

LIMITATIONS OF AUSTRALIA'S LEGAL HARDSHIP PROTECTIONS FOR WOMEN WITH DEBT PROBLEMS CAUSED BY ECONOMIC ABUSE

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Research on economic abuse has identified multiple ways in which perpetrators use debt to exercise power and control over women in violent relationships. However, there have been few attempts to evaluate consumer credit law's role in responding to perpetrators coercing or deceiving women into taking on debt in their own names or in joint names. At present, one option for women managing such debt is to negotiate payment arrangements with creditors under the legal protections for Australians in financial hardship. In this article, we draw upon focus groups with consumer advocates to examine the extent to which these protections and their implementation by creditors facilitate – or undermine – women's financial recovery. We argue that these protections have limited capacity to assist victims of economic abuse, in the absence of provisions for severing liability for joint debt incurred in the context of gendered dynamics of power and control.

I INTRODUCTION

Since the 1970s, feminist activism has driven a shift towards the treatment of family violence – previously considered a private matter that fell outside the scope of state regulation – as a social problem requiring public scrutiny and intervention. This shift occurred amidst growing criticism of police inaction in the face of assault taking place within the family home. Starting in the 1980s, this led to the enactment of specialist legislation introducing a civil remedy for family violence in all Australian states and territories.¹ In the Australian Capital Territory, the

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1 See *Domestic Violence and Protection Orders Act 2008* (ACT) (now replaced by *Family Violence Act 2016* (ACT)); *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic Violence Act 1992* (NT) (now replaced by *Domestic and Family Violence Act 2007* (NT)); *Domestic and Family Violence Protection Act 1989* (Qld) (now replaced by *Domestic and Family Violence Protection Act 2012* (Qld));

Northern Territory, Queensland, South Australia, Tasmania, Victoria, and Western Australia, such legislation has since been amended to acknowledge that family violence can include not only physical abuse, but also emotional, psychological, sexual and economic abuse.² Yet over three decades after the passing of Australia's first family violence legislation in 1987,³ the statistics on the incidence of family violence remain stark. One in four Australian women has experienced at least one incident of violence – including the attempt or threat of physical or sexual assault – by an intimate partner.⁴ The estimated economic cost of family violence against women in Australia totals \$21.7 billion per year, the bulk of which is borne by the victims themselves.⁵ An extensive body of scholarship has emerged documenting the prevalence of physical, emotional and sexual forms of family violence and their profound consequences for women's physical and mental health and long-term financial security.⁶

Significantly less attention has been paid to the problem of economic abuse, which has been described in the media as a 'covert'⁷ and 'relatively unknown'⁸ – yet 'awfully common'⁹ – form of family violence. Adams et al define economic

Domestic Violence Act 1994 (SA) (now replaced by *Intervention Orders (Prevention of Abuse) Act 2009* (SA)); *Family Violence Act 2004* (Tas); *Crimes (Family Violence) Act 1987* (Vic) (now replaced by *Family Violence Protection Act 2008* (Vic)); *Restraining Orders Act 1997* (WA).

- 2 *Family Violence Act 2016* (ACT) s 8(1) (covers sexual violence or abuse, emotional or psychological abuse and economic abuse); *Domestic and Family Violence Act 2007* (NT) ss 5–8 (covers sexual assault, economic abuse, intimidation (including mental harm) and stalking but does not explicitly mention broader emotional abuse); *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1) (covers sexual abuse, emotional or psychological abuse and economic abuse); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(1) (covers sexual, emotional, psychological and economic abuse); *Family Violence Act 2004* (Tas) ss 7–9 (covers sexual assault, emotional abuse or intimidation (including mental harm) and economic abuse); *Family Violence Protection Act 2008* (Vic) s 5(1) (covers sexual violence or abuse, emotional or psychological abuse and economic abuse); *Restraining Orders Act 1997* (WA) s 5A (covers sexual assault or abuse, stalking, derogatory remarks and economic abuse (denying financial autonomy and withholding financial support) but does not explicitly mention broader emotional or psychological abuse).
- 3 This was the *Crimes (Family Violence) Act 1987* (Vic).
- 4 By comparison, only 1 in 13 men has experienced violence by an intimate partner: Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017).
- 5 PricewaterhouseCoopers Australia, *A High Price to Pay: The Economic Case for Preventing Violence Against Women* (Report, 23 November 2015) 4.
- 6 See, eg, Rochelle Braaf and Isobelle Barrett Meyering, Australian Domestic and Family Violence Clearinghouse, *Seeking Security: Promoting Women's Economic Wellbeing following Domestic Violence* (Report, March 2011); Sandy Cook and Judith Bessant (eds), *Women's Encounters with Violence: Australian Experiences* (Sage Publications, 1997); Ilsa Evans, Centre for Women's Studies and Gender Research, Monash University, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (Report, February 2007); Anna Ferrante et al, *Measuring the Extent of Domestic Violence* (The Hawkins Press, 1996).
- 7 Georgina Dent, "'Covert Violence': The Hidden Cost of Financial Abuse', *The Sydney Morning Herald* (online, 10 March 2017) <<https://www.smh.com.au/money/planning-and-budgeting/covert-violence-the-hidden-cost-of-financial-abuse-20170309-guukah.html>>.
- 8 Samantha Donovan, 'Economic Abuse a Relatively Unknown Form of Domestic Violence', *ABC News* (online, 2 March 2017) <<http://www.abc.net.au/news/2017-03-02/finances-being-used-in-domestic-abuse-cases,-research-shows/8316566>>.
- 9 Bianca Hartge-Hazelman, "'I'm Not Paying for That': Financial Abuse Is Awfully Common', *news.com.au* (online, 6 September 2016) <<https://www.news.com.au/lifestyle/real-life/news-life/im-not-paying-for-that-financial-abuse-is-awfully-common/news-story/fl173e1b933dedc22678b403f286a07>>.

abuse as involving behaviours that ‘control a woman’s ability to acquire, use, and maintain economic resources, thus threatening her economic security and potential for self-sufficiency’.¹⁰ Like other forms of family violence, economic abuse is a gendered problem, with 15.7% of Australian women experiencing it in their lifetimes, compared to just 7.1% of men.¹¹ For this reason, this article will refer primarily to women as the victims of economically abusive behaviours. Sharp suggests that economically abusive behaviours can be grouped into four categories: (a) interfering with a woman’s ability to acquire economic resources through education, employment or access to social security; (b) controlling her access to economic resources such as household income, bank accounts and assets such as cars; (c) refusing to contribute towards economic costs such as household bills and child rearing; and (d) generating economic costs by coercing, deceiving or pressuring a woman to take on debt, either solely in her own name, or in joint names with the perpetrator.¹² It is the last form of economic abuse that will be the focus of this article.

The growing body of empirical research on the prevalence and dimensions of economic abuse in Australia and overseas has identified multiple ways in which perpetrators use debt to exercise power and control over women in the context of a violent relationship. During the relationship, the perpetrator may force the woman to take on liability for debts in her name only, even where the perpetrator is the sole beneficiary of the debt. Examples include coercing the woman into signing contracts for car loans, credit cards or mobile phones in her own name, and then retaining exclusive use of the car, credit card or phone. The perpetrator may also put contracts for household utilities in the woman’s name only, even where both members of the couple are living in the family home and using these services. Alternately, in circumstances commonly referred to as ‘sexually transmitted debt’, they may pressure the woman to act as a third party guarantor for loans taken out in the perpetrator’s name. After separation, the perpetrator may intentionally accrue debt on credit cards taken out in the woman’s name, or allow arrears to build on utility contracts held in her name after she has fled the family home. They may also stop paying their share of, or threaten to default on, debts held in the couple’s joint names. At present, the principle of joint and several liability means that women can be pursued separately for the entire amount owing on a credit, utility or phone contract that was taken out in joint names with their former partner. As a result, many women with joint debt taken out in the context of economic abuse are forced to forego essentials such as food and heating in order to pay both their own and their former partner’s share of the debt, and thus avoid having a default listing on their credit history.

10 Adrienne E Adams et al, ‘Development of the Scale of Economic Abuse’ (2008) 14(5) *Violence Against Women* 563, 564.

11 Jozica Kutin, Roslyn Russell and Mike Reid, ‘Economic Abuse between Intimate Partners in Australia: Prevalence, Health Status, Disability and Financial Stress’ (2017) 41(3) *Australian and New Zealand Journal of Public Health* 269, 270.

12 Nicola Sharp, “‘What’s Yours Is Mine’”: The Different Forms of Economic Abuse and Its Impact on Women and Children Experiencing Domestic Violence’ (Research Report, Refuge, 2008) 20–6. See also Adams et al (n 10) 565–7.

One option for women struggling to make repayments on debts incurred in the context of economic abuse is to seek assistance under the legal protections that have been enacted at national and state level for Australians in financial hardship. Financial hardship, in this context, refers to the situation where a person takes on payment obligations under a credit contract, but then – for reasons such as illness, unemployment, or relationship breakdown – becomes unable to meet them when they fall due.¹³ Hardship protections are contained in a complex patchwork of legislation – the most prominent example of which is section 72 of the *National Credit Code* ('NCC')¹⁴ – as well as regulatory codes and self-regulatory codes of practice across the consumer credit, energy, water and telecommunications sectors.¹⁵ They allow consumers facing payment difficulties to negotiate alternative payment arrangements with creditors, with the aim of deferring – and ideally, avoiding altogether – the consequences of default. They thus provide a limited exception to the principle that each party to a credit contract is responsible for their ability to pay in accordance with its terms.¹⁶ This principle stems from the liberal notion of the contract described by Dalton, which regards the strict enforcement of these terms as merely the 'neutral facilitation'¹⁷ of the original intent of autonomous parties with equal bargaining power.

The limited research in this area suggests that debtors face multiple barriers to exercising their rights under Australia's legal hardship protections, and that the short-term payment plans being provided by creditors in fulfilment of their obligations are unsuitable for women leaving violent relationships, for whom the process of gaining financial stability is typically a lengthy and complex one.¹⁸ There is a clear need for a more comprehensive examination of the extent to which the structure of the legal hardship protections and their implementation by creditors facilitate – or undermine – the financial recovery of women with debt problems caused by economic abuse.

We have sought to address this gap in the research by carrying out the empirical study that forms the subject of this article. Our study involved focus group interviews with consumer advocates employed by Victorian community organisations that have extensive experience in conducting research and policy

13 See, eg, Australian Bankers' Association, 'Promoting Understanding about Banks' Financial Hardship Programs' (Industry Guideline, November 2016) 1–2.

14 See *National Consumer Credit Protection Act 2009* (Cth) ('NCCP Act') sch 1, s 72.

15 The legal frameworks containing these protections are analysed in Paul Ali, Evgenia Bourova and Ian Ramsay, 'Responding to Consumers' Financial Hardship: An Evaluation of the Legal Frameworks and Company Policies' (2015) 23(1) *Competition and Consumer Law Journal* 29 ('Responding to Consumers' Financial Hardship').

16 Thomas Wilhelmsson, *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law* (Kluwer Academic Publishers, 1992) 130, 181.

17 Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94(5) *The Yale Law Journal* 997, 1012.

18 See, eg, Consumer Utilities Advocacy Centre, *Helping Not Hindering: Uncovering Domestic Violence and Utility Debt* (Research Report, August 2014); Owen Camilleri, Tanya Corrie and Shorna Moore, Good Shepherd Australia New Zealand and Wyndham Legal Service, *Restoring Financial Safety: Legal Responses to Economic Abuse* (Research Report, 2015); Emma Smallwood, Women's Legal Service Victoria, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (Report, September 2015).

work in relation to women affected by economic abuse and other forms of family violence. In Part II of this article, we introduce the legal context for our study, which includes the legal hardship protections as well as the recent responses to economic abuse as a cause of debt problems in the wake of Victoria's Royal Commission into Family Violence ('Royal Commission'), which released its final report in 2016.¹⁹ In Part III, we show that despite the emergence of a significant body of scholarship on 'sexually transmitted debt' and other forms of economic abuse since the 1990s, there have been few attempts to evaluate the role of consumer credit law in responding to the fourth category of economically abusive behaviours identified by Sharp,²⁰ where perpetrators generate economic cost by coercing, deceiving or pressuring women to take on debt, either solely in their own names, or in joint names. In Parts IV and V, we outline the methodology used to carry out our study and set out our findings.

In Part VI, we discuss the implications of our findings for the effectiveness of a range of current and proposed law and policy strategies for assisting women with debt problems caused by economic abuse. Such strategies include support for advocates in navigating a complex intersection of family law and consumer credit law to ensure that their clients can exercise their rights under the legal hardship protections. They also include options for reform to the legal hardship protections to limit creditors' discretion as to who may access hardship assistance and the forms that such assistance can take in circumstances involving family violence. We also evaluate other strategies such as financial literacy education, which was described by the Royal Commission as 'a tool for the prevention of economic abuse'.²¹ Ultimately, we argue that in the absence of provisions expressly allowing women to apply for severance of their liability for joint debt incurred in the context of family violence, the legal hardship protections have limited capacity to assist victims of economic abuse. This lack of provision for severing liability reflects the fact that contract law, as argued by Howell, 'explicitly favours the objective manifestation of a party's intent over their actual intent'.²² Contract law thereby accepts and enforces a woman's responsibility for debts that were incurred as a result of gendered dynamics of power and control, rather than through her own free and informed consent.

II THE LEGAL CONTEXT

A Legal Protections for Consumers in Financial Hardship

Statutory protections allowing debtors in financial hardship a reprieve from the consequences of default have been part of Australian consumer credit law since

19 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vols 1–7 ('*Royal Commission into Family Violence*').

20 Sharp (n 12) 25–6.

21 *Royal Commission into Family Violence* (n 19) vol 4, 116–17.

22 Nicola Howell, 'Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1995) 4(1) *Australian Feminist Law Journal* 93, 97 ('Sexually Transmitted Debt').

the 1970s.²³ More recently – in response to rising rates of disconnection of consumers from essential services due to inability to pay,²⁴ as well as other indications of financial stress in the community²⁵ – state and federal governments, industry associations and regulators have also incorporated hardship protections into the regulatory frameworks covering the energy, water and telecommunications sectors.

Hardship protections provide a limited exception to the principle that each party to a credit contract is responsible for their ability to pay in accordance with its terms.²⁶ This principle stems from the liberal notion of the contract as the objective manifestation of the intent of parties with equal bargaining power,²⁷ who, in accepting its terms, had also assumed the risk that some circumstance beyond their control – such as illness, unemployment, or relationship breakdown – might make it difficult for them to meet their obligations.²⁸ Hardship protections allow consumers in these circumstances to negotiate alternative payment arrangements with creditors, with the aim of deferring – and ideally, avoiding altogether – the consequences of default. These consequences can include having their household disconnected from energy services; being subject to debt recovery proceedings in a court or tribunal; being pursued by third party debt collectors; and having a judgment debt enforced through the repossession of their home or deductions from their wages.²⁹ Such consequences have serious impacts on debtors' mental and physical health,³⁰ and affect their financial security in the long term, making it difficult for them to access further credit from mainstream lenders, or enter new contracts for utility services.

The legal protections for Australians in financial hardship have been subject to a comprehensive analysis by Ali, Bourova and Ramsay.³¹ They include section 72 of the *NCC*, which allows debtors to apply to their credit provider for a variation of their payment arrangements under a credit contract. Such variations typically

23 Paul Ali, Evgenia Bourova and Ian Ramsay, 'The Statutory Right to Seek a Credit Contract Variation on the Grounds of Hardship: A History and Analysis' (2016) 44 *Federal Law Review* 77, 80.

24 See Energy and Water Ombudsman Victoria, 'A Closer Look at Affordability: An Ombudsman's Perspective on Energy and Water Hardship in Victoria' (Research Paper, March 2015) 3; Energy and Water Ombudsman Victoria, *2014 Annual Report* (Report, 2014) 23.

25 According to a 2015 survey, only 35.7% of Australians consider themselves 'financially secure' and are not experiencing any form of financial stress, while 14.6% have debts that they are only just managing to repay, and 2.7% have debts larger than their ability to repay them: Kristy Muir et al, Centre for Social Impact, *Financial Resilience in Australia 2015* (Report, August 2016) 25, 30.

26 Wilhelmsson (n 16) 130, 181.

27 Dalton (n 17) 1010, 1012–13.

28 Wilhelmsson (n 16) 130.

29 See Eve Bodsworth, Consumer Action Law Centre, *Like Juggling 27 Chainsaws: Understanding the Experience of Default Judgment Debtors in Victoria* (Report, June 2013) 7, 13–16.

30 See, eg, Consumer Action Law Centre, *Heat or Eat: Households Should Not Be Forced to Decide Whether They Heat or Eat* (Report, August 2015) 39–41; Sarah Nettleton and Roger Burrows, 'When a Capital Investment Becomes an Emotional Loss: The Health Consequences of the Experience of Mortgage Possession in England' (2000) 15(3) *Housing Studies* 463; Pascoe Pleasence, Nigel J Balmer and Alexy Buck, 'The Health Cost of Civil-Law Problems: Further Evidence of Links between Civil-Law Problems and Morbidity, and the Consequential Use of Health Services' (2008) 5(2) *Journal of Empirical Legal Studies* 351.

31 Ali, Bourova and Ramsay, 'Responding to Consumers' Financial Hardship' (n 15).

involve an alteration to the timing of repayments, whether in the form of a moratorium, or a temporary reduction in repayment amounts coupled with an extension in the term of the loan.³² Hardship protections are also contained in clause 28 of the Code of Banking Practice (2013) ('ABA Code') published by the Australian Bankers' Association ('ABA'), which is now known as the Australian Banking Association.³³ On 1 July 2019, these protections were replaced by the provisions in chapters 39, 40 and 41 of a new Banking Code of Practice that will be discussed further in Part II(B). Hardship protections for energy, water and telecommunications customers are contained in regulatory codes – for example, the national *Telecommunications Consumer Protections Code* (2019),³⁴ or the Victorian *Energy Retail Code* (2019)³⁵ and *Customer Service Code: Urban Water Businesses* (2018)³⁶ – and legislation such as the National Energy Retail Law ('NERL').³⁷ These protections require service providers to publish hardship policies, and to offer alternative payment arrangements such as payment plans to customers experiencing payment difficulties. In the energy and water sectors, they also provide for more intensive forms of assistance and a reprieve from debt recovery to customers assessed as being eligible for entry into a 'hardship program'.³⁸

Importantly, almost none of these hardship protections require creditors to waive – or to even consider waiving – a customer's debt in any circumstances.³⁹ Creditors may vary the amount for which the customer is liable – by waiving all or part of the debt – at their own discretion.⁴⁰ Yet creditors also retain significant

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- 32 Paul Ali, Evgenia Bourova and Ian Ramsay, 'Financial Hardship Assistance Behind the Scenes: Insights from Financial Counsellors' (2017) 52(3) *Australian Journal of Social Issues* 241, 244 ('Financial Hardship Assistance Behind the Scenes').
- 33 Other self-regulatory codes adopted by the financial services sector also contain hardship protections: see Customer Owned Banking Association, *Customer Owned Banking Code of Practice* (2018) cl 24; Mortgage and Finance Association of Australia, *MFAA Code of Practice* (2016) cl 13.
- 34 Communications Alliance Ltd, *Telecommunications Consumer Protections Code* (at 1 August 2019) ch 7 ('*Telecommunications Consumer Protections Code*').
- 35 Essential Services Commission, *Energy Retail Code* (version 13, 2019) cls 84–6 ('*Energy Retail Code*').
- 36 Essential Services Commission, *Customer Service Code: Urban Water Businesses* (2018) cl 5 ('*Customer Service Code*').
- 37 *National Energy Retail Law (South Australia) Act 2011* (SA) sch 1 ss 43, 44, 50 ('*NERL Act*'). The National Energy Retail Law, together with the National Energy Retail Rules and the National Energy Retail Regulations, is part of the National Energy Customer Framework. It applies in the Australian Capital Territory, New South Wales, Queensland, South Australia and Tasmania.
- 38 See, eg, *NERL Act* sch 1 s 44; *Customer Service Code* (n 36) cl 5.4.
- 39 Western Australia is the only jurisdiction where energy and water retailers are required to give consideration to a request to reduce the amount of a customer's debt: Ali, Bourova and Ramsay, 'Responding to Consumers' Financial Hardship' (n 15) 50. A review of energy retailers' hardship policies and practices in the NERL states found that debt waiver tends to be offered on an 'ad-hoc and discretionary basis': Australian Energy Regulator, *Review of Energy Retailers' Customer Hardship Policies and Practices* (Report, January 2015) 19.
- 40 For example, see *Energy Retail Code* (n 35) cl 92(4), which states that nothing in this Code prevents an energy retailer from waiving a customer's debt. For more detailed provisions for waiver, see Australian Banking Association, 'Banking Code of Practice' (Industry Guideline, 1 July 2019) cls 171–2 ('Banking Code of Practice'), which provide that banks may 'look outside normal processes' to reduce or waive a customer's debt in cases of 'long term hardship as a result of a material change in circumstances'. Clause 172 stipulates that this decision will remain fully at the bank's discretion, to be exercised 'on a case by case basis and on compassionate grounds'. In making this decision, banks will be able to have regard to:

discretion to determine eligibility for all other forms of assistance under these protections, and to decide on the types of assistance that will be provided in each case.⁴¹ For example, section 72 of the *NCC* does not require creditors to actually grant a hardship variation, especially if they do not believe there is a 'reasonable cause' for the debtor's inability to pay.⁴² Only in Victoria has there been an attempt to reduce this level of discretion through the introduction of a new framework of hardship protections.⁴³ Since 1 January 2019, Victorian energy retailers have been required to provide a minimum range of 'standard assistance' – including options for making payments at different intervals, or extending the due date for at least one bill per year – to all customers who are anticipating facing payment difficulties, as well as 'tailored assistance' comprising flexible payment arrangements and assistance with reducing energy costs for customers who are already in arrears.⁴⁴

Yet research suggests that few debtors are exercising their rights under these protections by negotiating payment arrangements with creditors during stressful, and sometimes traumatic, periods in their lives.⁴⁵ Debtors who contact creditors to discuss their payment difficulties are often forced to negotiate with staff who are unsympathetic, or who intentionally block access to company hardship teams.⁴⁶ When they do secure assistance, it is typically confined to short-term payment plans that have been criticised by consumer advocates for exacerbating the impoverishment of debtors on low incomes.⁴⁷ While such solutions may be sufficient for middle class debtors experiencing a temporary income disruption, multiple commentators argue that they are unsuitable for debtors negotiating complex financial problems in the context of socio-economic disadvantage.⁴⁸ One group of debtors who may fall within the latter category are women with debt problems caused by economic abuse.

(a) the customer's individual circumstances; (b) whether the customer is unable to meet their repayments; (c) whether their hardship is genuine and being caused by factors outside their control; and (d) their commercial considerations.

41 Evgenia Bourova, Ian Ramsay and Madeleine Roberts, 'Reporting on Hardship Practice in the Consumer Credit and Energy Sectors: An Analysis' (2017) 25(1) *Competition and Consumer Law Journal* 71, 74–7, 88; Essential Services Commission, *Supporting Customers, Avoiding Labels: Energy Hardship Inquiry Final Report* (Report, February 2016) 32, 37.

42 See note to *NCCP Act* sch 1 s 72(3).

43 See Essential Services Commission, *Payment Difficulty Framework* (Final Decision, 10 October 2017).

44 Energy Retail Code (n 35) pt 3.

45 Paul Ali, Evgenia Bourova and Ian Ramsay, 'The Role of the Legal Hardship Protections in Coping with Debt Problems: Insights from a Survey of Consumers' (2016) 24(2) *Competition and Consumer Law Journal* 77; Lynne Chester, 'The Impacts and Consequences for Low-Income Australian Households of Rising Energy Prices' (Research Paper, The University of Sydney, October 2013) 116.

46 Ali, Bourova and Ramsay, 'Financial Hardship Assistance Behind the Scenes' (n 32) 250–1.

47 See generally, Consumer Action Law Centre, *Problems with Payment: How Energy Retailers Can Assist Consumers Having Trouble Paying Bills* (Report, July 2014) ('*Problems with Payment*').

48 Ali, Bourova and Ramsay, 'Financial Hardship Assistance Behind the Scenes' (n 32) 254–8; Consumer Action Law Centre, *Problems with Payment* (n 47) 11–28; Denis Nelthorpe and Kate Digney, West Heidelberg Community Legal Service, *The Bulk Debt Negotiation Project* (Report, March 2011) 17–18.

B Responses to Economic Abuse as a Cause of Debt Problems

Feminist activism since the 1970s has driven a shift away from what O'Donovan describes as the 'liberal view' of the heterosexual nuclear family as a 'private' entity falling outside the scope of state regulation.⁴⁹ During the 1980s and 1990s, amidst growing criticism of police inaction in the face of assault taking place within the family home, Australian states and territories passed legislation introducing a civil remedy for victims of family violence, known as an intervention order in Victoria, or a restraining order, protection order or restraint order in other jurisdictions.⁵⁰ More recently, alongside other non-physical forms of violence, economic abuse was included in the definitions of family violence in the *Family Law Act 1975* (Cth),⁵¹ and in the family violence legislation of the Australian Capital Territory, the Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia.⁵² One example of such legislation is the *Family Violence Protection Act 2008* (Vic), which acknowledges that 'family violence extends beyond physical and sexual violence and may involve emotional or psychological abuse and economic abuse'.⁵³ Section 6 of the same Act defines economic abuse as

- behaviour by a person (the first person) that is coercive, deceptive or unreasonably controls another person (the second person), without the second person's consent –
- (a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
 - (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

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- 49 Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985) 12–15. See also Elizabeth M Schneider, 'The Violence of Privacy' in Martha Albertson Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (Routledge, 1994); Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995).
- 50 Anna Carline and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women* (Routledge, 2014) 82; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 12. For the current versions of this legislation, see *Family Violence Act 2016* (ACT); *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic and Family Violence Act 2007* (NT); *Domestic and Family Violence Protection Act 2012* (Qld); *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Family Violence Act 2004* (Tas); *Family Violence Protection Act 2008* (Vic); *Restraining Orders Act 1997* (WA).
- 51 Section 4AB(1) of the *Family Law Act 1975* (Cth) defines family violence broadly as 'violent, threatening or other behaviour by a person that coerces or controls a member of that person's family, or causes the family member to be fearful'. Section 4AB(2) provides examples of behaviour that may constitute family violence, including '(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; and (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support'.
- 52 See *Family Violence Act 2016* (ACT) ss 8(1), 8(3); *Domestic and Family Violence Act 2007* (NT) ss 5, 8; *Domestic and Family Violence Protection Act 2012* (Qld) ss 8(1), 12; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 8(1), 8(5); *Family Violence Act 2004* (Tas) ss 7–8; *Family Violence Protection Act 2008* (Vic) ss 5(1), 6; *Restraining Orders Act 1997* (WA) s 5A(2).
- 53 *Family Violence Protection Act 2008* (Vic) Preamble.

Over the past decade, the law and policy responses to economic abuse and other forms of family violence in Australia have been the subject of review at state and federal level.⁵⁴ In 2015, in response to a rise in family violence-related deaths in Victoria – most prominently, the murder of 11-year-old Luke Batty in 2014⁵⁵ – the Victorian Government established a Royal Commission charged with evaluating community and government responses to family violence. In its final report, the Royal Commission identified a ‘widespread lack of awareness’⁵⁶ of economic abuse in the community, including on the part of creditors implementing the legal hardship protections outlined in Part II(A). The absence of clear ‘eligibility criteria’ for accessing assistance under these protections theoretically meant that family violence could qualify as grounds for a reprieve from debt recovery. However, in practice, it gave creditors discretion to continue pursuing victims of family violence even after being informed that the debt was taken out in circumstances involving coercion or duress, or that the victim could not afford to make any repayments so soon after fleeing the relationship.⁵⁷ The Royal Commission concluded that for victims of family violence, ‘the psychological and emotional toll of attempting to resolve debts at the same time as ensuring their own personal safety cannot be understated’.⁵⁸

The Royal Commission expressed particular concern about joint debt incurred in the context of economic abuse, which it described as ‘one of the most difficult issues for victims to resolve’ with creditors.⁵⁹ At present, the principle of joint and several liability means that women can be pursued separately for the entire amount owing on a credit, utility or phone contract that was taken out in joint names with their former partner, whether or not they themselves used or benefited from the loan, utility service or mobile phone service.⁶⁰ Only in the consumer credit sector is there a provision – contained in clause 29.1 of the ABA Code – stating that both parties who take on joint and several liability under a loan should receive a benefit from the loan. However, it is unclear whether clause 29 can be used to allow co-debtors who have already been coerced into signing a contract from which they received no benefit to ‘sever’ their name from the liability. Citing research by Smallwood, the Royal Commission found that there is currently no clear ‘legal recourse’⁶¹ allowing women with joint debt incurred in the context of family

54 See, eg, Australian Law Reform Commission, *Family Violence: A National Legal Response* (Report No 114, October 2010) vol 1; Victorian Law Reform Commission, *Review of Family Violence Laws* (Report No 185, February 2006); National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children 2009–2021* (Report, March 2009).

55 See Madeleine Morris, ‘Luke Batty: Murdered Schoolboy’s Mother Rosie Calls for More Action against Domestic Violence’, *ABC News* (online, 24 April 2014) <<http://www.abc.net.au/news/2014-04-24/luke-rosie-batty-domestic-violence-campaign-murder-schoolboy/5410602>>.

56 *Royal Commission into Family Violence* (n 19) vol 4, 93.

57 *Ibid* 102–5.

58 *Ibid* 102.

59 *Ibid* 103.

60 For a general illustration of this principle, see *AIB Group (UK) PLC v Martin and Gold* [2001] UKHL 63. For a critique of how this principle operates in the context of economic abuse, see Smallwood (n 18) 20, 22, 27–8.

61 Smallwood (n 18) 4, 20.

violence to vary the contract – either by severing their name from the liability, or seeking an alternative payment arrangement under the legal hardship protections – without the other party’s consent.⁶² As a result, women who flee violent relationships may endure severe deprivation while trying to meet repayments on jointly held debt that their former partner has refused to pay, so as to avoid having their household disconnected from essential services, or having a default listing on their credit record.⁶³

In light of these findings, the Royal Commission recommended the following measures for improving responses to economic abuse:⁶⁴

- amending the legal hardship protections to define the circumstances in which debtors will be eligible to seek – or receive – assistance. The Royal Commission recommended that family violence be included as a ground for seeking a hardship variation under section 72 of the NCC; and as an explicit eligibility criterion for accessing a hardship program in the Energy Retail Code, the Customer Service Code – Urban Water Businesses and the Telecommunications Consumer Protections Code;
- developing family-violence-specific industry guidelines by the ABA and the Essential Services Commission (‘ESC’) to provide for ongoing training to assist their customer service staff to understand, identify and deal with economic abuse;
- promoting the availability of dispute resolution mechanisms (including those provided by the Energy and Water Ombudsman Victoria, the Financial Ombudsman Service and the Telecommunications Industry Ombudsman) to assist victims of family violence to resolve disputes with creditors;
- amending the Telecommunications Consumer Protections Code to require company family violence policies to clarify consent requirements for payment plans when an account is jointly held; and include grounds for splitting joint debt and removing an account holder’s name if family violence has occurred;
- requiring financial counsellors to receive training in assisting victims of family violence and economic abuse.

Some of the Royal Commission’s recommendations have since been implemented by regulators and industry associations. In 2016 and 2017, the ABA and the ESC released family-violence-specific industry guidelines for the Australian banking and Victorian water sectors.⁶⁵ The ABA guideline stated that the disclosure of family violence by a customer should trigger ‘referral to the

62 *Royal Commission into Family Violence* (n 19) vol 4, 103, 105.

63 *Ibid* 103–4.

64 *Ibid* 119–20.

65 Australian Bankers’ Association, ‘Financial Abuse and Family and Domestic Violence Policies’ (Industry Guideline, November 2016) (‘Financial Abuse and Family and Domestic Violence Policies’); Essential Services Commission, ‘Moving towards Better Practice: Implementing Family Violence Policies in the Victorian Water Sector’ (Guidance Paper, May 2017) (‘Moving towards Better Practice’).

appropriate team' and a reprieve from selling the debt on to debt collectors.⁶⁶ The ABA guideline acknowledged that customers affected by family violence may require longer-term payment arrangements and waivers for small amounts of unsecured debt, and stated that banks should avoid default listing customers impacted by economic abuse.⁶⁷ In addition to releasing its guideline, the ESC also amended the *Customer Service Code – Urban Water Businesses* to explicitly recognise family violence as an eligibility criterion for accessing hardship assistance;⁶⁸ and to require Victorian water retailers to develop family violence policies.⁶⁹ In 2017, the Communications Alliance Ltd also incorporated family violence into the definition of financial hardship in the *Telecommunications Consumer Protections Code*, and included it as a circumstance in which telecommunications companies should 'where possible' provide flexible repayment options.⁷⁰

None of these responses to the Royal Commission's recommendations represented an enforceable commitment to changing the approach to the issue of joint debt in the context of family violence. The ESC guideline merely noted that Victorian water retailers could choose between a range of options for dealing with joint debt, including waiving all or some of the debt; apportioning the debt between the parties and allowing each party to arrange separate payment plans; closing the joint account, opening an account in one name only, and apportioning the debt as agreed; and for joint property owners, leaving the debt against the property and then recouping it when the property was sold.⁷¹ The ABA guideline went further in outlining a preferred course of action for dealing with joint debt. Importantly, the guideline provided that banks should accept hardship applications from joint debtors without the consent of the other co-debtor; and should also consider severing or apportioning a joint loan so that a victim of family violence paid only a portion (or, if appropriate, no portion) of the debt in return for a release from the whole of the debt.⁷² The guideline also stated that banks should investigate circumstances where a co-debtor may have been coerced into taking on a credit obligation despite receiving limited or no benefit from it in contravention of clause 29.1 of the ABA Code.⁷³

The possibility of relying on clause 29.1 of the ABA Code to seek the severance of liability for joint debt in the context of family violence was acknowledged by the Financial Ombudsman Service ('FOS') – which, together with the Credit and Investments Ombudsman ('CIO'), was formerly the provider of dispute resolution services to financial services customers. The FOS suggested that a co-debtor may be able to apply to external dispute resolution to be released from liability where the credit provider should have been aware, at the time of

66 Australian Bankers' Association, 'Financial Abuse and Family and Domestic Violence Policies' (n 65) 5, 7.

67 Ibid 6–7.

68 *Customer Service Code* (n 36) cl 14.

69 Ibid.

70 *Telecommunications Consumer Protections Code* cls 2.1, 6.12(1)(f).

71 Essential Services Commission, 'Moving towards Better Practice' (n 65) 41–2.

72 Australian Bankers' Association, 'Financial Abuse and Family and Domestic Violence Policies' (n 65) 5.

73 Ibid 6.

lending, that the co-debtor would derive no benefit from the transaction.⁷⁴ Meanwhile, the CIO took the position that ‘strictly speaking’, they had ‘no way of severing the joint liability’, even in the context of family violence, meaning that the victim must ‘remain financially linked to their partner’.⁷⁵ However, the CIO left open the possibility of assisting victims of family violence to reach arrangements with the credit provider so that the latter agreed not to pursue them for the debt, or to make separate agreements relating only to their share of the debt.⁷⁶ In November 2018, the FOS and CIO were replaced by a single scheme – the Australian Financial Complaints Authority – and it is yet unclear what stance the new external dispute resolution body will take on this issue.

Most recently, the ABA released the new Banking Code of Practice (2019) introduced in Part II(A). In our view, this new Code goes furthest in providing a potential avenue for victims of family violence to seek the severance of liability for joint debts. Clause 54 of the new Code states that member banks will not approve a person as a co-debtor if, on the information provided by them, it appears that they will not receive a ‘substantial benefit’⁷⁷ from the loan. Clause 56 then states that a co-debtor may end their liability under a loan by giving the bank a written request to do so in certain circumstances, including ‘where credit has not been provided or relied upon by any co-borrower’. On its face, these provisions appear to provide a higher standard of protection compared to the current ABA Code, in that they (a) require that a ‘substantial’ benefit be provided to each co-debtor; and (b) expressly provide circumstances in which a co-debtor may apply to end their liability under a loan. However, as the new Banking Code of Practice only came into effect on 1 July 2019, it remains unclear what evidentiary hurdles a co-debtor might face in trying to show that she had never ‘relied upon’ a jointly held loan, especially if it was taken out for the purposes of acquiring a residential or investment property, or financing a family business.

III PREVIOUS RESEARCH ON ECONOMIC ABUSE AS A CAUSE OF DEBT PROBLEMS

The recognition of economic abuse as a social problem requiring public scrutiny and intervention in Australia was influenced by the emergence of an extensive body of feminist scholarship highlighting the ways in which gendered patterns of power and control manifest themselves in intimate partner relationships. Such scholarship has been central in raising awareness of the prevalence of physical, emotional, psychological and sexual abuse and its

74 Financial Ombudsman Service, *The FOS Approach to Joint Facilities and Family Violence* (version 3, March 2017) 7.

75 Credit and Investments Ombudsman, *Position Statement on Family Violence* (September 2017) [4.3].

76 *Ibid* [4.4].

77 A ‘substantial benefit’ includes where (a) the co-debtor acquires a reasonably proportionate legal or equitable interest in assets purchased with the loan funds; or (b) a reasonable portion of the loan’s funds are used to repay the debts of the co-debtor: Australian Banking Association, ‘Banking Code of Practice’ (n 40) cl 55.

profound consequences for women.⁷⁸ These include economic consequences, comprising not only the immediate costs of seeking medical treatment for injuries, replacing damaged property and navigating housing insecurity after separation, but also the longer-term impacts of ongoing susceptibility to physical and mental health problems (for example, depression and post-traumatic stress disorder) on women's capacity to pursue education and employment.⁷⁹ Research by Sheehan and Smyth has shown that physical abuse even affects post-separation outcomes in the Family Court property settlement process, with women who experience 'severe' abuse around three times as likely to receive a minority share of the couple's property as women who do not report physical abuse.⁸⁰

Significantly less attention has been paid to the problem of economic abuse, which can enable perpetrators to continue to control their victims long after separation. The landmark study on 'sexually transmitted debt' in the United Kingdom by Fehlberg⁸¹ – and later Australia's first study on 'relationship debt' by Millbank and Lovric⁸² – provided an important foundation for the recognition of economic abuse as a distinct phenomenon. Building upon earlier research by community organisations,⁸³ these studies showed that women taking on liability for their male partners' business borrowings as third party guarantors frequently did so as a result of a power imbalance in their relationships – whether due to physical abuse and emotional manipulation, or economic dependence on the borrower – rather than because they fully understood the legal consequences of, or received a benefit from, the transaction.⁸⁴

These studies provided an empirical reference point for scholarship that analysed judicial decisions grappling with the question of when the contractual liability of women acting as guarantors could be set aside on the basis of the equitable doctrines of undue influence and unconscionability.⁸⁵ These decisions

78 See, eg, Braaf and Barrett Meyering (n 6); Cook and Bessant (eds) (n 6); Evans (n 6); Ferrante et al (n 6).

79 Braaf and Barrett Meyering (n 6) 43–8, 65–7, 85–9; National Council to Reduce Violence against Women and their Children, *The Cost of Violence against Women and their Children* (Report, March 2009) 20–6; Evans (n 6) 5, 13–18, 24–30.

80 Grania Sheehan and Bruce Smyth, 'Spousal Violence and Post-Separation Financial Outcomes' (2000) 14(2) *Australian Journal of Family Law* 102, 112. See also Braaf and Barrett Meyering (n 6) 56–8; Belinda Fehlberg and Christine Millward, 'Family Violence and Financial Outcomes after Parental Separation' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 235, 239–40.

81 Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press, 1997) ('Sexually Transmitted Debt').

82 New South Wales Law Reform Commission, *Darling, Please Sign This Form: A Report on the Practice of Third Party Guarantees in New South Wales* (Research Report No 11, October 2003); Jenni Millbank and Jenny Lovric, 'Darling, Please Sign This Form: Relationship Debt and Guarantees' (2003) 28(6) *Alternative Law Journal* 282.

83 See, eg, Supriya Singh, *For Love Not Money: The Stories of Women in Family Business* (Consumer Advocacy and Financial Counselling Association of Victoria, 1995); Supriya Singh, *Marriage Money: The Social Shaping of Money in Marriage and Banking* (Allen & Unwin, 1997) ('Marriage Money').

84 Millbank and Lovric (n 82) 284.

85 See, eg, Belinda Fehlberg, 'The Husband, the Bank, the Wife and Her Signature' (1994) 57(3) *Modern Law Review* 467; Janine Pascoe, 'Wives, Business Debts and Guarantees' (1997) 9(1) *Bond Law Review* 58; Paula Baron, 'The Free Exercise of Her Will: Women and Emotionally Transmitted Debt' (1995) 13(1) *Law in Context* 23; Howell, 'Sexually Transmitted Debt' (n 22); Miranda Kaye, 'Equity's Treatment of Sexually Transmitted Debt' (1997) 5(1) *Feminist Legal Studies* 35.

considered the application of the principle of ‘wives’ special equity’ enunciated in the 1939 case of *Yerkey v Jones*,⁸⁶ which held that where a wife signed on as a guarantor for her husband’s loan, the burden of proving actual undue influence by the husband would be lessened where (a) there was no evidence that the wife received a substantial benefit from the transaction; and (b) the credit provider failed to explain the transaction or ensure that the wife received independent legal advice.⁸⁷ In 1998, *Yerkey v Jones* was upheld as current Australian law in *Garcia v National Australia Bank Limited*,⁸⁸ where the High Court decided that ‘special protection’ for married women was warranted on the basis that they may ‘repose trust and confidence’ in their husbands in business dealings.⁸⁹

While the majority judgment in *Garcia v National Australia Bank Limited* was criticised for endorsing stereotypes about the behaviour of married women,⁹⁰ this decision – and earlier cases involving ‘sexually transmitted debt’ – paved the way for the recognition of other forms of economic abuse by challenging two assumptions. The first of these was the assumption about what Howell described as the ‘commonality of interests’⁹¹ of partners in a heterosexual relationship, who are ‘regarded as the one person’⁹² even though they may not, in fact, have equal access to the benefits of a financial transaction, or equal knowledge of the risks involved. The second was the assumption that contracts reflect the free will of rational, self-interested parties with equal bargaining power.⁹³ This assumption was countered by Fehlberg and others, who found that for women who signed up as guarantors for their male partners, consent was constrained by factors such as the assumption that they were obliged to provide economic support to their partner;⁹⁴ fear of violence;⁹⁵ and fear that refusing to sign would result in the breakdown of a relationship on which they were economically dependent.⁹⁶

86 (1939) 63 CLR 649 (*Yerkey v Jones*). For a detailed explanation of this principle, see Kristie Dunn, “‘Yakking Giants’: Equality Discourse in the High Court” (2000) 24(2) *Melbourne University Law Review* 427, 431–5.

87 This principle was followed in *Warburton v Whiteley* (1989) 5 BPR 97 388 (Clarke JA); *Peters v Commonwealth Bank of Australia* [1992] ASC 56–135, 57,363–4 (Brownie J); *Australia & New Zealand Banking Group Ltd v McGee* [1994] ASC 56–278, 58,929–30 (Cox J); and distinguished in cases including *European Asian of Australia Ltd v Lazich* (1987) ASC 55–564, 57,290 (Clarke J); *Akins v National Australia Bank Ltd* (1994) 34 NSWLR 155, 173 (Clarke JA); *Commonwealth Bank of Australia v McGlynn* [1995] ANZ ConvR 81. In the United Kingdom, it was rejected by the House of Lords in *Barclays’s Bank plc v O’Brien* [1994] 1 AC 180, 195 ff (Lord Browne-Wilkinson).

88 (1998) 194 CLR 395. It is arguable that this principle could also be applied to long-term de facto relationships with the requisite level of ‘trust and confidence’: at 404 [21]–[22] (Gaudron, McHugh, Gummow and Hayne JJ). This was the interpretation taken in *Liu v Adamson* [2003] NSWSC 74, [13]–[14], [22]–[23].

89 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 404 [21], 409 [31] (Gaudron, McHugh, Gummow and Hayne JJ).

90 Dunn (n 86) 441–2, 444–6.

91 Howell, ‘Sexually Transmitted Debt’ (n 22) 96.

92 *Ibid* 97.

93 See *ibid*; Dunn (n 86) 429; Dalton (n 17) 1106–7.

94 Fehlberg, *Sexually Transmitted Debt* (n 81) 181, 183; Dunn (n 86) 452.

95 Dunn (n 86) 450–2.

96 Fehlberg, *Sexually Transmitted Debt* (n 81) 183.

The emergence of a body of scholarship on 'sexually transmitted debt' was followed by research that sought to raise awareness of other forms of economic abuse beyond pressuring a partner to take on liability as a guarantor. Qualitative studies conducted by Branigan,⁹⁷ Sharp,⁹⁸ and most recently, Cameron,⁹⁹ used the firsthand narratives of victims of family violence to shed light on a range of controlling and coercive behaviours that had serious consequences for women's financial security. Other early studies – for example, the 'scale' of economic abuse developed by Adams et al¹⁰⁰ – sought to measure the nature, extent and impacts of such behaviours. Postmus et al¹⁰¹ – and also Stylianou, Postmus and McMahon¹⁰² – found that economic abuse was frequently correlated with other forms of family violence, such as physical, psychological and sexual abuse. Kutin, Russell and Reid identified financial stress and disability as significant risk factors for economic abuse,¹⁰³ while Wendt et al found another risk factor – age – concluding that economic abuse was the most common form of abuse experienced by older Australians, particularly women who were dependent on a male family member for care.¹⁰⁴ Other risk factors include being a member of a culturally and linguistically diverse group,¹⁰⁵ suggesting, as MacDonald argues, that vulnerability to economic abuse is heightened by factors that make it more difficult for victims to seek assistance, including cultural norms, isolation, lack of access to services and information, and low English literacy.¹⁰⁶

These studies have been followed by a more limited body of research examining the systemic underpinnings of particular abusive behaviours. Some have documented the ways in which perpetrators use the legal system – and specifically, the family law, child support and social security systems¹⁰⁷ – to directly or indirectly control women and undermine their ability to regain financial autonomy long after a violent relationship is over. Yet until recently, there have

97 Elizabeth Branigan and Marty Grace, Coburg-Brunswick Community Legal and Financial Counselling Centre, 'His Money or Our Money? Financial Abuse of Women in Intimate Partner Relationships' (Conference Paper, Australian Social Policy Conference, 20–2 July 2005) ('His Money or Our Money'); Elizabeth Branigan, "'Who Pays in the End?': The Personal and Political Implications of Financial Abuse of Women in Intimate Partner Relationships' [2007] (44) *Just Policy* 31.

98 Sharp (n 12).

99 Prue Cameron, WIRE Women's Information, *Relationship Problems and Money: Women Talk about Financial Abuse* (Report, 2014).

100 Adams et al (n 10).

101 Judy L Postmus et al, 'Understanding Economic Abuse in the Lives of Survivors' (2012) 27(3) *Journal of Interpersonal Violence* 411, 421.

102 Amanda Mathisen Stylianou, Judy L Postmus and Sarah McMahon, 'Measuring Abusive Behaviors: Is Economic Abuse a Unique Form of Abuse?' (2013) 28(16) *Journal of Interpersonal Violence* 3186, 3198–9.

103 Kutin, Russell and Reid (n 11) 269, 271.

104 Sarah Wendt et al, 'Financial Abuse of Older People: A Case Study' (2015) 58(2) *International Social Work* 287, 290. See also, Dale Bagshaw, Sarah Wendt and Lana Zannettino 'Preventing the Abuse of Older People by their Family Members' (Stakeholder Paper 7, Australian Domestic & Family Violence Clearinghouse, University of New South Wales, 2009) 5–6.

105 Fiona MacDonald, 'Spotlight on Economic Abuse: A Literature and Policy Review' (Literature Review, Good Shepherd Youth & Family Service and Kildonan UnitingCare, September 2012) 17.

106 Ibid 16–17.

107 See, eg, Kay Cook and Kristin Natalier, 'The Gendered Framing of Australia's Child Support Reforms' (2013) 27(1) *International Journal of Law, Policy and the Family* 28, 31.

been few attempts to evaluate the role of consumer credit law in responding to debt generated by perpetrators in their victim's name, or in their joint names. Studies by the Consumer Utilities Advocacy Centre,¹⁰⁸ Camilleri, Corrie and Moore,¹⁰⁹ and most recently, Smallwood,¹¹⁰ drew attention to ways in which the principles of consumer credit law, as well as its implementation by creditors in the consumer credit, utilities and telecommunications sectors, failed to prevent and in some cases even facilitated the perpetuation of economic abuse against women. The most prominent example of this was creditors' strict application of the principle of joint and several liability, even when told that a debt had been incurred in the context of economic abuse.¹¹¹ Creditors' tendencies to take an inflexible approach to the enforcement of joint debts allowed abusive partners to exercise control over women by threatening to default on joint debt, forcing them to make repayments they could not afford in order to avoid damaging their credit history.¹¹² In the absence of clear criteria and streamlined processes for accessing assistance under the legal hardship protections, women who fell behind with repayments risked being disconnected from essential services, and being left with insufficient income to cover essentials such as food.¹¹³

These findings are concerning, as economic insecurity has been identified as a key factor influencing a woman's decision to stay in or return to a violent relationship.¹¹⁴ There is therefore a clear need for a more comprehensive examination of the role of consumer credit law – and specifically, the legal hardship protections introduced in Part II(A) – in responding to the fourth category of economically abusive behaviours identified by Sharp,¹¹⁵ where perpetrators generate economic cost by coercing, deceiving or pressuring women to take on debt, either solely in their own names, or in their joint names. We have addressed this gap in the research by carrying out the empirical study detailed in Part IV of this article.

IV METHODOLOGY

Our study was situated within a feminist theoretical framework informed by the literature outlined in Part III of this article. Drawing upon this literature, we made assumptions about the existence of gender norms surrounding the division of paid work and unpaid care work, and financial management within heterosexual relationships. Our study sought to provide insight into the dimensions and impacts of these norms in the context of debt caused by economic abuse. More specifically, we sought to obtain a picture of the types of debt problems that feature in the case

108 Consumer Utilities Advocacy Centre (n 18).

109 Camilleri, Corrie and Moore (n 18).

110 Smallwood (n 18).

111 Ibid 20–3, 27–31; Consumer Utilities Advocacy Centre (n 18) 17, 44.

112 Camilleri, Corrie and Moore (n 18) 13.

113 Consumer Utilities Advocacy Centre (n 18) 22–8, 30; Smallwood (n 18) 22–3, 27; Evans (n 6) 28–9.

114 Braaf and Barrett Meyering (n 6) 5, 29.

115 Sharp (n 12) 25–6.

work of consumer advocates working with victims of family violence, and to gain insight into the major challenges that advocates face in resolving such debt problems. We also sought to understand the barriers that women with debt problems caused by economic abuse face in making use of the legal hardship protections outlined in Part II(A). Finally, we sought to identify law and policy reforms and other strategies that could assist women to exercise their rights in relation to debt problems caused by economic abuse, and to improve their financial security in the long term.

Our study addressed these research questions by carrying out a series of focus group interviews with consumer advocates – including case workers, consumer solicitors, financial counsellors, telephone support workers and project coordinators – employed by Victorian community organisations. We opted for a focus group methodology to allow the participating advocates – the majority of whom deal with family violence issues in the context of high caseloads, within busy and underfunded community organisations – to discuss these issues in greater depth, and to generate ideas that could inform law reform proposals. In light of this objective, focus groups have significant advantages. They are guided by open-ended qualitative questions, and thus enable the collection of more in-depth information by comparison to quantitative surveys (which present participants with limited response options).¹¹⁶ Focus groups also encourage participants to challenge and explain themselves to one another.¹¹⁷ Participants are allowed to ‘[bring] forward their own priorities and perspectives’,¹¹⁸ and thus to ‘collectively’ develop ideas that may not have previously been appreciated by researchers working in the field.

The participating organisations were selected on the basis of their extensive experience in providing advice and advocacy services and conducting research and policy work in relation to women affected by economic abuse. Participants were informed at the outset that one of the aims of the focus groups would be to develop law reform proposals. These organisations were Consumer Action Law Centre (a specialist consumer advocacy organisation that provides free legal advice and financial counselling services to consumers around Australia, as well as outreach and training to Victorian community workers); Good Shepherd Australia New Zealand (which provides community-based programs including financial counselling to vulnerable women and girls); and WIRE Women’s Information (a free generalist information, support and referral service for Victorian women). All of these organisations have been involved in the Economic Abuse Reference Group, which seeks to ‘[influence] government and industry responses to the financial impacts of family violence’.¹¹⁹

Our study received ethics approval in April 2015. Recruitment of the participants in the study was conducted by the participating organisations, which

116 David L Morgan, ‘Focus Groups’ (1996) 22 *Annual Review of Sociology* 129, 137.

117 *Ibid* 139.

118 Janet Smithson, ‘Using and Analysing Focus Groups: Limitations and Possibilities’ (2000) 3(2) *International Journal of Social Research Methodology* 103, 116.

119 See ‘Economic Abuse Reference Group’, *Reducing the Financial Impacts of Family Violence* (Web Page, 2018) <<https://earg.org.au/>>.

provided a recruitment package comprising a plain language statement and consent form to any of their employees who expressed an interest in taking part. Five focus groups were carried out between November 2015 and January 2018 across a range of locations including the Melbourne CBD, an outer suburb of Melbourne and a regional town of Victoria. Focus group 1 was held in December 2015, and involved a sample of seven consumer solicitors; focus group 2 was held in March 2016, and involved seven financial counsellors; focus group 3 was held in April 2016, and involved five financial counsellors; focus group 4 was held in January 2018, and involved three consumer solicitors; focus group 5 was also held in January 2018, and involved two telephone support workers and two project coordinators.

The focus groups were between one hour and 90 minutes in length, and were facilitated and audio-recorded by a member of the research team. They were guided by open-ended qualitative questions that invited participants to discuss their subjective experiences of assisting women with debt problems resulting from economic abuse. Recordings of the focus groups were transcribed by a professional transcription company, with all participants de-identified in the transcripts in order to protect their confidentiality. The research team analysed the transcripts by reading and identifying the major themes that emerged from individual focus groups and across all five focus groups.

V FOCUS GROUP INTERVIEW FINDINGS

Four major themes emerged from our analysis of the focus group discussions. These themes are examined in this part of the article.

A Gender Norms Surrounding Financial Management and the ‘Hidden’ Nature of Economic Abuse

The first theme to emerge across all of the focus groups was that advocates assisting women with debt problems caused by economic abuse must be aware of, and respond to, gender norms surrounding the division of work and financial management within heterosexual relationships. The gender norms referred to most frequently by participants were (a) the expectation that the female partner would perform the role of primary carer for children in most heterosexual relationships, limiting her ability to undertake paid work outside the home; and (b) the expectation that the male partner would undertake paid work on a full-time basis. Many participants agreed that whether or not a relationship involved family violence, these gender norms typically translated into a gendered division of responsibility for financial decision-making. This division left women with unequal access to and control over the assets of the relationship, such as the income of the male partner undertaking paid work; superannuation; and any bank accounts, property or cars that were in their partner’s name only.

As one participant acknowledged, ‘not everyone abuses and exploits that. But ... [t]he opportunity is there’. Participants suggested that this ‘opportunity’ for financial control and exploitation in heterosexual relationships was often concealed by rhetoric that normalised the male partner’s monopoly over financial

decision-making as ‘a display of affection’ and a performance of masculinity. Their female clients were convinced that they were ‘useless with money’ to discourage them from trying to stay informed about and participate in household financial decisions. Their female clients were reluctant to question their partners about financial decisions that affected them for fear that this amounted to ‘questioning [their] masculinity’.

After a relationship broke down, perpetrators could intensify their efforts to control their victim, drawing on patterns of financial management that were ‘built up over time’. As one participant said, having all of the money and superannuation in their name meant a perpetrator could easily prevent the victim from maintaining an adequate standard of living for herself and her children. This was true across a broad spectrum of class. Even women whose partners were high income earners could face poverty while awaiting a property settlement in the Family Court. As another participant said:

The things that I come across most typically are women who are separating from their partners, with no access to money, even if there is money in that partnership or in that family. Often they’ll be wanting to leave the relationship, but ... the partner’s got all the money in their bank account because they’ve been the one earning the money. The women’s been receiving a household allowance or something which can be really easily cut off by a partner if they want to block and control them ... especially for this higher income segment ... there’s women that I’ve spoken to whose husbands are ... earning up to \$140,000 and they are eating pot noodles ... (Participant 2, focus group 5).

Even after a property and custody settlement was reached in the Family Court, child support remained a ‘very big power and control tool’ that enabled abusive partners to continue to perpetrate violence against participants’ female clients. As one participant explained, the child support system contained loopholes that ‘disadvantage the receiver’: if the payer of child support failed to lodge their tax return, for example, the amount of child support would be ‘reduced automatically’ to be based on the minimum wage. Meanwhile, the receiver would be potentially unable to meet ongoing expenses and debt obligations such as mortgage or rent payments and utility bills.

These complex causes of their clients’ financial disadvantage – comprising deeply entrenched gender norms, established patterns of financial management within relationships, and legal frameworks that enabled abuse to be perpetuated even after a violent relationship broke down – presented significant challenges for advocates, who were faced with the difficult task of coming up with workable solutions for clients who were often by that point experiencing severe financial hardship. Participants made it clear that even the preliminary task of convincing their female clients to recognise these behavioural patterns as abusive was a major challenge. They described economic abuse as an ‘invisible’ problem, saying that they frequently came up against a reluctance on the part of their female clients to acknowledge that their financial problems were the result of intentional actions by their partners, rather than just ‘the way things are’. As one participant said:

I manage the phone room where we receive calls from women who might even not identify that they’re in a financially abusive situation. The phone workers ... spend a lot of time identifying what that is, naming what that is ... [But] when people in the phone room say, “That sounds like financial abuse to me”, the woman on the

other end of the phone goes “No, it’s not. No, it’s not ...” [W]e can’t name it in a way that can be heard easily. (Participant 1, focus group 5).

B Legal Complexities Arising from the Intersection of Consumer Credit Law and Family Law in Cases Involving Economic Abuse

The second theme to emerge from the focus groups was that assisting women with debt problems caused by economic abuse required advocates to navigate a complex intersection of family law and consumer credit law to ensure that they were able to exercise their full range of legal rights.

For most participants, these clients were at various stages of separating from an abusive partner. Those who had already left a violent relationship were generally awaiting a custody order and property settlement in the Family Court. Their first point of contact was typically a family violence worker or a social worker, who tended to focus on their case as a relationship dispute raising issues of family law, not consumer credit law. One participant suggested financial counsellors were better placed to provide advice with respect to accessing assistance under consumer credit law, particularly the legal hardship protections. However, clients – and even community workers – were frequently unaware of the availability of financial counselling. Advising women on these rights was a challenge even for advocates with specialist legal training, such as family lawyers, because credit law and family law were ‘two very specialised areas of the law’. One participant observed:

It would be a very rare event that you’ve got expertise in both [of these areas] ... Private lawyers ... who are ... providing family law assistance to women in relation to the assets and the property ... won’t necessarily have an understanding of the woman’s credit law rights ... and vice versa. (Participant 1, focus group 4).

Even lawyers were challenged by the complex question of how to prioritise the resolution of the family law and debt matters:

It needs to be worked out case by case what’s going to be the best order to do those things in ... [O]ften you will see through the Family Court proceedings that access to assets and income is limited while that’s getting sorted out. There is some pressure on women to come and try and get a resolution [through the Family Court], so they can get some of the equity out of the property or make other arrangements. But at the same time, because of that pressure, they may be getting a raw deal because they haven’t exercised their credit law rights. (Participant 3, focus group 4).

Ultimately, participants felt that collaboration between different types of professionals – including family violence workers, financial counsellors, lawyers and social workers – was important in ensuring that women leaving violent relationships were receiving appropriate support with exercising their legal rights.

C Variable Creditor Responses and Barriers to Accessing Assistance under the Legal Hardship Protections

The third theme that emerged from the focus groups was that even when women did attempt to assert their rights under consumer credit law, creditors’ responses to debt problems caused by economic abuse remained variable. Inadequate understandings of economic abuse, as well as a preference for short-

term payment arrangements as a default response to financial hardship, limited the accessibility of the legal hardship protections for their clients, and sometimes actually undermined their capacity to regain financial independence.

1 Inadequate Understandings of Economic Abuse as a Cause of Debt Problems

Overall, participants agreed that creditors across the banking, utility and telecommunications sectors had highly variable understandings of economic abuse as the cause of their clients' financial hardship. One participant said, 'My experience has been that it hasn't been a factor that's really been understood or taken into account' by creditors across any of these sectors. Others felt that understandings *were* improving in the banking sector, but not in the telecommunications sector. Most, however, were of the view that within each sector, levels of understanding of economic abuse as a cause of financial hardship varied significantly, and outcomes could depend on 'who answers the phone on any given day':

[T]he minute you mention the words domestic violence, some banks have an understanding and sympathise. I suppose because they have a good relationship with financial counsellors ... Other banks ... They don't care if there's domestic violence or not. They want to know how much they're going to get and it's really, really difficult to negotiate with them. (Participant 2, focus group 3).

In negotiating with creditors in each of these sectors, participants faced multiple obstacles to securing a measure of flexibility for their clients. These obstacles included requests to provide unnecessary details of their clients' sensitive personal circumstances, and being required to provide sufficient 'proof' of family violence, including not only intervention orders but also other types of evidence such as doctor's reports. As one participant said, 'We have to point it out to them. We definitely have to put it in black and white and point it out to them'. Such approaches made accessing hardship assistance almost impossible for women who were not represented by an advocate. As one participant said:

Whenever we get involved, matters inevitably move faster and the resolutions are better. But when women are on their own, we just don't know that they're getting the same kind of outcomes. (Participant 1, focus group 4).

To assist women trying to self-advocate, some participants emphasised the importance of providing staff in creditors' collections and customer service teams with ongoing training 'to identify some of those trigger words that people might be using on the phones', and, when such triggers indicated the presence of family violence, to transfer women automatically to the creditor's hardship team. Another participant felt that training in recognising triggers was insufficient. Creditors also needed to proactively identify and offer assistance to clients whose payment histories suggested they were in financial hardship, as in their experience, women leaving violent relationships were in 'survival mode' and were 'just concerned with their immediate safety', meaning that contacting creditors to negotiate alternative arrangements for paying bills was 'way off their radar'.

Either way, participants stressed that women should not be required to provide evidence of family violence at the outset as a prerequisite for even speaking to

someone in the hardship team. Being forced to recount their sensitive personal circumstances to multiple staff members of different creditors was distressing and embarrassing for their clients, and sometimes acted as a barrier to seeking help in the first place: '[Y]ou have to disclose that you're in a violent relationship ... You have to ring your gas company. You have to tell your bank. You have to tell Centrelink ... You're just constantly retelling your trauma' (Participant 4, focus group 5).

2 Prevalence of Short-Term Payment Arrangements

Participants agreed that even when granting hardship assistance to women with debt problems caused by economic abuse, creditors across the consumer credit, utilities and telecommunications sectors favoured short-term payment arrangements that actually impeded their clients' ability to regain financial independence after leaving a violent relationship.

They were particularly frustrated that their clients – many of whom were unemployed and reliant on social security payments – were being offered short-term payment arrangements such as moratoriums or three-month payment plans when they could not realistically afford to make any repayment of debt. Waivers were difficult to negotiate, even for clients who were on the Newstart Allowance. Some creditors had a starting policy of refusing to waive debt 'without even hearing what the circumstances are'.

Participants had varying views on what constituted an appropriate response to a request for hardship assistance in cases involving family violence. One felt that arrangements such as moratoriums or payment plans could be appropriate provided that they were longer-term, stating that 'it takes 12 months, not ... three months or six months ... to settle and get organised'. Others were of the view that while creditors were not legally obliged to waive debt in any particular circumstances, the long-term financial and other impacts of family violence – including 'lack of confidence, isolation, mental health issues, estrangement from family and previous networks, fear, trauma' – meant that the full waiver of debt was the only realistic solution for some of their clients.

D Problems with Existing Legal and Policy Responses to Debt Caused by Economic Abuse

The fourth theme that emerged from the focus groups was that the existing legal and policy responses to debt caused by economic abuse failed to fully acknowledge that such debt was assumed as part of a gendered dynamic of power and control in the relationship. This assumption underpinned two problems in particular. The first of these was the overemphasis on general financial literacy education as a strategy to prevent financially disadvantaged women from taking on debt obligations that were not in their best interests. The second problem was the inadequacy of the legal hardship protections for dealing with joint debt incurred in the context of family violence, in the absence of clear and enforceable provisions for severing liability for such debt.

1 Overemphasis on General Financial Literacy Education as a Preventative or Remedial Strategy

Participants agreed that general financial literacy education was overemphasised as a strategy that could assist women to recover financially after leaving violent relationships, or empower them to avoid incurring debts that were not in their best interests in the first place.

Participants were particularly critical of the fact that initiatives to promote financial literacy for women tended to be focused on basic household budgeting. As many participants noted, their female clients were already 'pretty savvy with money' as a result of the gendered division of labour discussed above (which left them primarily responsible for managing everyday household expenses including utility bills and grocery shopping), combined with the realities of getting by on a low income. As one participant said, 'people with less money are usually the ones who manage it better, because [they] have to'. Another noted that their clients' lack of confidence with making financial decisions was often the result of undermining tactics by an abusive partner, rather than a lack of financial knowledge.

Instead of focusing on household budgeting, participants were of the view that financial literacy education should be targeted to address 'key moments' or 'transition points' in women's lives, such as separation or divorce, or re-entering the paid workforce. One participant emphasised the importance of guidance for discussing and making decisions about money in 'financially respectful relationships'. Others felt that their clients needed information about their legal rights and pathways to seeking assistance with complex financial problems such as falling behind with mortgage repayments, refinancing a home loan, or dealing with multiple debts incurred in the context of family violence (as opposed to straightforward budgeting). Some felt that more efficient access to financial counsellors was a crucial step in enabling women to exercise those rights:

[T]eaching financial literacy is putting the cart before the horse. Because you can be as financially literate as hell, but if you've got a massive debt ... [if] you don't know about hardship assistance ... it doesn't matter how many times you can make a dollar into \$1.50, you're actually not going to get ahead. I think our [focus] needs to be around linking information and increasing knowledge right across the board about those access points and making [access] to financial counsellors really easy ... It is very hard to find a financial counsellor quickly and easily and connect someone with a financial counselling service. (Participant 1, focus group 5).

Participants also emphasised the need for financial literacy education to be tailored to acknowledge the structural causes of women's financial disadvantage, which included the gender norms discussed above, as well as barriers to employment for people experiencing long-term poverty. Many referred to the low rate of payment for recipients of social security incomes paid by Centrelink, particularly for mothers who had been moved from the Parenting Payment to the Newstart Allowance, and who were unable to undertake regular paid work due to a lack of access to affordable childcare. One participant from regional Victoria said that budgeting and planning strategies were of little help for their female clients, who were often on the Newstart Allowance, and who faced multiple barriers to obtaining more than occasional paid work. Another participant noted that for

women with children, the tendency to be locked into part-time or casual work was another major impediment to planning for the future as their income varied from week to week, making it difficult to budget.

2 Lack of Clear Provisions for Severing Liability for Joint Debt

When commenting on the adequacy of the legal hardship protections for women with debt problems caused by economic abuse, most participants focused on issues with the implementation of these protections by creditors. As detailed in Part V(C) of this article, participants emphasised that creditors needed to develop processes to provide women leaving violent relationships with automatic access to their hardship teams, and to at least consider waiving debt in cases involving family violence. However, some participants suggested that ultimately, the legal hardship protections had limited capacity to assist women with joint debts taken out in the context of economic abuse, in the absence of clear legal recourse to sever their liability.

These comments related particularly to financial products and services, including home loans, personal loans, car loans and credit cards taken out in the name of a woman and her former partner. Several participants argued that making a hardship application under section 72 of the *NCC* in relation to such debts could only deliver a variation to the terms of repayment, when the woman might have the right to challenge her liability for the debt itself. In support of this argument, these participants referred to clause 29 of the ABA Code, which contains a commitment not to accept a person as a co-debtor where it is clear that they will not receive a benefit under the credit facility. These participants suggested that clause 29 could be used to terminate the woman's liability for the joint debt in cases where she was coerced to co-sign a loan by an abusive partner, did not understand the contract, or received no benefit from the loan (for example, because it was in respect of a car driven solely by her former partner). They were concerned that automatic transfer of all clients who attributed their financial difficulties to family violence to creditors' hardship teams assumed that their debts were entered into in circumstances that satisfied clause 29. The family violence, then, was treated merely as a ground for seeking flexibility as to the repayment of the debt:

I think there is still a risk that I'm really concerned about and that is that whenever family violence gets immediately referred to the hardship team, that underlying cause of the debt ... will be overlooked ... Whereas [the woman] may have always had rights to get out of the debt itself ... (Participant 1, focus group 4).

In such cases, these participants argued that the only appropriate response was the release of the woman from liability for the joint debt, as opposed to a hardship arrangement such as a moratorium on repayments, or even debt waiver. In practice, however, participants were often frustrated by creditors' insistence that their internal policies did not allow for the woman's liability to be terminated under any circumstances:

We've had conversations [with] banks who have said ... after eventually accepting our premise that joint and several liability means that someone doesn't have to be pursued for a debt and could be released ... that their processes don't allow them to remove someone from the joint liability. We would argue it should allow for that

because the person is signing up to be joint and/or severally liable ... (Participant 1, focus group 4).

As a result, debt waiver was frequently the best outcome that participants could achieve for their clients. Yet some argued that debt waiver was an inadequate response because it could leave the woman with a default listing on her credit history, which in turn acted as a barrier to borrowing money or entering new contracts for utility and other services.

Most participants, however, agreed that creditors needed to show greater preparedness to waive joint debt in the context of family violence, or at least to split the joint debt, particularly where this would not impact on the creditor's chances of recovering the amount of the debt. This view was expressed not only in relation to debts owing to banks and other financial service providers, but also in relation to other types of joint debt, such as unpaid energy, water and telephone bills, which were not covered by any provisions that could give grounds for severing joint debt in the context of family violence. Participants gave examples of creditors insisting on pursuing their female clients for unpaid bills that were in their joint names with a former partner who had stopped making repayments:

Sometimes women who leave a family house ... try and get utilities connected at [their] new place and the utility company will want to roll over the joint debt from the previous place into the new – even though ... she has left a domestically violent household ... They'll keep wanting to roll the old debt over onto her, even if it's in joint names ... (Participant 1, focus group 2).

VI DISCUSSION AND IMPLICATIONS FOR LAW AND POLICY DEVELOPMENT

Advocates assisting women with debt problems caused by economic abuse face multiple challenges. Their advice is provided in the context of a complex intersection of norms surrounding the division of paid work and unpaid care and other domestic work – which continues to be undertaken primarily by women,¹²⁰ contributing to a gender pay gap that has changed little since the late 1990s.¹²¹ These gender norms both enable and obscure the perpetuation of economic abuse against women. As Branigan wrote, economic abuse is 'hidden within societal expectations that couples will equitably share their financial resources', resulting in a 'deeply concealed feminisation of poverty' within heterosexual relationships, whereby the woman may not have the capacity to be financially secure at an individual level 'regardless of the overall assets a family may hold'.¹²² Singh also found that while it is increasingly common for heterosexual couples in traditional Anglo-Celtic, middle-income marriages to have joint bank accounts, this appearance of 'jointness' masks the fact that husbands frequently retain sole

120 See, eg, Australian Bureau of Statistics, 'Census Reveals the "Typical" Australian' (Media Release, 11 April 2017); Australian Government, Workplace Gender Equality Agency, 'Unpaid Care Work and the Labour Market' (Insight Paper, 9 November 2016) 6.

121 Australian Government, Workplace Gender Equality Agency, 'Australia's Gender Pay Gap Statistics' (Fact Sheet, August 2019) 3.

122 Branigan and Grace, 'His Money or Our Money' (n 97) 1.

control over income and financial decision-making.¹²³ Consequently, a major challenge for advocates involves suggesting workable solutions that would be effective in improving their female clients' financial positions despite the deep-seated causes of their financial disadvantage.

Another challenge for advocates is the need to navigate a complex intersection of family law and consumer credit law to ensure that their clients can exercise their full range of legal rights. Our findings highlight the importance of collaboration between different types of advocates – or greater integration between types of community services – to ensure that women with debt problems caused by economic abuse receive appropriate support. As noted by the Royal Commission, 'different sectors and service systems currently operate according to distinct underlying principles, service delivery models and theoretical frameworks'.¹²⁴ As a result, social workers or family violence support workers may have experience in advising women on the immediate practical aspects of separating from an abusive partner (for example, securing housing, applying for employment and social security payments, and receiving appropriate physical and mental health care), as well as some of the legal aspects (particularly the process of seeking a property and custody settlement in the Family Court). However, advocates other than financial counsellors may be unaware of rights available under consumer credit law that could assist women with the resolution of debt problems. One of the organisations participating in our study – Consumer Action Law Centre – recently carried out a project funded by the Victorian Government, where consumer lawyers provided 'secondary consultations' to other professionals in the community sector in order to assist them to identify and resolve debt problems arising out of family violence.¹²⁵ The project demonstrated the importance of specialised support for advocates navigating the legal issues involved in cases of economic abuse. It also showed that lawyers too could benefit from other advocates' understandings of the long-term impacts of family violence on women and their children, which were too complex to be addressed by 'taking a narrow ... technical yes/no stance' on particular questions of law.¹²⁶ Another project carried out by the Women's Legal Service Victoria and documented by Smallwood also suggested a need for greater integration in the provision of services to victims of family violence, recommending that funding be allocated to enable the placement of financial counsellors at specialist family violence services across Victoria.¹²⁷

Even when women do attempt to assert their rights under the legal hardship protections detailed in Part II(A) of this article, our study suggests that they frequently face a lack of empathy on the part of creditors' customer service staff, and a preference for short-term payment arrangements as a default response to

123 Singh, *Marriage Money* (n 83) 86–7, 108.

124 *Royal Commission into Family Violence* (n 19) 7.

125 Liz Curran, 'Responding Effectively to Family Violence Dimensions of Debt and Credit through Secondary Consultations and Training with Community Professionals' (First Research and Evaluation Report: Phase One, Consumer Action Law Centre Family Violence Project, 2017) 5, 18.

126 *Ibid* 14.

127 Smallwood (n 18) 13.

financial hardship. The industry guidelines and other measures introduced in Part II(B) are the product of continued dialogue with respect to ways in which industries can improve their response to debt problems caused by economic abuse. Yet the ABA and ESC guidelines are not legally binding.¹²⁸ Without being embedded in enforceable legislation or regulatory codes, commitments relating to financial hardship risk remaining aspirational statements that do not reflect creditors' practices behind the scenes (for example, a 2017 survey of financial service providers found that most had no specific family violence training for their staff, and no intention of introducing it).¹²⁹ There is therefore an argument for reform to the legal hardship protections themselves to reduce the amount of discretion that creditors have to determine the circumstances in which debtors will be eligible to receive assistance, and the forms that such assistance should take in cases involving family violence. So far, only the Victorian water and telecommunications sectors have explicitly recognised family violence as an eligibility criterion for accessing hardship assistance as recommended by the Royal Commission.¹³⁰ Hardship protections could also be amended to impose stronger – and binding – obligations to provide alternative payment arrangements automatically where a customer is experiencing financial hardship due to family violence, and in particular, to set out specific circumstances in which creditors must at least consider suspending or waiving the debt of a victim of family violence.¹³¹

Yet perhaps the major challenge in responding to the issue of debt incurred in the context of economic abuse – particularly for policymakers – involves acknowledging that such debts are the product of gendered dynamics of power and control within relationships. This acknowledgment has not yet occurred at the level of consumer credit law, perhaps because it puts into question an assumption central to the liberal notion of the contract: that contractual obligations reflect the intent of rational, consenting parties with equal bargaining power, and should be

128 There also continues to be uncertainty regarding the enforceability of the ABA Code (which may apply to the new Banking Code of Practice): Nicola J Howell, 'Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards' (2015) 38(2) *University of New South Wales Law Journal* 544, 582. While the position of the ABA has been that the ABA Code operates as an implied term of the contract between the bank and the debtor, according to Weaver, the courts have tended to apply it 'more as a guide to good banking practice than as a contractual requirement': Prudence M Weaver, *Banking and Lending Practice* (Thomson Reuters, 5th ed, 2016) 130. See, eg, *Sam Management Services (Aust) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWCA 320, [72]–[74] (Young JA); *Commonwealth Bank of Australia v Starrs* [2012] SASC 222, [114]–[117] (Peek J).

129 Financial Ombudsman Service, 'Update from the Family Violence Working Group', *The FOS Circular* (online, October 2017) <<https://www.fos.org.au/fos-circular-31-home/fos-news/update-from-the-family-violence-working-group/>>.

130 *Customer Service Code* (n 36) cl 14; *Telecommunications Consumer Protections Code* cls 2.1, 6.12(1)(f). See also, *Royal Commission into Family Violence* (n 19) vol 4, 119–120.

131 To some extent, this has been done in the ABA's new Banking Code of Practice, which describes circumstances when a customer's debt may be waived at the bank's discretion: see Australian Banking Association, 'Banking Code of Practice' (n 40) cls 171–2. However, the new Code does not explicitly refer to the ABA guideline or contain any obligations specific to family violence. It merely states that member banks are 'committed to taking extra care with vulnerable customers', including those who are experiencing 'elder abuse', 'family or domestic violence' or 'financial abuse': cl 38.

enforced as such.¹³² This assumption is manifested in the overemphasis on general financial literacy education as a strategy to deter financially disadvantaged women from taking on debt obligations that are not in their best interests. The Royal Commission, which described financial literacy as ‘a tool for the prevention of economic abuse’, noted that the majority of financial literacy resources funded by governments and delivered by community organisations are ‘generic’ and not targeted at victims of family violence or women at large.¹³³ Participants in our study suggest that targeted financial literacy education can provide women with pathways to accessing financial counselling and external dispute resolution, and ultimately exercising legal rights of which they might otherwise be unaware. However, general information on money management ignores the fact that women with debt problems resulting from economic abuse typically enter their predicament as a result of pressure, deception or coercion by their abusive partner, as opposed to a genuine lack of awareness that assuming liability for debts from which they receive no benefit is not in their best interests.

The abovementioned assumption is even more strongly reflected in the absence of provisions expressly allowing women to sever liability for joint debt incurred in the context of family violence. This lack of provision stems from the fact that contract law, as argued by Howell:

explicitly favours the objective manifestation of a party’s intent over their actual intent. The doctrine therefore accepts and reinforces a woman’s responsibility for her partner’s debt – by signing the relevant contract, she manifested her intention to accept its terms.¹³⁴

The consumer credit sector is the only one where there may now be a legal basis for the termination of liability for joint debt on the basis of clauses 54 to 56 of the ABA’s new Banking Code of Practice (2019). These provisions appear to reflect the recommendations of the independent review of the current ABA Code in 2016, which proposed that signatory banks be required to make ‘reasonable enquiries’ to ensure that every co-debtor receives a ‘substantial benefit’ under a credit facility.¹³⁵ The review recommended that the ABA Code be amended to specify that a credit facility is ‘unenforceable against a person who is accepted as a co-debtor but who, the signatory bank should have known, was not receiving a substantial benefit under the credit facility’.¹³⁶ While clause 56 of the new Code falls short of such an express statement, it may still provide women with an avenue to have a credit contract declared unenforceable. This is if the Australian Financial Complaints Authority follows the FOS in leaving open the possibility of co-debtors applying to external dispute resolution to be released from liability where the credit provider should have been aware, at the time of lending, that the co-

132 See Howell, ‘Sexually Transmitted Debt’ (n 22) 97, 104–6.

133 *Royal Commission into Family Violence* (n 19) vol 4, 116–17.

134 Howell, ‘Sexually Transmitted Debt’ (n 22) 97.

135 Phil Khoury, ‘Independent Review: Code of Banking Practice’ (Report, 31 January 2017) 229. By contrast, clause 29.1 of the ABA Code states that member banks will not accept a person as a co-debtor where ‘it is clear, on the facts known to us’, that they will not receive a ‘benefit’ under a loan.

136 *Ibid* 230.

debtor would derive no benefit from the transaction.¹³⁷ If the new dispute resolution body takes a different approach, hardship assistance may still be sought by a co-debtor under the new Code without involving the other co-debtor.¹³⁸ However, participants in our study suggest that the best outcome that can be accessed in this way – or under any of the hardship protections outlined in Part II(A) – is debt waiver, and this does not necessarily remove a default rating from the woman's credit history in the same way as terminating her liability altogether. While measures to allow victims of economic abuse to seek hardship assistance with respect to joint debt are a positive step, they nonetheless fail to address the lack of consent that should have invalidated the acquisition of the liability in the first place.

Finally, it is necessary to acknowledge that requiring creditors to sever liability for joint debt incurred in the context of family violence – or, at least, to waive such debt in circumstances where a debtor clearly cannot pay – will impose financial costs on creditors. Waiving liability for a higher proportion of debts would require banks, utility and telecommunications companies to assume additional costs, which would then be passed on to consumers. Requiring banks to make 'reasonable enquiries' to ensure that every co-debtor receives a 'substantial benefit' under a joint credit facility would also result in indirect 'implementation costs'.¹³⁹ Examples of such costs include the cost of providing staff with training on recognising signs that a co-debtor may not be benefiting from a loan, but may be signing on as a result of coercion by their partner and co-debtor. On the other hand, continuing to pursue debtors on very low incomes for payment also requires creditors to expend significant financial resources in circumstances where they are unlikely to recover all, or in some cases, any, of the debt.¹⁴⁰ This is why an increasing number of service providers now acknowledge that waiving the debts of the small group of consumers who are considered 'judgment-proof' makes commercial sense.¹⁴¹ In our view, the same may be said in respect of many victims of family violence during the period when they are awaiting a property settlement, have no access to the assets of the relationship, and, in many cases, are unable to undertake paid employment due to childcare responsibilities and other factors.

A related concern is that requiring creditors to sever liability for debts on grounds of economic abuse will make mainstream lenders unwilling to offer credit to women in heterosexual relationships, on the assumption that they carry too high a risk of defaulting on or later contesting their liabilities. Exclusion from the

137 Financial Ombudsman Service, 'The FOS Approach to Joint Facilities and Family Violence' (Version 3, March 2017) 7.

138 Australian Banking Association, 'Banking Code of Practice' (n 40) cl 159.

139 Submissions to Treasury's 2014 Financial System Inquiry noted that '[a]side from direct costs incurred by businesses in complying with regulatory change, regulation also has hidden costs' – being the costs of implementing new regimes and requirements: Commonwealth of Australia, The Treasury, *Financial System Inquiry* (Interim Report, July 2014) [3-93].

140 Nelthorpe and Digney (n 48) 2.

141 Lauren Levin and Fiona Guthrie, 'Hardship Policies in Practice: A Comparative Study' (Research Report, Financial Counselling Australia, May 2014) 54. 'Judgment-proof' debtors are those whose only income is a Centrelink payment, and who have no significant assets. They are legally protected from being sued for debt recovery in Victoria.

mainstream credit market could force more women – who already make up a growing proportion of payday loan users in Australia¹⁴² – to resort to taking out ‘high cost and arguably exploitative’ loans from fringe lenders.¹⁴³ This concern is most likely to apply to women in those demographics that are, as the research in Part III shows, most vulnerable to economic abuse. They include women with disabilities or long-term health conditions, and women experiencing high levels of financial stress.¹⁴⁴ Yet it is important to keep in mind that many women in these circumstances are already going to face barriers to accessing credit from mainstream lenders, especially if they already have default listings on their credit history.¹⁴⁵ In Part VII, partially in response to this concern, we conclude this article by identifying a number of other measures beyond the scope of consumer credit law that are particularly important for assisting women leaving violent relationships to achieve financial stability.

VII CONCLUSION

Advocates who provide assistance to women with debt problems caused by economic abuse are required to navigate a complex intersection of family law and consumer credit law to ensure that their clients can exercise their rights under the legal hardship protections identified in Part II(A) of this article. Yet our study suggests that women dealing with the emotional, physical and economic repercussions of family violence find it difficult to access appropriate assistance under these protections. Women frequently face a lack of empathy on the part of creditors’ customer service staff, and a preference for short-term payment plans as a default response to financial hardship. Reforms to the legal hardship protections – for example, to include disclosure of family violence as an automatic trigger for admittance into creditors’ hardship programs, or to prescribe particular circumstances where creditors will need to consider debt waiver – would be a positive step. So would additional funding for integrated financial counselling, legal and other family violence services; targeted financial literacy education with an emphasis on accessing support services and exercising relevant legal rights; and measures to allow women with debt problems caused by economic abuse to seek hardship assistance with respect to joint debt without the consent of the other co-debtor. At the same time, our study suggests that in the absence of provisions for severing liability for joint debt, the legal hardship protections have limited capacity to assist victims of economic abuse. They provide an example of how consumer credit law enforces women’s responsibility for debts that are the product of

142 Good Shepherd Microfinance, ‘Women and Payday Lending: An Update’ (Fact Sheet, January 2018) 2.

143 Nicola Howell and Therese Wilson, ‘Access to Consumer Credit: The Problem of Financial Exclusion in Australia and the Current Regulatory Framework’ (2005) 5 *Macquarie Law Journal* 127, 129.

144 Other factors associated with a higher prevalence of economic abuse were: being aged 30 to 39; being separated or divorced; having a lower level of education; being unemployed; and living in a household in the two lowest income quintiles: Kutin, Russell and Reid (n 11) 270–1.

145 Howell and Wilson (n 143) 132.

gendered dynamics of power and control, rather than their free consent, when that absence of consent should have invalidated the liability in the first place.

Ultimately, it is important to remember that women emerging from violent relationships typically do so with limited financial resources, yet significant needs and obligations. As shown by Braaf and Barrett Meyering, women affected by domestic violence have higher rates of reliance on social security,¹⁴⁶ and may face additional challenges in finding secure employment with work histories disrupted by ongoing abuse.¹⁴⁷ In addition to paying off debts, they may also need to secure housing; buy basic household goods; finalise legal matters such as property settlement and custody proceedings in the Family Court; and attend to their own and their children's physical and mental health issues.¹⁴⁸ In these circumstances, even the waiver or full cancellation of any particular debt such as a utility bill will not, on its own, enable a woman to avoid the accumulation of further debt. While we reiterate the importance of measures to improve the effectiveness of the legal hardship protections and their implementation by creditors, addressing these causes would require measures beyond the scope of consumer credit law.

As argued by Smallwood, some of the most important measures in this context would target the disadvantage that women leaving violent relationships currently experience in the property settlement process in the Family Court.¹⁴⁹ Such measures should include steps to make court-based property divisions more accessible; and amendments to the *Family Law Act 1975* (Cth) requiring courts to take family violence into account when determining a property division.¹⁵⁰ Reform in the area of family law would need to be combined with changes to social security policy which, as argued by De Vaus et al, plays a crucial role in protecting the incomes of women post-separation.¹⁵¹ The transitioning of women with children from the Parenting Payment to the Newstart Allowance as part of the 'Welfare to Work' reforms of 2006 – together with the ongoing indexation of the Newstart Allowance at a rate widely criticised as inadequate to meet the basic costs of living¹⁵² – makes it difficult, if not impossible, for many women leaving violent relationships to meet the needs described above.¹⁵³ While some women leaving violent relationships may be entitled to a Crisis Payment from Centrelink, this is only a one-off payment amounting to a week's pay at the recipient's existing

146 Braaf and Barrett Meyering (n 6) 95.

147 Ibid 85–95.

148 Ibid 121.

149 Smallwood (n 18) 35–47. See also Sheehan and Smyth (n 80) 110–13.

150 Smallwood (n 18) 46–7.

151 David de Vaus et al, 'The Economic Consequences of Divorce in Australia' (2014) 28(1) *International Journal of Law, Policy and the Family* 26, 42.

152 See, eg, Richard Denniss and David Baker, 'Are Unemployment Benefits Adequate in Australia?' (Policy Brief No 39, The Australia Institute, April 2012) 4–6; Australian Council of Social Service, Submission No 64 to Senate Education, Employment and Workplace Relations References Committee, *The Adequacy of the Allowance Payment System for Jobseekers and Others, the Appropriateness of the Allowance Payment System as a Support into Work and the Impact of the Changing Nature of the Labour Market* (August 2012) 41, 65.

153 See Braaf and Barrett Meyering (n 6) 98, 100.

income support payment rate.¹⁵⁴ There is therefore scope for a separate ongoing social security payment specifically for victims of family violence.¹⁵⁵

Finally, it is imperative to mention the importance of broader measures – for example, greater subsidies to assist women on low incomes to access childcare – to remove some of the major barriers that women with children face when pursuing and maintaining education and employment.¹⁵⁶ As our study indicates, the intersection between gender norms surrounding the division of paid work and unpaid care work and entrenched patterns of financial management within heterosexual relationships means that when women do not have the capacity to achieve financial security in their own right, ‘the opportunity is there’ for control and exploitation. Yet addressing these factors – which both enable and obscure economic abuse – is ultimately a much broader project, requiring continuing scrutiny of the hitherto ‘private’ domain of financial management within relationships.

154 See Department of Human Services (Cth), *Crisis Payment* (Web Page, 12 May 2018) <<https://www.humanservices.gov.au/individuals/services/centrelink/crisis-payment>>.

155 Braaf and Barrett Meyering (n 6) 103.

156 *Ibid* 87.