

Intimate partner economic abuse in loans and guarantees: An empirical review of 10 years of cases

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Abstract

Economic abuse is a form of family violence that is under-recognised and under-reported. A particular type of economic abuse is debt abuse in relation to joint borrowings for property and the provision of guarantees.

The doctrines of unconscionability (both under statute and equity), undue influence, and statutory jurisdictions to set aside 'unjust contracts' are key doctrines for a victim who seeks to have a credit contract set aside. This article uses a quantitative and qualitative content analysis of the facts and outcomes of ten years of Australian case law between 2008 and 2018 to examine whether victims of intimate partner debt abuse are obtaining meaningful outcomes using these doctrines.

We conclude that in the case of intimate partner debt abuse caused by family violence, the legal system is not able to account for gendered inequalities of bargaining power nor provide adequate remedies.

We provide recommendations for reform both at doctrinal level and as part of broader systemic reform.

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Introduction

Economic abuse is a form of family violence that is under-recognised and under-reported. In relation to the provision of credit, economic abuse may involve a perpetrator exploiting and controlling the provision of credit in a way that is not to the benefit of the victim of the abuse. In this article, we focus upon a particular type of economic abuse: debt abuse in relation to joint borrowings for property and the provision of guarantees.

A key legal recourse for victims of economic abuse in relation to a loan or guarantee lies in the doctrines of unconscionability (both under statute and equity), undue influence, and statutory jurisdictions to set aside 'unjust contracts'. There is limited access to redress for debt abuse under state and territory family violence legislation, family law, consumer law or under criminal provisions.² This article therefore focuses on unconscionability and undue influence as one of the few legal avenues for victims of economic abuse available to seek to reverse the effect of the abuse suffered.

This article examines whether mortgagors or guarantors who may have experienced debt abuse committed by an intimate partner in relation to a mortgage or guarantee over residential property are successful in obtaining redress through the legal system, particularly in relation to the equitable doctrines or under the statutory grounds.³ We use a quantitative and qualitative content analysis of the facts and outcomes of ten

² Madeleine Ulbrick, 'A Man's Home is His Castle. And Mine is a Cage': A Feminist Political Economy Analysis of Economic Abuse and Economic Consequences in Victoria' (PhD thesis, Monash University, 2019) ('Ulbrick'); Evgenia Bourova, Ian Ramsay and Paul Ali, 'Limitations of Australia's Legal Hardship Protections for Women with Debt Problems Caused by Economic Abuse' (2019) 42(4) *University of New South Wales Law Journal* 1146; Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality After Family Violence', Report on the Stepping Stones Project, (Women's Legal Service Victoria, 2015) ('Stepping Stones'); Owen Camilleri, Tanya Corrie and Shorna Moore, *Restoring Financial Safety: Legal Responses to Economic Abuse. Action Research Report* (Good Shepherd Australia New Zealand, Wyndham Legal Service, 2015) ('Restoring Financial Safety').

³ We chose to focus on intimate partners as it is a key site of debt abuse in the case law. The other common context where debt abuse occurs in the cases is elder abuse: abuse carried out by adult children (or other family members in a position of trust) against an elderly relative.

years of Australian case law between 2008 and 2018 (the 'case review') to examine whether the justice system is providing meaningful outcomes for victims of intimate partner debt abuse.⁴

The legal principles are well-established and understood, and we do not review the cases from the perspective of their application of doctrine. The analysis is empirical and quantitative and tied to our understanding of economic abuse.

This article contends that the equitable doctrines and statutory protections do not provide sufficient protection nor adequate means of legal redress for vulnerable spouses or intimate partners who act as guarantors or borrowers, in circumstances where the spouse or partner obtains little or no benefit from the loan. In the case of intimate partner debt abuse caused by family violence, the legal system is not able to account for, nor address the gendered inequalities of bargaining power.

The case law analysis shows it is very difficult to have a mortgage or guarantee set aside under the equitable doctrines or to obtain a remedy relying on general statutory unconscionability. Clear cases of economic abuse remained without remedy, due to the requirements of proving that the lender was aware of the abuse. Plaintiffs who are able to prove the contract was 'unjust' under the *Contracts Review Act 1980* (NSW) ('CRA') have a higher success rate.

In Part 1 we define economic abuse and its relationship to family violence and outline our methodology for the case review. We identify economic abuse in the intimate partner context, as well as discussing the current knowledge on the prevalence and effects of this abuse. We also explain the difficulties victims of intimate partner debt abuse face using the range of formal and informal avenues within the legal system to seek redress.

⁴ The research for this paper, and earlier versions of some of the text, stem from research prepared for the Australian Securities and Investment Commission (ASIC) in 2019. It does not represent the views and opinions of ASIC but of the authors only. Readers of this article should note that the opinions expressed in this article are for the purposes of academic discussion only and readers should draw their own conclusions regarding whether economic/ financial/debt abuse or family violence occurred in specific cases mentioned in this article where no previous allegations or findings of abuse have been made. The case data was collected as part of a broader research project which required ethics approval and compliance with the *Privacy Act 1988* (Cth). Although all case reports relied on in our analysis were from a public source, the Monash Human Research Ethics Committee approved publication of this article using case data in de-identified form (approval no 2022-31326) for privacy reasons. For this reason, the cases in the article remain anonymous. To satisfy the refereeing process, a list of the identified cases was supplied to the referees.

Part 2 provides the statistics from the case review, and examines which claims are made and the success rates. We then analyse the data more specifically in relation to the equitable doctrines and statutory claims and consider the problems with the doctrines in relation to economic abuse.

In Part 3, we consider the problems with victims engaging in litigation to undo the consequences of economic abuse. Firstly, we address the barriers to legal action faced by victims. We demonstrate that the economic abuse suffered by victims creates barriers for them to identify, disclose and challenge the abuse they have suffered. Secondly, we consider the limitations of the doctrines, and the role of independent advice. We demonstrate that a significant reason why victims are unsuccessful is due to the independent advice requirement, which we argue, fails to provide any real avenues for vulnerable parties to disclose or report the abuse. Instead, it enables lenders to rely on a process which is frequently formulaic to satisfy their legal obligations.

Our findings have significance for those who have experienced financial loss as a result of abuse committed by their partner in relation to mortgages or guarantees. We argue that the legal system provides victims of this form of family violence very limited means of legal redress. There is a clear imperative for both specific law reform and systemic change to ensure that victims of economic abuse are able to obtain remedies for financial consequences experienced as a result of intimate partner abuse.

Part 1: Explanation of Economic abuse, Debt Abuse and Methods

1.1 What is economic abuse?

Economic abuse is a key aspect of coercive control, constituting family violence. It is an especially under-recognised form of family violence. While physical and sexual and even emotional abuse are often identified as a form of family violence by lawyers, police, perpetrators and victims, economic abuse is not. Economic abuse is rarely the basis for obtaining a family violence protection order.⁵

⁵ Ulbrick (n 2) 244; Stepping Stones (n 2) 32; Restoring Financial Safety (n 2) 12.

Economic abuse has detrimental economic impacts both on an individual and societal level,⁶ as well as debilitating physical and psychosomatic impacts,⁷ which can impede prospects for financial recovery. Economic abuse is expressly defined in legislation across Australian jurisdictions as a form of family violence,⁸ with the exception of New South Wales (NSW), where there is no legislative definition. The most detailed and extensive definitions are provided in the Victorian and South Australian legislation.⁹

According to Victorian legislation, economic abuse is behaviour that is coercive, deceptive or unreasonably controls another person in a way that denies economic or financial autonomy or withholds the financial support necessary for meeting reasonable living expenses.¹⁰ It can involve forcing a victim to perform unpaid labour in the family business or handing over wages or money earned to a family member. Economic abuse can also include coercing a victim to claim social security payments or generating debt in a victim's name by pressuring the victim to sign a contract for the provision of finance, a loan or credit or a contract of guarantee.¹¹ It is the last context that is of most relevance in this paper.

What is consistent across all forms of economic abuse is the intentional use of financial resources to control the other person in an unhealthy and non-consensual way.¹² Economic abuse is not a singular incident; it is long-term and ongoing, part of a complex system of abuse, which keeps the victim financially dependent and socially isolated. Economic abuse is often present during the relationship, although it can

⁶ We note that the term 'economic abuse' and 'financial abuse' are used interchangeably in the broader literature to refer to this form of family violence. However, 'economic abuse' is more commonly used in the family violence field. Economic abuse is used in most legislation (Victoria, South Australia, Tasmania and Northern Territory). It is generally preferred in the family violence sector as it has a wider definition than financial abuse. For these reasons, we have adopted the term 'economic abuse' in this article.

⁷ Rachel J Voth Schrag, 'Experiences of Economic Abuse in the Community: Listening to Survivor Voices' (2019) 34(3) *Journal of Women and Social Work* 314.

⁸ See eg *Family Law Act 1975* (Cth) ss 4AB(2) (g) and (h), *Family Violence Protection Act 2008* (Vic) s 5(1)(a)(iii); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11; *Domestic and Family Violence Protection Act 2012* (Qld) s 8; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8; *Family Violence Act 2004* (Tas) s 8; *Restraining Orders Act 1997* (WA) s 5A; *Family Violence Act 2016* (ACT) s 8; *Domestic and Family Violence Act 2007* (NT) s 5.

⁹ Despite that, some family violence lawyers claim that the legislative definition in Victoria is still problematically unduly narrow, limiting its utility as a protection mechanism: Ulbrick, (n 2) 157.

¹⁰ *Family Violence Protection Act 2008* (Vic) s 6.

¹¹ *Family Violence Protection Act 2008* (Vic) s 6. See also Restoring Financial Safety (n 2) 19-20.

¹² Restoring Financial Safety (n 2) 18.

begin after separation, keeping the victim tied to the perpetrator, with no accessible legal remedy for victims to extricate themselves.¹³

In the context of intimate partner relationships, there is a significant relationship between economic abuse and other forms of family violence, such as physical, psychological and sexual violence.¹⁴

Economic abuse can impact women regardless of race, class, socio-economic status, educational level, and sexuality. Wonders argues that there is a persistent 'feminisation of vulnerability',¹⁵ which 'frames women as vulnerable victims, [and] tends to essentialise women and deny their agency ... [when in reality] vulnerability is a *produced* condition',¹⁶ generated by the unequal structures of society. Perpetrators often capitalise on these produced, structural vulnerabilities in order to exercise power and control.¹⁷ In light of this, there are some factors, such as activity or mobility limitations due to poor health or disability, which may heighten vulnerability to economic abuse.¹⁸

Identifying abuse and seeking assistance is particularly difficult for women where there are limitations with language facility, and/or as a result of cultural and religious mores, particularly in communities with strong patriarchal expectations, or cultural backgrounds where those norms are more prevalent. Patriarchal control of finances is embedded in the structures of society and this is often internalised by victims, complicating identification of abuse as well as access to recourse, remedy and ultimately the victim's ability to recover from the abuse.¹⁹

1.2 Debt Abuse: A Form of Economic abuse

A common and pervasive economic abuse tactic, is debt abuse.²⁰ As Singh explains, 'up until the late nineteenth century, most women in Australia had little to do with

¹³ Restoring Financial Safety (n 2) 7; Stepping Stones (n 2) 33; Ulbrick (n 2) 157.

¹⁴ 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*, 269-274.

¹⁵ Nancy Wonders, 'Climate Change, the Production of Gendered Insecurity and Slow Intimate Partner Violence', in K Fitz-Gibbon, S Walklate, J McCulloch & J Maher (eds) *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World*, (Routledge, 2018) 39.

¹⁶ Wonders (n 15) 39, emphasis in original.

¹⁷ Ulbrick (n 2) 27.

¹⁸ Kutin et al (n 14) 269.

¹⁹ Restoring Financial Safety (n 2) 13.

²⁰ Belinda Fehlberg *Sexually Transmitted Debt: Surety Experience and English Law*, (Oxford University Press, 1997). Stepping Stones (n 2); Restoring Financial Safety (n 2) 13.

money or banks'.²¹ Women were unable to be sole signatory on a loan, although it was routine for banks to request that women guarantee their husband's debts.²² As a consequence of the enduring 'legacy of these attitudes and gender assumptions, married women were often the subject of financial exploitation in terms of debts accrued by their husbands'.²³ This practice was – and remains – so pervasive it has been referred to since the early 1990s, as 'sexually transmitted debt'.²⁴

Debt abuse involves forcing a partner to sign a guarantee not for her benefit or to take a loan and maintain repayments on an asset, such as a car, but withholding the asset from her. It can also involve threatened or actual default on a joint debt to affect the victim's credit record.²⁵ Debt may be used as a means of effectively controlling a former partner after the relationship has ended, as well as during the relationship.²⁶ In Smallwood's recent study, many women 'had a debt that was accrued by an abusive partner against their wishes, without their knowledge, without understanding or under duress'.²⁷ Smallwood also found that '[m]any women entered into loan contracts because of the perpetrator's poor credit record and his subsequent inability to obtain finance' – in some cases, perpetrators falsely claimed poor credit records to coerce victims to enter loan contracts or become solely responsible for debt.²⁸

1.3 Prevalence of Economic abuse

The prevalence of economic abuse in Australia or internationally is unknown. International research identifies economic abuse as being as common as physical violence and psychological abuse among victims²⁹ seeking help for family violence.³⁰

Madeleine Ulbrick (2017), *Economic Abuse*, Research Brief, Monash Gender and Family Violence Prevention Centre, https://monash.figshare.com/articles/Economic_Abuse/8379089.

²¹ Supriya Singh, *Globalization and Money: A Global South Perspective* (Rowman & Littlefield Publishers, 2013), 71.

²² Ibid 71.

²³ Fehlberg (n 20) 10.

²⁴ G. McDonald, 'Women and credit in the Australian banking industry' (Conference paper, Women and Credit Conference, 6 March 1991); Fehlberg (n 20).

²⁵ Restoring Financial Safety (n 2), 13.

²⁶ Ibid 31.

²⁷ Stepping Stones (n 2) 16.

²⁸ Ibid 16.

²⁹ 'Victim' refers to people who are targets of family violence, economic abuse and elder abuse. We use the term to remind readers of the interconnected nature of abuse and how economic abuse rarely occurs in isolation from emotional, physical and sexual violence.

³⁰ Adrienne Adams, Megan Greeson, Angela Littwin & McKenzie Javorka. 'The Revised Scale of Economic Abuse (SEA2): Development and Initial Psychometric Testing of an Updated Measure of Economic Abuse in Intimate Relationships' (2019) 10(3) *Psychology of Violence*, 268-278.

Recent analysis of Australian Bureau of Statistics (ABS) data shows a gendered pattern of economic abuse with nearly 16% of Australian women reporting a history of economic abuse, compared with 7% of men; the statistics are even higher for women presenting to family violence services, with between 77-99% of women reporting such a history.³¹

Women are more likely to be victims of economic abuse than men. Economic abuse is connected to gendered stereotypes and is exacerbated by gender inequality, especially women's widespread economic disadvantage.³² All research to date, indicates that economic abuse is under-reported and poorly understood even by those who experience it.³³ Consequently, existing estimates are limited and it is anticipated that the actual prevalence is much higher.

There is currently no statistical evidence relating to the prevalence of debt abuse as a specific tactic of economic abuse. Reports from family violence services suggest it is common and very difficult to resolve, with many barriers preventing disclosure (such as shame, fear of repercussions (if the bank informs the other party), and being unaware of individual legal rights and entitlements), and few accessible remedies.³⁴

1.4 Economic Abuse in the Australian Legal System

There are a range of formal and informal avenues within the legal system which may provide redress for intimate partner debt abuse in relation to loans or guarantees. This article focuses on the 'major avenue for relief'³⁵ being the doctrines of unconscionability (either under statute or equity), undue influence, or statutory jurisdictions to set aside 'unjust contracts'³⁶ 'Unconscionability' in equity covers unconscionability as articulated in *Commercial Bank of Australia v Amadio*³⁷ ('Amadio') and the special wives' equity from *Garcia v National Australia Bank Ltd*³⁸ (*Garcia*). Victims can seek to have their obligations under a contract affected by these doctrines set aside in a court of a State or Territory. We have chosen to focus on this avenue

³¹ Kutin et al (n 14); Adams et al (n 30) 270.

³² Restoring Financial Safety (n 2) 18-19.

³³ Stepping Stones (n 2), 6.

³⁴ Stepping Stones (n 2), 4; Restoring Financial Safety (n 2), 11.

³⁵ Nicola Howell, 'Sexually Transmitted Debt - A Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1995) 4(1) *Australian Feminist Law Journal* 93, 97.

³⁶ Common law defences of duress or non est factum are possible, but less common in the intimate partner context. Additionally, some economic abuse is committed through misuse of a power of attorney but this also occurs more often in the elder abuse context.

³⁷ (1983) 151 CLR 447 ('Amadio').

³⁸ (1998) 194 CLR 395 ('Garcia').

because others have shown that remaining options remain inappropriate or inaccessible to victims of debt abuse.

A key avenue for redress for intimate partner debt abuse is family law property proceedings (in a federal court, in family dispute resolution or negotiations). Once separated, a victim of debt abuse could claim that the debt is treated as part of the property pool and that the abuse/family violence should be taken into account, making the victim's contributions to the marriage significantly more arduous than they ought to have been.³⁹ However, it is clear that in practice, victims are rarely able to successfully raise this argument in proceedings,⁴⁰ and that the remedies are 'inaccessible and inadequate.'⁴¹ Others have shown that the family law system is unreachable for victims of economic abuse seeking property division, especially where the property pool is small or there is net debt.⁴² When victims do access the system, perpetrators may use the proceedings to continue the violence through deliberate delays or unreasonable settlement offers.⁴³

A victim of debt abuse could also use consumer credit law to make a claim against the lender for debt relief for financial hardship under the *National Credit Code*,⁴⁴ for failure to take a responsible lending approach or financial difficulty provisions under a range of self-regulatory industry-wide codes,⁴⁵ or for breach of responsible lending laws.⁴⁶ Victims of economic abuse may also be able to make a claim against a lender using non-enforceable internal policies set by individual lenders for dealing with vulnerable consumers and economic abuse and family violence. Victims may enforce their rights

³⁹ *Family Law Act 1975* (Cth) s 79(4)(c); *In the Marriage of Kennon* (1997) 22 Fam LR 1; (1997) 139 FLR 118; (1997) FLC.

⁴⁰ Patricia Easteal, Catherine Warden & Lisa Young 'The Kennon "Factor": Issues of Indeterminacy and Floodgates' (2014) 28(1) *Australian Journal of Family Law* 1.

⁴¹ Ulbrick (n 2) 247.

⁴² *Stepping Stones* (n 2) 36-8.

⁴³ *Restoring Financial Safety* (n 2) 39.

⁴⁴ *National Consumer Credit Protection Act 2009* (Cth) sch 1, s 72.

⁴⁵ Australian Banking Association, *Banking Code of Practice* (October 2021) chapters 17 and 39 ('Banking Code'); See generally Paul Ali, Evgenia Bourova and Ian Ramsay, 'Responding to consumers' financial hardship: An evaluation of the legal frameworks and company policies' (2015) 23(1) *Consumer Credit Law Journal* 29.

⁴⁶ *National Consumer Credit Protection Act 2009* (Cth) chapter 3. Provision of credit despite the existence of economic abuse potentially breaches responsible lending laws. The ASIC licensee Regulatory Guides do not explicitly mention family violence or economic abuse: See eg Australian Securities and Investment Commission, *Regulatory Guide 165: Licensing: Internal and external dispute resolution* (2018); Australian Securities and Investment Commission, *Regulatory Guide 205, Credit licensing: General conduct obligations* (2010); Australian Securities and Investment Commission, *Regulatory Guide 104: Licensing: Meeting the general obligations* (2015); Australian Securities and Investment Commission, *Regulatory Guide 209: Credit licensing: Responsible lending conduct* (2014).

against a lender under consumer law through internal dispute resolution with the lender directly, external dispute resolution run by the Australian Financial Complaints Authority and/or court action.⁴⁷ Research shows, however, that victims of debt abuse face multiple barriers to using hardship provisions and responsible lending laws and that available remedies are unsuitable for family violence contexts.⁴⁸ Individual bank policies are inconsistent on family violence.⁴⁹ The complexity of the intersection of consumer and family law makes comprehensive professional help where there is also relationship breakdown unavailable.⁵⁰ Furthermore, the lack of provision for severing liability for joint debt means that legal hardship protections have limited capacity to assist victims of debt abuse.⁵¹

There is potential for victims of debt abuse to use family violence intervention orders (FVIO) to obtain some relief from the perpetrator or evidence to assist with other causes of action.⁵² Additionally, as a condition of a FVIO, a victim may request the return of their personal property, which may help where the perpetrator has denied access to an asset which the victim is responsible for a debt or loan over (such as a car)⁵³ However, Ulbrick's research reveals, in practice, police, lawyers and magistrates prioritise physical violence to the extent that economic abuse is not sufficient to form the sole basis for obtaining FVIO.⁵⁴ Conditions attached to FVIOs are largely aimed at preventing physical acts, which limits their usefulness for remedying debt abuse.

The final avenue through which a victim of debt abuse could obtain redress is the criminal justice system.⁵⁵ Some behaviour by intimate partner perpetrators, lenders, lawyers or other professionals leading to debt abuse could be considered criminal in

⁴⁷ *Corporations Act 2001* (Cth) s 912A; Australian Securities and Investment Commission, *Regulatory Guide 165: Licensing: Internal and external dispute resolution* (2018); Banking Code (n 45) chapters 47 & 48; Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (2020).

⁴⁸ Stepping Stones (n 2) 32; Restoring Financial Safety (n 2) 70.

⁴⁹ Stepping Stones (n 2) 31.

⁵⁰ Bourova et al, 'Limitations of Australia's Legal Hardship Protections' (n 2) 1166, 1172.

⁵¹ Ibid 1177.

⁵² *Family Violence Protection Act 2008* (Vic) s5(1)(A)(lii); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11; *Domestic And Family Violence Protection Act 2012* (Qld) s 8; *Intervention Orders (Prevention Of Abuse) Act 2009* (Sa) s 8; *Family Violence Act 2004* (Tas) s 8; *Restraining Orders Act 1997* (WA) s 5a; *Family Violence Act 2016* (ACT) s 8; *Domestic And Family Violence Act 2007* (NT) s 5.

⁵³ See eg *Family Violence Protection Act 2008* (Vic) s 86.

⁵⁴ Ulbrick (n 2) 149, 157.

⁵⁵ In our case review, we did not consider forgery or criminal behaviour. In relation to collusion, perpetrators of family violence are often masterful at encouraging lawyers, mortgage brokers and lenders to unwittingly collude with them in committing acts of fraud, forgery or theft against the victim as part of the abuse.

nature, as a breach of a FVIO, fraud, forgery, theft or collusion with perpetrators to commit these acts. In Tasmania there is a specific offence of economic abuse.⁵⁶ However studies of the prosecution of family violence in the criminal justice system consistently show patterns of harm minimisation and for victims, exclusion, misrepresentation, isolation and disempowerment.⁵⁷ Police routinely fail to identify or investigate economic abuse when responding to family violence.⁵⁸ No convictions have been made under the Tasmanian economic abuse offence.⁵⁹ Evidence suggests poor prospects for victims who seek reparation for debt abuse through the criminal justice system.

Overall, there are few viable formal or informal options that victims of intimate partner debt abuse can use in relation to loans or guarantees. The jurisdictional span, across civil, criminal, consumer and family law, is so large that comprehensive legal help is not usually available.⁶⁰ According to Ulbrick, economic abuse 'creates a situation in which the pursuit of security is almost impossible to navigate.'⁶¹

For this study we have chosen to focus on the yet unexplored area of the viability of obtaining a legal remedy for intimate partner debt abuse using the doctrines of unconscionability (either under statute or equity), undue influence, or statutory jurisdictions to set aside unjust contracts.

1.5 Case Review Methodology

We employed a quantitative and qualitative content analysis of a decade of Australian case law to address our key research question: does the justice system provide meaningful outcomes for victims of intimate partner debt abuse in relation to joint borrowings for property and the provision of guarantees through the doctrines of unconscionability, undue influence, or unjust contract legislation? We have named our

⁵⁶ *Family Violence Act 2004* (Tas) s 8.

⁵⁷ Heather Douglas, 'The criminal law's response to domestic violence: What's going on?' (2008) 30(3) *Sydney Law Review* 439, 466; Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (University of California Press, 2018) 12.

⁵⁸ Ulbrick (n 2) 147.

⁵⁹ Marilyn McMahon and Paul McGorrery, 'Criminalising emotional abuse, intimidation and economic abuse in the context of family violence: The Tasmanian experience' (2016) 35(2) *University of Tasmania Law Review* 1.

⁶⁰ Ulbrick (n 2) 243.

⁶¹ Ulbrick (n 2) 170.

approach a 'case review.'⁶² Ethics approval was received from Monash University Human Research Ethics Committee.

Content analysis is primarily a quantitative research method used for making replicable and valid inferences from texts and to systematically reveal patterns in texts.⁶³ It differs from the more commonly used legal method of case analysis/interpretation: 'Whether quantitative or simply inferential, content analysis approaches the study of text as a scientific, rather than simply interpretive, activity.'⁶⁴ The case law on the equitable and statutory doctrines is settled. Accordingly, our case review differs from an analysis of the legal principles common in doctrinal or 'black letter' legal research.⁶⁵ We use reported and unreported cases as artefacts produced by the legal system, as sites of empirical analysis which yield valuable data on the functioning of the system. The use of content analysis in the case review enables us to see patterns in the case law and to understand whether victims of intimate partner debt abuse are able to use established equitable and statutory doctrines to achieve a remedy through the legal system. We elected to examine the cases qualitatively as well as quantitatively, to provide a 'thick' description⁶⁶ of the litigation outcomes for victims of intimate partner economic abuse.

For our case review, our sample consisted of all reported and unreported decisions across all Australian State, Territory and Federal courts indexed in the Lexis Advance database from 2008-2018 using the search terms:

1. 'undue influence' and "guarantee'
2. 'undue influence' and 'mortgage'
3. 'unconscionable' and 'mortgage'
4. "unconscionable" and 'guarantee'
5. 'special disadvantage' and 'guarantee'
6. 'special disadvantage' and 'mortgage'
7. 'pressure' and 'mortgage'

⁶² A similar methodology has been applied in Easteal et al (n 40).

⁶³ Klaus Krippendorff, 'Content Analysis' in Neil J. Salkind (ed), *Encyclopedia of Research Design* (Sage, 2010) 233.

⁶⁴ Roberto Franzosi, 'Content Analysis' in Michael S. Lewis-Beck, Alan Bryman & Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (Sage, 2003) 186, 186.

⁶⁵ Terry Hutchinson & Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

⁶⁶ John W. Creswell and Dana L. Miller, 'Determining Validity in Qualitative Inquiry' (2000) 39: 3 *Theory into Practice*, 124, 128.

8. 'pressure' and 'guarantee'
9. 'unconscionable' with a sub-search 'borrower'
10. 'undue influence' with a sub-search 'borrower'

If a case was only indexed in summary form in the Lexis Nexis database, we cross referenced the case in Austlii for further facts. We also cross-referenced these searches against case law considering and applying the High Court cases of *Garcia* and *Amadio* and we reviewed case law on the National Credit Code and unjust contracts.

We excluded decisions where claims of wrongful conduct did not relate to the behaviour of a co-borrower or principal debtor but were directed at the lender's behaviour or the behaviour of another party, for example a solicitor.⁶⁷

From these searches we selected cases where the party alleging abuse was the female spouse or intimate partner of a co-borrower or principal borrower. We identified 38 potentially relevant decisions across all Australian State, Territory and Federal courts from 2008-2018.⁶⁸

There is not an exact correlation between the cases in our sample and the existence of economic abuse as defined in section 6 of the *Family Violence Protection Act 2008* (Vic) ('the Victorian legislation'). While a significant percentage involved coercive, deceptive or unreasonably controlling behaviour consistent with the definition of economic abuse in section 6 of the Victorian legislation, some were less conclusive about economic abuse as there was apparent benefit from the transaction. Some cases would qualify as economic abuse if the facts asserted by the party were proved to have occurred, but on the facts their claims were not upheld.

We conducted a thematic content analysis, where our coding scheme is 'based on categories designed to capture the dominant themes in a text'.⁶⁹ A single coder with

⁶⁷ Also, claims by parties within our sample cases have also been excluded if it is clear that the claim is against the lender for its behaviour only. For example, the wife's *Amadio* argument against the bank in *Case 13* was not counted. Some cases also involved claims by the other parties directly against a lender: eg *Case 17* and *Case 21* which are not relevant to our statistics. Where facts or pleadings in a case are unclear, we have kept the case in as potentially relevant. We included *Case 27* even though the female spouse was the principal borrower as the case involved the re-financing of a joint mortgage.

⁶⁸ Our initial research also considered potential cases of elder abuse. This paper looks only at cases involving intimate partners.

⁶⁹ Roberto Franzosi, 'Content Analysis' in Michael S. Lewis-Beck, Alan Bryman & Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (Sage, 2003) 186, 186.

deep knowledge of the legal doctrine and case law was used for reliability (Dr Barkehall Thomas). We extracted specific factual information from the cases:

- Identity and gender of claimant: female spouse or intimate partner.
- Type of financial product: loan/mortgage or guarantee.
- Legal claim made.
- Outcome: Success?

The categorised data summary is included in table form in the Appendix.⁷⁰

We then reviewed the case facts qualitatively, looking for specific relationship factors such as family violence, or evidence of coercive, deceptive or unreasonably controlling behaviour or of trust and confidence. We also looked for evidence that a party was from a culturally and linguistically diverse background,⁷¹ and whether independent advice had been provided.

There are a number of limitations to our approach. A limitation of the content analysis method is that it may miss subtle nuances in the production of meaning.⁷² To address this, in our review of the facts of individual cases in this article we provide additional qualitative detail of the relationship and litigation context to provide a richer picture of the litigation outcomes for victims of intimate partner economic abuse. Second, a limitation of our approach is that our sample is not representative of the broader population of economic abuse disputes around lending. Each reported and unreported case has been through the process of litigation in superior courts. Most victims of economic abuse, especially those who are most vulnerable, cannot afford to engage in civil litigation. The facts reported in the judgments have been through the fine sieves of the evidence and judgment-writing processes. Nevertheless, the cases provide valuable data on an underexplored issue: how the tiny percentage of victims of debt abuse who receive a legal judgment actually fare in the legal system. Third, a limitation of relying on data from reported judgments in our case review (rather than engaging in court file analysis, court observations or litigant interviews) is that the article is limited to material considered relevant by the judicial officers and lawyers arguing before the

⁷⁰ The claims data only captures claims relevant to the research question. It also generally does not capture statutory claims that were not applicable on the facts. A couple of specific exceptions are noted.

⁷¹ Cases were only counted if it was specifically indicated that the party was born overseas and/or had difficulty with English language.

⁷² Roberto Franzosi, 'Content Analysis' in Michael S. Lewis-Beck, Alan Bryman & Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (Sage, 2003) 186, 189.

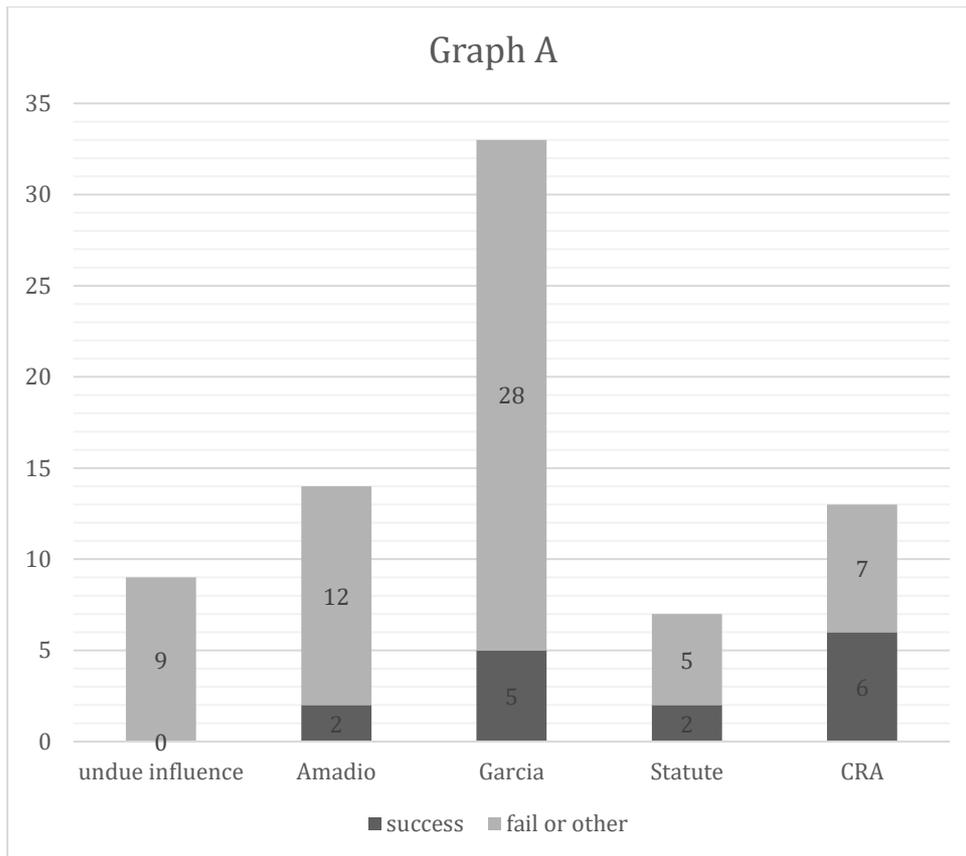
courts. While other qualitative methods could have provided a more complex account of the disputes, they are too resource-intensive to be realistically carried out across a decade of litigation in multiple Australian jurisdictions. As the first study on how our civil justice system caters for victims of economic abuse through the doctrines of unconscionability, undue influence, or unjust contract legislation, our less rich but wide-ranging methods are adequate to answer to our research question. Subsequent studies can provide more in-depth information on understanding why the civil justice system has failed victims of debt abuse.

Part 2: The data from the cases and overview of the claims

In our case review, 38 cases involved female spouses and intimate partners. Most cases pleaded multiple defences. 12 of these cases were fully or partly successful against a lender on substantive grounds.⁷³

Graph A below illustrates the breakdown of success rate by particular defence claimed.

⁷³ Some succeeded on more than one basis. Case data has been anonymised to protect the privacy of participants. *Case 17; Case 2; Case 19; Case 25; Case 35; Case 27; Case 9; Case 30; Case 31; Case 36; Case 37*. The wife was also successful in *Case 34* but on grounds related to misuse of a power of attorney. In another 4 cases, the wife was able to amend her defence or defend against summary judgment: *Case 18; Case 3; Case 1*. In *Case 23* the wife succeeded at a procedural stage (*Case 23 initial*), but ultimately lost (*Case 23 final*).



Overall, the success rate of the equitable defences is low.⁷⁴ Statutory unconscionability was claimed comparatively few times, and also has a low success rate.⁷⁵ The CRA has a comparatively good success rate, and is claimed in a high proportion of cases (especially given that they are all from New South Wales). We note here that the High Court decision of *Thorne v Kennedy*⁷⁶ was decided near the end of the review period and no cases in our analysis cited the decision.

⁷⁴ Note this data does not include cases where the pleadings asserted a claim which was later not pursued. Procedural successes are categorised as 'other'. In relation to unconscionable conduct, the argument may be raised in a general, rather than specific way. See for example *Case 37* and *Case 34*. It is not explicit in all of these cases how the special disadvantage related to her relationship with her husband but they have been included as potentially relevant, given their facts, or other claims made in each case. The *Amadio* claim in *Case 13* is excluded from this total as it related directly to the bank's behaviour. It is difficult to tell from the facts of *Case 32* so this case could be treated either way. It has been included conservatively.

⁷⁵ Unconscionability provisions also previously existed in the *Trade Practices Act 1974* (Cth) ('TPA') and in some cases the TPA was pleaded in addition to, or as an alternative to the ASIC Act provisions. The TPA and ASIC Act did not apply in *Case 8* so it has been treated as not a statutory case. Further, the claim under statute was not based on her husband's behaviour so is not directly relevant.

⁷⁶ (2017) 263 CLR 85 ('*Thorne*').

In the following sections, we go through each doctrine individually.

2.1 Undue Influence

In *Thorne*⁷⁷ the High Court explained that undue influence involves one party's will being overborne to the extent that the decision being made by them is not of their own free will.

Undue influence is divided into actual undue influence and presumed undue influence.

Presumed undue influence has two separate categories. The party alleging undue influence must show either (i) a relationship of presumed undue influence, or (ii) a relationship of trust and confidence.

The relationship of husband and wife is not a relationship of presumed influence. If there is not a presumed relationship of influence but a relationship of trust and confidence, it is necessary for the party to prove that a transaction not to their benefit occurred. The onus is on the 'stronger' party to prove that the transaction was a free exercise of will.

In the situation where the influence was exerted by a borrower/mortgagor over a co-borrower or guarantor, it is also necessary to prove that the lender had sufficient notice of the influence.⁷⁸ If the lender does not have notice of the influence, the transaction will not be set aside. Where a lender insists on the guarantor obtaining independent legal advice, it is entitled to rely on the solicitor's certificate and will not be on notice of any influence in the transaction.⁷⁹

In the case review, none of the cases relying on undue influence⁸⁰ succeeded substantively.⁸¹

2.1.1 Discussion and analysis

Undue influence was notably unsuccessful as a defence in our case sample. Strong facts are required to demonstrate that undue influence occurred in the transaction.

⁷⁷ Ibid.

⁷⁸ *Bank of NSW v Rogers* (1941) 65 CLR 42.

⁷⁹ See the discussion in *Mclvor v Westpac Banking Corporation* [2012] QSC 404 and the authorities cited there.

⁸⁰ In three additional cases, pleadings asserted undue influence but the defence was not pursued or was rejected at an early stage: *Case 8*, *Case 7*; *Case 23*. *Case 38* may also be potentially treated as an undue influence case although it is not explicit. Two succeeded procedurally: *Case 1*; *Case 18*.

⁸¹ Substantive fail cases were *Case 17*; *Case 22*; *Case 26*; *Case 27*; *Case 34*; *Case 24*; *Case 28*.

Allegations by an intimate partner are insufficient and four cases failed because insufficient evidence of influence was provided to support the claim.⁸² Two other cases failed on the basis of undue influence but succeeded on other grounds.⁸³

Undue influence was held to have occurred in one case but the defence was not successful against the lender. This case of abuse illustrates how extraordinarily difficult it is to prove an undue influence defence against a lender.

In *Case 27* the wife was a migrant who was completely illiterate in English. She and her husband jointly owned a home which was subject to a mortgage. Her husband became bankrupt and the lender was threatening foreclosure. Her husband's trustee in bankruptcy proposed that she purchase her husband's interest in the property. Finance was sought from the appellant bank for her to purchase her husband's share.

At trial, the wife said that 'she was raised in a very traditional and conservative family and that, according to her culture, wives always do what their husbands ask them to do'. Her evidence was that her husband arranged the loan application and provided incorrect information to the lender. Her husband was always present when she visited the bank and she also gave evidence that 'her husband took her to see [the solicitor] and was always with her when she met her.'

The trial judge accepted that the wife was in 'fear of violence' by her husband and if she went to the police, 'she would still have to come home and then he would hit her.' The judge was satisfied that her will had been overborne.

Although undue influence by the husband was established, the lender had no notice of it. The meetings between the bank manager and the wife were described by the trial judge as 'entirely uneventful'. The appeal failed.

2.2 Unconscionable Conduct

The seminal decision of *Amadio*⁸⁴ illustrates the general law doctrine of unconscionable dealing by a borrower in obtaining a guarantee. For unconscionable dealing it must be demonstrated that one party was at a special disadvantage, and this was exploited by another party who knew of the disadvantage.⁸⁵ The doctrine has

⁸² *Case 24; Case 22; Case 26; Case 28.*

⁸³ *Case 17, Case 34.*

⁸⁴ (1983) 151 CLR 447.

⁸⁵ *Amadio* (n 37); *Thorne* (n 75); *Australian Securities and Investments Commission v Kobelt* (2019) ALR 1, 37-8 per Nettle and Gordon JJ.

some overlap with undue influence, but unconscientious conduct may exist without the guarantor's will being overborne.⁸⁶

We only examined cases where the disadvantage occurred due to the relationship between intimate partners. Where the borrower is the party who has created the disadvantage of the guarantor or co-borrower, there is a further question as to whether the lender is sufficiently aware of the disadvantage that it can be said to have exploited the disadvantage brought about by the borrower's conduct.

Female partners raised unconscionable conduct in 14 cases that potentially involved economic abuse.⁸⁷ Five of these cases involved a female partner who was clearly from a non-English speaking background.⁸⁸ Most partner cases were unsuccessful and only two cases succeeded substantively using this doctrine.⁸⁹ One involved a partner from a CALD background.

2.2.1 Discussion and analysis

The most problematic aspect for a partner is to prove that she was under a special disadvantage, and that the lender knew of that disadvantage.

In relation to the first point, the unfortunate reality is that intimate partner victims of economic abuse do not present the type of characteristics that the law regards as sufficient for a special disability. The *Amadio* claim is not well suited to deal with economic abuse between intimate partners.

Of the failed intimate partner cases, one clearly involved abuse but failed on all counts,⁹⁰ and five failed on *Amadio* but succeeded on other grounds due to abuse in the transaction.⁹¹ One was abusive to the extent the wife signed a guarantee not to her benefit but she provided no evidence of transactional abuse or special disadvantage.⁹² One involved a transaction partly to the wife's benefit and she argued unsuccessfully that she did not understand her obligations, and was under a special

⁸⁶ *Thorne* (n 75).

⁸⁷ It may be raised in a general, rather than specific way: *Case 37* and *Case 34*. It is not clear in all of these cases how the special disadvantage related to her relationship with her partner/husband but they have been included as potentially relevant, given their facts, or other claims made in each case. The *Amadio* claim in *Case 13* is excluded from this total as it related directly to the bank's behaviour.

⁸⁸ *Case 20*; *Case 26*; *Case 27*; *Case 30*; *Case 36*.

⁸⁹ *Case 19*, *Case 36*. One case was procedural only: *Case 1*.

⁹⁰ *Case 20*.

⁹¹ *Case 17*; *Case 25*; *Case 27*; *Case 30*; *Case 37*.

⁹² *Case 32*.

disadvantage due to her poor English skills and her reliance and dependence on her husband.⁹³ Three cases do not provide facts to positively suggest abuse.⁹⁴

The second aspect of the problem is lender knowledge. Even where the female partner has a stronger case on disadvantage, the lender's knowledge is an ultimate stumbling block.

Amadio-type unconscionable dealing was unsuccessfully argued by victims of actual family violence and/or economic abuse in two notable cases. Both involved partners from non-English speaking backgrounds. *Case 20* involved a 'subservient' wife who experienced violence, and *Case 27* a wife who was scared of her husband due to past violence. Despite the strong findings of fact in each case, no explicit finding was made in either case as to whether the wife was in a position of special disadvantage due to the abuse in the relationship.

Ultimately, it was not necessary for the court in each case to decide if the wife was under a special disadvantage, because the crucial question was whether the lender was aware of any of the factors that could amount to disadvantage. In both cases it was held that the lender was not aware of any factors that could amount to such a disadvantage.

2.3 The Wives' Special Equity, or the Garcia Doctrine

A further equitable doctrine available at general law is the special wives' equity as articulated in *Garcia*.⁹⁵ While the High Court majority recognised that a wife may be able to set aside a guarantee on the basis of undue influence exerted by her husband,⁹⁶ the basis for intervention on the basis of unconscionable behaviour articulated in this case does not require undue influence to be proved. Rather, it is sufficient for a wife to show that she acted as a surety who obtained no benefit, without understanding the nature and effect of the transaction and the lender did not take sufficient steps to ensure she understood.⁹⁷ This doctrine is a manifestation of unconscionable behaviour that is separate from the *Amadio* form of unconscionable dealing.

⁹³ *Case 26*.

⁹⁴ *Case 34* (The wife was a director of the business whose debts were guaranteed); *Case 15*; *Case 33*.

⁹⁵ *Garcia* (n 38).

⁹⁶ The first head from *Yerkey v Jones* (1939) 63 CLR 649.

⁹⁷ *Garcia* (n 38).

Garcia unconscionability was pursued by female partners in 33 cases⁹⁸ and only five were substantively successful.⁹⁹

2.3.1 Discussion and analysis

2.3.1.a Correlation between cases and instances of abuse

The basis for the equitable claim of unconscionability in *Garcia* is that a wife can be expected to have trust and confidence in her husband, and accordingly may not have full information regarding the transaction for which she has agreed to act as a surety.

There is no direct correlation between a wife who successfully makes a *Garcia* claim and the existence of economic abuse. Consequently, it is difficult to identify whether cases where *Garcia* was relied on involved economic abuse. Wives frequently assert that they signed because their husbands asked them to do so.¹⁰⁰ They may not have read the document they signed.¹⁰¹ This may be due to their 'trust and confidence' in their husband or it may indicate the existence of a relationship of control and exploitation.¹⁰² As it is not necessary to prove any abuse, explicit factors evidencing it do not come necessarily out on the facts.

Wives who successfully rely on *Garcia* may be traditional homemakers¹⁰³ or have little commercial experience and understanding.¹⁰⁴ However, a wife who is well-educated or has some commercial experience, may still be able to successfully rely on the *Garcia* form of unconscionable conduct provided that she can show she did not understand the transaction and adequate steps had not been taken to explain it to her. A wife who is intelligent but has no interest in finances and is busy and distracted with her life as a wife and mother can rely on the doctrine.¹⁰⁵

Consequently, in some of these cases, women may have made a deliberate choice not to be involved in their partner's business activities. Alternatively, abuse may be present but unstated.

⁹⁸ See the case table in the Appendix for detail. In *Case 38* the wife was self-represented. She did not specifically raise *Garcia* so has not been counted but on the facts a *Garcia* claim might have been made.

⁹⁹ *Case 17; Case 2; Case 19; Case 25; Case 9.*

¹⁰⁰ *Case 30; Case 31; Case 17; Case 4; Case 19; Case 21; Case 7; Case 26; Case 9; Case 20; Case 6.*

¹⁰¹ *Case 11; Case 7; Case 9; Case 1.*

¹⁰² In *Case 12* the wife claimed that her husband's 'personality eclipsed [her] capacity for free and careful deliberation'.

¹⁰³ *Case 17.*

¹⁰⁴ *Case 19.*

¹⁰⁵ *Case 9.*

Conversely a wife with little business experience,¹⁰⁶ language difficulties,¹⁰⁷ whose husband has not disclosed to his wife that he is bankrupt,¹⁰⁸ or who said she 'had no choice'¹⁰⁹ may fail on the basis of *Garcia*. A wife's claim may also fail if her evidence is not accepted.¹¹⁰

2.3.1.b Volunteer requirement

This form of unconscionable conduct requires that the party seeking to set aside the credit transaction has acted as a volunteer. Traditionally, this occurs where the wife acts as surety for the debts of her husband or the husband's company and it is clear that she obtains no direct benefit from giving the guarantee. For the *Garcia* defence to apply, the partner must actually, or effectively, be entering into obligations as a guarantor.¹¹¹ Further, on the facts she must be a volunteer in that she receives little or no benefit from her obligation as surety.

Garcia cannot be relied upon where the parties are joint borrowers, or the wife is principal borrower, as the 'volunteer' element will be absent. Thus, in *Case 27* and *Case 30* female partners who were in abusive/controlling relationships could not rely on *Garcia* unconscionability, as they were borrowers who obtained a benefit from the loans on their face. In *Case 26*, the wife was a migrant with poor English skills whose husband made all the financial decisions. She would sign documents at his request without question, and said she did not understand that she was borrowing money from the bank. However, *Garcia* did not apply as she was a co-borrower, not a guarantor.¹¹²

In *Case 28*,¹¹³ the wife was not a volunteer and had no success even though she had not been told that her husband was already bankrupt when she entered into a mortgage.

¹⁰⁶ *Case 7*.

¹⁰⁷ *Case 27*.

¹⁰⁸ *Case 28*.

¹⁰⁹ *Case 33*. The wife asserted she had 'no choice' about signing due to the strain it would place on their relationship.

¹¹⁰ In *Case 29* the wife alleged pressure by her husband in the form of swearing and pressuring her to sign at short notice. Her evidence was not accepted. In *Case 22* the wife said the husband verbally abused her and that she felt 'compelled' to sign documents. The trial judge was not prepared to accept any of her evidence unless it had been independently verified.

¹¹¹ *Case 10* is another example of a non-surety transaction.

¹¹² Note however, that at summary judgment stage, the bank's claim for summary judgment in relation to two business loans secured by the mortgage was unsuccessful. See *Case 26 initial*.

¹¹³ *Case 28*.

Where a surety is nonetheless not a volunteer due to a receipt of benefit, a claim of *Garcia* unconscionability will fail even where no advice or explanation of the transaction was provided. The *Garcia* defence failed for this reason for wives who had received no explanation or advice in several cases in our review.¹¹⁴

The fact that a husband has control over the family finances and that some loan moneys are used to pay his debts is not enough to enliven *Garcia*-type unconscionability. In *Case 21*, the wife was the registered proprietor of the family home. She and her husband had four children and she did not work. The family was reliant on the husband's income. The husband and wife knew the bank manager socially and he convinced them to refinance and take a loan with his bank. The husband did not fully disclose his debts to the bank and it was held that the manager did not know that the husband's' businesses were in financial difficulty.

The loan and mortgage paid off the existing mortgage with another bank, and also provided a line of credit. Some of that line of credit was used for the husband's' businesses.

The wife was not a volunteer even in relation to the sums that were applied by her husband to his business debts. Because the husband was the sole source of the family's income, the expenditure directed to his debts was 'an immediate and direct benefit' to her.

Further, because the wife was not a volunteer, the unconventional circumstances of the advice given to her did not matter. The bank manager's evidence was that he met with the husband and wife at their home to complete the loan application, then visited a second time and went through the documents with them in their kitchen at the time of signing. He gave evidence that the husband and wife were preparing for a party to be held at their home and the wife was preparing food during his explanation.¹¹⁵

The trial judge concluded that an explanation had been provided although it was

objectively a matter of concern that a representative of the plaintiff bank thought that a party and a barbeque at the defendants' residence

¹¹⁴ In *Case 31* the wife was asked to sign the guarantee document at an event, and received no advice. She was unsuccessful under *Garcia* due to indirect benefit as she was a beneficiary under a family trust. In *Case 4* a non-volunteer surety wife had no success although she received no advice prior to signing the guarantee, there were no warnings on the documents regarding the need for advice prior to signing, and she did not read the documents prior to signing them. See also *Case 26*. The wife said she received no legal advice and that her husband was present at all meetings with bank staff.

¹¹⁵ The wife's evidence was that she signed documents in the manager's office and received no explanation.

were appropriate forums at which to arrange significant financial transactions which had serious implications for the defendants' interests.

In the context of economic abuse, and debt abuse particularly, the requirement for the wife or intimate partner to be a volunteer is a serious problem with the *Garcia* defence. Relationships of economic abuse are characterised by power and control over finances. An intimate partner co-borrower with no choice about how income is generated, and no control over how the borrowed money is spent will be unable to prove that she falls within the criteria for this equitable doctrine.

2.3.1. The understanding and advice requirement.

Where a wife is acting as surety for her husband, and has demonstrated that she did not understand the transaction, the lender has a responsibility to ensure that adequate steps were taken to ensure the surety understood the transaction. It is sufficient if the lender provides an explanation to the wife or if the lender reasonably believes that advice has been given by a 'competent, independent and disinterested' third party.¹¹⁶ Frequently a lender advises the surety to obtain independent advice.

The role of advice in the *Garcia* doctrine is to ensure the surety understands the transaction. It is not to ensure that she exercised a free choice. The understanding of the transaction will be sufficient if there is no 'material misunderstanding'.¹¹⁷ A wife who does not realise that she could be made personally bankrupt under the guarantee does not have a material misunderstanding.¹¹⁸ The effectiveness of the advice requirement in cases of economic abuse will be discussed in Part 3.

The *Garcia* defence as framed provides very little assistance to spouses in financially abusive relationships when seeking redress for debt abuse in relation to loans or guarantees.

2.4 Unconscionable Conduct Under Statute

Unconscionability is also incorporated in statute. Section 12CA *Australian Securities and Investment Commission Act 2001* (Cth) prohibits a person, in trade and

¹¹⁶ *Garcia* (n 38) 409. It has since been held that, depending on the sophistication of the guarantor, it may not be necessary to provide a verbal explanation of the documents if a written explanation is provided: see *Case 8*.

¹¹⁷ *Case 32*.

¹¹⁸ *Case 32*.

commerce, from engaging in unconscionable conduct in relation to financial services within the meaning of the unwritten law. Section 12CB prohibits a person in trade and commerce, from engaging in conduct that is unconscionable in all the circumstances in the supply of financial services. The Court may consider a broad range of factors under s12CC to determine if section 12CB was contravened.

A relevant factor under this section is:

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services.

Under the statutory form of unconscionable behaviour under s 12CB it is not necessary for a party to prove the strict elements of the general law doctrine.¹¹⁹

In the case review, statutory unconscionability¹²⁰ was in issue in seven cases and successful in two of these, but in both cases the women were also successful on other grounds.¹²¹

While the sample size is small, it is noteworthy that the only cases where statutory unconscionability was made out were also successful on equitable grounds. At least in the context in question, it appears that the statutory jurisdiction will be exercised in a restrained fashion.

A further statutory ground of review is available in New South Wales under the CRA. Under s7, a court has jurisdiction to intervene in an 'unjust' contract.¹²² Matters to be considered by a court are elaborated in s9 and include:

¹¹⁹ Section 12CB(4)(a) ASIC Act and *Kobelt* (n 83) per Gageler J at 23, Keane J at 31, Nettle and Gordon JJ at 37 and Edelman J at 73. Kiefel and Bell JJ did not consider the point.

¹²⁰ Unconscionability provisions also previously existed in the *Trade Practices Act 1974* (Cth) and in some cases the TPA was pleaded in addition to, or as an alternative to the ASIC Act provisions.

¹²¹ *Case 21*; *Case 17*; *Case 25* (successful - the judge said the conduct was prima facie in breach of the ASIC provisions, although further submissions were permitted); *Case 7*, *Case 26*, *Case 32*, *Case 36* - successful. The TPA and ASIC Act did not apply in *Case 8* so it has been treated as not a statutory case. Further, the claim under statute was not based on her husband's behaviour so is not directly relevant.

¹²² Certain types of contracts are excluded: s6(2) CRA. Relief will not be granted 'so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person'.

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract,

(ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or

(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract.

The Court must also have regard to the public interest.¹²³ The CRA grounds for review are wider than *Amadio* unconscionability (making it easier to satisfy them) and a court will determine the CRA grounds first.¹²⁴

A similar power to open unjust contracts exists in the National Credit Code, s76. The Credit Code 'unjust' contract provisions were only applicable in two cases and the argument did not succeed in either case.¹²⁵ We consider that the most likely explanation for the lack of cases on the Code in our sample is that most of the litigation involves high value borrowings or guarantees for business purposes, which are not governed by the Code.¹²⁶

In the case review,¹²⁷ 13 cases ran a CRA defence, and substantive success occurred in 6 of them.¹²⁸ In five of those cases the women either did not claim under *Garcia*, or the *Garcia* claims failed.¹²⁹

For three women in our case review the CRA defence offered at least some remedy where *Garcia* did not. Two of these cases clearly involved abusive/controlling

¹²³ Section 9(1).

¹²⁴ *Spina v Permanent Custodians Ltd* (2009) BPR 26,923.

¹²⁵ The Credit Code was not strongly relied on in the cases in our review and only Case 21 was directly decided on the basis of the Code. The wife lost the case on the basis of the contract not being unjust. Provisions of the Code were also addressed in Case 35 but the decision on the unjustness of the contract was made on the basis of the CRA. The Code was a triable issue in Case 1 but there is not enough detail to determine if it applied or not.

¹²⁶ See Credit Code s5(1)(a) and (b).

¹²⁷ See the case table in the Appendix for detail. This is conservatively calculated and includes Case 28 where it was held the CRA did not apply due to the business purpose for the loan contract: s6(2) CRA. The unjustness of the contract was still considered in obiter.

¹²⁸ One more case involved permission to amend the defence, which was granted: Case 23 *initial*. The case was ultimately substantively unsuccessful as no defence was provided: Case 23 *final*.

¹²⁹ Case 37; Case 27; Case 30; Case 31; Case 35. The sixth case was Case 17 where the wife was successful on *Garcia* and CRA grounds.

relationships: *Case 27* and *Case 30*. A wife who failed under *Amadio* had success under the CRA in relation to financial obligations she was pressured into signing.¹³⁰

However, the CRA did not assist the victim in *Case 20*. Her case will be discussed in Part 3.

Part 3: Barriers to success

This Part explores the barriers encountered by victims in the cases. First, we identify general barriers, as well as those arising from the abusive relationship, and how they impact a victim. Next, we consider the role of independent advice in credit transactions and the effect it has upon the ability of a victim to succeed in legal action against a lender. We consider the inadequacies in the legal advice process in providing a real avenue for a victim to disclose and address abuse in a transaction.

3.1 Barriers faced by victims who have suffered economic abuse.

Due to the cost of litigation, victims may not defend proceedings brought by a lender. In the case review there was a significant percentage of cases with unrepresented litigants. Eleven cases from our sample involved litigants who were unrepresented or had counsel acting pro bono.¹³¹

Further, the coercive control exercised by a perpetrator as part of the economic abuse may in itself be the barrier. Two cases in the review demonstrate this particularly. *Case 10* is an example of the persistence of control in a case of economic abuse and the significant impact it can have on a victim's ability to succeed in litigation.

In this case a wife sought to set aside a settlement deed made with the lender to settle its claims against a company controlled by her husband as the principal debtor and against her¹³² as guarantor. The wife asserted that she was never provided any advice in relation to the original guarantee and was told by her husband to sign a document that was important and it was urgent that she did so. She signed despite being initially reluctant to do so and no explanation of the document was provided. The lender

¹³⁰ *Case 37* (discussed in Part 4).

¹³¹ *Case 1*; *Case 38*; *Case 15*; *Case 12*, *Case 19* (for most), *Case 13*, *Case 14*; *Case 23 final*; *Case 22*, *Case 27* - counsel acting pro bono for part; *Case 21* - counsel acting pro bono for wife; 7 cases also had one unrepresented party (usually a husband) *Case 17*, *Case 30*; *Case 21*, *Case 28*, *Case 26*; *Case 11*; *Case 6*.

¹³² And two other guarantors, including her husband.

instituted proceedings and no equitable defence was asserted at that stage. When she was served with court documents, she gave them to her husband.¹³³

When the deed of settlement was subsequently entered into, the wife stated that no explanation was given to her by the solicitors, who were acting for the company as principal debtor and the guarantors. She claimed that she was not advised that she may have a defence, nor was she informed of the nature of her obligations under the deed.

Her case failed, as she was unable to satisfy the elements of a *Garcia* claim. The document she was attempting to set aside was a settlement deed, not a guarantee.¹³⁴

Victims may not be aware that abuse is occurring due to the perpetrator's manipulation. Alternatively, they may not recognise the behaviour as abusive, particularly where cultural norms are in play.

Case 30 illustrates both of these points. The wife was a migrant from Malaysia who signed mortgages over the family home in her name to secure joint loans for herself and her husband. She did not understand the difference between a loan and a mortgage and received no independent legal advice. The judge referred to her affidavit where she deposed that her husband had 'traditional' values and considered it his role to deal with the finances.

The loan monies were not used to her benefit and she did not know that her husband was facing financial difficulties with his business as he kept that information from her. Her husband's mail was sent to a post office box and although she asked for a copy of the loan statement from the mortgage originator, she did not receive one. The judge noted: 'Her first knowledge of the proceedings was when she was personally served with a notice to occupier.'

3.2 Independent advice

Independent legal advice is often required prior to signing a credit contract. In this section we explore the adequacy of independent advice requirements to identify

¹³³ The facts are discussed in an earlier judgment.

¹³⁴ Further, an *Amadio* claim was expressly abandoned, so there was no basis to argue that the lender was on notice of any special disability – being the lack of independent advice given to her. While solicitors were retained, their independence was compromised as they acted for the principal debtor and guarantors.

economic abuse and dissuade victims from participating in harmful credit arrangements.

Requirements for independent advice come from both the Banking Code of Practice and the general law.¹³⁵

Pursuant to the Banking Code where a person is going to act as guarantor, the lender is required to provide warnings and recommendations for the customer to obtain independent legal and financial advice. Where the person is a co-borrower, independent advice is not mandated. However, lenders should not lend to a co-borrower who appears to not be receiving a substantial benefit from the loan unless certain steps have been taken.¹³⁶ The lender is required to take 'reasonable' steps to ensure the co-borrower understands the risks and the differences between being a guarantor and co-borrower; the lender has to take into account the reasons why a person seeks to be a co-borrower, and has to be 'satisfied' the co-borrower is not 'experiencing financial abuse.'¹³⁷ Referring a customer to obtain independent legal advice is likely to be sufficient as a reasonable step.

Under the general law, independent legal advice has had a significant role in rebutting a claim of undue influence or special disadvantage for unconscionable conduct, although post-*Thorne*¹³⁸ that may change. The application of *Thorne* to lenders is still developing and almost five years on from the decision there are, to our knowledge, no cases applying or considering *Thorne* in the particular context in question. Even though the effect of *Thorne* may be that a wife entered into the credit transaction under the undue influence of her husband or suffering from a special disadvantage, this will potentially have no substantial effect on lenders, as properly independent advice¹³⁹ will likely still protect a lender from having notice of any such influence or disability for

¹³⁵ While financial advice may sometimes be required, we concentrate on the impact of independent legal advice, as this form of advice has proved to be the most important factor in the case law.

¹³⁶ Banking Code (n 45) chapters 17 and 26.

¹³⁷ Banking Code (n 45) chapter 17.

¹³⁸ (2017) 263 CLR 85.

¹³⁹ See *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6 for an example of where advice did not prevent the lender from acting unconscionably. Kiefel CJ, Keane and Gleeson JJ stated at [49] 'it is open to draw the inference that the certificates were mere "window dressing" ... however one views the certificates, they could not negate Mr Jeruzalski's actual appreciation of the dangerous nature of the loans and the appellant's vulnerability to exploitation by the respondents.'

unconscionable conduct except in extreme circumstances. The lender is not responsible for negligent or inadequate advice if it is not on notice of the deficiencies.¹⁴⁰

In relation to *Garcia* unconscionability, a lender who insists on the surety obtaining independent advice has taken adequate steps and is entitled to believe that the surety wife has received an explanation of the transaction.

For statutory unconscionability, relevant questions include whether undue influence or unfair tactics were used, whether the party understood the documents, and whether any relevant industry code was complied with.¹⁴¹ Legal advice is relevant to proving these factors.

Under the CRA and the National Credit Code the provision of independent legal advice or other expert advice is a factor which is relevant to the unjustness of a contract.¹⁴²

Existing literature has heavily criticised the independent advice requirement in the surety context. More than twenty years ago, in her study on surety wives, Fehlberg argued that independent legal advice is insufficient to guard against abuse.¹⁴³ She noted the low judicial standard for the provision of independent advice¹⁴⁴ and Kaye asserted that the steps to be taken by creditors will have little practical effect if the perpetrator's requests will simply be acceded to in any event due to the imbalance of power between the parties.¹⁴⁵

This also brings to bear the issue of 'informed powerlessness' identified by Singh,¹⁴⁶ which as Fehlberg contends, suggests that 'the law's focus on providing information to sureties and, indeed even truly independent advice, may not have this effect at all from the perspective of sureties.'¹⁴⁷

Unfortunately, in our case review, these criticisms of independent advice still resonate strongly. While lenders are able to rely on independent advice to prevent themselves from equitable claims, the independent advice process does not provide any meaningful protection for victims of debt abuse. In our case review we identified the

¹⁴⁰ *Provident Capital Ltd v Papa* (2013) 84 NSWLR 231; *Case 28*.

¹⁴¹ 12CC ASIC Act.

¹⁴² National Credit Code s76(2)(h); CRA s9(2)(h).

¹⁴³ Fehlberg (n 20), 180.

¹⁴⁴ *Ibid* 89.

¹⁴⁵ Miranda Kaye, 'Equity's Treatment of STD' (1997) 5(1) *Feminist Legal Studies* 35, 55.

¹⁴⁶ Supriya Singh, *For Love not Money: Women, Information and the Family Business*, (The Consumer Advocacy and Financial Counselling Association of Victoria, 1995), 98-99.

¹⁴⁷ Fehlberg (n 20) 89.

following themes around independent advice that demonstrate significant failings with the advice process:

1. Failure to give separate advice to victims.
2. The role of advice for a *Garcia* defence.

In this section we also compare how the issue of advice is treated under the CRA.

3.2.2 Failure to separately advise the vulnerable party

Where parties are co-borrowers, independent advice is not required. However, the case review demonstrates cases where a female partner needed such advice, and did not receive it. Further, in some case the female partner had no opportunity to obtain advice from a solicitor or bank representative separately, as her male partner was present at all meetings.¹⁴⁸ While not all these cases indicate abusive relationships, some clearly do.¹⁴⁹

Where a party acts as a guarantor, independent advice is required. There are also cases in our review where partners acting as guarantors had no opportunity to discuss the transaction without the other party being present.¹⁵⁰

However, this deficiency does not affect the lender unless exceptional circumstances are present.¹⁵¹ Cases which succeeded demonstrated failings in the advice process that were clearly evident to the lender. For example, in *Case 36*, a director of the lender was present when the wife signed the documents without receiving an explanation. In *Case 17*, the advice was given to the guarantor in the presence of the principal borrowers and the lender knew the solicitor was not independent. In *Case 19* the lender took no steps to ensure that documents were sent to the guarantor personally, and failed to recommend independent advice. The receipt of statutory declarations did not protect it as the declarations were defective - they had not been signed in the presence of the person who was supposed to witness them, and they were dated prior to the execution of the guarantees.¹⁵²

¹⁴⁸ *Case 6; Case 21; Case 27; Case 30; Case 36.*

¹⁴⁹ *Case 27 and Case 30* are the main examples.

¹⁵⁰ In *Case 38* the wife asserted that her husband remained in the room when the transaction was explained to her. In family law proceedings she was successful in having her liability reduced, although not on the basis of pressure exerted by her husband.

¹⁵¹ *Case 36 and Case 17.*

¹⁵² *Case 19.* See also *Case 25* – the wife received advice on the basis that she was entering into a \$50,000 mortgage to assist her husband. The lender then changed the arrangement, with her husband becoming principal borrower and the wife becoming a guarantor under an

If the lender is not aware of the deficiencies, the lack of opportunity for separate advice will not provide grounds for the defence. *Case 20* is a particularly problematic example of a wife being given no opportunity for separate advice. In this case, the lender was refinancing existing loans and sought personal guarantees from a number of parties.¹⁵³ The bank did not have any direct contact with the wife when she provided guarantees. In each case she asserted that no advice was given to her.

On giving the first guarantee, the wife signed an acknowledgment that she had received advice, when she had not actually done so. Three further guarantees and the provision of advice were in dispute. On the first occasion the judge accepted that the wife was given advice, this advice was given in the kitchen of her home and it is likely that her husband was present.¹⁵⁴ The solicitor did not know the full extent of the debt (over \$9m). The wife had already signed the guarantee and provided an acknowledgement.

On the second occasion, the provision of advice was unclear. The adviser did not appear in court and the husband asserted that the certificate of advice was signed without advice being given. While the judge was not prepared to accept this allegation, it was noted that the certificate was signed 10 days after the wife had signed an acknowledgement that she had been provided with advice. When a further guarantee had to be provided, the solicitor's evidence was that the husband and wife pulled up in a car and the solicitor spoke to her through the vehicle window and he gave general advice, before signing the document on the roof of the car.

The judge accepted that the relationship was one where the husband had previously been abusive, and he was 'dominant'. The wife failed against the bank.

The case review demonstrates significant problems with the practice of independent advice, but that these problems are rarely an issue for the lender.

3.2.3 *Garcia* and advice

The role of advice-giving in a *Garcia* claim is to ensure that the wife understands the nature of the transaction. Advice may be provided over the phone without being

all moneys mortgage. Neither she nor her advisors were informed by her husband or the lender that the transaction had changed. Her liability was limited to the \$50,000.

¹⁵³ Earlier loan arrangements with a different lender had also required guarantees to be provided. The wife attended at the bank with her husband, who translated the explanation given by the bank officer, then told her to sign.

¹⁵⁴ While the wife and husband gave evidence that no advice was provided, their evidence was not accepted.

inadequate.¹⁵⁵ A judge can conclude that the wife understood the transaction, even if her husband was present during the explanation. However, the fact that a party may understand the transaction does not mean it is free from abuse. The wife in *Case 20* may have had a good understanding of the documents, but no practical choice as to whether to sign.

The case review also demonstrated patterns of behaviour by guarantors which subvert the advice requirement. In several cases, female partners acting as guarantors waived their opportunity for independent legal advice or signed an acknowledgement that independent advice was given, although no such advice had been provided.¹⁵⁶

In such a case, the guarantor may be fully aware of the circumstances and genuinely not in need of any such advice. However, it is also possible they may waive it, or sign an acknowledgement, because the provision of the advice will afford them no opportunity to change the transaction or avoid the obligation.¹⁵⁷ While the abuse may not be explicitly identified in these cases, the behaviour of the guarantor is consistent with a situation of abuse. It is also possible that a guarantor who signs despite clear advice that it is not in their interests to do so has no effective choice but to sign.¹⁵⁸ A lack of explicit evidence on the issue of abuse may indicate that the wife does not acknowledge or recognise the relationship as one that was abusive or does not realise that it could make a difference. It is worth reiterating that the *García* defence only requires the wife to prove 'trust and confidence' in her husband.

The guarantor has no remedy against the lender if it does not know that the declarations are false or has no notice of facts suggesting the transaction is problematic.

For example, in *Case 7*, the lender insisted on the guarantor obtaining independent legal advice. The husband told the lender that he had arranged for his company's in-house counsel to provide the explanation and witness his wife's signature. The in-house counsel witnessed the document without providing advice.¹⁵⁹ The wife's claim against the lender failed, as it did not know that no explanation had been provided.

¹⁵⁵ *Case 16*.

¹⁵⁶ See *Case 37*; *Case 16*; *Case 32*; *Case 30*; *Case 17*; *Case 20*. Note: these examples are drawn broadly from the cases rather than just from the *García* sample.

¹⁵⁷ *Case 32*.

¹⁵⁸ *Case 5*. Also in *Case 13* the judge concluded that the solicitor gave careful advice of the potential risks but the wife 'for whatever reason...didn't really consider it...just went and signed it and walked out of there'.

¹⁵⁹ On the instructions of the wife, who said she only needed the documents to be witnessed.

The advice requirement is easily subverted and does not provide the vulnerable with any effective choice, even if she is adequately informed about the transaction.

3.2.4 Advice under CRA

The adequacy of independent advice or financial advice is treated differently in a CRA claim as the question of 'unjustness' is considered according to different criteria. In these cases, the court looks more closely at whether adequate advice was actually given.¹⁶⁰

Case 35 is a case of clear debt abuse. The debt abuse occurred when a partner was added as a joint party to a purchase contract due to her spouse's poor credit history. The female partner was pressured by both her male partner (who was violent)¹⁶¹ and the employee of the lender.

When contracts were ready to be executed, the female partner was urged to see a particular solicitor immediately, in order to obtain a discount on the fee. She saw the solicitor recommended by the lender, who told her that 'if she gave instructions and paid his fees that day, the charge would be significantly discounted.' The female partner had a baby and toddler with her at the appointment, and did not really understand the solicitor's explanation. Both the lender and the solicitor told her that the contract was effectively the same as entering into a mortgage. The female partner was successful in having the contract set aside as the advice had been incorrect and the contract terms were unfair.

Nonetheless, success under CRA does not always achieve a satisfactory outcome. In Case 37 the lender knew that the wife was reluctant to act as guarantor for her husband's property development company, and she had not been given an opportunity to consider whether to sign or to obtain independent legal advice.

The wife was 'ambushed' by her husband to sign the guarantee in circumstances where there was significant time pressure. He explained the arrangement to her before his solicitor and a representative from the bank¹⁶² later arrived at the family home. The wife said that she was unhappy and the solicitor and her husband indicated that she had 'no choice' but to sign. She received a cursory explanation from her husband's

¹⁶⁰ In New South Wales, it may be necessary for a solicitor to raise financial matters with a client in the course of giving legal advice, due to the decision in *Provident Capital Ltd v Papa* (2013) 84 NSWLR 231.

¹⁶¹ The judge summarised the relationship as 'violent and intimidatory'.

¹⁶² At the time he was affected by alcohol.

solicitor.¹⁶³ The bank representative did not hold a private meeting with her or attempt to explain the documents to her. He knew that the solicitor was acting for her husband in relation to the development and her reluctance to sign was obvious. The wife succeeded under the CRA.

Despite the apparent win by the wife it was a pyrrhic victory. While the guarantee was unjust, the bank was not attempting to enforce it. Instead, it sought possession of the development property and another property held in her husband's name pursuant to a settlement deed.¹⁶⁴ The wife and children were living in one of the apartments built on the development property. The challenge to the deed was not successful and the bank was entitled to possession of the properties. Ultimately, she still lost the home in which she was living.¹⁶⁵

Underpinning independent advice requirements is the assumption that contractual obligations reflect the intent of rational, consenting parties with equal bargaining power.¹⁶⁶ Independent advice does not assist victims of debt abuse because of the immense power difference caused by family violence. In such cases, independent advice operates to protect lenders and contributes to the abuse of victims.

Conclusion

The case review shows that significant limitations in the equitable doctrines mean that victims of debt abuse for joint loans and guarantees are not able to have a transaction set aside against a lender, despite the presence or possibility of economic abuse. Victims of economic abuse face significant barriers in recognising and articulating that abuse has occurred and may not wish to (or be able to) defend an action for possession.

This is further compounded by the difficulty demonstrated in the case review of proving that a lender knew of a special disadvantage, or relationship of influence, or the criteria

¹⁶³ In addition, certificates of financial advice were provided, but the wife said no such advice was given. The adviser who provided the certificate was her former brother in law.

¹⁶⁴ The wife, her husband, and his companies had entered into a negotiated settlement with the bank under which they agreed to pay a significantly reduced amount to the bank. If the payment was made, the bank would release funds it was holding (after the sale of the home) under the guarantee to the wife. As part of the settlement the parties released any claims they may have against the bank, and agreed that in the event of default under the deed, the bank was entitled to possession of the properties and to retain the guarantee funds.

¹⁶⁵ The bank also obtained possession of a farm property in the husband's name, but on which the wife conducted a business.

¹⁶⁶ Bourouva et al, 'Limitations of Australia's Legal Hardship Protections' (n 2) 1166, 1173-4; Howell (n 35) 97.

for the *Garcia* doctrine existed. An intimate partner may not satisfy the *Garcia* doctrine because she is not a volunteer in the strict sense, but this does not exclude the possibility that she is in a relationship of coercive control. Even if the volunteer requirement were to be relaxed, the advice process renders the chances of success very low.

The case review revealed that the key function of independent advice is to protect lenders from victims' claims. Independent advice is not a satisfactory mechanism for preventing debt abuse. Separate advice is not always provided as required, with limited consequences for lenders. Where the advice requirement is properly followed, it may serve to provide a vulnerable party with an explanation, but there is little likelihood that it will provide a victim of debt abuse with any realistic choice. Consequently, independent advice is more of a protection to the financial institutions than to vulnerable parties. In cases of debt abuse, independent advice requirements are an instrument of secondary victimisation.

The case review demonstrates that the CRA is more flexible due to its focus on wider factors, and there is a higher success rate under the CRA than under the other doctrines. However, it is still not sufficient protection. The lender's lack of notice of influence or coercive behaviour may mean the contract is not unjust. Further the exclusion in relation to business loans means the Act cannot protect vulnerable parties who provide mortgages or guarantees to support business loans. This is also a problem with the Credit Code provisions.

The wider unconscionability grounds under statute have some potential, however they are not widely used. Even though it is not necessary to prove the elements of the unconscionable dealing doctrine, the successful cases were all ones that were also successful at general law.

The evidence presented in this article suggests the effective closure of yet another legal door for redress for victims of debt abuse in relation to joint borrowings for property and the provision of guarantees. Over the decade until 2018 in Australia, very few victims of intimate partner debt abuse were able to draw upon the general law doctrines of unconscionability (both under statute and equity), undue influence or statutory jurisdictions to set aside unjust contracts, even where the matters proceeded to litigation.

Together with evidence from others' work in the fields of consumer, family, criminal and civil law, it is clear that victims of intimate partner debt abuse are left with almost

no viable formal or informal options within the legal system where they can seek redress or receive protection from the law in Australia.¹⁶⁷

For victims to have meaningful recourse to the legal system for their credit obligations entered into due to family violence and economic abuse specifically, such abuse needs to be recognised as profoundly affecting co-borrowers and guarantors. The impact of that abuse and the inability of the victim to make effective choices in her own best interests also need to be acknowledged.

We recommend that the most straightforward way to achieve the necessary reform is through the ‘unjust’ contracts statutory framework. The unjust contract rules need to be expanded in several ways, either through amendment of existing legislation, or through new national legislation. First, there needs to be jurisdiction to set aside a contract even if the borrowing or guarantee was for a business purpose. The current limitation is a significant barrier to victims being able to undo the consequences of the abuse they have suffered. Secondly, the definition of influence or pressure needs to be expanded, to explicitly recognise family violence and coercive control as relevant forms of pressure, even if the traditional definition of ‘undue influence’ is not satisfied. Thirdly, the provisions need to address not only whether independent advice was provided, but whether the advice was effective to overcome the abuse encountered in the transaction. The court should clearly be given the jurisdiction to set aside an unjust contract if entry into the contract was due to family violence and, in the circumstances, the advice did not overcome the effect of that abuse. The fact that the victim had the transaction explained to her is not sufficient if she had no choice. Finally, it should be made clear that the contract can be set aside as ‘unjust’ even if the lender did not have notice of the abuse.

Notwithstanding this, our proposals will be ineffective without broader systemic reform. Economically abusive debts are the product of gendered dynamics of power and control within relationships and in society generally.¹⁶⁸ The existing system is simply incapable of responding to situations of coerced debt abuse as a form of family violence because it was not developed with family violence, and especially coercive control, in mind.¹⁶⁹ Piecemeal reform to the existing legal framework is insufficient to overcome the paradigmatic assumptions underlying the doctrines.

¹⁶⁷ See section 1.4 *Economic abuse in the Australian Legal System*.

¹⁶⁸ Bourova et al, ‘Limitations of Australia’s Legal Hardship Protections’ (n 2) 1173.

¹⁶⁹ Howell (n 35) 94.

This is a complex social problem, spanning several legal jurisdictions; there is no simple solution. Reform therefore warrants 'radical changes in the structure, intent and process of the legal [and non-legal systems]'.¹⁷⁰ Radical change must be prioritised in the following areas. Firstly, a nationally consistent definition of economic abuse in family violence legislation across all state and territory jurisdictions must be implemented. We recommend that states and territories draw on the *Family Violence Protection Act 2008 (Vic)* as an example of defining and responding to economic abuse through state legislation. Secondly, new evidence reveals a correlation between financial stress and the onset of family violence,¹⁷¹ however, this is not yet well recognised or understood. Therefore, training of police, duty lawyers and judicial officers is crucial, to enable early identification of financial stress as an indicator of violence-onset, and economic abuse as a predictor of escalating violence risk. Recognising economic abuse as increasing the level of risk in women's lives would enable victims to obtain an intervention order earlier, before the point of crisis. In this way, it would prevent the lateral spread of economic abuse, provide evidence of the coercion to substantiate an action, and provide protection against future violence, making it less dangerous to seek a legal remedy. However, because an intervention order only binds the perpetrator, and not the bank, or a third party, it 'would only be effective ... where the bank agreed to recognise and enforce the terms of the intervention order'.¹⁷² Therefore, we recommend the introduction of enforceable industry guidelines for dealing with customers experiencing debt abuse as a form of family violence, which include a requirement that banks recognise and enforce family violence intervention orders.

Finally, we propose that a specific economic abuse risk tool be developed for the financial services sector, to assist lenders in identifying coercive control, at the point of entry into (and across the life of) a loan, alongside the development of a multidisciplinary response between the lending and specialist family violence sectors. This would involve a mechanism for strong referral pathways, and economic abuse casework to be delivered in partnership with specialist family violence services. Such a practice model would require long-term investment from the financial services sector

¹⁷⁰ Howell (n 35) 94.

¹⁷¹ Anthony Morgan and Hayley Boxall, Social isolation, time spent at home, financial stress and domestic violence during the COVID-19 pandemic, *Trends & Issues in crime and criminal justice* no. 609. (2020) Canberra: Australian Institute of Criminology.

¹⁷² Stepping Stones (n 2) 32.

in up-to-date and targeted training of all staff to identify, prevent and respond to economic abuse.

The law – in its current form – cannot prevent, will not protect and cannot provide redress for victims of economic abuse where a perpetrator has used debt to exercise coercive control over a partner in the context of a violent relationship. This must change.

Appendix

Appendix: Cases in Case Review

Key: UI = undue influence, UD: unconscionable dealing, CRA: Contracts Review Act; TPA Trade Practices Act

Table 1: All relevant cases indexed by the legal claim made, from reported and unreported decisions across all Australian State, Territory and Federal courts indexed in the Lexis Advance database, 2008-2018.

Cases have been anonymised to protect the privacy of participants.

Case	Claimant and relationship?	CALD?	Claims	Outcome: Success?
<i>Case 1</i>	wife		UI and Amadio	Procedural: Bank application for summary judgment denied. Credit code raised in cross claim. Triable issue.
<i>Case 2</i>	wife		Garcia	Yes.
<i>Case 3</i>	Wife (and deaf brother)		Garcia	Yes procedural: Leave to amend to add Garcia defence.
<i>Case 4</i>	Wife		Garcia	No. Evidence not accepted. Wife not a volunteer as closely involved in the business.
<i>Case 5</i>	De facto spouse and her company		Garcia	No: wife not satisfy Garcia.
<i>Case 6</i>	Wife		Garcia	No: wife not satisfy Garcia.

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<i>Case 7</i>	Wife		Garcia; CRA, statutory unconscionability (TPA)	No on all counts: lender took adequate steps- entitled to believe advice given. UI originally claimed but not pressed;
<i>Case 8</i>	wife but separated		Garcia	No: understood transactions and not a volunteer. Statute did not apply.
<i>Case 9</i>	wife		Garcia	Yes in relation to guarantee; No re loans as not volunteer; bank did not know she did not get use of some funds.
<i>Case 10</i>	wife		Garcia	No: Garcia n/a to a deed of settlement.
<i>Case 11</i>	wife		Garcia	No; wife not volunteer.
<i>Case 12</i>	wife		Garcia	No.
<i>Case 13</i>	wife		Garcia	No due to advice. <i>Amadio</i> claim raised but not related to husband's behaviour.
<i>Case 14</i>	wife	Y	CRA; Garcia	No on both- wife understood and received advice.
<i>Case 15</i>	Husband and wife		Amadio; Garcia	No on both: No disadvantage, no allegations of influence on each other; not volunteers, no suggestion did not understand.
<i>Case 16</i>	Wife		CRA and Garcia	No on both: pressure not undue. She sufficiently understood and not a volunteer.

Appendix

<i>Case 17</i>	Wife		Garcia, UI and Amadio, CRA and statutory unconscionability	Yes: Did not understand risk and position of company. Garcia and CRA claim successful. No on Amadio.
<i>Case 18</i>	Wife		Seeks to add Garcia and UI/duress/unlawful pressure	Yes procedural- Amended defence permitted.
<i>Case 19</i>	Wife		Garcia and Amadio	Yes Garcia: wife did not understand, was a volunteer and bank took no steps. Yes: Amadio.
<i>Case 20</i>	Wife	Y	Amadio and Garcia; CRA	No on all counts: Bank received certificates of legal advice and statutory declaration that advice received. No direct contact with wife prior to 1 st guarantee. Bank was refinancing existing facilities.
<i>Case 21</i>	Wife		Garcia; both also claimed under ASIC Act and Credit Code	No on all counts: Bank rep explained transactions and wife not volunteer. Understood transaction. No other unconscionability.
<i>Case 22</i>	Wife		UI and Garcia	No on both: Understood transactions and received indirect benefit.
<i>Case 23 (initial and final proceedings reviewed)</i>	Wife		Garcia and CRA	Yes: at initial procedural stage: Allowed to amend defence. Wife did not amend. Did not defend. Lost main proceeding.

Appendix

<i>Case 24</i>	Wife		UI and Garcia	No on both: wife participated in meetings with bank and no evidence of physical abuse and bank staff did not see any. No doctor's report although said she saw a doctor.
<i>Case 25</i>	Wife – separated at time		Garcia; Amadio, misrepresentation and statutory unconscionability	Yes: Garcia established. No Amadio: no special disadvantage. Yes: statutory unconscionability - Legal advice given but transaction later restructured.
<i>Case 26</i>	Wife	Y	UI Garcia and statutory unconscionability (TPA); Amadio	No Garcia: not a volunteer and no UI from trust and confidence. No Amadio: no special disability. No statutory unconscionability.
<i>Case 27</i> <i>Case 27 trial also reviewed for facts.</i>	Wife	Y	Actual UI; Garcia; Amadio; CRA	UI established but bank had no notice of it. Garcia not established as not a volunteer. No Amadio: Bank not aware of factors that would indicate special disadvantage. CRA: Yes Limited relief available.
<i>Case 28</i>	Wife		CRA; UI; Garcia	CRA n/a due to business purpose despite oppressive interest rate. No Garcia. No UI.
<i>Case 29</i>	Wife		Garcia	No: her evidence that she did not understand not accepted – corroborated by her husband's evidence which was unreliable. Not satisfied that she signed under pressure of time and language. Additional not relevant contractual/agency claims.
<i>Case 30</i>	Wife	Y	CRA, Garcia and Amadio	Yes under CRA: 'some influence was exerted' by husband plus no advice and other CRA factors present. No Amadio.

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				No Garcia: Not a volunteer.
<i>Case 31</i>	Wife		CRA; Garcia	Yes under CRA due to informal occasion and form of document misleading. No re Garcia; not a volunteer as she was a beneficiary in a family trust and the trust held the shares in the company.
<i>Case 32</i>	Wife		Garcia and unconscionability including statutory unconscionability	No on all claims. No material misunderstanding although not told could be made bankrupt. Assumed volunteer. No special disadvantage.
<i>Case 33</i>	Wife		Amadio/Garcia	No: Allegations completely insufficient. Solicitors acted and no sign that bank implicated.
<i>Case 34</i>	Wife		CRA, UI and Garcia, unconscionable conduct generally	No UI, Garcia:,CRA but guarantee not enforceable due to invalidity of husband's actions under power of attorney. <i>Amadio</i> raised in a general way. No special disadvantage.
<i>Case 35</i>	wife		CRA and claim under Credit Code.	Yes under CRA: contract was unfair; advice was lacking and given in circs where could not take it in; was misleading; contract terms unfair in operation.
<i>Case 36</i>	wife	Y	Amadio and statutory unconscionability	Yes - Amadio: under a special disability; Director of lender present when docs signed. Yes - Statutory unconscionability.
<i>Case 37</i>	wife		CRA and Amadio	Yes CRA: Contract was unjust. She was ambushed and bank knew she was reluctant. Husband placed great pressure on her. No: Amadio.
<i>Case 38</i>	wife		Grounds not clearly stated	Circumstances were dubious but held that wife acquiesced in loan, but partial reduction in liability on other grounds. Factual issues correspond to UI and Garcia but not clearly articulated.

Appendix