2022

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10.53300/001c.35703
Yin, K., & Naser, M. M. (2022). The intersection of the rule in Yerkey v Jones and contemporary anti-discrimination law in Australia–Can the 'Special Wives' equity survive?. *Bond Law Review*, *34*(1), 1-26.
https://doi.org/10.53300/001c.35703

Bond University

Bond Law Review

Volume 34 Issue 1

2022

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KENNETH YIN* AND MOSTAFA MAHMUD NASER♦

Abstract

The High Court in Yerkey v Jones considered the enforceability of a guarantee provided by a married woman to secure her husband's debts. Dixon J said that although the relationship of husband and wife did not give rise to a presumption of undue influence, the law had never been divested completely of 'the equitable presumption of an invalidating tendency'. Dixon J's formulation was essentially adopted by the majority justices in Garcia v National Australia Bank and their judgment thus represents the definitive endorsement of Dixon J's view. Kirby J on the other hand rejected 'the stereotype underlying Yerkey', which he described as evidence of an 'unprincipled discriminatory category'.

This article advances the argument that the majority's view of wives was stereotypical and accordingly would be inconsistent with the principles of contemporary sex discrimination laws which prohibit discrimination based on the assumption of stereotypical views. This inconsistency will be explored by first discussing the propositions that underpinned the Yerkey and Garcia, and by comparing them with the treatment of those propositions in contemporary discrimination law.

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We thank the anonymous reviewers for their careful reading of our manuscript and their many insightful comments and suggestions.

I INTRODUCTION

The High Court in *Yerkey v Jones* ('*Yerkey*')[1] considered whether a guarantee provided to a bank by a married woman to secure the debts of her husband should be enforceable. Dixon J stated that although the relationship of husband and wife did not give rise to a presumption of undue influence, the relationship of husband and wife had 'never been divested completely of what may be called equitable presumption of an invalidating tendency'.[2]

This article traces the treatment of Dixon J's views in *Yerkey* via the seminal judgment of the High Court of *Garcia v National Bank Ltd.* ('*Garcia*'),[3] focusing on the proposition that Dixon J's reasoning in *Yerkey v Jones* and of the *Garcia* majority amounted to a stereotyped view of married women. The idea that the views of Dixon J in *Yerkey* and of the *Garcia* majority amounted to a stereotyped role of wives is not in itself novel, and this part of the article serves primarily as an introduction to our more nuanced proposition, that such a stereotyped view of married women is in direct conflict with contemporary principles of sex discrimination, particularly s 39 of the *Anti-Discrimination Act 1977* (NSW) (NSWADA) [4] and equivalent provisions.[5] To that end, this article explores two significant cases of marital status discrimination, *Waterhouse v Bell* ('*Waterhouse*')[6] and *Boehringer Ingelheim Pty Ltd v Reddrop* ('*Boehringer*').[7] Both were decisions of the New South Wales Court of Appeal and, crucially, Kirby P (as he was), who ultimately disagreed with the *Garcia* majority, presided in *Waterhouse*.

This article next explores whether the stereotyped view of married women expressed by Dixon J in *Yerkey* and the *Garcia* majority can survive if directly confronted with contemporary principles in sex discrimination law. This article posits that this view is incompatible with those principles.

The article is divided into the following parts:

Part II introduces a simplistic definition of 'stereotype' which straddles the views underpinning Dixon J's judgment in *Yerkey* and the *Garcia* majority's perspective of married women, as well as the proscription of marital status discrimination in sex discrimination law.

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1 (1939) 63 CLR 649 ('*Yerkey*').
2 Ibid 675.
3 *Garcia v National Bank of Australia* (1998) 194 CLR 395 ('*Garcia*').
4 *Anti-Discrimination Act 1977* (NSW), s 39 ('*NSWADA*').
5 See *Sex Discrimination Act 1984* (Cth), ss 5, 6, 7D(1); *Anti-Discrimination Act 1977* (NSW), ss 24, 39; *Equal Opportunity Act 1995* (Vic), ss 6-9; *Anti-Discrimination Act 1991* (Qld), ss 7-11; *Equal Opportunity Act 1984* (SA), s 29; *Equal Opportunity Act 1984* (WA), ss 8-10; *Anti-Discrimination Act 1998* (Tas), ss 14-16; *Discrimination Act 1991* (ACT), ss 7, 8; *Anti-Discrimination Act 1996* (NT), ss 19, 20.
6 (1991) 25 NSWLR 99 ('*Waterhouse*').
7 (1984) 2 NSWLR 13 ('*Boehringer*').

In Part III, Dixon J's views in *Yerkey v Jones* are introduced, followed by a discussion of the treatment of his reasoning by the *Garcia* majority. This part next explores whether the *Yerkey v Jones* principle has always been accurately understood and applied. In particular, we identify cases where courts applied a flawed understanding of the *Yerkey v Jones Principle* so that those cases can be excluded from our subsequent discussion whether the application of the *Yerkey v Jones* principle does in truth give expression to marital status discrimination.

Part IV explores the argument that it would amount to marital status discrimination under contemporary sex discrimination laws to treat a woman less favourably because of some characteristic generally imputed to them. A detailed analysis of the reasoning that underpinned *Waterhouse v Bell*[8] and *Boehringer Ingelheim Pty Ltd v Reddrop,*[9] two important cases of marital status discrimination, will be conducted, focusing on the argument that the relevant 'characteristic' attracting the prohibition on marital status discrimination was that a married woman's will was overborne by her husband and that this characteristic resulted *solely* from the fact of her being married.

In part V, the article advances the proposition that the *Garcia* majority's view of the *Yerkey v Jones* principle amounted to stereotyping which would be proscribed as marital status discrimination under sex discrimination legislation. The broad scope of Australian sex discrimination law will be probed.

The conclusion explores the hypothesis that the *Yerkey v Jones* principle, despite criticisms of its being 'anachronistic', has never been expressly confronted with the argument that it is categorically incompatible with principles of marital status discrimination. The article offers a prognosis of the outcome of such a hypothetical confrontation if it arises.

II UNDERSTANDING 'STEREOTYPING'

An understanding of 'stereotyping' is needed to appreciate that stereotyping underpins both the rationalisation leading to what ultimately was a remedy for the married woman pursuant to the *Yerkey v Jones* principle as well as the proscription of marital status discrimination under relevant sex discrimination legislation. A rudimentary understanding is enough for these limited purposes.

A 'stereotype', by one definition, is 'a generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group'.[10] Brems

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8 *Waterhouse* (n 6) 99.

9 *Boehringer* (n 7) 13.

10 Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010) 9.

and Timmer explained that 'stereotypes assign certain roles and characteristics to a group. Examples include the notions that women are nurturing and weak, men combative and powerful, and gays promiscuous and unsuited to parenting'.[11] Such stereotypes 'restrict people to supposed group characteristics' and are likely to erode their 'dignity and personal autonomy'.[12]

Thus, a stereotype, at its most simplistic, is a preconception of the subject's attributes.[13] Particularly with women, Evatt J had described a 'stereotype' as an 'assumption about their status and capabilities'. [14] Such 'assumptions' may lead to 'inequality and discrimination' and thereby subvert the enjoyment of certain human rights. [15] Notably, several human rights instruments have imposed obligations on state parties to combat 'stereotyping' [16] including the *United Nations Convention on the Elimination of All Forms of Discrimination against Women* ('*CEDAW*') which requires state parties to modify 'social and cultural patterns of conduct' that are based on 'stereotyped roles for men and women'.[17] Australia signed the *CEDAW* on 17 July 1980, and thus invoked international obligation to implement the rights enunciated in the *Convention*. Since then, Australia has developed many mechanisms for giving effect to the rights within the *Convention*, and the adoption of the *Sex Discrimination Act 1984 (Cth)* ('*SDA*') is considered one of the significant steps to that direction. [18] This objective is explicitly stated in the s 3 of the *SDA* that one of its main aims is to 'give effect to certain provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women*'.[19]

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11 Eva Brems and Alexandra Timmer (eds), *Stereotypes and Human Rights Law* (Intersentia, 2016) 1.

12 Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11(4) *Human Rights Law Review* 707, 709.

13 Ibid 714.

14 Elizabeth Evatt, 'Equality and Gender Bias in the Law' (1993) 65 *Reform*1, 2.

15 Brems and Timmer (n 11) 1.; Timmer (n 12) 709.

16 See The *Convention on the Elimination of All Forms of Discrimination against Women*, open for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*') art 5(a); The *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008 ('*CRPD*') art 8(b); The *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 210 ('*Istanbul Convention*'), arts 12 and 14.

17 *CEDAW* art 5(a). See also art 10(c).

18 Australian Human Rights Commission, 'Women of the World – CEDAW and the Sex Discrimination Act', *Woman of the World – Know Your International Human Rights* (Web page, 28 July 2019) <https://www.humanrights.gov.au/our-work/woman-world-cedaw-and-sex-discrimination-act#8>.

19 *Sex Discrimination Act 1984* (Cth) s 3.

III THE DISTILLATION OF THE *YERKEY V JONES* PRINCIPLE

The facts in *Yerkey v Jones*[20] were that John Yerkey and his wife Mary brought an action in the Supreme Court of South Australia against Florence Jones and her husband, Estyn Jones for principal and interest secured by a memorandum of mortgage. Mrs Jones alleged undue influence on the part of the plaintiffs and her husband acting together and on the part of her husband separately.

Undue influence was not found. Nonetheless, Dixon J, said that the law had never been divested completely of an equitable presumption of an invalidating tendency,[21] and propounded that a married woman's guarantee was liable to be set aside under the following circumstances:

> [I]f 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.[22]

Dixon J's analysis is often referred to eponymously as the *Yerkey v Jones* principle.[23] Under the *Yerkey v Jones* principle, a female whose state of being married and no more is the primary basis to set aside a guarantee that she executed to secure her husband's debts.[24] Dixon J's view was described by *Cheshire and Fifoot* as readily showing 'something close to undue influence' even though, as the authors noted, the relationship of husband and wife does not itself raise a presumption of undue influence.[25]

The High Court's judgment in *Garcia v National Australia Bank*[26] contains the seminal contemporary Australian treatment of the *Yerkey v Jones* principle.

The facts in *Garcia* were described as 'fairly typical of this type of case'.[27] The Garcias, a husband and wife, had executed a mortgage over their home in favour of the bank, which secured all monies including future guarantees that either of them might execute. Mrs Garcia was a physiotherapist and found to be a capable woman.[28] Subsequently Mrs

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20 *Yerkey* (n 1).
21 Ibid 675.
22 Ibid 683 (Dixon J) (emphasis added).
23 See Nick Seddon and Rick Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis, 2017) 794.
24 See ibid 811-822. However, the majority noted that the principle applied in *Yerkey v Jones* may find application to 'long term publicly declared relationships short of marriage between members of the same or of opposite sex' *Garcia* (n 3) 404 (in the joint judgement of Gaudron, McHugh, Gummow and Hayne JJ *obiter*).
25 Seddon and Bigwood (n 23) 778.
26 *Garcia* (n 3) 409.
27 Seddon and Bigwood (n 23) 782.
28 *Garcia* (n 3) 401.

Garcia signed several guarantees to secure a loan to Mr Garcia for use in his company; although a director, she had no involvement in the management of the company. The couple subsequently separated, and the company was wound up.

Mrs Garcia sought declarations that the various documents were of no force or effect and relied on the *Yerkey v Jones* principle for relief.

Garcia like *Yerkey* thus concerned a married woman who had guaranteed her husband's debts and sought to be relieved of her obligations under it.

The majority of the High Court in *Garcia* famously endorsed the principles set out by Dixon J in *Yerkey* as 'authoritative', saying that they were 'particular applications of accepted equitable principles which have as much application today',[29] that a party having a legal right should not be permitted to exercise it in a way that amounted to unconscionable conduct.[30] In so doing, the *Garcia* majority focused on that part of Dixon J's judgment in *Yerkey* where he confronted the proposition that 'the only substantial or only ground for impeaching the instrument is misunderstanding or want of understanding' in which case the reliance placed on the creditor for the purpose of informing the wife what it was about must be of great importance.[31]

The following is the pivotal passage of the *Garcia* majority's reasoning[32]

> (a) the wife (surety) did not understand the purport and effect of the transaction; (b) the transaction was voluntary, in the sense that the surety obtained no gain from the contract the performance of which was guaranteed; (c) the creditor is to be taken to have understood that the wife (as surety) may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and (d) the creditor nonetheless did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her.[33]

It is necessary to juxtapose Kirby J's reasoning against that of the *Garcia* majority to fully appreciate the purport of each. Kirby J, contrary to the *Garcia* majority, focused on the nature of the *particular* relationship, asking if it was one of emotional dependence on the part of the surety, rather than assume that wives generally were vulnerable or unable to take care of their own interests.[34] Kirby J described the majority's reasons as being a stereotyped view of married women,[35] a view we explore in detail in Part 4 below. Whilst acknowledging that

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29 Ibid 403.
30 Ibid 409; see also the discussion of this view at Seddon and Bigwood (n 23) 779.
31 *Garcia* (n 3) 406.
32 Ibid 420.
33 Ibid 395.
34 Ibid 427-28.
35 Ibid 424.

the 'stereotype underlying *Yerkey* may hold true for some, perhaps even a significant number of, wives' Kirby J opined that 'this Court should, where possible, refuse to 'classify unnecessarily and overbroadly by gender when more accurate and impartial' principles can be stated'.[36]

Much confusion exists concerning the parameters of the *Garcia* majority view of the *Yerkey v Jones* principle, in particular whether the invalidation of the wife's guarantee was because of undue influence or if there was a separate, invalidating factor which operated in the absence of undue influence, leading to a 'voluminous' body of literature.[37] As *Cheshire and Fifoot* said:

> The High Court's decision in *Garcia v National Australia Bank* Ltd. has not made analysis of this area of the law (the identification of the parameters of the *Yerkey v Jones* principle) any easier. First, it is not always clear whether on the facts of any particular case, the principle is simply undue influence or whether it is a separate, special principle.[38]

To the above passage, the following footnote was added:

> There is no doubt that it (the *Yerkey v Jones* principle) is treated as a separate principle in some of the cases because the court has held that the wife has no relief under other principles such as undue influence or unconscionability.

Professor Elizabeth Stone alluded to the complications, following *Garcia,* in identifying the precise parameters of the *Yerkey v Jones* principle thus:

> In other cases, the judgments have applied *Garcia* as if it were based on principles of undue influence. The decision of the Queensland Court of Appeal in *ANZ Banking Group v Alirezai*[39] is a good example of this tendency to elide the quite different concepts of 'trust and confidence' and undue influence.[40]

The *Yerkey v Jones* principle amounts to the assumption of a stereotype, which the *Garcia* majority had characterised as a situation where the cause of the invalidation of the wife's guarantee was no more than the fact of her being married, what *Cheshire and Fifoot* had described as a 'separate, special principle'. It is important to distinguish the application of the *Yerkey v Jones* principle from the type of situation which Kirby J had explored, where the cause of the invalidation of a

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36 Ibid 427.

37 See eg Seddon and Bigwood (n 23) 778: 'The exact reach of this (the *Yerkey v Jones*) principle is not clear. It has excited a lot of attention in the last two decades or so'. See also Elizabeth Stone, 'The Distinctiveness of Garcia' (2006) 22 *Journal of Contract Law* 170, 172.

38 Seddon and Bigwood (n 23) 778.

39 (2004) QCA 6. Cited in Stone (n 37) 184.

40 Stone (n 37) 184.

wife's guarantee should be the emotional dependence on the part of the surety or some other invalidating factor. [41]

Cases which invoke a conflated view variously of 'trust and confidence', 'undue influence', and the fact that some invalidating tendency arises from the fact of the wife's being married, or some combination of these, serve no useful purpose in demonstrating the *Yerkey v Jones Principle*. The following passage from *ANZ Banking Group v Alirezai* ('*Alirezai*'), which Stone cites, lucidly shows this conflation and the difficulties that arise because of it:

> Special relationships of sufficient trust and confidence in which one party could abuse that trust and confidence so as to invoke equitable relief for transactions entered into by the other are not a closed category; they could, for example, arise in some parent–child relationships or perhaps in the relationship between a disabled person and carer; many other potential examples can be envisaged.[42]

McMurdo P's judgment in *Agripay Pty Limited v Byrne ('Agripay')*[43] is to similar effect. McMurdo P commenced her discussion of *Garcia* by setting out the majority's judgment in full,[44] including the reference to the High Court's seminal observation that the invalidating aspect of the wife's guarantee was that the lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business.[45]

Practically *uno flatu,* McMurdo P however also said:

> There seems to be no sound reason why these principles should be limited to wives entering into guarantees of their husbands' liabilities. Human weaknesses and unconscionable conduct are not limited to heterosexual marriage relationships. These legal principles should apply equally to all vulnerable parties in personal relationships: see Kirby J's reasons in *Garcia*, especially at 435 [83]… .

McMurdo P's subtle conflation of the principles of 'unconscionable conduct' arising from some perception of human weakness and unconscionable conduct invalidating the wife's guarantee and of the *Yerkey v Jones Principle* is particularly confusing. Though her Honour actually purported to rely on Kirby J's reasoning in *Garcia* to underpin her reasoning, Kirby J had himself disavowed the veracity of the *Garcia* majority's view of the *Yerkey v Jones Principle,* far less endorse its application to 'other relationships'.[46] Kirby J's reasoning had focused on the nature of the particular relationship, asking if it was one of emotional dependence on the part of the surety, rather than assume the

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41 Cf *Garcia* (n 3) 427 (Kirby J).
42 *ANZ Banking Group Ltd v Alirezai*, QCA 6, 9 [39] ('*Alirezai*').
43 [2011] QCA 85 (*'Byrne').*
44 *Garcia* (n 3) 375.
45 *Byrne* (n 44) 11.
46 *Garcia* (n 3) 428.

inherent vulnerability of any generic class of guarantor,[47] whilst acknowledging that the stereotype underlying *Yerkey* may hold true for some, perhaps even a significant number of, wives.[48]

Authentic undue influence cases on the other hand are those where, axiomatically, the creditor was aware of the influence whereas in cases which apply the reasoning of the *Garcia* majority, the wives' guarantees were sought to be impugned because of knowledge of the relationship, and no more, on the part of the creditor. *Bank of New South Wales v Rogers* ('*Rogers*')[49] is a clear example of the former type of case. Whilst *Rogers* was not a case of a wife's guarantee, it is proffered as a lucid illustration of the type of reasoning in which it was knowledge of the influence, not of any relationship without more, which tainted the bank's guarantee. The case thus usefully provides a clear contrast with the reasoning of the *Garcia* majority. Relevantly, McTiernan J said:

> The proof of [her] claim is twofold. It is necessary for her to prove that Gardiner procured the securities to be given to the bank *by undue influence or* other fraudulent means and that the [bank]…had notice either actual or constructive that the securities were obtained by such means [emphasis added].[50]

There is a telling contrast between the language in *Rogers* and the *Garcia* majority. In *Rogers*, the influence exerted by the creditor was the means by which the debtor had procured the securities, knowledge of which influence then rendered their being vulnerable to be set aside. The reasoning of the *Garcia* majority on the other hand did not invoke any consideration of the exertion of any influence, rather the invalidation of the wife's guarantee was based on the assumption that by reason of the marriage relationship, the wife would repose trust and confidence in her husband and leave the business arrangements to him.[51]

By way of contrast, an illustration of a case which did starkly adopt the reasoning of the *Garcia* majority was *State Bank of New South Wales Ltd. v Chia* ('*Chia*').[52] From the outset, it was made clear that the case did not turn on undue influence:

> As Mr Evans (counsel) made clear in his opening, Mrs Chia does not claim that the transaction was procured as a result of undue influence of her husband.[53]

Einstein J explained that the case before him invoked the requirement in *Garcia* that by reason of the marriage relationship the wife would

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47 Ibid 427-428.
48 Cf *Garcia* (n 3) 427 (Kirby J).
49 [1941] 65 CLR 42 ('*Rogers*').
50 Ibid 61 (McTiernan J).
51 See *Yerkey* (n 1); *Garcia* (n 3).
52 (2000) 50 NSWLR 587 ('*Chia'*).
53 Ibid 597.

repose trust and confidence in the husband.[54] Rather than conflating[55] the aspects of influence and of trust and confidence, Einstein J explained that the invalidating aspect of the wife's guarantee was knowledge of the marriage relationship rather than the exertion of undue influence on the part of the husband.

> The third requirement is knowledge on the part of the person taking the security, that the guarantor is the wife of the debtor.[56]

Chia thus represents an unequivocal endorsement and application of the *Garcia* majority's view of the *Yerkey v Jones Principle*.

Bank of Western Australia v Abdul[57] can similarly be analysed:

> There is no question that Bankwest knew that the first and second defendants were married. *Consequently,* Bankwest is 'to be taken to have understood that, as a wife, [Mrs Abdul] may repose trust and confidence in her husband in matters of business and therefore to have understood that [Mr Abdul] may not fully and accurately explain the purport and effect of the transaction to his wife [emphasis added].[58]

The conjunctive 'consequently' is telling because it goes to the core of the *Yerkey v Jones Principle*, that the knowledge of the relationship of trust and confidence arises solely from knowledge of the marriage relationship.

IV THE ILLEGITIMACY OF THE STEREOTYPICAL ASSUMPTION THAT A MARRIED WOMAN'S WILL IS OVERBORNE IN AUSTRALIAN ANTI-DISCRIMINATION LAW

Waterhouse and *Boehringer* were both concerned with complaints of discrimination by an employer under s 40(1) of the *NSWADA*. That section makes it unlawful for an employer to discriminate against a person on the grounds of marital or domestic status.[59] Section 39(1), pivotal to both cases as providing the framework for a finding of discrimination, is set out in full below:

> (1) A person ('the perpetrator') discriminates against another person ('the aggrieved person') on the ground of marital or domestic status if the perpetrator:
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> (a) on the ground of the aggrieved person's marital or domestic status or the marital or domestic status of a relative or associate person of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially

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54 Ibid 598.
55 'Eliding' – per Stone (n 37) 59.
56 *Chia* (n 53) 601.
57 *Bank of Western Australia v Abdul* [2012] VSC 222 ('*Abdul*').
58 Ibid [63] referring to *Garcia* (n 3).
59 *NSWADA* (n 4) s 40(1).

> different, the perpetrator treats or would treat a person of a different marital or domestic status or who does not have such a relative or associate of the marital or domestic status, or
>
> (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of a different marital or domestic status, or who do not have a relative or associate of that marital or domestic status, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.
>
> (1A) For the purposes of subsection (1) (a), something is done on the ground of a person's marital or domestic status if it is done on the ground of the person's marital or domestic status, a characteristic that appertains generally to persons of that marital or domestic status or a characteristic that is generally imputed to persons of that marital or domestic status.

The various Commonwealth and State Acts which address marital status discrimination contain similar wording.[60]

The expression 'stereotype' is not defined in the *NSWADA* or equivalent provisions,[61] and it is to case law that we turn to determine its materiality, if any, to marital status discrimination. Relevantly, Mahoney JA explained in *Boehringer*[62] that the definition of marital status discrimination in s 39(1) of the *NSWADA* covered not just the status of being married, but characterised s 39 as being a 'formula' for a finding of discrimination based on a 'stereotyped characterisation' of a married person, saying in the following pivotal passage:

> S 39(1) in effect expands the meaning of 'marital status' in 40(1): it extends it so as to include not merely marital status, as defined by s 4(1), but also the two characteristics specified in ss 39(1)(b) and 39(1)(c). The legislature was, perhaps, moved to provide for this kind of extension in order to prevent discrimination '*based on stereotyped characterisations of*' persons of particular sex or marital status: cf *Phillips v Martin Marietta Corp* 400 US 542 (1971) at 545 per Marshall J. But the legislature did not merely add such characteristics to the meaning of marital statute; *it also provided a formula for determining whether there has been discrimination* (emphasis added).[63]

The homogeneity with other equivalent State and Commonwealth laws[64] makes Mahoney JA's reasoning particularly useful.

The respondent in *Boehringer,* Mrs Redropp, had applied for a job with the appellant. She was married to an employee of a competitor of

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60 See (n 5) above.
61 See Ibid.
62 *Boehringer* (n 7) 12 (Mahoney JA) (emphasis added).
63 Ibid 18. Note that Mahoney JA referred to the then version of the *NSWADA*. Section 39 is later revised while the essence of the section remains same for the purpose of the argument formed here.
64 See (n 5).

the appellant. When she did not obtain the position, she contended that the appellant had discriminated against her on the grounds of marital status.[65]

The evidence of the parties in *Boehringer* conflicted in several significant places, including the extent the fact of Mrs Redropp's being married to an employee of a competitor played in the decision not to employ her.

The Equal Opportunity Tribunal considered that 'marital status' had an 'extended meaning', including the status of being married to an employee of a competitor. However, Mahoney JA explained that the prohibition on 'discrimination' in the NSWADA was a reference to discrimination based on the status of being married and did not include 'discrimination based on the identity or situation of one's spouse'.[66]

Priestley JA explained that the prohibition on discrimination in sub paragraph (a) was on discrimination 'against a married person simply because he is married and for no other reason';[67] in sub paragraph (b) 'against a married person because of some particular characteristic that all or nearly all married persons have'; [68] and in sub paragraph (c) (now repealed but essentially replicated within s 39(1A)) 'against a married person on the grounds of some particular characteristic which married persons are generally believed to have whether or not they have it'.[69]

Priestley JA's comment concerning the then sub paragraph (c), 'a characteristic that is generally imputed to persons of his marital status' is particularly significant, since it encompasses the notion that marital status discrimination includes discrimination not only on the basis of some actual characteristic possessed by wives, but also their *assumed* characteristics.

Priestley JA further clarified:

> I can see nothing in this which can justify a conclusion that *BI*'s decision not to employ Mrs Redropp was wholly or partly on the ground of the proneness to disclose confidences to their husbands which the tribunal thought is generally imputed to married women. *BI*'s[70] decision not to employ Mrs Redropp was on the ground of the possibility that she might disclose whether by inadvertence or otherwise, confidential information of *BI* to her competitor-employed husband (emphasis added).[71]

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65 *Boehringer* (n 7) 13–14; 29–31. (the latter passages containing useful observations on the evidence).

66 Ibid.

67 '*his marital status'*. This is in s 39(1A) in the current version of the Act.

68 'a characteristic that appertains generally to persons of his marital status' This is in s 39(1A) in the current version of the Act.

69 'a characteristic that is generally imputed to persons of his marital status'. This is in s 39(1A) in the current version of the Act.

70 The court's acronym for the appellant Boehringer Industries.

71 *Boehringer* (n 7) 31.

His Honour then noted, crucially, that this 'individual characteristic' was not a characteristic within the meaning of s 39(1)(c)[72] and so found that BI's conduct did not amount to marital status discrimination.[73]

The finding that the decision not to employ Mrs Redropp was made not on the basis of some generalised assumption concerning a characteristic of married women meant that that decision did not result from the adoption of a 'stereotype' in the sense explained by Mahoney JA.[74] The idea that marital status discrimination must be underpinned by the adoption of a stereotypical assumption concerning the characteristics of married women rather than some individual characteristic of the wife coheres with the several definitions of 'stereotype' explored earlier,[75] in particular Evatt J's barbed comment that with women, a stereotype is an assumption about their status and capabilities.[76] Whilst Mahoney and Priestley JJA's reasoning upon reflection seems almost axiomatic, it is noteworthy that the Equal Opportunity Tribunal had itself originally fallen into error in finding that the appellant had offended s 39 of the *NSWADA*.

Contrary to *Boehringer*, the New South Wales Court of Appeal in *Waterhouse* did find that marital status discrimination had been committed under the same Act, the *NSWADA*. A comparison of the respective findings in those cases furnishes us with insight into the requirement of the satisfaction of a stereotypical assumption concerning the characteristics of married women for marital status discrimination to be found.

The plaintiff in *Waterhouse* was married to one Robbie Waterhouse. She applied to the Australian Jockey Club for a trainer's licence. Her application was rejected because she was married to a person who was warned off all races in Australia on a number of occasions due to his involvement in a horse substitution scandal and who was notorious in horse-racing circles.

A feature common to both *Boehringer* and *Waterhouse,* at a high level of abstraction, was that the respective plaintiffs were married to someone and the fact of their marriage to that person was a pivotal consideration in the decision concerning the grievance for which they sought redress. Clarke JA's following question to himself in *Waterhouse* serves as a prelude to an appreciation of the factual differences between the two cases resulting in their ultimate different outcomes: 'The question which arises can be shortly stated: Was the

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72 In the version of the Act at the time. The same provision is now part of s 39(1A) of *NSWADA*.
73 *Boehringer* (n 7) 31.
74 Cf *Waterhouse* (n 6) 111, 114.
75 Cf Cook and Cusack (n 10) 9.; Brems and Timmer (n 16) 1.
76 See Evatt (n 14) 2.

Tribunal bound by *Boehringer Ingelhaim Pty. Ltd. v Reddrop* to dismiss the plaintiff's complaint?'[77]

At first instance, the Tribunal in *Waterhouse,* accepting that *Boehringer* was authoritative, noted: *first*, that the sole reason that Mrs *Waterhouse* was denied a trainer's licence was because she was married to Robbie Waterhouse*,* apparently notorious in racing circles; *secondly*, that the denial to her of registration because she was married to Robbie Waterhouse or because of an apprehension that she may be corrupted by him, did not amount to marital status discrimination and *Boehringer* could not be distinguished.

Clarke JA, though endorsing the reasoning of both Mahoney and Priestley JJA in *Boehringer*, added the following crucial enquiries, whether the first defendant acted as it did (in refusing Mrs Waterhouse's application for a trainer's licence) because the plaintiff was married to Robbie Waterhouse*,* and whether it believed that she, in common with married women generally, was susceptible to the corrupting influence of the husband.[78] Clarke JA, after carefully analysing the facts and reasoning in *Boehringer,* opined that the pivotal aspect of *Boehringer* which led to the finding in that case that BI had not engaged in marital status discrimination was that:

> the decision was grounded upon a characteristic which was particular to Mrs Redropp (and not generally imputed to married women) that is that she had a close relationship with an employee of a competitor.[79]

Keeping Clarke JA's observation at the forefront, the relevance of various evidentiary aspects of *Waterhouse* becomes clearer.

The *first* of those evidentiary aspects was the evidence that the personality of Mr Robbie Waterhouse was that he would be able to persuade or influence his wife, to which his Honour added a brief gloss, saying that a person might be capable of influencing others on many matters but be quite incapable of corrupting that person; the *second* of those evidentiary aspects was the observation that nothing critical was said about the plaintiff herself, nor was there was anything in her make-up which rendered her vulnerable to a corrupting influence; the *third* of those evidentiary aspects, and most significantly, was the evidence of one Bell, the chairman of the Australian Jockey Club which was noted in the judgement as follows:

> When pressed as to why the plaintiff might be susceptible to the corrupting influence of Robbie Waterhouse his clear and emphatic answer was that it was because she was married to him.[80]

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77 *Waterhouse* (n 7) 102.
78 Ibid 110.
79 Ibid 115.
80 Ibid 111.

Absent any suggestion of a character deficiency on the part of the wife, Clarke JA asked why the fact that the wife was married to a rogue meant that she was liable to be corrupted by him. Clarke JA's answer to his own question was:

> Because all wives are liable to be corrupted by their husbands. That is, that corruptibility at the hands of one's husband is a characteristic attributed or generally attributed to all married women. A finding of this nature clearly falls within s 39(1)(c) (emphasis added).[81]

The reasoning in *Boehringer* and *Waterhouse,* juxtaposed, is that in the former, marital status discrimination was not established because the decision was underpinned by the fact that the wife was married to employee of a competitor rather than some characteristic attributed to married women generally whilst in the latter, marital status discrimination was found because of the adoption of a stereotypical generalisation concerning an attribute of married women, that they were liable to be corrupted by their husbands.

Finally, we recount that Kirby J himself presided in *Waterhouse*. This is significant given his subsequent role in *Garcia*, which we explore below.

V IS THE *YERKEY V JONES PRINCIPLE* INCOMPATIBLE WITH CONTEMPORARY SEX DISCRIMINATION LAW?

In this part, we advance the argument that the *Yerkey v Jones Principle* is at worst incompatible, and at best cannot co-exist comfortably, with, the principles of contemporary sex discrimination law.

The word 'stereotype' is not actually mentioned in the *Garcia* majority's judgment and their decision was not based on the idea that women were subservient or that they occupied an inferior economic status, but rather on the unfairness that could flow from the relationship of trust and confidence characterising the marriage relationship.[82] The *Garcia* majority also disavowed any suggestion of an imbalance of power between the genders, but, rather, stated that the *Yerkey v Jones Principle* was a reflection of the trust and confidence each has in the other.[83] Dixon J also had said in *Yerkey* itself that the marriage relationship did not give rise to a presumption of undue influence.[84]

Callinan J, who wrote a separate judgment to the *Garcia* majority, stated that society's recognition of the equality of the sexes had led to rejection of the concept that the wife was subservient to the husband in

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81 Ibid 114.
82 *Garcia* (n 3) 420.
83 See *Yerkey* (n 1); *Garcia* (n 3).
84 *Yerkey* (n 1) 675.

the management of the family's finances,[85] yet in the same paragraph noted that 'in a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions'. [86] Endorsing Dixon J's judgment in *Yerkey*, Callinan J also said:

> For myself I would take the view that the principles stated by Dixon J have now stood and been accepted for so long as the law in Australia...that they should be taken as the law unless and until this Court has held or should now hold to the contrary.[87]

The argument that the reasoning of the *Garcia* majority that the wife, because she is a wife, would 'repose trust and confidence' in the husband amounts to a stereotypical assumption, has long been propounded, and persists, with numerous commentators suggesting that such reasoning is underpinned by various factors including: (a) the married women's will is generally overborne by their husband because of the trust and confidence reposed on their husband;[88] (b) married women are allowed to incur legal responsibilities 'without taking trouble to understand them which would normally be expected of any adult' while they are in marriage relationship, and it is excusable and protected under the special wives' equity;[89] and (c) a married woman while acting as surety for her husband's borrowings, is subservient to him and suffers from financial ineptitude.[90] *Stone* said that the marriage relationship was one in which, by the reasoning of the *Garcia* majority, ignorance of one's own affairs is excusable *and* notorious (the emphasis is reproduced from the article).[91] Finally, *Cheshire and Fifoot* opined that the effect of the *Garcia* majority's view was that the wife's will was 'more or less assumed to be overborne by her husband'.[92]

By the same reasoning, Callinan J's judgment would be considered to adopt a stereotypical view of married women.

The judicial antecedent to the *Garcia* majority's reasoning can be readily located in *Yerkey v Jones,* namely Dixon J's now celebrated observation, virtually definitive of the *Yerkey v Jones Principle* itself*,* that the relationship of husband and wife had never been divested fully of an equitable presumption of an invalidating tendency. [93] This

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85 *Garcia* (n 3) 441.
86 Ibid.
87 Ibid 440.
88 Tim Wright, 'The Special Wives' Equity and the Struggle for Women's Equality' (2006) 31(2) *Alternative Law Journal* 66, 66.
89 Stone (n 40) 172-73.
90 Wright (n 97) 69.
91 Stone (n 40) 172.
92 Seddon and Bigwood (n 23) 779.
93 *Yerkey* (n 1) 675.

reasoning without more clearly reflects a stereotypical assumption of the characteristics of married women.

In *Garcia,* concerning the question whether the views of the *Garcia* majority were 'stereotypical', Kirby J said:

> *Rejecting discriminatory stereotypes*:… A principle which accords to all married women a 'special equity' based on their supposed need for protection rests upon a stereotype of wives to which this Court should give no endorsement.[94] All persons of full capacity, including married women, should ordinarily conform to commercial transactions which they enter unless statute or judicial law affords relief. Marriage, and being the female member to a marriage, is not, as such, a relevant reason for relief from legal obligations.

Kirby J explicitly characterised the *Yerkey v Jones Principle* (whose adoption he expressly rejected) as being one where there was a presumption that because of the 'invalidating tendency', a characteristic of a security granted by a married woman in favour of her husband, a court would be more ready to find that a husband had exercised undue influence.[95]

Garcia was a banking case; section 4 of the *NSWADA* explicitly includes 'banking' in its definition of 'services' captured under that *Act* as is the case with *all* equivalent state and territory anti-discrimination laws.[96] The prohibition of discrimination in the provision of 'services', including, relevantly, 'banking', is then specifically caught in s 47 *NSWADA* and equivalent state and territory legislation.[97]

Kirby J then specifically confronted the question whether the *Yerkey v Jones Principle* was incompatible with sex discrimination legislation.[98]

> *Unacceptable discrimination*: There is a final reason for rejecting the special equity founded by Dixon J in *Yerkey v Jones*. Since 1939, Australian society and its legal systems have moved away from irrelevant discrimination, whether on the grounds of sex, matrimonial status or otherwise.[99] Any modern expression of a 'special equity' by this court

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94 *Garcia* (n 3) 425.

95 *Garcia* (n 3) 425.

96 *Sex Discrimination Act 1984* (Cth) s 4; *Equal Opportunity Act* 1995 (Vic) s 4; *Anti-Discrimination Act* 1991 (Qld) sch 1; *Equal Opportunity Act* 1984 (SA) s 4; *Equal Opportunity Act* 1984 (WA) s 4; *Sex Discrimination Act* 1994 (Tas) s 4; The Dictionary to the *Discrimination Act* 1992 (ACT); *Anti-Discrimination Act* 1992 (NT) s 4.

97 *Sex Discrimination Act 1984* (Cth) s 22; *Equal Opportunity Act* 1995 (Vic) s 44; *Anti-Discrimination Act* 1991 (Qld) s 46; *Equal Opportunity Act* 1984 (SA) s39; *Equal Opportunity Act* 1984 (WA) s 62; *Sex Discrimination Act* 1994 (Tas) s 22; *Discrimination Act* 1992 (ACT) s 20; *Anti-Discrimination Act* 1992 (NT) s 41.

98 *Garcia* (n 3) 427.

99 *Sex Discrimination Act* 1984 (Cth), ss 5, 6, 70(1). See also *Anti-Discrimination Act* 1977 (NSW), ss 24, 39; *Equal Opportunity Act* 1995 (Vict). ss 6-9; *Anti- Discrimination Act* 1991 (Qld), ss 7-11; *Equal Opportunity Act 1984* (SA), s 29; *Equal Opportunity Act 1984* (WA), ss 8-10; *Sex Discrimination Act 1994* (Tas), ss 14-16; *Discrimination Act 1991* (ACT), ss 7, 8; *Anti-Discrimination Act 1992* (NT), ss 19, 20. See *Gregg v Tasmanian Trustees Ltd* (1997)

> should similarly avoid unprincipled discriminatory categories. The stereotype underlying *Yerkey* may hold true for some, perhaps even a significant number of wives. But this Court should, where possible, refuse to 'classify unnecessarily and overbroadly by gender when more accurate and impartial' principles can be stated…
>
> Although it is suggested that *Yerkey* may sometimes provide an appropriate means to afford protection to a vulnerable person who happens to be a wife, its expression is in my view completely unacceptable as a principle of contemporary Australian law. It should be rejected not because (as the Bank put it) it is demeaning to women but because it lends the authority of this Court, and thus of Australian law, to an exposition of principle which is completely inappropriate.[100]

The *Garcia* majority view is frequently criticised as anachronistic and controversial, as 'the idea that a wife is more or less assumed to be overborne by her husband is one that has attracted indignation, agonising and recognition that this does still happen in this day and age'.[101]

Despite the frequently expressed laments that the *Garcia* majority's view is anachronistic and outdated,[102] Kirby J alone of the *Garcia* bench considered the application of the *Yerkey v Jones Principle* to express a principle that was stereotypical and not merely discriminatory but categorically incompatible with Australian sex discrimination legislation. As noted earlier in this paper, the expression 'stereotype' is not actually defined in the *NSWADA* or equivalent provisions.[103] The proscription on stereotyping as being discriminatory nonetheless is however lucid in both *Boehringer* and *Waterhouse* since the reasoning of the New South Wales Court of Appeal in both was underpinned by an analysis of whether the decisions were made because of 'some particular characteristic which married persons are generally believed to have',[104] which Mahoney JA in *Boehringer* had explained as meaning 'a stereotyped characterisation of persons of particular sex or marital status.'[105]

The long title of the *NSWADA* states that it is: 'An Act to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all

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73 FCR 91 at 114, per Merkel J (please note that this footnote is reproduced from the case itself).

100 *Garcia* (n 3) 427-428.

101 Seddon and Bigwood (n 23) 779.

102 See *Garcia* (n 3) 399, 434; *Warburton v Whiteley* (1989) NSW Conv R s55-453, 58, 286-7 (New South Wales Court of Appeal) [Kirby P (as he then was)] (*'Warburton'*); Wright (n 97); Samantha Hepburn, 'The *Yerkey* Principle and Relationship of Trust and Confidence: *Garcia v National Australia Bank*' (1997-98) (4)1 *Deakin Law Review* 99, 101.

103 See Part IV of this article.

104 S39(1) *NSWADA*.

105 *Boehringer* (n 7), 18.

persons'. Professor Beth Gaze has queried the aim of anti-discrimination law:[106]

> What is the aim of anti-discrimination law? Is it, as Creighton suggested, a prescription for change, encouraging, even requiring, thoroughgoing social change in order to reduce or eliminate unfair discrimination which to many seems pervasive in our society?[107] Or is it tokenism, allowing politicians to claim that discrimination has been dealt with while providing a remedy for only those few who suffer through the actions of an isolated, clearly identifiable 'bad individual' in what is generally a fair and equitable society.

The reasoning of the *Garcia* majority is sometimes regarded as a beneficial development for married women as it formed the basis on which she could obtain relief from the enforcement of a guarantee in her husband's favour.[108] It is also been argued that the 'special wives' equity' in giving special protection to married women offers 'remedies' thereby helping them overcome the social, economic and structural disparities faced by women in relationships.[109] The Australian Law Reform Commission's Report - ALRC 69 *Equality Before the Law: Women's Equality* advances this proposition explicitly:

> The principle in *Yerkey v Jones* is narrow and outmoded but nonetheless is an important *remedy* for married women [emphasis added].[110]

The riposte to the argument that the *Yerkey v Jones Principle* is an important 'remedy' is found within the above observation itself; if, as explicitly conceded by its authors the stereotype of the married woman is 'outmoded' then, adopting Kirby J's view, the continued acceptance of the *Yerkey v Jones Principle* even if it afforded a 'remedy' for married woman should nonetheless be rejected as being an exposition of principle which is completely inappropriate.[111] We recount that Kirby J stated in *Garcia* that marriage, and being the female member to a marriage, is not, as such, a relevant reason for relief from legal obligations'.[112] His Honour was thus obviously alive to the argument

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106 Beth Gaze, 'Context and Interpretation in Anti Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 329.

107 The footnote is reproduced verbatim: 'WB Creighton, "The *Equal Opportunity Act* — Tokenism or Prescription for Change?" (1978) 11 *Melbourne University Law Review* 503, 535 concluded: Tokenism as it undoubtedly is, it is better to have the *EOA* than to have nothing so long as it is not allowed to obscure the need for a much more radical approach to the problems with which it purports to deal. Even a rather half-hearted gesture like the *EOA* can serve a useful purpose as a consciousness-raising exercise both for the victims of discrimination and for the perpetrators of it. Despite many changes over the years, many of the features identified by Creighton as tokenism in the *Equal Opportunity Act 1977* (Vic) are still present in the *EOA 1995* (Vic).'

108 See, for example, Stone (n 37) 172.

109 See Anthony J Duggan, 'Till Debt Us to Part: A Note on *National Australia Bank Ltd v Garcia*' (1997) 19(2) *Sydney Law Review* 220, 229.

110 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (Report No 69, 1994) [13.29] ('*ALRC*').

111 *Garcia* (n 3) 427–428.

112 Ibid.

that it afforded a 'remedy', but nevertheless regarded it to be an exposition of principle which amounted to 'unacceptable discrimination'.[113]

In a case that post-dated *Garcia* by a year, *X v The Commonwealth,*[114] the High Court considered the question of whether the decision to discharge an HIV positive soldier from the Australian Army amounted to discrimination under s15(2) of the *Disability Discrimination Act*. 1992 (Cth) [115] The Army had resisted the application for relief on the basis that the decision to discharge the soldier was that because of his disability, he was unable to carry out the inherent requirements of his employment. Kirby J, who dissented, opined *inter alia* that the decision was based on a stereotyped assumption that HIV positive persons would be unable to perform the inherent requirements of their employment in the Army and made the following observation which was central to his reasoning: [116] 'The fundamental object of the Act is to achieve social change by removing stereotypes.' Kirby J's observation thus adds a useful gloss to his comments in *Garcia* a year earlier when he considered that the *Yerkey v Jones Principle* should be rejected even though it provided a means to afford protection to a married woman.[117]

Brems and Timmer warn that despite the common belief that only negative stereotypes are harmful, positive stereotypes may have 'negative consequences', [118] because their adoption can also have consequences in 'discrimination'.[119] Also, that stereotyping of women, howsoever apparently beneficial it appears, in reality impedes equality, and can result in the demeaning of women.[120] The views of Brems and Timmer are therefore consistent with Kirby J's views in *X v Commonwealth* that a fundamental object of the *Disability Discrimination Act*. 1992 (Cth) to achieve social change by removing stereotypes[121] and in turn consonant also with Creighton's views of the aims of anti-discrimination law, to achieve social change.[122]

Separately, advocates for the view that the *Yerkey v Jones Principle* is a beneficial development for married women[123] might yet argue that married women might as a group attract the benefit of a 'special

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113 Ibid 427.
114 *X v The Commonwealth* (1999) 200 CLR 177.
115 It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability.
116 X v the Commonwealth, above n (124) 147.
117 *Garcia* (n 3) 427.
118 See also, Zanita E. Fenton, 'Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence' (1998-99) 8 *Columbia Journal of Gender and Law* 1, 13.
119 See Brems and Timmer (n 11) 2.
120 Brems and Timmer (n 11) 4.; Wright (n 97) 69.
121 X v The Commonwealth, above (n 115) 147.
122 See Gaze (n 107).
123 Eg Stone, (n40) 172*; Duggan* (n110).

measure' under Federal anti-discrimination legislation.[124] Relevantly, s 7D of the *Sex Discrimination Act 1984* (Cth) provides that:

> (1) A person may take special measures for the purpose of achieving substantive equality between:
>
> …
>
> (b) people who have different marital or relationship statuses;
>
> S7D (2) of that Act provides that a person does not discriminate against another person by taking 'special measures'.

In 2018, the Australian Human Rights Commission released *Guidelines: Special measures under the Sex Discrimination Act 1984 (Cth)* ('the Guidelines').[125] The Guidelines explain that 'special measures are positive actions used to promote equality for disadvantaged groups'.[126] Further, they 'encompass a broad and diverse range of actions that are often focused on the root cause of unequal outcomes' and 'aim to address the underlying inequality.'[127] Illustrations of 'special measures' in the Guidelines include a board's setting a target of 30% of women to address the lack of women's representation, and the establishment of a special women's legal services group to support women subjected to domestic or family violence.[128]

The adoption of the special wives' equity as a special measure under discrimination law is necessarily predicated on the presumptive position necessitating such a measure, that it be needed to promote equality for 'disadvantaged groups'.[129]

The assumption that wives as a group were 'disadvantaged' demands the acceptance of the propositions considered even by advocates of the *Yerkey v Jones Principle* to be 'narrow and outmoded',[130] and the adoption of what Kirby J had rejected as 'unacceptable discrimination' in *Garcia*.[131] By this reasoning, the special wives' equity is not apt to find expression as a 'special measure' under discrimination law. The position of married women is at least not comparable to the illustrations of the special measures in the Guidelines, respectively of a board's setting a target of 30% of women to address the lack of women's representation, and the establishment of a special women's legal

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124 S7D *Sex Discrimination Act 1984* (Cth).

125 *Guidelines: Special measures under the Sex Discrimination Act 1984 (Cth)* ('the Guidelines') <https://humanrights.gov.au/sites/default/files/document/publication/AHRC_SDA_Special_Measures_Guidelines%202018.pdf>.

126 Guidelines (n 126) 8.

127 Ibid.

128 Ibid.

129 Guidelines (n 126) 8.

130 ALRC (n 123).

131 *Garcia* (n 3) 427.

services group to support women who have been subjected to domestic or family violence.[132]

> S 39 NSWADA, one of the provisions underpinning Kirby J's argument that Australia had 'moved away from irrelevant discrimination', was also the central provision in both of *Boehringer* and *Waterhouse.*

Kirby J, however, did not refer to either *Boehringer* or *Waterhouse* in *Garcia.* This is surprising given his personal involvement at least in *Waterhouse,* over which he had presided in the New South Wales Court of Appeal. To take Kirby J's own argument to a less abstract level of analysis, it is useful to instantiate his observation that the adoption of the *Yerkey v Jones Principle* would lend the Court's authority to a 'completely inappropriate' exposition of principle,

The difficulties experienced by the Tribunal in *Waterhouse,* explored on appeal, concerning the precise parameters of conduct which should be proscribed as marital status discrimination and which is not so proscribed, were substantially reprised in the difficulties in trying to authentically identify and apply the *Yerkey v Jones Principle.* The location of the fault line in the pair of New South Wales Court of Appeal cases between conduct which is not marital status discrimination (*Boehringer*) and which is (*Waterhouse*), thus greatly assists one to identify cases of marital status discrimination and to differentiate from these, cases in which marital status discrimination would not necessarily be inferred. Juxtaposing the reasoning in *Boehringer* and *Waterhouse* with that of the *Garcia* majority, one is then better informed to determine if the application of the *Yerkey v Jones Principle* does in truth give expression to the recognition of and 'unprincipled discriminatory category', the category of married women and their assumed characteristics, proscribed in *Waterhouse* and *Boehringer.*

This article, accordingly, suggests that the persuasiveness of Kirby J's views in *Garcia* would have been fortified if he had himself referred to *Waterhouse* and *Boehringer,* both of which would have furnished unequivocal jurisprudential grounding for his position. We revisit this point in the conclusion below, where we prognosticate on the survival of the *Yerkey v Jones Principle*. However, here we focus on the location of the fault line between cases of an authentic application of the *Yerkey v Jones Principle,* and those where the search for invalidating factors of the married woman's guarantee led elsewhere.

Examples of cases which do give expression to marital status discrimination include the decision of the *Garcia* majority and of Callinan J. Each of the assumptions adopted by them[133] readily fits within any of the several definitions of a 'stereotype' introduced earlier,

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132 See Guidelines (n 126).

133 See *Garcia* (n 3) 395 and 441 (per Callinan J).

broadly a generalised view or preconception of a particular group.[134] Particularly appropriate is Evatt J's explanation that, with women, a stereotype is an assumption about their status and capabilities.[135]

The cases that authentically adopt the reasoning of the *Garcia* majority, including *State Bank of New South Wales v Chia*[136] and *Bank of Western Australia v Abdul,*[137] by assuming a stereotype of married women, fall within the same category as the *Garcia* majority.

Each of those assumptions would in turn satisfy the 'formula' (as Mahoney JA described it in *Boehringer*[138]) for the finding of marital status discrimination based on a stereotype. In particular, his observation that the finding of a stereotype was based not merely on the status of being married, but the 'stereotyped characterizations of persons of particular sex or marital status',[139] and Priestley JA's explanation of the scope of s 39(1A)[140] of the *NSWADA*, that a characteristic 'imputed' to persons of a particular marital status was a reference to 'some particular characteristic which married persons are generally believed to have whether they have it or not'.[141]

Cases where the reasoning is not underpinned by the adoption of a stereotyped assumption of the characteristics of a married woman, would on the other hand not be caught by s 39(1A) of the *NSWADA* and its contemporary equivalents. *Boehringer* and *Waterhouse* together contain the definitive principles to assist one identify the distinction between which are and which are not cases of marital status discrimination. By the same reasoning, cases such as *Agripay*[142] and *Alirezai,*[143] whatever their other deficiencies, would not be caught by the proscription on marital status discrimination as the reasoning in those cases was not underpinned by the adoption of a stereotypical assumption of a married woman's characteristics – at least this cannot be discerned with confidence – but, rather, at best conflated the reasoning of the *Garcia* majority with the need for there to be some other invalidating factor.[144]

Banking is a 'service' captured in the *NSWADA* and the other state and territory equivalents[145] and, adopting Kirby J's reasoning,[146] the special wives' equity would have been prohibited under those

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134 See Cook and Cusack (n 10) 9; Brems and Timmer (n 11) 1.
135 See Evatt (n 14) 2.
136 See *Chia* (n 53) 597-601.
137 See *Abdul* (n 58) [63].
138 *Boehringer* (n 12) 18 (per Mahoney JA).
139 Ibid, citing *Phillips v Martin Marietta Corp* 400 US 542 (1971) within the case.
140 As explained, at the time of the case, the content of the section previously found expression as s 39(1)(c).
141 Boehringer (n 12) 31.
142 *Byrne* (n 44).
143 *Alirezai* (n 43).
144 *Byrne* (n 44) 11; *Alirezai* (n 43) 6, 9 [39].
145 See (n 97).
146 *Garcia* (n 3) 427 (per Kirby J).

provisions. The *Yerkey v Jones Principle* and the reasoning of the *Garcia* majority are thus incompatible with contemporary principles of sex discrimination, a proposition best expressed in Kirby J's own words, that it lends authority to an exposition of principle that is completely inappropriate, and unacceptable as a principle of Australian contemporary law, namely discrimination law.[147]

VI CONCLUSION – CAN THE *YERKEY V JONES* PRINCIPLE SURVIVE?

This part explores the proposition that the *Yerkey v Jones Principle* has not expressly confronted the principles of discrimination law. Kirby J's own judgment in *Garcia* came tantalisingly close to such a confrontation, but without fully grounding his assertion that the *Yerkey v Jones Principle* is incompatible with principles of contemporary discrimination law by identifying the fault line between cases of marital discrimination and those which would not be so regarded, his reasoning loses its potency.

Our search for cases which at least allude to the existence of this confrontation brought us to *Warburton v Whitely,*[148] a pre-*Garcia* decision of the New South Wales Court of Appeal which concerned itself with the scope of the application of the *Yerkey v Jones Principle*. Kirby J was a member of that bench, which also included Clarke JA, whose views in *Waterhouse* have also been explored in detail already. Kirby J in *Warburton* lamented the 'survival of rules for special treatment of women'[149] and that it 'perpetuated a stereotype which was out of harmony with today's society and conflicted with the development of statute law with which legal and equitable principles should keep in step'[150], but his argument remained at best inchoate as he did not then even make specific reference to the content of the 'statute law', as he himself subsequently did in *Garcia*. He also did not refer to *Boehringer* which the case actually had post-dated. Ultimately, Kirby J considered himself bound by the *Yerkey v Jones Principle,* by saying as follows:[151]

> It is possible that the High court with a fresh opportunity to review *Yerkey*, would refine the principle there stated. … But until the High Court, or the legislature, do so I do not believe that this court is free to act as the creditors urge.[152]

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147 *Garcia* (n 3) 427 (Kirby J).
148 *Warburton* (n 112).
149 Ibid (Kirby J) (p 4).
150 Ibid (Kirby J) (p 3).
151 *Warburton* (n 112).
152 *Warburton* (n 112). The creditors had 'urged' that *Yerkey* is not now necessary because of the later exposition of an applicable and more general legal principle of unconscionability set out in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 *('Amadio').*

Clarke JA in the same case ultimately dissented in the treatment of the *Yerkey Principle* in relation to the question of whether the surety need prove she had no interest in the enterprise or must the lender establish she did have a substantial interest, but broadly accepted, in words essentially to the same effect as Kirby J, that he should continue to apply the *Yerkey v Jones Principle* as a 'separate doctrine'.[153]

Clarke JA, in a differently constituted bench of the New South Wales Court of Appeal in *Akins v National Australia Bank* ('*Akins*')[154] held that if the principles of *Commercial Bank of Australia v Amadio* were to be applied to a case, there would be 'no room for resort to the special rule in *Yerkey*'[155] *Akins* post-dated both *Waterhouse* and *Boehringer* but neither case was referred to.

The actual reasoning in both of *Warburton* and *Akins* is of course academic as a result of *Garcia* itself and has not been fully set out. The purpose of mentioning them is not to analyse the veracity of the reasoning, but simply to recognise that in both cases, despite the opportunity to do so, neither Kirby J nor Clarke JA, whose roles in the development of the principles of marital status discrimination in the New South Wales Court of Appeal have been established, referred to those principles explicitly. We recount that Kirby J himself in *Warburton* went no further than to allude obliquely to the fact that the survival of the *Yerkey v Jones* conflicted with 'the development of statute law'[156] without referring expressly to the arguments either in *Waterhouse* or *Boehringer*.

This article suggests that the *Yerkey v Jones Principle* owes its present survival to the fact that it has never been confronted with the full force of the law of marital status discrimination. It would, of course require the High Court to overrule *Garcia.* It is suggested that if and when an opportunity arose for the High Court do so, in the light of full argument on the incompatibility of the *Yerkey v Jones Principle* with principles of marital status discrimination, it is open for it to determine, consistent with Kirby J's inchoate argument in *Garcia* itself, that it should decline to endorse the *Yerkey v Jones Principle* for to do so would, again to use Kirby J's words, lend authority to a principle completely unacceptable as a principle of contemporary Australian law.[157] Given the broad disapprobation of the *Yerkey v Jones Principle* as being anachronistic, and the contemporary movement 'away from irrelevant discrimination',[158] it is suggested that the special wives'

153 *Warburton* (n 112).
154 (1994) 34 NSWLR 155.
155 Ibid 173.
156 *Warburton* (n 112).
157 *Garcia* (n 3) 428.
158 To echo Kirby J's words in *Garcia* (n 3), 427.

equity will yield if confronted with the principles of marital status discrimination.