

## **OVERCOMING THE CONSUMER CREDIT IMPLICATIONS OF DOMESTIC AND FAMILY VIOLENCE**

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*Research shows that people subjected to domestic and family violence often suffer from economic abuse and experience economic hardship within and after their relationships. This research paper focuses on the economic hardship experienced, specifically the consumer credit implications, by people who have left a violent relationship. It is found that people who experience domestic and family violence are often left with debts from joint and personal loans accrued during and after the relationship, and sometimes even accrued without their knowledge. It is found that there is difficulty in dealing with lenders to resolve these debts. While the banking industry has introduced new industry guidelines in dealing with such matters, further changes are still required in order to prevent the consumer credit implications suffered.*

### I INTRODUCTION

After receiving calls and cases from clients seeking consumer credit advice, whom later revealed they experienced domestic violence, Consumer Credit Legal Service (WA) Inc. (CCLSWA) found a correlation between domestic violence and the consequences surrounding consumer credit. After spending a considerable amount of time per case file in relation to these matters, CCLSWA observed the failure in aspects of the legal system (in which CCLSWA works)<sup>1</sup> to recognise the impact of family violence on financial stability, and a corresponding lack of recognition in the policies and processes of many financial institutions and service providers.

Research has shown the inability to finalise joint debt issues has significant impacts on a persons' emotional and economic well-being when leaving a violent relationship,<sup>2</sup> therefore providing realistic and effective solutions are imperative in

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<sup>1</sup> Due to funding, CCLSWA only provides advice on consumer credit legal issues. Legal issues relating domestic violence tend to fall under family law and criminal law, which fall outside the scope of CCLSWA's capacity to provide advice. For this reason, the data/research may not fully encapsulate CCLSWA's clients that may have experienced domestic violence, as it may not be recorded on CCLSWA's database or clients did not report it to CCLSWA. In order to understand the extent of credit implications, community legal reports have been relied on for statistics and data.

<sup>2</sup> Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Report on the Stepping Stones Project, Women's Legal Service Victoria), 27.

enabling their financial independence. This paper specifically explores and identifies the consumer credit implications people experience after leaving a violent relationship, and analyses the current systems in place to provide solutions. The paper aims to understand how survivors of domestic violence experience financial vulnerability and what implications these experiences have on financial institutions and service providers and CCLSWA. There is a gap in the present legal and financial systems in providing options for regaining economic security to people fleeing violence.

## II ABOUT CONSUMER CREDIT LEGAL SERVICE (WA)

CCLSWA is a not-for-profit community legal centre based in metropolitan Perth that provides:

- legal advice and assistance to, and advocacy on behalf of consumers, with issues arising out of their credit and debt related problems; or out of their Australian Consumer Law disputes. CCLSWA operates a daily telephone advice line service which consumers use to request legal advice and information;
- a resource for financial counsellors and other consumer advocates working with low-income people for the resolution of their credit-related problems, or out of their Australian Consumer Law disputes; and
- community education programmes in matters relating to credit and debt law and the legal system.

CCLSWA also engages in relevant social policy and law reform initiatives, including contributing to such initiatives spearheaded by other organisations.

## III DOMESTIC VIOLENCE AND ECONOMIC ABUSE DEFINED

Family and domestic violence<sup>3</sup> is a pattern of controlling and coercive behaviour that includes violent, threatening or other behaviour, to gain and then maintain power and control over the behaviour of an intimate partner or a person in a 'domestic' or

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<sup>3</sup> The terms family violence and domestic violence are used interchangeably in the paper.

‘familial’ relationship with the abuser.<sup>4</sup> This threatening and controlling behaviour includes physical, emotional, sexual and economic abuse. This paper focuses mainly on the effects of economic abuse.

Economic abuse is a form of family violence that often occurs with other forms of violence.<sup>5</sup> Economic abuse concerns conduct such as coercing a person to relinquish control over assets or income, disposing of a person’s property without his or her consent, preventing a person from accessing joint financial assets for the purpose of meeting normal household expenses, or withholding financial support necessary for the maintenance of the person or the person’s children.<sup>6</sup>

#### IV CONSUMER CREDIT LAW IN AUSTRALIA

Consumer credit is a debt that a person incurs when purchasing a good or service.<sup>7</sup> The *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) is the law governing consumer credit in Australia and is designed to protect consumers’ interests. The NCCP Act includes the National Credit Code (**NCC**) as a schedule to the Act.<sup>8</sup>

The NCC applies to credit provided to an individual (or a strata corporation) wholly or predominantly for household, personal or domestic purposes. The NCC also applies to credit provided to an individual for purchasing, renovating or improving residential property for investment purposes (including refinancing). The NCC does not apply to credit obtained for commercial or business purposes.

In response to the NCC, the two associations that provide regulations and guidelines in the consumer credit and banking industry, the Australian Banker’s Association (**ABA**) and the Customer Owned Banking Association (**COBA**), have developed

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<sup>4</sup> National Association of Community Legal Centres Inc. & Women’s Legal Services, Submission No 26 to Senate Finance and Public Administration References Committee, *Domestic Violence Inquiry*, July 2014, 3.

<sup>5</sup> Smallwood, above n 2, 6.

<sup>6</sup> Department of Social Services, The National Council to Reduce Violence against Women and their Children, *Domestic Violence Laws in Australia* (2009), 2.5.18.

<sup>7</sup> Steven Finlay, *Consumer Credit Fundamentals* (Basingstoke: Palgrave Macmillan, 2<sup>nd</sup> ed, 2009) 1.2.

<sup>8</sup> *National Consumer Credit Protection Act 2009* (Vic), Schedule 1.

Codes of Practice for lenders. Members of ABA and COBA are bound by their respective Codes of Practice.

From 1 July 2010, all lenders, finance brokers, mortgage managers and mortgage originators who arrange or provide credit under the NCCP Act must be members of an Australian Securities and Investments Commission (**ASIC**) approved external dispute resolution (**EDR**) scheme as a condition of their licence (or registration).<sup>9</sup> This means that if a consumer has a dispute, and either the NCCP Act or the relevant Code of Practice applies, then (in most circumstances) consumers are able to go to the relevant EDR scheme about the dispute.

There are two such EDR schemes. Consumers are able to make complaints to either the Financial Ombudsman Service (**FOS**) or Credit and Investments Ombudsman (**CIO**) depending of which scheme the lender is a member. FOS and CIO members include lenders such as non-bank lenders, finance brokers, credit unions, building societies, debt collection firms, financial planners, trustees, servicers, aggregators, and mortgage managers.

#### A *Legislative protection to Consumer Credit implications*

At present, there are no legislative provisions that specifically protect people who experience domestic violence under consumer credit law. However, the NCC does provide the following protections:

##### *Responsible Lending*

Credit licensees (both the lenders and financial brokers) must comply with the responsible lending conduct obligations outlined by the NCCP Act.<sup>10</sup> Credit licensees must not enter into a credit contract or consumer lease with a consumer, suggest a credit contract or consumer lease to a consumer or assist a consumer to apply for a

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<sup>9</sup> Australian Securities & Investments Commission, *National Credit Code* (March 2016) <<http://asic.gov.au/regulatory-resources/credit/credit-general-conduct-obligations/national-credit-code/>>.

<sup>10</sup> *National Consumer Credit Protection Act 2009* (Cth) (National Credit Act), Chapter 3.

credit contract or consumer lease if the credit contract or consumer lease is unsuitable for the consumer.<sup>11</sup>

Meeting the responsible lending obligations requires the credit licensee to take three steps:

- i) make reasonable inquiries about the consumer's financial situation, and their requirements and objectives;
- ii) take reasonable steps to verify the consumer's financial situation; and
- iii) make a preliminary assessment (if you are providing credit assistance) or final assessment (if you are the lender or lessor) about whether the credit contract or consumer lease is 'not unsuitable' for the consumer (based on the inquiries and information obtained in the first two steps).<sup>12</sup>

Responsible lending is particularly important when lenders are contemplating contracts regarding joint loans and guarantors.

For joint loans, both parties (known as co-borrowers) are jointly and severally liable for the debt; the co-borrowers are both responsible for the debt, and the lender can pursue them separately for the entire amount owing.

Conversely, guarantors are not parties to a loan. They are legally responsible for paying back the loan if the borrower on the loan cannot or will not make the repayments. This includes liability for any fees, charges and interest on the loan. The guarantor doesn't have the right to own the property or items bought with the loan.

Given the onerous liability as a co-borrower and guarantor, in particular for larger loans, it is necessary that independent legal advice is sought prior to signing any loan agreement to understand the documents and the extent of the risks to be taken on.

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<sup>11</sup> Ibid s 133; See also Australian Securities & Investments Commission, *Credit licensing: Responsible lending conduct* (November 2014) Regulatory Guide 209 <<http://download.asic.gov.au/media/2243019/rg209-published-5-november-2014.pdf>>.

<sup>12</sup> Australian Securities & Investments Commission, *Responsible Lending* (September 2013) <<http://asic.gov.au/regulatory-resources/credit/responsible-lending/>>.

Lenders should ensure that borrowers completely understand their rights and obligations, the nature of the loan and the amount of the loan.<sup>13</sup>

### *Financial Hardship*

Section 72 of the NCC allows a borrower to request a change to the terms of their credit contract on the grounds of financial hardship. Financial hardship is when a borrower is willing but unable to meet their contractual debt obligations because of unexpected events or unforeseen changes that impacts cash flow.

While the NCC does not define ‘grounds of financial hardship’, the ABA lists examples of financial hardship as:

- Changes in income or expenditure;
- Changes in employment status (such as losing a job or having hours reduced);
- Significant life events such as a relationship breakdown or death in the family;
- Injury or illness; and
- Emergency event or natural disaster.

The ABA does not explicitly state that it recognises family violence as a ground of hardship; however, its industry guideline released in November 2016 states that “[hardship arrangements] will take into account the circumstances of a customer impacted by family and domestic violence”.<sup>14</sup>

### C *Regulatory Response to Consumer Credit implications*

In March 2016, the Royal Commission into Family Violence (Vic) (**Royal Commission**) called upon financial and utility institutions, and the regulatory regimes that govern them to “introduce clear and accessible processes to enable victims to resolve on-going financial complexities”.<sup>15</sup>

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<sup>13</sup> *National Australia Bank Limited v Wehbeh & Anor* [2014] VSC 431; *Paccar Financial Pty Ltd v Menzies* [2013] NSWSC 772; see also article Elliot May Lawyers, *Lender Fails to Insist on Independent Legal Advice* (2017) <<http://www.elliottmay.com.au/independent-legal-advice/>>.

<sup>14</sup> Australian Banker’s Association Inc, *Industry guideline: Financial abuse and family and domestic violence policies* (November 2016) <<http://www.bankers.asn.au/Consumers/Financial-abuse-prevention/domestic-violence>>.

<sup>15</sup> State of Victoria, *Royal Commission into Family Violence: Report and recommendations*, Vol IV, Parl Paper No 132 (2014-16) (‘Royal Commission into Family Violence’) 102.

The Royal Commission identified gaps in the law and policy regarding service responses to people who have experienced domestic violence. Specifically considering the consumer credit industry:

- i) There was a lack of information, awareness and identification of economic abuse; and
- ii) There was a failure to identify and prevent ongoing economic abuse post-separation through institutional and bureaucratic processes<sup>16</sup>

Women reported their experience of a lack of empathy and understanding when disclosing their situation to financial institutions, and thus suffered psychological stress.<sup>17</sup> Financial institutions would also request the people subjected to family violence to prove the violence, or obtain consent and information from the perpetrator, putting them in fear of being at risk.

The ABA industry guideline regarding financial abuse and family and domestic violence released in November 2016<sup>18</sup> was in response to the Royal Commission.

Following ABA's guidelines, in March 2017, FOS released 'The FOS Approach to Joint Facilities and Family Violence' document, to help consumers and financial services better understand how FOS reaches decisions about key issues.<sup>19</sup> Similarly, CIO addressed family and domestic violence in their 2016 Annual General Meeting, drafting guidelines for conduct when responding to people who demonstrate signs of family violence.<sup>20</sup>

These guidelines called for lenders to: provide training to their staff to be able to recognise the potential economic (and domestic) abuse; understand that it is difficult for customers to seek help or report the abuse; understand that customers may be

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<sup>16</sup> Ibid 94-5, 103.

<sup>17</sup> Ibid 102; see also Smallwood, above n 2, 6.

<sup>18</sup> Australian Banker's Association Inc., above n 13.

<sup>19</sup> Financial Ombudsman Service Australia, *The FOS Approach to Joint Facilities and Family Violence* (Version 3, March 2017) < <https://www.fos.org.au/custom/files/docs/fos-approachjoint-facilities-and-family-violence-final-4-may-17.pdf>>.

<sup>20</sup> See generally Credit & Investments Ombudsman, *Family Violence*, CIO News – July 2016 (July 2016) < <http://email.cosl.com.au/t/ViewEmail/y/B4132CB91D20AF74>>.

under significant stress; and develop internal banking guidelines and procedures to respond to instances where employees may identify economic abuse.<sup>21</sup>

Specifically, the ABA provided guidelines for banks to:

- Protect customer confidentiality and safety by not requiring contact with the perpetrator for documents, or provide the perpetrator with the customer's (who is seeking help) personal details if requested;
- Reduce the communication with banks by minimising the documentation required, and where possible, provide consistency for people who disclose family violence to only need to speak to one staff member to handle the case;
- Refer customers to external support for both financial and non-financial matters like financial counsellors or legal support;
- Recognise financial (and domestic) abuse as a contributing factor to financial hardship;
- Understand the impact of credit reporting and default listing; and
- Exercise the care and skill of a diligent and prudent lender.<sup>22</sup>

In response to the gaps in providing protection relating to joint liabilities, the ABA's guidelines call on banks to accept financial hardship requests from a joint borrower without the consent of the other co-borrower in the event that family violence is disclosed or detected and the joint borrower's safety may be at risk; and only obtain consent from all parties to vary the loan if it is safe to do so.<sup>23</sup> In instances where this is not possible (e.g. out of safety concerns), banks are to decide to settle the claim for the whole or part of the debt for the customer seeking help, such as severing or apportioning the loan so the customer only pays a portion in return for a release of the whole debt.<sup>24</sup> The guidelines do acknowledge that these protections need to be considered on a case-by-case basis.

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<sup>21</sup> See Australian Banker's Association Inc., above n 13; see also Financial Ombudsman Service Australia, above n 18.

<sup>22</sup> See generally Australian Banker's Association Inc., above n 13.

<sup>23</sup> Ibid, 5.

<sup>24</sup> Ibid.

When questioned on COBA's response to the increased demand from people who experience domestic violence, a spokesperson for COBA stated that their Code of Practice "sets high standards for serving customers and their communities... our service will be tailored to any special circumstances we become aware of, so that we can support customers in times of financial difficulty or great personal distress."<sup>25</sup> While not all financial service providers are ABA members, FOS notes and considers ABA's guidelines as 'good industry practice'.<sup>26</sup>

## V CCLSWA'S RESPONSE TO CONSUMER CREDIT IMPLICATION OF DOMESTIC AND FAMILY VIOLENCE

Domestic violence is a major cause of financial hardship for people who experience violence,<sup>27</sup> as most leave abusive relationships with few or no financial resources often resulting in a lifetime of economic disadvantage. In 2015 the Women's Legal Service (Vic) Stepping Stone project reported women<sup>28</sup> to have suffered the effects of both joint and sole debts after leaving a violent relationship: 43% were dealing with joint debts, and 85% were dealing with debts in their sole name.<sup>29</sup> Of these women, 25% had a debt that was accrued by an abusive partner against their wishes, without their knowledge, without understanding, or under duress. The women also reported dealing with lenders in negotiating these debts was difficult, and affected their emotional well-being.

CCLSWA has encountered several instances where people who experience domestic violence have suffered financial hardship as a result of their previous relationship, and consequently are unable to pay back loans (either in their sole name or a joint loan from the relationship).<sup>30</sup> Additionally, some of these clients have signed on as

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<sup>25</sup> Jason Bryce, 'Which banks will help me leave my abusive husband?' on SingleMum.com.au (26 November 2016) <<http://singlemum.com.au/features/which-banks-will-help-me-leave-my-abusive-husband-26112016-jason-bryce.html>>.

<sup>26</sup> Financial Ombudsman Service Australia, above n 18.

<sup>27</sup> Rochelle Braaf and Barrett Meyering, *Seeking security: Promoting women's economic well-being following domestic violence* (Australian Domestic & Family Violence Clearing house The University of New South Wales, 2011).

<sup>28</sup> The report was focused solely on women as people who experienced the violence.

<sup>29</sup> Smallwood, above n 2, 16.

<sup>30</sup> See Appendix A – Case study 7.

borrowers or as guarantors for loans for which they did not receive any benefit.<sup>31</sup> Subsequently the lenders sought to enforce the loan or the guarantee against them.

Thus, there are two main consumer credit implications people who experience domestic violence face:

- A. Sole responsibility to pay back loans; and as a result or otherwise,
- B. Financial hardship

A     *Sole responsibility to pay back loans*

Three issues are identified in the consumer credit implications of the sole liability (of the person who experiences domestic violence) to pay back loans: First, issues arise from joint loans; second, there are the issues of loans where they did not benefit; and third, the inability to pay loans back due to financial hardship. The third issue will be discussed in a separate section below.

*Joint loans*

It is common for people in relationships to enter into joint loans as co-borrowers or enter into joint bank accounts. However, issues arise when the relationship ends. Due to the nature of joint debts, such as loans (home or car) and credit cards, abusive partners are able to accrue debts in the name of their partner (who is subjected to violence), against their wishes, or even without their knowledge.<sup>32</sup>

Economic abuse tends to survive the termination of a domestically violent relationship.<sup>33</sup> Ex-partners remain in control by accruing debts during the course of the relationship (and sometimes after), and then refusing to pay off the debt.<sup>34</sup>

Generally, to alter the terms of a joint loan contract, both co-borrowers must consent, this includes entering into hardship agreements or payment plans. The only way to sever a joint loan is for one of the borrowers to refinance the loan into their sole name.

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<sup>31</sup> See Appendix A – Case study 5.

<sup>32</sup> See Appendix A – Case study 1.

<sup>33</sup> Royal Commission into Family Violence, above n 14, 94-5.

<sup>34</sup> See Appendix A – Case study 1 and 2.

Perpetrators may refuse to consent to the other borrower's hardship application; or to refinance the loan into their sole name.<sup>35</sup> This leaves lenders able to pursue the person subject to violence for large debts for which they are legally liable. Even if the perpetrator has agreed with the other borrower to repay the loan, this agreement is not binding on the lender. If the perpetrator does not repay the loan as agreed, the other borrower has no recourse against the lender, and may only take a civil action against the perpetrator.

Over the course of five years, CCLSWA has taken instructions from 22 clients who have exhibited signs of domestic violence. Of these 22 clients, 9 clients had a joint loan with the perpetrator.

Due to the nature and laws surrounding joint loan agreements, CCLSWA was only able to advise that the clients were jointly and severally liable for the loan. As a result, clients are legally liable to pay for the whole of the debt, and consequently suffer financial hardship.<sup>36</sup>

#### *Loans where they did not benefit*

As domestic violence is attributed to the pattern of coercive and controlling behaviour, partners can be coerced into signing up to loan agreements from which they did not receive a benefit. This includes joint loans where only the perpetrator benefited from the loan or did not allow their partner to access the joint funds,<sup>37</sup> where partners are pressured into signing up to a loan in their own name for the benefit of the perpetrator;<sup>38</sup> or signing as a guarantor for the benefit of the perpetrator.<sup>39</sup> In the case of both joint and sole loans, people who experience violence have received poor credit ratings which have impacted their ability to obtain further credit, and in extreme circumstances, had judgments entered against them.

The perpetrators exhibit control and coercion in the relationships, with their partners signing into agreements they do not understand out of fears for their own safety. This

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<sup>35</sup> Smallwood, above n 2, 21; see also, Royal Commission into Family Violence, above n 14, 102-3.

<sup>36</sup> See Appendix A – Case study 1.

<sup>37</sup> See Appendix A – Case study 5.

<sup>38</sup> See Appendix A – Case study 2 to 4.

<sup>39</sup> See Appendix A – Case study 5 and 6.

coercion and control can be either physical, or non-physical, with many CCLSWA clients disclosing they were verbally threatened to enter into agreements that did not clearly benefit them.<sup>40</sup>

In several cases where a person has entered into a joint loan agreement for which they did not receive a benefit, CCLSWA has been able to advocate on the person's behalf and successfully negotiate with the lender to have the debt waived, because the lenders were in breach of their responsible lending provisions under the NCCP Act.<sup>41</sup>

CCLSWA has continually dealt with lenders who failed to make reasonable inquiries about the financial situation, and failed to make an assessment of the 'suitability' of loan contracts where the client exhibited that they would not benefit from the agreement.<sup>42</sup> Additionally, these lenders failed to provide the clients with sufficient information regarding their rights and obligations as a co-borrower or guarantor.

While CCLSWA was able to successfully negotiate to waive some debts, in other cases, clients were still liable for the shortfall of debts, and the fees and interest incurred over time. The process of negotiations was also time-consuming, with limited responses from the lender often taking up to a year to reach a solution. The lengthy negotiations resulted in one client withdrawing from the dispute resolution process and filing for bankruptcy,<sup>43</sup> and another had received judgement against her before coming to CCLSWA.<sup>44</sup>

## B *Financial Hardship*

People who leave a violent relationship are often left without financial resources. This is because they may have little or no control of finances in their relationship, may need to leave jobs out of safety, or are left solely responsible to repay large loans they cannot afford. The implication of being left responsible for a joint loan (or a sole loan) following a relationship breakdown can leave the person escaping violence in

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<sup>40</sup> See Appendix A – Case study 5 and 6.

<sup>41</sup> See Appendix A – Case studies 3 to 6.

<sup>42</sup> See Appendix A – Case studies 3 to 6.

<sup>43</sup> See Appendix A – Case study 2.

<sup>44</sup> See Appendix A – Case study 5.

financial hardship as they are unable to repay loans.<sup>45</sup> As a result, they can receive poor credit history for not settling loans and continue to suffer long-term financial hardship.<sup>46</sup>

It is evident that financial hardship is a consequence suffered from a domestically violent relationship. In the first 12 months after divorce, 60% of women experience financial hardship.<sup>47</sup> Financial hardship is experienced whether the violence occurs before or after entering into loan agreements. CCLSWA clients have demonstrated the suffering of physical violence or coercion prior to signing a loan agreement,<sup>48</sup> as well as the suffering of domestic violence after signing a loan agreement and then falling into financial hardship.<sup>49</sup> The violence and consequent financial hardship can also continue after the end of the relationship.<sup>50</sup>

CCLSWA assisted their clients in applying for hardship variations by disclosing the prevalence of domestic violence. While the lenders did acknowledge the consequence of the domestic violence, most lenders required the client to provide evidence of the violence. This can put the client in emotional distress given the sensitive nature of the relationship, and possibly in danger with the perpetrator. Many people who experience family violence do not disclose the violence out of fear of their own safety, and cannot provide such evidence.

## VI FURTHER CHANGES NEEDED

It is noted that the guidelines released by the ABA and EDR schemes (in response to people who experience family violence) were only recently published, after many of CCLSWA's responses in dealing with the lenders.<sup>51</sup> Thus, the new guidelines in place do provide protections for many gaps the credit industry previously suffered.

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<sup>45</sup> All clients approached CCLSWA for assistance in debt recovery, see Appendix A.

<sup>46</sup> Royal Commission into Family Violence, above n 14, 95.

<sup>47</sup> Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 130.

<sup>48</sup> See Appendix A – See case 2, 3 and 4.

<sup>49</sup> See Appendix A – See case study 4 and 7.

<sup>50</sup> See Appendix A – See case study 1 and 5.

<sup>51</sup> As of June 2017, CCLSWA has 2 open case files who have disclosed domestic or family violence. The guidelines were published after negotiations began.

However, analysis into the process of resolving disputes and available information, has suggested further changes should be implemented.

A *Penalties imposed by Regulators for financial institutions who breach their responsible lending provisions*

While CCLSWA was able to successfully negotiate to waive some debts, some clients were still liable for the shortfall of debts, and the fees and interest incurred over time. The process of negotiations was also time-consuming, with limited responses from the lender, taking up to a year to settle negotiations. Thus a preventative system should be in place to deter lenders from entering into such agreements in the first place. While the industry guidelines do recommend lenders to exercise due diligence and skill if the presence of family violence is detected, the evidence suggests that lenders will continue to sign agreements in breach of their responsible lending obligations.

It is suggested that power be conferred to regulatory schemes such as ASIC to impose penalties for financial institutions that continually breach their responsible lending provisions. Administrative financial penalties can act as deterrence to unwanted behaviours,<sup>52</sup> and in order to be effective and preventive, a suitable system of administrative financial penalties should be designed where:

- i) Fixed penalties be used only for very minor offences, with the agency having discretion, up to a limit, to determine the amount in other cases; and
- ii) The penalty system can be related to the civil or criminal processes, enabling the trader to avoid those processes on payment of the penalty, or it can operate independently of those processes, but with a right of appeal to a tribunal or court – the choice between the two approaches might

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<sup>52</sup> For evidence of administrative financial penalties securing a high level of compliance with consumer protection legislation designed to prevent financial losses regarding issues such as illegal trading practices see Anthony Ogus, Michael Faure, and Niels Philipsen, 'Best practice for consumer policy: report on the effectiveness of enforcement regimes' (2006) *Organisation for Economic Co-operation and Development*; c.f. evidence regarding the imposition of financial penalties to deter drink driving offences see James L. Nichols and H. Laurence Ross, 'The Effectiveness of Legal Sanctions in Dealing with Drink Drivers' (1990) 6(2) *Alcohol, Drugs and Driving Journal*, 33-60.

depend on the level of administrative costs to which, respectively, they give rise.<sup>53</sup>

However, the cost-effectiveness of implementing such a system should be considered. There is also difficulty in determining the right amount of financial penalties – if it is too low, it may not act as a deterrent; if it is too high, there may be reluctance to impose penalties. Further suggestion is made that financial penalties be complemented by orders to compensate consumers who have suffered financial hardship as a consequence of the signed agreement, and the reimbursement of the administrative costs of enforcement.<sup>54</sup>

Alternatively, rather than imposing a fixed penalty on financial institutions, the financial institutions should be held accountable for the breach in responsible lending obligations, and therefore waive the shortfall debt regardless of what the debt was for, and whether any benefit was enjoyed.

**B**     *Financial institutions to provide clearer information about their responses to economic abuse*

The Royal Commission found that people who experience family violence continue to face difficulties in practice, including a lack of readily accessible information regarding hardship policies and adverse credit findings, which had resulted from an abusive partner failing to meet obligations with respect to joint debts.<sup>55</sup>

While many banks, such as Commonwealth Bank of Australia and Australian and New Zealand Banking Group, have released press releases in response to the ABA guidelines,<sup>56</sup> there is no evidence on their respective websites that any changes have been implemented. Given the distress and pressure clients may feel (and have reported to feel) when dealing with financial institutions regarding their debts, it is important that all information that may help be available.

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<sup>53</sup> Ogus, Faure, and Philipsen, above n 49.

<sup>54</sup> Ibid, para 189.

<sup>55</sup> Royal Commission into Family Violence, above n 14, 102-3.

<sup>56</sup> Wendy Williams, ‘Pioneering’ Report Paves the Way in Tackling Domestic Violence’ on Pro Bono Australia (24 November 2016) <<https://probonoaustralia.com.au/news/2016/11/pioneering-report-paves-way-tackling-domestic-violence/>>.

### C *Changes to legal frameworks*

Family and domestic violence protection laws differ in each state and territory. At present, only Victoria,<sup>57</sup> South Australia,<sup>58</sup> Tasmania<sup>59</sup> and the Northern Territory<sup>60</sup> have recognised ‘economic abuse’ as a form of family violence. In Western Australia, ‘economic abuse’ is not recognised in the *Restraining Orders Act 1997* (WA). By withholding financial support or through the use of deception or coercion, abusive partners can leave victims with substantial liabilities and debts. The inadequate recognition of economic abuse results in gaps in legislation and consumer credit regulating bodies. These gaps leave people who experience domestic violence in compromising positions when leaving the abusive relationships; they often struggle to move forward from relationships as they struggle with financial independence. Thus, it is suggested that the *Family Law Act 1975 (Cth)* and the state and territory family protection laws be expanded to include definitions and examples of economic abuse, and address the complexity and multifaced nature of this form of family violence. Legal recognition and definition of economic abuse will further hold lenders responsible to prevent the use of economic abuse.

## VII CONCLUSION

People who experience domestic violence often unknowingly suffer economic abuse too. This economic abuse can occur during the relationship, or even survive the termination of the relationship. People who experience family violence are left in financial distress after leaving the relationship, and as such, financial hardship is a consequence of domestic and family violence. Therefore, appropriate policies and systems should be in place in order for these people to regain financial independence. While the banking industry may have recently released guidelines in appropriately handling cases where domestic violence is disclosed or detected, further policy changes and legal reform needs to be made, in order to prevent the occurrence and suffering of economic abuse. Thus, it is suggested that financial penalties be put in place to deter lenders from continually breaching their responsible lending

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<sup>57</sup> *Family Violence Protection Act 2008* (Vic), s 6.

<sup>58</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s 8(5).

<sup>59</sup> *Family Violence Act 2004* (Tas), ss 7, 8.

<sup>60</sup> *Domestic and Family Violence Act 2007* (NT), s 5.

obligations, and hold them accountable. Additionally, the states and territories need to recognise economic abuse as a form of family violence in their family protection laws, to hold lenders responsible to prevent the use of economic abuse.

Given the limitation, nature and time frame of this project and the recent policy changes of the ABA guidelines, further research is required to determine the outcomes and effectiveness of these industry guidelines. When conducting such research, it is necessary to compare the time taken to negotiate and resolve disputes with financial institutions before the industry guidelines were announced, with the time taken now the guidelines have been implemented, to determine the effectiveness of the changes. It is also recommended that further empirical research be conducted to assess whether lenders have considered these changes in their internal policies and into the satisfaction of outcomes with dealing with the financial institutions should be considered.

**APPENDIX A – CASE STUDIES**

CCLSWA Case Study	Issue regarding	Facts	Time taken to advise
1 (Ms A)	Joint loan - Mortgage	<p>Ms A was married for 12 years to Mr A and took out a joint mortgage in 2006.</p> <p>Ms A disclosed that Mr A was verbally abusive and aggressive throughout the relationship.</p> <p>After the relationship dissolved, Ms A agreed to let Mr A keep the property if he continued to pay off the mortgage.</p> <p>To Ms A’s surprise, she was served with a Writ of Summons because the mortgage was in default. Ms A was unaware that Mr A had not been making mortgage repayments. Mr A had obtained multiple financial hardship variations but failed to comply with them.</p> <p>As Ms A was a co-borrower, she was jointly and severally liable for the loan, despite the fact that she no longer lived in the property.</p> <p>Ms A could not afford to go to the Family Court to get a court order to remove her name off the mortgage. Ms A contacted many community legal centres in regards to the Writ of Summons, but was referred to multiple centres.</p> <p>CCLSWA was only able to advise Ms A to sell the property and pay the shortfall debt, as there were no other defences available at law.</p>	7 months ( <b>ongoing</b> )

CCLSWA Case Study	Issue regarding	Facts	Time taken to advise
2 (Ms B)	Loan with no benefit – Credit Card	<p>Ms B came to CCLSWA because she was struggling to make repayments on her personal credit card. Ms B’s ex-partner had taken possession of her credit card for his own personal benefit, and pressured Ms B to continually increase the limit of her credit card. Ms B suffered physical and sexual violence during the course of her relationship.</p> <p>CCLSWA managed to negotiate with her lender to reduce the liability to the original amount, have zero interest on the account, and create a repayment plan. Unfortunately, as the negotiation process had taken over a year and 5 months, it was too late and Ms B had to file for bankruptcy.</p> <p>Had Ms B been aware that economic abuse was a form of family violence, and the avenues available for assistance, she could have come to CCLSWA earlier and prevented bankruptcy.</p>	17 months
3 (Ms C)	Loan with no benefit – Car Loan	<p>Ms C suffered a history of domestic violence, receiving intimidation against herself and her children from her ex-partner.</p> <p>Ms C was coerced into entering a car loan in her own name for the benefit of her ex-partner. Ms C had limited English, and did not have a driver’s license, which the lender was aware.</p> <p>The relationship ended and Ms C was left with a debt in her sole name, from which she did not benefit. Ms C also received speeding fines, despite her ex-partner being in possession of the vehicle.</p> <p>CCLSWA lodged a formal complaint to both the lender and FOS. CCLSWA managed to negotiate with the lender to waive the debt (including any other fees and charges arising out of the loan), and refrain from listing and removing any defaults in relation to the car loan. Ms C agreed to surrender the vehicle once the lender was able to recover it.</p>	10 months

CCLSWA Case Study	Issue regarding	Facts	Time taken to advise
4 (Ms D)	Loan with no benefit – Car Loan; Joint Loan	<p><b>Car Loan</b></p> <p>Ms D was coerced into entering a car loan in her own name for the benefit of her ex-partner, whom could not obtain a car loan for himself. The loan was originally for both Ms D and her ex-partner; however the lender only included Ms D’s income in the credit application, in order for the finance to be approved.</p> <p>Ms D suffered physical violence after signing the agreement, and fled the relationship out of her own safety. Ms D was left with a loan from which she did not benefit.</p> <p>CCLSWA managed to negotiate with the lender to surrender the car for auction, and use the funds from the sale to pay off the debt. However, Ms D was still liable for the shortfall of the debt.</p> <p>CCLSWA then lodged a complaint to FOS on the basis that the lender breached their responsible lending obligations, and the shortfall debt was waived.</p> <p><b>Joint Loan</b></p> <p>Ms D also had a joint loan in her and her ex-partner’s name, which was entered into prior to experiencing domestic violence.</p> <p>As Ms D did benefit from the loan, the debt could not be waived, and no coercion was experienced upon entering the loan.</p> <p>However, as Ms D experienced financial hardship as a result of the violent relationship, CCLSWA managed to negotiate with the lender not to pursue Ms D for the joint loan. The lender has listed a default on her credit report as an incentive to pay back the loan when she is financially capable.</p>	13 months

CCLSWA Case Study	Issue regarding	Facts	Time taken to advise
5 (Ms E)	Co-borrower and Guarantor – Mortgage and Personal Loans	<p>Ms E and Mr E were married and had a joint account with ABC Bank. Ms E and Mr E owned two properties: Property 1 and Property 2. In 2001, Ms E and Mr E divorced and finalised their property settlement, with Ms E getting sole title in Property 1.</p> <p>During the course of, and continuing after the relationship, Ms E suffered domestic violence. Mr E constantly threatened and abused Ms E and her children.</p> <p>Out of fear for the safety of herself and her children, in 2006 Ms E signed as a guarantor for Mr E's brother and sister-in-law with ABC Bank. Mr E was originally on the agreement as a second guarantor but was subsequently removed. Upon signing the guarantor agreement, Ms E was under the impression that the loan was secured with Property 2, and was not provided with independent legal advice.</p> <p>Again, in 2009 Ms E signed as a guarantor for Mr E's own personal loan with ABC Bank. Property 1 was used to secure the loan.</p> <p>Further, in 2010, Ms E signed on as a co-borrower on a joint loan with ABC Bank to cover Mr C's personal debts, which included a mortgage for Mr E and his new partner.</p> <p>ABC Bank failed to make reasonable inquiries into Ms E's situation, and dealt solely with Mr E. Ms E was not advised to obtain independent legal advice, and was not aware of her liabilities as a guarantor.</p> <p>Ms E did not contact CCLSWA until a judgement was made against her, and she lost Property 1 as a result.</p>	12 months

CCLSWA Case Study	Issue regarding	Facts	Time taken to advise
6 (Ms F)	Guarantor – Ex-partner’s loan; joint loan	<p>Ms F did not suffer any physical violence during the course of her relationship, however suffered economic abuse.</p> <p>Ms F signed on as a guarantor for her (then) partner for a loan of what she believed was for \$40,000. On quick review of the paperwork, the loan was actually for \$100,000. The financial broker advised that they did not approve loans for less than \$100,000.</p> <p>Uncomfortable with guaranteeing such a large loan, Mr F assured Ms F that he would only use \$40,000 and deposit the surplus \$60,000 in a joint bank account. Despite agreeing to deposit the surplus into a joint account, Ms F did not benefit from the loan.</p> <p>Ms F disclosed to CCLSWA that she felt a lot of pressure from both her ex-partner and the lender to sign the agreement.</p> <p>Subsequent to that agreement, Mr F continued to pressure Ms F into guaranteeing a further loan, threatening to declare bankruptcy so she would be liable for the \$100,000.</p> <p>Ms F is also a co-borrower on Mr F’s mortgage, to which she received notice from the lender of missed repayments.</p> <p>Ms F came to CCLSWA as she was aware Mr F had missed his first repayment and sought advice to remove herself as a guarantor. Ms F had not been served any default notices at the time.</p> <p>CCLSWA provided a document request to the lender, which the lender ignored. During the time CCLSWA waited for the loan documents, the lender served a writ of summons on the client.</p> <p>Despite Ms F approaching CCLSWA early, the lender’s lack of co-operation meant Ms F was served with a court appearance.</p> <p>Due to the complexity of the matter, CCLSWA referred her case to be represented on a pro bono basis.</p>	11 months

CCLSWA Case Study	Issue regarding	Facts	Time taken to advise
7 (Ms G)	Financial Hardship – Personal Mortgage	<p>Ms G entered a mortgage agreement solely in her name in 2010.</p> <p>Shortly after, Ms G met her ex-partner who eventually became physically violent.</p> <p>After the relationship ended, Ms G had to leave her job for her own safety and became homeless.</p> <p>As a result, in 2014 Ms G fell into arrears and could not pay her mortgage.</p> <p>Ms G’s lender failed to sell Ms G’s property, and so Ms G continually was charged with utility rates, increasing her debt owed.</p> <p>CCLSWA has lodged a formal complaint to her bank and FOS, and the matter is ongoing.</p>	8 months ( <b>ongoing</b> )

## APPENDIX B – GLOSSARY

Term	Definition
Assessment (in context of responsible lending)	In undertaking the assessment, lenders must: (a) make reasonable inquiries about both the consumer's requirements and objectives and their financial situation; and (b) take reasonable steps to verify the consumer's financial situation
Borrower (also the Debtor)	A person who obtains credit from a <b>Lender</b>
Co-borrower	A person who obtains credit with a <b>Borrower</b> on the same credit contract for a <b>Joint Loan</b> . A <b>Co-borrower</b> will be legally responsible for the whole debt if the Borrower does not make repayments on the loan, not just the Co-borrower's share. If neither can pay the debt, it can end up as a default listing on the credit report
Consumer lease	A contract for the hire of goods a <b>Lessee</b> that does not have a right or obligation to purchase the goods
Credit assistance	A person who gives advice to a consumer or <b>Credit licensee</b> about consumer credit e.g. <b>Financial broker</b>
Credit licensee	All <b>Lenders</b> must have a credit licence from the Australian Securities & Investments Commission to engage in credit activities (such as providing credit)
Debt	Money owed on a credit contract
Default listing	An overdue debt listed on your credit report that may make it hard to borrow money for several years, and risk being made bankrupt
Financial broker	An individual or firm that charges a fee or commission for signing credit contracts on behalf of a <b>Lender</b> (such as a bank)
Financial hardship	When a <b>Borrower</b> is willing, but unable, to meet their contractual debt obligations because of unexpected events or unforeseen changes that impacts cashflow, for example: Changes in income or expenditure, changes in employment status (such as losing a job or having hours reduced)
Guarantor	A person who signs a 'contract of guarantee' that is a written promise by the <b>Guarantor</b> that the <b>Borrower</b> will keep to all the terms and conditions of their credit contract. If the Borrower doesn't do so, the contract of guarantee requires the <b>Lender</b> to chase the guarantor for all the money owing under the credit contract
Joint loan	When a <b>Borrower</b> and <b>Co-borrower</b> sign a credit agreement for a loan where they are jointly and individually liable for the debt
Judgement	A decision by a court that has been entered into the public record to recover debt
Lender (also the Credit provider)	Person providing the credit
Lessee	A person who signs a <b>Consumer Lease</b> to hire goods or property
Lessor	A person who leases goods or property for hire

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