# THE *YERKEY* PRINCIPLE AND RELATIONSHIPS OF TRUST AND CONFIDENCE: *GARCIA V NATIONAL AUSTRALIA BANK*

**SAMANTHA HEPBURN***

## I INTRODUCTION

In *Garcia v National Australia Bank*[1] the majority of the High Court confirmed the validity of what has become known as the 'special wives' equity, first enunciated by Dixon J in *Yerkey v Jones*.[2] 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. In this respect, the majority of the High Court have revitalised the discussions set out by Dixon J in *Yerkey* and adapted the principle to modern relational dynamics.

The essence of the *Yerkey* principle is, 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, the wife has a prima facie right to have it

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* Senior Lecturer in Law, Deakin University.

[1] (1998) 155 ALR 614 ('*Garcia*').

[2] (1939) 63 CLR 649 ('*Yerkey*'). For academic discussion on the 'special wives equity' see: Dianne Otto, 'A Barren Future? Equity's Conscience and Women's Inequality' (1992) 18 *Melbourne University Law Review* 808; Belinda Fehlberg, 'The Husband, the Bank, the Wife and her Signature' (1994) 57 *Modern Law Review* 467; Nicola Howell, 'Sexually Transmitted Debt': A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1994) 4 *Australian Feminist Law Journal* 93; Belinda Fehlberg, 'The Husband, the Bank, the Wife and her Signature - The Sequel' (1996) 59 *Modern Law Review* 675; Anthony Duggan, 'Till Debt Us Do Part: A Note on *NAB v Garcia* (1997) 19 *Sydney Law Review* 220; S Cretney, 'The Little Woman and the Big Bad Bank', (1992) 108 *Law Quarterly Review* 534; Janine Pascoe, 'Wives, Business Debts and Guarantees' (1997) 9 *Bond Law Review* 58; Belinda Fehlberg, 'Women in 'Family' Companies: English and Australian Experiences' (1997) 15 *Company and Securities Law Journal* 348.

[3] *Bank of Victoria v Mueller* [1925] VLR 642 (Cussen J).

set aside.[3] The principle has been recognised as having two primary limbs.[4] First, where the consent of the wife to the instrument of suretyship is procured through actual undue influence by the husband, the wife will be entitled to set aside the instrument against the creditor unless the creditor can prove that the wife received independent legal advice. In this context, actual influence must be established by the wife; undue influence will not simply be presumed from the marriage relationship.[5] There is no need to prove that the creditor knew of the circumstances surrounding the actual influence – proof that the creditor received constructive knowledge of the marriage relationship is sufficient.

The second limb of the *Yerkey* principle will arise where, in the absence of actual undue influence, the wife fails to fully appreciate the effect of the instrument of suretyship. In this situation, the wife may set the instrument aside against the creditor unless the creditor took steps to inform the wife about the transaction and reasonably believed that the wife knew what she was entering into. It is not necessary for the creditor to prove that the wife was independently advised, as long as the creditor is reasonably satisfied as to the wife's comprehension of the transaction.

Dixon J in *Yerkey* specifically considered the relational dynamics between a husband and wife. His Honour noted that the Court of Chancery was not blind to the opportunities of husbands obtaining and unfairly using influence over their wives and that wives will quite often place complete dependence upon their husbands with respect to financial decisions. Dixon J referred to earlier comments in *Story (Equity Jurisprudence)* where it was noted that 'courts of equity examine every transaction between husband and wife with an anxious watchfulness and caution, and dread of undue influence.'[6] Whilst it was clear that the husband and wife relationship was not one of influence, it could not be divested of what Dixon J referred to as 'equitable presumptions of an invalidating tendency'.[7] This may amount to no more than saying that the opportunities which a wife's confidence in her husband gives him of unfairly or improperly procuring her to become a surety for his debts or to confer some other benefit is recognised by the court and taken into account.

The majority of the High Court in *Garcia* reinstate the *Yerkey* principle as enunciated by Dixon J, but in doing so, illuminate to a greater extent the relational basis of the rule. Their Honours highlight in a much more explicit sense than is explored by Dixon J, the trust and confidence that a wife will often, even in modern times, repose in her husband. The reason for this, they argue, does not necessarily lie in any bad faith on the part of the husband but rather, the unquestioning faith which can accompany a close, long-term, emotional relationship. It is implicit in their judgment that they feel that this level of trust has not necessarily altered with the changing times and is just as relevant and needy of protection today as it was when *Yerkey* was handed down.

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[3] *Bank of Victoria v Mueller* [1925] VLR 642 (Cussen J).
[4] Note the discussion on the *Yerkey* decision by Professor Tony Duggan in 'Undue Influence' in Patrick Parkinson (ed) *The Principles of Equity* (1996) 406.
[5] *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 190 (Lord Browne-Wilkinson) (*'O'Brien'*); *Peters v Commonwealth Bank of Australia* (1992) ASC ¶56-135. See also Duggan, 'Till Debt do us Part,' above n 2.
[6] *Yerkey* (1939) 63 CLR 649, 674 (Dixon J).
[7] Ibid 675.

By contrast, Dixon J in *Yerkey* referred rather obliquely to the opportunities that the husband and wife relationship provide for the exploitation of the wife without really directly grappling with the question of trust, confidence, faith and emotion. His Honour focused more upon comparative legal analysis with the presumption of undue influence and the cogency of cases exploring the adequacy of a wife's consent when providing a large benefit to the husband. Whilst all of this analysis assists in the eventual recognition of a special wives equity – and indicates that Dixon J was clearly aware of trust and confidence considerations – his judgment ultimately failed to directly explicate the fundamental underlying issue, namely, should wives receive special equitable protection and, if so, upon what grounds.

This is where the *Garcia* decision provides some clarification. This is not, however, to suggest, that the majority decision in *Garcia* provides a complete solution to the matter, if that is indeed possible. What the new decision does, by its direct explication of the relational foundation of the special equity, gives the principle an added legitimacy and makes it more adaptable and better suited to modern relationships and modern sensibilities.

## II POLICY CONSIDERATIONS

The *Garcia* decision was handed down following increasing scrutiny of the *Yerkey* principle. Of particular significance was the actual and perceived societal changes affecting married women since 1939. Modern considerations in this regard included: the need to avoid discriminatory stereotyping in the application of equitable relief and the development of equitable doctrine; recognition that the display of legal tenderness towards a wife in a marriage relationship is not, necessarily, an accurate response to modern domestic relations as the concept of the 'ignorant, subservient' wife is outmoded and offensive[8] and an awareness that the *Yerkey* principle tended to encourage 'women's selflessness in marital relationships rather than to promote equality.'[9]

A further significant concern is the discrepancy between the perception of modern gender roles and domestic reality. Modern western society has attempted to embrace equality between the sexes and espouses the ideal of mutuality and balance between marriage partners; however, the reality for a substantial number of marriages is that the wife remains subservient to the husband and does not independently assess the suitability of financial transactions entered into by the husband. Although the desire to liberate such gendered roles is felt acutely in modern society, this does not necessarily mean that the law, in particular the equitable jurisdiction, can assume the existence of such progression. The equitable jurisdiction is concerned with the implementation of individual justice and to achieve this end, must concern itself with a tangible, concrete approach to relational dynamics.[10]

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[8] See especially, S Cretney, above n 2. See also Otto, above n 2.

[9] Otto, above n 2, 819.

[10] See in particular the comments by Lord Browne-Wilkinson in *O'Brien* [1994] 1 AC 180, 188 where his Honour notes:

A further important implication of the *Yerkey* principle lies in its economic consequences. This matter was clearly summarised by Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien*:

> It is easy to allow sympathy for a wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest, viz the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law render vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises.[11]

This is an extremely important consideration which may have wide ranging implications for the general community.

An even more disturbing implication of affording a specially protected status to married women, as noted by Professor Cretney, and specifically raised by Kirby J (in dissent on this point in *Garcia*) is that the principle is 'likely to encourage a particular category of borrowers, and those associated with them, to seek to escape their lawful obligations by challenging the adequacy of the explanations given to their wives for the documents they have signed.'[12]

One way to resolve these policy considerations, advocated by the earlier decision of the New South Wales Supreme Court in *National Australia Bank v Garcia*[13] is to abandon the *Yerkey* principle altogether and simply place the matter under the broad umbrella of unconscientious dealing as espoused in *Commonwealth Bank v Amadio.*[14] This suggestion has now, however, been categorically rejected by the High Court majority in *Garcia.*

The English courts have not approved of a special wives equity and ordinary undue influence principles are applicable, except for the fact that where undue influence is proven and the creditor knew of the marriage relationship, the creditor will be fixed with constructive notice of the instrument of suretyship. This means that the creditor will be unable to enforce it unless the creditor can prove that he or she is reasonably satisfied that the wife understood the transaction and entered it freely.[15] Under the English ap-

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> Society's recognition of the equality of the sexes has led to a rejection of the concept that the wife is subservient to the husband in the management of the family's finances. ...Yet... [t]he number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands.

[11] *O'Brien* [1994] 1 AC 180, 188.
[12] *Garcia* (1998) 155 ALR 614, 637 (Kirby J). See also Cretney, above n 2.
[13] (1996) 39 NSWLR 577.
[14] (1983) 151 CLR 447 ('*Amadio*'). 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 unconscientious 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. See also: Pascoe, above n 2; Belinda Fehlberg, 'Women in Family Companies: English and Australian Experiences', (1997) 15 *Company and Securities Law Journal* 348; Duggan, 'Till Debt do us Part,' above n 2.
[15] *O'Brien* [1994] 1 AC 180.

proach, the wife will not be able to set aside a transaction purely on the grounds that she did not understand it. Furthermore, the English exception applies to a range of different relationships analogous to a heterosexual marriage.[16]

Given the awareness and increasing concern over such divergent policy considerations, there was a clear need for an unequivocal High Court pronouncement in the area.

## III THE *GARCIA* DECISION

In August, 1979, the appellant, Mrs Jean Garcia, and her husband, Mr Fabio Garcia, executed a mortgage over their home in favour of the Commercial Banking Company of Sydney Ltd.[17] The terms of the mortgage set out that the mortgage secured all moneys loaned to the mortgagors under the mortgage as well as moneys loaned to the mortgagors under future guarantees they may enter into. The mortgage was initially entered into to secure a $5000 loan to the husband for use in his business, that of buying and selling gold through a company known as 'Citizens Gold Bullion Exchange Pty Ltd' and was subsequently used as security for a personal loan to Mrs Garcia and her husband. Mrs Garcia worked part-time as a physiotherapist and in 1979 set up her own practice. The trial judge found that she was a competent, professional woman with a reasonable understanding of business matters.

Over a two year period, between 1985-1987, Mrs Garcia signed four guarantees in favour of the bank for debts owed by her husband's company. In particular, Mrs Garcia signed a guarantee in November 1987 for an amount of $270,000 plus interest, cost and charges. The trial judge found that Mrs Garcia understood the nature of the instrument at the time of signing the guarantee and she knew it was to secure the overdraft of Citizens Gold Bullion Exchange Pty Ltd. Nevertheless, the trial judge found that Mrs Garcia did not understand that the guarantee was secured by the previous mortgage she had entered into in August 1979 and that the guarantee was risk proof because either money or gold could support it.

Mr and Mrs Garcia subsequently separated. Mrs Garcia informed the bank of this fact and requested that the bank limit the extent of her husband's company account. On 13 October 1989 Citizens Gold Bullion Exchange Pty Ltd was wound up. Mr and Mrs Garcia were divorced on 1 January 1990.

In June 1990 Mrs Garcia commenced proceedings in the Supreme Court of New South Wales seeking a declaration that the mortgage and guarantees she had given for the indebtedness of Citizens Gold Bullion Exchange Pty Ltd were void on the grounds of undue influence and, alternatively, unconscionable conduct as set out in *Amadio*. In August the respondent bank cross-claimed for possession of the mortgaged property and the sum paid over under the November 1987 guarantee. The respondent bank made no demand with respect to the other guarantees entered into by Mrs Garcia.

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[16] Ibid 195.

[17] This was a bank with which the respondents, National Australia Bank, subsequently merged.

The trial judge, Young J, set aside the November 1987 guarantee and found in favour of Mrs Garcia under the *Yerkey* principle. His Honour held that Mr Garcia had pressured his wife to sign the guarantee and that 'she appeared to have done so because her husband consistently pointed out what a fool she was in commercial matters whereas he was an expert, and because she was trying to save her marriage.'[18] Young J did not make a positive finding that the pressure exerted by Mr Garcia constituted actual undue influence. Furthermore, Young J rejected the alternative unconscionable conduct argument raised by Mrs Garcia on the grounds that, even if Mr Garcia's conduct towards his wife could be described as unconscionable, there was no way that the bank would have had notice of this. His Honour noted that Mrs Garcia was an 'intelligent, articulate lady with a professional position' and when she called to the bank she 'appeared to be voluntarily signing a guarantee in respect of an account of which she was a director of the company concerned.'[19]

The bank then appealed to the New South Wales Court of Appeal. Mrs Garcia cross-appealed. The appeal by the bank was allowed. Sheller JA issued the leading judgment in this appeal and held that it was not bound to follow *Yerkey* as it represented a principle which was outdated and should no longer be applied in New South Wales. His Honour noted that *Yerkey* – in particular the judgment of Dixon J in that case – was essentially based upon specific, stereotypical assumptions about the capacity of married woman rather than an overall assessment of the evidence of an alleged undue influence in each particular case. Based upon this interpretation, his Honour expressed doubts about 'a principle founded on the assumption that a married woman is ipso facto under a special disadvantage in any transaction involving her husband and that the husband is in this context the stronger party.'[20] His Honour determined that the decision in *Amadio* properly described the jurisdiction of equity to relieve a surety against unconscionable dealings noting: 'Once the principles of ... *Amadio* were applied to the facts of the case there should be no room for resort to the special rule in *Yerkey*.'[21] The Court of Appeal concluded that the *Amadio* principle could not be made out on the facts and, accordingly, refused Mrs Garcia's claim for equitable relief.

Mrs Garcia appealed to the High Court. The High Court unanimously upheld the appeal, holding that the guarantee entered into by Mrs Garcia in November 1987 could not be enforced by the bank. In reaching this decision, Gaudron, McHugh, Gummow and Hayne JJ jointly concluded that a 'new' *Yerkey* applied to the facts and that the November 1987 guarantee could not be enforced against Mrs Garcia as the bank was affected by the misconduct of the husband. Kirby J agreed with the majority and held that the November 1987 guarantee was not enforceable against Mrs Garcia. However, he did not apply the 'old' *Yerkey* principle but rather, a revision of the principles adopted by the English Courts in *O'Brien*.

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[18] *Garcia v National Australia Bank* (1993) 5 BPR 11,996 at 12,009 ('*Garcia*').
[19] Ibid 12,012.
[20] *Garcia v National Australia Bank* (1996) 39 NSWLR 577, 593 ('*Garcia*').
[21] *Garcia* (1996) 39 NSWLR 577, 597. See also *Akins v National Australia Bank* (1994) 34 NSWLR 155, 172-73 (Clarke JA) ('*Akins*').

Callinan J also concluded that the November 1987 guarantee could not be enforced against Mrs Garcia, although he reached this conclusion through an application of the 'old' *Yerkey* principle and rejected the principle enunciated by the English Courts in *O'Brien.*

## A *Gaudron, McHugh, Gummow and Hayne JJ's Judgment*

Their Honours carefully examined the judgment of Dixon J in *Yerkey* and concluded that the principles his Honour enunciated did not reflect an outdated view of the role of women in society and were simply particular applications of accepted equitable principles – as relevant today as they were in 1939. Their Honours felt that the perceived progression of women in Australian society since 1939 did not actually mean that Australian women are no longer in need of protection. As noted in their judgment: 'there is still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties.'[22]

Whilst their Honours were careful to apply the *Yerkey* principle to the particular fact situation involved, they did indicate the possibility of the principle applying to other relationships more common today than may have been the case in 1939, including 'long term and publicly declared relationships short of marriage between members of the same or of opposite sex.'[23]

Their Honours went on to examine the two-tiered application of the *Yerkey* principle. Although noting the validity of the first tier, specific attention was given to the scope of the second tier, entitling the wife to set aside a surety transaction against a creditor in circumstances where she did not understand its purport or effect. Their Honours set out four crucial elements to the application of the second tier:

- that the surety did not understand the purport and effect of the transaction;
- that the transaction was voluntary (in the sense that the surety obtained no gain from the contract, the performance of which was guaranteed);
- that the lender is to be taken to have understood that the surety may repose trust and confidence in the partner in matters of business and therefore to have understood that the partner may not fully and accurately explain the purport and effect of the transaction to his wife; and
- that the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her.[24]

Their Honours concluded that the enforcement of a transaction executed under such circumstances would be unconscionable and general equitable principles prevent a person from enforcing a legal right in such a way that the exercise amounts to uncon-

[22] *Garcia* (1998) 155 ALR 614, 619.
[23] Ibid 620.
[24] Ibid 623.

scionable conduct.[25] This analysis can be described as a reformulation of the old *Yerkey* principle because a much greater emphasis is placed upon the elements of trust and confidence within a marriage. Furthermore, this new *Yerkey* specifically sets out that third party creditors are taken to have understood that the comprehension of a wife may have been impeded by such relational issues.

The focus of the second-tier of the old *Yerkey* principle was simply upon whether or not the lender could reasonably suppose that the wife understood the nature and effect of the surety transaction. The majority's new *Yerkey* principle provides a clearer and, in many cases, more accurate rationalisation of the relational and emotional basis of the special wives equity; it highlights the fact that surety transactions are often misunderstood – not because they are often entered into by women who have no understanding of business transactions – but rather, because they are often entered into by women who have reposed such trust and confidence in their husbands that it is commonplace for them not to question such transactions. As their Honours specifically noted, the failure by a wife to understand the nature of a surety transaction she has entered into is not necessarily a consequence of bad faith by the husband, but the unquestioning faith accompanying a close, dependent relationship.

The majority judgment gives the *Yerkey* principle a new focus. The surety transaction is set aside against the lender because of the unfairness in allowing a lender to enforce a surety transaction, entered into for the benefit of the surety's partner, in circumstances where the lender *knows* that, given the trust and confidence the surety has in her partner, she is unlikely to have questioned him about the full nature and effect of the transaction.

The majority refused to adopt the English approach outlined by Lord Browne-Wilkinson in *O'Brien* which required proof that the lender received actual or constructive notice of the 'wife's equity to set aside the transaction'.[26] Their Honours noted that although notice may be relevant to a priority dispute between competing interests in property it was irrelevant within the *Yerkey* context and 'may well distract from the underlying principle'.[27]

Their Honours also disagreed with Sheller JA in the Court of Appeal and firmly concluded that the *Yerkey* principle was not subsumed by the unconscientious conduct principle enunciated in *Amadio*. Three specific reasons were given for this: first, there is nothing expressly stated in the *Amadio* decision to suggest that it was intended to overrule or subsume the *Yerkey* principle; second, the *Amadio* decision did not intend to mark out the boundaries of the whole field of unconscionable conduct;[28] and third, the unconscionable conduct in the *Amadio* decision was quite different from the cases considered under the *Yerkey* principle because in *Amadio* there was actual misconduct on the part of the son of the respondents which affected their entry into the mortgage and

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[25] Ibid. Their Honours cited: *Legione v Hateley* (1983) 152 CLR 406, 444 where reference was made to Story, *Commentaries on Equity Jurisprudence*, (12th ed, 1877).
[26] *Garcia* (1998) 155 ALR 614, 625.
[27] Ibid.
[28] Reference was made to the comments of Mason J in *Amadio* (1983) 151 CLR 447, 461 where his Honour specifically notes that 'it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct.'

the guarantee and the bank had received notice of this misconduct. By contrast, the *Yerkey* principle did not depend in any way upon proof that the third party creditor had received actual or constructive notice of the inequitable behaviour.

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* where the Supreme Court of New South Wales made the following comment:

> [T]he principles of unconscionability propounded in ... *Amadio* furnish adequate grounds of relief to a wife who claims to have been the subject of her husband's improprieties and, in circumstances where, for instance, a creditor knew, or must be taken to have known of the risk that that might have occurred.[29]

In the *Akins* decision, their Honours felt that the unifying link between the *Yerkey* principle and unconscionable dealing was the fact that both focused upon the circumstances in which a third party will be fixed with notice of a disability of impropriety.[30] Cases of this nature encouraged speculation and comment as to the possibility of a broader doctrinal integration between undue influence and unconscionability.[31]

The majority decision in *Garcia* has now ambushed these developments – at least so far as they relate to an integration of the *Yerkey* principle. The majority made it clear that the *Amadio* principle is not concerned with undue influence and, while it is true to say that enforcement of both *Amadio* and *Yerkey* transactions would be unconscionable, they do not involve the same type of unconscionability. Their Honours felt that *Amadio* type cases utilised a reasoning which depended upon a direct analysis of whether the conduct was unconscionable, but *Yerkey* cases considered whether the enforcement of the surety transaction by the lender would be unconscionable.[32] Any reference to unconscionability in the *Yerkey* principle must necessarily be a characterisation of the overall result – the actual reasoning process remains distinctive.

Given the facts in *Garcia*, their Honours concluded that the second arm of the reformulated *Yerkey* principle had been made out and that the appeal should be allowed and the order of the trial judge setting aside the guarantee be reinstated. Their Honours concluded that Mrs Garcia knew the nature of the transaction she was signing but was unaware of its consequences and did not understand her obligations under the guarantee were secured by the mortgage which she had given over her home. They further found that the bank took no steps to explain the transaction to her and did not reasonably believe that independent legal advice had been given to her.

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[29] *Akins* (1994) 34 NSWLR 155, 172.

[30] Sheller JA in the Court of Appeal decision in *Garcia* adopted this approach: see *Garcia* (1996) 39 NSWLR 577, 596ff.

[31] See in particular D Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *Law Quarterly Review* 479.

[32] *Garcia* (1998) 155 ALR 614, 624.

## B *Kirby J's Judgment*

His Honour agreed with the outcome of the majority; however, for a range of reasons, refused to uphold the old *Yerkey* principle, introducing instead an approach based on the *O'Brien* decision.

In considering the dispute, his Honour set out three primary issues for determination:

- Whether the view expressed by Dixon J in *Yerkey* represented a binding principle endorsed by the court or simply a single opinion.
- Whether any rule *Yerkey* may have developed is now obsolete having regard to changes in society affecting married women, their legal status, the expansion of the availability of financial credit to them and the desirability of avoiding reliance upon discriminatory criteria for the provision of equitable relief.
- Whether the opinion of Dixon J in *Yerkey* can now be subsumed under the broader doctrines of equity – and in particular, whether the *Amadio* doctrine is sufficiently broad to meet the particular problem of sureties who are emotionally vulnerable or dependent on the debtor.[33]

Each issue is dealt with respectively:

### 1 *Status of the judgment of Dixon J in* Yerkey.

His Honour concluded that the opinion of Dixon J in *Yerkey* did not represent the opinion of a majority of the judges – as each judge in that case, namely, Latham CJ, Rich, Dixon, and McTiernan JJ, expressed individual opinions and none of them expressly concurred in the reasoning of the other, nor did they do so by implication in reasons suggesting the adoption of the same legal analysis. In reassessing the status of the comments by Dixon J, Kirby J agreed with the approach taken by Sheller JA in the Court of Appeal and found that the opinion of Dixon J in *Yerkey* did not represent binding authority.

### 2 *Is the opinion of Dixon J in* Yerkey *obsolete?*

Kirby J concluded that the opinion of Dixon J in *Yerkey* is obsolete and should be rejected. Five specific rationales were given:

#### (a) *Historical anachronism*

Kirby J concluded that the opinion expressed by Dixon J in *Yerkey* represents an historical anachronism. The rule has the effect of placing the wife in an advantageous position that she would not have enjoyed had she not been married to the principal debtor. His Honour noted that one of the central rationales for Dixon J's opinion was that married

[33] Ibid 627.

women were unable to deal with property at common law.[34] This rule has now been abolished by the series of *Married Women's Property Acts* and the rigour of the common law has been mitigated through the development of equitable doctrines examining every transaction and keeping a cautious eye on undue influence.

Dixon J's further rationale for introducing the special wives equity was that the relationship of wife and husband had never been completely divested of invalidating equitable presumptions. Kirby J admonished such reasoning, noting that presumptions of this kind are no longer appropriate within contemporary society as the 'capacity of a married woman to deal with her property freely as a femme sole is long established.'[35]

Furthermore, his Honour felt that it would be anomalous to develop a rule which fails to protect other classes of sureties in analogous positions – such as a de facto spouse, an unmarried child in a position of dependence, a parent vulnerable to pressure from a child or a companion of either sex having a long-term domestic relationship with the borrower.[36]

Kirby J stressed the fact that the respective roles of husband and wife in family life have changed dramatically and to obtain a true and accurate assessment of individual circumstances a full investigation of the facts is essential. Given this change in lifestyle, his Honour felt that there was no longer any good reason to retain the *Yerkey* presumption, other than the fact that it has been an enduring principle. His Honour quoted the strong words of Oliver Wendell Holmes: 'It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.'[37]

In rejecting the *Yerkey* principle his Honour agreed in substance with the opinion of Lord Browne-Wilkinson in *O'Brien*, who noted that the law in this area needs to be restated in a form which is 'principled, reflects the current requirements of society and provides as much certainty as possible.'[38]

### (b) *Rejecting discriminatory stereotypes*

Kirby J felt that marriage, and being the female member of the marriage, is not a relevant reason for providing automatic relief against legal obligations. It is offensive to the status of women today to suggest that all married women are needful of special protec-

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[34] Ibid 634. Reference in this respect is made to William Blackstone, *Commentaries* (21st ed, 1844), vol I, 422 where it is noted 'The very being or legal existence of a woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything.'

[35] *Garcia* (1998) 155 ALR 614, 634.

[36] Ibid.

[37] Ibid. See also Oliver Wendell Holmes, 'The Path of the Law', in *Collected Legal Papers*, (1921) 187.

[38] *Garcia* (1998) 155 ALR 614, 635 (Kirby J).

tion supported by a legal presumption in their favour. This approach depends upon gender loyalty or sympathy rather than on principle.[39]

### (c) *Marriage is not a suspect category*

As marriage per se has been rejected as a category of relationship where a presumption of undue influence arises, Kirby J argued that it would be inconsistent to perpetuate a rule promoting the idea that a court would more readily find that a husband had exercised undue influence over his wife where she acts as his surety. His Honour felt that the selection of marriage as a criterion of vulnerability is inappropriate at this stage in the evolution of personal relationships in this country. It would be more rational to consider all of the facts of the relationship between the surety and the borrower than choose to rely simply upon the fact of marriage and the sex of one party.

### (d) *Economic arguments*

Kirby J agreed with the reasoning of the House of Lords in *O'Brien* where they noted that most matrimonial homes are now owned jointly and that they represent a vital source of security. Hence, the 'desirability of protecting vulnerable persons from loss of their assets, particularly their homes, must therefore be balanced against the undesirability of economically sterilising those assets.'[40] Affording a specially protected status to married women would encourage a particular category of borrowers to escape their lawful obligations by challenging the adequacy of the explanations given to their wives for the documents they have signed.[41] This may create a disincentive to provide capital to persons within such special categories.

### (e) *Unacceptable discrimination*

Finally, Kirby J rejected the *Yerkey* principle on the basis that the Australian legal system has moved away from irrelevant discrimination on the basis of sex and matrimonial status. His Honour felt that when the opportunity arises to legitimately re-state an equitable principle set out in discriminatory terms, it is appropriate to do so. In this respect his Honour felt that it was appropriate to develop this area of law from 'species to genus: from category to concept.'[42]

## 3 *Does* Amadio *subsume* Yerkey?

Kirby J concluded that *Amadio* could not appropriately cover the field in this area and that the best solution was a reworking of the principle expressed by Lord Browne-Wilkinson in *O'Brien.* Under the new *O'Brien* principle, where a person has entered into

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[39] Ibid 636. See also: Otto, above n 2; Fehlberg, 'The Husband, the Bank, the Wife and her Signature' above n 2; Howell, above n 2; Fehlberg, 'The Husband, the Bank, the Wife and her Signature - The Sequel' above n 2.
[40] *Garcia* (1998) 155 ALR 614, 637.
[41] Ibid. Reference is made to the economic reasoning of Cretney, above n 2, 538.
[42] *Garcia* (1998) 155 ALR 614, 639.

an obligation to stand as surety for the debts of another and the credit provider knows, or ought to know, that there is a relationship involving emotional dependence on the part of the surety towards the debtor, the surety obligation will be valid and enforceable by the credit provider unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor.

If undue influence, misrepresentation or other legal wrong has been committed by the principal debtor, unless the credit provider has taken reasonable steps to satisfy itself that the surety entered into the obligation freely and in knowledge of the true facts, the credit provider will be unable to enforce the surety obligation because it will be fixed with notice of the surety's right to set aside the transaction. Unless the circumstances are special or the risks large, a credit provider will take such reasonable steps where it warns the surety of both the potential liability and the risks involved to the surety's own interests and advises the surety to take independent legal advice.[43]

His Honour felt that the relationship of emotional dependency provides a ready weapon for undue influence and the informality of business transactions in this context can make them liable to misrepresentations. A credit provider will 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. His Honour made it clear that relationships of cohabitation, de facto marriage, or long term relationships between the parties could place the credit provider on alert for the need to conduct further inquiry.

Applying his reformulated *O'Brien* principle to the facts, Kirby J agreed with the conclusion of the majority and held that the bank could not enforce the guarantee against Mrs Garcia because the bank knew or could readily have discovered that Mrs Garcia reposed trust and confidence in her husband in relation to her financial affairs and that she was therefore in a position of potential vulnerability to demands that she should act as a surety. The misrepresentation by Mr Garcia as to the consequences of the transaction, together with the bank's constructive notice of the potential vulnerability of the wife meant that the bank was unable to enforce the surety obligation against Mrs Garcia. The bank failed to take reasonable steps to satisfy itself that Mrs Garcia entered the obligation freely; it did not adopt usual procedures, it gave no advice or explanation to Mrs Garcia and it did not advise her to seek an independent explanation.

### C *Callinan J's Judgment*

Callinan J felt that the principle stated by Dixon J in *Yerkey* has stood and been accepted for so long as the law in Australia, and served the ends of justice so well that it should remain. His Honour felt that despite the changes in sexual and matrimonial relationships, 'perhaps more apparent than real', there was no occasion in this case to express any different principles from those enunciated under the old *Yerkey* principle and that there was no injustice to a lender in requiring it to be diligent in the case of married women

[43] Ibid 640.

who enter into transactions advantageous to husbands and disadvantageous to themselves.[44]

His Honour rejected the *O'Brien* principle limiting recovery to co-habitees in cases where the creditor is aware of an emotional relationship between the co-habitees, arguing that such a principle may lead to definition difficulties and also narrow the range of people deserving protection.[45]

Callinan J approved the findings of the trial judge and upheld the appeal, agreeing with the orders of the majority.

## IV CONCLUSION

Prior to the *Garcia* decision, the *Yerkey* principle was subject to an increasing amount of criticism for its failure to recognise the modern status of women and its paternal approach to the issue of undue influence within spousal guarantees.[46] This was particularly evident in *O'Brien* where the House of Lords concluded that there was no need for a special wives equity because adequate protection could be afforded under ordinary equitable principles and the *Yerkey* principle was based upon unsure foundations and, in the words of Lord Browne-Wilkinson

> [H]ad developed in an artificial way, giving rise to artificial distinctions and conflicting decisions...[and] [y]our Lordships should seek to restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible.[47]

The validation of the *Yerkey* principle and the rejection of the *O'Brien* approach by the majority in *Garcia* represents a clear move away from the English approach and earlier Australian authority rejecting the validity of the *Yerkey* principle. The reformulated *Yerkey* principle now unequivocally represents a part of Australian undue influence law, the majority adopting a policy of increased relational protection, focusing upon the misconceptions that can arise between parties in close, dependent relationships of trust and confidence.

The rejection of the *O'Brien* decision by the majority will, however, place a much greater burden upon credit providers: banks and lenders can no longer defend the enforcement of such a transaction on the grounds that they received no notice of the misconduct perpetrated on the surety. Only Kirby J (in dissent on this point) raised the matter. The onerous burden of such a requirement was something which Kirby J contemplated because the principle he proposes does not assume that third party credit providers should be taken to have understood the existence of a trusting and confident

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[44] Ibid 649-50.
[45] Ibid.
[46] See in particular: Fehlberg, 'The Husband, the Bank, the Wife and her Signature' above n 2; Howell, above n 2; Fehlberg, 'The Husband, the Bank, the Wife and her Signature - The Sequel' above n 2.
[47] *O'Brien* [1994] 1 AC 180, 194-95.

relationship. His Honour expressly felt that the notice requirement outlined by the House of Lords in *O'Brien* should be retained.

The new principle formulated by Kirby J in *Garcia* appears to have been motivated by a strong desire to eradicate the old *Yerkey* as his Honour systematically condemns the discriminatory, biased, paternal attitudes which he believes are embodied in the old *Yerkey* principle. By contrast, the majority chose, largely, to ignore the criticisms raised by Kirby J and highlight instead the beneficial protective elements of the *Yerkey* principle.

There are, of course, inherent problems in the majority's one-dimensional focus. In the first place the potential of the new *Yerkey* to apply to different relationships remains unclear. Second, the wisdom of restricting relief to wives was not explored by the majority. These are extremely important considerations in a legal system that wants to prevent being frozen in an age of discrimination. If the primary focus of the majority reformulation lies in the behaviour flowing from a relationship of trust and confidence, it must surely be a logical postulate that the principle apply to *any* relationship identifying such features and, indeed, either gender. The failure of the court to deal expressly with these important considerations, particularly given the multi-faceted nature of human relationships in modern society, must surely be seen as one of the major shortcomings of the decision.

This is not to overlook the significance of the majority determination in *Garcia*. The majority's reformulation of the second arm of the *Yerkey* principle de-mystifies the old principle by highlighting its basic purpose, that is, to protect faithful and dependant parties in a relationship from unfair exploitation. This clear directive seems to dilute the gendered and paternal nature of the old *Yerkey* rule. The majority make it clear that the new *Yerkey* does not simply protect the 'weak and vulnerable wife,' but rather, the 'trusting and confident' partner in a close and dependent relationship – who in many instances, including those of *Garcia*, happens to be the wife. The creativity of the majority's decision lies not so much in the recognition that relationships of trust and confidence can be exploitative, but in its appreciation of the subtlety that exploitative behaviour in such a context can assume.