

**Griffith University Final Year Student Submission to the Australian Law Reform
Commission
Protecting the Rights of Older Australians from Abuse
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July 2016**

The Executive Director
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Dear Executive Director,

Re: Protecting the Rights of Older Australians from Abuse Inquiry

Attached you will find our submission regarding the Australian Law Reform Commission's inquiry into elder abuse. This submission is authored by three final-year honours law students at Griffith University, working under Dr Kieran Tranter. It deals with questions 25 and 26 of the Elder Abuse Issues Paper released on the 16th of June 2016. This submission recommends that Commonwealth legislation is required to deal with financial abuse of elderly Australians where it involves forms of lending from financial institutions. It consists of four parts:

Part 1 provides an introduction and background.

Part 2 outlines the current remedies available through the courts, and examines the case law.

Part 3 discusses the current legislative framework in the area.

Part 4 analyses current financial industry self-regulation.

Part 5 contains our recommendations.

Thank you for the opportunity to comment.

Yours sincerely,

Nicholas Morrissey
Matthew Staley
Pauline Klippmark

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1. INTRODUCTION AND BACKGROUND

- 1.1. This submission recommends that legislative reform at the federal level is required to deal with financial abuse of elderly Australians where forms of lending from financial institutions are involved, such as joint-debtor and third party guarantee agreements. Appendix A of this submission provides summaries for the 20 cases which we have sampled for our analysis.
- 1.2. Currently, there are three main avenues that provide protection or remedies for elderly persons who suffer financial abuse which involves financial institutions. First, equitable principles are used to provide relief, although success is limited to the most acute cases and only after the fact of abuse having occurred. Second, there are three Commonwealth Acts which can be utilised for the purposes of granting relief, however none are wholly focused on the issues which give rise to elder abuse. The gulf of regulation that is left untouched by the previous two avenues is plugged in-part by industry-led, voluntary codes of practice. These are both undemanding and largely unenforced, resulting in substantial inconsistency of practice in the sector. Despite this, it will be argued that the current best practices of institutions should be used as a starting point for determining the protections that must be legislated to proactively deal with the issue of financial elder abuse.
- 1.3. As Australia has an ageing population and there is a growing socio-economic divide, this submission recommends that now is the time for dedicated reform to implement strong and consistent legislative protections that build on current industry best practice. Not only will this provide protection for elderly Australians, it will ensure a level playing field in the competitive finance sector.

Population

- 1.4. Statistics show that not only is Australia's population proportionately the oldest it has ever been, but this ageing is set to continue for the foreseeable future. The Australian Bureau of Statistics (ABS) reported that the number of people aged over 65 has increased by 20%

between 2009 and 2014, now accounting for 15% of the population.¹ This is an extension of the steady ageing that has taken place since 1901, when those over 65 only made up 4% of the population.² The ABS projections predict that this group will go on to represent up to 19.4% of the population in 2031, and 24.5% in 2061.³

Financial Elder Abuse

1.5. Financial elder abuse has been defined broadly as ‘the illegal or improper exploitation or use of funds or resources of the older person.’⁴ It often takes place in the context of a relationship of trust,⁵ generally involving family members.⁶ A recent study which analysed data from records of calls to the Senior Rights Victoria helpline between July 2012 and June 2014 found that concerns relating to financial abuse were most common (61% of calls).⁷ A similar study in Queensland identified financial abuse as the most common abuse type, accounting for 43.2% of complaints between 2014 and 2015.⁸ This data resonates with the World Health Organization’s estimation that financial abuse is the most recurring type of elder abuse internationally.⁹ It also estimates that only 1 in 24 cases of elder abuse

¹ Australian Bureau of Statistics, *Population by Age and Sex, Regions of Australia 2014* (18 August 2015) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3235.0Main%20Features102014?opendocument&tabname=Summary&prodno=3235.0&issue=2014&num=&view=>>>.

² Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census* (21 June 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features752012-2013>>>.

³ Australian Bureau of Statistics, *Population Projections Australia 2012* (26 November 2013) <[http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3222.0Main%20Features52012%20\(base\)%20to%202101?opendocument&tabname=Summary&prodno=3222.0&issue=2012%20\(base\)%20to%202101&num=&view=>](http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3222.0Main%20Features52012%20(base)%20to%202101?opendocument&tabname=Summary&prodno=3222.0&issue=2012%20(base)%20to%202101&num=&view=>)>.

⁴ World Health Organization, *World Report on Violence and Health* (2002) 127.

⁵ Louise Kyle, ‘Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7 *Elder Law Review* 1, 1.

⁶ Tina Cockburn and Barbara Hamilton, ‘Equitable Remedies for Elder Financial Abuse in Inter Vivos Transactions’ (2011) 31 *Queensland Lawyer* 123, 123.

⁷ Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data About People Seeking Help from Seniors Rights Victoria Summary Report* (June 2015) Senior Rights Victoria <http://seniorsrights.org.au/wp-content/uploads/2014/03/Summary-Report_Profile-of-Elder-Abuse-in-Victoria_Final.pdf>.

⁸ Elder Abuse Prevention Unit, *Elder Abuse Prevention Year in Review 2015* (2015) 17.

⁹ World Health Organization, *Elder Abuse Fact Sheet* (October 2015) <<http://www.who.int/mediacentre/factsheets/fs357/en/>>.

is reported to authorities.¹⁰ While statistics relating to underreporting in Australia are unavailable, it is undoubtedly an issue.¹¹

1.6. In *Older People and the Law*, a report released in 2007 by the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs, it was accepted that close relatives account for about 80% of suspected financial abuse cases.¹² In 2013, Bagshaw and colleagues surveyed 209 service providers, collecting data on their views as to what risk factors led to financial elder abuse. The following were most commonly identified by the providers:

- A family member having a strong sense of entitlement to an older person's property or possessions (84%)
- An older person having diminished capacity (82%)
- An older person being dependent on a family member for care (81%)
- A family member having a drug or alcohol problem (73%)
- An older person feeling frightened of a family member (73%)
- An older person lacking awareness of his or her rights and entitlements (72%)¹³

1.7. Out of these six risk factors, four were of a familial nature, and two were more connected to the specific disadvantage possessed by older persons. Our data resonates with these findings. Having sampled case law concerning elder financial abuse, we found that the abuse was often perpetrated by a family member, and the financial institution's liability was rooted in a failure to be attentive to potential risk factors.

¹⁰ Ibid.

¹¹ Tsharna Stewart, 'Enduring Powers of Attorney: An Effective Advanced Planning Tool or an Avenue for Financial Abuse' (2012) 32 *Queensland Lawyer* 201, 203.

¹² Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Older People and the Law* (2007) 20.

¹³ Dale Bagshaw et al, 'Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members' (2013) 66 *Australian Social Work* 86, 96.

Opportunity

- 1.8. Banks and financial institutions represent the ideal conduit for Commonwealth legislated protections against financial elder abuse involving lending for a number of reasons. While the Commonwealth does not have the ability to put in place a comprehensive elder abuse prevention framework due to constitutional restrictions,¹⁴ it does have considerable powers in the area of banking and finance.¹⁵ Federal legislation will also provide the consistency across jurisdictions that is sorely needed in this area. This provides an opportunity to utilise a point of contact with the elderly in situations where, as will be demonstrated in the case law in section 2, financial abuse is occurring through credit provision involving third parties. Finally, as will be discussed in section 4, some institutions have already implemented suitable protections, providing a proof of concept that merely needs to be extended consistently across the industry.
- 1.9. It is important to note that the idea that the elderly are a discrete and distinct group for whom special legal treatment is justified is controversial.¹⁶ There is a great risk that targeting legislation at the elderly will perpetuate ageist attitudes by positioning them as a group in need of special protection in the same vein as children.¹⁷ Furthermore, the use of age as a metric needs to be re-assessed to determine whether it is obfuscating characteristics which are a more legitimate factor in leading to financial abuse (e.g education, cultural background, language skills). There is a danger that focusing on the elderly may arbitrarily exclude others who require protection. The courts have overcome such arbitrary restrictions in relation to special disadvantage, as old age may be an indicator,¹⁸ but other associated disabilities must be present to justify intervention.¹⁹

¹⁴ Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 102.

¹⁵ *Australian Constitution* s 51(xiii), (xx).

¹⁶ Margaret Hall, 'Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable' in Israel Doron (ed), *Theories of Law and Ageing: The Jurisprudence of Elder Law* (Springer Berlin Heidelberg, 2009) 107, 107.

¹⁷ Kyle, above n 5, 5.

¹⁸ *Blomley v Ryan* (1956) 99 CLR 362, 405.

¹⁹ *Bayne v Karaliamis* (2001) ANZ ConvR 181; *Wilby v St George Bank* (2001) 80 SASR 404.

1.10. In recommending that current industry best practice be used as a foundation for legislation that prevents financial abuse, it is not suggested that elderly people be specifically targeted at all. In fact, the case law indicates that the need for these protections is not confined to those aged over 65.²⁰ The measures recommended here both eschew age discrimination, but also demonstrate that the needs of the elderly do not necessarily differ greatly from the wider community. Were the suggested measures to require extensive resource expenditure for the government, creditors, or parties to such agreements, this could provide a basis for an argument for a narrower focus. However, as will be later discussed, the legislation called for here would only be tightening regulations that already exist in the voluntary industry codes, and giving them statutory backing. The requirement that those involved seek independent legal advice will undoubtedly increase costs for clients. However, if such costs were to represent an insurmountable hurdle for a client, it is suggested that this itself should represent a ‘red light’ to lenders.

2. EQUITY

2.1. Equity currently acts as the primary backstop to provide relief in cases of financial abuse against the elderly which are assisted by, or involve, financial institutions. Statutory measures will be covered in section 3 of this submission, which essentially codify and extend the equitable principles, setting out a broad list of matters which the courts must take into account when deciding cases, and providing additional remedies where breaches are found. It will be argued here that equity is an ineffectual safeguard against financial elder abuse, as it only provides reactive relief in the most visibly severe circumstances, and the need to resort to the courts is an overwhelming deterrent. The latter point is especially pertinent in this area as the cases generally require the vulnerable to fight on two fronts, against those closest to them, and against well-heeled financial institutions who are familiar with the justice system.

²⁰ Denise McGill and Nicola Howell, ‘Improving the Ability of Guarantors to Make a Real Choice: Lenders’ Practices in Taking Third Party Guarantees’ (2013) 24 *Journal of Banking and Finance Law and Practice* 182.

2.2. This part will outline the equitable principles relevant to our submission. This will be followed by an analysis of the strengths and weaknesses of equity at a case level, where it will be demonstrated that relief is only granted in glaringly obvious cases of financial abuse. This analysis will then be extended in an assessment of equity as a whole, arguing that while it is an important measure of last resort, it is too cumbersome, and does little to actually prevent financial elder abuse from occurring at the point where financial institutions are involved.

Relevant Equitable Principles

2.3. At a broad level equity complements the common law, preventing it from being used in a way that would lead to unconscientious²¹ or unconscionable outcomes.²² It acts to protect parties against exploitation of their weaknesses or vulnerabilities, abuse of positions of trust or confidence, insistence upon rights that would yield harsh outcomes, the denial of obligations, or the unjust retention of property.²³ It is not bound by fixed rules, instead applying equitable principles to the facts of the case, providing a flexibility that allows for relief in situations such as financial elder abuse where there is an absence of specific statutory protections.

2.4. This submission will focus on the equitable doctrine of unconscionable dealing, as it has been the primary avenue of intervention utilised in the cases sampled. The courts can set aside a transaction where a party can prove that they were under a special disadvantage when the transaction was executed and that ‘the other party has unconscientiously taken advantage of’ it.²⁴ This disadvantage must be of substantial enough to ‘seriously affect the ability of the innocent party to make a judgment as to his own best interests’ and it must be sufficiently evident to the other party.²⁵ There is no exhaustive list of disadvantages, but they may include ‘poverty, or need of any kind, sickness, age, sex, infirmity of body or

²¹ *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324.

²² *Lift Capital Partners Pty Ltd v Merrill Lynch International* (2009) 253 ALR 482, 507.

²³ Patrick Parkinson, ‘The Conscience of Equity’ in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook Co, 2003) 35.

²⁴ Cockburn, above n 6, 125.

²⁵ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462.

mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'.²⁶ Limited ability to speak, read, or write in English is also often considered in the question of special disadvantage,²⁷ as is emotional dependency.²⁸ Any level or combination of these and other factors can combine to lead to a finding of disadvantage. However, a single factor, such as age, is unlikely to lead to such a finding.²⁹ Once the elements of special disadvantage are made out, the other party must prove that the transaction was fair, just and reasonable, which will often be difficult to do in the absence of independent legal advice for the disadvantaged party,³⁰ or evidence of the party's commercial acumen.

Application to Financial Elder Abuse

2.5. When the cases of financial elder abuse involving financial institutions are examined, it is clear that equity will only intervene where the special disadvantage of the party is serious and glaringly obvious. The result is that relief will only be available in the most acute examples of financial elder abuse. The very structure of the discussion of cases provided here also demonstrates that certainty is a major flaw in equity, as the flexibility of what may be considered as important factors in each case prevents reliable conclusions from being drawn. This part will endeavour to provide an insight into the factors which determine success or failure in seeking relief in financial elder abuse cases.

CBA v Amadio

2.6. As the leading authority for unconscionable dealing in Australia is coincidentally a case of financial elder abuse which involves a major financial institution, it is convenient to deal

²⁶ *Blomley v Ryan* (1956) 99 CLR 362, 405; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J), 474 (Deane J).

²⁷ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1; *Suncorp-Metway Ltd v Nam Property Holdings Pty Ltd* [2010] NSWSC 1078; *Sleboda v Sleboda* [2007] NSWSC 361; *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413; *Perpetual Trustees Aust Ltd v Schmidt* [2010] VSC 67; *Spina v Permanent Custodians Ltd* [2009] NSWCA 206; *Butler v Vavladelis* [2012] VSC 186.

²⁸ *Louth v Diprose* (1992) 175 CLR 621, 630-631; *Gregg v Tasmanian Trustees Ltd* (1997) 73 FCR 91, 116.

²⁹ *Williams v Commonwealth Bank of Australia* [2013] NSWSC 335, [4].

³⁰ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

with it in some detail at the outset. It is an important case, as it has shaped the behaviour of creditors in similar scenarios since, and demonstrates a worst case scenario with almost no redeeming features in the lender's conduct. Our sample of cases indicates that since this case was litigated, no similarly major financial institutions have been involved in successful unconscionable dealing cases involving elders, indicating that they have taken notice, and improved their practices.

2.7. *Commercial Bank of Australia Ltd v Amadio*³¹ involved an elderly Italian couple (70 and 71) who had lived in Australia for 40 years, had limited formal education, had almost no grasp of written English, and limited speaking capability. While Mr Amadio had some business experience, Mrs Amadio had none. The transaction involved the parents mortgaging their house as security for an overdraft for their son's failing business. They believed the business was profitable and were misled by their son as to the nature of the transaction and their liability. The son was the most important customer of the bank's local branch,³² and they were fully aware of his financial woes. A bank representative brought the agreement to their house, where he discussed it with them for a short time, and they signed without reading it. The majority of the High Court found that they were at a special disadvantage, and that the bank had acted unconscionably. The majority based their decision on the fact that the bank was aware of all the above mentioned vulnerability factors of the Amadios,³³ as well as the fact that the bank had not ensured that they actually understood the transaction, and hadn't either suggested that they seek independent legal advice, or left them time to do so.

2.8. The case represents the clearest example of unconscionable dealing in relation to financial elder abuse, with almost no features which could prevent the granting of relief. The direct relationship between the bank, the Amadios, and their son removed the hurdle of attributing knowledge of any disadvantages. The nature of their vulnerability was readily apparent, as was the duplicity of their son. In the elderly abuse cases that have reached the courts since

³¹ Ibid.

³² Ibid 473 (Deane J).

³³ Ibid 476.

this time, none allow for such an easy attribution of knowledge of such clear disadvantages to the financial institutions.

Potential Bars to Relief

- 2.9. In the recent cases of financial elder abuse involving financial institutions that we have examined for this submission, obtaining independent legal advice or inversely failing to do so can be a decisive factor. In five of the cases, a lack of such advice was considered to be at least one of the factors that led to a finding of special disadvantage.³⁴ The actual obtaining of independent advice was only considered in two cases that we examined. It was not decisive in one due to commercial experience, understanding of the transaction, and numerous other factors being sufficient to support the finding.³⁵ Independent advice was however a decisive factor in another case, particularly as the bank was issued solicitor's certificates, and had no reason not to rely on them.³⁶ This case demonstrates a low bar for the 'independent' nature of advice, as the relevant solicitors had previously worked for the son, but the court found that the advice merely had to be independent of the lender.³⁷ The transaction was therefore allowed despite the mother having little formal education or business experience.³⁸ The fact that actually obtaining legal advice was raised in so few cases suggests that it may be viewed as a fatal bar to relief for potential litigants, or it may prevent potentially unconscionable transactions actually going ahead.
- 2.10. In cases examined, commercial experience was often a determinative factor. For example, in *Ellison v Vukicevic*³⁹, it was held that the plaintiff was not at a special disadvantage as her commercial acumen ensured that she understood the transaction, despite her age (70) and lack of independent legal advice.⁴⁰ Likewise in *Micarone v Perpetual Trustees*

³⁴ *Commonwealth Development Bank Ltd v Kerr & Ors* [2001] QSC 234; *Permanent Mortgages Pty Ltd v Vandenberg* [2010] WASC 10; *National Australia Bank v Nobile and Another* (1988) 100 ALR 227; *Spina v Permanent Custodians Ltd* [2009] NSWCA 206; *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413.

³⁵ *Reliance Financial Services NSW P/L v Sobbi* [2010] NSWSC 236, [348].

³⁶ *McIvor v Westpac Banking Corporation* [2012] QSC 404, [90].

³⁷ *Ibid* [81].

³⁸ *Ibid* [84].

³⁹ (1986) 7 NSWLR 104.

⁴⁰ *Ellison v Vukicevic* (1986) 7 NSWLR 104, 109.

Australia Ltd,⁴¹ experience with financial transactions prevented a finding of special disadvantage because they were taken to have understood the transaction, despite their age (72 and 65) and limited understanding of English. An alternative example can be found in *Commonwealth Development Bank Ltd v Kerr*,⁴² where a lack of business knowledge was significant in conjunction with their age, lack of education, and absence of independent legal advice in a finding that they were unable to understand the guarantee that they entered into for their son.

- 2.11. In line with the requirement of knowledge of the exploiting party, *Sivicki v National Australia Bank Ltd*⁴³ and *Suncorp-Metway Ltd v Nam Property Holdings Pty Ltd*⁴⁴ demonstrates that an elderly person's claims will be dismissed if it cannot be sustained that the financial institution had any knowledge of alleged disadvantage. This has become a significant hurdle in modern cases, with either intentional or incidental insertion of intermediaries often complicating the attributing of knowledge to the financial institution.⁴⁵

High Standard

- 2.12. In the cases sampled, it is observed that equity requires a particularly high bar for it to intervene and provide remedial justice. It appears that equity only intervenes where unconscionable dealing occurs by virtue of compounding disadvantages. In *Commonwealth Development Bank Ltd v Kerr*,⁴⁶ *Permanent Mortgages Pty Ltd v Vandenberg*,⁴⁷ and *National Australia Bank v Nobile*,⁴⁸ all successful cases, the elderly respondents were subject to several disadvantages. In these cases, a combination of factors were relied upon to support the finding that the elderly people were unable to understand the nature and gravity of transaction, including: lack of business knowledge, lack of education, no receipt of independent legal advice, emotional dependence and language ability. However, all three

⁴¹ (1999) 75 SASR 1.

⁴² [2001] QSC 234 [18].

⁴³ [2010] VSC 547 [36].

⁴⁴ [2010] NSWSC 1078 [62], [75].

⁴⁵ *Baira v RHG Mortgage Corporation Ltd* [2012] NSWCA 387, [218].

⁴⁶ [2001] QSC 234.

⁴⁷ [2010] WASC 10.

⁴⁸ (1988) 100 ALR 227, 254.

cases did not share all of these factors, and varied factors were accorded different weight in each case - thus not only illustrating the flexibility of equity, but also the arbitrariness of it.

- 2.13. While the successful cases above highlight the need for compounding disability factors, unsuccessful cases demonstrate how difficult it can be to reach this vague quota. One such example is *Burt v Australia and New Zealand Banking Group Ltd*, where advanced age (87), numerous physical ailments, loss of other family members, minimal education (school until 14 years of age), and the fact that mother stood to gain nothing from the transaction did not give rise to relief for unlimited guarantees.⁴⁹ Bryson J emphasised the fact that people are free to enter into transactions, and the courts will not provide relief without the existence of infirmities beyond merely old age.⁵⁰
- 2.14. We also found that that in several cases, equity intervened where loans were secured by an elderly person's only asset, and they were under compounding disabling factors such as age and understanding of english. In such cases, the morally reprehensible conduct often turned on the lack of inquiry by the bank, in relation to the circumstances of the elderly - as they pertained to their ability to make the payments. This indicates that equity intervenes, where the circumstances are so severe, that the elderly's chance at ordinary life is at risk. For example, in *Elkofairi v Permanent Trustee Co Ltd*,⁵¹ *Perpetual Trustees Australia Ltd v Schmidt*,⁵² and *Butler v Vavladelis*⁵³ the elderly had limited understanding of english, virtually no ability to service the agreement, and nevertheless had loans secured by their only assets.⁵⁴ In all cases, the unconscionable conduct turned on the lender's failure to make relevant enquiries despite knowing that in the case of default their only asset could be taken away.

⁴⁹ (Unreported, Supreme Court of New South Wales, Bryson J, 6 May 1994) 35.

⁵⁰ *Ibid* 42.

⁵¹ [2002] NSWCA 413 [59].

⁵² [2010] VSC 67.

⁵³ [2012] VSC 186.

⁵⁴ Even though Elkofairi's age falls outside the age bracket of the elderly, the striking similarity with other cases sampled calls into question the definition of elderly people. However, that is beyond the scope of this submission.

- 2.15. New South Wales cases concerning elders such as *Spina v Permanent Custodians Ltd*,⁵⁵ *Moray v Scandinavian Pacific Ltd*⁵⁶ and *Perpetual Trustee Company Limited v Khoshaba*,⁵⁷ have had guarantees and mortgages set aside based on equitable principles pursuant to unjust contracts or unconscionable dealing under the *Contracts Review Act 1980* (NSW). These cases concern substantial amounts of money, and substantial failures of the lenders to exercise reasonable care. In *Khoshaba*,⁵⁸ the lender failed to make any enquiries as to whether the elderly person could service the payments, and that indifference, led to the transaction being deemed an unjust contract. These cases appear to overcome the difficulties and uncertainty in establishing an undefined list of special disadvantages, by turning on the bank's failure to exercise reasonable care where they should have been put on notice of an unjust transaction.

Conclusions from Case Examination

- 2.16. The above examination of the case law surrounding financial elder abuse demonstrates that only the most severe cases will lead to relief, and the ambiguity as to what factors will be considered by the courts creates uncertainty. The unavoidable conclusion that stems from this analysis is that equity is only useful as a backstop for the worst cases of abuse involving financial institutions, and that the very process of assessing whether a case is likely to succeed is excessively complicated.

Barriers to Seeking Remedies

- 2.17. While equity may intervene in certain instances of financial abuse, it can only operate through the courts, and is thus susceptible to all the inherent weaknesses of judicial intervention, such as financial barriers. The access to justice issues that apply to the general population are only compounded in scenarios of financial elder abuse, due to that fact that

⁵⁵ [2009] NSWCA 206.

⁵⁶ (1992) 5 bpr 11902.

⁵⁷ [2006] NSWCA 41.

⁵⁸ *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41.

family is often involved, and the vulnerabilities that give rise to remedies are often still present.

- 2.18. The financial cost of going to court or even seeking the services of a lawyer alienates much of Australia from the legal system, and is especially relevant to the elderly who are generally no longer working. The cost of a lawyer can range from \$200 to \$600 per hour depending on the experience of the lawyer and whether they are city, suburban or regionally based.⁵⁹ Fees for even simple matters are usually in the thousands of dollars. If a matter proceeds to litigation, it has severe financial impacts on the parties. Court fees can skyrocket to over \$100 000.⁶⁰ There are Government funded legal aid organisations and non-governmental community legal centres operating in all States and Territories, however these institutions are severely underfunded and it is usually only the most disadvantaged that are able to access pro bono assistance. In effect the legal system is inaccessible to middle Australia. As then Shadow Attorney-General George Brandis handily summarised ‘[u]nless you are a millionaire or a pauper, the cost of going to court to protect your rights is beyond you.’⁶¹ In the financial abuse considered here, well-funded litigants are generally the opposing parties, only intensifying the deterrent effect of costs. Beyond this, older Australians encounter a number of specific barriers, including but not limited to technological barriers and lack of awareness of where to obtain legal assistance.⁶²
- 2.19. The very relationships that bring about financial abuse may act as a deterrent to litigating legal issues that arise. As has previously been established, family relationships often lay at the heart of the financial abuse, complicating the decision to seek intervention in a public forum. This echoes observations in other literature, suggesting that older Australians are

⁵⁹ Community Law Australia, *Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System* (2012) 4.

⁶⁰ *Ibid.*

⁶¹ *Ibid* 5.

⁶² Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Older People and the Law* (2007) 159-68.

reluctant to seek legal advice for issues they perceive to be private, or as a family matter,⁶³ or because of they feel ashamed.⁶⁴

- 2.20. The sample of cases that we have examined act as evidence of these access to justice issues, as the majority of cases concern the elderly person's only asset, indicating that litigation is only relied upon in the most desperate of circumstances. In New South Wales, it has been observed that 'many guarantors simply pay the debts of others rather than dispute a transaction'.⁶⁵ Seeking legal redress through the courts, perhaps only becomes an option when there is no other choice available.

3. LEGISLATIVE FRAMEWORK

- 3.1. The current legislative framework that could potentially provide assistance and protections in relation to financial elder abuse in lending scenarios is complicated and unfocused. The tangled web of Commonwealth and varied State legislation ensures that protections are not always clear, and litigation is complex, expensive, and inefficient. While some of the measures are important, the overriding effect is to merely extend the reach of equitable principles, doing little to improve on the shortfalls covered in section 2. This section will briefly outline the major pieces of relevant legislation in an attempt to highlight the need for greater clarity and focus in the field.

Legislative Overview

- 3.2. There are several pieces of Commonwealth legislation which regulate the conduct of financial institutions in relation to financial services. The *Australian Securities and*

⁶³ Ibid 165.

⁶⁴ Lana Zannettino et al, 'The Role of Emotional Vulnerability and Abuse in the Financial Exploitation of Older People from Culturally and Linguistically Diverse Communities in Australia' (2015) 27(1) *Journal of Elder Abuse and Neglect* 74, 77.

⁶⁵ Jenni Millbank and Jenny Lovric, 'Relationship Debt and Guarantees: Best Practice v Real Practice' (2005) 15 *Journal of Banking and Finance Law and Practice* 89, 109.

Investments Commission Act 2001 (Cth) ('ASIC Act'), the *Australian Consumer Law* ('ACL')⁶⁶ and the *National Credit Code* ('NCC')⁶⁷ each provide protections against the enforcement of unjust contracts.

- 3.3. An extensive list of State based legislation offers protections from misleading and deceptive conduct,⁶⁸ unconscionable conduct⁶⁹ and false representations.⁷⁰ From the cases studied for this submission, the most common statutory instrument to be used was the *Contracts Review Act 1980* (NSW).⁷¹ It was used a total of 9 times out of 20 cases, whereas the *NCC* and the superseded *Trade Practices Act 1974* (Cth)⁷² were only relied upon once and twice respectively. The single decision based on the *NCC* was set aside on appeal.⁷³ The utilisation of the NSW legislation perhaps suggests that it is user-friendly, and better suited for litigants than the equivalent Commonwealth Act.

National Credit Code

- 3.4. The *NCC* can potentially touch on financial elder abuse involving lending through a provision allowing courts to intervene in certain transactions, and by regulating standard

⁶⁶ *Competition and Consumer Protection Act 2010* (Cth) sch 2.

⁶⁷ *National Consumer Credit Protection Act 2009* (Cth) sch 1.

⁶⁸ *Fair Trading Act 1987* (NSW) s 42(1); *Fair Trading Act 1999* (Vic) s 9(1); *Fair Trading Act 1989* (Qld) s 38(1); *Fair Trading Act 1987* (SA) s 56(1); *Fair Trading Act 1987* (WA) s 10(1); *Fair Trading Act 1990* (TAS) s 14(1); *Fair Trading Act 1992* (ACT) s 12; *Consumer Affairs and Fair Trading Act 1990* (NT) s 42(1)

⁶⁹ *Fair Trading Act 1987* (NSW) s 43; *Fair Trading Act 1999* (VIC) s 7, s 8; *Fair Trading Act 1989* (QLD) s 39; *Fair Trading Act 1987* (SA) s 57; *Fair Trading Act 1987* (WA) s 11; *Fair Trading Act 1990* (TAS) s 15; *Consumer Affairs and Fair Trading Act* (NT) 1990 s 43; *Fair Trading Act 1992* (NSW) s 13; *Contracts Review Act 1980* (NSW) s 9.

⁷⁰ *Fair Trading Act 1987* (NSW) s 44; *Fair Trading Act 1999* (VIC) s 12; *Fair Trading Act 1989* (QLD) s 40; *Fair Trading Act 1987* (SA) s 58; *Fair Trading Act 1987* (WA) s 12; *Fair Trading Act 1990* (TAS) s 16; *Consumer Affairs and Fair Trading Act 1990* (NT) s 44; *Fair Trading Act 1992* (ACT) s 14.

⁷¹ *Ellison v Vukicevic* (1986) 7 NSWLR 104; *Moray v Scandinavian Pacific Ltd* (1992) 5 bpr 11902; *Perpetual Trustees Australia Ltd v Schmitt* [2010] VSC 67; *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413; *Spina v Permanent Custodians Ltd* [2009] NSWCA 206; *Reliance Financial Services NSW Pty Ltd v Sobbi* [2010] NSWSC 236; *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41; *Williams v Commonwealth Bank of Australia* [2013] NSWSC 335; *Bendigo and Adelaide bank Limited v Karamihos* [2014] NSWCA 17.

⁷² The *Trade Practices Act 1974* (Cth) was replaced by the *ACL*. In *Permanent Mortgages Pty Ltd v Vandenberg* (2010) 41 WAR 353, sections 51AC and 87 were used which are now ss 22 and 237-238 respectively under the *ACL*.

⁷³ *Bendigo and Adelaide bank Limited v Karamihos* [2014] NSWCA 17; see also *Karamihos v Bendigo and Adelaide Bank Limited* [2013] NSWSC 172.

form contracts. The *NCC* regulates the financial services industry with the objective being to protect consumers through ‘truth in lending.’⁷⁴

- 3.5. Under s 76 of the *NCC*, if the court is satisfied that the transaction was unjust, they may reopen the transaction. In doing so, they must have regard to the public interest and all of the circumstances of the case.⁷⁵ Under s 76(2) there is a list of matters that the court may have regard to in determining whether or not to intervene. However even if the circumstances of a particular transaction align with the wording of one or more s 76(2) criteria, it is still at the court’s discretion to give relief.⁷⁶ The effect of s 76(2), as identified by Pembroke J in *Karamihos*, is that it presents ‘a catalogue of prudence.’⁷⁷ A creditor who does not comply with the terms set out in the catalogue ‘simply increases the risk that a court will find that the contract, or one of its terms, was unjust.’⁷⁸ This provision is replicated in the *ACL*, although it applies to the provision of goods and services generally, rather than merely financial services.
- 3.6. When considering the above intervention, there are 16 different criteria that may be considered by a court in its determination of a case.⁷⁹ Whether or not any party to the contract was reasonably able to protect their interests because of his or her age or physical or mental condition may be considered by a court.⁸⁰ The presence of this provision however, does not seem to offer greater protections than the common law. While evidence that age or mental or physical infirmity affected the ability of the person to protect their own interests may be adduced, the presence of these factors alone will not be a decisive factor.⁸¹
- 3.7. There are also preventative measures included in the *NCC*. Under s 76(2)(g) ‘the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed’ may be considered by the court in making a determination as to whether the

⁷⁴ Explanatory Memorandum, *National Consumer Credit Protection Bill 2009* (Cth) 6.

⁷⁵ *National Credit Code*, s 76(2).

⁷⁶ *National Credit Code*, s 77.

⁷⁷ *Karamihos v Bendigo and Adelaide Bank Ltd* [2013] NSWSC 172, [41].

⁷⁸ *Ibid.*

⁷⁹ *National Credit Code*, s 76(2).

⁸⁰ *National Credit Code*, s 76(2)(f).

⁸¹ CCH Australia, *Australian Consumer Credit Law Commentary* (North Ryde, NSW CCH Australia, 2010) [9.070].

transactions should be reopened or not. The terms of this section are repeated in s 184, under which, the court may prohibit a credit provider from using a certain provision or similar provision in future credit contracts. The breach of such a prohibition amounts to a criminal offence.

Australian Consumer Law

- 3.8. The *ACL* contains measures which deal with unconscionable conduct in the course of trade or commerce, effectively codifying the equitable principle of unconscionable conduct.⁸² However, the provisions provide the possibility to claim a broad range of remedies that are not available under the common law.⁸³ Section 20(2) provides that s 20 does not cover ‘conduct that is prohibited under section 21.’ Due to the comprehensiveness of s 21 and the matters the court may have regard to under s 22, s 20 has arguably been made redundant.
- 3.9. Unconscionable conduct in the course of trade or commerce and the (potential) supply or acquisition of goods or services is prohibited under s 21 of the *ACL*. Section 22 provides a list of matters that the court may have regard for the purposes of section 21. This list is identical to s 12CC of the *ASIC Act*, with the only difference being that the *ASIC Act* deals with financial services specifically whereas the *ACL* deals with the supply or acquisition of goods or services. In relation to elderly persons disputing financial transactions, both Acts apply equally with similar remedies available. Remedies under these Acts are much broader than rescission, restitution and injunction generally offered under equity.

Australian Securities and Investments Commission Act

- 3.10. For the purposes of this submission the *ASIC Act* is concerned with unfair contract terms and unconscionable conduct. Section 12BA provides a court with the ability to make unfair contract terms void. It has a limited application as it only applies to standard form financial contracts. A standard form contract is where a party sets the terms and the other party does

⁸² *Australian Consumer Law*, ss 20, 22.

⁸³ *Ibid* ss 232, 236, 243.

not have an opportunity to negotiate more beneficial terms for their interests. This provision only applies to select circumstances as it is difficult to prove that a contract is a standard form contract if its terms have been negotiated.

- 3.11. The *ASIC Act* contains provisions covering unconscionable conduct where it relates to the delivery or acquisition of financial services.⁸⁴ In effect, the measures have broadened the reach of equitable principles to include systemic behaviour without the need for a clear victim.

Legislation Conclusion

- 3.12. Under the current Commonwealth legislative framework, the reach of equity has been broadened as there are many more remedial avenues available to aggrieved parties. There are also some provisions which, in a way, pre-emptively prohibit conduct that has the potential to cause harm, such as the use of standard form contracts that do not allow for negotiation or unclear terms that are repeatedly used. Although these are a positive step, they only apply to select circumstances. On the whole it does not seem as though the current Commonwealth legislation has provided a superior alternative to the common law. What it has done is provide a checklist against which financial institutions can review their behaviour.

4. SELF-REGULATION

- 4.1. Self-regulation is the primary prophylactic measure with the potential to actually prevent conduct by financial institutions which assists elder abuse. It is recommended that this industry-led approach be abandoned, and replaced with Commonwealth legislation that provides clear, consistent, and strong protections that are supported by significant enforcement measures. As will be demonstrated here, the voluntary codes that currently exist set such a low bar for protections that they are often being exceeded by lenders, and in those instances where these minimum standards are being breach, the enforcement

⁸⁴ *Australian Consumer Law*, pt 2 sub-s C.

measures are almost non-existent. It is recommended that the current identifiable best practices of creditors represent the standard that should be established in future reform.

- 4.2. While equitable and statutory protections apply equally to both Authorised Deposit-taking Institution (ADI) and non-ADI lenders, self-regulatory instruments such as codes of practices do not. The Code of Banking Practice⁸⁵ (CBP) will be the focus of the discussion here as it is the major code to which almost all retail banks in Australia subscribe, and thus the leading instrument of self-regulation. A separate but almost identical code deals with customer owned banks, although it will not be covered in detail here.⁸⁶ It should be noted that no industry code exists that applies to the lending practices of non-ADIs, leaving this area bereft of even the minimum protections that this could provide.

CBP Protections

- 4.3. This section will discuss the CBP obligations which relate to third party guarantees and joint-debtor agreements, in order to highlight that the demands are minimal and vague. It will be demonstrated that strict adherence by members would achieve little to protect elderly people against financial abuse.
- 4.4. The baseline promise of the CBP is that members will exercise the care and skill of a diligent and prudent banker in forming an opinion on the suitability of credit transactions,⁸⁷ although the practical effect of this is minimal. *Prima facie* this would appear to protect guarantors and joint-debtors by preventing transactions going ahead where debtors are unlikely to be in a position to service the loan.⁸⁸ However, the courts have found that it merely ensures that lenders will take care in how they assess loan risk, not what risk they take on.⁸⁹ This vague requirement therefore offers little protection to joint-debtors and guarantors.

⁸⁵ Australian Banker's Association, *Code of Banking Practice* (2013).

⁸⁶ Customer Owned Banking Association, *Customer Owned Banking Code of Practice* (2014).

⁸⁷ Australian Banker's Association, *Code of Banking Practice* (2013) cl 27.

⁸⁸ McGill and Howell, above n 20, 198.

⁸⁹ *Doggett & Anor v Commonwealth Bank of Australia* [2015] VSCA 351, [163].

- 4.5. The CPB fails to require adequate delineation between guarantee and joint-debtor arrangements, a significant defect as the latter category are offered little to no protections. Only those transactions where it is clear, on the facts known to the lender, that a party is receiving no benefit are to be considered guarantees.⁹⁰ This is obviously a low standard, and it is widely accepted that ‘lenders and mortgage brokers now go to great lengths to avoid guarantees’ by structuring agreements to provide a token benefit to a party who often does not want it.⁹¹ The incentives of doing so are that creditors are only required to ‘take all reasonable steps to ensure’ that joint-debtors understand that they may be liable for the full amount of the debt.⁹² When compared to the protections offered to guarantors, it is obvious that lenders would take the easy step of avoiding this category where possible.
- 4.6. The CBP requirements in relation to guarantees allow for important information disclosure,⁹³ but fail to provide the protections necessary to prevent the elderly from being financial abused due to their inability to understand that information, or emotional pressure from debtors. There is no requirement that the guarantor seek independent legal advice, instead only promising that notice be given recommending they should do so.⁹⁴ There is also no promise that the lender will meet personally with the guarantor and explain the transaction in a way that assures the lender that the nature of the transaction is understood. The weak provisions specifically aimed at reducing emotional pressure from the debtor are wholly undermined by the fact that they are only applicable if the lender is attending the signing,⁹⁵ and the cooling-off period required is less than 24 hours.⁹⁶ The CBP therefore ensures that guarantors are given the information necessary to make an informed decision,⁹⁷ but falls far short of ensuring that they understand it, or are not entering the agreement due to pressure from debtors.

⁹⁰ Australian Banker’s Association, *Code of Banking Practice* (2013) cl 29.1.

⁹¹ Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Older People and the Law* (2007) 59.

⁹² Australian Banker’s Association, *Code of Banking Practice* (2013) cl 29.2.

⁹³ *Ibid* cl 31.4(b)-(e).

⁹⁴ *Ibid* cl 31.4.

⁹⁵ *Ibid* cl 31.6.

⁹⁶ *Ibid* cl 31.5.

⁹⁷ *Ibid* cl 31.4(b)-(e).

Enforcement and Monitoring

- 4.7. The CBP has been criticised in recent times as a ‘toothless tiger’,⁹⁸ with weak sanctions for breaches of measures which are already undemanding. This section will briefly describe its enforcement structure, in order to establish that in practice it amounts to little more than a mechanism for polite encouragement to comply.
- 4.8. The CBP is monitored by the independent Code Compliance Monitoring Committee (CCMC)⁹⁹ whose functions include investigating and determining allegations of breaches,¹⁰⁰ as well as monitoring compliance and conducting its own motion inquiries.¹⁰¹ The extent of sanctions available to the CCMC for breaches is naming members publicly in instances of serious non-compliance.¹⁰² However, the Financial Ombudsman Service (FOS) has the ability to determine disputes and provide remedies for bank customers, such as setting aside agreements or ordering compensation.¹⁰³
- 4.9. When an example of one of the CCMC inquiries is examined, its impotence in dealing with breaches becomes obvious. A 2013 inquiry focused on the pre-contractual obligations relating to guarantees contained in the previous version of the CBP.¹⁰⁴ In areas identified in complaints, the inquiry’s recommendations merely provides suggestions such as ‘each Bank should carefully consider and review its potential risk of non-compliance’ in relation to the relevant clause.¹⁰⁵ At no point are numbers supplied or names attributed to concerning practices, and the basis for the findings is based only on self-assessment by the members.¹⁰⁶ While breaches are identified as having occurred, there is no example of the

⁹⁸ Nicola Howell, ‘Revisiting the Australian Code of Banking Practice: is Self-Regulation Still Relevant for Improving Consumer Protection Standards?’ (2015) 38 *University of New South Wales Law Journal* 544, 545.

⁹⁹ Australian Banker’s Association, *Code of Banking Practice* (2013) cl 36.

¹⁰⁰ *Ibid* cl 36(b)(i).

¹⁰¹ *Ibid* cl 36(b)(ii).

¹⁰² *Ibid* cl 36(j).

¹⁰³ Financial Ombudsman Service, *Terms of Reference* (1 January 2015) cl 9.1.

¹⁰⁴ Code Compliance Monitoring Committee, *Inquiry Report: Pre-Contractual Obligations in Relation to Guarantees* (June 2013).

¹⁰⁵ *Ibid* 18.

¹⁰⁶ *Ibid* 14.

only sanction available (naming) having been applied in recent years.¹⁰⁷ This suggests that the CCMC is reluctant to apply sanctions.

- 4.10. It is important to note that the CBP states that members will incorporate relevant provisions into the terms and conditions of any contract for services between a subscriber and customer.¹⁰⁸ The Australian Banking Association has argued that the CBP acts as a contract between customers and members, and can therefore be enforced in the courts.¹⁰⁹ However, there has been no consistent approach by the courts as to the CBP's relevance in determining a breach of contract, with no cases demonstrating its use as a significant factor.¹¹⁰
- 4.11. Enforcement of the CBP is almost non-existent, outside of the FOS's ability to use it in determining disputes, and the still unproven ability for the courts to use it as a measure of breach of contract. It is arguable that were the CBP to not exist, the effectiveness of FOS or courts would remain unaffected.

The Reality of the Financial Landscape

- 4.12. As the 2013 CCMC inquiry into guarantees demonstrates, the reality of the practices of members varies extremely, with some far exceeding the codes while others are in breach of the minimal requirements. Even more troubling is the lack of transparency, as only the extremities of practice are identified, with no specifics given on where members fall on the continuum.
- 4.13. The driving force for the inquiry was the CCMC receiving 'a number of concerns and enquiries about alleged breaches of the Code by banks in this area.'¹¹¹ These related to

¹⁰⁷ No example can be found in the CCMC annual reports for the last three years.

¹⁰⁸ Australian Banker's Association, *Code of Banking Practice* (2013) cl 12.3.

¹⁰⁹ Howell, above n 93, 553.

¹¹⁰ *Ibid* 582.

¹¹¹ Code Compliance Monitoring Committee, *Inquiry Report: Pre-Contractual Obligations in Relation to Guarantees* (June 2013) 4.

situations where guarantors did not understand the transaction or the financial position of the debtor, or had not sought independent legal or financial advice as suggested.¹¹² In relation to this, the inquiry acknowledged studies which indicated that:

The vast majority of guarantors were people who are traditionally considered vulnerable: the elderly, women, migrants, members of minority groups and those who find it difficult to understand legal documents and transactions.¹¹³

- 4.14. Four formal allegations of breach of guarantee provisions were identified, all involving guarantors who may have been classified as vulnerable, with a personal relationship with the borrower.¹¹⁴ All cases alleged that the transaction was not understood, there was a failure to ensure independent advice was sought, and the financial capacities of all parties were not properly assessed.¹¹⁵ On top of this, the 2011/2012 FOS Annual Review noted that 146 complaints had been received in relation to guarantees, 34% alleging that the original loan should not have been approved, while 11% related to failure to meet disclosure obligations.¹¹⁶ Anecdotal evidence had also been sought from consumer advocates, indicating that many clients were not made aware of the need to seek independent advice or did not understand their level of liability.¹¹⁷ One advocate stated that in the previous 10 cases, none had sought advice, relying wholly on the representations of the debtor or lender.¹¹⁸
- 4.15. The inquiry found that some banks were going beyond their obligations, identifying their procedures, and encouraging these as best practice. This included banks placing greater stress on the need for independent advice, some going as far as personally interviewing guarantors.¹¹⁹ Some banks had a procedure in place to categorise guarantors in order to identify those who may be vulnerable including criteria such as: age (over 65), language

¹¹² Ibid 11.

¹¹³ Ibid 15.

¹¹⁴ Ibid 16.

¹¹⁵ Ibid 16.

¹¹⁶ Ibid 17.

¹¹⁷ Ibid 19.

¹¹⁸ Ibid 20.

¹¹⁹ Ibid 19.

capabilities, family home as security, and the potential for undue influence.¹²⁰ Furthermore, some actually made independent legal advice mandatory, while others do not provide credit where the primary residence is the only security.¹²¹

- 4.16. The above inquiry demonstrates the inadequacies of the code. There is a massive gulf between the standards that the CBP sets, and the actual practices of its members. It also identifies massive variation in those practice between different members. Some Banks were said to have appropriate measures in place to meet the obligations of the CBP ‘if appropriately applied’,¹²² while others demonstrated strict requirements that exceeded their obligations to such a degree so as to render their membership redundant in this area. Where the CCMC identifies these best practices, it powerlessly encourages others to follow suit, essentially arguing that the obligations are insufficient.

5. RECOMMENDATIONS

- 5.1. The best practices identified by the CCMC above demonstrate that financial institutions have the capability to put in place the protections necessary to prevent financial elder abuse, and they clearly do not represent an intolerable burden. These practices can be used as a starting point for the effective protections that need to be legislated at a Commonwealth level to ensure consistency in industry practice.
- 5.2. It is recommended that the following protections, which build on current best practice, could play a significant role in preventing financial elder abuse:
- 5.2.1. No agreement should be entered into without a co-debtor or guarantor actually receiving independent legal advice at a minimum, and financial advice strongly recommended. Solicitor’s certificates should be required.

¹²⁰ Ibid 23.

¹²¹ Ibid 24.

¹²² Ibid 19.

- 5.2.2. Lenders must be required to meet personally with joint-debtors or guarantors, in order to explain the transaction. There must also be a requirement that the lender record that the guarantor or joint-debtor has understood the transaction.
- 5.2.3. Lenders must be required to identify vulnerable parties, with a paper trail created that records consideration of key criteria (eg age, language abilities, education, relationship to debtor). Where vulnerable parties are identified, very strict financial criteria should met in order to overcome the presumption that the transaction should not be entered into.
- 5.2.4. A longer cooling-off period is required, regardless of independent advice being sought.

5.3. The benefits of the above recommendations are:

- 5.3.1. The need for independent legal advice imports a fiduciary relationship into the transaction. This provides strong protections for those involved, without requiring great innovation, as it relies on legal infrastructure that is long standing. This will provide greater certainty for guarantors or co-debtors, as well as for creditors. Another by-product of this requirement would be easier determination of cases, as independent advice would act as a strong factor against successful claims.
- 5.3.2. The need to personally meet, and create a paper trail, will also assist in reducing the complexity and quantity of cases that progress to litigation, as it removes the need to determine whether knowledge of disabilities can be attributed to the lender. It also represents prudent and diligent banking practice.
- 5.3.3. Identifying vulnerable parties through clear criteria again merely represents prudent and diligent lending practice. Strict financial criteria in situations of

vulnerability will prevent these transactions continuing unless the personal impact will be minimal.

5.3.4. A longer cooling off period would allow parties to actually absorb, understand, and contemplate the information and advice provided.

5.4. As has been argued, it is not only the content of the CPB that is inadequate, but also its operation. We suggest that the stricter measures argued for here should be legislated at a Commonwealth level, with penalties and sanctions for breaches. The body charged with enforcement should be independent of the industry, adequately funded, and should have transparent monitoring procedures in place.

6. CONCLUSION

6.1. With a rapidly ageing population, and growing intergenerational wealth divide, there is no doubt that the risk of financial elder abuse is only going to rise. It is therefore time to enshrine strong protections for this group in Commonwealth legislation, in order to provide greater certainty, and a level playing field in the competitive credit market. The protections recommended here will undoubtedly benefit the elderly, but there is nothing to suggest that the wider community should not also fall under this protective umbrella. The idea of the financial industry self-regulating in areas that may result in severe outcomes for the vulnerable is one that has long passed its used by date.

APPENDIX A - FINANCIAL ELDER ABUSE CASE LAW

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447.

Covered extensively in body.

Commonwealth Development Bank Ltd v Kerr & Ors [2001] QSC 234

Law: Unconscionable conduct.

Court: Supreme Court of Queensland Trial Division.

Judge(s): Dutney J.

Relationship: An elderly couple were the first defendants and the second defendants were their son and his wife.

Facts: The defendants were joint owners of one property which was used as security for the son and his wife to purchase a second. The plaintiff sought recovery of both parcels of land and they sought summary judgement to that effect.

Decision: Summary judgement was dismissed.

Reasons: Summary judgement was dismissed on a range of factors of special disadvantage experienced by the first defendants. They had a lack of education and business experience, naivety in dealing with the bank, and they did not receive independent advice in relation to the mortgage, instead they dealt with legal and financial matters through their son.

Permanent Mortgages Pty Ltd v Vandenberg [2010] WASC 10

Law: *Trade Practices Act 1974* (Cth) and Unconscionable Dealing

Court: Supreme Court of Western Australia.

Judge(s): Murphy J.

Relationship: Mother and son relationship.

Facts: The plaintiffs tried to enforce mortgage to secure payment of debt due to loan taken by the defendants (elderly mother and adult son). The loan was at \$192,000, most of which was used by the adult son to pay his creditors and finance a divorce settlement. The remaining \$43,000 was used to pay an existing mortgage on the property which was the residence of the elderly mother (85 at the time). The mother was a pensioner at the time of the granting of the mortgage.

Decision: That the loan agreement and mortgage was obtained from the mother by the plaintiff by unconscionable dealing and conduct. The loan agreement and mortgage was ordered to be set aside *ab initio* against the mother.

Reasons: The mother was at a special disadvantage because she did not sufficiently understand the nature of the transaction due to her limited commercial experience, received no independent legal advice, and was misled by her son as to the circumstances of the transaction. Further, she had no income and unable to repay a 192,000 loan and was as such, reliant on her son to service the loan - but did not understand that he would be unable to do so. In addition, her age, growing social isolation, rendered her susceptible to her son's duplicity. The bank knew of this disadvantage. It was held that the bank exploited this disadvantage and thus a declaration of unconscionable conduct was made in favour of the mother.

Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 413

Law: Unconscionable dealing and Unjust Contract under the *Contracts Review Act 1980* (NSW)

Court: Supreme Court of New South Wales Court of Appeal.

Judge(s): Beazley, Santow JJA and Campbell AJA.

Relationship: Husband and wife relationship.

Facts: In this case, the appellant, along with her husband, mortgaged their home as security for a loan. The couple were Syrian immigrants and the appellant could not read, write or understand English with the exception of a few simple phrases. She was also illiterate in her mother tongue and had no comprehension of mortgages or other business matters. Apart from this she had a history of mental health issues and there was a history of domestic violence between her and her husband.

Decision: The court held that it was unconscionable for the creditor 'to lend a large sum of money to a person with no income with full knowledge that if the repayments under the loan were not met, it could sell that person's only asset'.

Reasons: Notwithstanding the special disadvantages made out in the facts. This case was decided on the appellant's lack of income and the fact that the appellant had not received legal advice.

Butler v Vavladelis [2012] VSC 186

Law: Unconscionable dealing.

Court: Supreme Court of Victoria.

Judge(s): Hargrave J.

Relationship: An elderly couple and their daughter

Facts: In this case, the defendants mortgaged their home (their only asset) as security for a credit of \$400 000, loaned to them by the plaintiffs. The defendants were two elderly Greek migrants with no formal education in English. The plaintiffs sought to have the transaction enforced and the defendants cross claimed on the basis of unconscionable conduct. **Decision:** The court found there was an arguable case for unconscionable conduct, and granted an injunction to prevent possession of the defendant's home, as it was their only asset.

Reasons: It was held that the failure of the plaintiff to make relevant enquiries as to the defendant's circumstances - including age, ability to understand English, income and ability to repay amounts - was considered morally repugnant and amounted to an unconscionable form of asset-based lending.

Perpetual Trustees Australia Ltd v Schmidt & Anor [2010] VSC 67

Law: Unconscionable dealing.

Court: Supreme Court of Victoria .

Judge(s): Forest J.

Relationship: An elderly man induced to invest in a property by a con-man (Mr Maddocks)

Facts: The defendant took out a loan from the plaintiff, secured by a mortgage over his home which was his only asset of significance. The defendant was a retired Austrian migrant with no formal education in english. In order to finance his investment activities with Mr Maddocks, the defendant took out a loan with the plaintiff. Mr Maddocks and three other intermediaries were involved in arranging this loan and there were irregularities in the loan application.

Decision: The court held that the plaintiff's actions were unconscionable and the loan document was set aside.

Reasons: This case develops the concept of situational special disadvantage. This concept extends the equitable principle of unconscionability to asset-based lending. Here, despite the defendant's other disadvantages, the court held that the plaintiff's actions were unconscionable because they ignored irregularities in the loan application and income declaration, and they failed

to inquire about proof of income (which would have led to the rejection of the loan application). As such, the contract and mortgage were set aside.

National Australia Bank v Nobile and Another (1988) 100 ALR 227

Law: Unconscionable dealing.

Court: Federal Court of Australia .

Judge(s): Davies, Neaves and Spender JJ.

Relationship: The respondents were two elderly Italian married couples. The son of one couple was married to the daughter of the second and they were the directors of a company (the directors).

Facts: The respondents acted as guarantors for the directors' company. None of the respondents had a good command of English, and they were unaware of the company's dire financial situation (while the plaintiff was aware).

Decision: The court held that the respondents were at a special disadvantage which was known to the plaintiff. Thus the guarantee was set aside on the basis of unconscionable conduct.

Reasons: The unfairness of this transaction turned on the respondent's lack of independent legal advice and the plaintiff's failure to allow an appropriate time frame to seek such advice.

Spina v Permanent Custodians Ltd [2009] NSWCA 206

Law: *Contracts Review Act 1980* (NSW) and unconscionable dealing.

Court: Supreme Court of New South Wales .

Judge(s): Tobias, Campbell and Young JJA.

Relationship: An elderly woman and her son.

Facts: In this case, the applicant was an 86 year old woman with limited ability to speak English. The matter concerning the court was an application for finance made by her son, acting as her attorney, in circumstances in which he took benefit over her only major asset. There was no evidence of independent legal advice.

Decision: The transaction was set aside.

Reasons: It was held that a reasonable person in the respondent's position should have been put on notice that independent legal advice had not been received and unconscionable conduct may exist considering all the circumstances.

Moray v Scandinavian Pacific Ltd (1992) 5 bpr 11902

Law: *Contracts Review Act 1980* (NSW).

Court: Supreme Court of New South Wales.

Judge(s): Rolfe J.

Relationship: An elderly woman and her son whom she trusted in business matters.

Facts: In this case, the elderly plaintiff was in poor health and had no business experience. She handed certificates of title to her son on the understanding that the max amount that could be borrowed was \$50 000, however the certificate of title was held to secure an indebtedness of \$300 000, without her knowledge.

Decision: The various mortgages given by the plaintiff to the defendant were set aside on various equitable principles and under the *Contracts Review Act 1980* (NSW).

Reasons: Due to the extension of the loan by the son without consent of the plaintiff, her obligations under the guarantee were discharged by the court. In this case it was not so much that the plaintiff's emotional dependence on her son itself that put her at a special disadvantage but her unwillingness to confront her son about his use of her certificate of title due to the nature of their relationship.

Perpetual Trustee Company Limited v Khoshaba [2006] NSWCA 41

Law: Unjust contracts under the *Contracts Review Act 1980* (NSW), s 7.

Court: Supreme Court of New South Wales

Judge(s): Spigelman CJ, Handley and Basten JJA.

Relationship: An elderly couple who invested in a pyramid scheme.

Facts: In this case, the respondents Mr and Mrs Khoshaba were an elderly couple who invested in a pyramid investment scheme with a company called CHL. CHL submitted a loan application on their behalf. In the loan application Mr Khoshaba was described as having an income of \$43 000 and the part of the application that required the purpose of the loan to be stated was left blank. On the application Mrs Khoshaba's signature was forged.

Decision: The transaction was deemed unjust pursuant to the *Contracts Review Act 1980* (NSW).

Reasons: The court made this decision because the lender failed to make any enquiries in regards to the respondents' ability to make payments.

***Williams v Commonwealth Bank of Australia* [2013] NSWSC 335**

Law: Unconscionable dealing and unjust contracts under the *Contracts Review Act 1980* (NSW).

Court: Supreme Court of NSW.

Judge(s): Pembroke J.

Relationship: An elderly man acted as guarantor in order to assist his son financially. He sought to have this transaction set aside as it affected his other children's claim to the estate.

Facts: The plaintiff sought to have a guarantee and mortgage over his property set aside on the basis of a breach of the Code of Banking Practice and alternatively unconscionability under the contracts review act.

Decision: Both actions were dismissed.

Reasons: The action under the code was dismissed on the basis that even if it had been complied with, the plaintiff's intentions were such that it would not have altered the outcome of the case. The action under unconscionability was dismissed on the basis that the plaintiff understood his commitments to the bank upon signing he just failed to give attention to the lasting personal and domestic ramifications of his actions. Importantly in this case, the court held age alone to be insufficient in establishing a special disadvantage.

***Wilby v St George Bank Ltd* [2001] SASC 388**

Law: Undue influence

Court: Supreme Court of South Australia

Judge(s): Doyle CJ, Perry and Bleby JJ

Relationship: An 83 year old man refinanced his home loan in order to provide capital to his son's business.

Facts: The elderly plaintiff had, over four decades, dealt in realty and had various mortgages over land that he owned. Instead of using the funds the plaintiff gave to him, the son used them to for other purposes. The plaintiff argued that due to his age and frailty, poor eyesight and vulnerability to undue influence by his son that the loan should be unenforceable by the defendant.

Decision: The action was dismissed.

Reasons: The claim failed due to the plaintiff's business acumen. It was stated that age does not necessarily amount to a special disadvantage.

Ellison v Vukicevic (1986) 7 NSWLR 104

Law: *Contracts Review Act 1980* (NSW), s 6(2).

Court: Supreme Court of New South Wales

Judge(s): Young J

Relationship: An independent 70 year old landowner was approached by a quarrying firm who proposed to strike a deal so that they could conduct work on her property.

Facts: When the firm approached her with a written agreement, she declined to sign the document and drafted a new agreement herself.

Decision: The court was not willing to set aside the transaction as she was not able to prove that she was at a special disadvantage.

Reasons: This was because she was accustomed to commercial matters and the fact that she was able to draft a well thought-out document between her and the defendant contributed to this conclusion.

Micarone v Perpetual Trustees Australia Ltd (1999) 75 SASR 1

Law: Unconscionable dealing

Court: Supreme Court of South Australia

Judge(s): Olsson, Debelle and Wicks JJ

Relationship: This case involved two elderly married couples, the Micarone appellants and the Bachara appellants.

Facts: The appellants all had a limited understanding of English and were educated only to a young age in their home countries of Italy and Lebanon. The appellants all had some experience running small businesses in Australia. Both appellants were the defendants in separate actions against them by the respondent. The appeal involved transactions where the appellants each made guarantees over their homes for the benefit of Tony Bechara, the Bechara appellant's son and the Micarone appellant's son-in-law. The appellants sought to have these transactions set aside.

Decision: The appeal was dismissed.

Reasons: This was mainly because the appellants all had experience in business matters. Despite their limited understanding of English, they had a sufficient ability to understand mortgages and other financial transactions.

Siwicki v National Australia Bank Ltd [2010] VSC 547

Law: Unconscionable dealing

Court: Supreme Court of Victoria

Judge(s): Mukhtar AsJ

Relationship: In this case the plaintiff was a woman who was the director of a company. She along with her husband, the company which she was a director of, and three others, were the defendants in an earlier matter where the National Australia Bank was the plaintiff.

Facts: In the earlier case the bank succeeded in enforcing a mortgage agreement over her home and other transactions. In this case, the plaintiff sought to set aside the mortgage agreement over her home. The plaintiff claimed that she was at a special disadvantage because, at the time of the transaction, she felt that if she were to oppose the deal it would strain such a strain on her relationship with her husband that it would end her marriage.

Decision: The claim was dismissed.

Reasons: The court dismissed her claim because it could not be sustained that the financial institution had any knowledge of alleged disadvantage and had not failed to make relevant inquiries.

Suncorp-Metway Ltd v Nam Property Holdings Pty Ltd [2010] NSWSC 1078

Law: Unconscionable dealing and *Trade Practices Act 1974* (Cth)

Court: Supreme Court of New South Wales

Judge(s): Garling J

Relationship: An elderly couple who could not speak or read English were the directors of a company which was the defendant in these proceedings.

Facts: The defendant, Nam Property entered into an agreement and a mortgage with the plaintiff. It was alleged that the defendant elderly couple could not speak or read English language and that the mortgage was executed without them having any understanding of the legal, practical and financial effect of the mortgage.

Decision: The court granted a summary judgment in favour of the plaintiff for possession of mortgaged property.

Reasons: The fact that the elderly couple did not speak English was not enough to generate a reasonable suspicion that there was a special disadvantage. As such, it could not be established that the bank had any knowledge of the alleged disadvantage. Further, the elderly couple received legal advice about the mortgage document, represented that they had understood the document and that they were acting pursuant to legal advice.

Reliance Financial Services NSW P/L v Sobbi [2010] NSWSC 236

Law: Unjust Contract under the *Contracts Review Act 1980* (NSW) and Unconscionable dealing

Court: Supreme Court of New South Wales

Judge(s): Hall J

Relationship: This case concerns elderly parents who guaranteed a loan between the plaintiff and the son, without knowledge of the son's bankruptcy.

Facts: In this case there was a loan agreement between the plaintiff and the son of the defendants concerned a guarantee and mortgage given by the elderly defendant parents of the son. The defendant parents alleged that the bank knew of said bankruptcy, and as such, the guarantee was unconscionable.

Decision: The terms of the loan were not unjust and the elderly parents were ordered to give the plaintiff possession of the property.

Reasons: The court found that the elderly couple was at no special disadvantage because they were experienced in commercial deals, could benefit from the transaction, initiated the loan and provided clear directions pertaining to the disbursement of the money. Further, legal advice had been obtained and they were in a position so as to service the debt, and were also aware of their son's financial position

Karamihos v Bendigo and Adelaide Bank Ltd [2013] NSWSC 172

Law: Unjust contract under the *Contracts Review Act 1980* (NSW) and the *National Credit Code*.

Court: Supreme Court of New South Wales

Judge(s): Pembroke J

Relationship: Mr and Mrs Karamihos, an elderly couple who had limited english, took out a loan with Bendigo and Adelaide Bank.

Facts: Mr and Mrs Karamihos defaulted from the loan and sought to have the transaction set aside as an unjust contract under the *National Credit Code, Schedule 1* of the *National Consumer Credit Protection Act 2009* (Cth) or the *Contracts Review Act 1980* (NSW).

Decision: The court found that the *National Credit Code* applied and under s 76(1) they were able to reopen the transaction on the basis that it was unjust. This decision was later reversed, as on appeal it was held that the *National Credit Code* did not apply.

Reasons: The gravity of non-compliance (the loss of their only house), the disproportionate bargaining power of the parties, the absence of a negotiation and the fact that Mr and Mrs Karamihos had not received legal advice were all cited as reasons for the decision.

***McIvor v Westpack Banking Corporation* [2012] QSC 404**

Law: Undue Influence

Court: Supreme Court of Queensland

Judge(s): Applegarth J

Relationship: Elderly mother whose adult son was a solicitor with a business of moneylending.

Facts: The son requested his mother to sign a number of guarantees and mortgages in favour of the defendant. It guaranteed *inter alia*, the obligations of the son's moneylending company. The son and his company defaulted in obligations to bank, and the defendant issued a letter of demand to the plaintiff mother pursuant to the guarantee. The mother commenced proceedings seeking an injunction, alleging that her son's undue influence over her caused her to sign the guarantees and mortgage.

Decision: The court concluded that her son exercised undue influence over her in asking her to sign the guarantees and mortgage for the benefit of his company. However, due to having received independent legal advice, it could not be established that her will was overborne. Therefore, she did not establish a claim of undue influence and the proceedings were dismissed.

Reasons: The mother had received independent legal advice, and had been advised of the effect of each transaction. As such, she had sufficient understanding of them. Although having limited

education and commercial experience, she nevertheless possessed an adequate understanding of the obligations she took on

Burt v Australia and New Zealand Banking Group Ltd (NSWSC)

Law: Unconscionable dealing, *Contracts Review Act 1980* (NSW) and *Trade Practices Act 1974* (Cth)

Court: Supreme Court of New South Wales

Judge(s): Bryson J

Relationship: An elderly woman who wished to support her son and daughter-in-law.

Facts: Aged between 72 and 81, the plaintiff gave ANZ Banking Group unlimited guarantees so that she could provide financial support to the business of her son and daughter-in-law. She did not stand to gain from the transactions. The plaintiff was advanced in years, had become physically infirm and had partially lost her hearing and eyesight. She had limited education and had lost a number of close family members in recent years which may have indicated a level of dependence to her son.

Decision: Despite the plaintiffs various ailments and disadvantages, the court held that the transaction did not give rise to relief for unlimited guarantees.

Reasons: Bryson J emphasised the fact that people are free to enter into transactions, and the courts will not provide relief without the existence of infirmities beyond merely old age.