WOMEN'S GUARANTEES AND 'ALL MONEYS' CLAUSES

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I BACKGROUND

Many of the guarantee cases before the courts over the last two decades involved wives seeking to set aside guarantees given to support the debts of family businesses controlled by their husbands. Frequently the wife had mortgaged her interest in the family home to secure the guarantee.[1] Although many of the women were partners in the business or appointed as directors of family companies, they were typically not active participants in the business, having little understanding of its financial affairs or control over decision-making. Several important qualitative reviews[2] of the case law as well as empirical studies[3] confirmed that the combination of economic inequality and emotional dependence in many marriages contributed to the vulnerability of married women sureties. The empirical studies undertaken by Singh and Fehlberg in the 1990s investigated the division of power between couples in business, particularly in relation to financial decisions. The studies showed that regardless of their educational levels, women saw themselves as providing a support role for their husbands' businesses. Despite the High Court's reaffirmation in 1998 of the special wives' equity in *Garcia v National Australia Bank Ltd* ('*Garcia*'),[4] cases involving women guarantors continue to come before the courts.[5] The issue of third party

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1 The long list of cases includes: *Gough v Commonwealth Bank of Australia* (1994) ASC 58-831; *European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192; *Warburton v Whiteley* (1989) NSW ConvR 55-453; *Commonwealth Bank of Australia v Cohen* (1988) ASC 55-681; *National Australia Bank Ltd v McKay* (1995) ATPR 41-409; *ANZ Banking Group Ltd v Dunosa* (1995) ANZ ConvR 86; *Akins v National Australia Bank* (1994) 34 NSWLR 155; *Gregg v Tasmanian Trustees* (1997) 143 ALR 32; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Commonwealth Bank of Australia v Ridout Nominees Pty Ltd* [2000] WASC 37 (Unreported Supreme Court of Western Australia, Wheeler J, 28 February 2000); *State Bank of New South Wales v Chia* (2000) 50 NSWLR 587.

2 P Baron, 'The Free Exercise of her Will: Women and Emotionally Transmitted Debt' (1995) 13 *Law in Context* 23; M Kaye, 'Equity's Treatment of Sexually Transmitted Debt' (1997) 1 *Feminist Legal Studies* 35; N Howell, 'Sexually Transmitted Debt' (1994) 4 *Australian Feminist Law Journal* 93.

3 B Fehlberg, *Sexually Transmitted Debt; Surety Experience and English Law* (Clarendon Press Oxford, 1997); S Singh, 'For Love not Money: Women Information and the Family Business' (Consumer Advocacy and Financial Counselling Association of Victoria, Melbourne, 1995).

4 (1998) 194 CLR 395.

5 Recent cases include *Davies v ANZ Banking Group Ltd* [1999] FCA 1104 (Unreported, Federal Court of Australia, Heerey J, 5 August 1999); *Commonwealth Bank of Australia v Ridout Nominees Pty Ltd* [2000] WASC 37 (Unreported Supreme Court of Western Australia, Wheeler

guarantees given by women to support their husbands' business debts has been the subject of considerable interest and debate for some time. This is a particular aspect of what is sometimes termed 'sexually transmitted debt', which was defined by the Australian Law Reform Commission ('ALRC') as:

> …the transfer of responsibility for a debt incurred by a party to his/her partner in circumstances in which the fact of the relationship, as distinct from an appreciation of the reality of the responsibility for the debt, is the predominant factor in the partner accepting liability.[6]

It is an issue which has given rise to a great deal of litigation and learned commentary. It has also been the subject of several detailed reform proposals by government and reform bodies.[7] The New South Wales Law Reform Commission is presently undertaking a review of the law and practice governing third party guarantees.[8]

The inclusion of onerous 'all moneys' clauses presented in standard form guarantee and mortgage documents has been identified as the source of dispute in many sexually transmitted debt cases concerning guarantees of the debts of small family businesses. In these cases the surety may unwittingly be bound in respect of future credit contracts entered into between her husband and the creditor. The landmark case of *Garcia* is a typical example, and, as is well known, Mrs Garcia succeeded in having the guarantees in dispute set aside. However, wives have not always succeeded in having onerous 'all moneys' guarantees set aside. In the absence of unfairness in the pre-contractual dealings the common law doctrine of unconscionability does not offer relief on the substantive grounds that the contract is unfair in its terms.[9] Moreover, woman may not, for various reasons, be able to satisfy the elements of the special wives equity, particularly the requirements of lack of benefit and lack of understanding.[10] The clause

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J, 28 February 2000); *Commonwealth Bank of Australia v Horkings* [2000] VCSA 244 (Unreported, Supreme Court of Victoria Court of Appeal, Winneke, Phillips and Buchanan JJA, 22 December 2000); *Bylander v Multilink Investments Pty Ltd* [2001] NSWSC 53 (Unreported, New South Wales Court of Appeal, Handley, Giles and Heydon JJA, 14 March 2001); *Armstrong v Commonwealth Bank of Australia* (2000) ANZ Conv R 470; *Burrawong Investments Pty Ltd v Lindsay* [2002] QSC 82 (Unreported, Supreme Court of Queensland, Muir J, 26 March 2002); *Brueckner v Satellite Group (Ultimo) Pty Ltd* [2002] NSWSC 378 (Unreported, Supreme Court of New South Wales, Cambell J, 23 May 2002); *State Bank of New South Wales v Chia* (2000) 50 NSWLR 587.

6 Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report 69 (1994) Part II, [13.4].

7 Ibid; Trade Practices Commission, *Guarantors: Problems and Perspectives*, Discussion Paper (1992)*;* Expert Group on Family Financial Vulnerability, *Good Relations, High Risks: Financial Transactions Within Families and Between Friends*, Report (1996)*;* Australian Banking Industry Ombudsman Ltd, *Report on Relationship Debt*, Bulletin No 22 (1999).

8 The issues under investigation are outlined in the New South Wales Law Reform Commission, *Guaranteeing Someone Else's Debts*, Issues Paper 17 (2000). Recently the Commission released the results of its empirical study into the practice of third party guarantees, with particular reference to business loans in New South Wales. See New South Wales Law Reform Commission, *Darling Please Sign This Form: A Report on the Practice of Third Party Guarantees in New South Wales*, Research Report II, (2003).

9 The limitation was highlighted in the recent Standing Committee of Officials of Consumer Affairs ('SOCA') *Unfair Contract Terms*, Discussion Paper (2004) to be discussed below.

10 The rule in *Garcia* applies to give a wife the right to set aside a guarantee given to secure her husband's debts where her consent is obtained by some wrongdoing — for example, misrepresentation or undue influence — or without an adequate understanding of the nature and

in dispute in the case of *Commonwealth Bank of Australia v Cohen*[11] is a typical illustration of an 'all moneys' clause. The wife provided an unlimited guarantee, secured by a mortgage where she promised to pay to the bank on demand:

> All monies whatsoever which the bank shall lend pay or advance or become any way liable to lend pay or advance to for or on account of the mortgagor or to for or on account of any other person upon the order or request or under the authority of the debtor and mortgagor or both of them.[12]

The wife's claim to have the guarantee set aside failed, although she did not receive any independent legal or other advice prior to signing the guarantee. The court held that she was a director of the family company whose debts she had guaranteed and as such the bank was entitled to assume that she had an understanding of its affairs and of the nature of the guarantee. A more recent example of a failed claim involving an 'all moneys' clause is the case of *State Bank of New South Wales v Chia.*[13] Einstein J found in favour of the bank, rejecting Mrs Chia's *Garcia* claim. He said:

> The one matter in respect of which I have real doubt is as to whether or not Mrs Chia did understand that the subject mortgages were 'all moneys' mortgages…She has deposed that she was not aware of the legal implications of any 'all monies clause' [sic] whereby the Strathfield property could be at risk and secured by the full amount of her husband's borrowings from time to time with the bank.[14]

Despite these doubts Einstein J held Mrs Chia's evidence to be unreliable and concluded that she had not satisfied the onus upon her of proving lack of understanding of the terms of the guarantee.

Given the plethora of similar cases,[15] which have come before the courts in which the lack of awareness or comprehension of an 'all moneys' clause was one of the main grounds for challenging the guarantee, controlling their use is necessary in guarantees given to support small business debts. While 'all moneys' mortgages and guarantees can be very useful to lenders wishing to secure borrowings over the debts of ongoing businesses, like any contracts which contain open-ended liability they pose dangers for both lenders and guarantors. They are particularly hazardous for inexperienced guarantors. The liability they create is typically expressed in convoluted 'legalese'. Frequently guarantors may expect that they will be liable for a certain time or for a certain amount. Hidden in the fine print is a clause allowing additional facilities to be provided, topping up the initial advance, which may have been almost repaid, without the knowledge or consent of the guarantor. Additionally, it is often not realised, even by those experienced in dealing with securities, that an 'all moneys' guarantee does

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effect of the transaction. The special equity applies if the wife is a volunteer in the sense that she derives no substantial benefit from the guarantee.

11 (1988) ASC 55-681.

12 Ibid 58, 60.

13 [2000] NSWSC 522.

14 Ibid [207].

15 See, for example, *Commonwealth Bank of Australia v Cohen* (1988) ASC 55-681; *Commonwealth Bank of Australia v ABC Property Planners Pty Ltd*, (Unreported, Supreme Court of New South Wales, Cohen J, 25 May 1991); *European Asian of Australia Ltd v Lazich* (1987) ASC 55-564; *Commonwealth Bank of Australia v Khouri* [1998] VSC 128 (Unreported, Supreme Court of Victoria, Harper J, 4 November 1998); *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *State Bank of New South Wales v Chia* (2000) 50 NSWLR 587.

not merely secure the future liability of the borrower as a debtor, but covers all liabilities which the borrower may have assumed in any capacity and in any account with the particular creditor, whether, for example, as a debtor, mortgagor or guarantor.[16]

The law cannot ignore the social context surrounding the taking of guarantees. Circumstances of emotional and financial dependence and lack of understanding of the company's business affairs and of the role of company director are often intertwined. While it is appropriate that women have a **general** understanding of their company's business financial position and of the nature of documents they are required to sign in relation to those matters, cases involving transactions imposing very heavy liability stand on a different footing. The typical 'all moneys' clause, which is embedded in a standard form guarantee document and expressed in convoluted technical language, may not be comprehensible even to the most sophisticated guarantor.

Recently, in *Karam v Auastralia and New Zealand Banking Group Ltd*,[17] Santow J made some pertinent comments about the 'all moneys' clause in that case. His Honour said*:*

> Certainly no explanation of the effect of the 'all monies' [sic] clause was given. Its comprehensibility…would have strained the understanding of sophisticated lawyers let alone laypersons with limited understanding of financial matters and even less legal matters. …. The whole is characterised by tangled syntax, lengthy, unparagraphed expression and dense, legal terminology, in the least plain of English. As Professor Butt says "… no area of law is too complex for plain language. Plain language may not be able to simplify concepts, but it can simplify the way concepts are expressed" (Peter Butt "Legalese versus plain language" in Amicus Curiae, Journal of Society for Advanced Legal Studies, June/July 2001 at 30). That torrent of dense technical language is then embodied in tiny print, with minimum punctuation, on a printed form required by the Bank on a take it or leave it basis. I do not say that this Bank was obliged to provide a plain English mortgage. What I do say, is that the Bank had no reason to believe that reading it would have enlightened the Karams.[18]

Efforts by financiers to protect their security under these onerous clauses, by providing generic warnings or advice may increasingly be ineffectual, as steps to eliminate their use in cases involving vulnerable guarantors are progressively implemented. This paper considers a number of options to prevent their unfair use.

As noted above, many women before the courts are directors of the companies whose debts they have guaranteed. It is important to reiterate that while all directors should observe appropriate standards of care and diligence in the exercise of their duties, including situations where they provide security, it is not realistic to expect that directors of small family companies with limited financial backgrounds have the skills necessary to comprehend these complex clauses. However, banning them entirely would be an unnecessary fetter on the flow of funds to small business. Most of the

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14 The dangers of the open-ended liability imposed by all moneys clauses were spelt out in the Trade Practices Commission Discussion Paper, above n 7 [5.3].

17 [2001] NSWSC 709 (Unreported, Supreme Court of New South Wales, Santow J, 21 August 2001).

18 Ibid [215].

critical reports by government and law reform bodies commenting on the widespread use of third party guarantees[19] have expressed reservations about the continued use of 'all moneys' provisions. The reports considered various options, including banning all personal guarantees or banning unlimited and 'all moneys' guarantees. While, for example, the Martin Committee challenged the 'appropriateness of guarantees as commonly used financial instruments',[20] the former Trade Practices Commission[21] ('TPC') adopted a realistic approach, pre-empting the concerns about flexibility in lending to small businesses later expressed in the United Kingdom decisions in *Barclays Bank plc v O'Brien*[22] and *Royal Bank of Scotland plc v Etridge*.[23] The TPC in its 1992 Discussion Paper stated:

> The TPC believes that credit providers, particularly banks, do not sufficiently adapt guarantees to suit the particular circumstances in which the principal loan is extended. Whilst it is arguable that unlimited all moneys provisions are necessary in commercial circumstances, there seems to be no tenable reason for employing them indiscriminately in consumer guarantees. That is not to say that unlimited all moneys guarantees are inherently unjust, but rather that attempts to rely on these terms can in certain circumstances be unjust.[24]

As the TPC indicated throughout its Discussion Paper, circumstances of unfair reliance on these clauses, include failure to provide proper advice, explanations and disclosure as well as the use of excessively complex fine-print documentation.

When financiers seek to call up guarantees provided by married women it is a no-win situation for both parties. The case law illustrates, and the reform bodies have emphasised, that legal doctrines with respect to third party guarantees are highly technical, complex and expensive to litigate. There is a lack of uniformity in the decided cases and litigation is invariably protracted. In women's guarantee cases, where reliance is sought by a wife under the protective special equity as reaffirmed in *Garcia's* case, unfortunate stereotypes emerge. The wife by necessity may be portrayed as passive, dependent and unable to comprehend commercial and business matters, while the financier may appear as uncaring and willing to exploit the wife's vulnerability. A preventative approach is preferable to litigation. This paper considers a number of preventative strategies which target the use of onerous 'all moneys' clauses in guarantees. The use of these clauses may be objectionable because of unfairness in the circumstances or procedures surrounding the taking of the guarantee or because the substantive terms of the contract are themselves unfair. Reforms addressing procedural unfairness have been progressively implemented over recent years. In particular, new provisions in the revised Code of Banking Practice attempt to ameliorate the unsatisfactory use of 'all moneys' clauses by banks. While recent reforms in the Banking Code and under consumer credit legislation have been

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19 Martin Committee Report, Australia, House of Representatives Standing Committee on Finance and Public Administration, *A Pocketful of Change: Banking and Deregulation* (1991); Trade Practices Commission Discussion Paper, above n 7; Australian Law Reform Commission, above n 6, Part II; Expert Group on Family Financial Vulnerability, above n 7; Australian Banking Industry Ombudsman Ltd, *Report on Relationship Debt,* Bulletin No 22 (1999).

20 Ibid 414.

21 Now the Australian Competition and Consumer Commission ('ACCC').

22 [1994] 1 AC 180, 185-6 (Lord Browne-Wilkinson).

23 [2002] 2 AC 773, 801 (Lord Nicholls).

24 Trade Practices Commission Discussion Paper, above n 7 [5.4].

confined to procedural unfairness, that is, unfairness in the bargaining process, there is a growing trend towards regulating and prescribing contractual terms which are unfair in themselves (substantive unfairness). This approach is sometimes described as ‘abstract control’ because the precise clause is not targeted, rather it will be prescribed if it comes under a general rubric of unfairness. A consideration of the preventative approach, covering aspects of both procedural and substantive unfairness is outlined below. While a preventative approach is best, litigation may be unavoidable in some cases. Therefore, this paper will also examine the judicial construction of ‘all moneys’ clauses and consider the role of statutory unconscionability, under s 51AC of the *Trade Practices Act 1974* (Cth) as a remedial tool.

II PREVENTATIVE ACTION

A *Legislation and Banking Code - Targeting Procedural Unfairness*

The reform bodies’ recommendations for improved practices in the taking of guarantees have now generally been adopted in consumer transactions.[25] For example, guarantees which are unlimited in amount have been banned in legislation and industry codes of practice since 1996 so far as they secure loans which are of a personal household or domestic nature.[26] Under the revised Code of Banking Practice[27] they are now also banned in all guarantees given to support small business debts.[28] This means that where a bank provides an overdraft or line of credit to a business, liability under any guarantee provided to the bank to secure the facility will have to be set at a ceiling amount.

The parallel practice of taking of ‘all moneys’ guarantees (i.e. guarantees which are unlimited in time) is now also subject to greater restrictions in some lending transactions. These guarantee contracts are strictly controlled under the Uniform Consumer Credit Code (‘UCCC’).[29] Their use is also restricted under the new Code of Banking Practice, but unfortunately, they are treated with more latitude than under the UCCC. This aspect of the Banking Code is discussed in detail below. Guarantors of business debts dealing with other sectors of the finance industry are not accorded even these protections. Their guarantees are governed, among other things, by common law principles and the *Trade Practices Act 1974* (Cth) (TPA). [30] While the guarantee provisions of the UCCC, as obviously intended, remain linked to loans

25 For example, Uniform Consumer Credit Code (‘UCCC’), Part 3 Div 2, ss 50 - 57.

26 For example, UCCC s 55 (1) and Australian Bankers’ Association *Code of Banking Practice* 1993, cl 17.2 (1993 version, which came into effect in 1996).

27 Australian Bankers’ Association Code of Banking Practice (May 2004) <http://www.bankers.asn.au/Default.aspx?FolderID=102> at 23 February 2005.

28 Clause 28.2 provides that a bank may only accept a guarantee that is limited in amount or limited to the value of a specified security. Small business is defined in cl 40 of the Code.

29 Section 54 (2) provides that a guarantee will be unenforceable in relation to credit provided under another future credit contract unless the credit provider provides the guarantor with a copy of the relevant future credit contract and obtains his or her consent in writing to the extension of the guarantee.

30 See generally, J Pascoe, ‘Review of Clause 17 of the Code of Banking Practice - a ‘Guaranteed Improvement’ (2001) *Australian Banking and Finance Law Bulletin* 17; ‘The Effect of the Federal Government’s Small Business Package on Guarantees of Business Debts’ 12 *Commercial Law Quarterly* 17 and ‘Wives, Business Debts and Guarantees’ (1997) 9 *Bond Law Review* 58.

provided or intended to be provided wholly or predominantly for personal, domestic or household purposes,[31] the guarantee coverage of the Code of Banking Practice[32] has now been extended to include guarantees given to secure small business debts. The revised Code of Banking Practice was launched on 12 August 2002 and came into effect in August 2003. It provides a complete overhaul and reform of the 'old' Code, which was first released in 1993. The guarantee provisions have been substantially rewritten to provide enhanced protection for guarantors. Unlike the previous version, the new Code covers guarantees given by individuals to secure small business lending and provides some controls over 'all moneys' securities. Under cl 28.1 the new Code applies to guarantees given by individuals in respect of facilities or accommodation provided by a bank to individuals or small business whether incorporated or not. 'Small business' means a business employing:

- Fewer than 100 full time employees if the business includes the manufacture of goods; or
- In any other case fewer than 20 full time employees.

To achieve consistency in financial sector regulation, this is same meaning as 'retail client' in the *Financial Services Reform Act 2001* (Cth).

1 *Clause 28.13 of the Revised Code of Banking Practice*

One of the most significant changes in the context of a preventative approach concerning the taking of guarantees is the attempt in cl 28.13 of the revised Code of Banking Practice to ameliorate the unsatisfactory use of 'all moneys' clauses. However, a perusal of cl 28.13 indicates that the steps taken under the Code to control their use prior to entry into a guarantee do not go far enough.

The Report of Richard Viney, the Independent Reviewer of the Code,[33] recognised that the enforceability of guarantees in relation to future credit contracts was an issue of major concern and concluded that 'all moneys' clauses required disclosure, warnings and advice which should be made available to the guarantor in a clearly understandable format. The Australian Bankers' Association ('ABA'), in adopting the main Viney Report recommendations, did not dispute that all of these steps were necessary and should be applied to small business as well as consumer guarantees. In most respects the ABA followed the Viney recommendations, providing benefits such as a commitment from banks to act 'fairly and reasonably', improved pre-contractual information and the use of plain language documentation. Detailed provisions were inserted into the Code regulating all of these matters.[34] In addition, the ABA formulated a particular provision, cl 28.3, to specifically address the concerns about guarantees and future credit contracts.

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31 UCCC s 6(1).

32 The new Code can be obtained from the Australian Bankers' Association website <www.bankers.asn.au>.

33 R Viney, RTV Consulting Pty Ltd, *Review of the Code of Banking Practice*, Final Report (2001) 59.

34 See, in particular, cl 28(4)(a)-(d) which sets out detailed requirements for pre-contractual notices regarding recommendations for advice, warnings about the risks involved and disclosure concerning demands, excesses and overdrawing in relation to any facility the principal debtor has with the bank. This information must be provided in plain language. Disclosure is now an absolute obligation, not conditional upon the consent of the debtor.

Unfortunately, in drafting this clause, the ABA departed in a material way from the Independent Reviewer's recommendations, thereby compromising the desired objective of transparency in all guarantee transactions. The Viney Report recommended that the new Code essentially adopt the same requirements as s 54 of the UCCC in relation to the extension of a guarantee to any future contract.[35] Section 54 prohibits guarantees expressed to be applicable to future credit contracts unless the guarantor receives a copy of the future credit contract and subsequently accepts in writing the extension of the guarantee to that future credit contract.

Clause 28.13 is modelled on s 54, yet departs from it in a way which significantly undermines the protection to guarantors so far as future credit contracts are concerned. Clause 28.13 provides that:

> A guarantee given by you will be unenforceable in relation to a future credit contract unless we have:
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> (a) given you a copy of the contract document of the future credit contract; and
> (b) subsequently obtained your written acceptance of the extension of the guarantee
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> except to the extent the future credit contract (together with all other existing credit contracts secured by that guarantee) is within a limit previously agreed in writing by you and we have included in the notice we give you … a prominent statement that the guarantee can cover a future credit contract in this way.

The qualification allowing the guarantee to be extended to future contracts in the manner spelt out in cl 28.13, effectively means that guarantees will be enforceable in relation to further advances that a guarantor may not be aware about, or has agreed to at the time, providing that a statement has been given that this can occur and the lending is within the previously agreed limit. Providing an initial warning purporting to cover transactions which may occur many years later is not sufficient protection and the effect of cl 28.13 is not in the spirit of the Viney recommendations. Section 54 of the UCCC requiring the specific written consent of the guarantor at the time of the future advance is a more equitable provision. As it stands, cl 28.13 could permit a lender to provide a different kind of facility, such as an overdraft, in addition to an initial term loan no matter how many years later than the original facility was provided to the debtor. This would not necessarily be something a guarantor would expect, regardless of the warning provided. A reasonable guarantor may well have expected that the loan they guaranteed would reduce over time and be paid off within a fixed period.

Further, it should be noted that there is no equivalent requirement in the Banking Code to that under s 162 of the UCCC requiring a guarantee or related notice to be easily legible and clearly expressed.[36] Therefore, convoluted drafting of 'all moneys' clauses is still possible. The hazards involved in these clauses are unlikely to be overcome by the Code's requirement for a prominent warning notice in the form required under s 50 of the UCCC, given that the warning notice is only required when the initial guarantee is signed and need not be presented in respect of future advances

[35] Above, n 30, 17-18.

[36] Although cl 28.8 requires a general warning notice to be provided in the form required by s 50 UCCC (i.e. a notice complying with s 162).

under the guarantee. In any event, it is submitted that a general warning is not enough in the case of 'all moneys' clauses. Attention should be drawn to the specific dangers in very clear terms. These defects in the Code should be remedied upon its review. [37]
Therefore, although the revised guarantee provisions of the Banking Code redress some significant inadequacies in its predecessor provisions, it is submitted that cl 28.13 is substantially flawed. It is doubtful whether it complies with a bank's commitment in cl 2.2 to 'act fairly and reasonably to you'. While it may generally be appropriate for banks to use 'all moneys' guarantees in business lending, they should only do so in circumstances of complete transparency. It is arguable that failing to obtain the guarantor's specific agreement to future lending, even if it is within the existing limit, is not fair and reasonable. Moreover, while there is a formal requirement under cl 28.4 for the bank to recommend the guarantor to seek independent legal and financial advice, the obtaining of such advice is not a mandatory requirement. Guarantors, for many reasons, do not always obtain advice. This would put the onus back on the bank to explain the effect of provisions governed by cl 28.13. Where lawyers act for guarantors, they should be aware of effect of this provision and similarly explain that it means that the guarantee can lie dormant for many years, but later secure future incurred obligations.

It is particularly unfortunate that cl 28.13 is a weaker provision than s 54 UCCC, given that the transitional provisions in cl 39 (1) (c) of the new Code give it a retrospective effect so that is also binding in respect of guarantees taken under the 'old' Code. There is a need for this particular provision to be appropriately redrafted, in line with the Viney Report's recommendation for the same kind of controls on 'all moneys' clauses as provided by s 54 of the UCCC. It is worthwhile noting that notwithstanding the drawbacks of cl 28.13, banks still have a general contractual commitment under cl 2.2 to act 'fairly and reasonably'. In addition, it should be noted that the voluntary Code operates subject to legally enforceable rights under statute and general law. Clause 4 specifically refers to rights under the TPA. Therefore, depending on the circumstances, banks may also be liable for unconscionable conduct[38] in seeking to enforce a guarantee without the guarantor's specific acknowledgement for additional lending, as now permitted by cl 28.13. Despite the fact that a guarantee with an 'all moneys' clause complies with the Banking Code and requires a generic warning of the risks involved, it may be still have been presented on a 'take it or leave it' basis, drafted incomprehensibly and without specific warnings of the degree of risk involved or requiring written acceptance at the time of later advances. These factors could well lead to a finding of unconscionability on the part of the bank. However, for guarantors to seek remedial action under the TPA or at common law subverts the preventative approach implicit in the Viney Report's recommendations on guarantees. Taking legal action is the very mischief that the proscription of unfair provisions is aimed at preventing.
In any event, when the Code is reviewed cl 28.13 should be redrafted in line with s 54 UCCC, to remove the exception to written approval of future advances under 'all moneys' contracts in the new Code. Similar provisions should apply to other lenders

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[37] Clause 5 of the new Code provides that the code is to be reviewed every 3 years. Therefore, the review must take place before August 2006.

[38] Under the general law *Amadio* doctrine or under ss 51AA and 51AC *Trade Practices Act 1974* (Cth). Although the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') has mirror unconscionability provisions, these apply to 'financial services', which as defined do not cover guarantees.

as well as just to the banking sector[39] an plain English guarantees should be mandatory.

B *Abstract Control - Targeting Substantive Unfairness in 'All Moneys' Clauses*

The above discussion highlighted the limitations of the Banking Code in dealing with 'all moneys clauses', not the least being the obvious drawback that the Code is only binding on banks. Restricting the use of 'all moneys' guarantees is part of an approach, recommended by the New South Wales Law Reform Commission ('NSWLRC')[40] that lends itself to the concept of 'abstract control', which is predicated upon preventing **all** lenders from entering into contracts using terms that are 'unfair' to guarantors. It is an approach directed towards regulating both procedural and substantive unfairness. The limitations of the common doctrine of unconscionability were noted above. The doctrine is limited to situations of procedural unfairness as determined on a case-by-case basis. It does not cover unfairness in the actual contractual terms. A useful approach to defining 'unfairness' is the European Directive on Unfair Terms in Consumer Contracts,[41] referred to by the NSWLRC. Reforms in the United Kingdom,[42] implemented in accordance with the European Directive treat a contractual term as unfair if, 'contrary to the requirement of good faith, it causes a significant imbalance the parities' rights and obligations under the contract'.[43] Examples include 'terms irrevocably binding the consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract'.[44] The term will not be binding and consumer regulators or other bodies can seek, by injunctive measures, to prevent their use. The UK Law Commission noted that the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) effect a form of 'abstract control'.[45] There are some specific examples of 'abstract control' in Australian legislation[46] aimed at preventing lenders from entering into contracts with unfair terms, which are relevant to contracts of

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39 While the rules for taking of guarantees are changing and improving so far as banks are concerned, there are still sectors of the finance industry which use guarantees in business lending which are unaffected by the scope of recent reforms. For example, a Finance Company Code of Practice is needed, given their prominence in business lending and the fact that they commonly use guarantees. This was recommended by the Expert Group on Family Financial Vulnerability, above n 7, which expressed concerns that persons giving guarantees to some financiers are not offered the same protections as those with banks in terms of coverage by an industry code of conduct and access to independent cost effective dispute resolution processes such as those provided by the Banking and Financial Services Ombudsman.

40 New South Wales Law Reform Commission, *Guaranteeing Someone Else's Debts,* Issues Paper 17 (2000), [2.108] to [2.113].

41 EC directive 93/13.

42 *Unfair Terms in Consumer Contracts Regulations* 1999 (UK).

43 *Unfair Terms in Consumer Contracts Regulations* 1999 (UK), reg 5 (1).

44 *Unfair Terms in Consumer Contracts Regulations* 1999 (UK), Sch 2 cl 1 (i).

45 '[I]t must be the case that substantive unfairness alone can make a term unfair under [the UK Regulations]. This is because the Director General of Fair Trading and the bodies listed in Schedule 1 have the power to prevent the use of unfair terms and this may be done "in the abstract" in the sense that the precise way in which the clause is presented to the consumer is unknown'. The Law Commission of England and Wales, *Unfair Terms in Contracts,* Consultation Paper 166 (2002).

46 For example, the legibility and print size requirements under s 162(1) of the Uniform Consumer Credit Code ('UCCC'), which came into effect in 1996. A court may on the application of the relevant State Government consumer agency, prevent the lender using a non-complying provision in any guarantee.

guarantee. 'All moneys' clauses in guarantees are the sorts of 'take it or leave it terms' which may well be dealt with in this manner.

So far as the Australian position is concerned there is also the possibility, briefly noted by the NSWLRC, that the implementation of this preventative approach can be achieved through powers under the TPA.[47] Section 80 of the TPA allows the court to grant an injunction in terms it deems appropriate in relation to contraventions of the Act. The Commission said:

> It is possible that a similar approach may be achieved by a broad power to grant injunctions to prevent conduct in breach of provisions under the trade practices legislation relating to unconscionable conduct and misleading and deceptive conduct. The provisions, however, remain untested in this regard.[48]

Since those comments of the NSWLRC, the Australian Competition and Consumer Commission ('ACCC') has in fact had recourse to the injunctive powers of the TPA in a guarantee case. The recent case of *ACCC v National Australia Bank Ltd*[49] indicates the potential scope of the 'abstract control' approach in 'special equity' type cases. The case is of significance in the context of women's guarantees in illustrating the flexibility of remedies and orders which can be obtained for breach of s 51AA TPA. It is important to note that these kinds of proceedings can be brought against financial institutions and lenders generally, not just banks. The ACCC brought proceedings alleging that the bank had acted unconscionably in obtaining and enforcing a personal guarantee for $200,000 from a wife as security for a business loan to a company of which her husband was a director. The ACCC alleged that when the bank sought the guarantee, it did not explain its nature or effect or advise her that she should obtain independent legal advice. The ACCC also alleged that the bank knew the company was in serious financial difficulty but did not inform the wife. A year later the bank demanded payment of the company's debts to the bank secured by the guarantee. The ACCC alleged that enforcement of the guarantee resulted in the sale of the family home and NAB required the entire sale proceeds to be paid to the bank. The couple's home was used as security. The Federal Court declared that the bank had acted unconscionably in its dealings with the wife. The case was an extreme example of vulnerability on the part of the guarantor, who was not a director or shareholder of the company and whose husband was totally incapacitated at the time. While she would no doubt have made out a *Garcia* defence, the proceedings brought under s 51AA avoided protracted litigation and enabled the case to be resolved by mediation and consent orders.

The Court ordered, by consent, injunctions against the bank and one of its managers, a Mr Dixon, to restrain them from obtaining personal consumer or business guarantees in Tasmania without properly explaining the nature of the guarantee and the need to obtain independent legal advice before signing the guarantee. The Court also ordered

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47 Or similarly, in New South Wales by the use of s 10 of the *Contracts Review Act 1980*, a provision which has rarely been used but allows the relevant Minister to apply for a court order restricting the terms on which a person may enter into a contract of specified class of contracts if the person 'has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts'.

48 New South Wales Law Reform Commission, *Guaranteeing Somone Else's Debts*, Issues Paper 17 (2000) [2.112].

49 Unreported, Federal Court of Australia, 5 June 2001 No T 22 of 2000.

by consent that the bank include in its internal Lending Manual a statement requiring its entire lending staff throughout Australia to strictly comply with these procedures when obtaining personal consumer or business guarantees. It ordered the bank to circulate to its entire lending staff throughout Australia a bulletin to this effect.

The objective of proceedings initiated by the ACCC is not only to obtain a favourable result binding on the immediate parties to the litigation, but also to apply normative standards to the same or similar cases in the future. There is thus scope for the ACCC, in appropriate cases, to obtain injunctions and seek consent orders restraining lenders from using of onerous 'all moneys' clauses. In the *National Australia Bank* case, above, the ACCC brought proceedings based on a contravention of s 51AA of the TPA. There is in fact now greater scope for attacking 'all moneys' clauses under the expanded indicia for unconscionability under s 51AC TPA. The scope of s 51AC is largely untested, but its terms are wider than s 51AA. Together with the use of the injunctive power in s 80, it provides a useful weapon to the regulator in controlling and preventing unfair clauses in small business guarantees. When considering the role of s 80, the question arises as to whether a guarantee which *prima facie* complies with cl 28.13 of the Banking Code is unconscionable, thus justifying the use of the injunctive power to prevent reliance on 'all moneys' guarantees where no later warnings and consents have been obtained for later advances. It is doubtful whether cl 28.13 would comply, for example, with the European Directive on Unfair Terms in Contracts which is guided by such matters as good faith, imbalance in the parties' rights and obligations and the ability to become acquainted with the term before the contract is signed.[50] The 'shopping list' of factors indicating unconscionability under s 51AC(3) includes the respective bargaining positions of the parties, the extent of disclosure of relevant risks, the ability to negotiate the terms of the contract and the extent to which the parties acted in good faith. There is an obvious parallel with the indicators of unfair terms under the European Directive. The suggestion of 'abstract control' by the use of the injunctive power under the TPA to prevent the unfair use of 'all moneys clauses' in guarantees is a strategy for which there is now a precedent.[51] There is certainly scope for the ACCC intervening in appropriate cases to ensure draconian terms are not imposed on vulnerable guarantors. In the long term, however, the recommended option in terms of an 'abstract control' approach lies in the implementation of generic unfair contract legislation.

The preventative approach in dealing with unfair or unconscionable contractual terms was recently recognised by the Dawson Report on the TPA.[52] Although the unconscionability provisions contained in Part IVA of the TPA were generally outside of its terms of reference, the Dawson Report responded briefly to a number of submissions about the scope of those provisions. The Report concluded that there might be some uncertainty about the operation of Part IVA, noting that s 51AC was only added in 1998 and applies only prospectively so that its scope has, perhaps, not yet been fully explored. The Report suggested that the ACCC consider issuing guidelines concerning its approach to Part IVA. Significantly, the Report recommended that 'take it or leave it' contracts be banned under the TPA. This

50 *Unfair Terms in Consumer Contract Regulations 1999* (UK) Sch 2 cl 1 (i).

51 *ACCC v National Australia Bank Ltd* (Unreported, Federal Court of Australia, 5 June 2001 No T 22 of 2000).

52 2002 Review of the Competition Provisions of the *Trade Practices Act 1974* (the 'Dawson Report') [3.2].

recommendation, if adopted, would enable these provisions to be prohibited and unenforceable to the extent that their terms have not been explained and imposed unilaterally upon guarantors. Such a step would represent a major step forward in implementing a preventative approach to guarantee disputes involving 'all moneys' clauses and would be in the spirit of the EC directive on unfair contractual terms.

A variant of the UK legislative model on unfair terms now exists in Victoria, which recently amended its *Fair Trading Act 1999* (Vic). The provisions,[53] inserted into Part 2B of the Act, came into effect on 9 October 2003. They allow consumers to take civil action against a supplier to have an unfair contract term declared void and to also allow the Victorian Consumer Affairs agency to apply for an injunction to stop a supplier using an unfair term. Unfair terms in standard form contracts may be prescribed and declared void. It is now a criminal offence for a supplier to continue to use a prescribed term in a standard form contract. The provisions are useful, but not relevant to guarantees given to support business lending, as they are limited to consumer transactions.[54]

A uniform, national approach to harsh and unconscionable standard form contracts is needed. The issue of uniform unfair contract law has recently come under the scrutiny of the Standing Committee of Officials of Consumer Affairs ('SOCA') national working party, which released its Discussion Paper on 1 February 2004.[55] The paper noted that in recent times it is the standard form contract which has become the focus of allegations of unfairness. Clauses in financial services contracts, including guarantees, were amongst the types of unfair terms noted in the Discussion Paper. The Discussion Paper highlighted the limitations of the common law and existing statutory provisions in providing systemic regulation of unfair contractual terms and considered five models which could be implemented, providing a preliminary analysis of the costs and benefits of the various options. The working party considered the UK model in detail, and is presently seeking responses to its options. Based on the cost benefit analysis in the SOCA Discussion Paper, it is submitted that specific unfair terms legislation, based on a variant of the UK model (of which the new Victorian provisions are a substantial variant), should be the preferred option. This offers the possibility that unfair terms will be addressed systemically. The model requires the use of plain and intelligible language, a minimum font size and allows injunctions to prevent the continued use of unfair terms. Additionally, as with the Victorian provisions, certain unfair terms may be prescribed, creating greater certainty and reduction in disputes and litigation. The UK guidelines as to the kind of terms which may be considered unfair make reference to contracts 'irrevocably binding the consumer to terms which he [sic] had no real opportunity of becoming acquainted before the conclusion of the contract'.[56] This type of guideline should be included in any proposed Australian model.

It is significant that the SOCA working party noted that the courts have given a narrow interpretation to TPA provisions prohibiting conduct which is unconscionable 'in all the circumstances'. Although it is not entirely clear, particularly in the case of s

53 Sections 32U – 32Z.
54 Defined in s 3 to mean the supply of goods or services of a kind ordinarily acquired for personal, household or domestic use.
55 SOCA, *Unfair Contract Terms*, Discussion Paper (2004).
56 *Unfair Terms in Consumer Contracts Regulations* 1999 (UK), Sched 2, reg 5(5).

51AC, it seems that these words limit the scope of the provisions to cases involving unfairness in the circumstances surrounding the taking of the guarantee (i.e. procedural unfairness). To ensure that cases of both procedural and substantive unfairness were covered, the working party considered that any indicative guidelines of terms which may be regarded as unfair should **not** include the words 'in all the circumstances'. [57]

Although the case of *ACCC v National Australia Bank Ltd* illustrates the scope for the use of injunctions under the TPA's unconscionability provisions, in terms of 'abstract control', the problem of substantive unfairness inherent in standard form contracts containing 'all moneys' clauses should preferably be targeted by specific unfair contract terms legislation.

III THE ROLE OF THE COURTS - JUDICIAL CONSTRUCTION AND REMEDIAL PROVISIONS

A *Judicial Construction of 'All Moneys' Clauses - An Assessment*

It is relevant to consider in this section of the paper whether problems associated with 'all moneys' clauses can be solved merely as a matter of construction of the clause. While the new Code of Banking Practice continues to prohibit the use of guarantees which are unlimited in amount, guarantees covering future credit contracts are still permitted, but are now subject to certain restrictions. As already noted, there is no doubt that 'all moneys' mortgages and guarantees can be very useful to lenders wishing to secure borrowings over the debts of ongoing businesses. Lenders may also misuse them. So long as they are permitted in business lending, albeit with some fetters under the revised Code of Banking Practice, it is likely that 'all moneys' guarantees will continue to be used and to be a source of dispute in guarantee transactions. In situations where these clauses are still permitted, disputes as their meaning and application may be subject to rules of judicial construction. It is therefore important to consider whether these rules are appropriate and whether the courts adopt a useful and consistent approach to the construction of these clauses.[58] An examination of the relevant Australian authorities concerning the construction of 'all moneys guarantees' indicates that the courts have generally done so. Several conclusions may be drawn from the relevant case law:

- There is no general rule providing that 'all moneys' clauses should be interpreted strictly against the creditor and in favour of the guarantor/mortgagor; but they will be so construed where there is ambiguity in the operation of the clause; [59]

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57 SOCA Discussion Paper, above n 55, 23, 65.

58 See generally, B Collier, 'All Debts Clauses in Commercial Construction and Limitations on the Ambit of Clauses of this Nature' (1998) 24 *Monash University Law Review* 7.

59 In *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549, 561 Mason ACJ Wilson, Brennan and Dawson JJ observed, 'At law, as in equity, the traditional view is that the liability of the surety is *strictissimi juris* and that ambiguous contractual provisions should be construed in favour of the surety'. But see also *Estoril Investments Pty Ltd v Westpac Banking Corporation* (1993) 6 BPR 13,146, 13,154 where Young J said 'I do not think one can say in New South Wales that if a mortgagee chooses to use wide words and legal jargon it runs the risk that it will be construed against it under the contra proferentem rule'.

- Courts should give meaning to 'all moneys clauses' having regard to the actual language used, construed in context, and for the purposes of the agreement between the parties; [60]
- Widely drafted 'all moneys clauses' clauses may be read down so that the words will only cover those situations contemplated by the ordinary guarantor by the use of the words;[61] and
- There has been a trend in some guarantee cases to give a narrower scope to the ambit of 'all moneys' clauses.

A summary of the relevant principles governing the construction of 'all moneys' clauses, suggests that this general approach is appropriate and does not, in itself, cause injustice to vulnerable guarantors. The problems caused by vitiating factors surrounding the taking of the guarantee, such as duress, unconscionability and lack of comprehension and understanding should not necessarily affect the way courts are required to interpret the words used in legal documents. Kirby P in *Smith v ANZ Banking Group Ltd*,[62] pointed out that these situations are provided for by protection under common law, equity and legislation, which is a 'reason for avoiding any lingering temptation to adopt a construction of the 'all moneys' clause which is unduly strained and narrow'.

There is no general *contra proferentem* rule which operates to construe the clause strictly in favour of the guarantor. An 'all moneys' clause will not necessarily be construed against the lender merely because it uses wide words and complex legal language. Mere complexity is not enough to treat the relevant clause as ambiguous, given the intrinsic complexity of what is described.[63] Santow J provided a useful summary of the relevant principles in *Burke v State Bank of New South Wales Ltd*, noting:

> I thus conclude that where ambiguity is absent, such guidelines must yield to clear language expressing a contrary intention, though subject to being interpreted by reference to their context and to the commercial purpose served. Where ambiguity is present, or where the language is not wholly clear, any doubt in the case of guarantees, should be resolved, where the language permits, in favour of the guarantor and, certainly in the case of guarantees and probably more generally, so as to avoid absurdities or results which could not sensibly have been contemplated. This is particularly, though not exclusively, where dealing with printed forms given on a take it or leave it basis, often to unsophisticated laymen. I apply now these principles to the present circumstances. Insofar as effective, in the sense of informed, consent was not given by the Burkes senior as third party mortgagors to some or all of the advances made pursuant to the 1990 transaction, then, consistently with the approach of the Bank itself in seeking such consent, the relevant "all monies" clause should be construed as not covering any such advances as were not the subject of an effective consent. [64]

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60 *Smith v ANZ Banking Group Ltd* (1996) NSW Conv R 55-774; *Estoril Investments Pty Ltd v Westpac Banking Corporation* (1993) 6 BPR 97,404, 13, 146 (Young J) quoting Gleeson CJ in *Fountain v Bank of America National Trust and Savings Association* (1992) 5 BPR 11,817.

58 *ANZ Banking Group Ltd v Comer* (1993) 5 BPR 97,404, 11, 748 (Young J); *Estoril Investments Pty Ltd v Westpac Banking Corporation* (1993) 6 BPR 13,146 13, 154 (Young J).

62 (1996) NSW Conv R 55-774, 937.

63 Gleeson CJ in *Fountain v Bank of America National Trust and Savings Association* (1992) 5 BPR 11,817, 11,819.

64 (1995) 37 NSWLR 53, 72.

As Kenny J stated in the Federal Court case of *McVeigh v National Australia Bank Ltd* 'all moneys' clauses are obviously intended by their authors to catch all eventualities, but that may not be the common intent of all of the parties at the time of the execution of the security'.[65] The difficulty for the courts has been to determine what the ordinary guarantor might sensibly have contemplated. Consumer regulators argue in favour of guarantors, claiming that most reasonably expect to 'be let off the hook' once the initial debt is repaid.[66] However, there is no general presumption to this effect in construction of 'all moneys' guarantees. Young J at first instance in *Smith v ANZ Banking Group Ltd* suggested that an additional guideline should apply in the construction of these clauses such that 'in the absence of some indication in the facts and circumstances to the contrary one normally expects the parties' intention to be that once the original debt for which the mortgage or guarantee was given is paid in full then the guarantor's liability is extinguished'.[67] As Collier notes, 'an indication in the facts and circumstances to the contrary includes the situation where an all debts clause is drawn so widely as to cover all eventualities'.[68] However, on appeal, the New South Wales Court of Appeal in *Smith* disagreed that such a guideline should apply.[69] The Court of Appeal determined on the facts that in view of the circumstances and language used in the documents, the parties' intention was to cover all future liabilities.[70]

Determining liability under a guarantee solely on the basis of construction of the working of an 'all moneys' clause is not an approach that has been generally adopted, except in cases involving experienced and sophisticated borrowers, such as those engaged in large scale borrowings or project financing.[71] On the other hand, in cases involving 'sexually transmitted debt' or guarantors undertaking liabilities due to personal ties, judges have sensibly preferred not to determine liability on this basis, or alternatively to regard the construction of the clause as a subsidiary issue. This is a sensible approach since in these latter cases the courts are more likely to be dealing with commercially unsophisticated guarantors. The wording of the clause will be but one factor in the matrix of circumstances which could give rise to equitable or statutory relief on the grounds of unfair or unconscientious dealing. This was the case in *Burke v State Bank of New South Wales Ltd*,[72] which concerned unsophisticated parents who had guaranteed the business debts of their son and his wife. Santow J, at first instance found in their favour, both in terms of a construction of the 'all moneys' clause and the alternative ground that the bank was on notice of the parents' special disadvantage vis a vis their son's misrepresentations about his company's parlous financial situation. His Honour concluded they were entitled to equitable relief, but

65 [2000] FCA 187 [82].

66 See, for example, E Wentworth, General Counsel to the ABIO, *Financial Services Guarantees: How Things are Changing*, Paper presented at the Law Council of Australia/Law Institute of Victoria Financial Services Seminar, 16 October 2002, 17.

67 (1995) NSWSC (Unreported , Supreme Court of New South Wales, Young J, 16 June 1995).

68 Collier, above n 58, 33.

69 (1996) NSW Conv R 55-774, (Kirby P, Priestly and Sheller JJA).

70 Ibid 58, 937.

71 See, for example, *McVeigh v National Australia Bank Ltd* [2000] FCA 187 (Unreported, Federal Court of Australia, Heerey, Finkelstein and Kenny JJ, 28 February 2000)*; Johncorp Industries Pty Ltd v Sussman* [2001] NSWSC 519 (Unreported, Supreme Court of New South Wales, 20 June 2001); *Smith v ANZ Banking Group Ltd; Estoril Investments Pty Ltd v Westpac Banking Corporation* (1993) 6 BPR 13,146 and the general discussion in Collier, above n 58.

72 (1995) 37 NSWLR 53.

only in so far as to relieve them from the liability they would not have undertaken, but for the misrepresentation.[73] On appeal, Priestly JA, delivering the judgment of the New South Wales Court of Appeal, said:

> My tentative view is that there would be reasonable grounds for reading down the 'all moneys' clause … However, I do not need to express a final opinion on this point, because it seems to me that the alternative basis upon which Santow J placed his conclusion is a sound one and is not dependent upon the construction of the 'all moneys' clause.[74]

Similarly, in *Commonwealth Bank of Australia v Horkings,*[75] the Victorian Court of Appeal, in upholding the decision of the trial judge, Harper J,[76] confined its decision to the guarantor's right to equitable relief, although an argument based on the construction of an 'all moneys' clause was also considered at first instance. This was a case of a guarantee entered into by a company director wife. Her *Garcia* defence succeeded and it was unnecessary for the Court of Appeal to consider the question of the construction of the 'all moneys' clause. The case of *State Bank of New South Wales v Muir*[77] was also one where statutory protection under the *Contracts Review Act 1980* (NSW) ('CRA'), rather that the application of rules of construction, rendered the 'all moneys' clause ineffective.

Notwithstanding the reliance in recent times on statutory intervention[78] and equity as a means of dealing with excessively onerous 'all moneys' clauses in sexually transmitted debt cases, there has, in any event been a trend towards a more liberal approach in those cases where courts have considered the construction 'all debts' clauses.[79] Finklestein J's judgment in *McVeigh v National Australia Bank Ltd*[80] is a recent example of this.

It is reasonable to conclude that there is no need to put additional fetters on the way the courts interpret 'all moneys' clauses, given that their interpretation already occurs with reference to the surrounding matrix of circumstances. Attacks on standard form documentation, which may cause injustice to vulnerable guarantors, may be better achieved by a preventative approach regulating pre-contractual requirements, such as those discussed above.

In conclusion, to suggest that courts should always strictly read down 'all moneys' clauses is not the answer to resolving the protection/liability conundrum. However, the present trend towards a more contextual approach to the construction of these clauses is appropriate and to be commended. It should continue to be adopted in those

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73 This aspect of the decision is discussed below in the discussion of partial rescission.

74 (1997) NSW Conv R 55-814, 56,596.

75 [2000] VSCA 244 (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke, Phillips and Buchanan JJA, 22 December 2000).

76 *Commonwealth Bank of Australia v Khouri* [1998] VSC 128.

77 [1998] ANZ Conv R 211.

78 See, for example, *Muir* ibid, and *Varthalis v Commonwealth Bank of Australia* [1996] ANZ ConvR 508, cases decided under the CRA.

79 See the discussion of recent decisions adopting an interpretative rather than a literal construction of these clauses, in R Edwards, 'Problems with 'all moneys' mortgages' (2002) 17 *Australian Banking and Finance Law Bulletin* 151.

80 [2000] FCA 187 [82]-[85] (Unreported, Federal Court of Australia, Heerey, Finklestein and Kenny JJ, 28 February 2000).

specific cases where construction of the clause is the main issue. Ultimately, however, there are other more useful means of resolving the protection versus liability conundrum in sexually transmitted debt cases.

B *Promoting Statutory Unconscionability as a Basis for Relief in Cases Involving Director Wives*

The recent SOCA discussion paper[81] on unfair contract terms noted the limitations in reliance upon the doctrine of unconscionable conduct, both at common law and under the TPA, which offers a remedial and not a preventive solution. The discussion paper highlighted[82] the particular deficiencies in the common law doctrine of unconscionability. Its parameters can only be developed on a case by case basis, and thus does not promote the need for consistency and certainty in providing relief from unfair contractual terms. As was noted above in this paper, the courts have also generally required some aspect of procedural unfairness based on problems surrounding the circumstances of the making of the contract.

Undeniably, a preventative approach is best. However, statutory unconscionability should be considered as an appropriate alternative basis of relief in cases involving guarantor wives, where litigation is unavoidable. It is submitted that there are a number of considerations in the case of women's guarantees which suggest that it may be more appropriate for a court to consider the provisions of the guarantee unconscionable under s 51AC of the TPA than under the *Garcia* principles. These include the broad general coverage of the TPA,[83] the detailed guidelines provided for the courts to evaluate the conduct of the parties, the expanded notion of unconscionability under recent provisions, the availability of TPA remedies,[84] and the application of laws which do not carry the perception of gender bias. Significantly, and as a policy matter so far as women directors and partners in family businesses are concerned, action under the TPA does not turn on the undesirable spectre of a wife claiming lack of understanding or involvement in her own company. It is submitted that the parameters of unconscionability under s 51AC have expanded to such an extent that there is no need to have recourse to the *Garcia* doctrine in the business context.

It should be noted, though, that the High Court in *ACCC v Berbatis Holdings*[85] rejected a move towards refashioning the notion of unconscionability under s 51AA

81 Above n, 9.

82 Ibid 21.

83 Note that while the *Australian Securities and Investments Commission Act 1989* (Cth) ('ASIC Act') applies specifically to 'financial services' and 'financial products' as defined in s 12BA, the TPA applies to consumer and business dealings generally, so long as those transactions are not defined as 'financial services': s 51AF. Section 4(1) of the TPA defines services as including a contract between banker and customer and any contract for or in relation to the lending money. This includes the taking of guarantees, which does not fall within the definition of 'financial services' under the *ASIC Act*.

84 Injunctive relief under s 80, recovery of the amount of loss or damage under s 82 and, in particular the availability of relief under s 87 which confers a wide discretion on the court to make such orders as it thinks appropriate.

85 (2003) 197 ALR 153.

of the TPA into a wider concept that embraces so-called 'situational'[86] unconscionability arising from differences in the legal and financial positions of the parties. Nevertheless, the scope of s 51AC in the 'business guarantee' context may still be significant, given its wide drafting.[87] The expanded indicia of unconscionability, for the purposes of s 51AC, go beyond traditional indicators of unconscionability under the general law principles[88] as incorporated in s 51AA. Section 51AC of the TPA[89] was modelled on existing s 51AB, but was designed to protect the interests of 'business consumers'.[90] The provision prohibits a person or corporation in trade or commerce in connection with the supply or acquisition of goods or services by a company (other than a listed public company) engaging in conduct that is in all the circumstances unconscionable. The provision also covers unconscionable dealings in relation to the 'possible' supply or acquisition of goods or service. In its terms, s 51AC enunciates a wider version of unconscionability than the common law and existing statutory provisions. Section 51AC provides a list of factors wider than those listed in s 51AB, to which the courts may have regard in determining unconscionability. Given the appropriate circumstances, the provision is particularly well suited to strike down unfair 'all moneys' clauses. The expanded criteria reinforce the need to prevent both procedural unfairness in pre-transaction negotiations and substantive unfairness in the actual terms of the contract. The application of s 51AC to substantive unfairness is suggested by reference to terms which are onerous in the sense that 'they were not reasonably necessary for the legitimate protection of the suppliers'. This is particularly the case with respect to the particular criteria in ss 51AC (3) outlined below.[91] The extent to which $3 million monetary limit applying to transactions brought under s 51AC[92] is a barrier in many small business guarantee cases is as yet unknown.[93]

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86 As suggested by French J at first instance in *ACCC v Berbatis Holdings* (2000) 169 ALR 324. See B Horrigan, 'Unconscionability Breaks New Ground - Avoiding and Litigating Unfair Client Conduct After the ACCC Test Cases and Financial Services Reform' [2002] *Deakin Law Review* 4, citing the decision of French J in *ACCC v Berbatis Holdings Pty Ltd*.

87 See, for example, the arguments of D Knoll, 'Protection Against Unconscionable Business Conduct - Some Possible Applications for s 51AC of the Trade Practices Act 1974' (1999) 7 *Competition and Consumer Law Journal* 54.

88 The classic statement of Fullagar J in *Blomley v Ryan* (1956) 99 CLR 362, 405 referred to 'poverty or need of any kind, sickness, age, sex infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'.

89 Inserted by the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth).

90 A business consumer may be an incorporated body, other than a public listed company which has acquired or supplied goods/services not exceeding $3m in the course of business. Knoll, above n 87, 61 states that the price cap encourages legal argument and creates unnecessary legal costs, arguing that it should be rescinded as a matter of urgency.

91 But see the restrictive approach given to s 51AC by the Full Federal Court in *Hurley v McDonald's Corporation Australia* [1999] FCA 1728 [31] (Unreported, Heerey, Drummond, Emmett JJ, 17 December 1999). The court held that 'Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract 'unfair' or 'unreasonable'.

92 Section 51AC(10).

93 It is a moot point whether the $3m includes the capital cost of the loan, or the amount disputed under the guarantee. Recent statistics provided by the NSWLRC show that 24 per cent of the guarantors sampled had guaranteed loans in excess of $200,000. New South Wales Law Reform Commission, *Darling Please Sign this Form: A Report on the Practice of Third Party Guarantees in New South Wales*, Research Report II (2003) [2.19].

1 *The Application of s 51AC TPA to Conduct in Relation to Guarantees*

Section 51AC is also closely modelled on existing s 51AB, albeit with a more extensive list of factors. The list of factors includes the following:

- whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;[94]
- whether the business consumer was able to understand any documents relating to the supply or possible supply of services;[95]
- the extent to which the supplier's conduct is consistent with the supplier's conduct towards other business consumers;[96]
- the requirements of any applicable industry code;[97]
- whether the supplier unreasonably failed to disclose to the business consumer intended conduct which may affect the business consumer's interest;[98]
- the extent to which the supplier was willing to negotiate the terms and conditions of the contract;[99] and
- the extent to which the supplier and business consumer acted in good faith.[100]

There is some complexity surrounding the interpretation of this provision in the guarantee context.[101] The wording of s 51AC does not make it entirely clear whether the provision covers conduct by lenders in guarantee cases. The section prohibits unconscionable conduct by a supplier towards a business consumer. The actual drafting of s 51AC and of the various factors listed in s 51AC (3) is directed towards two party situations, not a three party situation such as the giving of a guarantee to support financial accommodation provided by a lender to a principal debtor. If s 51AC is restricted to bi-partite dealings between the 'supplier' and 'business consumer' (i.e. the principal debtor in the guarantor context), then presumably guarantors of small business debts are still governed by s 51AA which incorporates the *Amadio* principles of unconscionability, and which, under the High Court's interpretation in *Berbatis Holdings*, is confined the to the traditional indicia of inherent disadvantage pointing to a special disability on the part of the guarantor.

This problem of statutory construction also arose when s 51AB was introduced into the TPA. There is a strong case for accepting that s 51AB, and its predecessor provision,[102] was intended to include unconscionable conduct in relation to a guarantor.[103] It now generally appears to be accepted that the words adopted in s 51AB (and substantially replicated in s 51AC) are capable of applying to tripartite situations such as those involving third party sureties. Although it is clear that a

94 Section 51AC(3)(b).
95 Section 51AC(3)(c).
96 Section 51AC(3)(f).
97 Section 51AC(3)(g).
98 Section 51AC(3)(i).
99 Section 51AC(3)(j).
100 Section 51AC(3)(k).
101 See, J Pascoe, 'The Effect of the Federal Government's Small Business Package on Guarantees of Business Debts' (1998) 12 *Commercial Law Quarterly* 17.
102 Section 52A.
103 This construction was well argued by M Sneddon, 'Unfair Conduct in Taking Guarantees and the Role of Independent Advice' (1990) 13 *University of New South Wales Law Journal* 302, 332 -333.

lender does not provide services to a guarantor, and that the 'real' business consumer is the debtor, the prohibition on unconscionable dealings extends to conduct '**in connection with** the supply ... of services' (emphasis added). Moreover, a court is not limited to the listed factors which refer to matters between the supplier and the business consumer, but has the discretion to consider any other relevant matters. On this analysis a court is not precluded from considering the supplier's conduct in relation to third parties, such as guarantors. This construction is supported by reference to the Explanatory Memorandum[104] accompanying the bill which introduced the predecessor of s 51AB into the Act. The stated intention of that section was to cover *Amadio* type situations, which obviously cover conduct in relation to guarantees.

Therefore, although the current ACCC guidelines[105] on unconscionable conduct make no reference to guarantee transactions, there is a strong case for giving s 51AC a wider construction, given that s 51AC (3) indicates the court is not in any way limited in regard to the matters it may consider. Accepting this construction, there is no doubt that s 51AC has a far-reaching and flexible potential application in the guarantee context. The courts will have the discretion to apply a requirement of good faith disclosure to surety transactions. This follows from the inclusion of the additional factor, noted above, to which the court may have regard, which directs the court's attention to any failure by the supplier to disclose any intended conduct or risks, known to the supplier which might effect the interests of the business consumer (s 51AC (1)(i)). Moreover, the lender's conduct can be judged by the normative standards incorporated into relevant industry codes. As stated above, the extent to which the transaction is presented on a take it or leave it basis places a strong emphasis on the significance of procedural fairness. To this extent s 51AC can be seen as extending the protection offered to business guarantors under the judge-made law and existing statutory provisions. Additionally, the availability of ancillary orders under s 87 for conduct which breaches s 51AC also gives the court similar discretion, as in equity, to order partial rescission of the contract.

In determining whether a guarantee is unconscionable or not, a court is not merely limited to considering whether the guarantor received written explanations, warnings or recommendations for independent advice, which are essentially procedural matters. The inclusion of factors such as good faith and risk disclosure, allows a court to focus squarely on the issue of substantive unfairness. It is also consistent with the increasing tendency by Australian courts to imply a general obligation of good faith into contracts.[106] It has been suggested that the insertion of these factors actually apply

[104] Trade Practices Revision Bill 1997 [22].

[105] Australian Competition and Consumer Commission, *A Guide to Unconscionable Conduct in Business Transactions,* Report (October 1998).

[106] Recent examples include *Alcatel Australia Ltd v Scarcella* [2001] NSWCA 401 (Unreported, New South Wales Court of Appeal, Beazley, Stein JJA, Davies AJA, 14 November 2001) and *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187 (Unreported, New South Wales Court of Appeal, 21 June 2001). The concept that a contract imposes a duty of good faith and fair dealing on the parties is established jurisprudence in the United States and has been growing in acceptance in Australia. See E Peden, 'Incorporating Terms of Good Faith in Contract Law in Australia', (2001) 23 *Sydney Law Review* 222 and J Paterson, 'Duty of Good faith-Does it have a Place in Contract Law?' (2000) 74 *Law Institute Journal* 47. The High Court in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 (Unreported, High Court of Australia, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne

new moral and ethical standards to business dealings.[107] Arguably, such issues as the social and emotional vulnerability of the guarantor, as well as informational disparities can also potentially be taken into account. Some people will sign a guarantee for a close family member whether or not the lender has technically complied with the correct procedures. However, they might not do so if they had actual knowledge that the business venture was in serious difficulties or was inherently risky or that their liability was open-ended. In many of the cases coming before the courts many women guarantors believed, in the absence of access to financial information or accounts, that the businesses of their partners were highly successful.

The scope of s 51AC is such that failure to accurately disclose the debtor's financial position to all intending sureties could be regarded as lack of good faith. While informational imbalance may not generally be sufficient to constitute unconscionability under the general law, it may well constitute unconscionability under s 51AC. Failure to explain the workings of 'all moneys' clauses, as well as failure to provide financial information relevant to the risk, information that is now required under an industry code, expands the parameters of unconscionability considerably. Clearly s 51AC is not merely a prescriptive 'black letter law' provision. Although some of the more recent decisions, particularly the High Court's decision in *Berbatis Holdings* considering unconscionability under s 51AA,[108] may be seen as restricting the statutory boundaries of unconscionability and perhaps as an indicator of the courts' likely attitude to s 51AC, it is submitted that s 51AC is clearly wider in scope than s 51AA which covers *Amadio* unconscionability. As emphasised above, the strength of s 51AC[109] is that it incorporates concepts of fairness and ethical conduct as well as normative industry standards, by the inclusion of 'the requirements of any applicable industry code' as a factor in determining unconscionability.

By its terms, s 51AC is well-suited to the consideration of issues concerning the complexity and obscurity of the wording of 'all moneys' clauses such as a lack of explanation of the clause and the 'take it or leave it' imposition of their terms. So far as wives' guarantees are concerned it makes good sense for courts to target their remedial intervention to the particular aspect of the transaction which has caused injustice, rather than continuing to accept and widen the 'broad brush' *Garcia* defence. 'All moneys' clauses have, in recent times, become more susceptible to challenge under consumer protection legislation, such as s 7 of the CRA.[110] This enables relief to be granted where the court finds a contract or provision in a contract to have been unjust in the circumstances relating to the contract at the time it was made. The equitable doctrine of partial rescission, also enables courts to be more discriminating in the application of a remedy which, rather than the blunt *Garcia*

and Callinan JJ, 14 February 2002) considered but found it unnecessary to decide whether such an obligation exists and therefore the matter is unsettled.

107 R Baxt and J Mahemoff, 'Unconscionable Conduct Under the Trade Practices Act - An Unfair Response by the Government: A Preliminary View' (1998) 26 *Australian Business Law Review* 5.

108 Which codifies the common law notion of unconscionability.

109 Section 51AC (3) (g) (i) and (k).

110 See, for example, *Karam v ANZ Banking Group Ltd* [2001] NSWSC 709; *State Bank of NSW v Muir* (1997) 8 BPR 15, 483; *Varthalis v Commonwealth Bank of Australia* [1996] ANZ Conv R 508.

defence under which the whole contract of guarantee is unconscionable, may result only in the particular clause being unenforceable.

It is pertinent to recall that the recent Dawson Report on the TPA,[111] recommended that the Act be amended to prohibit the use of 'take it or leave it contracts'. The Report also suggested that the ACCC should prepare useful guidelines on its interpretation of the unconscionability provisions of Part 1VA of the TPA. It would be particularly valuable for the ACCC to clarify the scope of s 51AC.

The preceding discussion reinforces the submission that the remedial focus in cases involving spousal director guarantees should be directed away from reliance on the controversial *Garcia* defence and towards the TPA. Whether s 51AC expands the boundaries of unconscionability as suggested above, is unclear, although there is a strong case to suggest that such an expansion could occur.

IV Conclusion

Where a term involving future liability is presented on a take it or leave it basis with no requirement for later notification of that increased liability, then arguably it is not fair. It is submitted that the flexibility of allowing for the future flow of credit should be retained in business lending. Therefore 'all moneys' guarantees need not be banned, but the consequences and risks should be fully transparent. Extensions of the guarantee to secure future credit contracts should only be permitted with the acknowledgement and written consent of the informed guarantor at the time of the future advance. While lenders are entitled to assume that the wife, as guarantor has a general understanding of the company's business and financial affairs, they cannot assume that she understands the complexities and risks involved in unlimited or 'all moneys' guarantees. Therefore the procedural reforms in the Banking Code are useful and to a large extent mirror existing requirements in the UCCC, but are only part of the answer. Clearly procedural reforms cannot address the root cause of sexually transmitted debt, which frequently stems from emotional rather than rational decision making by the guarantor. Nevertheless, they can go some way to redressing information balance and lack of understanding of complex guarantee documents. Access to alternative forms of dispute resolution, such as ready access to the Banking and Financial Services Ombudsman is also significant in this respect. However, the Code does not have the force of law, and in any event its treatment of 'all moneys' clauses does not go far enough. Obviously, creditors other than banks are not bound, although there may be a follow-on approach in the use of improved procedures by financiers generally when taking guarantees from vulnerable sureties. Law reform should go further than the Code and cover substantive unfairness. As emphasised in this paper, this requires a uniform, national approach to address unfair terms in contracts, particularly standard form contracts, which offer little, if any, freedom of choice or negotiation of terms. This approach would overcome many problems involving 'all moneys' securities. Any proposed legislation must be wide enough to cover small business transactions. As the NSWLRC noted in its recent report, the vast majority of women's guarantees are given to support the debts of small family businesses.

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111 Above n 52, [3.2].