The Retreat from Yerkey v Jones: From Status Back to Contract

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There is an old saying: 'Behind every successful man stands an astonished woman'. This articles deals with a variation on that theme: 'Behind every unsuccessful businessman stands an even more astonished woman — his wife/guarantor'. Over 50 years ago the High Court in Yerkey v Jones *established a rule under which a wife/guarantor can escape liability under a guarantee procured by her husband. This sexist rule has been trenchantly criticised and in recent decisions of appellate courts it has been rejected. The High Court itself will review the rule later this year. This article traces the historical genesis of the rule, explains its essential elements and suggests that all guarantors, not just wife/guarantors, require a different form of protection.*

SIR Henry Maine's famous dictum that the development of legal rules in a progressive society is characterised by a movement from 'status to contract'[1] provides an interesting perspective on the controversial principle in *Yerkey v Jones*.[2] Essentially, this principle can be invoked as an equitable defence by wives who are persuaded by their husbands to provide guarantees of their husbands' debts without understanding the nature and effect of their guarantees.[3]

In English law, property, debts and status went hand in hand and married women had no rights to property at common law.[4] They were

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1. H Sumner Maine *Ancient Law* (New York: EP Dutton & Co, 1888) 164-165.
2. (1939) 63 CLR 649.
3. See generally G Williams 'Equitable Principles for the Protection of Vulnerable Guarantors: Is the Principle in *Yerkey v Jones* Still Needed?' (1994) 8 JCL 67; L Gerathy '*Yerkey v Jones* Revisited' (1993) 7 Comm L Quart 16.
4. See L Holcombe *Wives and Property: Reform of the Married Women's Property Law in 19th Century England* (Toronto: Toronto UP, 1983) 18. In *US v Yazell* (1966) 382 US

relegated to the same status as infants and lunatics. As Sir William Blackstone put it, the husband and wife:

> are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In real estate, he only gains a title to the rents and profits during coverture: for that, depending upon Feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him. [5]

The rule in *Yerkey v Jones* is rooted in this special, subordinate status of married women. It is 'based upon a notion of a special vulnerability of wives in business dealings'.[6] However, in recent times, the courts have begun to question the rule as 'discriminatory' and 'anachronistic'.[7] It is timely, therefore, to assess the current standing of the rule in Australian law and to examine the consequences of discarding it.

YERKEY v JONES: THE FACTS

To understand the principle in *Yerkey v Jones*, one must first grasp the facts of the case. Mr Jones, a man of slender means, agreed to purchase a property at Payneham near Adelaide from the plaintiffs, Mr and Mrs Yerkey, for £3 500. The property consisted of a house on three acres of land and the equipment of a poultry farm. Mr Jones was keen to complete the purchase so that he could give up his job as a clerk and take up dog breeding and, to a lesser extent, poultry farming. He could muster only a small deposit but he agreed to procure his wife's signature on a second mortgage of her property at Walkerville to secure £1 000, which was payable to the plaintiffs three years after the date of the contract.

Mrs Jones was reluctant to sign the mortgage as she did not share her husband's optimism about the new venture. Nevertheless, she agreed to do so because he told her that he had already agreed to purchase the property and that he might get into trouble if she did not sign the mortgage. He assured her that if anything went wrong and she lost the Walkerville

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341 the US Supreme Court established a principle similar to *Yerkey v Jones* but it was based on a provision in a Texas statute which provided, at the time the loan in question was made, that a married woman could not bind her separate property unless she first obtained a court order removing her disability to contract. The Texas law of coverture which was examined in *US v Yazell* has since been repealed.

5. W Blackstone *Commentaries on the Laws of England* 18th edn (London: Sweet & Maxwell, 1829) 433.
6. N Howell 'Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1995) 4 Aust Feminist L Journ 93, 98.
7. Eg *Akins v National Aust Bank* [1994] ASC ¶ 56-279; *European Asian of Aust Ltd v Kurland* (1985) 8 NSWLR 192; *Warburton v Whiteley* (1989) 5 BPR ¶ 97-388.

property, she would still have the Payneham property. This was not a statement of fact but rather a hopeful prediction based on his belief that the venture would succeed. He also assured her that, even if she lost the Walkerville house, £1 000 would be paid off the Payneham purchase. Finally, he told her that the mortgage for £1 000 would not fall due for three years. While this was an accurate statement which represented the intention of the parties, it did not refer to the fact that, if default were made in the payment of interest, the principal would become due under the mortgage. However, Mrs Jones understood this fact when she signed the mortgage.

Mr and Mrs Jones attended a meeting with Mr and Mrs Yerkey at the offices of the Yerkeys' solicitor. The solicitor explained the general nature and effect of the mortgage to Mrs Jones at that meeting before she and Mr Jones signed the mortgage. The solicitor was engaged by Mr and Mrs Yerkey and there was no evidence that Mrs Jones believed that he was acting on her behalf in providing his simple, but adequate, explanation of the document.

The effect of the mortgage was that, as between the mortgagees and the mortgagor, Mrs Jones was a principal debtor and not merely a guarantor of her husband's debt. As a principal debtor, Mrs Jones would not be discharged by the release of her husband, the true borrower. The mortgage also contained the usual personal covenant and it provided that the principal would fall due forthwith on default in the payment of interest or non-observance of covenants.

In an action by the Yerkeys to enforce the mortgage, Napier J held that Mrs Jones was entitled to equitable relief against the personal covenants in the mortgage on the grounds of undue influence, misrepresentation and unilateral mistake. The High Court allowed the Yerkeys' appeal against this judgment, and Mrs Jones and her property were held liable under her mortgage.

It is important to note that there was no evidence of any misrepresentations or any actual undue influence by Mr Jones. Mrs Jones was not deceived by her husband and she was not overborne by his stronger will. Nor was there any element of fraud or sharp practice, and the court held that the relationship of husband and wife was not one which gave rise to a presumption of undue influence. Moreover, this was not a case where a creditor required a husband to procure a guarantee from his wife to secure his *past* indebtedness to the creditor at the expense of the wife who obtained no tangible benefit from the transaction. While Mrs Jones' second mortgage may have been unwise or improvident, it did enable Mr Jones to purchase a home for himself and his wife and to obtain a new means of livelihood. It was not simply a guarantee or third party mortgage of Mr Jones' past business debts.

YERKEY v JONES: THE SPECIAL EQUITY

On what basis, then, could Mrs Jones claim to be relieved of her liability under the mortgage? Her only hope was to invoke the special rule which applies to a wife who becomes a surety for her husband.

Dixon J, who delivered the leading judgment in the High Court, declared that the relationship of husband and wife has 'never been divested completely of what may be called equitable presumptions of an invalidating tendency'.[8] His Honour distilled the essence of this special rule applicable to a wife/guarantor in the following passage from his judgment:

> 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.[9]

THE HISTORICAL RATIONALE OF THE SPECIAL EQUITY

Before we dissect this statement and examine its essential elements, it may be useful to trace its historical basis. Prior to the Married Women's Property Acts,[10] a married woman was almost incapable in law. It was only through equitable doctrines that a married woman could bind her separate estate by conduct. As Kanowitz points out, the concept of a wife's separate equitable estate 'gave rise to a rudimentary contractual capacity for married women'.[11] Only the courts of equity recognised this separate estate as her equitable property.[12] In time, equity developed a special rule to determine whether a guarantee given by a woman in respect of her husband's debts could be set aside.[13] It did not turn on undue influence or unconscientious dealings but rather on how far the Court of Chancery was prepared to carry its doctrine that a married woman (ie, a femme covert) was to be considered a femme sole of full legal capacity in relation to her separate estate as a form of equitable property. In the course of the 18th century the courts of

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8. *Yerkey v Jones* supra n 2, 675.
9. Ibid, 683.
10. Eg Married Women's Property Acts 1870 (UK); 1870, 1884, 1890 (Vic); 1883 (SA); 1884 (Tas); 1886 (NSW); 1892 (WA); 1893 (Qld).
11. L Kanowitz *Women and the Law: The Unfinished Revolution* (Albuquerque: New Mexico UP, 1969) 39.
12. *Yerkey v Jones* supra n 2, 663, 670.
13. Eg *Turnbull & Co v Duval* [1902] AC 429; *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233; *Grigby v Cox* (1750) 27 ER 1178; *Pybus v Smith* (1790) 30 ER 294.

equity gradually came to recognise that a married women in controlling her own separate estate had sufficient capacity to provide a guarantee, and even a third party mortgage, in respect of her husband's debts.[14]

In *Yerkey v Jones,* Dixon J observed: '[T]he equitable conception of separate estate is the foundation upon which the Married Women's Property Act was constructed'.[15] His Honour continued:

> The legislation could hardly be considered inconsistent with any consequential rules of equity. Indeed, the Married Women's Property Acts [make] all the property to which a woman is entitled at the time of her marriage or which she afterwards acquires her separate estate.[16]

He concluded that the legislation 'should operate to give a general application to presumptions and rules of equity governing dealings by a married woman for the benefit of her husband'.[17]

This explanation of the effect of the Married Women's Property Acts upon the so-called 'equitable presumptions of invalidating tendency' has been accepted largely without challenge.[18] But why should equitable presumptions which had no application to unmarried women who had full legal capacity in relation to their own separate property continue to be extended to married women once they acquired, by statute, the same legal capacity as their unmarried sisters? Surely, the special scrutiny and protection which equity applied to transactions involving married women when the common law did not recognise that they had a separate estate apart from their husband's property is no longer necessary now that they are entitled by statute to hold and dispose of their own property. Sufficient protection may be afforded to married women simply by the fact that undue influence may be more easily proved in the case of husband and wife than in cases where no special relationship exists between the parties,[19] even though the relationship of husband and wife is not one which itself calls into play a presumption of undue influence.[20] In short, perhaps it is time to question more closely the 'indefinite survival'[21] of the equitable principle favouring wife/guarantors in the distant aftermath of the Married Women's Property Acts.

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14. See *Grigby v Cox* ibid; *Pybus v Smith* ibid.
15. *Yerkey v Jones* supra n 2, 676.
16. Ibid, 676-677.
17. Ibid, 677; see also Latham CJ 655.
18. Eg Williams supra n 3, 72.
19. *Yerkey v Jones* supra n 2, Latham CJ 659.
20. *Howes v Bishop* [1909] 2 KB 390; *Bank of Montreal v Stuart* [1911] AC 120, 137.
21. *Yerkey v Jones* supra n 2, Latham CJ 663.

ESSENTIAL ELEMENTS OF THE SPECIAL EQUITY

1. Guarantees by wives

Let us now turn to the essential elements of the principle in *Yerkey v Jones*. First, it is restricted to guarantees or third party mortgages provided by wives in respect of their husband's debts. The principle applies to all wives regardless of their educational background, intelligence or business acumen or experience. It is a general rule which admits no exceptions. But it does not apply to similar guarantees or third party mortgages given by de facto wives or co-habitees. Nor does it apply where a husband provides a guarantee or third party mortgage in respect of his wife's debt. Hence, its scope is narrow and sexist. However, its tight boundaries are not dictated by moral considerations but rather by its historical genesis.[22]

2. Procurement by the husband

Secondly, the guarantee or third party mortgage must be procured by the husband. It is not clear whether it is essential that this is done with the encouragement or agreement of the creditor, but this was the case in *Yerkey v Jones*[23] itself. While the principle might apply even where the creditor has not 'left everything' to the husband to procure his wife's signature,[24] it appears to be essential that the creditor is at least aware that the husband has undertaken to obtain his wife's signature on the document. If the husband does, in fact, procure his wife's signature, it does not matter that the documents were executed in the creditor's presence.[25] In other words, the passive presence of the creditor or the creditor's agent does not displace the rule in *Yerkey v Jones*.

3. Lack of proper explanation

The third element is that if the creditor does not take care to provide a full explanation of the transaction, he may find that the court will grant

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22. See Holcombe supra n 4; also R Graycar & J Morgan *The Hidden Gender of Law* (Sydney: Federation Press, 1990), 113-114.
23. Supra n 2. Cf *Chaplin & Co v Brammall* supra n 13.
24. In *Turnbull v Duval* supra n 13 the court set aside a transaction on the ground that it conferred a benefit upon a trustee at the expense of a beneficiary whose consent was obtained by her husband. The court found that the trustee had 'left everything' to the husband but there was also evidence that the husband had deceived his wife who did not understand the transaction.
25. Cf *Challenge Bank Ltd v Pandya* (1993) 60 SASR 330 where the mere fact that the document was actually executed at the creditor's offices did not affect the application of the rule that a creditor who entrusts it to an interested party to procure the signature of guarantors will be bound by the interested party's fraudulent misrepresentations.

the wife equitable relief on proof that she did not fully understand it.[26] But the burden of proving that the wife fully understood the guarantee of her husband's debts is not placed squarely on the creditor by the mere fact that her consent to give the guarantee or become surety was procured by her husband. It appears that the wife must provide some evidence raising doubts about her understanding of the actual nature and consequences of the transaction.[27]

4. Level of understanding required

The principle in *Yerkey v Jones* applies only where the wife does not understand the effect of the transaction 'in essential respects'.[28] Indeed, it could be argued that the explanation provided by or on behalf of the creditor is the crucial element of the principle in this case. As Dixon J declared:

> If the creditor takes adequate steps to inform [the wife] and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing, cannot, I think, in itself give her an equity to set it aside, notwithstanding that at an earlier stage the creditor relied upon her husband to obtain her consent to enter into the obligation of surety.[29]

In other words, the mere fact that the husband procures his wife's signature or consent is not fatal where the creditor provides an adequate explanation of her obligations and the effect of the guarantee or third party mortgage.

The extent of the explanation required from the creditor varies with the circumstances of the case: the complexity of the transaction, the amount of deception practised by the husband, and the intelligence and business understanding of his spouse.[30]

5. Source of the explanation

It is not always necessary for the explanation to be provided by a third party whom the creditor believes on reasonable grounds to be competent, independent and disinterested.[31] As *Yerkey v Jones* itself shows, the explanation can be given by a party engaged and remunerated by the creditor. This did not prevent the court finding that the explanation given

26. *Yerkey v Jones* supra n 2, Latham CJ 662, Dixon J 678.
27. Ibid, 675, 680-681, 683.
28. Ibid, Dixon J 683.
29. Ibid, 685.
30. Ibid.
31. See *Colonial Bank of Australasia v Kerr* (1889) 15 VLR 74, Beckett J 78; *Howes v Bishop* supra n 20.

by the Yerkeys' solicitor was clear and adequate. On the evidence, 'the solicitor had no reason to suppose that [Mrs Jones] did not grasp the essentials of the transaction'.[32] Moreover, the appellants and their solicitor believed on reasonable grounds that she had understood in all material respects the substantial effect of the obligations she was undertaking.[33]

However, if the creditor took the precaution of insisting that the guarantor obtain independent legal advice from a third party whom the creditor believed on reasonable grounds to be competent and disinterested, the court would be reluctant to set aside the guarantee.[34] This independent legal advice would almost invariably negate any equity which might otherwise arise from the husband's conduct or his wife's failure to understand the transaction. Hence, independent legal advice is desirable but not essential.

6. No tangible benefit to the wife

It appears to be an essential element of the principle in *Yerkey v Jones* that the wife obtains no tangible benefit from the transaction. Dixon J considered that the principle applied where 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'.[35] The fact that Mrs Jones moved into the property purchased from Mr and Mrs Yerkey for just over 12 months was not a sufficient benefit to take the case outside the equitable principle. Nor was the fact that Mr Jones acquired a new means of livelihood, albeit for a relatively short period. The poultry farming venture did not prosper and it appears Mrs Jones enjoyed no real benefit from the transaction.

7. Guarantee of the husband's debts

Finally, the *Yerkey v Jones* principle in its pristine form is restricted to a guarantee or third party mortgage given by a wife in respect of her husband's debts. While it does not appear to be necessary that the debts are *past business debts* which confer no benefit upon the wife,[36] the guarantee or third party mortgage must be in respect of the debts of the husband alone. The principle was not designed to cover the joint debts of the husband and the wife or the debts of a company in which the wife had a significant interest.[37]

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32. *Yerkey v Jones* supra n 2, 664, 665, 685-686.
33. Ibid, 689.
34. Ibid, Dixon J 686.
35. Ibid, Dixon J 676.
36. As in *Bank of Victoria Ltd v Mueller* [1925] VLR 642.
37. *Yerkey v Jones* supra n 2, 663, 675-676.

EFFECT OF THE SPECIAL EQUITY

If the 'invalidating tendency' identified in *Yerkey v Jones*[38] applies, the wife has a 'prima facie right'[39] to have her guarantee or third party mortgage set aside. This is a form of equitable relief and it is discretionary, not automatic. Consequently, it is subject to equitable constraints such as 'doing equity' and the 'clean hands' principle. These principles might limit the relief granted to the wife[40] or deny her relief altogether.

When these disparate elements of *Yerkey v Jones* are synthesised it become clear that it represents a formidable weapon in the arsenal of a married woman who has provided a guarantee or third party mortgage in respect of her husband's debts. She does not need to establish mistake, misrepresentation, misleading and deceptive conduct, duress or undue influence. She does not even have to prove that the creditor was aware, or should have been aware, that she did not understand the nature and effect of the guarantee.[41] It is not necessary to show that the creditor was aware that she was dependent on her husband or that the creditor was aware of her husband's wrongdoing. She is entitled to the benefit of the principle even if she is not in a position of special disadvantage and even if the creditor did not take unfair advantage of her through unconscionable dealings.[42] All she needs to show is that the creditor left it to her husband to procure her signature on the guarantee and that she did not understand what she was doing and the essential elements of the obligations she was undertaking. This is not a particularly difficult burden for, as Latham CJ observed in *Yerkey v Jones*, 'the law of guarantee is particularly complex, and it is doubtful whether any surety ever understands in its full significance the nature of the transaction into which he enters'.[43]

On the facts of *Yerkey v Jones* itself, however, the presumption of invalidating tendency did not arise in favour of Mrs Jones because she had been given an adequate estimation of the mortgage.

JUDICIAL RESPONSES TO YERKEY v JONES

Judicial reactions to *Yerkey v Jones* have been diverse. Some courts have reluctantly applied the principle,[44] others have distinguished the

38. Ibid, Dixon J 675.
39. Ibid, Dixon J 683.
40. Eg *ANZ Bank Ltd v McGee* [1994] ASC ¶ 56-278; *Turnbull v Duval* supra n 13; *Willis v Barron* [1902] AC 271; *Talbot v Von Boris* [1911] 1 KB 854; *Bank of Victoria v Mueller* supra n 36, 659.
41. *Warburton v Whiteley* supra n 7.
42. *Akins* supra n 7; *Teachers Health Investments Pty Ltd v Wynne* (1995) ANZ Conv R 74.
43. *Yerkey v Jones* supra n 2, 662.
44. *Warburton v* Whiteley supra n 7; *Garcia v National Aust Bank Ltd* (1993) ANZ Conv R

case.[45] More recently, appellate courts in both England[46] and New South Wales[47] have rejected the principle. Indeed, in one recent case, a judge expressed the view that 'there never was a principle in *Yerkey v Jones*'.[48] Nevertheless, the preponderance of authority, in Australia at least, is that the principle still exists as a separate rule, quite apart from the defences which succeeded in *Commercial Bank of Australia Ltd v Amadio*.[49] By the same token, the principle has been refined, clarified and extended over the last 50 years to such an extent that it is now invoked by wife/guarantors as a defence virtually as a matter of course. The full significance of the *Yerkey v Jones* principle as it exists today can only be understood in the light of these developments.

If *Yerkey v Jones* had been confined to guarantees procured by husbands from their wives in respect of their outstanding business debts it would have had a limited impact in the modern commercial world where business is often conducted through companies and trading trusts. It was ultimately recognised that the principle could be applied to guarantees of the present and future debts of companies and trading trusts in which the husband was the sole or substantial beneficiary or in which the wife had no material or tangible interest.[50] Indeed, the creditor carries the positive onus of proving that the wife/guarantor does not have a sufficient interest in the business of the borrower in order to displace the principle. The wife/guarantor does not carry any legal onus to tender evidence showing the nature of her interest in the borrower or to prove affirmatively that she had any interest in the principal debtor.[51] Where there is no admissible evidence of this interest, the wife will be entitled to the benefit of the principle if its other elements are present. It will not be sufficient for the creditor to establish that the wife is merely a director or a minor shareholder of the borrower company unless she derives

603; *ANZ Bank v McGee* supra n 40; *Peters v Commonwealth Bank* (1992) NSW Conv R ¶ 55-629; *Teachers Health Investments v Wynne* supra n 42.

45. *European Asian of Aust Ltd v Lazich* [1987] ASC ¶ 55-564; *European Asian of Aust Ltd v Kurland* supra n 7; *Commonwealth Bank v Cohen* [1988] ASC ¶ 55-681; *Akins* supra n 7; *Commonwealth Bank v McGlynn* (1995) ANZ Conv R 81; *ANZ Bank Ltd v Dunosa Pty Ltd* (1995) ANZ Conv R 86.

46. *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200.

47. *Akins* supra n 7; cf *Warburton v Whiteley* supra n 7.

48. *Akins* supra n 7, Powell JA.

49. (1982) 151 CLR 447.

50. *ANZ Bank v McGee* supra n 40; *Peters v Commonwealth Bank* supra n 44; *Warburton v Whiteley* supra n 7. Cf *European Asian of Aust v Lazich* supra n 45; *European Asian of Aust v Kurland* supra n 7 (where *Yerkey v Jones* was distinguished on the ground that both the husband and wife in this case were equally interested in the husband's business); *Commonwealth Bank v Cohen* supra n 45 (where *Yerkey v Jones* was distinguished on the ground that the wife and her children were supported by the company which the husband managed).

51. *Warburton v Whiteley* supra n 7, McHugh JA 11 634.

some significant, tangible benefits from her interest in the company. Nor will it be enough that the wife has a contingent interest as a beneficiary of a discretionary trust, of which the borrower is trustee.[52] It might be different where it is proved that the wife's standard of living and domestic lifestyle is heavily supported by the income generated by her husband's business or the business which he controls.[53] Ironically, these factors tend to reinforce her dependency status.[54]

There is no difficulty in distinguishing *Yerkey v Jones* where the wife/guarantor stands to benefit equally from the loan to the borrower company through her shareholding or where a failure to provide the guarantee would place her home at risk.[55] Nevertheless, it is curious that the onus is on the creditor to prove that the wife had a tangible beneficial interest in the borrower when this information is likely to be more readily accessible to the wife than to the creditor.

In some cases the courts have highlighted the procurement feature of the principle in *Yerkey v Jones* and sought to limit it to the situation where the creditor 'left everything'[56] to the husband to procure his wife's signature or consent to the guarantee. Hence, in *Commonwealth Bank of Australia v Cohen,*[57] Cole J distinguished *Yerkey v Jones*, inter alia, on the ground that in the case before him the guarantee was signed by Mrs Cohen at the bank and the bank did not deal with Mrs Cohen exclusively through her husband. With respect, this is a specious basis for distinguishing *Yerkey v Jones* because, it will be recalled, Mrs Jones executed her guarantee during an interview with Mr and Mrs Yerkey and their solicitor. In other words, in *Yerkey v Jones* itself it was even clearer that the creditors did not deal with the wife/guarantor exclusively through her husband, so this is not a valid ground for distinguishing *Yerkey v Jones*.

While it is true that some cases have continued to apply *Yerkey v Jones* in its pure or refined form, the House of Lords in *Barclays Bank v O'Brien*[58] and the New South Wales Court of Appeal in a series of recent cases[59] have concluded that it is no longer good law. In *O'Brien*, the House of Lords unanimously held that there was no basis for a special rule applicable

52. Cf *ANZ Bank v McGee* supra n 40.
53. *Commonwealth Bank v Cohen* supra n 45; *European Asian of Aust v Kurland* supra n 7. Cf *European Asian of Aust v Lazich* supra n 45, where Clark J held that the principle was displaced simply because the borrower was a company in which the wife/guarantor was *engaged* with her husband.
54. See P Baron 'The Free Exercise of Her Will: Women and Emotionally Transmitted Debt' (1995) 13 Law in Context 23.
55. *European Asian of Aust v Kurland* supra n 7.
56. *Turnbull v Duval* supra n 13.
57. Supra n 45.
58. Supra n 46.
59. *Akins* supra n 7; *National Bank v Garcia* (unreported) NSW Ct App 3 July 1996; *Teachers Health Investments v Burnswood* (unreported) NSW Ct App 16 July 1996.

to guarantees given by wives in particular situations and that general equitable principles provided adequate protection for wives and, indeed, all co-habitees who provide guarantees or third party mortgages in respect of the debts of their domestic partners or fellow occupants where the creditor is aware that there is an emotional relationship between the co-habitees. There is a compelling logic in extending equity's protection to all co-habitees in this situation and this approach sweeps away the anachronistic and discriminatory aspects of the rule in *Yerkey v Jones* as part of English law.

Lord Browne-Wilkinson delivered the leading judgment in *O'Brien*. His Lordship suggested that 'the whole of the modern law is derived'[60] from *Turnbull & Co v Duval*[61] and that this case did not support any 'special equity' in favour of wives as guarantors. The important decision in *Yerkey v Jones* received cursory attention and this is a major weakness in his Lordship's reasoning.[62]

In the absence of any 'special equity' in favour of wives, the validity of guarantees given by co-habitees was largely governed in his Lordship's view by the dual concepts of notice and advantage. A co-habitee could apply for an order setting aside a guarantee of a co-occupant's debts where:

(1) the co-habitee was induced to act as surety by the co-occupant's undue influence, misrepresentation or some other legal wrong; and
(2) (a) the husband was acting as the creditor's agent; or
    (b) the creditor had actual or constructive notice of the facts giving rise to the equity in favour of the co-habitee.[63]

But when will a lender be taken to have constructive notice of the wife's equity to have the guarantee set aside? Lord Browne-Wilkinson declared that a lender is put on inquiry when a wife offers to become surety for her husband's debts by a combination of two factors:

(1) the transaction is not on its face to the wife's financial advantage; and
(2) 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.[64]

Lord Browne-Wilkinson recommended certain steps which can be taken by the creditor to avoid being fixed with constructive notice of the wife's equity. The creditor should insist that the guarantor attend a private meeting

60. *O'Brien* supra n 46, 189, 191-192.
61. Supra n 13.
62. His Lordship ignored *Colonial Bank of Australasia v Kerr* supra n 31 and gave scant attention to *Bank of Victoria v Mueller* supra n 36. Moreover, the Court of Appeal decision in *Chaplin & Co v Brammall* supra n 13 was neither cited to the court nor mentioned in his Lordship's judgment.
63. *O'Brien* supra n 46, 195. Cf *CIBC Mortgages v Pitt* supra n 46, 211.
64. *O'Brien* ibid, 196.

(in the absence of the husband) with the lender's representative who should tell the wife of the extent of her liability under the guarantee, warn of the risk and urge the wife to take independent legal advice.[65] This is a radical departure from the principle in *Yerkey v Jones*. While it is defensible in terms of policy considerations,[66] it raises some problems of its own.

In the first place, how would this doctrine of constructive notice prevent a creditor obtaining an indefeasible title once its third party mortgage is registered over the guarantor's property?[67] Secondly, on what basis can the wife's mere equity to set aside the transaction prevail over a purchaser for value?[68] A mere equity is personal to the parties and it is incapable of binding successors in title.[69] Perhaps the answers to these questions lie in the fact that the transaction is voidable, not just against the husband, but also against the lender because the lender is privy to the husband's impropriety:[70] the lender is bound by the wife's personal equity against her husband because the lender is tainted with the husband's actions through notice of the salient facts.[71]

The House of Lords gave no indication how the doctrine of constructive notice will be applied outside the context of a marriage. Will it be necessary for banks to take Lord Browne-Wilkinson's 'reasonable steps' whenever there is any suggestion that the party providing the guarantee or third party mortgage is a co-habitee of the borrower? If so, this will involve the banks in delicate inquiries and increase administrative costs.[72]

Recent English cases have compounded this problem by expanding the class of persons who are thought to be vulnerable to misrepresentation or undue influence beyond co-habitees to parties in a long-standing sexual and emotional relationship without co-habitation,[73] and even to parties who are members of an Islamic sect.[74] English banks may be forced to

65. Ibid.
66. Ibid, 188.
67. See generally H Goo 'Enforceability of Securities and Guarantees after *O'Brien*' (1995) 15 Oxford Journ Leg St 119, 123-124; M Thompson 'The Enforceability of Mortgages' [1994] Conv 140.
68. Goo ibid, 124-125.
69. *National Provincial Bank v Ainsworth* [1965] AC 1175, Lord Upjohn 1238.
70. See M Dixon & C Harpum 'Fraud, Undue Influence and Mortgages of Registered Land' [1994] Conv 421, 423; JRF Lehane 'Undue Influence, Misrepresentation and Third Parties' (1994) 110 LQR 167, 171-172. Cf *Bank of Credit and Commerce In'l SA v Aboody* [1990] 1 QB 923, 973. In *CIBC Mortgages v Pitt* supra n 46, the House of Lords overruled the decision in *Aboody* but on other grounds.
71. *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428, Fox LJ 464.
72. See Goo supra n 67, 125.
73. *Midland Bank plc v Massey* [1995] 1 All ER 929.
74. *Shams v United Bank Ltd* (unreported) 24 May 1994, where Branley J found that Mrs Shams was entitled to have her security set aside on grounds of undue influence and misrepresentation. His Honour had no doubt that the expectation and belief of the bank employees involved was that Mrs Shams would do exactly what Mr Shams told her was

become private inquiry agents to ensure that they do not overlook vulnerability which could give rise to constructive notice of an impropriety.

One of Lord Browne-Wilkinson's 'reasonable steps' required to rebut constructive notice is the warning as to the risks of signing the guarantee or third party mortgage. Lenders may be concerned that their staff do not have sufficient expertise to provide an adequate warning of the potential risks to the guarantor or third party mortgagor. In *Westpac Banking Corporation v Koloff*,[75] the bank manager's explanation was held to be inadequate even though the parties were with him for over an hour and approximately 20 minutes was spent explaining the obligations of the guarantor. Moreover, there will, no doubt, be cases where the explanation given by the lender makes no impression on the guarantor or third party mortgagor because of the continuing undue influence of the borrower.[76] Even a private meeting will not overcome this problem.

In *Akins v National Australia Bank*,[77] the New South Wales Court of Appeal considered that *Barclays Bank v O'Brien*,[78] 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*[79] 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*.

Leaving aside this rather cavalier approach to the doctrine of precedent, let us turn to the substance of the decision in *Akins v National Australia Bank*.[80] There were sound reasons why Mrs Akins was not entitled to the benefit of the principle in *Yerkey v Jones*. First, it appeared that the bank's explanation of the guarantee to Mrs Akins was adequate. Moreover, the third party mortgages and guarantees given by Mrs Akins were 'for her benefit in a substantial sense'.[81] Indeed, the Court of Appeal stressed that this case was quite different from *Yerkey v Jones* in this respect. Strictly speaking, therefore, the Court of Appeal's retreat from *Yerkey v Jones* was purely obiter.

It was central to the court's reasoning in *Akins* that the *Yerkey v Jones* principle had, in any event, been subsumed under the principles established

to be expected in the common culture of the parties involved in the Muslim sect.

75. (Unreported) NSW Sup Ct (Comm Div) 18 Nov 1992, Rogers CJ.
76. *Corbett v NSW State Bank* (unreported) NSW Sup Ct 20 Oct 1992, Hodgson J.
77. *Akins* supra n 7, ¶ 58-933.
78. Supra n 46.
79. Ibid.
80. Supra n 7. See also *Teachers Health Investments v Burnswood* supra n 59 where the Court of Appeal again held that *Yerkey v Jones* is no longer part of New South Wales law.
81. *Akins* supra n 7, ¶ 58-937.

by the High Court in *Commercial Bank of Australia v Amadio*. As Clarke JA put it: '[O]nce the principles of *Amadio* are applied to the facts of a case there should be no room for resort to the special rule in *Yerkey*'.[82] The flaw in this reasoning is revealed in his Honour's next sentence when he conceded that 'there is a theoretical possibility that conduct found not to be unconscionable (or unconscientious) could nevertheless provide grounds for relief under *Yerkey*'.[83] In other words, *Amadio* and *Yerkey v Jones* overlap but they are not co-extensive. The *Yerkey v Jones* principle has an independent operation quite distinct from the *Amadio* defences and it will afford relief in circumstances where the *Amadio* defences have no application. Accordingly, it is difficult to understand his Honour's comment that this independent operation is 'quite inconsistent with the principles which inform equitable relief.'[84] As new equitable principles are recognised must old equitable principles be discarded or rationalised? Surely they can exist side by side, without threatening or eroding one another.

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*[85] 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*[86] was that *Yerkey v Jones* remains applicable until the High Court itself overrules that decision. On this basis Mrs Warburton's guarantee of the business debts of a corporate borrower was not enforceable because it had been procured by her husband, and neither her husband nor the creditor had explained to Mrs Warburton that her guarantee rendered her personally liable to make good any default by the company. Nor was it established that Mrs Warburton had any direct or indirect beneficial interest in the company.

In *Teachers Health Investments Pty Ltd v Burnswood*,[87] the New South Wales Court of Appeal again rejected *Yerkey v Jones*, declaring that it no longer represents the law in New South Wales. But *Yerkey v Jones* would not have applied on the facts because the wife/guarantor apparently understood the essential elements of the third party mortgage she executed to secure an improvident transaction. In any event, the respondent may not have qualified for relief on the *Yerkey v Jones* principle because she

82. Ibid.
83. Ibid.
84. Ibid.
85. Supra n 7, 11-628, 11-629.
86. Supra n 7.
87. Supra n 59.

was both a beneficiary of the family trust and a shareholder in the borrower. However, in the particular circumstances of the case, the Court of Appeal was prepared to grant her relief because she was in a position of special disadvantage under the principles of unconscionability propounded in *Amadio*.[88] She was in an emotionally vulnerable state and her will had been overborne by her husband, who was the principal shareholder in the borrower. Given her emotional state and her ignorance of the borrower's parlous condition, she was not in a position to judge for herself whether the transaction was provident. For good measure the Court of Appeal also granted relief under the Contracts Review Act 1980 (NSW) because, while the appellant bank had sufficient information about the borrower's financial position to indicate that the transaction was improvident, the respondent mortgagor was given false information by the borrower and believed that her interests were adequately protected. Like *Akins*,[89] *Burnswood's*[90] rejection of *Yerkey v Jones* was purely obiter and it cannot be regarded as a binding authority on this point even in New South Wales.

However, just a few weeks earlier, the New South Wales Court of Appeal in *National Australia Bank v Garcia*[91] gave a considered decision which concluded that *Yerkey v Jones* should no longer be applied in New South Wales. The judgments of the Court of Appeal in *Garcia* cannot be dismissed as obiter dicta because *Yerkey v Jones* was directly in issue in that case.

To sum up, in New South Wales the support for *Yerkey v Jones* in *Warburton v Whiteley* has been withdrawn in obiter dicta in *Akins v National Australia Bank* and *Teachers Health Investments Pty Ltd v Burnswood* and in the ratio decidendi of *National Australia Bank v Garcia*.

Courts in other States and Territories may still be inclined to follow *Yerkey v Jones* until the High Court itself overturns this decision. Alternatively, these courts may follow the lead of the New South Wales Court of Appeal in dismissing the 'so-called rule in *Yerkey v Jones*' as merely a statement by Dixon J in relation to the particular facts of that case, a statement which was not explicitly supported by the other justices of the High Court. In States and Territories other than New South Wales, there is an urgent need for *Yerkey v Jones* to be re-assessed, if only to give it a decent burial.

A RE-ASSESSMENT OF YERKEY v JONES

This re-assessment could focus upon the historical genesis of the

88. Supra n 49.
89. Supra n 7.
90. Supra n 59.
91. Supra n 59.

principle and determine whether it is still necessary or desirable in the light of the full legal capacity which married women enjoy under the Married Women's Property Acts. On this basis the High Court could conclude that *Yerkey v Jones* is based on a faulty historical foundation.

Policy factors will, no doubt, loom large in any re-appraisal of *Yerkey v Jones*. The High Court has not been particularly reticent about addressing such factors in recent years. Kirby J's judgment in *Warburton v Whiteley* would serve as a useful starting point. His Honour declared:

> What is in issue is the important question of principle as to whether the law's protection should be offered on the basis of assumptions about a dependent relationship as described 50 years ago or grounded in a more discriminating principle which can be applied to the facts of the relationship proved. Such a principle would avoid presuppositions about the relationship only of wives to husbands. It would avoid (as Deane J did in *Amadio*) a rule which confines the 'process of reasoning...to cases of the relief of female spouses.' It would examine the facts of each relationship to determine whether a special disability existed. It could thus adjust the principle of the law so that it could apply to the greater variety of personal relationships such as exist today in greater number (than) 50 years ago. And it would withhold the interference of the law in the economic activities of individuals based upon no better reason than the existence of marriage and the presumed dependence of the wife within it.[92]

It would also be instructive to refer to the policy considerations which guided the House of Lords in *Barclays Bank v O'Brien*. Lord Browne-Wilkinson noted that the matrimonial home has become recognised as a major asset in securing business loans and that the law should ensure that this asset does not become 'economically sterile'.[93] His Lordship declared that if:

> the rights, secured to wives by the law, renders (sic) 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. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial house unacceptable as security to financial institutions.[94]

One should not underestimate the difficulties in balancing the competing policy considerations. There may be some opposition to the abandonment of the principle in *Yerkey v Jones*[95] on the ground that, despite improvements in educational qualifications, working opportunities and social equality, many women remain in a vulnerable position in relation to their husbands because of their financial dependency and the emotional

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92. *Warburton v Whiteley* supra n 7, 11-630.
93. *O'Brien* supra n 46, 188.
94. Ibid.
95. See generally ALRC *Multiculturalism and the Law* Report No 57 (Sydney, 1992); Howell supra n 6, 94-97.

commitment to their relationship.[96] Even women in middle and higher income households are less likely to have financial independence and financial responsibility if they do not earn an income themselves.[97] Moreover, there is some evidence that wives who are asked to provide guarantees of their husbands' debts see the decision principally in terms of what effect their consent or refusal would have on their relationship.[98] Equality of treatment in law does not necessarily guarantee equality of treatment in fact.[99]

One may doubt whether the High Court will decide that all wives are in such a vulnerable position that they suffer from a special disability[100] and require protection under the *Amadio* principle. But as Paula Baron has pointed out:

> Clearly, some women are at a special disadvantage, in the sense of being unable to look after their own interests, because of the combination of their adherence to traditional 'female' roles, their relationship of dependency and control, and their lack of business education and experience. They lack the power, the resources or the knowledge to make a commercial decision.[101]

The most cogent criticism of the principle in *Yerkey v Jones* is not that it is anachronistic.[102] There are still wives who are in a vulnerable position in relation to their husbands and their business dealings.[103] Hence, the principle is not entirely discordant even in modern times. No, the real objection to the principle is that it is absolute and discriminatory. It pays no regard to the wife's intelligence, educational background, qualifications or business experience. It treats all wives the same way. It presumes they

96. M Thornton 'Feminist Jurisprudence: Illusion and Reality?' (1986) 3 Aust J of L & Soc 5; S Deery & P Plowman 'Anti-discrimination in Employment' in *Australian Industrial Relations* 2nd edn (Sydney: McGraw-Hill, 1985) 437; L Bryson 'Women and Management in the Public Sector' (1987) 46 Aust J Pub Admin 259; NSW Anti-Discrimination Board *Women and Credit: Sex Discrimination in Consumer Credit* (Sydney, 1986) 85. Cf W Williams 'The Equality Crisis: Some Reflections on Culture, Courts and Feminism' (1981) 7 Women's Rights L Rep 175; L J Krieger & P W Cooney 'The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality' (1983) 13 Golden Gate U L Rev 513.

97. S Edgell *Middle Class Couples* (London: Allen & Unwin, 1980); J Pahl *Money and Marriage* (London: MacMillan, 1989); G Wilson *Money in the Family* (London: Allen & Unwin, 1987). See also C Vogler & J Pahl 'Money, Power and Inequality within Marriage' (1994) 42 Sociological Rev 202, 274-275.

98. C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard UP, 1982) 159.

99. See supra n 97.

100. In *Blomley v Ryan* (1956) 99 CLR 362, Fullagar J identified gender as a potential disadvantage; but see *European Asian of Aust v Kurland* supra n 7, Rogers J 198.

101. Baron supra n 54, 32-33.

102. See *Warburton v Whiteley* supra n 7; *Carrington Confirmers Pty Ltd v Atkins* (unreported) NSW Sup Ct 23 Apr 1991, Giles J.

103. *O'Brien* supra n 46, 188, 190.

are all unable to understand the essential aspects of the guarantee and requires positive proof that they did understand the guarantee or that they were given an adequate explanation. Moreover, this tender treatment is not extended to other co-habitees whose domestic positions and relationships may be equally vulnerable.

It is possible that some wives may be protected under the *Amadio* principle[104] where their intelligence, language and comprehension skills, experience and education are so deficient that they require special protection, but such cases will be rare.

The essence of the *Amadio* principle is the 'special disadvantage' vis-à-vis the lender, not the husband. Hence, the court will generally discount any disability arising out of adherence to traditional female roles or even relationships of emotional or financial dependency.[105] It is perhaps more instructive to focus upon the disparity between the information available to the wife and the information available to the lender, particularly as to the state of the borrower's indebtedness or the purpose of the loan. An objective comparison of the relative positions of the wife and the lender and their respective abilities to protect their own interests may reveal that the wife is in a position of special disadantage vis-à-vis the lender.[106] If the wife can establish that the lender is aware of the possibility that she is under a special disadvantage in the circumstances, or is aware of facts which would raise this possibility in the mind of a reasonable person, then she should be entitled to relief under the *Amadio* principle on the ground of the lender's unconscionable conduct.[107] Applied in this way, the *Amadio* principle is neither anachronistic nor discriminatory.

The *Amadio* principle does not redress the power imbalance which often occurs in domestic relationships[108] but it could be applied in such a way as to increase the lender's duty of disclosure in certain circumstances. This would give wives more information about their husband's financial position and the purpose of the loan but it would not give wives a better understanding of their guarantees.

The reasonable steps which the House of Lords in *O'Brien* required creditors to take to avoid being imputed with constructive notice of the

104. Supra n 49.

105. Contrast *Louth v Diprose* (1993) 67 ALJR 95 where the High Court extended the *Amadio* principle to a solicitor who made a gift of a house to a woman with whom he was infatuated. The woman was held to have acted unconscionably because she had manipulated and exploited the solicitor's emotional dependence upon her. Paula Baron suggests that this case was based upon the court's traditional expectation of male and female patterns of behaviour: see Baron supra n 54, 34.

106. Eg *Begbie v NSW State Bank* (1994) 16(2) ATPR ¶ 41-288.

107. *Amadio* supra n 49, Mason J 467, Deane J 479. Cf *Begbie v NSW State Bank* ibid, ¶ 41-896.

108. See Baron supra n 54, 47.

equitable rights of co-habitees would provide more comprehensive protection through the private meeting, the warning of the risks and the recommendation of independent legal advice. This approach seems to address both the needs of guarantors and the legitimate expectations of lenders. But, as we have seen, it is not a complete solution and it has spawned some problems of its own.

Nor would an absolute requirement that all prospective guarantors obtain independent legal advice solve all the problems faced by the wife/guarantor. In itself, this does not satisfy her need to obtain more information about the borrower's financial position and the purpose of the loan. Moreover, it is unclear what the lender's responsibilities are where the wife refuses to obtain independent legal advice.[109] There is the further problem of the expense and delay involved in obtaining such advice. Finally, independent legal advice merely shifts the risk from the lender and the guarantor to the guarantor's legal adviser.[110] Lenders can rely upon the guarantor's solicitors and assume that they will give the guarantor proper advice.[111] Certainly the lender is under no obligation to stipulate the nature and extent of the advice to be given.[112] Far from a panacea,[113] independent legal advice is merely a Pandora's box which legal practitioners and their insurers can ill afford.

Let me illustrate just one of the pitfalls for inexperienced legal practitioners who are asked to provide a certificate of independent advice. In *Macindoe v Parbery,*[114] the New South Wales Court of Appeal held that a solicitor engaged to advise a client in relation to a transaction had a duty to alert the client to reasonably foreseeable risks and to unusual terms or provision in the documents. In the context of an 'all accounts' guarantee given by a wife, this could include the fact that the principal debtor himself had given guarantees in respect of other borrowers since it would be reasonably foreseeable that this might expose the wife to much greater liabilities than she may have expected.[115] The law of guarantees is littered with technical principles which have no counterparts in general contract or property law. Legal practitioners who provide certificates of independent

109. See *Coldunell Ltd v Gallon* [1986] QB 1184; *MacKay v Bank of Nova Scotia* (1994) 20 OR (3d) 698, 709 (failure to insist upon independent legal advice fatal to bank).

110. The writer has examined the pitfalls facing solicitors who provide certificates of independent legal advice and has provided a checklist for use in giving such advice: J O'Donovan 'Guarantees: Vitiating Factors and Independent Legal Advice' (1992) 66 L Inst J 51, 54.

111. *Midland Bank plc v Massey* [1995] 1 All ER 929.

112. Ibid.

113. See also M Sneddon 'Unfair Conduct in Taking Guarantees and the Role of Independent Advice' (1990) 13 UNSWL Journ 302.

114. (Unreported) NSW Ct App 17 Aug 1994.

115. See *Goodwin v National Bank Ltd* (1968) 42 ALJR 110, 117.

advice without a sound grasp of these principles are acting at their peril.

LEGISLATIVE SOLUTIONS

If all prospective guarantors and third party mortgagors were provided with a simple statement of their essential rights and obligations and required to sign the statement in the form of Appendix I (p 330) in the presence of a Justice of the Peace before executing the guarantee or third party mortgage, they could hardly complain that they did not understand the nature and effect of documents. This requirement could be imposed by legislation for all consumer guarantees and all guarantees or third party mortgages where the guarantor or mortgagor does not have a significant or a substantial interest in the principal debtor or the principal debt. In the absence of such an acknowledgment of rights and obligations, the guarantee or third party mortgage would be unenforceable. By the same token, the execution of the acknowledgment would not protect the guarantee or third party mortgage from being challenged on the grounds of misrepresentation, unconscionable dealings, misleading and deceptive conduct or a breach of the creditor's duty of disclosure.

CONCLUSION

In England, the retreat from *Yerkey v Jones* is clearly evident in the House of Lords' decision and reasoning in *Barclays Bank v O'Brien*. In Australia, there has been some judicial grumbling about *Yerkey v Jones*[116] and some judges have broken ranks[117] by following the House of Lords' approach. Nevertheless, except in New South Wales, *Yerkey v Jones* remains intact as a binding precedent. Only the High Court can set a new course. When the occasion arises, the High Court may well decide that the *Yerkey v Jones* principle should be subsumed within the principle of unconscionable dealings in *Commercial Bank of Australia v Amadio*, now enshrined in sections 51AA and 51AB of the Trade Practices Act 1974 (Cth).

The *Amadio* principle contains elements of a status concept in its emphasis upon the 'special disability' or 'special disadvantage' but at least it is not confined to one particular class of guarantors, namely married women. If the High Court expanded the concept of special disadvantage by recognising the disparity between the information available to the wife and the information available to the lender as a 'special disability' of the wife, it would be possible to provide protection for wives as guarantors without any suggestion of relegating them to an inferior status. This would constitute further progress along the continuum from status to contract.

116. Eg *Alderton v Prudential Assurance Co Ltd* (1993) 41 FCR 435; *Akins* supra n 7.
117. P Finn 'Unconscionable Conduct' (1994) 8 JCL 37.

APPENDIX 1†

GUARANTOR'S ACKNOWLEDGMENT OF RIGHTS AND OBLIGATIONS UNDER A GUARANTEE

I understand that the results of signing the attached documents are that:

1. I am becoming a guarantor and putting at risk all my assets/my assets to the extent of $ *.
2. I may be liable for the borrower's whole debt (*up to $) even if there are, or are supposed to be, other guarantors or other securities involved.
   Note: If the guarantor's liability is limited then insert the amount of the limit. If no amount is inserted in clauses 1 and 2 then the guarantor's liability will be unlimited.
3. The borrower's debt may include his/her liabilities as a guarantor for others.
4. I may not be entitled to receive any notice of the borrower's default.
5. If the borrower defaults, then the lender may be entitled to take action against me without first taking action against the borrower or any other person or enforcing its securities.
6. The lender may increase the borrower's debt, change its terms, release the borrower or any other guarantor or delay taking any action even if the borrower defaults. None of these actions will release me from my guarantee.
7. I may not be able to rely on anything which may be said to me by anyone about this guarantee unless it is in writing from the lender.
8. At any time I may cancel my guarantee regarding any future liability by giving written notice to the lender, but I will remain liable for the amount of the borrower's debt at that time. However, if I take this action, the amount owing might be demanded by the lender immediately.

WARNINGS TO GUARANTOR:

1. IF YOU ARE NOT PREPARED TO ACCEPT ALL OF THESE THINGS THEN YOU MUST NOT SIGN THE ATTACHED DOCUMENTS.
2. THE LENDER RECOMMENDS THAT THE GUARANTOR OBTAIN INDEPENDENT LEGAL ADVICE ABOUT THE ATTACHED DOCUMENTS BEFORE SIGNING THEM.
3. IF THE GUARANTOR DOES NOT OBTAIN INDEPENDENT LEGAL ADVICE THEN THERE MAY BE RISKS TO THE GUARANTOR.

Signed by the Guarantor: _____

Date: _____

*Delete whichever is inapplicable.

I, _____ an Authorised Witness, of

_____

certify that _____ (Guarantor) of

_____ attended on me

at _____

on _____ The Guarantor:

1. was alone (except for _____ who acted as interpreter);
   Note: If no name is inserted here it will be assumed that the guarantor was alone.

2. confirmed that he/she had read and understood the above 'Guarantor's Acknowledgment of Rights and Obligations';

3. confirmed that he/she was signing the 'Acknowledgment' and the attached documents voluntarily; and

4. signed a Guarantee) in favour of
   a Guarantee and Indemnity) _____ (lender)
   a Mortgage over real property) in my presence
   _____)

_____

Authorised Witness

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† Cf ALRC *Multiculturalism and the Law* supra n 95, ¶¶ 11.52-11.54; Sth Aust LRC *Suretyship* Report No 39 (1997) Recommendation 9.