excessive

consumption of alcohol. Ryan then resiled from the sale of his farm, and Blomley sought specific performance of the contract from the court. The High Court found that Ryan was suffering under a special disability which impaired his ability to form rational judgment and protect his own interest, which Blomley knowingly took advantage of to Ryan's detriment as he sold the farm well below market price. Specific performance of the contract or damages associated with breach were denied as it would be unconscionable to enforce it.

While this case concerned two men in a commercial arrangement, Justice Fullagar famously stated:

"The circumstances adversely affecting a party, which may induce a court of equity to refuse its aid or set aside a transaction, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of arty kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy, or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-avis the other." (at p. 386)

Thus, in this list of disabling attributes, he lists 'sex'. While this is a famous judicial statement, courts have not followed this in attributing a person's 'sex' (presumably female) as a special disability that equity recognises.

- ***Commercial Bank of Australia Ltd v Amadio*** (1983) 151 CLR 447 | [austlii](#)
High Court of Australia: Gibbs CJ, Mason, Wilson, Deane, and Dawson JJ (dissenting)

Mr and Mrs Amadio executed a guarantee and mortgage (as security for the guarantee) in favour of the bank for debts of their son's company. Mr and Mrs Amadio were Italian migrants in their 70's, with limited English skills, little formal education and limited or no business experience. They mistakenly believed their son's company was successful. The bank manager was aware that the company was in financial trouble and assisted the son in procuring the guarantee by going to the Amadio's house and providing little explanation. The son told the Amadios that the guarantee was for around \$50,000 and would be for about six months. In fact, liability was not limited.

The majority of the High Court found that the Amadios suffered from a special disability when signing the guarantees. The disadvantage was evident to the bank manager and he and the son took advantage of that disability to the detriment of the Amadios. There was no evidence by the bank that the agreement was fair, just and reasonable. It was therefore unconscionable to enforce the guarantee and it was set aside. The facts also indicate that Mrs Amadio was not included in the discussion with the bank manager in her kitchen and was busy washing the dishes at the time. Nevertheless, the judgments treat her as occupying the same position as her husband in the context of signing the guarantees. For instance, in dissent, Dawson J

commented on the relationship between the Amadios from the law's perspective:

"There was no suggestion that the female respondent would have done other than follow her husband's lead and there is no basis for treating her position differently for the purpose of the application of the relevant principle" (at 490).

There was no discussion of any disadvantage suffered by Mrs Amadio as a result of her assumption of gendered roles or her specific exclusion from the discussions.

Feminist commentary

Neutral commentary

"Decided cases show that the circumstances in which men guarantee the debts of others are more restricted than those circumstances where women undertake liability. Where the guarantors are men, the factual situation tends to be similar to that of *Commercial Bank of Australia v Amadio*, that is, a man (either alone or with his wife) undertakes liability for the business debts of the son. I suggest this pattern conforms to traditional social expectations as to gender roles: women are expected to act selflessly; men are expected to act selfishly except in certain circumscribed situations, most notably where the good of their children is concerned." (Baron 1995, p.25)

Negative assessments

"[T]here is a tendency on the part of some judges and, indeed, some credit providers, to subsume a woman's interests into those of her male partner. ... in situations where parents guarantee the debt of their son, the husband and wife are identified as one unit. This was the case in *Commercial Bank of Australia v Amadio*." (Baron 1995, p.37)

"It was Mr Amadio's involvement with the transaction that constituted the 'facts' upon which the decision was made. This has the effects of dismissing the relevance of Mrs Amadio's experience and silencing the issues of gender which were involved. Substituting Mrs Amadio's view for her husband's, it becomes apparent that she was not even included in the brief negotiations finalizing the transaction in question, which took place in her kitchen whilst she was occupied with washing up." (Otto 1992, p.816)

"Another aspect of her special disadvantage arose from her position as a wife. This secondary social position resulted in her exclusion from participation in the negotiation of the agreement, and seriously affected her ability to act in her own self-interest. This remained unacknowledged because of the privileging of Mr Amadio's experience." (Otto 1992, p.816)

Comparing Yerkey v Jones principle and Amadio principle

"[T]he *Amadio* doctrine is not appropriate for spousal guarantee cases, other than in the exceptional case where [the bank] independently of [the borrower] is guilty of wrongdoing towards [the guarantor]." (Duggan 1997, p.229)

"It should be noted, however, that arguments have been made that the *Amadio* principle rarely applies to protect vulnerable women in marriages because it is necessary to establish that the disability of the weaker, vulnerable party is sufficiently evident to the stronger party making it unconscionable for the stronger party to proceed with the transaction. The *Yerkey* principle does not require this level of knowledge under either limb making it easier for a wife to have the transaction set aside." (Hepburn 1997, p.102)

- ***Louth v Diprose*** (1992) 110 ALR 1 | [austlii](#)

High Court of Australia: Mason CJ, Brennan, Deane, Dawson, **Gaudron**, McHugh JJ and Toohey J (dissenting)

In this case, a man (a solicitor) gave a house, in which he had been living, to a woman. He had been pursuing a sexual relationship with her despite her refusals. After ending relations between them, he sought ownership of the house. He argued that he had not meant to give it to her. The trial judge did not accept his evidence on this basis but accepted that the evidence established that it would be unconscionable for the woman to retain the house. This finding was based on the 'emotional dependence' of the man when making the gift which the woman knew about and deliberately manipulated to her own advantage. The finding of dependence so as to create a legally recognised disability was based on judicial acceptance that he was so in love with the woman as to be unable to protect his own interests, and the degree of improvidence of the gift.

Feminist commentary

Negative assessments

"The vivid portrayal of Diprose as a harmless romantic and Louth as conniving, manipulative, lying and undeserving (of course she manipulated him, you can't believe a thing she says) made the acceptance of this most unlikely version of events possible." (Sarmas 1993-94, p.723)

"The South Australian Supreme Court, and more recently the High Court, displayed a similar 'blindness' to their gender partiality in response to Mary Louth's situation in the case of *Diprose v. Louth*. In constructing his infatuation as a 'special disadvantage', the South Australian Supreme Court focused on the actions of Louth which the majority found to be manipulative and intended to deliberately manufacture a crisis which led to the gift in question. The Court completely overlooked the seven years of sexual harassment that she had

endured at the hands of Diprose. King C.J. at first instance, whose findings of 'fact' were heavily relied upon by the majority of the Full Court on appeal, went so far as to judge Louth's reluctance to allow Diprose to temporarily move in with her as 'niggardly', when it clearly would have meant subjecting herself to his infatuation in a situation from which she would have no escape. A majority of the High Court also refused to disturb these findings of King C.J." (Otto 1992, pp.816-817).

... "the creation of an equitable doctrine [of emotional dependence] incorporating a large degree of subjectivity acts as a stimulus for discriminatory stereotyping. ... This doctrinal expansion to unconscionability has introduced a highly subjective area of judicial analysis: domestic relational dynamics." (Haigh and Hepburn 2000, p.276, 301)

See also Francesca Bartlett's feminist judgment in [Louth v Diprose](#) (Douglas et al 2014, p. 196) as part of the Australian Feminist Judgments Project.

Recognising STD and successfully established cases under the *Yerkey* principle

Many wives were successful in establishing relationship effects and that these facts brought them within the scope of the law to receive relief from a guarantee, usually relying on the *Yerkey* principle. This recognition often reflected emerging feminist literature documenting the range of factors impacting on women in relation to banking. For instance, from the early 1990s, there was recognition of direct sex discrimination in banking. After the [Equality Before the Law Report](#) in 1994, some courts accepted evidence about STD continuing to occur within marriages and cited feminist commentary.

- ***Women and Credit: Sex Discrimination in Consumer Lending*** (1986)
Anti-Discrimination Board (NSW)

This paper identified the continued lack of access of women to consumer banking facilities available to men. Women had been traditionally considered a bad credit risk. The paper found that women were still often denied access to credit facilities. If they were offered such facilities, it was often only on more unfavourable terms than a man or only offered if accompanied by a male co-signer or with proof of infertility.

- ***Borg-Warner Acceptance Corporation (Australia) Ltd v Diprose*** (1987) 4 BPR 97-279; (1988) CCH Aust & NZ Conv R 57
Supreme Court of New South Wales: Cohen J

Mrs Diprose guaranteed the business loans of her husband. She argued, with medical evidence, that she was under such stress which he aggravated, that she signed with impaired judgment so as to constitute a 'special disability' at the time. The lender had left procuring the guarantee to the husband and had not explained the transaction, and it was therefore unconscionable conduct to enforce the contract. Relief was granted.

- ***Broadlands Finance v Sly*** (1987) 4 BPR 9420; [1987] ANZ ConvR 328; (1987) NSW ConvR 55-342

Supreme Court of New South Wales: Foster J

Undue influence exercised over Mrs Sly, the wife, by her husband, Mr Sly, through his domination in the relationship, and applied when procuring her signature on a guarantee for a loan to buy a hotel. The Court was satisfied she played no part in the transaction or servicing the mortgage except signing. The Court described the loan as an 'ordinary transaction' except for the haste in which it was executed. While the lender had no actual knowledge, the Court found that the lender had constructive knowledge so as to render the contract unconscionable. Relief was granted.

Foster J

"I am satisfied that Mrs. Sly's education in no way fitted her for participation in any business enterprise. I am equally satisfied that during what seems to have been a fairly lengthy period of residence at Gunnedah, although she was, in a broad way, aware of the financial ups and downs of the farming enterprise, she played no part in the day to day running and management of the business and, in particular, had no real knowledge of or participation in the financial aspects of its operation. ... Mrs. Sly, I am quite satisfied, played no part in these matters, had no real understanding of them, and, indeed, had no interest in them. Indeed, she left all financial matters of any consequence to her husband, including matters such as "things like Medicare applications". Apart from house-keeping money provided by her husband, Mrs. Sly had no income other than a pension she received in respect of her war service. This was paid into her bank account at a local bank, from which account she made minor expenditures on behalf of herself and her grand-children" (at [17]).

"As already indicated, she left all matters of business to him. She trusted him. She readily deferred to him in any commercial matter. She did not regard herself as stupid but she considered herself to be dominated by him. In any mutual dealings between them, she was obviously at a complete disadvantage. He was obviously both in a position of advantage and also of influence over her" (at [45]).

- ***Warburton v Whiteley*** (Unreported, 1989 - BC8902562)

Court of Appeal New South Wales: Kirby P, McHugh, Clarke JJA

In this case Whiteley was entitled to invalidation of her separate personal liability on the basis that her husband had procured her execution of the guarantee to the knowledge of the creditor who had no reasonable ground to believe that she fully comprehended the transaction and freely entered into it. The Court of Appeal considered whether the principle in *Yerkey* was obsolete. The Court held the principle in *Yerkey* is the law to be applied in New South

Wales until altered by legislation or varied by the High Court of Australia. The Court found in favour of the wife (pursuant to *Yerkey*), even though she failed to prove that she had no shareholding in the company. Nevertheless, she was not considered to be a substantial beneficiary as the Court accepted that the company guaranteed was "the pup" of her husband.

Kirby J

"The general advance in the education and economic involvement of women does not prevent the conclusion that, in a particular case, the woman in question suffers a relevant special disadvantage. In the present case Mrs Warburton had no education past her intermediate certificate. She was absent from the workforce and business world for a substantial period whilst rearing her children. She was always subordinate to her husband in their common business affairs. She took no part in the business affairs of the companies. She was unaware of the details of her husband's association with the companies and with the creditors generally. In sum, the evidence paints a picture of a woman in a significantly unequal relationship with her husband, at least in relation to business affairs and the incurring of debts" (at 631).

Literature cited by Kirby J evidenced the continuing inequality experienced by women in a range of aspects of their lives from employment to access to banking:

- Thornton 1986;
- Deery and Plowman 1985;
- New South Wales Anti-Discrimination Board 1986.

Feminist Commentary

Positive assessment

"By contrast with the muddled reasoning and scant regard for the doctrine of precedent in *Akins*, the earlier decision of a differently-constituted Court of Appeal in *Warburton v Whiteley* is a model of clarity and intellectual rigour. While acknowledging the policy considerations favouring a revision of the rule in *Yerkey v Jones*, the Court of Appeal on this occasion concluded that it was bound by this High Court authority and proceeded to apply it to the facts of the case. Indeed, in technical terms, the ratio decidendi of *Warburton v Whiteley* was that *Yerkey v Jones* remains applicable until the High Court itself overrules that decision." (O'Donovan 1996, p.323)

- ***Nolan v Westpac Bank*** (1989) 51 SASR 496
Supreme Court of South Australia: Leigertwood AJ

Nolan mortgaged her home to secure the debts of her ex-husband's business, believing that she guaranteed a loan of around \$6000. However, she was in

fact the principal debtor. There was a material misrepresentation by the ex-husband as to the financial viability of the business being secured, and misrepresentation by the branch manager of Westpac as to the nature of her liability. Thus the Court found unconscionable conduct on the part of the bank and set aside the guarantee.

Leigertwood AJ

“Notwithstanding the divorce [the ex-husband], over the years, has had considerable hold upon the plaintiff and during a period of nearly a year prior to the impugned transaction held considerable sway, as at relevant times was obvious to Baum [the bank manager], over the plaintiff in relation to her involvement in Mr Nolan’s financial affairs” (at p. 515)

While there were a number of misrepresentations about the company secured and the nature of the transaction, Leigertwood AJ attributed the fault of misunderstanding to Nolan: “That she believed these things demonstrates how inadequate she was in dealing with business matters” (at p. 515).

- ***Peters v Commonwealth Bank of Australia*** (1992) ASC 56-135
Supreme Court of New South Wales: Brownie J

Peters executed a mortgage on her home, and a guarantee, so as to provide security in respect of an advance to companies associated with her husband. She provided evidence that the couple became estranged because of his angry and bad tempered behaviour when he was affected by alcohol. Even some 6 years after their separation, she remained concerned for her physical safety, should he be affected by alcohol, and she was therefore concerned not to provoke him. The loan was for restaurant venture to be undertaken by himself and his girlfriend, which he subsequently defaulted on. She claimed relief for: undue influence on the part of her husband; unconscientious conduct by the defendant and statutory relief under the *Contracts Review Act 1980*. She was a married woman who agreed to act as surety for her husband without understanding the effect of the transactions. The Court held a defence based on the principle in *Yerkey* succeeded as she had no understanding of the nature of the guarantee or the ex-husband’s business and the bank had reason to know this. Relief was also given under the *Contracts Review Act*. However, no undue influence was found.

Brownie J

“... he made representations to her, as likely as not by silence, as well as by spoken words; she was accustomed to leaving all business decisions to him, and she then did what he asked, either without discussion or with a discussion so limited as to be virtually no discussion; and she was concerned for physical safety, so as not to wish to provoke him; but the relationship was not one of

undue influence. Rather, her actions seem to be fairly described as the free exercise of her will, with the qualification that she chose to do what he asked without asking questions” (at 89, 320).

Feminist commentary

Negative assessments of the approach taken to facts for doctrine of undue influence

“For a woman in an ETD [emotionally transmitted debt] situation, undue influence is difficult to establish because many judges assume that a fairly high level of control by a male over a female is acceptable and hence not ‘undue’. For example, in *Peters v Commonwealth Bank Australia*.” (Baron 1995, p.39)

“Another example in which a judge appeared to consider that ‘a high level of control by a male over a female is acceptable and hence not ‘undue’ is found in the case of *Peters v Commonwealth Bank of Australia*” (Kaye 1997, p.48)

- ***Guarantors – Problems and Perspectives***, Discussion Paper (1992)
Trade Practices Commission

This report addressed issues regarding a range of persons who provide personal guarantors. It did not raise the specific issue of (or use the phrase) STD.

- ***Multiculturalism and the Law*** (1992)
Australian Law Reform Commission

This report examined guarantees, among other legal issues impacting on a multicultural society. It recommended that protections in the form of better information for guarantors be implemented.

- ***Equality before the Law: Women’s Equality*** Report No. 69 | [austlii](#)
Australian Law Reform Commission

In 1994, the Australian Law Reform Commission released the influential *Equality before the Law* reports. The Commissioners who produced these reports were prominent feminist scholars, such as Reg Graycar, Jenny Morgan and Hilary Charlesworth, Rebecca Bailey-Harris, and judicial officers such as Justice Elizabeth Evatt, Deputy President Sue Tongue and Justice Margaret Beazley (consulting). Chapter 13, entitled ‘Sexually transmitted debt’, examines women and debt by looking at the problems faced by women guarantors who mortgage their share in the family home as security for their guarantee. The Report acknowledged the ‘developments and initiatives over the last 10 years which should help, to some extent, to identify and reduce the injustices created by sexually transmitted debt but it remains a problem’. The Report calls for changes to banking industry practice by amending the

Australian Bankers' Association Code of Banking Practice. The Code sets out minimum standards for banks such as:

- the limitation of the guarantee to a fixed amount
- provision by the bank to the guarantor of a warning of the guarantor's potential liability
- provision by the bank of information concerning the primary borrower, with the permission of the borrower
- conditions that if the borrower fails to give such permission the bank may only go ahead with the express agreement of the guarantor
- a recommendation by the bank that the guarantor seek independent legal advice.

However, the Report pointed out that the Code's coverage needed to be extended to cover situations in which STD arises as it may not have any binding force for guarantors or for loans to family companies. The Report also recommended widening of the terms of reference of the Australian Banking Industry Ombudsman so that it could hear and address complaints about debts owed by companies and in respect of loans over \$100,000, as STD frequently relates to these situations. The Report recommends increasing the requirements regarding provision of legal and financial advice to guarantors. One particular recommendation is that where the guarantee is secured by the family home, the bank must not proceed until the guarantor has obtained independent financial and legal advice which could be provided by a specialist women's legal service. The bank must also independently meet with the guarantor to explain the transaction and satisfy itself that it is understood and freely consented to. Many of these recommendations were implemented into the recent [Banking Code](#). Finally, the Report recommends funding for specific women's legal advice services to meet the obvious needs created by the above processes.

- ***Teachers Health Investments Pty Ltd v Wynne*** (1996) 2 ACCR 424; ***Burnswood and Others v Wynne***

Court of Appeal New South Wales: Mahoney P, **Beazley JA**, Waddell AJA

Wynne provided a mortgage on her home as security for a loan for her husband and his company. The wife and husband had a history of poor marital relations. The trial judge found that, at the time of entering into the mortgage, the respondent was in a vulnerable position (mental health issues causing her anxiety) which the husband took advantage of in contriving to secure her entry into the mortgage. The trial judge held that Wynne was entitled to relief under *Yerkey*. However, he found that the lender's conduct was not unconscionable in the circumstances and that the mortgage transaction was not unjust within the meaning of the *Contracts Review Act 1980* (NSW).

On appeal the Court of Appeal held that the equitable presumption in *Yerkey* no longer represents the law in New South Wales as the principles of unconscionability propounded in the common law provide adequate grounds of relief to wives who act as sureties for their husband's debts. The Court also held that the two matters which must be established to demonstrate unconscionable conduct were present in this case: that the respondent was under a special disability due to her highly vulnerable state and the appellant should have known of the respondent's special disadvantage and have been on notice that the transaction was perilous from the principal debtor's point of view and improvident from the respondent's point of view. The Court found the bank should have told her to obtain advice relating to the propriety of the transaction from her point of view. Failure to do so rendered its conduct unconscionable. The contract was also unjust within the meaning of the *Contracts Review Act 1980* (NSW). The appeal was upheld.

Feminist commentary

Positive assessments

"In many cases, the *Yerkey* principle has served to protect wives from being exploited and having their interests neglected. The degree of the exploitation and neglect varies from one case to another. For example, in *Teachers Health Investments Pty Ltd v Wynne*, where the husband used the threat of divorce to persuade his wife to act as guarantor, the court held that the wife was highly vulnerable and her will had been overborne." (Wright 2006, p.68)

Negative assessments

"The outcome of *Wynne's* case is more sensitive to the relevant concerns. The trouble is that the decision assumes the fact situation to have been an isolated one. If the court had recognised its recurrent nature, it would hardly have rejected the case for a special rule." (Duggan 1997, p.226)

- ***Geelong Building Society (in liq) v Thomas & Anor*** (1996) Aust Contract R 90-068; BC9601710

Supreme Court of Victoria: Hedigan J

This case concerned the influence of the defendant's father-in-law and husband in order to procure a guarantee for the father-in-law's investments. Thomas was offered no explanation of the loan and claimed she executed it under undue influence, because she was given no advice and it was demanded when she was trying to feed children in her kitchen. The Court noted the power imbalance between the parties based on social and educational differences. It found no benefit followed to the guarantor, and there was no evidence that she had solicitors or that the bank believed she was advised. The Court referred to *Yerkey v Jones* but since this was not a husband and wife situation it stated

that the principle could not apply. The Court expressly disagreed with NSW authority rejecting the principle. However, there was no need for the principle in this case, as the Court found that the bank had actual or constructive notice of the undue influence, and it set aside the mortgages.

Hedigan J

“I also accept her evidence about her trust and confidence in Fred Thomas, although I am of the view that it was accompanied by an excessive desire to please, an exaggerated awe and respect for his abilities and skills (which, with the benefit of hindsight, appear to have had some limitations) and her assumptions about his wealth. ... In my view, her trust and confidence in [the husband and Fred Thomas] was also grounded in the different level of education, as she perceived it. Her husband Charles had been educated at Scotch College, occupied a managerial position in the father's company and ultimately became a State Manager for Operation at Seapak Transport. She would naturally have had substantial respect for her ex-father-in-law as her first employer as well. I conclude that in the first 10 years of their marriage her want of sophistication and schooling would have made her more than usually prone to reliance upon them both and accounted for her susceptibility to their influence in relation to her financial affairs. She, herself, described herself as overawed and intimidated by Fred Thomas because she believed he was a great businessman. His early influence had been sufficient to break up their original courtship. I am prepared to conclude that the first defendant, Charles Thomas, was well aware of the purposes for which this mortgage was required, namely, to support his father's entrepreneurial investment in the development of the townhouses...” (at pp. 46-47).

“The general tenor of authority has been that the position of a wife guaranteeing the debts of her husband or of a company which the husband controls but in which she has an interest stand in a very different position to cases of the kind here applying, the provision of a surety mortgage without apparent benefit to the sureties. It should be said that these matters do not necessarily exclude the application of the principle in *Yerkey v Jones*...” (at p. 59).

Considering whether the transaction benefits the wife

In this period, courts applied a broad understanding of when the wife stood to benefit from the loan such that relief was often unavailable. The *Yerkey* principle requires that:

- there to be influence or a lack of understanding,
- no gain from the transaction, and
- no attempt by the bank to explain the transaction or advise seeking advice by another.

Feminist commentators noted that courts often assumed passivity of the wife in relation to the financial affairs of the family. It was often assumed that the husband's business would benefit the wife. If she was a director or shareholder of the company borrowing, this was often prima facie evidence of the wife's benefit even if it was clear that the company was exclusively run by the husband and she received no personal income.

- ***European Asian of Australia Ltd v Kurland and Another*** (1985) 8 NSWLR 192
Supreme Court of New South Wales: Rogers J

A husband and wife gave their personal guarantees in respect of a company obtaining a loan with security of a second mortgage over their home. The house was registered in the name of the wife, Mrs Kurland, alone. The Supreme Court found there was evidence that all documents relating to the loan transactions were procured of Mrs Kurland by her husband and she signed them without knowing anything about the nature of the documents or the liability they imposed on her. She relied on the principle from *Yerkey v Jones* in order to release her from the guarantee. However, the Court held that the contracts were enforceable. The 'invalidating tendency' did not apply as the Court decided that she stood to benefit equally with her husband by virtue of their equal shareholding in the company and thus the transaction was not unconscionable.

Rogers J

In assessing the 'special disability' of the guarantor in order to fulfil an aspect of the unconscionable dealing doctrine, Rogers J "encountered great difficulty in attempting to describe Mrs Kurkland in a way which avoids giving offence." His Honour described Mrs Kurland as "an archetype of a female with a total lack of interest in anything outside her household" (p. 197).

Despite this factual conclusion about the case before him, Rogers J expressed the following strong concerns about the principle from *Yerkey v Jones*:

"I feel compelled to say that in the year 1985 it seems anachronistic to be told that being female and a wife is, by itself, a sufficient qualification to enrol in the class of persons suffering a special disadvantage. . . . Were this to be correct, it would affix a badge of shame to this branch of the law. . . . That being a female spouse should place a person shoulder to shoulder with the sick, the ignorant and the impaired is not to be tolerated."

Feminist commentary

Negative assessments – regarding approach to Yerkey principle

"This judgment sees gendered differences as an anachronism. This view fails to see the inequalities in power associated with sex." (Otto 1992, p.818)

"[G]ender inequality has not been considered to be an appropriate basis for equitable relief [footnoting *Kurland* and *Warburton*]. As the cases on sexually transmitted debt reveal, classifications on the basis of gender are increasingly considered to be 'anachronistic', and gender-neutral doctrines such as the *Amadio* doctrine of unconscionable dealing are seen to be consistent with the promotion of gender equality." (Dunn 2000, p.439)

"Many judges have voiced fervent opposition to the ready assumption made by some legal counsel that wives exhibit especial vulnerability to influence. Rogers J in *European Asian of Australia Ltd v Kurland* asserted that this assumption placed married women 'shoulder to shoulder with the sick, the ignorant and the impaired'." (Wright 2006, p.68)

"In these situations, the legacy of traditional gender roles is clearly evident" and yet unrecognised by the court. (Baron 1995, p.28)

Negative assessments – regarding approach to evidence

"Although the binding force of ['special equity theory'] has been recognised and subsequently applied, in recent years the trend has been to narrowly interpret the ratio and distinguish the case to avoid its application" [citing this case]. (Bailey 1999, p.1014)

"The standards against which the behaviour of women is compared seem to vary from case to case. Some women appear to have their behaviour judged by comparing it to an active masculine standard. For example, Mrs Kurland had a tertiary education and her failure to become involved in financial matters affecting her was measured against the involvement that a reasonable person (man?) with a tertiary education would have had." (Howell 1995, p.100)

"In some cases where the facts have suggested the rule could apply, the response has not been so circumspect. This is demonstrated by Rogers J in *European Asian of Australia Ltd v Kurland ...*" (Fisher 1996, p.40)

- ***ANZ Banking Group v Aileen Joan Bateman (nee Walls)*** (Unreported, 6194 of 1986)
Supreme Court of Victoria: Kaye J

This case concerned an appeal against an order made by a Master granting Bateman leave to defend on a summons for final judgment in a claim for possession of her home. She had given the mortgage over the home as security for a loan to herself and her husband. Bateman met her husband when he was in jail for a number of convictions for armed robbery. He received a first loan in order to partner in a printing business which subsequently failed. He then asked Bateman to be a guarantor for a further loan, telling her that he would face jail if he could not raise the money and threatening suicide. Bateman argued that she did not appreciate that she had guaranteed not only a loan of \$50,000 but also an overdraft account which he subsequently used. The

Court found that the bank did not have actual or constructive knowledge of the undue influence exerted by the husband and therefore no unconscionability could be imputed to the third party. The Court considered the *Yerkey v Jones* principle but distinguished it as Bateman was not considered a volunteer as the bank believed the transaction was a joint venture. The Court allowed the appeal and gave leave for summary judgment for the bank.

- ***Commonwealth Bank of Australia v Cohen*** (1988) ASC 55-681
Supreme Court of New South Wales: Cole J

Cohen applied to set aside guarantees she gave to support business loans to her husband. Cohen had signed the documents at home at the request of her husband, and in circumstances where she did not know the perilous financial position of the company she was guaranteeing, and she did not receive independent legal advice. However, the Court found that the wife benefited from the transactions in the sense that she relied on her husband for income to support herself and her family, and the income was derived from the company, and the wife was aware that it was necessary to give the guarantee to enable the company to continue.

- ***Carrington v Confirmers Pty Ltd v Akins*** (Unreported, 23 April 1991)
Supreme Court of Victoria: Giles J

Two married women (Mrs A and Mrs D) sought relief in respect of mortgages and guarantees they had given to support business loans to their husbands. The Court rejected their claims and yet held that the principles in *Yerkey v Jones* must be applied even if now 'anachronistic as founded on an outmoded view of the husband and wife relationship.' The Court found that while mere directorship of the company by the wife may not of itself constitute a benefit so as to remove possible relief, in this case the income of the family company was what the family lived on. Therefore the transaction could convey a substantial benefit to the wife. On the other grounds, there was no undue influence by the husband. To obtain relief on the ground of unconscionable conduct of the creditor, it would be necessary to show that the creditor had actual knowledge of the special disability of the other party and that it entered too readily into an improvident transaction placing a real burden on the other party. Where a wife guarantees the debt of a company by which her husband conducts business and the creditor does not know the precise arrangements between them or the benefits falling to the wife, more must be shown than knowledge of the creditor of the fact of the relationship. Finally the *Contracts Review Act* requires that it be established that the contract was unjust at the time when it was made, and whether there is injustice requires attention to the position of both parties. Relief was refused on all grounds.

Giles J

"... It is not essential that the benefit to the wife be through an interest in the debtor company. That can not be the test, since otherwise it is hard to see why a half interest in the debtor would suffice to exclude *Yerkey v Jones* wholly. ... In the present case the mortgages and guarantees were for the benefit of Mrs Akins in a real sense, in that they supported the business conducted by Mr Akins through various companies from which came the family income which she enjoyed." (at [47])

Feminist commentary

Negative commentary

"By contrast with the muddled reasoning and scant regard for the doctrine of precedent in *Akins*, the earlier decision of a differently-constituted Court of Appeal in *Warburton v Whiteley* is a model of clarity and intellectual rigour..." (O'Donovan 1996, p.323)

- ***ANZ Banking Group Ltd v Lefkovic*** (Unreported, 5929 of 1991)
Supreme Court of Victoria: Tadgell J

Mr and Mrs Lefkovic gave guarantees for a loan to their company. Mrs Lefkovic contended that she was asked by her husband to sign documents 'as a director' of the company. She did not know she was a director and thought what she was signing was a company document not a guarantee attracting personal liability. She attended at the bank and signed with no explanation of the document. She spoke but did not read English well. The Court applied *Yerkey v Jones*, but distinguished the case on these facts. The Court found no evidence that the bank required the husband to procure the guarantee from the wife, but simply asked the co-directors of the company to sign guarantees. The Court also found that, as co-director of the company the loan was made to, she could not be seen as a volunteer.

- ***Story v Advance Bank Australia Ltd and Another*** (1993) 31 NSWLR 722
Court of Appeal New South Wales: Gleeson CJ, Mahoney, Cripps JJA

The bank took a mortgage over property owned by a company, the directors and shareholders of which were husband and wife. The mortgage, which was apparently regular on its face, was in fact a forgery. The forgery was a false signature to the attestation of the common seal of the director/wife affixed by the director/husband without his wife's knowledge. There was a contest at the trial as to the context of the forged signature, and the evidence showed that this was something he had done on previous occasions. He asserted that he had his wife's express approval to place her signature on the mortgage in question, but his Honour did not accept that the husband had either express or implied authority to sign on behalf of his wife. However, the Court of Appeal held that the bank did not have actual or constructive knowledge of the forged signature,

and the mere fact of defective execution of a mortgage document alone does not give rise to a personal equity to have the mortgage set aside. The loan benefited the company in which she was a director and shareholder and thus she was not a volunteer. Appeal allowed and no relief given.

Feminist commentary

Negative assessments

“The *Story* case ... once again tells us very little about Mrs Story and the circumstances in which she came to be so uninvolved in her husband’s company ... the liability issue was determined in favour of the creditor once non-participation (being a matter of ‘choice’) and benefit were established.” (Fehlberg 1997, p353)

“In the view of the writer the outcome of that case is critically dependent upon notions of shared property. It reveals an ambivalence about the independence of women such as Mrs Story, i.e. is this an independent claim or does this woman still retain the shared responsibility of family ... [m]oreover the notion of de facto control enables the court to achieve several outcomes:

1. Equate the interests of the family with those of the corporation.
2. Deny a separate claim for the corporate assets by Mrs S based on her contribution to the family.
3. Consequently deny her labour rendered to the family as having any value.
4. Privileging the rights of the creditor negotiated in the public sphere over Mrs S’s rights ‘negotiated’ within the private sphere. ...

The case also relies upon fictitious consents and arbitrary notions of control in order to come to the conclusions favourable to the creditor. Like the female passive director cases, it imposes a conception of a publicly negotiated right upon a domestic arrangement.” (Spender 1996, p.91)

- ***Australia and New Zealand Banking Group Ltd v McGee*** ([unreported 1994 - BC9400418](#))
Supreme Court of Tasmania: Cox J

McGee became a guarantor for her husband’s business borrowings. The context of this personal liability was, she claimed, that she went with her husband to the bank and signed some documents which were not explained to her. She was later asked to sign a mortgage over the property which was to secure the \$40,000 overdraft (first mortgage). Again she argued she was given no explanation of the nature or contents of the document she signed. The Court found she had a right to rely on the principle expressed in *Yerkey*. However, the Court held that McGee had a sufficiently substantial shareholding to warrant a finding that she had a beneficial interest in the company’s debt. However, the extent of the shareholding was not known to McGee and her own

perception of the benefit it attracted to her was that it was an indirect one flowing to her and her children from the profits made by the company and received by her husband whether as wages or as dividends or the like. Relief was refused.

- ***St George Bank Ltd v Dunstan*** (Unreported, 10 November 1994)

Supreme Court of Victoria: Hayne J

A husband and wife signed guarantees with security of their home for a loan to a company in which they were majority shareholders. The Court applied *Yerkey v Jones* but distinguished these facts as his Honour found no reason for the bank to believe the wife was signing under a misunderstanding – there was a solicitor's letter that she had been given advice (even if the solicitor was acting for the borrowers). There was evidence of actual undue influence of the husband but no evidence that the bank was aware of this. It was argued that the bank should have ensured the wife understood the transaction through giving her or telling to her receive independent advice. The Court found that there was nothing to say that adequate advice was not given, or that a reasonable lender should question the solicitor's certificate even if the advice was given by a solicitor in a position of conflict. The Court also found that the wife was not a volunteer as she was a director and shareholder of the company. Relief was refused.

- ***ANZ Bank v Dunosa Pty Ltd*** [1995] ANZ ConvR 86

Supreme Court of Victoria: Hansen J

Various guarantees were given for loans by the bank for business transactions of a family company, including personal guarantees secured by the family home. Dunosa had little education but she did have some business experience. Hansen J found of Dunosa: "She impressed me as a person of reasonable acumen and intelligence who would have been unlikely not to have been aware of the occasion and purpose for which documents were required or have been able to understand their nature and effect, even in general terms, if explained to her" (at p. 62). Dunosa claimed not to know about one of the companies granted a loan and the family trust, and that she had no involvement in the family business. The Court found she understood the nature of the contracts she signed, and was advised at the bank. No misrepresentation or influence by the husband was found. No relief was granted.

Hansen J

The company was not the "alter ego" of the husband and the loan supported the "business from which came the family income which she enjoyed" (at [61]).

- ***Pyramid Building Society v Martin*** (1995) 1 ACCR 337

Supreme Court of Victoria: Hansen J

A husband and wife provided personal all moneys guarantees for a loan provided to a company in which the husband was a director. Neither party was found to be under a special disability. The Court applied *Yerkey v Jones* and found that the wife had limited education and was not involved in the business, and signed on request of the husband. There was evidence that a solicitor for the bank advised them, but there would have been no disability of the husband or wife evident to him. The solicitors for the borrowers were found not to be giving advice to the husband and wife as surety, but they were not on this basis on notice of any vitiating factor. The Court found that the loan to the business was “for the benefit of the family and herself,” and thus the wife was not found to be a volunteer. No relief was granted.

1998 - 2015: ‘Trust and confidence between marriage partners’ and other relationships

Speculation about the application of ‘wives special equity’ in Australia was put to rest in 1998 when it was endorsed by the High Court in [Garcia v NAB](#). However, in doing so, the majority decision replaced Dixon J’s formulation with gender-neutral language of a principle concerned with the effect of ‘trust and confidence, in the ordinary sense of the words, between marriage partners’. The majority decision also left open the prospect of application of the principle to other ‘long term and publicly declared relationships short of marriage’. As this was only a hint, this section maps the slowness of acceptance by courts across Australia to extend the evidentiary principle to recognise STD in other relationships. This common law approach represents the current law of Australia.

- ***Garcia v National Bank Limited*** (1998) 155 ALR 614 | [austlii](#)
High Court of Australia: **Gaudron**, McHugh, Gummow, Kirby, Hayne and Callinan JJ

Mrs Garcia and her husband executed a mortgage in favour of the bank for the purposes of securing guarantees given for a loan to her husband’s business. Mr Garcia assured Mrs Garcia there was no ‘danger’ in the transaction and no explanation of the transaction was given by the bank. Mrs Garcia was a physiotherapist. However, there was evidence that her husband had belittled her and that she was trying to save their marriage. The Garcias divorced and Mrs Garcia sought a declaration that the guarantees were void as a result of undue influence. The trial judge found Mrs Garcia understood nature of guarantees but not the extent of this particular guarantee and that undue influence was established. The Appeal Court overturned this finding and also dismissed the principle from *Yerkey*. The appellant then appealed to the High Court. The High Court found that Mrs Garcia did not understand the nature of the transaction, the Bank was aware that Mrs Garcia was married to the creditor and, because they took no step to explain the transaction to her and knew of no independent advice to her about it, Mrs Garcia was entitled to relief.

Gaudron, McHugh, Gummow, Hayne JJ

“[Yerkey v Jones] is one concerning what today is seen as an imbalance of power. In point of legal principle, however, it is actual undue influence in that the wife, lacking economic or other power, is overborne by her husband and goes surety for her husband's debts when she does not bring a free mind and will to that decision.” (at [23])

The majority found that a principle that recognised the “trust and confidence, in the ordinary sense of the words, between marriage partners” was appropriate to retain in Australian law. Their Honours did not need to decide in the context of the (marriage) relationship before them but left open the prospect of the application of the principle to other “long term and publicly declared relationships short of marriage.”

Literature cited by Gaudron, McHugh, Gummow, Hayne JJ

- Howell 1995;
- Fehlberg 1996;
- Fehlberg 1997.

Kirby J:

“Thus the credit provider will be fixed with constructive notice if it knows facts sufficient to put it on inquiry as to the possibility of wrongdoing by the debtor and it fails to inquire. ... A credit provider will be put on inquiry by a combination of two factors. (1) the transaction is not on its face to the personal financial advantage of the party offering the security; and (2) there is a relationship which is known, or which ought to be known, by the credit provider involving an emotional dependency on the part of the surety towards the debtor. The relationship of emotional dependency is singled out because of the possible effects of the sexual and/or relationship ties between the parties, on their financial dealings with each other. The fear of destroying or damaging the wider “relationship between persons makes these ties a ready weapon for undue influence”. Moreover the informality of business dealings raises a “substantial risk” of misrepresentation as to the nature of the liability concerned. A credit provider will therefore be put on inquiry if it is aware that the surety reposes trust and confidence in the debtor in relation to his or her financial affairs. Cohabitation, as such, may alert the credit provider to the need for further inquiry. So may marriage, de facto marriage, or long term relationships with respect to sureties and borrowers of either sex. So may other information as to the relationships of the parties which comes to the notice of the credit provider or which it, out of prudence, requests and obtains. A rudimentary question as to the address of the parties and the discovery that they are (or have been) cohabitants would ordinarily be enough to set alarm bells ringing. This is because of the added vulnerability which cohabitation may bring to a relationship, otherwise unexplained, under which one person guarantees the debt of another by assuming their risks if things go wrong”.

Literature cited by Kirby J:

- ALRC 1994;
- Pascoe 1997;
- Fehlberg 1997;
- Dodds-Streeton 1994;
- Cretney 1992;
- Duggan 1991.

Feminist commentary

Positive assessments

“Unless the lender takes steps to explain the transaction to the wife (or ensure that someone else has done so) it will be unconscionable for it to enforce the security if in fact the wife did not understand it ... [s]uch an analysis reveals that most criticism of *Yerkey v Jones* (or at least the most fierce) is misdirected. The presumption is one of trust between spouses – surely unobjectionable – rather than of wives’ collective incompetence.” (Stone 1999, p.606)

“[T]he principle outlined by the majority in *Garcia* provides an excellent example of the advantageous use of stereotyping in the development and application of equitable doctrine. The basic premise of *Garcia* is that protection for married women against unscrupulous creditors who fail to fully explain the terms and conditions of financial agreements they may enter into must be sustained. The reason for this continued protection is simple: a significant number of married women in Australia are in relationships ‘marked by disparities of economic and other power’. ... In *Garcia*, the benefits of the discrimination flowing from the new *Yerkey* principle are encapsulated in what we have described as ‘positive stereotyping’. The new doctrine allows for a healthier form of stereotyping to be used in order to uphold the sense of individual justice upon which the equitable jurisdiction is founded.’ (Haigh and Hepburn 2000, p. 305, 307)

“The *Garcia* decision comprehensively examines the ambit of the *Yerkey* principle and categorically confirms its continuing relevance to the modern law of undue influence in Australia, despite marked changes in societal mores and gender roles since *Yerkey* was first handed down. The legal significance of this latest decision lies in its explication of the relational focus of the principle; according to the majority, the rationale underlying the special wives’ equity is not based on the subservience or inferior economic position of women, nor is it based upon their vulnerability to exploitation but rather, the unfairness that can flow from relationships of trust and confidence.” (Hepburn 1997, p.99)

“The rule in *Garcia* although a narrow one, applying only to marital relationships where the wife is substantially regarded as a volunteer, nevertheless has the

significant advantage of enabling a wife to resist enforcement of a guarantee on the grounds that she lacks full understanding of its effect. The rationale for the rule, as emphasised by the majority, was to be found in the special nature of the marriage relationship which is based on trust and confidence between the spouses.” (Pascoe 2006, p117)

Negative assessments

“[T]he judgments in *Garcia* ... while appearing to take different approaches to the question of how best to promote equality, implicitly employ common stereotypes - or stock stories - about women's difference within marriage. ... Kirby J recognises that the problem is one that primarily affects women, yet his failure to analyse this as a product of gender inequality leads, once again, to the invocation of an inherent women's difference despite the stated desire in the first part of his judgment to avoid gender stereotypes. Again Kirby J seems to imply that it is merely a matter of preference or choice for women as to whether they follow their husbands' advice... While the judgments all acknowledge, either implicitly or explicitly, that the phenomenon of sexually transmitted debt is a gendered one, their explanations, although different on their face, end up locating the problem in some notion of women's 'difference' rather than inequality. The missing factor in all three judgments is an analysis of the structural gendered inequality and, in particular, the economic factors, which contribute to the problem.” (Dunn 2000, p.444, 446, 447).

“The decision in *Garcia* has attracted a fair share of academic criticism, as failing to discharge a judicial responsibility to provide practical guidance by refusing to provide particular guidance beyond the facts in the case before them and merely indicating what may be decided in future cases.” (Cockburn 2000, p.278)

“Just as this decision provides no clear guidance on how to deal with such cases, it also shows that the Court has no clear understanding of how women are affected by legal doctrines nor of some of the important theoretical work on gender and equality that might assist it in developing a clear and principled approach to such issues...” (Graycar and Morgan 2001, p.721)

“While the majority judges ... left open the possibility that this special protection might be extended beyond wives ... they confined their ruling's scope to the situation of a wife in Jean Garcia's position. However justifiable that might be in terms of the facts before the Court and as a matter of strict precedent, the modern High Court has engaged in law-making to varying degrees in cases with equally confined facts but also equally significant socioeconomic consequences. ... In that sense, *Garcia* represents a missed opportunity for judicial leadership and community guidance.” (Horrigan 2003, p. 185)

- ***State Bank of NSW v Hibbert and Also Groom v Hibbert*** [2000] NSWSC 628 | [austlii](#)

No application to heterosexual de facto partner

A woman entered into a guarantor arrangement for her de facto partner's business endeavours. Her claims to relief were based in part on advice, misrepresentations and communications allegedly made by the bank to her partner and passed on to her so that she acted on them. The Court found the principles in *Garcia* are not available for de facto relationships. However, the Court ordered the mortgage be set aside under the *Contracts Review Act 1980* (NSW) because it was unreasonably difficult to comply with the conditions of the loan. She was not equipped by her educational background or otherwise to make an analysis of the business feasibility of the contract. There was an absence of availability to her of any expert advice analysing the business feasibility of the contract. The practical effect of the provision of the contract was not accurately explained but was misrepresented to her by her partner's tactics.

Bryson J

"The question whether a proposed guarantor is the wife of a proposed borrower is readily ascertainable; people usually behave responsibly in handling information like that. Their Honours in *Garcia* contemplated ... the possibility that the principles applied in *Yerkey v. Jones* would find application to other relationships, Callinan J was unwilling to extend exceptional rules formerly applicable to guarantees by wives to co-habitees. On the other hand Kirby J was prepared to adopt a modified *O'Brien* principle which would apply to cases where there is a relationship of emotional dependence between the debtor and the person conferring the advantage... . Extension of the principles acted on in *Garcia* from wives to all married persons, or to all women, or all persons who are living in de facto relationships, or all persons who share domestic relationships without consideration in detail of the circumstances of those relationships does not appear to me to be a development which the law can realistically be expected to take. The only extension which seriously falls for consideration if persons other than wives are to be protected appears to me to be an extension of the kind addressed by Kirby J and acted on by the House of Lords in *O'Brien*, that is, to all cases where one co-habitee stands surety for the co-habitee's debts and the creditor is aware that there is an emotional relationship between the co-habitees, and to other relationships where the creditor is aware that the surety reposes trust and confidence in the principal debtor. As a matter of judicial authority there has been no such extension" (at [58-60]).

- ***Liu v Adamson*** [2003] NSWSC 74 | [austlii](#)
Supreme Court of New South Wales: Master Macready

Applied to long term de facto partners

A woman initiated proceedings to set aside a costs agreement and a mortgage that she entered into with the first defendant. One of the other parties to the costs agreement and mortgage was her de facto partner. She says that she executed the mortgage but that it was not explained to her at the time of execution. She found out several days later when she asked her partner what she had signed and he said that it was a mortgage. The woman's claim was based upon the principles in *Garcia*, the fiduciary arrangement between her and the defendant, and also upon the *Contracts Review Act 1980* (NSW). The Court had to decide if the law extended to de facto cases. In this case it was determined that *Yerkey* applied because the couple had been living together for 18 years and had 5 children. The Court held under *Garcia* relief should be refused because she was not a volunteer. However, the Court held pursuant to the [Contracts Review Act 1980](#) (NSW) the guarantee and the mortgage should be set aside.

Master Macready

"There is a fundamental difficulty which presents itself with the plaintiff's claim in reliance upon these principles. That is that the relationship between the plaintiff and Mr Miller was not that of husband and wife. ...The extension of the rule to the situation of a man and a woman living in a de facto relationship involves no difficulty with notice nor does it involve any constructive notice of the type rejected by the majority in *Garcia*. For a lender there is no more difficulty with enquiries than when the parties are married and the female is being asked to give a guarantee as she is shown on the title. The same trust and confidence which leads to the female surety receiving no sufficient explanation of the transaction's purport and effect equally applies to a de facto relationship as to a marriage. The matter before me involves a simple long standing de facto relationship between a man and a woman and, indeed, the circumstances of it and the role each plays would fit many marriages. It has endured seventeen years and the parties to it have five children. It is clear that Mr Adamson [from the bank], given ... the fact that he attended at the home of the plaintiff and Mr Miller to obtain her execution, well knew that they were living in a de facto relationship as a man and a woman. In these circumstances it seems to me that the principle in *Yerkey v Jones* should be extended to cover the situation presently before me" (at [13-14], [22-23]).

- ***ANZ Banking Group Ltd v Alirezai; Alirezai v ANZ Banking Group Ltd & Anor*** [2004] QCA 6 [|austlii](#)
Queensland Court of Appeal: **McMurdo P**, Wilson J, Jerrard JA (dissenting)

Apply to a range of 'special relationships'

This case did not concern a wife signing a guarantee, but rather a guarantee offered for a loan to a friend's business. However, the plaintiff relied on *Garcia* principles (and *Royal Bank of Scotland v Etridge (No 2)*) and referred to STD. The Court found that the majority in *Garcia* applied the equitable 'tendency' to other 'marriage like' relationships. The appeal by the bank was dismissed.

McMurdo P

"I do not understand *Garcia* to necessarily limit appropriate equitable relief to marriage or marriage-like relationships, which involve what is sometimes referred to as sexually transmitted debt. What was important in *Garcia* was that the marriage relationship itself put the bank on notice that there was a relationship of trust and confidence between the debtor and the surety so that it was unconscionable for the bank to enforce the surety without having explained, or having had explained to the surety, the effect of the transaction. Special relationships of sufficient trust and confidence in which one party could abuse that trust and confidence so as to invoke equitable relief for transactions entered into by the other are not a closed category; they could, for example, arise in some parent-child relationships or perhaps in the relationship between a disabled person and carer; many other potential examples can be envisaged" (at [39]).

McMurdo P referred to:

- Kirby J's judgment in *Garcia* at 430-31;
 - Horrigan 2003, 183-185.
- ***Westpac Banking Corporation v Stevenson (Aka Jenette Honey Steveson)* [2005] WADC 210** | [austlii](#)
District Court of Western Australia: **Muller DCJ**

Extend to father and daughter relationship

A woman appealed a default judgment against her. She gave evidence that her parents' home was in danger of being repossessed by the mortgagee which led to her father persuading her to become the sole director of a shelf company he had acquired and which he explained would borrow the necessary funds to discharge the mortgage. The woman argued that the default judgment ought to be set aside: firstly, on the ground of undue influence on the part of the father and the absence of any endeavor by the bank to ensure that she received independent advice; second, in the absence of proof of undue influence, that she had an inadequate understanding of the nature of the transaction to which she had become a party, and, given the bank's knowledge of the relationship between father and daughter, it would be unconscionable to allow the contract to stand; and thirdly, that the transaction was unconscionable in all the

circumstances for the purposes of s 51AB or s 51AC of the [Trade Practices Act](#) or, alternatively, s 12CB or s 12CC of the *ASIC Act*. The District Court held the default judgment should be set aside. The Court held *Garcia* was satisfied and it was unconscionable to enforce the guarantee.

Muller DCJ

“It was conceded that the decision in *Garcia* was based upon a relationship of husband and wife. Given the reasoning of the High Court, however, I see no reason why the relationship of father and daughter should not fall into the same category. A paternal relationship, like marriage, is based on trust and confidence and, in a business context, may lead to decisions being made by one party with little or no consultation with the other. In her affidavit the defendant asserted that she had nothing to do with the daily business affairs of the company and simply signed documents that her father asked her to sign in ignorance of what she was actually signing. As I have already said, she wanted to extricate herself from the position she was in and reached an agreement with her father to resign her directorship of the company” (at [13]).

- ***Agripay Pty Limited v Byrne*** [2011] QCA 85 | [austlii](#)
Supreme Court of Queensland Court of Appeal: **McMurdo P**, **White JA**, McMeekin J

Extend to ‘all vulnerable parties in personal relationships’

The husband borrowed money to invest in a tax avoidance agricultural managed investment scheme. There was some evidence that the benefits of this investment were to go into a joint superannuation fund for the couple. His wife guaranteed his loan. The Chief Justice at trial set aside the guarantee on the basis that it was unconscionable. The basis of this finding was that the first the wife knew that she was required to be involved in the scheme was when she was told she had some documents to sign so that her husband could take advantage of the investments. If she did not sign, he could not use the scheme to solve his tax problem. She did not read the application before she signed it as guarantor or receive independent advice before signing. She was upset and felt she was being ambushed. She had blind faith in her husband, notwithstanding his sometimes indifferent personal treatment of her. The couple were both doctors. The Court of Appeal dismissed the appeal and held that a principled application of the rule laid down in *Yerkey* and confirmed in *Garcia* requires that the lender be imputed with knowledge about the ‘trust and confidence’ in this relationship, and had to do more to ensure her informed consent. The lender had not provided any advice to her or ensured that that advice was given by an independent advisor. Arguments were raised by the appellant about the high levels of education of both and the general understanding of the wife about what she was guaranteeing and that the scheme financed was to benefit them both.

McMurdo P

“There seems to be no sound reason why these principles should be limited to wives entering into guarantees of their husbands' liabilities. Human weaknesses and unconscionable conduct are not limited to heterosexual marriage relationships. These legal principles should apply equally to all vulnerable parties in personal relationships” (at [4]).

“It may seem odd that in this case a practising medical practitioner with some business experience can avoid the obligations of her guarantee under *Garcia*. But the respondent is not disentitled to the protection of the law because she is tertiary-educated. It must be remembered that the principles explained in *Garcia* over 13 years ago have long been the law in Australia. Commercial lenders like the appellant, which require partners of borrowers to guarantee their partners' loans, should be well aware of their legal obligations to ensure such guarantors understand the purport and effect of their guarantees and the transactions to which they relate” (at [27]).

“The evidence before the primary judge was sparse, both as to the likelihood and extent of any profit to the joint superannuation fund or generally from the agricultural managed investment scheme. At best, it was that there was some prospect of an eventual profit which may have benefited the family unit if it remained functional; and some small portion of any eventual profit may have found its way to the joint superannuation fund. But the short term benefit of a lower tax bill and any profit received in the long term was essentially for Dr Murray Byrne. There was no clear evidence that the respondent would actually profit from the scheme. ... The evidence favoured the conclusion that the prospect of any profit to the respondent was speculative. Even if she did receive some eventual modest benefit, it was likely to be neither direct nor immediate” (at [11]).

White JA

“Ultimately, cases where a wife seeks to be relieved of the burden of her contract of suretyship will depend on a close analysis of the particular facts. [The lender] submitted that the learned primary judge took an indulgent view of Dr Byrne's want of understanding against her involvement in many of the financial activities of her husband. This is to elevate too highly those activities. The use of a family trust to protect assets in this case involved the purchase of two or three paintings by well known Australian artists. The learned primary judge's acceptance of Dr Byrne's limited involvement in the running of her husband's medical practice was open on the facts. Her evidence that she attempted to bring some financial order into her husband's affairs by managing the household bills from their joint account (required as a condition of her visa) was not challenged. But she was unable, apparently, to exercise any influence over him to plan for his tax obligations and her evidence of his purchase of a

\$390,000 car when he had looming liabilities suggests just how little influence she had. No matter how intelligent she might have been, the emotional pressure that she felt at the time the transactions were entered into was of a kind for which in part the rule had been developed and in respect of which the [lender] could relatively easily have dealt. ... [The lender] also submitted that Dr Byrne gave no evidence to the effect that if fully informed and given time to reflect she would not have entered into the contract. She did not need to do so. This was not a defence of misrepresentation ..." (at [66]).

- ***Dowdle v Pay Now For Business Pty Ltd*** [2008] QSC 224 [austlii](#)
Supreme Court of Queensland: Daubney J

Applied to separated married couples

A husband and wife refinanced their house so the husband could obtain a loan. The husband asked the wife whether she would assist in this regard. She agreed to stand as guarantor and provide a mortgage over the property. The bank sought to call on the guarantee and for possession of the home, calling for summary judgment on the terms of the contract. This application was rejected on the basis that there were arguably grounds for relief argued by the guarantor. ([See trial decision.](#))

Daubney J

"I would not be prepared to find, on a summary basis, that the fact that Mr and Mrs Dowdle had separated is necessarily fatal to reliance on the *Garcia* principles. Whilst in many circumstances, separation is likely to bring to an end the relationship of trust and confidence that exists between parties to a marriage, this is not necessarily always so. One can readily conceive of an 'amicable separation' in which there continues to be a close relationship involving a significant degree of trust (Equally, I should add, one can easily conceive of a married couple who continue to reside together but whose relationship is, in fact, poisonous and completely devoid of trust and confidence.) Furthermore, a separation is, by definition, not irreversible. For the law to assume that the trust that exists between a married couple automatically dissolves the moment cohabitation ends would be artificial. Are the courts to assume, in the case of temporary separations, that the *Garcia* principle applies one week while the parties are cohabiting, but ceases the next when they are not, only to revive a month later when the parties are wholly or partially reconciled? This aspect of the relationship between the Plaintiff and Mr Dowdle clearly requires investigation at trial"(at [35]).

- ***Morrison & Ors v 180 Capital Finance Pty Ltd (No. 2)*** [2012] VCC 1162 | [austlii](#)
County Court of Victoria: Ginnane J

Apply to 'close personal relationships'

A woman signed guarantees and indemnities and other documents in respect of the loan for her de facto partner. She argued the equitable defence of unconscionable conduct pursuant to *Yerkey* and *Garcia*. The County Court held she understood the effect of a guarantee. The Court cited *White JA in Agripay Pty Ltd v Byrne* that the intelligence of the wife does not rebut the fact that the bank should be aware of emotional pressure within a relationship. The lender knew she took no steps to advise herself and did not ensure she received advice. However, relief was refused on the basis that Morrison transacted without any influence and was aware of the nature of transaction she entered.

Ginnane J

“... I proceed on the basis that the equitable defence can apply to close personal relationships, where trust and confidence exist” (at [21]).

- ***Schultz v Bank of Queensland*** [2014] QSC 305 | archive.sclqld.org.au
Supreme Court of Queensland: Jackson J

A wife guaranteed a loan made to the corporate trustee of a discretionary family trust which was controlled by her former husband. She relied on the principle from *Yerkey v Jones* in her claim for relief from the contract and an alternative claim based on statutory unconscionable conduct by the bank. She had previously provided a mortgage as security for a loan, and obtained independent legal advice at that time. She did not receive advice in relation to two guarantees provided for a loan to the trust but signed a waiver provided by the bank. It was agreed that the bank representative told her to seek legal advice and that the document was a guarantee and for the amount specified. Her evidence was that when she asked she was not told about the terms except that if her husband defaulted she would be asked to repay the loan. After some consideration of the law, Jackson J found that Schultz was not a volunteer.

Jackson J

“The “*Yerkey v Jones* equity” is an equity raised in favour of a wife who enters into a transaction as surety for the debts of her husband or her husband’s company. To some, it might seem an anachronism in a 21st century world. But it was affirmed by the High Court as recently as 1998 in *Garcia v National Australia Bank* (“*Garcia*”). There are dicta which urge that the principle extends beyond the protection of a wife to analogous relationships of trust and confidence, but I am not concerned with that question” (at [1]).

1998 - 2015: Considering whether the transaction benefits the wife/partner

Acknowledging feminist critique, the High Court in [Garcia v NAB](#) revised what constitutes a benefit for the wife/partner to take a less technical and more substantive approach. Courts were required to look for evidence of substantial benefit to the wife/ partner in the transaction and not

to automatically assume continuity of interest between husbands and wives. As a result of a different inquiry, directorship of or shareholding in the borrowing company did not always exclude relief. In Queensland, in [*Agripay Pty Ltd v Byrne*](#) (in 2011) the Court of Appeal held that the bank must establish that the (de facto) wife received a 'direct or immediate gain' from the transaction in order to assert that she is not a 'volunteer'. Nevertheless, the volunteer requirement is often the basis for spouses failing to gain relief even where there is evidence of relationship pressure affecting their consent or understanding.

- ***Garcia v National Bank Limited*** (1998) 155 ALR 614 | [austlii](#)
High Court of Australia: **Gaudron**, McHugh, Gummow, Kirby, Hayne and Callinan JJ

Mrs Garcia and her husband executed a mortgage in favour of the bank for the purposes of securing guarantees given for a loan to her husband's business. Mr Garcia assured Mrs Garcia there was no 'danger' in the transaction and no explanation of the transaction was given by the bank. Mrs Garcia was a physiotherapist. However, there was evidence that her husband had belittled her and that she was trying to save their marriage. The Garcias divorced and Mrs Garcia sought a declaration that the guarantees were void as a result of undue influence. The trial judge found Mrs Garcia understood the nature of guarantees but not the extent of this particular guarantee and that undue influence was established. The Appeal Court overturned this finding and also dismissed the principle from *Yerkey*. The appellant then appealed to the High Court. The High Court found that Mrs Garcia did not understand the nature of the transaction, the Bank was aware that Mrs Garcia was married to the creditor and, because they took no step to explain the transaction to her and knew of no independent advice to her about it, Mrs Garcia was entitled to relief.

Gaudron, McHugh, Gummow, Hayne JJ

"[*Yerkey v Jones*] is one concerning what today is seen as an imbalance of power. In point of legal principle, however, it is actual undue influence in that the wife, lacking economic or other power, is overborne by her husband and goes surety for her husband's debts when she does not bring a free mind and will to that decision." (at [23])

The majority found that a principle that recognised the "trust and confidence, in the ordinary sense of the words, between marriage partners" was appropriate to retain in Australian law. Their Honours did not need to decide in the context of the (marriage) relationship before them but left open the prospect of application of the principle to other "long term and publicly declared relationships short of marriage."

Literature cited by Gaudron, McHugh, Gummow, Hayne JJ

- Howell 1995;
- Fehlberg 1996;

- Fehlberg 1997.

Kirby J

“Thus the credit provider will be fixed with constructive notice if it knows facts sufficient to put it on inquiry as to the possibility of wrongdoing by the debtor and it fails to inquire. ... A credit provider will be put on inquiry by a combination of two factors. (1) the transaction is not on its face to the personal financial advantage of the party offering the security; and (2) there is a relationship which is known, or which ought to be known, by the credit provider involving an emotional dependency on the part of the surety towards the debtor. The relationship of emotional dependency is singled out because of the possible effects of the sexual and/or relationship ties between the parties, on their financial dealings with each other. The fear of destroying or damaging the wider “relationship between persons makes these ties a ready weapon for undue influence”. Moreover the informality of business dealings raises a “substantial risk” of misrepresentation as to the nature of the liability concerned. A credit provider will therefore be put on inquiry if it is aware that the surety reposes trust and confidence in the debtor in relation to his or her financial affairs. Cohabitation, as such, may alert the credit provider to the need for further inquiry. So may marriage, de facto marriage, or long term relationships with respect to sureties and borrowers of either sex. So may other information as to the relationships of the parties which comes to the notice of the credit provider or which it, out of prudence, requests and obtains. A rudimentary question as to the address of the parties and the discovery that they are (or have been) cohabitantes would ordinarily be enough to set alarm bells ringing. This is because of the added vulnerability which cohabitation may bring to a relationship, otherwise unexplained, under which one person guarantees the debt of another by assuming their risks if things go wrong”.

Literature cited by Kirby J:

- ALRC 1994;
- Pascoe 1997;
- Fehlberg 1997;
- Dodds-Streeton 1994;
- Cretney 1992;
- Duggan 1991.

Feminist commentary

Positive assessments

“Unless the lender takes steps to explain the transaction to the wife (or ensure that someone else has done so) it will be unconscionable for it to enforce the security if in fact the wife did not understand it ... [s]uch an analysis reveals that

most criticism of *Yerkey v Jones* (or at least the most fierce) is misdirected. The presumption is one of trust between spouses – surely unobjectionable – rather than of wives' collective incompetence." (Stone 1999, p.606)

"[T]he principle outlined by the majority in *Garcia* provides an excellent example of the advantageous use of stereotyping in the development and application of equitable doctrine. The basic premise of *Garcia* is that protection for married women against unscrupulous creditors who fail to fully explain the terms and conditions of financial agreements they may enter into must be sustained. The reason for this continued protection is simple: a significant number of married women in Australia are in relationships 'marked by disparities of economic and other power'. ... In *Garcia*, the benefits of the discrimination flowing from the new *Yerkey* principle are encapsulated in what we have described as 'positive stereotyping'. The new doctrine allows for a healthier form of stereotyping to be used in order to uphold the sense of individual justice upon which the equitable jurisdiction is founded.' (Haigh and Hepburn 2000, p. 305, 307)

"The *Garcia* decision comprehensively examines the ambit of the *Yerkey* principle and categorically confirms its continuing relevance to the modern law of undue influence in Australia, despite marked changes in societal mores and gender roles since *Yerkey* was first handed down. The legal significance of this latest decision lies in its explication of the relational focus of the principle; according to the majority, the rationale underlying the special wives' equity is not based on the subservience or inferior economic position of women, nor is it based upon their vulnerability to exploitation but rather, the unfairness that can flow from relationships of trust and confidence." (Hepburn 1997, p.99)

"The rule in *Garcia* although a narrow one, applying only to marital relationships where the wife is substantially regarded as a volunteer, nevertheless has the significant advantage of enabling a wife to resist enforcement of a guarantee on the grounds that she lacks full understanding of its effect. The rationale for the rule, as emphasised by the majority, was to be found in the special nature of the marriage relationship which is based on trust and confidence between the spouses." (Pascoe 2006, p117)

Negative assessments

"[T]he judgments in *Garcia* ... while appearing to take different approaches to the question of how best to promote equality, implicitly employ common stereotypes - or stock stories - about women's difference within marriage. ... Kirby J recognises that the problem is one that primarily affects women, yet his failure to analyse this as a product of gender inequality leads, once again, to the invocation of an inherent women's difference despite the stated desire in the first part of his judgment to avoid gender stereotypes. Again Kirby J seems to imply that it is merely a matter of preference or choice for women as to

whether they follow their husbands' advice... While the judgments all acknowledge, either implicitly or explicitly, that the phenomenon of sexually transmitted debt is a gendered one, their explanations, although different on their face, end up locating the problem in some notion of women's 'difference' rather than inequality. The missing factor in all three judgments is an analysis of the structural gendered inequality and, in particular, the economic factors, which contribute to the problem." (Dunn 2000, p.444, 446, 447).

"The decision in *Garcia* has attracted a fair share of academic criticism, as failing to discharge a judicial responsibility to provide practical guidance by refusing to provide particular guidance beyond the facts in the case before them and merely indicating what may be decided in future cases." (Cockburn 2000, p.278)

"Just as this decision provides no clear guidance on how to deal with such cases, it also shows that the Court has no clear understanding of how women are affected by legal doctrines nor of some of the important theoretical work on gender and equality that might assist it in developing a clear and principled approach to such issues..." (Graycar and Morgan 2001, p.721)

"While the majority judges ... left open the possibility that this special protection might be extended beyond wives ... they confined their ruling's scope to the situation of a wife in Jean Garcia's position. However justifiable that might be in terms of the facts before the Court and as a matter of strict precedent, the modern High Court has engaged in law-making to varying degrees in cases with equally confined facts but also equally significant socioeconomic consequences. ... In that sense, *Garcia* represents a missed opportunity for judicial leadership and community guidance." (Horrigan 2003, p. 185)

- ***Commonwealth Bank of Australia v Khouri*** [1998] VSC 128 | [austlii](#)
Supreme Court of Victoria: Harper J

A wife became a guarantor for her husband's business loan. The Court concluded that the bank would be "obtaining an unconscientious advantage" over the wife if it were permitted to enforce that security. The Court found *Yerkey* and *Garcia* were applicable. They held that the wife was not aware that she was signing a guarantee or a second mortgage in support of it; and that she believed only that she was signing documents in support of a \$10,000 overdraft. Furthermore, the bank did not explain the purport or effect of the documents to her, nor did it seek to protect her interests in any way notwithstanding that they knew that the marriage relationship existed and that her husband had not informed her of what the transaction was about. The Court found that she was a volunteer to the transaction because, although she was a director of the company, it was a business run by and under the control of her husband and in which she took no active interest. She was pre-occupied with raising her three children and any benefit she gained came to her

not as of right, but as the result of discretion by her husband. Relief was refused.

- **Commonwealth Bank of Australia v Horkings** [2000] VSCA 244 [austlii](#)
Victorian Court of Appeal: Winneke P, Phillips, Buchanan JJA

This is the appeal from the decision in Commonwealth Bank v Khouri (above).

The Court of Appeal dismissed the appeal by the bank. Winneke P agreed with respondent counsel that ‘... the facts, as his Honour [at trial] found them to be, were - to all intents and purposes - indistinguishable from the facts found in *Garcia’s* case’ (at [55]).

- **ANZ Banking Group Ltd v Pham (No. 2)** [1999] VSC 503 | [austlii](#)
Supreme Court of Victoria: **Warren J**

A husband and wife from Vietnam worked full time in the various family businesses. The wife entered into a guarantee for a business loan. Another family member who was the daughter-in-law of the wife, also from Vietnam, entered into a guarantee for the family business. The daughter-in-law received very limited education in Vietnam and upon arrival in Australia attended English classes for a period of six months. Both wife and daughter-in-law relied on *Yerkey* and *Garcia* to have the guarantee set aside. The Court held both the wife and daughter-in-law understood the nature of mortgage, and the guarantee. Furthermore, as members of the Pham family and as a part of the commercial network they stood to gain from the transactions. Relief was refused.

- **Armstrong v Commonwealth Bank of Australia** (unreported 1999 - BC9903751)
Supreme Court of New South Wales: Hamilton J

Armstrong guaranteed the liabilities of her husband’s company by providing mortgages over her properties. She was subject to domestic violence by her husband and on one occasion she stated that he had assaulted her before demanding she sign the documents. She stated: “I was concerned that if I did not do what my husband wanted me to do I believe I would have been subjected to abuse and physical violence. Eventually I signed the documents to keep the peace.” The Court found the mortgages were procured by the actual undue influence of her husband. The Court also held that she was a volunteer in relation to the documents even though she was a shareholder in the company. Hamilton J concluded that any benefit from the transaction was “conferred on her as a wife and mother and not as a shareholder in or in any way by reference to the company”. The Court found that whilst the Bank did not know of the particular circumstances in which the documents were executed, it knew that they were married. That, according to *Yerkey* and *Garcia*, is sufficient. The Bank gave the documents to the husband to go and obtain his wife’s

signature, or in the case of the acknowledgments, posted them to their matrimonial home. The husband's forthright, impatient and forceful personality must have been apparent to those who dealt with him. The guarantees were set aside.

Feminist commentary

Neutral assessments

"[I]t is particularly interesting to note some cases involving guarantees where it was clearly impossible for the court to ignore that violence. For example, in *Armstrong v Commonwealth Bank of Australia* Mrs Armstrong disputed her liability for her husband's business debts. She claimed she signed the relevant documents in a situation of actual undue influence... Hamilton J also accepted that Mrs Armstrong '*signed [the relevant documents], whatever legal advice she had then, under the real fear of a repetition of the actual violence which had by then been applied to her.*'" (Graycar et al 2001, p.184)

- ***State Bank of NSW v Kit Cheng Chia and Peng Tin Chia; Peng Tin Chia v Kenneth John Rennie and Anor*** [2000] NSWSC 552; (2000) 50 NSWLR 587 | [austlii](#)
Supreme Court of New South Wales: Einstein J

A husband and wife from Singapore worked together. She was a certificated general nurse. She had assisted her husband in his practice as a medical practitioner. The bank claimed repayment from the wife as surety of moneys said to be owing to it by the husband. The wife claimed that she was ignorant of the contents of the mortgage. She had not seen the mortgage document prior to its production by her husband for execution by her. She was not afforded any opportunity to negotiate for, reject or make any alteration to the terms of the mortgage, or offered any legal advice. However, the Court held that the wife failed to establish the elements of undue influence as she had a material understanding of the transaction and risk. No relief was granted.

Einstein J

Einstein J found that the requisite understanding of the guarantor will include,

"... at least an understanding of the fact of liability, the general extent of liability and the possible consequences of default However, it is not productive of an equity that the wife misunderstood or failed to appreciate the degree of risk associated in the transaction, or the improvidence or unwisdom of the uses to which the money so secured will be put: *Yerkey v Jones* (at 686). Further, the wife's misapprehension must be of a material matter: *Bank of Victoria Ltd v Mueller* (at 648); that is, material to the liability the creditor wishes to impose upon the wife" (at [169]).

Einstein J summarised the case law in respect of when a wife will be considered a 'volunteer':

"... It is not sufficient that the wife has received consideration as would be recognised in the law of contract: *Bank of Victoria v Mueller* (at 649). The consideration for the guarantee must be of 'real benefit' to the wife: *Garcia* (at 412). Incidental benefit which accrues generally to the family of which the wife is a member is not sufficient benefit to render a transaction which does not otherwise contain a 'real benefit,' non-voluntary... . Where the wife expects to reap direct profit from the transaction, the transaction cannot be said to be voluntary... . Neither can it be said to be voluntary where the monies secured by the guarantee are used to purchase an asset in which the wife is equally interested with her husband... . However, where the interest of the wife is a shareholding in the company through which her husband conducted his business and in which she has no real involvement, then a guarantee given by the wife over that company's debts will be voluntary... . But where the wife has an active and substantial interest in the conduct of, and the fortunes of, the business run by her husband, she will not be a volunteer in relation to any guarantee over the debts of that business... . Where the transaction is not *ex facie* for the benefit for the wife, then the onus will lie on the party seeking to enforce the security to show that the wife was not, relevantly, a volunteer..." (at [169]).

- ***Commonwealth Bank of Australia v Ridout Nominees Pty Ltd & Ors*** [2000] WASC 37 | [austlii](#)

Supreme Court of Western Australia: **Wheeler J**

A number of family members provided a guarantee for family companies. The wife providing a guarantee argued that she did not receive independent advice and did not understand the very complex set of transactions. The bank relied on the husband to obtain the wife's execution of the mortgage and did not satisfy itself that she had advice or explain the transaction to her. The Supreme Court held the wife satisfied the requirements of undue influence and the bank knew about her marriage relationship applying *Yerkey* and *Garcia*.

Wheeler J

"The transaction was voluntary in the sense that while the family businesses obtained a benefit from it and, in that sense, as a practical matter, there might have flowed an indirect benefit to Dorothy, she gave the guarantee in her personal capacity and in her personal capacity received no benefit from it" (at [207]).

- ***Bylander v Multilink*** [2001] NSWCA 53 | [austlii](#)
Court of Appeal New South Wales: Handley, Giles, Heydon JJA

A wife became a guarantor for her husband's company. The trial judge held that a *Yerkey* defence was not open on the pleadings but the defence failed in any event because she was not a volunteer. The Court of Appeal held the *Yerkey* defence was open to the wife on the pleadings and was established. The wife, in giving the guarantee, was a volunteer. The fact that the wife was a director and shareholder in the borrower company, and that the loan funds were paid into the joint bank account of the husband and the wife before the bulk of the funds were paid out, almost immediately, for the husband's business purposes, did not prevent the wife being, in substance, a volunteer for the purposes of the defence.

- ***Commonwealth Bank of Australia v Longo*** [2001] VSC 191 | [austlii](#)
Supreme Court of Victoria: Hansen J

In this case an Italian husband and wife entered into mortgages. The husband admitted signing the first and second mortgages but alleged that he did so under the actual undue influence of his wife. He disclaimed any case of unconscionability based on *Garcia* and expressly confined the defence to the plea of undue influence. He argued that his wife spoke better English than him (he claimed no literacy in English); that she dealt exclusively with the Bank; that he relied on her to protect his interest and explain matters; that she put emotional pressure on him to sign documents; that she did not explain relevant matters including the documents; and he signed the documents at her request, without independent advice, trusting in and relying upon her judgement that it was in his interest to do so. He alleged that the Bank knew or ought to have known of these matters.

The Supreme Court held there was no element of diversion of profit or money from him to her. There was no deception or undue influence.

- ***Elkofairi v Permanent Trustee Co Ltd*** [2002] NSWCA 413 | [austlii](#)
Court of Appeal New South Wales: **Beazley**, Santow JJA, Campbell AJA

A husband and wife gave a mortgage over their jointly owned home as security for a loan. Of that about \$470,000 was applied in discharge of the existing mortgage over the property. The wife was unaware of how the balance of the monies were utilised. The wife appealed the decision of the trial judge who found in favour of the bank enforcing a mortgage. On appeal the Court of Appeal held she had not established an entitlement to relief under *Yerkey*. The respondent did not have express notice or any other information sufficient to put it on notice that the appellant was a volunteer. However, the Court held she was in a special position of disadvantage. There was evidence that her husband was domineering, non-consultative about family decisions and was aggressive and intimidating. Marital difficulties continued until about 1992 when she attempted suicide. She had little education and was illiterate. She had no income and this was a large borrowing secured over her only asset. This was

apparent to the respondent from the loan application form and sufficient to put the respondent on notice of the appellant's lack of capacity to meet the mortgage repayments and thus of the unconscionability of the transaction. Furthermore, the circumstances were also sufficient to make the mortgage contract unjust: [Contracts Review Act 1980](#) (NSW).

Beazley JA

"In my opinion, notwithstanding that the respondent did not have knowledge of the appellant's lack of education and her language and domestic difficulties, her lack of income, in the circumstances of this transaction – that is a large borrowing secured over her only asset, in circumstances where the application form failed to disclose any income for either husband or wife – placed her in a special position of disadvantage. Though the full extent of that special position of disadvantage was not known to the respondent, nonetheless, the absence of any relevant financial information was sufficient to put the respondent on notice of the appellant's lack of capacity to meet the repayment obligations under the mortgage. That left as the only source of repayment the selling of her only asset, as again the respondent must be taken to have known" (at [56]).

Santow J

"Because relief is available under the wider doctrine of unconscionability, for the reasons stated by Beazley JA, it has not been necessary to consider whether the form of the transaction should matter. Here the lender lends under a transaction where the money is intended to go to the husband, though framed in terms rendering husband and wife jointly liable as co-principals. Such a situation may, in the eye of equity, involve a transaction of guarantee or, as sometimes described, constructive suretyship" (at [92]).

- ***Brueckner v The Satellite Group (Ultimo) Pty Ltd and Ors*** [2002] NSWSC 378 | [austlii](#)
upreme Court of New South Wales: Campbell J

A wife became guarantor for her husband's commercial transactions. At the time she felt she had no choice. As she understood it, her husband's bankruptcy meant that he could not be employed by other people, the project was one which her husband really wanted to be involved in. The wife gave evidence that she never attended the offices from where any of the companies conducted their business, except on a few occasions when she would take the children in to see her husband. She never received notices of meetings of any of the companies of which she was a director. She was never a signatory on the cheque accounts of any of the companies, and was never consulted by anyone about any business matters relating to the companies. The Court held she succeeded in making out the *Garcia* defence and she was relieved her from liability under the guarantee. Also, the Court found undue influence between her and her husband and she did not receive independent advice.

Campbell J approved of the principle that where the wife is a non-participating director and the benefit accruing to her came at the exercise her husband's discretion because he controlled the company, she was a volunteer.

- ***Burrawong Investments P/L v Lindsay & Anor*** [2002] QSC 82 | [austlii](#)

Supreme Court of Queensland: Muir J

A wife became a guarantor for her husband's business endeavours. She asserted that the documents she signed at the meeting were not explained to her. She said that at no time was she ever told that she and her husband were borrowing money or that they were guaranteeing a loan or that the mortgage would have to be provided over her property. The Supreme Court held there were no allegations in the pleadings about any undue influence by her husband, about any failure on her husband's part to give appropriate explanations or asserting that the proposed transaction was for his and not her benefit. Nor was she a volunteer. She stood to benefit from the proposed transaction equally with her husband and it was entered into with a view to extricating the defendants from the financial predicament they found themselves in over the land. The Court held *Yerkey* could not succeed. An action under the *Contracts review Act* 1980 (NSW) was also brought. However, the Court held it was not established that the loan agreement was "unconscionable harsh or oppressive".

- ***Rapp, Rapp & Rapp v Li*** [2004] SADC 27 | [austlii](#)

District Court of South Australia: Clayton J

A wife became a guarantor for her husband's business activities. She contended that the mortgage agreement was not binding upon her because she did not understand the agreement. The District Court, rejected her defence under *Yerkey* and held if she did misunderstand the purport of the document which she signed, that could only have been because of carelessness on her part. She was experienced in business matters and had at least her solicitor and husband to explain the documents to her if anything needed explaining. She was not a volunteer. She received good consideration for the transaction, namely, the shares in the companies which received the loans.

- ***Dubois v Ong & Anor*** [2004] QCA 185 | [austlii](#)

Supreme Court of Queensland: Williams JA, Muir, **Mullins JJ**

A wife became a guarantor for her husband's business activities. The primary judge found the existence of a triable issue on the part of the wife on her contention that it would be unconscionable to enforce the guarantee against her by application of *Garcia*. The wife was Chinese speaking and unfamiliar with documents. She also swore that she did not read the documents; that they were not explained to her; and that she received no advice about them. The argument by the lender in the appeal was that, having regard to the particular

facts of the case, there was no obligation on the appellant to either explain the terms of the guarantee or to be satisfied that appropriate explanation of such terms had been given. The foundation of the argument was that the wife being a director and shareholder of the company was not a volunteer and that one of the necessary bases of unconscionability under the principles stated in *Garcia* was therefore lacking. The Supreme Court disagreed and dismissed the appeal.

- ***Commonwealth Bank of Australia v Anna Maria Crowe*** [2004] NSWSC 330 | [austlii](#)
Supreme Court of New South Wales: James J

A wife became a guarantor for her husband's bank loan and other commercial transactions. She argued she could resist the bank's claims under the principles stated in *Yerkey* or *Amadio* or under the provisions of the *Contracts Review Act 1980* (NSW). She argued she had little education with only basic language skills in English and with no commercial or business experience, and did not understand the nature of the transactions she entered into. She was the sole owner of the house over which she gave the mortgage and the house was her only substantial asset. She claimed that although she was a director of and a shareholder in the company, the business carried on by the company was in reality her husband's business. The Court found that she was not a volunteer as she was a joint owner of the business for the purposes of applying *Yerkey*, and she did not suffer from a disability or one that was known to the bank. The Court did not accept the wife's evidence that at the time she granted the mortgage she did not understand what a mortgage was, or that she entered into some of the transactions because she was afraid of her husband and considered that she no choice. She had received advice from a solicitor and the bank had the solicitor's certificate. Despite a claim that the solicitor was not 'disinterested' as he advised husband and wife, the court accepted the solicitor's account. Relief was refused.

- ***Willis and Bowring v Ziade Investments No. 2 and 2 Ors*** [2005] NSWSC 952 | [austlii](#)
Supreme Court of New South Wales: White J

Both the husband and wife were personal guarantors for the husband's business. The wife became the director and sole shareholder. She contended that her guarantee was not binding because she provided it to support her husband's business activities, she did not understand its purport and effect, she did not receive independent advice in respect of it, and no one ever spoke to her about her guarantee. She relied upon *Garcia*. The Supreme Court held that she was not a volunteer. The Court held she understood the purport and effect of what she signed. The fact that the solicitor who explained the documents to her and the potential consequences of her signing the documents was her husband's uncle, and not a stranger to her, did not mean that she could escape liability on her guarantees. Relief was refused.

- ***Kasparian v Burns*** [2007] NSWSC 895 | [austlii](#)
Supreme Court of New South Wales: **Bell J**

A wife became guarantor for her husband's business loan. She requested the setting aside of the loan agreement and the guarantee on the ground that it would be unconscionable for the plaintiffs to enforce them against her, or pursuant to the provisions of the [Contracts Review Act](#) 1980 (NSW).

The wife had not been involved in the affairs of any of the companies of which she had been a director. She had a general appreciation of the fact that directors of companies are subject to legal duties. She relied on her husband to conduct the affairs of the companies. She recalled signing a document without anyone explaining the meaning of it to her. She claimed it would be unconscionable to enforce the guarantee. The Court held the guarantee was not unjust under the *Contracts Review Act*. Furthermore, she was not a volunteer. The lenders' failure to inquire whether the wife had been independently advised about her role as guarantor of the loan did not give rise to an entitlement to have the guarantee set aside by reference to the principles explained in *Yerkey* and *Garcia*. Relief was refused.

- ***CBFC Ltd v Fadhel Ahmed & Myongsuk Oh*** [2008] VCC 4 | [austlii](#)
County Court of Victoria: **Anderson J**

A wife became guarantor for her husband's business. She says that she was aware that she was required to attend the business premises of the company in order to execute loan documents. The wife said that she was not offered any explanation about the nature of the documents. She had her infant son with her at the bank and her husband was anxious to conclude the business. She relied on *Yerkey* and *Garcia* to have the guarantee set aside. The County Court held the wife did not establish that the lender failed to take steps to explain the transaction to her or to offer her the opportunity to receive independent legal advice before proceeding to execute the documents. She was also involved with the business, and was not a volunteer, rather, she was more of a "family representative". Relief was refused.

- ***Spina v Conran Associates Pty Ltd; Spina v M and V Endurance Pty Ltd*** [2008] NSWCA 326 | [austlii](#)
Supreme Court of NSW: **Austin J**

The plaintiff in this case, Angelina Spina, was a 91-year-old widow living in a nursing home, who had only a very limited understanding of written and spoken English. Her son was Michael (deceased at the time of the proceedings). Michael's widow, Sarina Spina, provided a guarantee for one of the loans in dispute. The proceedings related to two mortgages over the Angelina's property. The mortgages arose out of the purported exercise by Michael of an enduring power of attorney granted to him by his mother. The money borrowed

(by the mother) under the mortgages was used in a business conducted by Michael of which he and his wife were directors. The company went into liquidation in May 2006. Angelina resisted possession of her mortgaged properties and Sarina sought orders to set aside the guarantee she had given. In regards to the guarantee by Sarina, the Court accepted that she had signed the documents without legal advice, although a solicitor was present, and in her home. Despite her denials, the Court found that she knew she was signing a guarantee responsible for the debts of the company which she knew was in some trouble. The decision does not directly address the elements set down in *Garcia*, however, the Court was of the view that Sarina was neither mistaken about the material nature of the guarantee nor a volunteer. The judgment notes that she was a director of the company receiving funds and receiving a salary from it. It was also found not to be unjust under the *Contracts Review Act* for the same reasons. (While there was no available relief, the obligation guaranteed was void for other reasons.)

Austin J

“In light of all these facts, the present case is longwave from *Garcia v National Australia Bank Ltd* [\[1998\] HCA 48](#); [\(1998\) 194 CLR 395](#). The case is closer in this respect to *Commonwealth Bank of Australia v Cohen* (1988) ASC para 55-681, where Cole J declined to set aside guarantees given by a wife to support business loans to her husband. The wife had signed the documents at home at the request of her husband, in circumstances where the mortgagee did not ensure that she was aware of the parlous position of the company she was guaranteeing or that she received independent legal advice. But Cole J pointed out that the wife benefited from the transactions in the sense that she relied on her husband for income to support herself and her family, and the income was derived from the company, and the wife was aware that it was necessary to give the guarantee to enable the company to continue (at 58,159-58,160)” ([126]).

- ***Satchithanantham v National Australia Bank Ltd*** [2009] NSWCA 268 | [austlii](#)
Court of Appeal New South Wales: Giles, Hodgson, Young JJA

A wife entered into loan agreement with the bank securing mortgage and loan monies used to discharge another mortgage and to finance her husband's business. The wife claimed undue influence under *Yerkey* and that the transaction was unjust under [Contracts Review Act 1980](#) (NSW). She was a Sri Lankan woman who could only speak, read and write in Tamil and was completely illiterate in English. She did not receive any explanation of the mortgage from the bank and her husband did all the paper work on her behalf. She said that the mortgage was executed under the undue influence of her husband; she had no benefit of independent legal or other advice. The trial judge took that view that *Yerkey* primarily deals with the situation where a wife or equivalent mortgages her property and receives no benefit at all from the

funds produced by the mortgage. The wife herself had received considerable benefit under the transaction. There is a very limited area where a wife can take advantage of the *Yerkey* principle where she receives some benefit, usually in the case where she is a director and shareholder of a corporate borrower. The Court of Appeal agreed and dismissed the appeal.

- ***Plasterboard Central Pty Limited v Blain*** [2009] NSWDC 44 | [austlii](#)
District Court of New South Wales: Goldring DCJ

A wife provided a guarantee for her husband's business borrowings. The wife sought equitable relief, or relief under the provisions of the [Contracts Review Act 1980](#). Her evidence was that she trusted her husband absolutely and that she left it to him to decide what was or was not necessary for the business. She understood that he would not permit her to sign a document which he thought was not in her interest. The Court held the interest of the wife was as a beneficiary of the family trust, which was in turn the beneficial owner of shares in the company. So she could not be regarded as a volunteer. There was no undue influence exerted over her, however, it was accepted that she did not understand her material liability. She was precluded from any remedy under the common law principles.

However, the Court held the guarantee was unjust under the [Contracts Review Act 1980](#) (NSW). The Court held that there was a material inequality of bargaining power which the lender exploited, no ability to negotiate and a difficult form to complete and understand. No legal advice offered or obtained. The guarantee was enforced by limited to a specified amount.

- ***Agripay Pty Limited v Byrne*** [2011] QCA 85 | [austlii](#)
Supreme Court of Queensland Court of Appeal: **McMurdo P**, **White JA**, McMeekin J

The husband borrowed money to invest in a tax avoidance agricultural managed investment scheme. There was some evidence that the benefits of this investment were to go into a joint superannuation fund for the couple. His wife guaranteed his loan. The Chief Justice at trial set aside the guarantee on the basis that it was unconscionable. The basis of this finding was that the first the wife knew that she was required to be involved in the scheme was when she was told she had some documents to sign so that her husband could take advantage of the investments. If she did not sign, he could not use the scheme to solve his tax problem. She did not read the application before she signed it as guarantor or receive independent advice before signing. She was upset and felt she was being ambushed. She had blind faith in her husband, notwithstanding his sometimes indifferent personal treatment of her. The couple were both doctors. The Court of Appeal dismissed the appeal and held that a principled application of the rule laid down in *Yerkey* and confirmed in *Garcia* requires that the lender be imputed with knowledge about the 'trust and confidence' in this relationship, and had to do more to ensure her informed

consent. The lender had not provided any advice to her or ensured that that advice was given by an independent advisor. Arguments were raised by the appellant about the high levels of education of both and the general understanding of the wife about what she was guaranteeing and that the scheme financed was to benefit them both.

McMurdo P

“There seems to be no sound reason why these principles should be limited to wives entering into guarantees of their husbands' liabilities. Human weaknesses and unconscionable conduct are not limited to heterosexual marriage relationships. These legal principles should apply equally to all vulnerable parties in personal relationships” (at [4]).

“It may seem odd that in this case a practising medical practitioner with some business experience can avoid the obligations of her guarantee under *Garcia*. But the respondent is not disentitled to the protection of the law because she is tertiary-educated. It must be remembered that the principles explained in *Garcia* over 13 years ago have long been the law in Australia. Commercial lenders like the appellant, which require partners of borrowers to guarantee their partners' loans, should be well aware of their legal obligations to ensure such guarantors understand the purport and effect of their guarantees and the transactions to which they relate” (at [27]).

“The evidence before the primary judge was sparse, both as to the likelihood and extent of any profit to the joint superannuation fund or generally from the agricultural managed investment scheme. At best, it was that there was some prospect of an eventual profit which may have benefited the family unit if it remained functional; and some small portion of any eventual profit may have found its way to the joint superannuation fund. But the short term benefit of a lower tax bill and any profit received in the long term was essentially for Dr Murray Byrne. There was no clear evidence that the respondent would actually profit from the scheme. ... The evidence favoured the conclusion that the prospect of any profit to the respondent was speculative. Even if she did receive some eventual modest benefit, it was likely to be neither direct nor immediate” (at [11]).

White JA

“Ultimately, cases where a wife seeks to be relieved of the burden of her contract of suretyship will depend on a close analysis of the particular facts. [The lender] submitted that the learned primary judge took an indulgent view of Dr Byrne's want of understanding against her involvement in many of the financial activities of her husband. This is to elevate too highly those activities. The use of a family trust to protect assets in this case involved the purchase of two or three paintings by well known Australian artists. The learned primary

judge's acceptance of Dr Byrne's limited involvement in the running of her husband's medical practice was open on the facts. Her evidence that she attempted to bring some financial order into her husband's affairs by managing the household bills from their joint account (required as a condition of her visa) was not challenged. But she was unable, apparently, to exercise any influence over him to plan for his tax obligations and her evidence of his purchase of a \$390,000 car when he had looming liabilities suggests just how little influence she had. No matter how intelligent she might have been, the emotional pressure that she felt at the time the transactions were entered into was of a kind for which in part the rule had been developed and in respect of which the [lender] could relatively easily have dealt. ... [The lender] also submitted that Dr Byrne gave no evidence to the effect that if fully informed and given time to reflect she would not have entered into the contract. She did not need to do so. This was not a defence of misrepresentation ..." (at [66]).

- **NAB v Savage** [2013] NSWSC 1718 | [austlii](#)
Supreme Court of New South Wales: **Adamson J**

A wife provided guarantees for six separate loans on properties and for her husband's business loan. These guarantees were secured by mortgages on two properties. Mrs Savage was a co-borrower in all facilities except for the business loan. Each obligation owed by Mrs Savage to the bank was secured by the mortgage over their home or their farm, or both. Although the evidence did not establish that Mrs Savage signed all of these agreements, she accepted that, absent equitable intervention, she was bound by them. She relied on a *Garcia* defence. She spent less than 15 minutes at the bank on each occasion of signing. The husband initialled all the statutory declarations about advice. There was no evidence that the bank manager sought to explain to her or had reason to believe that the documents were explained to her. Usual banking practice not followed. However, she was unable to establish that she was a volunteer in any of the loans except her guarantee of her husband's business. She did not need to establish that she would have acted differently if she had known about the extent of her liability.

- **ANZ Banking Group Ltd v Londish** [2014] NSWSC 202 | [austlii](#)
Supreme Court of New South Wales: **Adamson J**

Mrs Londish inherited a large amount of property from her parents and a family company. She had a university degree and was a full-time carer of her three children. Her husband was a lawyer and managed and developed the property that his wife had inherited from her parents, as well as acquiring further real property. She did not take an active part in the business. A number of loans were guaranteed with mortgages over property owed by the wife. The Court found no basis for saying the various transactions were unjust under the provisions of the *Contracts Review Act 1980*, and not unconscionable or based on undue influence. The wife knew, in general and material terms, what they

involved and that they benefited the family. She was not a volunteer to the transaction and did not suffer a 'special disadvantage'. Relief was refused.

Adamson J

"I consider the instant case to be distinguishable from *Garcia* in a number of respects. In respect of the loan secured by the Challenger Mortgage Mrs Londish was a co-debtor with her husband and the loan was advanced to both of them jointly. In the case of the ANZ Mortgage she was the sole borrower and the bulk of the funds advanced were applied to discharge a mortgage over property she owned. She regarded herself, correctly, as the "owner" of the Knoll companies and was a principal shareholder or co-shareholder with her husband in each of them. She was also a director at least of some of them. There was therefore a direct benefit to her in having monies advanced to those companies for the purposes of improving their real property assets" (at [142]).

- ***Capital One Securities Pty Ltd v Soda Kids Holdings Pty Ltd & Ors*** [2014] VSC 168 | [austlii](#)

Supreme Court of Victoria: Ginnane J

A husband and wife provided guarantees for a number of business loans. The businesses were conducted by the wife and the husband sought relief under *Garcia* principles. The husband had a very low level of education and could not speak English well and could not read it at all. She said that he did not understand business matters. He only helped her in the business with tasks like unloading containers. However, the solicitor denied this was the case. The Court found that the husband understood in a general sense the obligations that a loan and mortgage might impose. However, he was not given advice or the documents about a variation. However, the Court found that he was not a volunteer. Relief was refused.

Ginnane J

"[The husband] received a direct and immediate financial interest from the guarantee and mortgage, as he owned trademarks for products that his wife sold in the business. The loans assisted [the wife] to continue the business from which [the husband] stood to receive direct financial benefit. Later in 2010, he became the sole shareholder and director of Soda Kids 146 which eventually took over the operation of the Soda Kids business" (at [227]).

- ***Schultz v Bank of Queensland*** [2014] QSC 305 | [archive.sclqld.org.au](#)
Supreme Court of Queensland: Jackson J

A wife guaranteed a loan made to the corporate trustee of a discretionary family trust which was controlled by her former husband. She relied on the principle from *Yerkey v Jones* in her claim for relief from the contract and an alternative claim based on statutory unconscionable conduct by the bank. She

had previously provided a mortgage as security for a loan, and obtained independent legal advice at that time. She did not receive advice in relation to two guarantees provided for a loan to the trust but signed a waiver provided by the bank. It was agreed that the bank representative told her to seek legal advice and that the document was a guarantee and for the amount specified. Her evidence was that when she asked she was not told about the terms except that if her husband defaulted she would be asked to repay the loan. After some consideration of the law, Jackson J found that Schultz was not a volunteer.

Jackson J

“The “*Yerkey v Jones* equity” is an equity raised in favour of a wife who enters into a transaction as surety for the debts of her husband or her husband’s company. To some, it might seem an anachronism in a 21st century world. But it was affirmed by the High Court as recently as 1998 in *Garcia v National Australia Bank* (“*Garcia*”). There are dicta which urge that the principle extends beyond the protection of a wife to analogous relationships of trust and confidence, but I am not concerned with that question” (at [1]).

1998 - 2015: Informed consent of the guarantor and the bank’s responsibility for this

The High Court in *Garcia v NAB* called for those susceptible to STD to receive advice from a “competent, independent and disinterested stranger,” or that the bank explains the transaction to the guarantor. Yet courts rarely imposed responsibility on banks for ensuring that the wife/partner had adequate information or for inquiring about whether the relationship affected her consent. The law did not require that the bank ensure that the wife actually received either legal or financial advice, only that it tell her to seek it. In addition, as confirmed in the decision in [State Bank of NSW v Kit Cheng Chia and Peng Tin Chia](#) in 2000, when considering whether the wife/partner understood the transaction, courts require her to understand the ‘general extent of the liability’ (if material) rather than have a full understanding of the transaction. Yet, feminist research and law reform reports in the early 2000’s indicated that STD remained a widespread issue because women were rarely obtaining advice, feeling pressured and/or did not understand what they were guaranteeing. While these critiques remain relevant, in a number of cases since 2011, courts have gone behind documentary evidence of legal advice provided to a spouse guarantor to consider the circumstances of that advice, or whether legal advice had actually been received.

- ***Garcia v National Bank Limited*** (1998) 155 ALR 614 | [austlii](#)
High Court of Australia: **Gaudron**, McHugh, Gummow, Kirby, Hayne and Callinan JJ

Mrs Garcia and her husband executed a mortgage in favour of the bank for the purposes of securing guarantees given for a loan to her husband’s business. Mr Garcia assured Mrs Garcia there was no ‘danger’ in the transaction and no explanation of the transaction was given by the bank. Mrs Garcia was a physiotherapist. However, there was evidence that her husband had belittled

her and that she was trying to save their marriage. The Garcias divorced and Mrs Garcia sought a declaration that the guarantees were void as a result of undue influence. The trial judge found Mrs Garcia understood nature of guarantees but not the extent of this particular guarantee and that undue influence was established. The Appeal Court overturned this finding and also dismissed the principle from *Yerkey*. The appellant then appealed to the High Court. The High Court found that Mrs Garcia did not understand the nature of the transaction, the Bank was aware that Mrs Garcia was married to the creditor and, because they took no step to explain the transaction to her and knew of no independent advice to her about it, Mrs Garcia was entitled to relief.

Gaudron, McHugh, Gummow, Hayne JJ

“[Yerkey v Jones] is one concerning what today is seen as an imbalance of power. In point of legal principle, however, it is actual undue influence in that the wife, lacking economic or other power, is overborne by her husband and goes surety for her husband's debts when she does not bring a free mind and will to that decision.” (at [23])

The majority found that a principle that recognised the “trust and confidence, in the ordinary sense of the words, between marriage partners” was appropriate to retain in Australian law. Their Honours did not need to decide in the context of the (marriage) relationship before them but left open the prospect of application of the principle to other “long term and publicly declared relationships short of marriage.”

Literature cited by Gaudron, McHugh, Gummow, Hayne JJ

- Howell 1995;
- Fehlberg 1996;
- Fehlberg 1997.

Kirby J:

“Thus the credit provider will be fixed with constructive notice if it knows facts sufficient to put it on inquiry as to the possibility of wrongdoing by the debtor and it fails to inquire. ... A credit provider will be put on inquiry by a combination of two factors. (1) the transaction is not on its face to the personal financial advantage of the party offering the security; and (2) there is a relationship which is known, or which ought to be known, by the credit provider involving an emotional dependency on the part of the surety towards the debtor. The relationship of emotional dependency is singled out because of the possible effects of the sexual and/or relationship ties between the parties, on their financial dealings with each other. The fear of destroying or damaging the wider “relationship between persons makes these ties a ready weapon for undue influence”. Moreover the informality of business dealings raises a “substantial

risk” of misrepresentation as to the nature of the liability concerned. A credit provider will therefore be put on inquiry if it is aware that the surety reposes trust and confidence in the debtor in relation to his or her financial affairs. Cohabitation, as such, may alert the credit provider to the need for further inquiry. So may marriage, de facto marriage, or long term relationships with respect to sureties and borrowers of either sex. So may other information as to the relationships of the parties which comes to the notice of the credit provider or which it, out of prudence, requests and obtains. A rudimentary question as to the address of the parties and the discovery that they are (or have been) cohabitees would ordinarily be enough to set alarm bells ringing. This is because of the added vulnerability which cohabitation may bring to a relationship, otherwise unexplained, under which one person guarantees the debt of another by assuming their risks if things go wrong”.

Literature cited by Kirby J:

- ALRC 1994;
- Pascoe 1997;
- Fehlberg 1997;
- Dodds-Streeton 1994;
- Cretney 1992;
- Duggan 1991.

Feminist commentary

Positive assessments

“Unless the lender takes steps to explain the transaction to the wife (or ensure that someone else has done so) it will be unconscionable for it to enforce the security if in fact the wife did not understand it ... [s]uch an analysis reveals that most criticism of *Yerkey v Jones* (or at least the most fierce) is misdirected. The presumption is one of trust between spouses – surely unobjectionable – rather than of wives’ collective incompetence.” (Stone 1999, p.606)

“[T]he principle outlined by the majority in *Garcia* provides an excellent example of the advantageous use of stereotyping in the development and application of equitable doctrine. The basic premise of *Garcia* is that protection for married women against unscrupulous creditors who fail to fully explain the terms and conditions of financial agreements they may enter into must be sustained. The reason for this continued protection is simple: a significant number of married women in Australia are in relationships ‘marked by disparities of economic and other power’. ... In *Garcia*, the benefits of the discrimination flowing from the new *Yerkey* principle are encapsulated in what we have described as ‘positive stereotyping’. The new doctrine allows for a healthier form of stereotyping to be used in order to uphold the sense of individual justice upon which the equitable jurisdiction is founded.’ (Haigh and Hepburn 2000, p. 305, 307)

“The *Garcia* decision comprehensively examines the ambit of the *Yerkey* principle and categorically confirms its continuing relevance to the modern law of undue influence in Australia, despite marked changes in societal mores and gender roles since *Yerkey* was first handed down. The legal significance of this latest decision lies in its explication of the relational focus of the principle; according to the majority, the rationale underlying the special wives’ equity is not based on the subservience or inferior economic position of women, nor is it based upon their vulnerability to exploitation but rather, the unfairness that can flow from relationships of trust and confidence.” (Hepburn 1997, p.99)

“The rule in *Garcia* although a narrow one, applying only to marital relationships where the wife is substantially regarded as a volunteer, nevertheless has the significant advantage of enabling a wife to resist enforcement of a guarantee on the grounds that she lacks full understanding of its effect. The rationale for the rule, as emphasised by the majority, was to be found in the special nature of the marriage relationship which is based on trust and confidence between the spouses.” (Pascoe 2006, p117)

Negative assessments

“[T]he judgments in *Garcia* ... while appearing to take different approaches to the question of how best to promote equality, implicitly employ common stereotypes - or stock stories - about women's difference within marriage. ... Kirby J recognises that the problem is one that primarily affects women, yet his failure to analyse this as a product of gender inequality leads, once again, to the invocation of an inherent women's difference despite the stated desire in the first part of his judgment to avoid gender stereotypes. Again Kirby J seems to imply that it is merely a matter of preference or choice for women as to whether they follow their husbands' advice... While the judgments all acknowledge, either implicitly or explicitly, that the phenomenon of sexually transmitted debt is a gendered one, their explanations, although different on their face, end up locating the problem in some notion of women's 'difference' rather than inequality. The missing factor in all three judgments is an analysis of the structural gendered inequality and, in particular, the economic factors, which contribute to the problem.” (Dunn 2000, p.444, 446, 447).

“The decision in *Garcia* has attracted a fair share of academic criticism, as failing to discharge a judicial responsibility to provide practical guidance by refusing to provide particular guidance beyond the facts in the case before them and merely indicating what may be decided in future cases.” (Cockburn 2000, p.278)

“Just as this decision provides no clear guidance on how to deal with such cases, it also shows that the Court has no clear understanding of how women are affected by legal doctrines nor of some of the important theoretical work on

gender and equality that might assist it in developing a clear and principled approach to such issues..." (Graycar and Morgan 2001, p.721)

"While the majority judges ... left open the possibility that this special protection might be extended beyond wives ... they confined their ruling's scope to the situation of a wife in Jean Garcia's position. However justifiable that might be in terms of the facts before the Court and as a matter of strict precedent, the modern High Court has engaged in law-making to varying degrees in cases with equally confined facts but also equally significant socioeconomic consequences. ... In that sense, *Garcia* represents a missed opportunity for judicial leadership and community guidance." (Horrigan 2003, p. 185)

- ***Liptak v Commonwealth Bank Of Australia*** [1998] SASC 6887 | [austlii](#)
Court of Appeal Supreme Court of South Australia: Doyle CJ, Prior, Lander JJ

A wife became a guarantor for her husband's business. She alleged that she executed the mortgage as a result of actual or presumed undue influence exercised upon her by her husband. Her belief, based on what her husband said, was that they were borrowing \$50,000. She said in evidence her husband was very adamant that it was extremely important and it was very urgent, and that he would be ruined if she did not sign it. The wife claimed that the mortgage should be set aside. The trial judge rejected the case put forward by her. He found no undue influence. In the alternative, based on *Yerkey* and *Garcia* the trial judge found she did understand the effect of the mortgage and the nature of the transaction. No relief was given. The Supreme Court agreed and dismissed the appeal.

- ***Vladimirka Radin v Commonwealth Bank of Australia*** [1998] FCA 1361 | [austlii](#)
Federal Court of Australia: Lindgren J

This case was brought under the *Trade Practices Act 1974* (Cth). The wife and the husband's mother provided security for the husband's business loan with mortgages on their homes. They sought to set aside the mortgages on the basis of claims of breach of duty of disclosure and unconscionable dealing by the bank, and pursuant to provisions of the [Contracts Review Act 1980](#) (NSW). The wife also relied on *Yerkey* and *Garcia* principles for relief. The wife made serious allegations of violence against her husband. In particular, she alleged that she signed mortgages and other documents in favour of the bank because of her fear of what her husband would do to her if she did not sign. At the time the couple were separated. The wife claimed that the bank was actively concealing from her the fact that it was allowing the maintenance cheques to be met as part of its selective honouring of cheques in collusion with her husband. The Court held that she knew that she was liable for the indebtedness of her husband as well as for the joint borrowings more directly connected with the couple's investment in real estate. The Court also held she was his "business partner" and thus not a volunteer. The Court held she did not

satisfy the *Garcia* principles and that that bank did not know about any violence of the husband or dependence by the wife.

In regards to the husband's mother the court found no extraordinary circumstances which would justify any order against the bank in favour of her. Her decision to trust and support her son to the extent of mortgaging her home to support his business was not a vitiating factor.

Feminist commentary

Negative assessment

"[T]he views expressed by Lindgren J ... seem at odds with the *Garcia* decision itself, in that the majority emphasised that the critical issue for the creditor was whether the surety and debtor were married, and that the wife did not need to actively show that she reposed trust and confidence in her husband." (Collier 1999)

- ***Mcauley & Ors v Panagiotidis (No 2)*** [1998] SADC 3916 | [austlii](#)
District Court of South Australia: Lunn J

A wife gave a mortgage over her sole property to secure a loan to her husband's business. She argued that *Yerkey* applied. She was illiterate, spoke poor English, did not properly understand the transaction and was subject to fraud by her husband. The District Court held the wife was a volunteer even though a small part of the money raised was used for her benefit. Also, although she understood the document was a mortgage she did not understand the extent of the risk which she was running under it and it was not explained to her.

- ***Commonwealth Bank of Australia v Khouri*** [1998] VSC 128 | [austlii](#) [view appeal](#)
Supreme Court of Victoria: Harper J

A wife became a guarantor for her husband's business loan. The Court concluded that the bank would be "obtaining an unconscientious advantage" over the wife if it were permitted to enforce that security. The Court found *Yerkey* and *Garcia* were applicable. They held that the wife was not aware that she was signing a guarantee or a second mortgage in support of it; and that she believed only that she was signing documents in support of a \$10,000 overdraft. Furthermore, the bank did not explain the purport or effect of the documents to her, nor did it seek to protect her interests in any way notwithstanding that they knew that the marriage relationship existed and that her husband had not informed her of what the transaction was about. The Court found that she was a volunteer to the transaction because, although she was a director of the company, it was a business run by and under the control of her husband and in which she took no active interest. She was pre-occupied with raising her three children and any benefit she gained came to her

not as of right, but as the result of discretion by her husband. Relief was refused.

- ***Davies v Australia & New Zealand Banking Group Ltd*** [1999] FCA 1104 | [austlii](#)
Federal Court of Australia: Heerey J

A wife sought an interim injunction to restrain the bank from taking steps to obtain possession of her house which was provided as security for a guarantee of her husband's loan. She relied on the provision of Part IVA of the [Trade Practices Act 1974](#) (Cth) relating to unconscionable conduct and claimed to satisfy the requirements of the principles under *Garcia*. The Court dismissed the application for an interim injunction. The Court did not accept the wife's evidence as to her lack of knowledge and understanding of the nature of a mortgage and guarantee. The Court found she had been closely associated with the business fortunes of her husband over the years. Her dealings with the bank in recent times were inconsistent with somebody not understanding the nature of a mortgage and the consequences of default under a mortgage.

Feminist commentary

Negative commentary

"In the absence of actual influence, where the wife does not establish that she did not understand the nature and effect of the security documents, she will be unable to have the documents set aside under the rule in *Yerkey v Jones* as explained in *Garcia* [see *Davies v Australia & New Zealand Banking Group Ltd*]." (Cockburn 2000, pp.270-271)

- ***Commonwealth Bank of Australia v Horkings*** [2000] VSCA 244 [austlii](#) [view trial](#)
Victorian Court of Appeal: Winneke P, Phillips, Buchanan JJA

This is the appeal from the decision in Commonwealth Bank v Khouri (above).

The Court of Appeal dismissed the appeal by the bank. Winneke P agreed with respondent counsel that '... the facts, as his Honour [at trial] found them to be, were - to all intents and purposes - indistinguishable from the facts found in *Garcia's* case' (at [55]).

- ***Cranfield Pty Ltd v Commonwealth Bank*** [1998] VSC 140 | [austlii](#)
Supreme Court of Victoria: Mandie J

An Italian wife entered into a guarantee at her husband's instigation for a business loan. It was argued that she was "uneducated and illiterate and accustomed to obey husband's directions in business matters". The Court held the principles in *Yerkey* were applicable. Her husband neglected to inform her of the nature of the obligations knowing she would give her assent in complete ignorance. The Court held that where the bank took no steps itself to inform her

or to assure itself that she had sufficient understanding, relief should be available. Furthermore, the Court held she was undoubtedly a volunteer.

- ***ANZ Banking Group Ltd v Pham (No. 2)*** [1999] VSC 503 | [austlii](#)
Supreme Court of Victoria: **Warren J**

A husband and wife from Vietnam worked full time in the various family businesses. The wife entered into a guarantee for a business loan. Another family member who was the daughter-in-law of the wife, also from Vietnam entered into a guarantee for the family business. The daughter-in-law received very limited education in Vietnam and upon arrival in Australia attended English classes for a period of six months. Both wife and daughter-in-law relied on *Yerkey* and *Garcia* to have the guarantee set aside. The Court held both the wife and daughter-in-law understood the nature of mortgage, and the guarantee. Furthermore, as members of the Pham family and as a part of the commercial network they stood to gain from the transactions. In addition, the Bank was entitled to be satisfied that solicitors were acting for both of them and they had received advice upon the transactions. No relief was granted.

- ***Guaranteeing Someone Else's Debts***, Issues Paper 17 (2000) | [austlii](#)
New South Wales Law Reform Commission

The NSW Law Reform Commission ('Commission') Report concluded that, in regards to STD there are some legal safeguards for people who guarantee consumer loans but people who guarantee business loans do not have the same protection and must rely on the common law. The Commission recommended various changes to provide further protections for guarantors based on providing appropriate advice to guarantors. It did not recommend banning or limiting spousal guarantees or using the home as security.

Commission comment and literature cited

"A recurring and highly significant theme in guarantee transactions is the personal relationship between the borrower and guarantor. Many guarantors are spouses (usually wives), parents, other relatives or close friends of the borrower. If the borrower is in default, the creditor will usually attempt to recover the money from the guarantor. Hence, this phenomenon has been called 'sexually transmitted debt', 'emotionally transmitted debt' or 'relationship debt'. On the one hand, the emotional relationship between the borrower and guarantor means the guarantor is vulnerable to unfair conduct on the part of the borrower and/or lender. A significant number of guarantors have reported that they did not understand what they were doing at the time of the transaction. Many do not engage in the usual inquiries that a person entering a business arrangement would undertake. Quite often, they do not receive information needed to understand the nature of the transaction and the risks involved. On the other hand, many guarantors in a close relationship to the borrower agree

to guarantee the borrower's indebtedness even where they fully comprehend the nature of the risks associated with the transaction into which they are entering. They do so simply because they do not want to damage their relationship with the borrower by refusing to act as a guarantor, viewing themselves as having no real choice about providing security for the underlying loan. ...It is apparent, therefore, that the legal system needs to protect guarantors as far as it reasonably can, especially from unfair conduct by lenders and borrowers" (at pp. at 66-67).

The Commission recommended, however:

"That protection must, however, recognise that guarantees are an essential tool in facilitating access to credit. Reform measures intended to protect guarantors must, therefore, take into account the interest of lenders and borrowers and ensure that the utility and convenience of guarantees as a credit risk-minimising device remain largely undiminished" (p. 7).

References for STD discussion within the Report

- ALRC Equality before the Law
 - Baron 1995
 - Lovric and Millbank 2003
 - Fehlberg 1997
 - Haigh and Hepburn 2000
 - Dunn 2000
 - Otto 1992
- ***Westpac Banking Corporation v Mitros*** [2000] VSC 465 | [austlii](#)
Supreme Court of Victoria: Byrne J

A wife executed a mortgage to secure loans made and to be made to her husband's company. At trial she relied on three defences to resist the bank's claim: her husband's undue influence; her want of understanding of the nature of the transaction; and a subsequent agreement under which the bank agreed to release the security. She did not read the documents nor was she told that she might or should do so. She did not recall what the documents were or how many there were. No explanation was provided about them by the husband and no advice to her to seek legal advice. The Court found that she acceded to her husband's demand that she execute the mortgage in circumstances where she had little alternative if she wanted to preserve her domestic situation. She had no economic or other power which gave her true independence from her husband. Her will was overborne by him when she executed the security documents. Moreover, the influence which he exercised was undue inasmuch as he failed to explain to her the nature of the obligation which he required her to undertake and the nature and extent of the debt for which she was providing

security. The Court found that she signed the mortgage in circumstances which amount in law to undue influence and set aside the guarantee.

Byrne J

“This is, of course, a matter between the spouses. It is not suggested, and I do not find, that any officer of Westpac was aware of this. Nevertheless, the law is that even an innocent and ignorant creditor of a husband or of his company who accepts a security from a wife who is a volunteer does so at the risk that it may be set aside in equity if there be undue influence unless the creditor takes certain steps. It is not sufficient that the creditor explains to the wife the nature of the transaction, for her want of understanding is not to the point. The creditor must ensure that she has independent advice or that she is, at the time of executing the security, free of the influence of the husband over her judgment. ... I am satisfied that the explanation provided by the Westpac officer was not, in the circumstances, a sufficient explanation of the nature and effect of the mortgage. ... On the facts as I find them, [the bank employee] made no enquiry to satisfy himself that she had an adequate comprehension of the obligations she was undertaking. The bank officers had no reason to think that she had obtained competent and independent advice as to the nature and effect of the security” (at [27], [30]).

- ***State Bank of NSW v Kit Cheng Chia and Peng Tin Chia; Peng Tin Chia v Kenneth John Rennie and Anor*** [2000] NSWSC 552; (2000) 50 NSWLR 587 | [austlii](#)
Supreme Court of New South Wales: Einstein J

A husband and wife from Singapore worked together. She was a certificated general nurse. She had assisted her husband in his practice as a medical practitioner. The bank claimed repayment from the wife as surety of moneys said to be owing to it by the husband. The wife claimed that she was ignorant of the contents of the mortgage. She had not seen the mortgage document prior to its production by her husband for execution by her. She was not afforded any opportunity to negotiate for, reject or make any alteration to the terms of the mortgage, or offered any legal advice. However, the Court held that the wife failed to establish the elements of undue influence. No relief was granted.

Einstein J

Einstein J found that the requisite understanding of the guarantor will include,

“... at least an understanding of the fact of liability, the general extent of liability and the possible consequences of default However, it is not productive of an equity that the wife misunderstood or failed to appreciate the degree of risk associated in the transaction, or the improvidence or unwisdom of the uses to which the money so secured will be put: *Yerkey v Jones* (at 686). Further, the wife’s misapprehension must be of a material matter: *Bank of Victoria Ltd v*

Mueller (at 648); that is, material to the liability the creditor wishes to impose upon the wife” (at [169]).

Einstein J summarised the case law in respect of when a wife will be considered a ‘volunteer’:

“... It is not sufficient that the wife has received consideration as would be recognised in the law of contract: *Bank of Victoria v Mueller* (at 649). The consideration for the guarantee must be of ‘real benefit’ to the wife: *Garcia* (at 412). Incidental benefit which accrues generally to the family of which the wife is a member is not sufficient benefit to render a transaction which does not otherwise contain a ‘real benefit,’ non-voluntary... . Where the wife expects to reap direct profit from the transaction, the transaction cannot be said to be voluntary... . Neither can it be said to be voluntary where the monies secured by the guarantee are used to purchase an asset in which the wife is equally interested with her husband... . However, where the interest of the wife is a shareholding in the company through which her husband conducted his business and in which she has no real involvement, then a guarantee given by the wife over that company’s debts will be voluntary... . But where the wife has an active and substantial interest in the conduct of, and the fortunes of, the business run by her husband, she will not be a volunteer in relation to any guarantee over the debts of that business... . Where the transaction is not *ex facie* for the benefit for the wife, then the onus will lie on the party seeking to enforce the security to show that the wife was not, relevantly, a volunteer...” (at [169]).

- ***Robinson v Watts*** [2000] NSWSC 584 | [austlii](#)
Supreme Court of New South Wales: Hunter J

Maria Watts granted a mortgage over her property as security for a guarantee in favour of a company controlled by her de facto partner. This mortgage was subsequently transferred but enforcement proceedings continued against Watts under the *Real Property Act*. The Court was satisfied that Watts “resented being called upon to provide the mortgage, being under some pressure from Watts to assist in the provision of security to enable the varied contract to proceed” (at [33]), and that she was a volunteer under the mortgage. However, no common law undue influence or unconscionability was found, or misrepresentation. The Court found that she understood the nature of the contract and the risks posed. Indeed, the Court cited her ‘continued state of anger’ and ‘resentment’ as evidence of her understanding of the nature of the imposition on her. The Court also accepted evidence of the bank employee, with reference to an acknowledgment signed by Watts, that she had had the transaction explained to her and she did not wish to seek legal advice. Cross claim by Watts was rejected.

- ***Westpac Banking Corporation v Paterson*** [2001] FCA 556 | [austlii](#) [view appeal](#)

Federal Court of Australia: **O'Connor J**

A husband and wife entered into a transaction which on its face was a housing loan (refinanced). It was, in fact, part of a larger business transaction designed to secure credit facilities to her former husband's business. At the time they were divorced. She relied on *Garcia*, and claimed that the mortgage was unjust and unconscionable in the circumstances in which it was obtained by Westpac under the [Contracts Review Act 1980](#) (NSW). The Federal Court held *Garcia* was applicable. The Court found the wife demonstrated her "trust and confidence" in her husband by allowing him to deal with the Bank in all respects in relation to the transaction. The Bank even permitted him to be in the room while the officers gave an explanation of the documents and process. At no stage did the Bank deal with her independently. They could not be said to discharge their obligation to ensure that she was a free and informed agent.

- ***Westpac Banking Corporation v Paterson*** [2001] FCA 1630 | [austlii](#) [view trial](#)

Full Federal Court of Australia: **Branson**, Mansfield and Katz JJ

The Full Federal Court allowed the appeal because it found there was no evidence before the primary judge to show that there was any special disability suffered by the wife, and no evidence of misunderstanding of the transaction. The officers of Westpac were aware that the respondent was Mr Paterson's former wife. However, when it was suggested to her by an officer of Westpac that she should obtain independent legal advice, she declined to do so on the basis that she had obtained advice before signing a previous mortgage.

- ***Darling Please Sign This Form: A Report on the Practice of Third Party Guarantees in New South Wales***, Research Report II, (2003) | [austlii](#)

New South Wales Law Reform Commission, authored by Jenni Millbank and Jenny Lovric

This document reported on an empirical study conducted by feminist academics Jenni Millbank and Jenny Lovric examining third party guarantees, where another person, often a wife or family member, is asked to provide security for the debt of the borrower. The findings were published as a research report and informed the NSW Law Reform Commission's final report (in 2007). This research indicated that there was still a pervasive problem of STD which was primarily experienced by women in guaranteeing loans for either their husbands or children. The report doubted whether these guarantors received any or adequate advice and warned that in situations of dependence, violence or emotional pull, such advice is likely to be ineffective in dissuading a woman from guaranteeing a transaction that is not in her financial interest.

- ***Rapp, Rapp & Rapp v Li*** [2004] SADC 27 | [austlii](#)

District Court of South Australia: Clayton J

A wife became a guarantor for her husband's business activities. She contended that the mortgage agreement was not binding upon her because she did not understand the agreement. The District Court, rejected her defence under *Yerkey* and held if she did misunderstand the purport of the document which she signed, that could only have been because of carelessness on her part. She was experienced in business matters and had at least her solicitor and husband to explain the documents to her if anything needed explaining. She was not a volunteer. She received good consideration for the transaction, namely, the shares in the companies which received the loans.

- ***Commonwealth Bank of Australia v Anna Maria Crowe*** [2004] NSWSC 330 | [austlii](#)
Supreme Court of New South Wales: James J

A wife became a guarantor for her husband's bank loan and other commercial transactions. She argued she could resist the bank's claims under the principles stated in *Yerkey* or *Amadio* or under the provisions of the *Contracts Review Act 1980* (NSW). She argued she had little education with only basic language skills in English and with no commercial or business experience, who did not understand the nature of the transactions she entered into. She was the sole owner of the house over which she gave the mortgage and the house was her only substantial asset. She claimed that although she was a director of and a shareholder in the company, the business carried on by the company was in reality her husband's business. The Court found that she was not a volunteer as she was a joint owner of the business for the purposes of applying *Yerkey*, and she did not suffer from a disability or one that was known to the bank. The Court did not accept the wife's evidence that at the time she granted the mortgage she did not understand what a mortgage was, or that she entered into some of the transactions because she was afraid of her husband and considered that she no choice. She had received advice from a solicitor and the bank had the solicitor's certificate. Despite a claim that the solicitor was not 'disinterested' as he advised husband and wife, the court accepted the solicitor's account. Relief was refused.

- ***ANZ Banking Group v Paul Stephen Fuller and Ors*** [2004] NSWSC 305 | [austlii](#)
Supreme Court of New South Wales: Master Malpass

Two couples entered into a business conducted as a partnership which concerned the buying and the selling of second-hand cars. Both wives had signed a guarantee for business funds. It was alleged the Bank took steps to explain the transaction to the second wife. She was told that the guarantee was secured by the mortgage. She was told that liability was unlimited. She declined the opportunity of obtaining independent legal advice. However, the Bank did not seek to explain the guarantee part of the transaction to the first wife. The Court held the second wife was not entitled to any relief. But the first wife was entitled to relief under *Yerkey* principles which restricted her liability under the guarantee to an unsecured sum of \$30,000. The Court held both

wives understood the purpose and effect of an unlimited guarantee and that they understood that they were guaranteeing an overdraft of the business. Both understood the purpose and effect of a mortgage and neither of them were under any disability.

- ***Commonwealth Bank of Australia v Thompson & Anor*** [2005] SADC 156 | [austlii](#)
District Court of South Australia: Robertson J

A wife became a guarantor for her husband's business loan. She relied on *Garcia* and claimed that the enforcement of the provisions of the guarantee by the plaintiff was unconscionable and should be set aside. The husband gave evidence that his wife signed the guarantee at his request. He explained that he and his wife had been married for many years and she would always agree with what he wanted to do. The wife did not understand at the time of signing the guarantee that there were other companies involved so that if these companies defaulted on their loan repayments she would be liable as guarantor. She was a shareholder in the company, but the Court found her to be a volunteer. The Court held that the bank employees knew that the wife had not received an explanation of the transaction by another person and she had not read any of the documents, and found that the bank needed to explain to her the extent of her liability, and how that liability could arise. The Court held the principles in *Garcia* were established and the guarantee must be set aside.

Robertson J

"The Defendant did not have any business acumen. Indeed, she displayed very little interest in the businesses operated by Mr Thompson during their married life. Her interest focused on her family and her household. Her approach to her life with Mr Thompson was highlighted at one point in her evidence when she was asked whether she was upset at losing her house following the bankruptcy of Mr Thompson, and she replied that she was not upset because as long as her family was together that was all that mattered to her. As a result of her having no interest in any of the businesses, the Defendant never became involved in the management or operation of any of the businesses. She really knew very little about them. I did not gain the impression that the Defendant was quarantined from any matters arising during the business life of Mr Thompson; she simply had no interest in them. It is clear from his evidence, and the evidence of the Defendant, that all of the business decisions were made by Mr Thompson. He alone controlled and managed the various businesses" (at [163-165]).

- ***Willis and Bowring v Ziade Investments No. 2 and 2 Ors*** [2005] NSWSC 952 | [austlii](#)
Supreme Court of New South Wales: White J

Both the husband and wife were personal guarantors for the husband's business. The wife became the director and sole shareholder. She contended

that her guarantee was not binding because she provided it to support her husband's business activities, she did not understand its purport and effect, she did not receive independent advice in respect of it, and no one ever spoke to her about her guarantee. She relied upon *Garcia*. The Supreme Court held that she was not a volunteer. The Court held she understood the purport and effect of what she signed. The fact that the solicitor who explained the documents to her and the potential consequences of her signing the documents was her husband's uncle, and not a stranger to her, did not mean that she could escape liability on her guarantees. Relief was refused.

- ***Roseville Estate Pty Ltd v Bouris*** [2006] VSC 49 | [austlii](#)
Supreme Court of Victoria: Hansen J

A wife gave a guarantee for her husband's loan securing it with a mortgage on her property. The loan applications were made in relation to a criminal proceeding in which the husband was charged with a number of counts resulting from his theft of money from his former employer. She claimed relief on the basis of *Garcia*. Her husband was in a position of ascendancy to influence her to execute documents at his request and without her comprehending them. The Court held that she had satisfied the elements of *Garcia*. She had signed the document without understanding that she was signing a mortgage and without understanding the purport and effect of that document or the other documents signed at the same time. There was no advice provided by the lender or anyone else. The Court found she was a volunteer, the suggested benefit to her not being of a financial character.

- ***Wenczel v Commonwealth Bank of Australia*** [2006] VSC 324 | [austlii](#)
Supreme Court of Victoria: Habersberger J

A wife gave a mortgage over her home as security for a guarantee for her husband's business. She gave evidence of her husband's conduct that he came to the house demanding that she provide the property as security for a new bank loan. She said that she attempted to obtain the details of his indebtedness from her husband and the reasons for his needing her financial assistance, which she did not want to give, but that he became aggressive, shouting and swearing, banging his fists on the kitchen bench, and threatening to sell the property if she did not sign the papers put before her. The Court held that the wife was a volunteer and mistaken about the purport and effect of transaction. There was no independent legal advice obtained and a failure of the creditor to explain transaction. There was also a failure of creditor to comply with banking Code of Practice. The Court considered *Yerkey* and *Garcia*, and also held there was duress and undue influence. She was a volunteer despite being a joint principal debtor.

Habersberger J

“Ms Loughnan submitted that the evidence of the plaintiff and her two children about the aggressive and threatening behaviour of Mr Wenczel was exaggerated and that in any event his conduct was not truly the reason why the plaintiff signed the documents. She submitted that the plaintiff did so for two reasons – to promote the chances of a reconciliation and to avoid her husband invoking his rights under the *Family Law Act* and selling the house. Ms Loughnan also referred to the phrase which the plaintiff used twice in correspondence to the effect that she had let her heart rule her head. In my opinion, this was a case of undue influence in that the plaintiff's will was overborne. I agree with Mr Klempfner's submission that the plaintiff only signed the documents as a result of a combination of threats, emotional manipulation and betrayal of her trust and confidence in her husband. Whatever the precise circumstances of the kitchen confrontation I find that Mr Wenczel bullied his wife into signing the Mortgage and forced her to change from a long standing position of not wanting to be involved with her husband's debts. I accept that she was reduced to signing the documents in tears. I also accept that Mr Wenczel manipulated his wife's emotions in persuading her to sign. As the plaintiff said: "I never wanted to place the house at risk but when Stefan was threatening to force the sale of the house if I didn't sign the mortgage I felt I had no choice. He had an uncanny ability to make me feel guilty by making me feel wrong that I was opposing him."

The plaintiff knew that at that time her wages were not sufficient to meet the monthly home loan payments and that she was reliant on her husband's continued support in that regard. Thus, the threat to sell the house was real. Finally, I have found that the plaintiff still had trust and confidence in her husband. His conduct in pressuring his wife into signing the Mortgage betrayed that trust” (at [157-158]).

- Report 107, ***Guaranteeing Someone Else's Debts*** (2006) | [austlii](#)
New South Wales Law Reform Commission

In 1999 the Attorney General asked the New South Wales Law Reform Commission to inquire into and report on the legal framework for the protection of guarantors of small business and other loans. An Issues Paper 17 was released in May 2000. Between 2000 and 2003 empirical research was undertaken into the issue. The final report was not released until 2006. In the report, the Commission recommended the need for a national ‘model law’ relating to contracts guaranteeing another’s debt. The content of the law would involve, somewhat like the UK model, structural reform of the process of procuring a guarantee focused on informed consent of the guarantor. The Report had regard to the feminist critiques of common law approaches which favour efficient process for the banks rather than focusing on relief for the wife’s STD. It concluded that, in regards to STD there are some legal safeguards for people who guarantee consumer loans but people who guarantee business loans do not have the same protection and must rely on the common law. It

also pointed to the fact that providing more information about the transaction to the guarantor might be ineffective if pressure is still being exerted by the spouse at the time of signing. Thus the Report recommended that there be minimum of one day between advice given and signing, and signing without the borrower being present. The [Australian Banking Association's Code of Banking Practice 2013](#), adopted by all major financial institutions, implements these measures. The [National Credit Code](#) has similar requirements for consumer contracts. The Report categorically ruled out prohibiting third party guarantees or imposing restrictions on the use of the family home as security.

Commission comment and literature cited

“A recurring and highly significant theme in guarantee transactions is the personal relationship between the borrower and guarantor. Many guarantors are spouses (usually wives), parents, other relatives or close friends of the borrower. If the borrower is in default, the creditor will usually attempt to recover the money from the guarantor. Hence, this phenomenon has been called ‘sexually transmitted debt’, ‘emotionally transmitted debt’ or ‘relationship debt’. On the one hand, the emotional relationship between the borrower and guarantor means the guarantor is vulnerable to unfair conduct on the part of the borrower and/or lender. A significant number of guarantors have reported that they did not understand what they were doing at the time of the transaction. Many do not engage in the usual inquiries that a person entering a business arrangement would undertake. Quite often, they do not receive information needed to understand the nature of the transaction and the risks involved. On the other hand, many guarantors in a close relationship to the borrower agree to guarantee the borrower’s indebtedness even where they fully comprehend the nature of the risks associated with the transaction into which they are entering. They do so simply because they do not want to damage their relationship with the borrower by refusing to act as a guarantor, viewing themselves as having no real choice about providing security for the underlying loan. ...It is apparent, therefore, that the legal system needs to protect guarantors as far as it reasonably can, especially from unfair conduct by lenders and borrowers” (at pp. at 66-67).

The Commission recommended, however:

“That protection must, however, recognise that guarantees are an essential tool in facilitating access to credit. Reform measures intended to protect guarantors must, therefore, take into account the interest of lenders and borrowers and ensure that the utility and convenience of guarantees as a credit risk-minimising device remain largely undiminished” (p. 7).

References for STD discussion within the Report

- ALRC *Equality before the Law*

- Baron 1995
 - Lovric and Millbank 2003
 - Fehlberg 1997
 - Haigh and Hepburn 2000
 - Dunn 2000
 - Otto 1992
- ***CBFC Ltd v Fadhel Ahmed & Myoungsuk Oh*** [2008] VCC 4 | [austlii](#)
County Court of Victoria: Anderson J

A wife became guarantor for her husband's business. She says that she was aware that she was required to attend the business premises of the company in order to execute loan documents. The wife said that she was not offered any explanation about the nature of the documents. She had her infant son with her at the bank and her husband was anxious to conclude the business. She relied on *Yerkey* and *Garcia* to have the guarantee set aside. The County Court held the wife did not establish that the lender failed to take steps to explain the transaction to her or to offer her the opportunity to receive independent legal advice before proceeding to execute the documents. She was also involved with the business, and was not a volunteer, rather, she was more of a "family representative". Relief was refused.

- ***Secure Funding Pty Ltd v Nicol*** (Civil Claims) [2009] VCAT 2189 | [austlii](#)
Victorian Civil and Administrative Tribunal: Senior Member A. Vassie

A wife signed a loan application for her husband. They had borrowed money from the applicant to purchase a car from a car dealer and to pay expenses associated with the purchase. The wife relied on *Garcia* and gave evidence that her husband was an undischarged bankrupt, which is why her signature to the loan agreement was required. Her husband drove the vehicle as she did not have a driver's licence. The Tribunal held the circumstances as provided in *Garcia* were established and the wife was not liable. Senior Member Vassie followed *Wenczel v Commonwealth Bank of Australia* and found that in the present case the wife was in the position of a surety, even though the document which she signed designated her as a joint principal debtor. The loan was primarily for the husband's business or employment purposes. He told her that the payments under the loan agreement would be his responsibility. The applicant's documents included a direct debit request, addressed to the applicant, signed by the husband alone. That was consistent with the applicant regarding the husband as the principal debtor and the wife as a surety.

Senior Member Vassie

"There is other authority [*Wenczel v Commonwealth Bank of Australia* [2006] VSC 324], however, which supports the view that the type of transaction that might be set aside under the *Garcia* principle is of a wider class than an

express contract of guarantee, and that the kind of misapprehension by the wife which might attract the principle is not merely a misunderstanding of the nature of the document she was signing. ... I find that Mrs Nicol did not receive a full explanation of the document she signed or of the transaction into which she entered. Her then husband gave only a partial explanation. He told her that it was his responsibility to make the payments. He did not tell her that on its face the document she was signing could make that her responsibility too. Mrs Nicol is not a sophisticated person. Without a full explanation she would not have gained a full understanding of the ramifications of her signature. So she did not sufficiently understand the purport and effect of the transaction into which she was entering. All the other circumstances or factors which, according to the majority judgment in *Garcia*, establish “the married woman’s equity” are present. Mrs Nicol was a volunteer. Her husband, not she, was primarily gaining from the transaction. The personal relationship of trust and confidence was present. The applicant did not itself take steps to ensure that the transaction was explained to her, even though it ought to have explained it fully and accurately. To enforce the loan agreement against her would therefore be unconscionable within the meaning of that expression as used in *Garcia*. Because the loan agreement should be enforced, she cannot have a liability under it” (at [8], [16-17]).

- ***Siwicki v National Australia Bank Limited*** [2010] VSC 547 | [austlii](#)
Supreme Court of Victoria: Mukhtar AsJ

A wife entered into mortgage over her home for a loan to a company so she and her husband could buy a hotel in the Snowy Mountains. She stated “[t]he purchase of the Lodge was Richard’s dream project. I very strongly felt and believed that if I refused to be involved, or opposed Richard’s involvement, it was likely to create such a strain on our relationship that it would end our marriage. I really believed I had no choice”. A consent judgment was entered into for the bank to take possession of the mortgaged property. However, she argued the transaction was unconscionable because she did not understand what she was doing and was not made aware of what was going on. She never instructed the solicitors to act for her and acted under pressure from her husband, or ignorance, in agreeing to the consent judgment. The Court held judgment for the bank and held that *Yerkey* and *Garcia* do not apply to an application to have a consent judgment set aside.

Mukhtar AsJ

“There is no basis for alleging that the bank ought to have made inquiries to satisfy itself that Mrs Siwicki was not subject to undue pressure or some other impropriety from her husband or for that matter, from Harwood Andrews, nor checking to see if she was receiving proper advice from them when it came to signing the consent to judgment: see *Euroasia (Pacific) Pty Ltd v Narain*. As far as the bank knew, there were solicitors acting. If there was a conflict of interest

between Mrs Siwicki and her husband, that would have been something for Harwood and Andrews to determine and advise accordingly. In any event, even if there was some apprehension that she required separate legal representation, that does not indicate to an honest and reasonable person that she had been subject to undue influence in signing the consent judgment” (at [45]).

- ***Agripay Pty Limited v Byrne*** [2011] QCA 85 | [austlii](#)

Supreme Court of Queensland Court of Appeal: **McMurdo P**, **White JA**, McMeekin J

The husband borrowed money to invest in a tax avoidance agricultural managed investment scheme. There was some evidence that the benefits of this investment were to go into a joint superannuation fund for the couple. His wife guaranteed his loan. The Chief Justice at trial set aside the guarantee on the basis that it was unconscionable. The basis of this finding was that the first the wife knew that she was required to be involved in the scheme was when she was told she had some documents to sign so that her husband could take advantage of the investments. If she did not sign, he could not use the scheme to solve his tax problem. She did not read the application before she signed it as guarantor or receive independent advice before signing. She was upset and felt she was being ambushed. She had blind faith in her husband, notwithstanding his sometimes indifferent personal treatment of her. The couple were both doctors. The Court of Appeal dismissed the appeal and held that a principled application of the rule laid down in *Yerkey* and confirmed in *Garcia* requires that the lender be imputed with knowledge about the ‘trust and confidence’ in this relationship, and had to do more to ensure her informed consent. The lender had not provided any advice to her or ensured that that advice was given by an independent advisor. Arguments were raised by the appellant about the high levels of education of both and the general understanding of the wife about what she was guaranteeing and that the scheme financed was to benefit them both.

McMurdo P

“There seems to be no sound reason why these principles should be limited to wives entering into guarantees of their husbands' liabilities. Human weaknesses and unconscionable conduct are not limited to heterosexual marriage relationships. These legal principles should apply equally to all vulnerable parties in personal relationships” (at [4]).

“It may seem odd that in this case a practising medical practitioner with some business experience can avoid the obligations of her guarantee under *Garcia*. But the respondent is not disentitled to the protection of the law because she is tertiary-educated. It must be remembered that the principles explained in *Garcia* over 13 years ago have long been the law in Australia. Commercial lenders like the appellant, which require partners of borrowers to guarantee

their partners' loans, should be well aware of their legal obligations to ensure such guarantors understand the purport and effect of their guarantees and the transactions to which they relate" (at [27]).

"The evidence before the primary judge was sparse, both as to the likelihood and extent of any profit to the joint superannuation fund or generally from the agricultural managed investment scheme. At best, it was that there was some prospect of an eventual profit which may have benefited the family unit if it remained functional; and some small portion of any eventual profit may have found its way to the joint superannuation fund. But the short term benefit of a lower tax bill and any profit received in the long term was essentially for Dr Murray Byrne. There was no clear evidence that the respondent would actually profit from the scheme. ... The evidence favoured the conclusion that the prospect of any profit to the respondent was speculative. Even if she did receive some eventual modest benefit, it was likely to be neither direct nor immediate" (at [11]).

White JA

"Ultimately, cases where a wife seeks to be relieved of the burden of her contract of suretyship will depend on a close analysis of the particular facts. [The lender] submitted that the learned primary judge took an indulgent view of Dr Byrne's want of understanding against her involvement in many of the financial activities of her husband. This is to elevate too highly those activities. The use of a family trust to protect assets in this case involved the purchase of two or three paintings by well known Australian artists. The learned primary judge's acceptance of Dr Byrne's limited involvement in the running of her husband's medical practice was open on the facts. Her evidence that she attempted to bring some financial order into her husband's affairs by managing the household bills from their joint account (required as a condition of her visa) was not challenged. But she was unable, apparently, to exercise any influence over him to plan for his tax obligations and her evidence of his purchase of a \$390,000 car when he had looming liabilities suggests just how little influence she had. No matter how intelligent she might have been, the emotional pressure that she felt at the time the transactions were entered into was of a kind for which in part the rule had been developed and in respect of which the [lender] could relatively easily have dealt. ... [The lender] also submitted that Dr Byrne gave no evidence to the effect that if fully informed and given time to reflect she would not have entered into the contract. She did not need to do so. This was not a defence of misrepresentation ..." (at [66]).

- **Commonwealth Bank of Australia v Sandra Lee Tarrant** [2011] NSWSC 1087 | [austlii](#)
Supreme Court of New South Wales: **Harrison AsJ**

The wife gave a guarantee for her husband's loan. She sought relief under undue influence and the *Contracts Review Act 1980* (NSW). The wife was an

experienced nurse with no knowledge of the business world. She relied on her husband to do all business negotiations and make all decisions in relation to business and legal matters. She says that her husband was the only person that she relied on for advice prior to signing the transaction and she did not have any legal advice about the loan or mortgage documents prepared by the bank. The Court held that the difficulty with the wife's defence of undue influence was that there is no evidence to establish that the bank had any knowledge of her arrangements. The wife signed the mortgage and loan documentation and she signed an 'acknowledgment by borrower' contained in the Guarantor's Servicing Acknowledgements and the bank had recommended that independent legal and financial advice be obtained. The Court held that Ms Tarrant could proceed to trial with a defence under the *Contracts Review Act*.

However, in the following case *Commonwealth Bank of Australia v Tarrant & Hawkins (No. 2)* [2012] NSWSC 302, Davies J found that the wife was bankrupted on 18 October 2011, and because of this she had no legal interest or right to defend the proceedings. That right had passed on the making of a sequestration order to her trustee in bankruptcy.

- ***Bank of Western Australia Ltd v Abdul & Anor*** [2012] VSC 222 | [austlii](#)
Supreme Court of Victoria: Croft J

A husband and wife gave various guarantees with respect to financial facilities agreements whereby moneys were advanced to four companies at their request. The wife relied on *Garcia* with respect to the transactions. Additionally, in relation to the guarantees, the pleadings raised the issue of unconscionability against the bank. The Court found that it would be unconscionable for the bank to seek enforcement of the guarantees against the wife. She did not know what documents she was signing and that, even had she known, she did not understand their nature and effect. The Court found that the evidence indicated that she was a volunteer. The Court preferred the evidence of the guarantors to the bank employee and placed no weight on statutory declarations that the guarantor had received legal advice given the circumstances.

Croft J

"Unlike the professional women in *Garcia* and *Byrne*, at the time of signing of the documents, it was submitted the second defendant did not even understand what a guarantee was, let alone the extent of any potential liability to Bankwest which might flow from its execution. Additionally, the evidence was that ... the second defendant did not understand what the documents she was signing were, and her unchallenged evidence was that had she known she could lose her family home and end up bankrupt as a result of signing them, she would not have done so. ... [T]he picture painted of the process was of a reasonably thick pile of paper, being the documents, with tags of some sort attached to the various signing pages to which the second defendant was directed for the

purpose of placing her signature in the appropriate signing box. The evidence indicates that the physical process adopted for the execution of these documents meant that unless one dismantled the “pile of paper” to examine each document in turn, one would not know what was being signed. The evidence also indicates that there was some urgency in the execution of the documents. In any event, there is no evidence that the second defendant was invited to examine the documents in any detail, or at all, or told what she was signing, document by document.

Having regard to the evidence of the second defendant as to the first defendant’s usual practice of not discussing matters of finance with her, together with evidence of only limited involvement on her part in the management of the businesses ..., I am of the view that it can be inferred with an appropriate degree of confidence and assurance that the second defendant’s knowledge that these documents related to “refinancing” was insufficient to give her an understanding of the purport and effect of the transaction. Further, I gained the strong impression from the second defendant’s evidence that she did not have a high level of business and financial acumen. In saying this, I wish to make it very clear that this observation is not intended as a criticism or any negative comment in relation to her knowledge or ability. Clearly, the evidence indicated that the second defendant had supported the first defendant in the development of various businesses by the first defendant over a number of years and had contributed in a variety of ways, but principally by way of performing administrative tasks. ... As a matter of logic, the fact that a person signs, for example, nine guarantees at various times, never understanding what they were signing, does not mean that when, say, the tenth is signed, they must be taken to know what they were signing and understand the nature and effect of that transaction. In the absence of evidence of an appreciation of the nature and effect of a guarantee, either during the signing of the nine or on the signing of the tenth, the situation does not change” (at [54], [56-57]).

In relation to the advice given by the lender, Croft J stated:

“Bankwest took no steps to ensure that documents sent to the second defendant, complete with warnings, were sent to her personally. Nor, it appears, did Bankwest ensure that the second defendant had adequate time to read the documents, much less understand them and have the opportunity to take independent legal or financial advice. In my view, the process of procuring the second defendant’s signature on the documents ignored all of the safeguards that should have been in place to ensure that the guarantees would be enforceable against her, both on the basis of the authorities to which reference has been made. The process was also at odds with the procedure contemplated by the Code of Banking Practice, which specifically deals with execution of guarantees” (at [76]).

While, the lender relied on declarations that the guarantor received legal advice, the Court found:

“... as a matter of policy, Bankwest should not be able to defeat the equity in favour of the second defendant by adding an additional document to the pile to sign, that effectively purports to waive her rights. It was submitted that the equity could be routinely defeated, without offering any protection to the people it is designed to protect, if banks were able to escape it by simply adding a waiver to be signed. As was observed on behalf of the second defendant, a similar waiver was signed in [*Agripay v Byrne*], but that did not relieve the lender from the otherwise unconscientious nature of its attempt to enforce its legal rights” (at [80]).

- ***Dowdle v Pay Now For Business Pty Ltd*** [2008] QSC 224 [austlii](#) [view appeal](#)
Supreme Court of Queensland: Daubney J

A husband and wife refinanced their house so the husband could obtain a loan. The husband asked the wife whether she would assist in this regard. She agreed to stand as guarantor and provide a mortgage over the property. The bank sought to call on the guarantee and for possession of the home, calling for summary judgment on the terms of the contract. This application was rejected on the basis that there were arguably grounds for relief argued by the guarantor. (*See trial decision below.*)

Daubney J

“I would not be prepared to find, on a summary basis, that the fact that Mr and Mrs Dowdle had separated is necessarily fatal to reliance on the *Garcia* principles. Whilst in many circumstances, separation is likely to bring to an end the relationship of trust and confidence that exists between parties to a marriage, this is not necessarily always so. One can readily conceive of an ‘amicable separation’ in which there continues to be a close relationship involving a significant degree of trust (Equally, I should add, one can easily conceive of a married couple who continue to reside together but whose relationship is, in fact, poisonous and completely devoid of trust and confidence.) Furthermore, a separation is, by definition, not irreversible. For the law to assume that the trust that exists between a married couple automatically dissolves the moment cohabitation ends would be artificial. Are the courts to assume, in the case of temporary separations, that the *Garcia* principle applies one week while the parties are cohabiting, but ceases the next when they are not, only to revive a month later when the parties are wholly or partially reconciled? This aspect of the relationship between the Plaintiff and Mr Dowdle clearly requires investigation at trial”(at [35]).

- ***Dowdle v Pay Now For Business Pty Ltd*** [2012] QSC 272 | [austlii](#) [view trial](#)
Supreme Court of Queensland: **Mullins J**

The wife relied on three grounds to set aside her guarantee and mortgage. Firstly, on the basis of the trust and confidence between her husband and herself, being a volunteer and mistaken about the effect of the transactions, the lender should have appreciated that she may receive insufficient explanation for the effect of the transactions from her husband, but did not itself provide such an explanation and did not provide sufficient information – the *Garcia* defence. Secondly, she relied upon unconscionability. Thirdly, she argued the misleading and deceptive or was unconscionable conduct under the [Trade Practices Act 1974](#) (Cth) (TPA) or the [Australian Securities and Investments Commission Act 2001](#) (Cth) (ASIC Act). The Supreme Court held she established the elements of *Garcia* and was successful under the *Trade Practice Act*, but did not meet the threshold for *Amadio*.

- ***Bank of Western Australia v Ellis J Enterprises Pty Ltd*** [2012] NSWSC 313 | [austlii](#)
Supreme Court of New South Wales: **Harrison AsJ**

A wife gave a guarantee for her husband's business loan. She claimed she was fully dependent on her husband and that they did not have an equal relationship. She felt that she was expected to be a traditional wife. She claimed she was entitled to relief under the [Contracts Review Act 1980](#) (NSW), unconscionable conduct or the *Garcia* principle. The Court held the bank is to be taken to have understood that as a wife she may repose trust and confidence in her husband in matters of business and that the husband may not fully and accurately explained the purport and effect of the loan facilities and her obligations in relation to her guarantees secured by the mortgages of the wife. However, the wife understood that if the company defaulted on its obligations, she would lose her property even if she didn't understand the full details of the transaction. She received advice from a solicitor and evidence of this was sufficient to discharge responsibility of the bank even if it had not advised her. The Court also found the contract was not unjust pursuant to the *Contracts Review Act*. No relief was granted.

Harrison ASJ

"I accept Christine Nassif's evidence that she has been assaulted by her husband a number of times but had not and that he can intimidate her by staring at her intently when she does not want to do as he says. Steve Nassif has not assaulted Christine Nassif since 2005. He was dominant partner in their marriage and she was financially subservient to him" (at [142]).

However, her Honour found that the common law and statutory requirements were not fulfilled:

"Christine Nassif was subservient to her husband in relation to financial matters. While she portrayed herself both in her affidavits and in court as not being cognisant with any of the financial dealings of her husband and Sherene,

it is my view that Christine Nassif did have some basic understanding of their financial affairs. Certainly Christine Nassif was aware in October 2007, a few months after the Bankwest refinancing occurred, that there were money problems and that her husband's business the Speers Point development was not going well. In 2006/2007, Christine Nassif (wrongly) believed that the bank could not get the house if there was a problem as the Wentworth Falls property was solely in her name despite her obligations as a guarantor had been explained to her by an officer at NAB in about 2005. However, by August 2008, when Robert Barraket provided her with independent legal advice, she understood that the bank could take possession of her Wentworth Falls property if the moneys due to Bankwest were not repaid. Even though the explanation by Robert Barraket was brief, it was in clear terms "you could lose everything" (at [165-166]).

- ***Commonwealth Bank of Australia v Starrs*** [2012] SASC 222 | [austlii](#)
Supreme Court of South Australia: Peek J

A husband and wife signed a joint guarantee for a loan to acquire a business secured by mortgages on various properties. At trial, the couple claimed relief on the basis of *Yerkey and Garcia*, but failed to establish a number of elements in each common law doctrine. There was also a claim that in the signing process, the bank failed to comply with the Banking Code which constituted a contractual breach. The Court found that the Code did not extend to these guarantees because of the size of the business.

Peek J

"To take an extreme, but nevertheless useful, example, it cannot reasonably be suggested that it is to be taken to be the intention of the parties that a guarantee for millions of dollars given by a mature, hardened entrepreneur experienced with all aspects of the law and practice regarding guarantees will be nullified upon him later establishing that he was not provided with various information packages designed for novices or that he was presented with the guarantee directly by the debtor (a person who could never have over-awed him) or that various other transgressions of the Code occurred, none of which transgressions could have produced a different result than would have occurred had the Code been scrupulously followed. In my view, the Code is largely a collection of "dos and don'ts" of bankers' conduct, the origin of most of the provisions being traceable to various factual situations considered in decisions of the courts in areas including those of unconscionability generally and particular doctrines such as those in *Yerkey v Jones*, *Garcia* and ... *Amadio*. At a basic level, the Code will serve the useful purpose of warning or reminding bankers of the things that must be done, and must not be done, in order to avoid, for example, an *Amadio* situation occurring. At that same basic level, but from the viewpoint of the guarantor, the fact that the Code does set out in digestible form what must, and must not, be done may be very useful at

the stage of considering whether or not to give a guarantee. It may be of even greater value in the situation of a bank attempting to enforce a guarantee which had been given in circumstances plainly inconsistent with the requirements of the Code; a guarantor (particularly one who only reads the Code for the first time at that late stage) may then be put on notice of his or her potential legal redress in an *Amadio* situation. At a higher level, establishing that significant breaches of the Code occurred may be very important if they are relevant to a defined cause of action such as *Amadio* or *Garcia* unconscionability” (at [115-118]).

- ***Commonwealth Bank of Australia v Duckworth*** [2012] WASC 476 | [austlii](#)
Supreme Court of Western Australia: Master Sanderson

A wife signed a guarantee after her husband told her that signing the guarantee was a formality and there was “nothing to worry about.” The wife argued that neither the lender nor anyone else explained the purport or effect of the guarantee to her. She was not given the opportunity to and did not read the guarantee before she signed it. She was not told she could obtain independent legal advice before signing it. The Court held that she failed the *Garcia* test and her case was a “sham”. This was because, the Court found, she had produced no evidence which supported her position. The only evidence of undue influence in this case was her evidence her husband was prone to shouting. To avoid such shouting matches, she tended to do what he wished.

Master Sanderson

“The only evidence of undue influence in this case is Mrs Duckworth's evidence her husband was prone to shouting. To avoid such shouting matches, she tended to do what he wished. In my view, that is a long way short of what would be required to establish undue influence. But the killer point in this case is the fact of independent legal advice. The principles set out in *Yerkey v Jones* and *Garcia* and in *Amadio* are not some sort of cheat's charter; nor are they a safe harbour for individuals who are wilfully blind and simply refuse to read relevant documents when they are encouraged to do so. The principles are designed to protect the vulnerable. The best way to protect the vulnerable is to make available to them disinterested independent legal advice. That is what has happened here and Mrs Duckworth can have no complaint” (at [124-125]).

- ***Frontlink Pty Ltd v Feldman*** [2012] VSC 624 | [austlii](#)
Supreme Court of Victoria: Pagone J

A wife signed a joint farming venture agreement with her husband. She provided evidence that from time to time her husband gave documents for her to sign and that she would sign them. He did not explain what the documents were and she signed them because he had told her to sign them and did so

because she had relied upon him. She said that she did not feel able to refuse to sign the documents and that it is possible that the agreement in question was one of the documents which she signed but could not say whether it was. The wife relied on *Garcia* for relief. The Court held there was no evidence of unconscionable dealing as against the wife either by her husband or the plaintiff, nor any basis to enliven an equity to make the agreement unenforceable as between the contracting parties through conduct between the husband and wife.

- ***Morrison & Ors v 180 Capital Finance Pty Ltd (No. 2)*** [2012] VCC 1162 | [austlii](#)
County Court of Victoria: Ginnane J

A woman signed guarantees and indemnities and other documents in respect of the loan for her de facto partner. She argued the equitable defence of unconscionable conduct pursuant to *Yerkey* and *Garcia*. The County Court held she understood the effect of a guarantee. The Court cited White JA in *Agripay Pty Ltd v Byrne* that the intelligence of the wife does not rebut the fact that the bank should be aware of emotional pressure within a relationship. The lender knew she took no steps to advise herself and did not ensure she received advice. However, relief was refused on the basis that Morrison transacted without any influence and was aware of the nature of transaction she entered.

- ***NAB v Savage*** [2013] NSWSC 1718 | [austlii](#)
Supreme Court of New South Wales: Adamson J

A wife provided guarantees for six separate loans on properties and for her husband's business loan. These guarantees were secured by mortgages on two properties. Mrs Savage was a co-borrower in all facilities except for the business loan. Each obligation owed by Mrs Savage to the bank was secured by the mortgage over their home or their farm, or both. Although the evidence did not establish that Mrs Savage signed all of these agreements, she accepted that, absent equitable intervention, she was bound by them. She relied on a *Garcia* defence. She spent less than 15 minutes at the bank on each occasion of signing. The husband initialled all the statutory declarations about advice. There was no evidence that the bank manager sought to explain to her or had reason to believe that the documents were explained to her. Usual banking practice not followed. However, she was unable to establish that she was a volunteer in any of the loans except her guarantee of her husband's business. She did not need to establish that she would have acted differently if she had known about the extent of her liability.

Adamson J

"The various demands on Mrs Savage's time left her with neither inclination for, nor interest in, reading transactional documents that her husband brought home for her, or for which she was required to attend the Bank, to sign. She

was content to sign the documents without reading them because she was happy to go along with whatever decision her husband had made about the acquisition of assets or investments. She understood that the documents she was asked to sign were "important legal documents". She considered it to be inconvenient to have to go to the Bank to sign documents because of her other commitments and because she was prepared to sign anything her husband asked her to. ... Even when Mrs Savage realised, in 2010, that things were going badly as far as the family finances were concerned, she still signed the Deed because her husband told her that it was the best thing for her to do. She did not see the need for independent legal advice because, although she knew solicitors who practised locally and felt comfortable with them, she was prepared to do whatever her husband thought best" (at [60] and [64]).

- **Code of Banking Practice 2013** | bankers.asn.au
Australian Banking Association

This revised Code of Banking commenced on 1 February 2014 and all major financial institutions have adopted it. The Code now provides that it will not accept as a co-debtor a person who will clearly derive no benefit from the transaction (s 29.1). All guarantees must be limited to specific amounts rather than unlimited credit facilities of the borrower (s 31.1). There is no specific mention of wives or partners in the Code. However, as it is simply a code of practice it is subject to the operation of the common law. The Code is structured around a process for facilitating informed consent for all guarantees by individuals for personal or small business loans.

The provisions of the Code appear to implement most of the recommendations made by the NSW Law Reform Commission Report in 2007. It provides that the bank will give the guarantor a prominent notice that:

- you should seek independent legal and financial advice on the effect of the Guarantee;
- you can refuse to enter into the Guarantee;
- there are financial risks involved;
- you have a right to limit your liability in accordance with this Code and as allowed by law; and
- you can request information about the transaction or facility to be guaranteed.

The bank will also provide the guarantor with information about the progress of the debt, if the loan is contingent upon the provision of the guarantee and financial information about the debtor.

The Code also provides for one day after information provided to the guarantor to decide unless the guarantor has obtained independent legal advice after having received the information (s 31.1). The Code provides that the debtor will

not be allowed to procure the guarantee (except if a lawyer or a financial advisor) and not be present at the signing of the guarantee.

- ***Bendigo & Adelaide Bank Ltd v Torbay Enterprises Pty Ltd*** [2014] WASC 191 | [austlii](#)
Supreme Court of Western Australia: Master Sanderson

The bank lent money to the company with a guarantee provided by the wife of the director of the company. There was a variation to the loan agreements which subsequently drew the company defendant in as a borrower and guarantor. The husband and wife had been together for approximately 19 years. The companies were run by the husband. His wife had no involvement in these businesses, but ran a business of her own. The couple kept their finances separate - each having their own bank account. The wife argued that she had no knowledge of the business affairs or financial position of the companies or her husband's finances in general. The husband asked his wife to guarantee, using her company, restructuring of his financial affairs. She understood that it would be limited to \$550,000. The loan itself would be secured over a property which was valued at over \$1 million. She therefore felt it to be a transaction that would require no payment herself. She was wrong as there were other debts and therefore the guarantee was likely to be called upon as the debtor was unable to pay. She received legal advice not to enter into the guarantees.

Master Sanderson

“This case represents almost a text book example of what a lender in the position of the plaintiff has to do to ensure a wife providing a guarantee is fully informed as to her potential liability. The [lender] recommended the [wife] see a reputable firm of solicitors and would not enter into a transaction until that was done. [The bank representative] explained the transaction, told the [wife] what her potential liability was and recommended she not sign the guarantees. It is difficult to imagine more disinterested independent and, as it turned out, correct advice. In no way, could it be said that [the wife] was not fully apprised of her obligations and potential liability. Armed with the certain knowledge that the [wife] was aware of what might happen if she signed the guarantees, the [lender] went ahead with the transaction. It was entitled to do so. It is difficult to know what more it could have done to satisfy itself the fourth defendant knew exactly what she was doing. In my view, there was no prospect the [lender's] actions in seeking to enforce the guarantee could be seen as unconscionable” (at [16-17]).

- ***NAB Ltd v Wehbeh & Anor*** [2014] VSC 431 | [austlii](#)
Supreme Court of Victoria: Macaulay J

A wife provided a guarantee of her husband's business loan with a mortgage on the home. When they separated and the husband went bankrupt, the bank

sought possession of the property. The wife claimed relief on the basis of unconscionable dealing and undue influence. She claimed she had no business experience, was dependent on her husband and the guarantee was procured by her husband. However, she obtained independent legal advice about the transaction. The bank also pointed to her directorship in the company and some active participation in the conduct of the business. The Court found her to be a volunteer as she only received incidental benefit from the loans. No special disability applied. No relief was granted.

- **Westpac Banking Co v Diagne** [2014] NSWSC 822 | [austlii](#)
Supreme Court of New South Wales: Ball J

The principal facilities were a loan obtained by Mr and Mrs Diagne to acquire their home and a Commercial Loan Facility to enable them to buy a property in Enmore from which they proposed to operate a restaurant. Both loans were secured by registered first mortgages over the relevant properties. Mr and Mrs Diagne contended that the bank made misrepresentations or engaged in misleading or deceptive conduct which caused them loss. They plead an alternative claim based on estoppel. They also make a claim under the *Contracts Review Act 1980* (NSW) and claimed that the bank was negligent in advancing money to them and that it breached an implied warranty of fitness for purpose in reducing an overdraft that had been made available to their company. Finally, Mrs Diagne made a claim based on the principles in *Yerkey v Jones*. The husband and wife are from Senegal. He spoke English well and had some business experience. She needed interpreter services. They received independent legal advice and the bank was given certificates of this. The Court found that *Yerkey* cannot apply to loans made directly to the wife (rather than guaranteeing loans to another). No relief was granted.

- **NAB v Smith** [2014] NSWSC 1605 | [austlii](#)
Supreme Court of New South Wales: Slattery J

A husband and wife guaranteed a company's loan obligations under various interrelated facilities. They mortgaged their family home to secure their guarantee obligations to the bank. The company defaulted on the loan. The bank called on the spouse's guarantees and they sold their property and applied their equity in it to reduce the company's liability to the bank. The bank then commenced proceedings to claim the rest of the company's indebtedness. The husband and wife cross-claimed for relief on the grounds that their guarantees: were unjust under the *Contract Review Act 1980* and were occasioned by misleading and deceptive or unconscionable conduct within the *Australian Securities and Investment Commission Act 2001* (Cth) and the *Fair Trading Act 1981*. The Court had regard to the bank's failure to follow the Banking Code it had adopted despite the couple signing standard releases. There was no adequate explanation provided and the bank did not do adequate due diligence as to whether the loans were able to be serviced by the

company. The Court found that elements of statutory unconscionability and common law unconscionable conduct were fulfilled and relief granted. Other relief was provided under the *Contact Review Act*.

Slattery J

"I do not find labels such as "asset lending" particularly helpful in analysing whether [Contracts Review Act](#) relief should be granted in a case such as this. But what is clear in my view from the Court's detailed findings in the earlier factual narrative is that the Bank had reason to know Craig and Denise had not received financial advice. The financial advice certificates that the Bank received were too uncertain a basis to infer such advice had been given. Moreover the Bank knew that due diligence had not been done on the vendor's financial statements because the Bank had neither asked for, nor been given, material which would show that such due diligence had been done. Added to that the multiple departures from prudent banking practice on the Bank's side had the capacity to increase the riskiness of this transaction for Craig and Denise, warranting a finding of unjustness enabling the Court's intervention. The appropriate intervention in my view is that Craig and Denise's guarantees and mortgages over the Oyster Bay property be declared void. [Contracts Review Act](#) intervention is also warranted because of the conduct of GHS Financial in allowing signatures on the LT Services certificates to be forged and then for the certificates to be forwarded by facsimile to the Bank. This must have been the result of structural problems in the Bank's relationship with this mortgage broker" (at [352-354]).

Statutory approaches to STD

There are a number of statutory instruments which provide possible grounds of relief from spousal guarantees. At the federal level, the [Trade Practices Act 1974](#) (Cth) provided remedies where there had been a misrepresentation or unconscionability, as did [Fair Trading Acts](#) at the State level. In 2001, the [Australian Consumer Law](#) replaced these provisions and the [Australian Securities and Investment Commission Act 2001](#) (Cth) makes provisions for relief for unconscionable conduct in the provision of financial services. However, cases relating to STD are rarely solely commenced under these provisions either because they do not provide further protection than the common law, or they are of less use as they require attributing responsibility to the bank.

In 2006, a NSW Law Reform Commission report proposed a national model introducing mandatory structural reforms focused on enhancing informed consent of the guarantor. This has not eventuated. However, the Commonwealth has introduced the [National Consumer Credit Protection Act 2009](#) (Cth) which provides protections for consumer transactions, but does not cover the many instances of STD for business credit mapped here. The Australian Banking Association's [Code of Banking Practice 2013](#) (adopted by all major financial institutions) implements a number of recommendations of the NSW Law Reform Commissioner report (see Code and cases in previous section).

In NSW, the [Contract Review Act 1980](#) (NSW) has long provided grounds on which wives can contest the validity of a guarantee on the basis that the deal was harsh or unfair. The potential grounds for relief are wider than the common law – looking at contract terms as well as procedural ‘unfairness’. In addition, there are a number of cases mapped where wives succeeded in establishing that the contract was unfair under this Act where relief would not be available under common law principles because the court found that the wife received some benefit from the transaction. Since 2002, NSW courts have also been more attuned to circumstances of STD of family guarantors of imprudent loans, particularly when the security offered is a mortgage on the family home. This provides a unique jurisprudence unavailable in other jurisdictions.

1974 - 2015: Statutory instruments, Bills and cases

- **Trade Practices Act 1974** (Cth) | [austlii](#)

This Act provided, *inter alia*, consumer protection for actions of a corporation in trade and commerce, including prohibiting ‘misleading or deceptive conduct’ (s 52) and unconscionable conduct ‘within the meaning of the unwritten law (s 51AA) and unconscionable conduct in the supply of goods and services and certain business transactions (ss51AB and 51AC).

This Act has been superseded by the Australian Consumer Law (ss 18, 20-22) and the *Australian Securities and Competition Law 2001* (Cth) in relation to financial services (ss 12CA- 12CC).

Cases relating to STD were rarely solely commenced under these provisions either because they do not provide further protection than the common law or are of less use because attributing responsibility to the bank is more difficult. The more flexible statutory remedies are often not needed in cases where the spouse seeks to have the guarantee set aside.

- **Fair Trading Acts** introduced across the country in 1987

These Acts were introduced to provide consumer protection that had a wider coverage than the Commonwealth *Trade Practices Act 1974* (Cth) because the States have power to regulate businesses that are not incorporated. These Acts were brought in across the country in 1987 (for most jurisdictions) and many continue in force even after the enactments of the Australian Consumer Law in 2001 and the *Australian Securities and Investment Act 2001* (Cth).

- **A Pocket Full of Change** (‘The Martin Report’), 1991
A Commonwealth House of Representatives Standing Committee on Finance and Public Administration

This Committee, chaired by S Martin MP, produced a report into banking and deregulation in 1991. It found a ‘disturbing’ common practice of banks obtaining guarantees from ‘relatives and friends of business proprietors in relation to

business borrowing...' (p. 164). The Committee recommended that unlimited guarantees in this context be banned and there be a code of industry practice established requiring full disclosure about the borrower to the guarantor. These recommendations have to a certain extent been incorporated in the latest version of the [Code of Banking Practice in 2013](#).

- ***Alexander Gregg v Tasmanian Trustees Ltd*** [1997] FCA 128 | [austlii](#)
Federal Court of Australia: Merkel J

Mr and Mrs Gregg granted a mortgage over their home to secure a loan to a business in which the husband was a director. This case was pleaded on ss 51AA and 52 of the *Trade Practices Act 1974* (Cth) that her husband made misleading representations about the nature of the loan and did so as an agent for the lender. This argument failed. However, the Court found that there was a material misrepresentation by the other directors of the company to Mrs Gregg. The court also found that it was unconscionable conduct by the lender in the circumstances knowing of the misrepresentation, and granted relief under the Act. The Court considered whether the principle from *Yerkey* had been overruled.

Merkel J

"It is quite clear from the decision in *Yerkey v. Jones* itself that the presumption was applied in the context of the statutory and sociological framework that existed in relation to married women in Australia in the late 1930's. World War II led to fundamental changes in the role of women in the Australian workforce. During and after the War, women's, especially married women's, participation in the paid workforce rose steadily. As historian Professor Marilyn Lake recently wrote, far from being under a post-war "condition of house arrest", that participation led to post-war pressure to provide married women with a right to work in the Federal Public Service and the banking sector as well as rights to equal pay and work opportunities. As a consequence of such pressures, over time, the role and economic independence of married women changed. The present framework is different to that of the late 1930's in many fundamental respects. It is, and is accepted as, commonplace that married women are likely to be employed in all sectors of the workforce and in all occupations and professions. In doing so it is expected that married women might occupy positions of legal, financial or corporate responsibility. Equal pay for equal work has now been long accepted as a right for all women. Affirmative action programs have been undertaken, as a matter of public policy, in order to assist that outcome for all women. Equal opportunity legislation protecting women from discrimination, inter alia, in relation to employment on the grounds of gender, pregnancy or marital status has been enacted throughout the Commonwealth... . Whilst the present reality is that gender inequality in the workforce may still persist the assumptions which formed the very basis and rationale for the presumption in *Yerkey v. Jones* in favour of a *married*

woman can no longer be made or regarded as applicable to present Australian society. These factors do not lead me, as a Judge at first instance, to decline to follow or apply *Yerkey v. Jones*. Rather, they lead me to the conclusion that the equitable presumption as to a matter of fact in *Yerkey v. Jones* is not applicable as a precedent in the fundamentally different legal and factual environment which exists in Australia today. In my view the conclusion of the Court of Appeal in *Garcia* as to the inapplicability of the principle or presumption of fact said to be established in *Yerkey v Jones* in modern Australian society is clearly correct.”

However, his Honour continued:

“However, the judicial deconstruction of the laws "tender treatment" of married women should not lead to sight being lost of the true rationale for that treatment. ... Relationships of confidence and trust of the kind which gave rise to the presumption in *Yerkey v. Jones* abound in many intimate personal relationships in which emotional dependence or influence leaves one party particularly vulnerable to the other, who using the language of Dixon J, has the "opportunity of abusing the confidence". That situation was succinctly summarised by the Australian Law Reform Commission in its discussion on "sexually transmitted debt" ... Further, development of the law in this area should not lose sight of the social context in which the problem of 'sexually transmitted debt' arises. In her article on "Sexually Transmitted Debt - A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers" (1995) 4 *Feminist Law Journal* at 93 Nicola Howell....”

Feminist literature cited by Merkel J:

- ALRC 1994;
- Howell 1995.

Feminist commentary

Negative assessment

“Equitable intervention in domestic relational transactions is not a recent phenomenon; however, courts are increasingly adopting stereotypical language and assumptions as the basis for such intervention [*citing example of Gregg*].” (Haigh and Hepburn 1997, p.299)

- ***Vladimirka Radin v Commonwealth Bank of Australia*** [1998] FCA 1361 | [austlii](#)
Federal Court of Australia: Lindgren J

This case was brought under the *Trade Practices Act 1974* (Cth). The wife and the husband’s mother provided security for the husband’s business loan with mortgages on their homes. They sought to set aside the mortgages on the basis of claims of breach of duty of disclosure and unconscionable dealing by

the bank, and pursuant to provisions of the [Contracts Review Act 1980](#) (NSW). The wife also relied on *Yerkey* and *Garcia* principles for relief. The wife made serious allegations of violence against her husband. In particular, she alleged that she signed mortgages and other documents in favour of the bank because of her fear of what her husband would do to her if she did not sign. At the time the couple were separated. The wife claimed that the bank was actively concealing from her the fact that it was allowing the maintenance cheques to be met as part of its selective honouring of cheques in collusion with her husband. The Court held that she knew that she was liable for the indebtedness of her husband as well as for the joint borrowings more directly connected with the couple's investment in real estate. The Court also held she was his "business partner" and thus not a volunteer. The Court held she did not satisfy the *Garcia* principles and that the bank did not know about any violence of the husband or dependence by the wife.

In regards to the husband's mother the court found no extraordinary circumstances which would justify any order against the bank in favour of her. Her decision to trust and support her son to the extent of mortgaging her home to support his business was not a vitiating factor.

Feminist commentary

Negative assessment

"[T]he views expressed by Lindgren J ... seem at odds with the *Garcia* decision itself, in that the majority emphasised that the critical issue for the creditor was whether the surety and debtor were married, and that the wife did not need to actively show that she reposed trust and confidence in her husband." (Collier 1999)

- ***Westpac Banking Corp v Glenn Robert Jarrett & Anor*** [1998] FCA 887 | [austlii](#)
Federal Court of Australia: **O'Connor J**

A husband and wife became guarantors for the husband's business using their matrimonial home as security. Both the husband and wife argued to have the mortgage set aside on the grounds that the mortgages and loan agreements were obtained in circumstances that were unjust, relying on the provisions of the [Contracts Review Act 1980](#) (NSW) and [Trade Practices Act 1974](#) (Cth). The husband and wife submitted that the bank was sufficiently aware of the wife's circumstances as to put it on notice that her will was suborned by her husband. The wife had limited business experience. Neither spouse had obtained independent legal advice. They argued that the principles in *Garcia* were fulfilled. It was also argued that, at or around the time of execution of the mortgage and loan agreement, the wife was under a special disability (an advanced stage of pregnancy) such that it would be unconscionable to enforce the guarantee against her. The Court held there was

evidence that the wife knew what she was doing, agreed with her husband to do so and did not communicate, at any time, to the officers of the bank any health difficulties she was experiencing. As she was not providing a third party guarantee, the *Garcia* principles did not apply such that there was an obligation on the bank to tell her to obtain independent legal advice. No relief was granted.

- ***Davies v Australia & New Zealand Banking Group Ltd*** [1999] FCA 1104 | [austlii](#)
Federal Court of Australia: Heerey J

A wife sought an interim injunction to restrain the bank from taking steps to obtain possession of her house which was provided as security for a guarantee of her husband's loan. She relied on the provision of Part IVA of the [Trade Practices Act 1974](#) (Cth) relating to unconscionable conduct and claimed to satisfy the requirements of the principles under *Garcia*. The Court dismissed the application for an interim injunction. The Court did not accept the wife's evidence as to her lack of knowledge and understanding of the nature of a mortgage and guarantee. The Court found she had been closely associated with the business fortunes of her husband over the years. Her dealings with the bank in recent times were inconsistent with somebody not understanding the nature of a mortgage and the consequences of default under a mortgage. No relief was granted.

Feminist commentary

Negative commentary

"In the absence of actual influence, where the wife does not establish that she did not understand the nature and effect of the security documents, she will be unable to have the documents set aside under the rule in *Yerkey v Jones* as explained in *Garcia* [see *Davies v Australia & New Zealand Banking Group Ltd*]." (Cockburn 2000, pp.270-271)

- ***Australian Securities and Investments Commission Act 2001*** (Cth) | [austlii](#)

This Act contains provisions which relate to the behaviour of financial service providers requiring guarantees for loans. The provisions, ss12CA, 12 CB and 12CC, replace the provisions contained in the *Trade Practices Act 1974* (Cth) s51AA-51AC, and now prohibit 'unconscionable conduct in connection with financial services'. These provisions apply to consumer transactions and certain business transactions like guarantees for less than \$3 million. The statutory definition of unconscionability is not tied to the common law.

- Report 107, ***Guaranteeing Someone Else's Debts*** (2007) | [austlii](#)
New South Wales Law Reform Commission

In 1999 the Attorney General asked the New South Wales Law Reform Commission to inquire into and report on the legal framework for the protection of guarantors of small business and other loans. The Commission recommended the need for a national 'model law' relating to contracts guaranteeing another's debt. The content of the law would involve, somewhat like the UK model, structural reform of the process of procuring a guarantee focused on informed consent of the guarantor. The Report had regard to the feminist critiques of common law approaches which favour efficient process for the banks rather than focusing on relief for the wife's STD. It also pointed to the fact that providing more information about the transaction to the guarantor might be ineffective if pressure is still being exerted by the spouse at the time of signing. Thus the Report recommended that there be minimum of one day between advice given and signing, and signing without the borrower being present. The Australian [Banking Association's Banking Code of Conduct 2013](#), adopted by all major financial institutions, implements these measures. The [National Credit Code](#) has similar requirements for consumer contracts.

Literature cited in the Report in relation to STD:

- Otto 1992;
 - Baron 1995;
 - Fehlbeg 1997;
 - Fehlbeg 1997A;
 - Haigh and Hepburn 2000;
 - Dunn 2000;
 - Pascoe 2004.
- ***National Consumer Credit Protection Act 2009*** (Cth) and National Credit Code | [austlii](#)

This Act commenced 1 July 2010 and replaces the Uniform Consumer Credit Codes enacted in each state and territory. This Act was amended by the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth). The Australian Securities and Investments Commission is responsible for regulation of consumer credit and administers this Act. The Act provides a number of additional requirements where a guarantee is entered into in relation to a credit contract regulated by the National Credit Code. Sections 76-81 allow a court to consider 'unjust' transactions. However, this Code does not apply to business borrowings and will therefore not apply to many situations of STD in the case of partner guarantees of family companies or businesses.
- ***Australian Consumer Law*** (2011)

The Australian Consumer Law (ACL) commenced on 1 January 2011. It is Commonwealth legislation made as a cooperative reform of the federal Government and the governments of the States and Territories under an intergovernmental agreement. The ACL replaces the *Trade Practices Act 1974*

and the *Fair Trading Acts* in States and Territories. The relevant parts of the ACL replace and replicate the prohibitions on unconscionable conduct within the meaning of the unwritten law (s 20) and unconscionable conduct in connection with goods and services (ss 21 and 22), as well as prohibiting misleading or deceptive conduct (s 18). Cases relating to spousal guarantees are rarely solely commenced under these provisions presumably frequently because of an absence of evidence of the bank's awareness of or participation in the guarantor's lack of informed consent.

- **National Consumer Protection Amendment** (Credit Reform Phase 2) Bill 2012

This document was only in the form of an exposure draft released at the end of 2012 by the former Labor government. It was called 'Phase 2 of the National Credit Reforms'. Any form of this Bill seems unlikely to be presented to Parliament soon.

This draft Bill proposed more stringent obligations applying to a 'protected small business credit contract.' A 'protected small business credit contract' is defined as a small business contract where:

- the predominant use of the credit is to refinance liability under an existing small business credit contract;
- the borrower has defaulted in respect of the repayments due under that contract; and
- the credit contract is secured by a mortgage over residential property.

The lender would be required to make certain inquiries and there would be a prohibition on entering into, or increasing the credit limit of, the contract if it is unsuitable for the business. These measures may have addressed some of the underlying financial issues of STD in family businesses.

1980 - 2015: NSW cases under the *Contracts Review Act 1980*

In 2002, in [*Elkofairi v Permanent Trustee Co Ltd*](#), the NSW Court of Appeal recognised the importance of the family home as a unique asset. It stated that there was a public interest in finding that such a transaction is 'unjust' when the lender is indifferent to the purpose of the loan and the ability of the borrower to repay (ie. 'pure asset lending'). These considerations have provided a basis on which a number of guarantees by wives (and de facto partners and parents) have been set aside in NSW under the *Contracts Review Act 1980* (NSW). The mapping below only provides cases in which the claim for relief was based solely or primarily on these provisions. This statutory relief is unavailable in other jurisdictions, but judicial reasoning in these cases has influenced considerations of facts in other States' courts.

- **Contracts Review Act 1980** (NSW) | [austlii](#)

This NSW Act gives a court discretion to set aside or vary a contract where the contract is unjust looking to the circumstances at the time it was made, and

with regard also to the public interest. There is a non-exclusive list of factors the court may consider such as inequality of bargaining power and whether pressure was exerted on the person transacting. The Act allows consideration of the circumstances of forming a contract and its performance as well as the nature of terms. This wide focus has meant that the majority of cases mapped here concerning the effects of STD in NSW cases ask for remedies under the Act. While the Act only pertains to consumer contracts and will not be available for a contract for the purposes of trade, business or a profession, in the situation of a personal guarantee for another's business, its provisions apply. As confirmed in cases in the early 1990s, the Act does not require knowledge by the lender of influence by the borrower or disadvantage of the guarantor. This makes the Act broader than the common law doctrines and similar in effect to the evidentiary assistance provided by the *Yerkey* principle in spousal guarantee cases. The Act's scope is not limited to the wife and has therefore been successfully pleaded by other people who are subjected to unfair contracts (not mapped here).

This is a current Act that continues to have an important role in allowing the court to consider the fairness of spousal guarantees executed in NSW.

- ***West v AGC (Advances) Ltd* (1986) 5 NSWLR 610**

Supreme Court of New South Wales Court of Appeal: McHugh and Hope JA, Kirby P (dissenting)

The Court of Appeal dismissed an appeal of a judgment upholding a deed of loan and guarantee of a wife, West, her husband and a company and three directors. Her husband was employed part-time by the company. West believed that the loan was discharging a mortgage on her house, as well as assisting the company. West provided the guarantee with the security of a second mortgage over her home. West was advised against the transaction by her son (an accountant) and barrister friend. She knew other wives of company directors who had refused to provide guarantees. McHugh JA described West as not a "suburban housewife" (at 631). The lender did not know that the company to which it was providing a loan was in financial trouble but could have discovered this from documents. When the company was wound up the creditor called on the guarantors. The appeal related to interpretation of provisions of the *Contracts Review Act 1980* (NSW) as wider than the common law; operating 'within and not outside the domain of the law of contract...'. The majority found that its provisions should be interpreted 'liberally' (at 631) so a contract can be "unjust" even if it does not qualify as unconscionable, harsh or oppressive. Nevertheless, the majority found that as the wife had been legally advised and was knowledgeable about the general terms, there was no unfairness or harshness. They also noted that the Act was available for consumer contracts not investments. No relief was provided.

Kirby P dissented as he found that West had not received independent legal advice so as to fully appreciate the nature of her liability.

McHugh J

Under the *Contracts Review Act*, the “contract may be unjust ‘because of the way it operates in relation to the claimant [substantive injustice] or because of the way in which it was made [procedural injustice] or both’” (at p. 620).

Feminist commentary

Negative commentary

“The messages given to women by the case law are confusing. The only clear message that can be gained is that the discretionary provisions allow judges to emphasise certain facts in order to achieve a particular result. Whether they reduce, remove or reaffirm the liability of a particular woman will depend on the extent that the judges believe she has contributed to her own fate”. [Footnote: “Compare the majority and minority judgments in *West v AGC (Advances) Ltd*”] (Howe 1995, 101).

- ***Collier and Anor v Morlend Finance Corporation (Victoria) Pty Ltd*** (1989) NSW Conv R 55 - 473

Supreme Court of New South Wales Court of Appeal: Hope, Clarke, Meagher JJA

This was an appeal from a decision dismissing a cross claim that certain transactions be set aside under the *Contracts Review Act 1980*. A husband and wife had become guarantors for their son's loan to purchase a new business. Collier was accustomed to complying with her son's requests, even though manifestly to her own disadvantage. The trial judge found that at all material stages the husband and wife both knew what they were doing. The Court of Appeal held, dismissing the appeal, the lender was not party to the exercise of undue influence by the son under the general law. The lender did not have knowledge, either actual or constructive, of any vitiating factor. Nevertheless, Hope JA indicated that the statutory provisions are broader than common law in so far that there need not be knowledge of the undue influence on or disadvantage of the guarantor.

- ***Beneficial Finance Corporation Ltd v Sheila Mary Julia Frances Comer*** (Unreported, 1991 - BC9102349)

Supreme Court of New South Wales: Rogers J

A wife signed a guarantee for a loan for her husband's business. She had little education and no commercial experience. She was also misled by her husband as to documentation she was signing, and whilst in the solicitor's office she was distracted by their child. She contended that the contract was unjust with regard to the provisions of the *Contracts Review Act 1980*. The Court held that she never at any time made an offer of a guarantee. The lender was content to transact all its dealings with her through her husband, and therefore, the lender used her husband as its agent for the transmission of communications and is

saddled with any incorrect statement that her husband may have made to his wife. The wife obtained no benefit whatsoever from the loan which was made to her husband. However, the Court did not make the order sought by the wife but rather ordered that there be a restriction on the guarantee which limited the obligation of the wife to her interest in one of the two properties only that were subject to the guarantee.

Feminist commentary

Neutral commentary

"[I]n *Beneficial Finance Corporation Ltd v Comer*, Rogers CJ did not wish to be 'in any way offensive or hurtful' in outlining Mrs Comer's circumstances. Although such descriptions could be considered necessary within the scope of the doctrines being applied, the judges often fail to realise that women present themselves as 'archetypal females' as a result of extreme social conditioning. This conditioning on the one hand prescribes for women a homemaking/childrearing role within the private family and on the other hand derides women for "choosing" not to become involved in business affairs. The unfavourable descriptions encourage us to think of women in stereotypical terms and therefore reinforce the stereotypes." (Howell 1995, pp. 99-100).

Negative assessment

"The behaviour of other women has ... been measured against a standard that more closely approximates a 'feminine' standard. Women whose conduct is measured against this standard are, not surprisingly, more likely to be successful, whether they take a more active role, or not" [including citing *Comer*]. ... The facts that ... Mrs Comer was distracted by the activities of her young child, when [she] signed [the] contract are relevant. In those situations, the debtor and/or credit provider could have exercised this alternative form of power by giving [Comer] more time, free of distractions and adequate explanations before insisting on a signature. The failure of the courts to recognise this experience of power as valid and relevant relieves the credit providers and male debtors of responsibility for their behaviour." (Howell 1995, pp. 100, 106)

- ***Gough v Commonwealth Bank of Australia*** (unreported 1994 - BC9402555)
Court of Appeal New South Wales: Mahoney, Meagher JJA and Kirby P (dissenting)

At the request of her husband, Gough provided personal security for her husband's business borrowings with a mortgage on her home. The husband was the principal and the wife was a director of the company. The accountant informed the wife that "for legal reasons" her name would go onto the papers for the company. The company was the source of the husband and wife's

family income. Gough appealed the trial judge's refusal to grant her relief citing breaches of the *Contracts Review Act 1980* on the following circumstances:

- That she was a person of limited education having no capacity to understand technical legal language;
- That the company was, in reality, her husband's business and that she had very little, if anything, to do with its running;
- That the mortgage was signed "in the most casual of circumstances" at the defendant's home and she was given no explanation of what she was signing; and
- That she had no independent advice before signing the mortgage - a matter of particular importance in the circumstances because it would have been obvious to the bank that the business of the company was in an unhealthy financial state.

The Court of Appeal dismissed the appeal and agreed with the primary judge's (Sully J) findings that the wife understood the nature of mortgage and had prior mortgages of her own. The bank manager had also advised both husband and wife of the risks of losing their home. No relief was given.

Mahoney J described the requirement that, 'as a general rule' the bank was obliged to require the spouse to have independent advice as dangerous stereotyping. He considered it too great an imposition on a lender to expect them to investigate affairs associated with a spouse who was the guarantor to confirm that she had independent advice.

Justice Meagher found that the bank was not put on 'special notice' when there was a wife providing a guarantee or in this particular fact situation because while she was not 'extremely sophisticated or well lettered' she was 'no gaping rustic...'.

Kirby P (dissenting)

'... the whole circumstances of the case cried out for independent advice which the bank could [not] have given Mrs Gough... a clear ruling of this Court would establish a principle that would encourage the provisions of independent legal or other advice as, (in my view) the Act contemplated".

Literature cited by Kirby P

- ALRC 1994;
- Department of Prime Minister and Cabinet, Office for the Status of Women 1992;
- O'Donovan 1985.

Feminist commentary

Negative assessments

“[I]t has been argued that even to require banks in such situations to ensure that a guarantor has independent advice is too onerous... [u]nfortunately, this approach was adopted by the majority of the Court in the recent decision of *Gough v Commonwealth Bank of Australia*.” (Baron 1995, pp.48-49)

“The New South Wales Court of Appeal’s response to Mrs Akins and Mrs Gough may be seen by a feminist as an example of a preference for the (male) bank officer’s version of the story over the woman’s story.” (Richardson 1996, p.384)

- ***Hepburn v McLaughlins Nominee Mortgage Pty Ltd*** (Unreported 4239 of 1996)
Queensland Court of Appeal: Davies JA, Thomas and Fryberg JJ

A loan was made to a company controlled by a man who was bankrupt but which was guaranteed by his wife, Hepburn. She testified that her agreement to sign the security was procured by physical force and intimidation by her husband, and a promise to release her from it within a short time. She did not know about the company or that she had been made a director of it. The Court applied the NSW *Contract Review Act 1980* to the facts of the case. Argument was also made on common law grounds of undue influence and duress. Despite Hepburn’s evidence, the Court of Appeal did not find that she was under duress when she signed and there was no evidence of constructive or actual notice by the lender of any undue influence by the husband. The appeal was dismissed and the mortgage enforced.

Fryberg J

“[Counsel] argued that duress and undue influence could be established on the basis described in the judgment of Dixon J in *Yerkey v Jones*. Whether that judgment ever established an independent principle capable of founding a defence in these circumstances may be doubted. In any event, there are two reasons why the argument must fail. First, the Supreme Court of New South Wales has held that the principle in *Yerkey v Jones* ought no longer be applied in New South Wales, and this guarantee is one the proper law of which is that of New South Wales. Second, on the evidence an equitable defence must fail, having regard to the considerations already referred to in the context of the refusal of discretionary relief under the CRA.” (at p. 25)

- ***United Overseas Bank Limited v Tan and Ors*** (Matter No 10737/97) [1998] NSWSC 416
| [austlii](#)
Supreme Court of New South Wales: Master Malpass

A wife was a director of a company but left the conduct of the business activities in the hands of her husband. The activities were conducted with legal assistance. From time to time, the wife signed documents. Sometimes she

attended at the lawyer's office with her husband to sign the documentation. At other times, the lawyer would bring the documents to their home for signature. The wife says that she did not read the documents and they were never explained to her. The wife argued that she was entitled to relief under either equitable doctrines or the provisions of the *Contracts Review Act 1980* (NSW). The Court held that she did not have an arguable defence. Primarily, there was evidence that the Deed of Guarantee had been executed by her after receiving what purported to be independent legal advice. The Court would not set aside the default judgment against her.

- ***State Bank of NSW v Hibbert and Also Groom v Hibbert*** [2000] NSWSC 628 | [austlii](#)
Supreme Court of New South Wales: Bryson J

A woman entered into a guarantor arrangement for her de facto partner's business endeavours. Her claims to relief were based in part on advice, misrepresentations and communications allegedly made by the bank to her partner and passed on to her so that she acted on them. The Court found the principles in *Garcia* are not available for de facto relationships. However, the Court ordered the mortgage be set aside under the *Contracts Review Act 1980* (NSW) because it was unreasonably difficult to comply with the conditions of the loan. She was not equipped by her educational background or otherwise to make an analysis of the business feasibility of the contract. There was an absence of availability to her of any expert advice analysing the business feasibility of the contract. The practical effect of the provision of the contract was not accurately explained but was misrepresented to her by her partner's tactics.

- ***Elkofairi v Permanent Trustee Co Ltd*** [2002] NSWCA 413 | [austlii](#)
Court of Appeal New South Wales: **Beazley**, Santow JJA, Campbell AJA

A husband and wife gave a mortgage over their jointly owned home as security for a loan. Of that about \$470,000 was applied in discharge of the existing mortgage over the property. The wife was unaware of how the balance of the monies were utilised. The wife appealed the decision of the trial judge who found in favour of the bank enforcing a mortgage. On appeal the Court of Appeal held she had not established an entitlement to relief under *Yerkey*. The respondent did not have express notice or any other information sufficient to put it on notice that the appellant was a volunteer. However, the Court held she was in a special position of disadvantage. There was evidence that her husband was domineering, non-consultative about family decisions and was aggressive and intimidating. Marital difficulties continued until about 1992 when she attempted suicide. She had little education and was illiterate. She had no income and this was a large borrowing secured over her only asset. This was apparent to the respondent from the loan application form and sufficient to put the respondent on notice of the appellant's lack of capacity to meet the mortgage repayments and thus of the unconscionability of the transaction.

Furthermore, the circumstances were also sufficient to make the mortgage contract unjust: [Contracts Review Act 1980](#) (NSW).

Beazley JA

“In my opinion, notwithstanding that the respondent did not have knowledge of the appellant’s lack of education and her language and domestic difficulties, her lack of income, in the circumstances of this transaction – that is a large borrowing secured over her only asset, in circumstances where the application form failed to disclose any income for either husband or wife – placed her in a special position of disadvantage. Though the full extent of that special position of disadvantage was not known to the respondent, nonetheless, the absence of any relevant financial information was sufficient to put the respondent on notice of the appellant’s lack of capacity to meet the repayment obligations under the mortgage. That left as the only source of repayment the selling of her only asset, as again the respondent must be taken to have known” (at [56]).

Santow J

“Because relief is available under the wider doctrine of unconscionability, for the reasons stated by Beazley JA, it has not been necessary to consider whether the form of the transaction should matter. Here the lender lends under a transaction where the money is intended to go to the husband, though framed in terms rendering husband and wife jointly liable as co-principals. Such a situation may, in the eye of equity, involve a transaction of guarantee or, as sometimes described, constructive suretyship” (at [92]).

- ***Perpetual Trustee Co Ltd v Khoshaba*** [2006] NSWCA 41 | [austlii](#)

Supreme Court of New South Wales Court of Appeal: Spigelman CJ, Handley, Basten JJA

The trustee for a securitised mortgage program run by a company entered into a loan agreement with two married pensioners, secured by a mortgage over their home. This was their only major asset. The company employed an agent to assess loan applications on its behalf in accordance with specific guidelines. The couple’s loan application was deficient. It falsely described the husband as being employed, it did not state the purpose of the loan (leaving the item blank) and the wife’s signature had been forged. The agent knew they were pensioners and not employed. Furthermore, the company did not verify the employment and income position of the couple or obtain details of the purpose of the loan, in accordance with the guidelines. The money was advanced to the couple’s daughter and by her into an investment akin to a pyramid selling scheme, which eventually collapsed. The couple sought relief from the loan agreement under the *Contract Review Act 1980*(NSW). They were successful at first instance and the company appealed.

The appeal was dismissed. The couple were entitled to have the contract set aside as unjust according to sections of the *Contracts Review Act*. The company was indifferent to the purpose of the loan and failed to verify other details of the loan application, which indicated that it was content to lend on the value of the security. Where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust. Chief Justice Spigelman indicated that it may not have been found to be unjust if the company had made inquiries into the nature of the investment. The failure of the company to recommend that the pensioners seek independent legal or accounting advice was not significant to the finding of unjustness.

Basten JA

“To engage in pure asset lending, namely to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default, is to engage in a potentially fruitless enterprise, simply because there is no risk of loss. At least where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust, at least in circumstances where the borrowers can be said to have demonstrated an inability reasonably to protect their own interests, for the purposes ... [of the *Contracts Review Act 1980* (NSW)]. That does not mean that the Act will permit intervention merely where the borrower has been foolish, gullible or greedy. Something more is required ...” (at [128]).

Spigelman CJ

“In many respects this case, in its basic structure, is similar to that considered by this Court in *West v AGC (Advances) Ltd* where the Court held, by majority, that the contract was not ‘unjust’. The Appellant in this case relies on a number of steps in the reasoning in *West* in support of its contention that the contract in the present case should not be found to be ‘unjust’. Of course each case must depend upon its own facts. Furthermore, *West* is now 20 years old. When the Parliament adopts so general, and inherently variable, a standard as that of ‘justness’, Parliament intends for courts to apply contemporary community standards about what is just. Such standards may vary over time, particularly over a period of two decades. There have been observations in this Court that the standards may have changed from those applied in 1986 in *West*... [citing the decision in *Elkofairi v Perpetual*]” (at [63-65]).

- ***Riz v Perpetual Trustee Australia*** [2007] NSWSC 1153 | [austlii](#)
New South Wales Supreme Court: Brereton J

In this case Mr and Mrs Riz (the borrowers) sought relief from a mortgage to the lender as security for a loan to them both for an investment. They sought relief under the *Contracts Review Act 1980*. Mr Riz gave evidence that he

came to Australia from Lebanon in early 1977, and that he could speak only basic English while his wife only understood some words and phrases. Neither Mr nor Mrs Riz ever lodged a tax return in Australia and operated a small food business. They received Centrelink benefits. They, as many people from the Syrian community in Sydney, unwisely invested in a fraudulent scheme and lost money. Their solicitor was negligent in advising them about the scheme. In this case, however, the Court did not accept their evidence about their poor financial position and denied relief under the *Contracts Review Act*. The Court also rejected the submission that the lender's failure to ensure the borrowers were independent financially made it an unjust contract and took note of the solicitor's advice.

Brereton J

"The evidence does not demonstrate any indifference or recklessness on the part of [the lender], and I do not accept that, although [the lender] did not know the true circumstances of Mr and Mrs Riz, it ought to have ascertained them, or should be regarded as having been wilfully blind as to the income of its borrowers. ... A prospective borrower is not entitled to expect the lender to be alert for fraud by or on behalf of the borrower; and a lender is not required, in the interests of the borrower, to have a high index of suspicion for fraud by the borrower or the borrower's agent. ... To grant remedies under the *Contract Review Act* on such grounds would be to convert an Act, intended to achieve just results, into an instrument of injustice. This case has two important features that distinguish it from *Khoshaba*. First, in *Khoshaba*, the circumstances that the statement of the purpose of the loan was left blank, and that [the lender] made no inquiry about its purpose, were decisive... . In the present case, the purpose of the loan - refinance and further investment - was stated... Secondly, for reasons already explained, there is no basis for concluding that [the lender] was in this case engaging in "asset lending". Mr and Mrs Riz were represented and advised by their own lawyer. [The lender] did not demonstrate the indifference referred to in *Khoshaba*, and did not engage in asset lending, but assessed the loan having regard to serviceability. ... Although Mr and Mrs Riz were the subject of unfair tactics, those were perpetrated not by or on behalf of [the lender] The false financial information, without which the loan agreement would not have been approved, was provided to [the lender] ... on behalf of Mr and Mrs Riz ..." (at [78-80]).

- ***Plasterboard Central Pty Limited v Blain*** [2009] NSWDC 44 | [austlii](#)
District Court of New South Wales: Goldring DCJ

A wife provided a guarantee for her husband's business borrowings. The wife sought equitable relief, or relief under the provisions of the [Contracts Review Act 1980](#). Her evidence was that she trusted her husband absolutely and that she left it to him to decide what was or was not necessary for the business. She understood that he would not permit her to sign a document which he thought

was not in her interest. The Court held the interest of the wife was as a beneficiary of the family trust, which was in turn the beneficial owner of shares in the company. So she could not be regarded as a volunteer. There was no undue influence exerted over her. However, it was accepted that she did not understand her material liability. She was precluded from any remedy under the common law principles.

However, the Court held the guarantee was unjust under the [Contracts Review Act](#) 1980 (NSW). The Court held that there was a material inequality of bargaining power which the lender exploited, no ability to negotiate and a difficult form to complete and understand. No legal advice was offered or obtained. The guarantee was enforced but limited to a specified amount.

Goldring DCJ

“The [wife] says that there was a clear and significant inequality of bargaining power. ... First, the [wife’s] husband required the plaintiff to provide him with supplies on credit in order to carry on his proposed business. The [lender] was prepared to do so, provided [the husband] applied for credit in the way required, and also that he provided security for performance of his obligations. The unchallenged evidence from Ms Ross is that this included a personal and continuing guarantee from [the wife] as well, as she was the joint owner of the matrimonial home. In economic terms, the defendant and her husband had far less economic power than the plaintiff, and depended on the plaintiff” (at [53]).

- ***Perpetual Trustee Victoria v Yap*** [2010] NSWSC 761 | [austlii](#)
Supreme Court of New South Wales: James J

A wife became a guarantor for her husband’s business borrowings. She had migrated to Australia as an adult and spoke very little English. She had previously entered into mortgages and had some understanding of the concept of a mortgage. However, she did not understand that, if she defaulted under a mortgage which she had given over her home, her home could be sold. The wife argued she habitually entrusted all financial matters to her husband, because of his superior command of English and his business experience. She entered into each agreement at the instigation of her husband. She did not receive any legal advice before entering into either agreement. The Court held that she was entitled to relief under the *Contracts Review Act* 1980 (NSW), but that the Court did not then have to consider her claims for relief under common law principles. The Court found the lender had notice at the time of each loan agreement of her “disabling” factors (that she was not a native English speaker and had only limited English language skills, did not have a full understanding of the nature of a mortgage and entrusted all financial matters to her husband). Furthermore, the lender had notice at the time of each loan agreement that she was a married woman and hence there was a possibility of emotional subservience to her husband, and that she was the sole owner of the property

being offered as a security. However, she was found to have received a benefit from the borrowings and was a volunteer. The Court held that it was not appropriate for a lower court to apply the *Yerkey* principle to transactions other than a guarantee as a volunteer, but the contracts were held to be 'unjust' under the provisions of the *Contracts Review Act 1980*.

- ***Commonwealth Bank of Australia v Sandra Lee Tarrant*** [2011] NSWSC 1087 | [austlii](#)
Supreme Court of New South Wales: **Harrison AsJ**

The wife gave a guarantee for her husband's loan. She sought relief under undue influence and the *Contracts Review Act 1980* (NSW). The wife was an experienced nurse with no knowledge of the business world. She relied on her husband to do all business negotiations and make all decisions in relation to business and legal matters. She says that her husband was the only person that she relied on for advice prior to signing the transaction and she did not have any legal advice about the loan or mortgage documents prepared by the bank. The Court held that the difficulty with the wife's defence of undue influence was that there is no evidence to establish that the bank had any knowledge of her arrangements. The wife signed the mortgage and loan documentation and she signed an 'acknowledgment by borrower' contained in the Guarantor's Servicing Acknowledgements and the bank had recommended that independent legal and financial advice be obtained.

The Court held that Ms Tarrant could proceed to trial with a defence under the *Contracts Review Act*.

However, in the following case *Commonwealth Bank of Australia v Tarrant & Hawkins (No. 2)* [2012] NSWSC 302, Davies J found that the wife was bankrupted on 18 October 2011, and because of this she had no legal interest or right to defend the proceedings. That right had passed on the making of a sequestration order to her trustee in bankruptcy.

- ***Westpac Banking Co v Chadha*** [2012] SASC 223 | [austlii](#)
Supreme Court of South Australia: **Peek J**

Mr and Mrs Chadha appealed against the orders of a Supreme Court Master granting summary possession of two properties to the bank. The properties were the subject of registered mortgages in favour of the bank as security for a series of loans given jointly as individuals and to their family company. The appeal argument was based on the decision of the Court in *Perpetual Trustee Co Ltd v Khoshaba* which related to whether there was a 'public interest' under the *Contracts Review Act 1980* to find 'pure asset lending' unfair. The Court distinguished this case on the basis that it applies statutory provisions only available in NSW and distinguished the facts of this case.

Peek J

“The appellants here submit that *Khoshaba* established that there is a “public interest” in setting aside contracts which are directed at “pure asset lending”. However, in my view this case does little to assist the appellants for several reasons. First, *Khoshaba* involved a finding that the contract was “unjust” under the *Contracts Review Act 1980*, which has no South Australian equivalent. The appellants wish to ignore the fact that the law in New South Wales is quite different to that in South Australia but this cannot be done. Their case must be assessed by reference to general legal and equitable principles and not by decisions on interstate legislation. Indeed, in *Khoshaba*, Basten JA referred to the severe disadvantages suffered by the respondents in that case (including limited education and business experience) and specifically acknowledged that “[t]hese circumstances would probably *not* have justified a finding that the borrowers were under a special disadvantage or disability, for the purposes of equitable principles of unconscionable dealing”. Further, the court in *Khoshaba* made it plain that even under the New South Wales regime, “something more” than just the characterisation of “pure asset lending” is required to make such conduct of a bank unjust or unconscionable. Of course, the facts of the present case are certainly distinguishable in that here each of the loan agreements clearly stated the intended purpose of the loans, thus demonstrating that the bank did make inquiries into these matters. It was the lack of inquiry that was thought critical in *Khoshaba*” (at [41-46]).

- **NAB v Smith** [2014] NSWSC 1605 | [austlii](#)
Supreme Court of New South Wales: Slattery J

A husband and wife guaranteed a company’s loan obligations under various interrelated facilities. They mortgaged their family home to secure their guarantee obligations to the bank. The company defaulted on the loan. The bank called on the spouse’s guarantees and they sold their property and applied their equity in it to reduce the company’s liability to the bank. The bank then commenced proceedings to claim the rest of the company’s indebtedness. The husband and wife cross-claimed for relief on the grounds that their guarantees: were unjust under the *Contract Review Act 1980* and were occasioned by misleading and deceptive or unconscionable conduct within the *Australian Securities and Investment Commission Act 2001* (Cth) and the *Fair Trading Act 1981*. The Court had regard to the bank’s failure to follow the Banking Code it had adopted despite the couple signing standard releases. There was no adequate explanation provided and the bank did not do adequate due diligence as to whether the loans were able to be serviced by the company. The Court found that elements of statutory unconscionability and common law unconscionable conduct were fulfilled and relief granted. Other relief was provided under the *Contact Review Act*.

Slattery J

"I do not find labels such as "asset lending" particularly helpful in analysing whether [Contracts Review Act](#) relief should be granted in a case such as this. But what is clear in my view from the Court's detailed findings in the earlier factual narrative is that the Bank had reason to know Craig and Denise had not received financial advice. The financial advice certificates that the Bank received were too uncertain a basis to infer such advice had been given. Moreover the Bank knew that due diligence had not been done on the vendor's financial statements because the Bank had neither asked for, nor been given, material which would show that such due diligence had been done. Added to that the multiple departures from prudent banking practice on the Bank's side had the capacity to increase the riskiness of this transaction for Craig and Denise, warranting a finding of unjustness enabling the Court's intervention. The appropriate intervention in my view is that Craig and Denise's guarantees and mortgages over the Oyster Bay property be declared void. [Contracts Review Act](#) intervention is also warranted because of the conduct of GHS Financial in allowing signatures on the LT Services certificates to be forged and then for the certificates to be forwarded by facsimile to the Bank. This must have been the result of structural problems in the Bank's relationship with this mortgage broker" (at [352-354]).

Recognising STD (or not) within family companies

In 1988, in [Metal Manufacturers v Lewis](#), the NSW Court of Appeal upheld a decision to allow a non-participating director to escape personal liability for incurring a company debt when the company was insolvent as she had not provided authority or consent - recognising STD within family companies. She was found to have been appointed as a director largely to comply with requirements of company law and had accepted the position as a consequence of the spousal relationship. However, Kirby P's decision (in dissent) in that case – arguing for a 'sameness' approach to directors' responsibilities because they make a choice to participate - proved more influential and has been followed in the reasoning of subsequent cases. Typically, the cases mapped concerned director liability for the company trading while insolvent which is strictly regulated, first by provisions of the state Companies Codes, and now by the [Corporations Act 2001](#) (Cth). Director defences based on the effects of her spousal relationship under company law provisions are rarely successful, except in [Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation](#) (in 2001 which applied *Yerkey v Jones* principles) that was subsequently overturned.

As a result of several reports which considered STD in family companies and cited feminist commentary, there was a deliberate legislative change to remove the requirement for two directors in 1995. Successive revisions of legislation governing companies have codified the common law approach imposing stricter liability on directors, with the expectation of all directors undertaking "core, irreducible duties." As the onus rests on the director to show that there is an available defence even for inactivity, Australian company law appears to currently provide few opportunities for legal redress for effects of STD. There have consequently been very few cases which raise arguments based on relationship pressures or gendered difference since the mid 90's.

- ***Metal Manufacturers v Lewis*** (1988) 13 NSWLR 315

Supreme Court of New South Wales Court of Appeal: Kirby P (dissenting), Mahoney, McHugh JJA

Both husband and wife were directors of a metal company. The wife defended an action for recovery of a debt alleged to be owed by the company to the appellant. She did so upon the basis of the defences provided by s 556(2) of the *Companies (New South Wales) Code* which creates an offence by a director for insolvent trading of her company. The defences include when the debt is incurred without the director's express or implied authority or that the director did not have reasonable cause to expect that the company could not pay its debts. This case raised questions in relation to the liability of directors for contracts made by a managing director of a company. The husband, as director, did not contest liability and consented to judgment. The proceedings continued against the wife. The trial judge gave judgment for the wife.

The creditor appealed against that judgment. However, the Court of Appeal dismissed the appeal and held the husband incurred the debt on behalf of the company in his capacity as managing director. The wife had no power to prevent him from exercising his authority to contract the debt. She knew nothing about it. Accordingly, she proved that she neither authorised nor consented to the incurring of the debt satisfying the statutory defence in s 556(2).

(The state *Companies Codes* are now replaced by the Commonwealth [Corporations Act 2001](#) and continue to impose direct responsibility on directors for insolvent trading and narrow defences.)

Kirby P (in dissent)

"The fact that the managing director arrogated authority to himself is, as it seems to me, irrelevant to the question whether the respondent expressly or by implication authorised or consented to the *company's* activities being inducted through him. Clearly she did. Equally clearly, she must have known (or must be taken by the statute to have known) that opting out of concern in the company's affairs would mean, in effect, that the company, as a continuing trading entity, would have to incur debts which would thereupon be incurred by her husband, as managing director, on behalf of the company and with her implicit acquiescence, authority and consent. No other inference is available from the course which she adopted, being a director with the responsibilities which the Code imposes upon her, being sufficiently concerned about the company's liquidity to ask about it, and being prepared to be brushed off by the generalities of her husband, the managing director.

It might be said that, given the true nature of the relationship between the respondent and her husband, her reaction was entirely understandable. Perhaps it was. But it was not a reaction which the Code permitted her to take.

And if the consequence is that a creditor can attack assets which have been acquired or placed in her name, the answer comes back that this is so because Parliament has so provided. People should not become (relevantly) directors of companies, if they wish to avoid exposing themselves and their assets to the liabilities now imposed by s 556. If they are directors, they should exercise the reasonable care and diligence which the Code now requires of them. They cannot surround themselves with a shield of immunity from the operation of s 556, by the simple expedient of washing their hands of the company's affairs and leaving it to a co-director to attend to those affairs and to incur the debts with third parties which it is the very purpose of s 556 to control" (at 321).

Feminist commentary

Positive assessments

"Unlike many other judges, Hodgson J was willing to include in his judgement evidence about Mrs Lewis' subordinate and dependent position in the family and business and to recognise, to some degree, the domination and control her husband exerted over her. However, the case raises difficult issues about imposing general standards of involvement upon directors. Mrs Lewis had effectively been excluded from being involved in the affairs of the corporation by the rebukes and silence of her husband. She had been denied access to the most basic information about her role and responsibilities and had been limited in every way in having input into the business. Yet the circumstances of her exclusion are similar to those faced by many women in family owned businesses. Gendered ideas about women's roles as passive carers in the home can collide with gendered notions about assertive behaviour in the market place. In this case for example 'it was practically impossible for [Mrs Lewis], within her family structure, even to ascertain much less fulfil her duties as a company director'" (Hall 1998, p.53).

"...at times the Australian courts have been inclined to interpret the defences liberally to enable such persons to escape liability [citing *Metal Manufacturers Ltd v Lewis*]. These courts have been sympathetic to the plight of these non-executive directors because they have viewed their only crime as being to leave the affairs of the company to the dominant director, often their spouse, whom they believed they could trust" (Cassidy2002, 343).

- ***Statewide Tobacco Services Ltd v Morley*** (1990) 8 ASCR 463
Victorian Supreme Court: Ormiston J

A widow, Mrs Morley, had been a director and shareholder of a family company since 1959. After her husband's death, her son ran the family business with her consent, although he was never appointed to the position of managing director. Mrs Morley took no active part in the management of the company, apart from signing company documents and returns, and made no attempt to look at or

ask to see any of the company's invoices, statements or books or to seek further information at any relevant time. She saw the last annual accounts but they gave her no indication of future problems. The company went into liquidation. A creditor of the company sued Mrs Morley for debts incurred by the company when it was insolvent. Ormiston J held that Mrs Morley was personally liable because she was taken to have consented or authorised the debt due to her position, and there was no defence available to her because it was not "reasonable" for a director to "hide behind ignorance of the company's affairs which ... has been contributed to by his own failure to make further necessary inquiries".

Ormiston J

"Here the defendant took no interest in the day to day affairs of the company, attended no regular directors' meetings and sought no financial or other information from her son to whom she had delegated managerial responsibility. It may readily be believed that she trusted her son to manage the company competently. I also accept that she knew nothing of the responsibilities as a director and that nobody had informed her that they involved her doing more than signing a few documents from time to time upon the say so of her son, or possibly of the company's accountants. Those matters, unfortunately for her, do not excuse her failure to perform those duties. It may be that the company was set up for tax purposes, as appeared at one stage in the evidence, but if people choose to use a corporate vehicle to carry on their business activities, then they must accept the consequential responsibilities imposed by law" (at p. 432).

Feminist commentary

Negative assessment

"... the case is important in demonstrating the difficult issues of 'benefit' and 'choice' that arise in this context. ... The *Morley* case illustrates three important points which are equally relevant to other cases involving women and family business. First, while Mrs Morley's non-participation suggested her conformance with 'a socially and legally endorsed stereotype of passivity, dependence, and derivative participation in commercial activity', legal and commercial expectations of her were clearly far less accepting of this model, to her cost. Secondly, the case illustrates a judicial tendency to equate formal power with real power. ... This view works in the interests of creditors, but fails to explore the reasons for Mrs Morley's apparent reliance on her husband and then her son in business matters. Instead, the implication is that Mrs Morley chose not to exercise her power... . Thirdly, while never fully articulated, there is the undercurrent in the case that, because Mrs Morely had not merely been idle but had benefited directly from the business, the imposition of liability on her was more acceptable – a view which fails to acknowledge the qualified and contingent nature of her benefit. ... The perspective is very much that of an

empowered, informed, commercially-minded outsider, with Mrs Morley being judged by that standard.” (Fehlberg 1997, 35-2).

- ***Hosken, Robert William and Hosken, Heather v Australian Securities Commission*** [1999] TASSC 27 | [austlii](#)

Supreme Court of Tasmania: Slicer J

A husband and wife were the co-directors of a company which operated a hotel. The applicants were convicted of 372 offences, contrary to the *Companies (Tasmania) Code* s 556(1) which attributes personal director responsibility for company trading while insolvent. The husband was convicted of the charges and a fine of \$150,000 was imposed. Convictions were recorded against the wife and she was fined the sum of \$10,000. Both appealed their respective penalties. The wife on appeal argued the fine of \$10,000 was manifestly excessive. She submitted that the magistrate paid insufficient regard to her lack of personal gain. On appeal the Court held “[a] wife who is a co-director of a family company is well able and expected to monitor the affairs of that company. She is as qualified to discern irregularity as any other non-professional or lay person. The penalty ought not be reduced because of her status as a woman or a wife. The motion to review the penalty imposed on Heather Hosken ought be dismissed”.

- ***Group Four Industries Pty Ltd v Brosnan*** | (1992) 59 SASR 22; (1992) 8 ASCR 463
South Australian Supreme Court Full Court: Matheson, Olsson and Debelle JJ

Mr and Mrs Brosnan were the only shareholders and directors of a company which carried on a business of selling air-conditioning equipment. From its incorporation, the company was indebted to GFI (the plaintiff), a supplier of air-conditioning equipment. In 1987, a liquidator was appointed to the company and GFI was owed money. GFI sought to recover the unpaid debt of the company from its directors under s 556 of the *Companies Code*. Judgment was entered against Mr B, but Mrs B was able to establish a defence under s 556(2). GFI appealed in relation to Mrs B. Mr B was responsible for the everyday running of the business and was aware of the precise financial situation of the company. By comparison, Mrs B knew very little about the financial aspects of the business. She assisted Mr B in relation to the business from time to time, but her role was restricted to answering the telephone and accepting deliveries when made to their residence and occasionally doing the banking. Mrs B did not have any involvement with the creditors or debtors of the business. However, over a course of years, Mrs B had (with Mr B) signed a number of directors’ statements relevant to the accounts of the company. The Full Court held that Mrs Brosnan could not establish a defence under the Code.

Matheson J

“As I understand it, Mrs Brosnan was living with her husband at all relevant times. He was managing the business. She and her husband were the only directors. She and her husband were the only employees. I am prepared to infer that as a director Mrs Brosnan impliedly authorised him to incur debts on behalf of the company in the course of buying and selling airconditioners, but I think the inference that Mrs Brosnan impliedly consented to her husband incurring the debts is irresistible. ... As his Honour found, when considering the case against Mr Brosnan, the financial structure of the business was ‘uncomplicated’, and Mrs Brosnan ‘could have quite easily and quickly ascertained the precise financial situation of the company’” (at 483).

Feminist commentary

Neutral assessment

“The role of the passive director has received considerable attention by the judiciary in the last few years. Of greatest importance have been the cases dealing with insolvent trading [citing *Group Four v Brosnan*]... Overwhelmingly, the judges held that women should have full liability as directors. ... The 588G cases are important on one level because they raise the dilemma of whether women directors should be treated the same as males or that their special situation requires special treatment. However, these cases also demonstrate the difficulty faced by the courts in adjudicating the competing claims of families and creditors to corporate assets. The family’s role as repository of corporate assets should not be underestimated, because the family plays a significant role in immunising assets from creditors” (Spender 1995, 203-4).

- ***Corporate Law Reform Act 1992*** (Cth)

This Act enacted major reform in relation to corporate insolvency. These reforms were instigated by a number of corporate collapses in the 1980s from which creditors called for better protections from inactive or negligent directors. The reforms were based on recommendations by the Australian Law Reform Commission in two documents: the Australian Law Reform Commission *Discussion Paper No 32, General Insolvency Inquiry*, 1987, (the ‘Harmer Discussion Paper’); and the Australian Law Reform Commission *Report No 45, General Insolvency Inquiry*, 1988 (the ‘Harmer Report’). These reports made a range of recommendations, subsequently enacted, about priorities of the Australian Taxation Office in insolvency. The Act tightened the exclusion of liability when a director had no reasonable grounds to expect insolvency of a director for reasons of ‘illness or other good reason’ (s556 *Companies Code 1981*). Rather it reversed the onus so that the director pleading a defence must show that there is a ‘good reason’ why the director is not participating. While the cases illustrate that it was difficult to convince a court about factors of STD among spousal directors, this legislative change further impacted on passive directors of family companies.

The current federal Act governing corporations is the [Corporations Act 2001](#).

- ***Story v Advance Bank Australia Ltd and Another*** (1993) 31 NSWLR 722

Court of Appeal New South Wales: Gleeson CJ, Mahoney, Cripps JJA

The bank took a mortgage over property owned by a company, the directors and shareholders of which were husband and wife: the mortgage, which was apparently regular on its face, was in fact a forgery. The forgery was a false signature to the attestation of the common seal of the director/wife affixed by the director/husband without his wife's knowledge. There was a contest at the trial as to the context of the forged signature, and the evidence showed that this was something he had done on previous occasions. However, at trial and in the Court of Appeal the bank succeeded on the findings that: It did not have actual or constructive knowledge of the forged signature, and the mere fact of defective execution of a mortgage document alone does not give rise to a personal equity to have the mortgage set aside. The loan benefited the company in which she was a director and shareholder. The Court of Appeal also found that s 68A of the *Companies Code* allowed the bank to assume approval as a result of her connection with the company – the 'indoor management rule'.

Feminist commentary

Negative assessment

"In the view of the writer, the outcome of that case is critically dependent upon the assumption of domestic harmony — that the interests of Mrs Story and the family were the same as those of Mr Story and the corporation. The creditor can therefore satisfy its claim out of family property which devalues Mrs Story's claim under s 79 of the [*Family Law Act*]. The parallel assumption of the "need for commercial certainty" is demonstrated by the response of the commercial community to Story and the subsequent decision of *BNZ v Fiberni*. Story was welcomed in the commercial community, with Professor Baxt declaring that "commerce can now move more swiftly, certain in the knowledge that minor irregularities will not spoil the day". (Spender 1997, p)

- ***Bank of New Zealand v Fiberni Pty Ltd*** (1994) 12 ACLC 48

New South Wales Court of Appeal: Kirby P, Priestley and Clarke JJA

Fiberni Pty Ltd was a shelf company for the purpose of buying and holding property at Palm Beach. The directors were a de facto couple (subsequently married) and the property was their family home. Mr Doyle was the controller of a group of companies which was experiencing financial difficulties and the bank required guarantees from Fiberni Pty Ltd to secure Mr Doyle's companies' debts. His wife was not aware of this transaction. When Mr Doyle's companies defaulted, the bank sought possession of the family home on which a mortgage

had been placed securing Fibern's guarantee. The bank argued the operation of the 'indoor management rule' which allows an assumption that those representing the company have appropriate authority to act for the company. However, the bank dealt with Mr Doyle and his son, who was not a company director. The trial judge found, and this was upheld on appeal, that the bank was not entitled to rely on this legislative rule because the son was not held out as a director and the facts were such that it was not reasonable to rely on the documents provided. Therefore the guarantees were not able to be enforced.

Feminist commentary

Neutral assessment

The creditor win in *Story v Advance Bank* "was welcomed in the commercial community... . However, in 1994, a differently constituted Court of Appeal came to a different conclusion on similar facts [in *BNZ v Fibern*]. ... After the decision in *Story* which had been 'comforting to the commercial community', it was lamented that 'business certainty has again become a question of doubt... .' Thus the concept of business certainty is a powerful catchcry which will in many circumstances defeat any corresponding argument about domestic certainty" (Spender 1997, 202).

- ***First Corporate Law Simplification Act 1995*** (Cth)

This Act instituted a range of changes in regulatory burdens imposed on small companies, including the requirement that there be two directors and shareholders. In the Second Reading Speech, the then Attorney-General, Michael Lavarch, referred to a number of considerations in drafting the Bill which relate to either the enormous increase in women forming companies since the late 1980s or the effects of STD in relation to family companies (as cited by Spigleman CJ in *Deputy Commissioner of Taxation v Clark* [2003] NSWCA 91 at [154]):

"I should highlight the importance of the provisions in the bill which will enable sole traders to incorporate without the need to involve a second shareholder or director in the business. This amendment will alleviate a number of problems which have a particular impact on women who are involved in business. Reports over recent years suggest that women are heavily involved in small business and, in fact, are setting up their own businesses at a much faster rate than men. The current requirement for a minimum of two directors and shareholders for a company has presented significant practical difficulties for many women.

First, businesswomen may find it difficult to find another person willing to act as a director of their companies. They may be unwilling to have their husbands or

partners as directors or shareholders out of a desire to retain a degree of independence within the family unit.

Secondly, the minimum number requirement often leads to women becoming directors of companies controlled by their spouse in which they do not play any meaningful role. This can expose these women to the legal liabilities of a company director, without them having any influence over the operation of the company. As recent cases have shown, people acting as directors without being involved in the company's affairs can be responsible for the company's debts upon insolvency. The outcome is similar to the problem which results from 'sexually transmitted debt' when a person acts as guarantor for the debts of their spouse. The bill will address these problems, and help women to establish themselves in business on their own terms."

- ***Metropolitan Fire Systems Pty Ltd v Miller & Others*** (1997) 23 ASCR 699
Federal Court of Australia: Einfeld J

Mr and Mrs Miller and Mr Ewins were directors of a company (Raydar). The applicant company (Metropolitan) sought a declaration that the directors of Raydar breached the Corporations Law by allowing Raydar to trade while insolvent and incur debts to Metropolitan. A defence of reasonable grounds to believe the company was solvent was raised by two of the directors on the basis that they relied on Mr Miller with respect to running the company's affairs. However, the court found that the circumstances were not sufficient for this belief and simply relying on the husband was not enough to discharge the assumption of activity by a director. The declaration sought by the creditor was made and compensation awarded.

Einfeld J

"Patricia Miller, as well as being a director, was employed by the company as a full time casual clerk performing banking, some invoicing and general banking duties from home. She typed the invoices but claimed that she did not take in the details. Mrs Miller also sometimes made phone calls regarding debt collection, but she claimed not to be aware of the details of these debts or the difficulties being experienced in recovering them. She claimed to be unaware of the dispute with Turks or the company's liability to the Tax Office, although she was aware of the mortgages granted over the family home and the factory unit. Mrs Miller also admitted that she was aware that the company was reducing its staff although this apparently caused her no concern. More importantly, there is no evidence of her inquiring of her husband, the director of the company on whom she relied for information about the company, as to the state of the company's finances. ... She may have believed that her husband would inform her if the company was in trouble but as a director she had a duty to take an interest in and demand information on the financial state of the company, especially as she undoubtedly knew that it was at best 'in trouble.' As a working

director, she had a duty to observe and draw reasonable and obvious conclusions from facts coming to her attention. I accept that Mrs Miller lacked detailed knowledge of the financial situation of Raydar, but I cannot find that there were and that she had reasonable grounds to believe that Mr Miller was fulfilling the responsibility of providing adequate information to his co-director. I therefore reject her defence raised under s 588H(3)” (at p. 712).

- **Corporations Act 2001** (Cth) | [austlii](#)

This current Act imposes broad requirements of care, skill and diligence on directors in exercising their duties as had been imposed in cases decided prior to its enactment. Section 180 of the Act imposes a mixed objective and subjective standard of care and diligence, measuring conduct against that of a ‘reasonable person.’ A failure to act or have knowledge about the company will not be a ‘reasonable’ excuse for a failure to recognise a breach of the Act by the company (like insolvent trading). The Act imposes personal responsibility on directors for the company trading while insolvent. Section 588H provides specific defences for director liability for insolvent trading such as if the director had reasonable grounds to suspect that the company was solvent when it was not, or if the director did not take part in management for reason of illness or some other ‘good reason.’

As in decisions about previous provisions, courts have tended to read these defences narrowly. The assumption of activity of directors underlying many provisions has consequences for passive directors of family companies who have accepted this role for reasons of influence, trust or dependency, and do not or cannot participate in its running. The expectation is that these directors have made a choice to adopt the role and must provide strong evidence of a relevant defence to avoid personal liability in most cases.

- ***Southern Cross Interiors Pty Ltd and Anor v Deputy Commissioner of Taxation and Ors*** [2001] NSWSC 621 | [austlii](#) [view appeal](#)
Supreme Court of NSW: Palmer J

The husband and wife were directors of a company. The company was wound up and the company's liquidator obtained an order against the Deputy Commissioner of Taxation. The payments were held to be an unfair preference. The husband was ordered to indemnify the appellant for the amount, but the wife succeeded in establishing the defence pursuant to s 588FGB(5) of the *Corporations Act* 2001 (Cth). The Deputy Commissioner appealed against the judgment given by the trial judge in favour of the wife. The issue before the Court was whether the wife had good reason not to take part in the management of the company at the times of the payments. At no time during the period in which the wife was a director did she participate in the management of the company in any degree at all. She was not ill at any relevant time. Accordingly, the sole issue in the defence is whether she did not

participate in management "for some good reason" pursuant to s 588FGB(5) of the *Corporations Act* 2001 (Cth).

The wife's evidence was that she had been carrying out home duties full time since the birth of the first of her three children in 1992. She had had no business experience and had never been a company director before being appointed as a director. The Court held the wife had established a good reason for not participating in the management of the company at any relevant time, so that her defence under s 588FGB(5) succeeded. She accepted the appointment as a director with no understanding at all of the duties and responsibilities which that office entailed. That lack of understanding was not due to any fault on her part. Her husband failed to explain to her anything of the responsibilities which directorship involved and did not suggest that she seek advice or further information.

Palmer J

"The law recognises that the relationship of trust and confidence between married people may lead one of them to undertake responsibilities or liabilities which would not have been undertaken but for the relationship. That reality of human experience, when it produces financial liability for the unsuspecting or incautious spouse, has recently acquired the provocative tag of "sexually transmitted debt". ... Academic writers have drawn attention to the problems of women who incur liabilities as sureties or as 'silent directors' of family companies because of: '... the tendency of women ... to defer to and trust in male authority and expertise, in matters of the 'public' sphere, including business, commerce and legal transactions'" (at [129 and 132]).

"In my opinion, any reason which the law holds sufficient, according to accepted legal principle, to excuse a person from the legal consequences of his or her acts or omissions is a "good reason" for the purposes of a defence under [*Corporations Act*] [s.588H\(4\)](#) and [s.588FGB\(5\)](#). [127] Within the category of circumstances constituting "good reason" for non-participation in a company's management I would include those circumstances which underlie the reasons of Dixon J. in *Yerkey v. Jones*, as affirmed and explained in *Garcia v. National Australia Bank Ltd* ... " (at [126-7]).

"In my view, the law should recognise that a wife's failure to appreciate the reality of her responsibilities as a director due to deferral to her husband in the circumstances referred to in *Garcia* and in para.13.4 of the ALRC [*Equality Before the Law*] Report may be a "good reason" for failing to participate in management for the purposes of a defence under [s.588H\(4\)](#) and [s.588FGB\(5\)](#). Such recognition will not undermine the policy of the law that those who accept office as a director are expected to act with competence and diligence in discharging the duties of their office. Whether the wife has truly failed to appreciate her responsibilities and whether such failure has anything to do with

trust and confidence in the marital relationship are questions of fact in each case. So, for example, if a woman already has some knowledge and experience of business and of the responsibilities of a company director before she accepts a directorship at her husband's request, it will be very difficult indeed for her to convince the Court that she had a "good reason" for not participating in management simply because she left business matters to her husband. In those circumstances, she would be expected to know that her duties as a director overrode the exigencies of the marital relationship. On the other hand, if a woman, inexperienced in business and completely unaware of the responsibilities of company directorship, is told by her husband, whom she trusts and believes to be honest and to be knowledgeable in such matters, that some formality requires her to be appointed as a director to a family company and that management of the company may be left entirely to him, then, in my view, she has a "good reason" for not participating in management for such time as she genuinely remains in ignorance of her duties" (at [134-5]).

Feminist scholarship cited by Palmer J:

- ALRC 1994;
- Fehlberg 1997A;
- Bailey 1999;
- Kaye 1997;
- Howell 1995;
- Fehlberg 1997

Feminist commentary

Positive assessment

"...at times the Australian courts have been inclined to interpret the defences liberally to enable such persons to escape liability. These courts have been sympathetic to the plight of these non-executive directors because they have viewed their only crime as being to leave the affairs of the company to the dominant director, often their spouse, whom they believed they could trust" [citing *Southern Cross Interiors*] (Cassidy 2002, 343).

- ***Deputy Commissioner of Taxation v Clark*** [2003] NSWCA 91 | [austlii](#) [view trial](#)
Court of Appeal New South Wales: Spigelman CJ, Handley, Hodgson JJA

The Deputy Commissioner of Taxation appealed Palmer J's decision. The Court of Appeal found that one aspect of directors' duty of care and diligence is a core, irreducible requirement of participation in the management of the company. Such a requirement is one of the factors underlying the scheme for insolvent trading of which the defences in s 588FGB *Corporations Act 2001* is a part. A total failure to participate, for whatever reason, should not be regarded as a 'good reason' within [s 588FGB\(5\)](#). The express reference to 'illness' in s

588FGB(5) does not assist the applicant on the facts. It is not appropriate to interpret the general words of the Act so broadly as to invoke other areas of the law in which a person may be excused from the legal consequences of his or her acts (ie equitable doctrines such as the *Yerkey* principle in undue influence). The appeal was upheld and personal liability was attributed to the wife.

Spigelman CJ

“Mrs Clark has never been a director of any other company. Nor did she have any business experience. Her time was taken up as a housewife and mother. She said that when requested to become a director, she thought she had to accept as a wife. She agreed that, from time to time, she signed company documents, but that they were not explained to her and signature occurred in situations in which: ‘I would usually have a frying pan in one hand and be signing with the other’” (at [10]).

However, in finding that no defence applied under the Act, his Honour referred to a “core, irreducible requirement of involvement [by directors] in the management of the company” (at [108]). His Honour continued:

“The preparatory materials for the [First Corporate Law Simplification Act](#) and the Attorney's Second Reading Speech both drew on the concept of ‘sexually transmitted debt’ by way of an analogy. Palmer J in his judgment in the present proceedings refers to some of the literature on this matter. There is often an acute dilemma when deciding whether the principled application of the law requires formal equality or gender neutral treatment, on the one hand, or recognition that the position of women in particular relationships requires separate treatment on the other. The issues that arise are as old as Aristotle, who identified injustice as treating equals unequally or treating unequals equally. The difficulty is to identify the circumstances in which persons are relevantly equal or unequal. Some emphasise that gender neutral rules ignore the actual experience of many women who assume subordinate roles in both the public and private spheres. Others emphasise the possibility that permitting women to rely upon stereotypes embodied in special rules as a defence to legal liability will have adverse consequences on the ability of women to participate equally in commercial life. ... The contrasting views are also reflected in the literature on the particular defence under consideration in the present case. ... The recognition of complete abdication of responsibilities as a director as a “good reason”, for purposes of the statutory defences, carries with it the risk of reinforcing gender stereotypes and undermining the confidence with which potential creditors will deal with small companies in which women participate with their husbands. Maintaining a firm position on the duties of directors will encourage the use of single director corporate structures for small business. In my opinion, it is desirable to promote coherence between appearance and reality in corporate practice” (at [160-4]).

Feminist literature cited by Spigelman CJ (discussing STD)

- ALRC 1994;
 - Dunn 2000;
 - Dodds-Streeton 1994;
 - Fehlberg 1997.
- ***Brown & Anor v Wilen Pty Ltd & Ors*** [2012] QCAT 324 | [austlii](#)
Queensland Civil and Administrative Tribunal: **Peta Stilgoe**, Senior Member

A couple sold their unit through Wilen Pty Ltd trading as Wilson Allen Real Estate. Mr Allen and Ms Wilson were directors of that company. The purchasers of the unit paid a deposit of into the company's trust account. The sale was settled but the vendors never received the balance of the deposit from Wilen. The vendors made a claim on the statutory claim fund for their money. Wilen was by then under external administration. The Tribunal was required to determine whether there should be a payment from the fund to the vendors under provisions of the *Property Agents and Motor Dealers Act 2000* (Qld). The difficulty was that there was no money available in the trust account to pay the balance deposit when the sale settled because it had been misappropriated by Mr Allen. The Tribunal found that Wilen was clearly liable for the loss and that under s 490(2) of the *Property Agents and Motor Dealers Act 2000* (Qld) a 'responsible person' is personally liable. As directors of Wilen, Mr Allen and Ms Wilson were executive officers of the company and were therefore 'responsible persons' under the Act. Ms Wilson filed submissions denying responsibility for the loss on the grounds that: she had no involvement with the day-to-day running of the business; she was not consulted in any management decision; she did not have an office at Wilen; she is not computer literate; she did not deal with the accounts; she has no accounting experience or knowledge; she has never had a board meeting with Mr Allen; she has never received any financial information in relation to the company; she has no understanding of the statutory or other requirements that apply to Wilen; and it was Mr Allen, acting alone, who is responsible for the loss.

Peta Stilgoe SM

"Ms Wilson has also detailed her current financial position, her family difficulties and her inability to reimburse the statutory fund if I make the order sought. [19] Being a director of a company carries obligations to manage the company. The [Corporations Act 2001](#)[s198A] does not contemplate the role of a silent director who takes no part in the management of the company and thereby avoids obligations to the company and its creditors. This is yet another salutary lesson to ensure that would-be directors of companies understand their obligations fully. It is also another unfortunate example of sexually transmitted debt. It is not enough for a woman to claim that she should not be liable for her failure as a director because she left that obligation to others, including, at

some stage throughout the life of Wilen, her husband. While I have some sympathy for Ms Wilson's position, the fact remains that she was an executive officer of Wilen at the time of the loss and, therefore, a responsible person, and, therefore, a person liable to reimburse the fund" (at [18]-[20]).

References

Anti-Discrimination Board (NSW) *Women and Credit: Sex Discrimination in Consumer Lending* (1986)

Australia's National Research Organisation for Women's Safety, *Building effective policies and services to promote women's economic security following domestic violence: State of Knowledge paper* Issue 7 (August 2015) <http://anrows.org.au/publications/landscapes/building-effective-policies-and-services-promote-women%E2%80%99s-economic-security>

Australian Law Reform Commission *Australian Law Reform Commission Report No. 69, Part 2 Equality before the Law: Women's Equality* (1994) (specifically, Chapter 13 'Sexually transmitted debt' paragraphs 13.0 -13.56). www.austlii.edu.au/cgi-bin/sinodisp/au/other/lawreform/ALRC/1994/69.html?stem=0&synonyms=0&query=%22sexually%20transmitted%20debt%22#2

M. Bailey, 'Sexually Transmitted Debt: Criticisms and Prospects for Reforms' (1999) 8 *Auckland University Law Review* 1001.

F Bartlett, 'Louth v Diprose 175 CLR 621' in H Douglas, F Bartlett, T Luker and R Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart, Oxford 2014) 191-195.

P. Baron, 'The Free Exercise of Her Will: Women and Emotionally Transmitted Debt' (1995) 13 *Law in Context*, 23-56.

R. Baxendale, '*Garcia v NAB Ltd* – Ensuring Equity in Surety Transactions: A Legal-Debt End?' (1999) 21 *Sydney Law Review* 313

www.austlii.edu.au/au/journals/SydLawRw/1999/13.html

J Cassidy, '"Sexually Transmitted Debts": The Scope of Defences to Directors' Liability for Insolvent Trading' (2002) 20 *Company and Securities Law Journal* 372.

T. Cockburn, '*Garcia* - A Softly Softly Approach' (2000) 4 *Flinders Journal of Law Reform*, 251-278. www.austlii.edu.au/au/journals/FlinJILawRfm/2000/14.html

B. Collier, '*Garcia v National Australia Bank* - securities and insolvency' (Paper delivered at Queensland Law Society Symposium, 12 March 1999).

S.M. Cretney, 'The Little Woman and the Big Bad Bank' (1992) 108 *Law Quarterly Review*, 534-539.

S. Deery and P. Plowman, *Australian Industrial Relations* (2nd ed.) (McGraw-Hill, 1985).

Department of Prime Minister and Cabinet, Office for the Status of Women, *Women in Australia: Australia's second progress report on implementing the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, (Canberra, 1992).

A. Diduck 'Commentary on *Royal Bank of Scotland plc v Etridge (No. 2)* and *Ors Appeals* [2002] 2 AC 773' in Hunter, McGlynn and Rackley (eds.) *Feminist Judgments: From Theory to Practice* (Hart, 2010), 149-154. <https://www.kent.ac.uk/law/fjp/>

A. Duggan, 'Trade Practices Act 1974 (Cth) Section 52A and the Law of Unjust Contracts' (1991) 13 *Sydney Law Review*, 138-168. www.austlii.edu.au/au/journals/SydLawRw/1991/13.html

Duggan 'Till Debt Do Us Part: A Note on *National Australia Bank v Garcia*' (1997) 19 *Sydney Law Review*, 220-229. www.austlii.edu.au/au/journals/SydLawRw/1997/12.html

K. Dunn, 'Yakking Giants: Equality Discourse in the High Courts' (2000) 24 *Melbourne University Law Review*, 427-461. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MelbULawRw/2000/16.html?stem=0&synonyms=0&query=sexually%20transmitted>

B. Fehlberg, 'Money and Marriage "Sexually Transmitted Debt"' (1994) (Unpublished paper, Queen's University, Canada, October 1994).

Fehlberg, 'The Husband, the Bank, the Wife and Her Signature - the Sequel' (1996) 59 *Modern Law Review*, 675-694.

Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law*, (Clarendon Press, 1997).

Fehlberg, 'Women in "Family" Companies: English and Australian Experiences' (1997) 15 *Company and Securities Law Journal*, 348-365.

Fehlberg, 'Australian Law and Surety Wives: *Garcia v National Australia Bank Limited*' (1999) 15 *Banking and Finance Law Review* 161-171.

Fehlberg and C. Millward, 'Family violence and financial outcomes after parental separation' in A. Hayes, D. Higgins (ed), *Families, policy and the law: Selected essays on contemporary issues for Australia* (2014)

R. Fisher, 'De Facto Relationships and *Yerkey v Jones*' (1996) 3 *James Cook University Law Review* 16. www.austlii.edu.au/au/journals/JCULawRw/1996/3.html

M. J. Frug, 'Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook' (1984-5) 34 *American University Law Review* 1065.

R. Graycar and J. Morgan, *The Hidden Gender of Law* (2nd ed) (Federation Press, 2002)

Graycar and Morgan, 'Women' in *The Oxford Companion to the High Court of Australia* (Oxford University Press 2001)

Graycar, R. Johansson, and J. Lovric, 'Guaranteeing Someone Else's Debts' (2001) 12 *Journal of Banking and Finance Law and Practice*, 181-198.

G. Gretton, 'Sexually Transmitted Debt' (1999) 3 *Journal of South African Law* 419

R. Haigh and S. Hepburn, 'The Bank Manager Always Rings Twice: Stereotyping in Equity after Garcia' (2000) 26 *Monash University Law Review*, 275-311. www.austlii.edu.au/au/journals/MonashULawRw/2000/11.html

K. Hall, 'Theory, Gender and Corporate Law' (1998) 9 *Legal Education Review*, 31-57. www.austlii.edu.au/au/journals/LegEdRev/1998/2.html

S. Hepburn, 'The Yerkey Principle and Relationships of Trust and Confidence: Garcia v National Australia Bank' (1997) 4 *Deakin Law Review*, 99 www.austlii.edu.au/au/journals/DeakinLawRw/1997/8.html

Bryan Horrigan *Adventures in Law & Justice* (UNSW Press, 2003)

N. Howell, "'Sexually Transmitted Debt': A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1995) 4 *Australian Feminist Law Journal*, 93-112.

M. Kaye, 'Equity's Treatment of Sexually Transmitted Debt' (1997) 5 *Feminist Legal Studies*, 35-55.

Ho Cheuk Hang Martin, 'Protecting Wife-Sureties from 'Sexually Transmitted Debts'' (2011) 5 *Hong Kong Journal of Legal Studies* 49.

New South Wales Anti-Discrimination Board, *Women and Credit: Sex Discrimination in Consumer Credit* (1986)

K. O'Donovan, *Sexual Divisions in Law (Law in Context)*, (Weidenfeld & Nicolson Ltd: 1985)

J. O'Donovan, 'The Retreat from Yerkey v Jones: From Status Back to Contract' (1996) 26 *Western Australian Law Review*, 309-331.

D. Otto, 'A Barren Future: Equity's Conscience and Women's Inequality' (1992) 18 *Melbourne University Law Review*, 808-827. www.austlii.edu.au/au/journals/MelbULawRw/1992/19.html

J. Pascoe, 'Wives, Business Debt and Guarantees' (1997) 9 *Bond Law Review*, 56-82.

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/BondLawRw/1997/4.html?stem=0&synonyms=0&query=sexually%20transmitted>

Pascoe, 'Women's Guarantees and 'All moneys' Clauses' (2004) 4 *Queensland University of Technology Law and Justice Journal*, 258-262. www.austlii.edu.au/au/journals/QUTLawJJl/2004/17.html

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/QUTLawJJl/2004/17.html?stem=0&synonyms=0&query=sexually%20transmitted>

Pascoe, 'Statutory Unconscionability and Guarantees' (2006) 18 *Bond Law Review*, 104-142. www.austlii.edu.au/au/journals/BondLawRw/2006/12.html

M. Richardson, 'Protecting Women Who Provide Security for a Husband's, Partner's or Child's Debts – The Value and Limits of an Economic Perspective' (1996) 16 *Legal Studies*, 368-386.

L. Sarma, 'Storytelling and the law: A Case Study of *Louth v Diprose*' (1993-1994) 19 *Melbourne University Law Review*, 701-728.

P Spender, 'Women and the Epistemology of Corporations Law' (1995) 6:2 *Legal Education Review* 195

Spender, 'Exploring the Corporations Law using a Gender Analysis' (1996) 3 *Canberra Law Review*, 82-95.

Spender, 'Family Companies and Women's Proprietary Entitlements' (1997) 11 *Australian Journal of Family Law* 196

E. Stone, 'Infants, Lunatics and Married Women: Equitable Protection in *Garcia v National Australia Bank*' (1999) 62 *Modern Law Review*, 604-609.

J. Dodds-Streeton, 'Feminist Perspectives on the Law of Insolvency' in Streeton and Langford (eds.), *Aspects of Real Property and Insolvency Law*, (1994) Adelaide Law Review Research Paper No 6, University of Adelaide.

M. Thornton, 'Feminist Jurisprudence: Illusion or Reality' (1986) 3 *Australian Journal of Law and Society*, 5.

Trade Practices Commission, *Guarantors: Problems and Perspectives Discussion Paper* (1992).

R. Wilson, 'Sexually transmitted debt: family law and bankruptcy' (2002) 22:3 *Australian Bar Review*, 225-234.

T. Wright, T 'The Special Wives' Equity and the Struggle for Women's Equality' (2006) 31:2 *Alternative Law Journal*, 66-87. www.austlii.edu.au/au/journals/AltLawJl/2006/17.html

© 2012 The University of Queensland, Brisbane, Australia
ABN 63 942 912 684, CRICOS Provider No: [00025B](#)

Last updated: Jan 14, 2016