

**THE EXTENT TO WHICH UNCONSCIONABILITY AT GENERAL
LAW, THE SPECIAL EQUITY IN *GARCIA* AND PART IVA OF THE
TRADE PRACTICES ACT 1974 (CTH) ARE AVAILABLE TO A DEBTOR
OR GUARANTOR WHEN A FINANCE PROVIDER SEEKS TO
ENFORCE A SECURITY**

by

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CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

Geoffrey Nigel O'Shea

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LIST OF ABBREVIATIONS

Abbreviation	Definition
ACCC	Australian Competition and Consumer Commission.
ADI	Approved Deposit Institution.
APRA	Australian Prudential Regulatory Authority.
ASIC	Australian Securities and Investments Commission.
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth).</i>
Corporations Act	<i>Corporations Act 2001 (Cth).</i>
EFM	Equity Finance Mortgage.
L/C	Letter of Credit.
NCC	National Credit Code.
SAM	Shared Appreciation Mortgage.
TPA	<i>Trade Practices Act 1974 (Cth).</i>
VCAT	Victorian Civil and Administrative Tribunal.

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ABSTRACT

AIM AND FIELD OF RESEARCH

Debtors and guarantors of loans by finance providers often endeavour to escape liability by relying on disentitling conduct on the part of their finance provider.

Over the last twenty-six years, a body of jurisprudence has developed around s 52 of the *Trade Practices Act 1974* (Cth). This has enabled debtors and guarantors of loans by finance providers to escape liability where there has been misleading or deceptive conduct by the finance provider.

Recently the Australian Consumer Law¹ has been enacted. Over time it is anticipated that debtors and guarantors of loans by finance providers will be able to escape liability by reason of conduct which contravenes this legislation.

This thesis examines the circumstances in which guarantors and debtors are able to escape liability by relying on unconscionability under the general law, unconscionability under the *Trade Practices Act 1974* (Cth) or by relying on the special equity considered in *Garcia v National Australia Bank Limited*² (*Garcia*). The special equity in *Garcia* is sufficiently closely related to the doctrine of unconscionability to warrant its examination in this thesis.

¹ The first part of the Australian Consumer Law (the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* (Cth)) has already commenced. On 15 April 2010, the Australian Competition and Consumer Commission received a wide range of new enforcement powers. New provisions were created in the *Trade Practices Act 1974* (Cth) on unfair contract terms to commence on 1 July 2010.

The main part of the Australian Consumer Law (the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth)) commences on 1 January 2011. On that date, the existing consumer protection provisions in Parts IVA, V, VA and VC of the *Trade Practices Act 1974* (Cth) will be repealed and replaced with the Australian Consumer Law. The *Trade Practices Act 1974* (Cth) will also be renamed as the *Competition and Consumer Act 2010* (Cth). The States and Territories are also intended to amend their existing laws with effect from 1 January 2011 to adopt the Australian Consumer Law as a uniform national law, but all the necessary legislation has as yet not been enacted.

² (1998) 194 CLR 395.

In addition to examining the circumstances under which guarantors and debtors are able to escape liability by relying on unconscionability under the general law and/or unconscionability under the *Trade Practices Act 1974* (Cth) and/or by relying on the special equity considered in *Garcia*, this thesis also examines the future direction of this area of the law, together with its likely future impact on the provision of finance in Australia.

The first area examined by this thesis is unconscionability claims in equity.

The second area examined by this thesis is the special equity, which was identified by Dixon J in *Yerkey v Jones*,³ and reaffirmed and extended by the High Court of Australia in *Garcia*. The special equity in *Garcia* is seen to be a special extension to the doctrine of unconscionability.

The third area examined by this thesis is unconscionability under Part IVA of the *Trade Practices Act 1974* (Cth). Here it is recognised that Part IVA unconscionability allows courts to consider both the existing ‘unwritten law’⁴ of what is unconscionability, as well as statutory unconscionability under ss 51AB and 51AC of the *Trade Practices Act 1974* (Cth).

This thesis spans the period up until 28 May 2010.

The following questions are asked:

1. What is unconscionability under the general law?
2. Having regard to the High Court’s decision in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*⁵

³ (1939) 63 CLR 649.

⁴ ‘Unwritten law’ being the term referred to in s 51AA.

⁵ (2003) 214 CLR 51.

(*Berbatis*), what legislative changes are needed in ss 51AB and 51AC in Part IVA of the *Trade Practices Act 1974* (Cth) in order to extend the statutory definition of unconscionable conduct?

3. If there were changes made to ss 51AB and 51AC so as to extend the liability of parties who engage in unconscionable conduct, what would be the likely impact on financiers?
4. Post *Garcia*, has there been a willingness by courts to extend the types of relationships that will attract the special equitable relief in *Garcia*, beyond the confines of the wife-and-husband marital relationship?