



13<sup>th</sup> November 2018

Australian Law Reform Commission  
By email: [familylaw@alrc.gov.au](mailto:familylaw@alrc.gov.au)

Dear Sir/Madam,

### **Review of the Family Law System – Joint Debt**

We thank you for the opportunity to respond to the Discussion Paper.

The Economic Abuse Reference Group (EARG) is an informal group of twelve community organisations which provides input to government and industry regarding the financial impact of family violence. Our work is focused primarily in Victoria, but organisations from outside Victoria contribute to our work on national issues. See [www.earg.org.au](http://www.earg.org.au)

We wish to comment on the matter of joint debt, in particular Proposals 3-13 and 3-14. We support the views of Women’s Legal Service Victoria (WLSV) in relation to these proposals.

We are concerned about the significant problems arising from joint debt, and the failure of the family law system to resolve these issues. We don’t believe that it is practical or adequate to rely on a voluntary response from the finance sector to address the problems arising from joint debt as proposed in the paper.

### **Joint Debt**

Our member organisations report that it is common in family law matters, for one party to have liability for debts for which they have received no benefit. This is particularly the case where family violence and economic abuse are involved.

#### Lender obligations

Banks and other credit providers should be required to take greater responsibility for preventing the imposition of legal liability on victims of violence for debts incurred by and for the benefit of a violent partner or a violent adult.

With such a high percentage of marriages and relationships ending in separation, lenders have an important role to play at the time the contracts are entered into. While there may be clear reasons for some joint loans (such as where there is a joint asset or where the loan is clearly for the benefit of both partners and both incomes are required to secure the loan) lenders should not offer a joint contract as the default position where the borrower is in a relationship.

In one case<sup>1</sup>, the Australian Financial Complaints Authority (AFCA)<sup>2</sup> found for the co-borrower, who only received a small benefit from the loan that predominantly benefited her husband.

However only a small minority of bank customers pursue their dispute through AFCA, and those who have a family law property dispute may be prohibited from doing so.

Property settlement excludes disputes to Australian Financial Complaints Authority.

If the couple in the case above had finalised a property settlement, AFCA would have refused to consider the dispute with the lender on the basis that it was outside the Terms of Reference because the dispute had been determined by another jurisdiction (even if the lender was not involved in the family court matter).

We are aware of a case where a wife signed a joint loan with her husband for over \$200,000 because she was told that it would be to pay off a debt to her father-in-law and remove his name from the title of the family home. When she left her abusive marriage, she found that the husband's father was still on title, which (along with the \$200,000+ loan) significantly reduced the property pool. When she lodged a dispute in AFCA because there was evidence that the lender should have been aware that she was being misled and/or coerced, AFCA refused to deal with the matter because a property settlement had taken place with her husband and father-in-law. The husband denied misleading or coercing her and the settlement didn't compensate her for the loss she suffered.

The result is that those involved in family law property disputes are disadvantaged if they have legal rights against the lender (for example due to maladministration in lending, inappropriately signing one party as a co-borrower or guarantor, or failing to recognise undue pressure from another party). In cases of economic abuse, it is not unusual for these issues to arise.

In such cases the cost of joining the lender in family law proceedings are too high for most people.

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<sup>1</sup> Case 412040, <https://service02.afca.org.au/CaseFiles/FOSSIC/412040.pdf>

<sup>2</sup> Previously Financial Ombudsman Service

### Impact of orders not binding the lender.

Due to the extreme difficulty in obtaining an order that is binding on the lender, family law orders (and settlements) rely on one party indemnifying the other. This raises challenges of enforcement.

The party who has been determined to not be liable for the debt under the order (or settlement) is, in effect, acting as “guarantor”, protecting the lender. This puts many people at risk of economic abuse by their ex-partner, and the likelihood of loss of income or assets to meet their obligations under the contract.

### Addressing these problems

We acknowledge that the issue of joint debts and family law is very complex, but serious solutions are required.

We don't agree with **Proposal 3–13**, where the Australian Government would “work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence.” While our members have worked closely with industry to develop some responses to customers experiencing family violence, this problem requires more than voluntary lender policies.

We support **Proposal 3.14**, although this should be implemented now, so that the requirement that “it not be foreseeable, at the time the order is made, that to make the order would result in the debt not being paid in full” is relaxed.

This may assist where the property pool and debts are significant, and it is worth the costs of a court hearing and the costs involved in joining the lender. It may also have some impact on voluntary property settlements.

However, many people (including those assisted by our members) need a simpler, lower cost option.

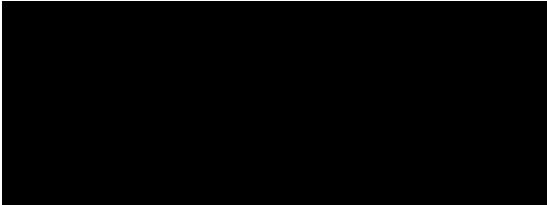
We support a streamlined process for small property claims where debt allocation can be dealt with, as WLSV have proposed. Creditors should be able to be joined in these cases at no cost to the parties.

The Family Court should be able to consider the rights of borrowers under credit law (for example, determining whether the loan was granted irresponsibly). Further, options must be considered which would allow someone who has a family law property dispute to access the free dispute resolution provided by AFCA. It is unjust that a person who may have legal rights against a lender must give up the opportunity to enforce those rights in order to resolve their matter in the Family Court.

The ALRC should consider the problems arising out of the uncertainty caused by the dual jurisdictions of AFCA and the Family Court to resolve joint debt issues.

While currently raising a dispute in AFCA first may further delay family law proceedings, information about the role of AFCA, and the need for legal advice (regarding whether to raise a dispute with a creditor in AFCA before issuing family court proceedings) should be included in the proposed national information package.

Yours faithfully,



Carolyn Bond AO  
For EARG