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Dear Senate Economics Committee,

Questions on Notice

Thank you for the opportunity to respond to your Questions on Notice:

1. *Is there anything we can do as a Commonwealth Parliament about coercive control?*
2. *What is the substantive provision you are wanting to retain?*
3. *What can be done to improve AFCA?*
4. *Is there an insertion or section that could be retained?*

As we discussed at the Senate Economics Committee hearings on Friday 26 February, we will respond to questions 2 and 4 together.

Is there anything we can do as a Commonwealth Parliament about coercive control?

The Economic Abuse Reference Group's collective expertise is in the financial impact of family and domestic violence, so our response to this question is focussed on economic abuse and our casework experience.

Coercive control is critical to understanding domestic and family violence (**DFV**), and has been analysed and understood through research, policy and legislation both in Australia and in comparable jurisdictions such as the United Kingdom and Scotland.[1] Whilst there is no agreed definition of coercive control the research has conceptualised it as having three elements: intentionality on the part of the abuser; the negative perception of the controlling behaviour on the part of the victim; and the abuser's ability to obtain control by use of a credible threat.[2] Coercive control aims to encapsulate the patterns of abusive behaviours that occur in DFV

[1] Paul McGorrey and Marilyn McMahon 'Criminalising Coercive Control: An Introduction' in Marilyn McMahon and Paul McGorrey (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020). See also Walklate S and Fitz-Gibbon K (2019) The criminalisation of coercive control: The power of law? *International Journal for Crime, Justice and Social Democracy* 8(4): 94-108.

[2] Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

which may seem like small incidents to an individual but have the impact of removing freedom, autonomy and agency from the victim survivor.

Coercive control is a key feature of economic abuse. Money is a powerful tool that can be used to control and isolate a person. Economic abuse can manifest in many ways. Every case is different. Some victim survivors are controlled and isolated through the abuser restricting their access to money, for example, not allowing them to work or giving them a diminutive allowance that barely covers their basic living expenses. Others may be exploited and left with the full burden of what should be joint financial responsibilities, such as being made to pay for everything and forcing them to take out credit cards and loans that they do not get any benefit from.

Many victims experience financial sabotage that persists well beyond the end of a relationship when the abuser deliberately defaults on joint loans to damage the victim's previously good credit history. These abuse behaviours are often subtle and corroding, and ultimately render the victim under the complete control of their abuser. Like the frog put in a pot of tepid water and then brought to a boil slowly, victims will not perceive the danger because the threat arises gradually.

Financial abuse is one of the main reasons why a person will remain in or return to a violent relationship. Debts and eroded financial confidence can trap and prevent victims from being able to leave, and even if they manage to escape, it can cripple them financially, leading to a lifetime struggle to make ends meet.

Coercive control is complex both in nature and in understanding not only by victim survivors, but by the judiciary, the police, and the broader community. For the Commonwealth Parliament to address coercive control it is important to examine the broader impacts this will have, such as how it would interact not only with state laws but also with the family law system, migration law and social security. Another important consideration is the policy and practice implications for services that support victim survivors such as the DFV sector, and the banking industry.

Coercive control and consumer credit laws

Whether or not Parliament considers addressing coercive control, we maintain that in relation to protections for people experiencing coercive control in the context of economic abuse, our strong recommendation is that the *National Consumer Credit Protection Amendment (Supporting Economic Recovery)* Bill 2020 (**Bill**) should not be passed as it removes some of the most effective measures to prevent and support victim survivors experiencing economic abuse. We have detailed our reasons for this position in our submission, our evidence before the Senate Committee and in response to the other Questions on Notice below.

We are of the view the Commonwealth Parliament should be working to increase protections for victim survivors of coercive control and economic abuse, not weaken them.

Additional opportunities for Commonwealth Parliament to address coercive control

Coercive control is a widespread problem, which is at the source of most DFV. Any potential responses to this complex issue require careful consideration and broad consultation.

The EARG NSW chapter recently provided input to the NSW Joint Select Committee on Coercive Control's Inquiry into coercive control in domestic relationships. This Inquiry is largely focused on criminal law responses to coercive control, however we have summarised below the submissions which may also be applicable to the Commonwealth Parliament. This is not exhaustive and our members would welcome the opportunity to be involved in further consultation with the Commonwealth Parliament.

1. Research, prevention and education

Given the endemic levels of DFV in Australia, we are of the view there should be significant investment in research and education for the prevention of coercive control, including economic abuse.

Education, prevention and other mechanisms have the ability to address coercive control and economic abuse without the blunt force of the law. Prevention is critical to addressing economic abuse and DFV, and a prevention model such as the hierarchy of controls which focuses on education and role modelling on respectful relationships would support victim survivors.[3] These approaches would make redress more accessible for the wider community, would lead to broader cultural change around how we as a community understand coercive control and DFV, and represent a more holistic approach to a serious and devastating social problem. A public education campaign to ensure that coercive control is understood by the broader community could be one way of addressing this.

While we need to continue to find ways to prevent, or reduce, coercive control, it's important to ensure there are protections in place to prevent or reduce harm. The current responsible lending obligations (RLOs) do this.

2. Consultation

A thorough and robust consultation equivalent to the four-year consultation undertaken in Scotland[4] would ensure diverse engagement with all relevant groups to understand how coercive control works, consider the evidence from other jurisdictions and also how coercion relates more broadly to the current system for DFV in Australia.

Any consultation should include consideration of:

- Existing state and Commonwealth laws and policies (explained further below);
- Adverse consequences for victim survivors;
- Evidence-based research on prevention;
- Adequate funding to the sector to implement changes; and
- Education, awareness raising and training for all sectors of society, not just the police and judiciary.

3. Harmonisation

A thorough consultation should examine existing state and commonwealth laws and policies with the view to achieving consistent and effective support for victim survivors across Australia. Whist there are national definitions for domestic abuse in various Federal legislative instruments[5] in Australia there is currently no consistent definition or understanding for domestic abuse. Most state jurisdictions in Australia have a definition for DFV that includes forms of abuse such as emotional, psychological, coercive or financial, which would encapsulate coercive controlling behaviours, even if they don't have a specific definition or offence of coercive control.

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[3] See also Our Watch's Submission to the NSW Joint Select Committee on Coercive Control (2021), available at https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2021/02/19121054/Our-Watch-Paper-NSW-Coercive-Control.pdf

[4] Scottish Government 'Domestic Abuse Act in Force' available at https://www.gov.scot/news/domestic-abuse-act-in-force/

[5] See for example the definition of family violence contained in the Family Law Act 1975 (Cth), section 4AB, and also the definition in Schedule 2, Regulation 1.21 of the Migration Regulations 1994 (Cth).

We are of the view that economic abuse should be specifically recognised and defined in any law and policy changes relating to coercive control. We refer the Committee to the recommendations contained in the Australian Law Reform Commission's Final Report 'Family Violence – A National Legal Response' which recommended family violence definitions include economic abuse, to adopt consistent definitions across jurisdictions as well as within the Family Law Act.[6]

Some of our members have experience in family law and DFV. Whilst family law legislation recognises coercive controlling behaviours including financial abuse, in practice EARG members have not found this to be an effective way of dealing with coercive control. In fact, perpetrators often use the family law to further abuse victim survivors. Any consideration of new legislation for coercive control would need to consider the intersections with the family law system. One way to address coercive control is to consider the recommendations made in the ALRC's report as discussed above in relation to harmonisation of family violence definitions across jurisdictions.[7]

We were asked by Senator Bragg "*What is the substantive provision you are wanting to retain?"* We were then later asked by Senator Patrick if there is an "*insertion or section that could be retained*". In context, Senator Patrick seemed concerned that there were too many instruments and was looking to discuss ways to simplify it. These two questions will be answered together as the answers overlap.

To both prevent and remedy economic abuse, it remains our position that all of the provisions in Chapter 3 of the NCCP Act should be retained in their current form and should apply to all consumer credit contracts provided by both ADIs and Non-ADIs.

Substantive provisions required to prevent and remedy economic abuse

Currently, all credit licensees must adhere to the responsible lending framework required by Chapter 3 of the NCCP Act which applies to both credit providers and credit assistance providers.

We gave evidence in relation to the importance of the current laws around unsuitability[8] and steps to make reasonable inquiries.[9]

Specifically, section 118(2) of the NCCP Act states that credit must be assessed as unsuitable if:

a. the consumer is unable to comply with the financial obligations under the contract, or they could only comply with substantial hardship; or

b. the contract does not meet the consumer's requirements and objectives.[10]

The substantial hardship provision in section 118(2)(a) is important because it reduces the chances that a loan will be made that a victim survivor can't afford. The requirement for the lender to make reasonable inquiries to verify the borrower's financial information is key to

[6] Australian Law Reform Commission (2010) Family Violence – A National Legal Response (ALRC Report 114), available at https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/ See recommendations 5, 6 and 7.
[7] Ibid.
[8] See National Consumer Credit Protection Act 2009 (Cth) ss 118, 119, 131.
[9] See National Consumer Credit Protection Act 2009 (Cth) ss 117, 130.
[10] See National Consumer Credit Protection Act 2009 (Cth) s 118.

uncovering economic abuse because we regularly see perpetrators provide false payslips and other financial information in their partner's name. The Bill flips this around and introduces borrower responsibility provisions which will make it easier for perpetrators to get away with providing false or unreliable information, and remove the lender's obligation to make reasonable inquiries.

Furthermore, our members assist many clients who *can* afford the repayments and therefore may satisfy the bank that they can comply with the financial obligations without substantial hardship, which makes the second limb about the consumer's requirements and objectives critical. Without the obligation on the lender to check a consumer's requirements and objectives and to in turn see if they will receive a benefit from the loan, it is anticipated that many loans will be approved that are a result of financial abuse. This is evident from the cases we see where a lender has failed to inquire into the requirements and objectives of victim survivors. A common example of this is where a victim survivor ends up with a car loan in their name when they don't have a driver's license and the car is clearly for their partner's sole benefit. In other cases, we see victim survivors who have been coerced to take out a mortgage over a property which they brought into the relationship unencumbered, accessing equity which their partner then spends on gambling or to pay off personal debts.

ASIC Regulatory Guide 209 'Credit Licensing: Responsible Lending Conduct' provides lenders with guidance on circumstances that affect inquiries about the consumer's requirements and objectives, and states it is likely the lender will need to make more inquiries where:

'...the consumer will obtain no or limited benefit from the credit product, (e.g. a loan to purchase an asset in the name of another person), or there are other indicators the consumer may be the subject of financial abuse (e.g. the consumer seeks a loan secured over previously unencumbered assets to obtain funds for another person or appears to be acting at the direction of a third party) ...'[11]

Retaining these laws, and Regulatory Guide 209, for all credit contracts provided by both ADI and Non-ADI lenders is critically important to stop economic abuse debts from being approved in the first instance.

The NCCP Act also provides civil penalty provisions for individual unsuitable loans that bring court rights and empower a regulator with a mandate to prevent consumer harm to actually take action where an individual unsuitable loan has caused serious harm.[12] Furthermore, in practice, the prospect of civil action against a lender also acts as a deterrent from providing unsuitable loans, or as an incentive to settle a matter through internal dispute resolution.

Can Responsible Lending Obligations be retained in another instrument?

We do not believe that the current responsible lending legislative framework should be dismantled and replaced by retaining some or all of the above provisions in other instruments, such as the Prudential Standard APS 220 on Credit Risk Management (**APS 220**) or other codes of practice.

Instruments such as the APS 220 are not designed to be enforced at individual loan level, and are not designed to afford consumers individual remedies. This means borrowers

[11] ASIC Regulatory Guide 209.85(d).

[12] See generally National Consumer Credit Protection Act 2009 (Cth), Chapter 4, Division 2 Declarations and pecuniary penalty orders for contraventions of civil penalty provisions; and National Consumer Credit Protection Act 2009 (Cth) Part 4-2, Division 2—Power of the court to grant remedies.

cannot use a breach of APS 220 as a legal defence if a lender seeks default judgment in court when chasing an irresponsibly lent debt (this is explained in more detail in response to question 3). Removal of the responsible lending framework from legislation removes legal enforceability and the right for the individual consumer to pursue a remedy in court.

Whilst we support responsible lending and family violence provisions being incorporated into more instruments (for example the family violence provisions in the Banking Code of Practice), we are concerned that such provisions would only provide special protections for co-borrowers if the lender identifies a problem based on the information provided in the course of the loan application. We are worried that without the responsible lending obligations in Chapter 3 of the NCCP Act, lenders will not ask the right questions and they will simply rely on the information provided in the application, which we know from experience is often completed by the perpetrator of economic abuse with no input from the victim survivor. This will cost the lender the opportunity to identify red flags of economic abuse. Codes and guidance documents are a useful tool when industry participants show goodwill and want to comply with them, but as we know that's not always the case. Codes also rely on subscribers and not all lenders will be subscribers. These codes and industry guidelines are 'soft law' and exist to articulate extra standards to add to or strengthen the law, however they should not replace the law and do not give rise to remedies for individual consumers. Removing the responsible lending obligations and relying on codes will leave consumers with reduced enforceable remedies when banks or lenders do the wrong thing.

Furthermore, monitoring compliance of other instruments can be difficult and sometimes self-regulated, and this will particularly be the case if ASIC no longer holds the power as the main regulator in the lending space.

The EARG maintains that anything that weakens protections for family violence victim survivors is not supported. We live in a climate now where we should be strengthening these protections and individual remedies, not weakening them.

Victim survivors rely on lenders to make unsuitable loan assessments. The practical impact of removing these protections is that there will be an increase in the frequency and severity of economic abuse and reduced options to help those people to be free from the burdens of economic abuse. Victim survivors need laws that make it harder for perpetrators to use credit products to perpetrate economic abuse, not easier.

Simplifying the regulatory system

It is our position that the Bill introduces a more complex system whereby there will be different rules depending on whether the lender is an ADI, a Non-ADI lender or provides SACCs or leases.

To address the point that Senator Patrick was exploring, we believe that these consumer credit reforms will not in fact simplify or reduce the amount of instruments in place, we believe it will complicate things further and lead to the introduction of a confusing set of rules contingent upon what type of lending is occurring, what type of credit licence is held and when the credit contract is entered into. For example, a bank is an ADI and would be subject to the rules that apply to ADIs, however if they lend an amount under $2,000 to a consumer, they would then have to revert to rules applying to SACCs in respect of that particular loan. Far from simplifying the regulatory landscape, this bifurcation of rules will leave the whole space open to confusion.

This is complicated further by the fact that the revised legislative framework will only apply to loans created from when the legislation comes into force, meaning that three different laws will apply depending on when the credit contract was entered into:

1. Credit contracts entered into prior to 1 July 2010 will be under the Consumer Credit Codes of each state and territory;

2. Credit contracts entered into from 1 July 2010 – 2021 will be under the NCCP Act (in addition to specific laws introduced for SACCs, Medium Amount Credit Contracts and reverse mortgages during this period); and

3. Credit contracts entered into from 2021 will be under the revised legislative framework (the Bill).

The Bill actually creates a more confusing and complex and less effective regulatory regime.

What can be done to improve AFCA?

The Australian Financial Complaints Authority (**AFCA**) provides an invaluable opportunity for consumers to have their complaints against banks and other financial firms determined in a free and accessible forum. As with any organisation, there is always room for improvement. As Treasury has just commenced a formal review of AFCA, we will be providing more detailed submissions about AFCA through that consultation.[13] However, specific to this Bill, we are of the view that no improvement to AFCA will be sufficient to counter deficiencies in law – AFCA's role is to improve access to justice under the law, not re-write it.

We remain concerned about the ability for people who have experienced economic abuse to successfully seek redress for poor lending practices at AFCA should the Bill be passed into law, for the following reasons (explained below):

- The Bill removes the underlying law under which AFCA can resolve responsible lending complaints;
- There will be no access for AFCA to consider post-judgment disputes involving responsible lending;
- AFCA cannot conduct enforcement through remediation schemes; and
- There will be no cases determined by the Courts on responsible lending which would inform AFCA decisions.

Removes the underlying law for AFCA complaints

The Explanatory Memorandum (**EM**) for the Bill states that consumers will retain access to redress through the AFCA scheme for relevant breaches of any obligations in the NCCP Act by both ADIs and Non-ADI lenders, even if they do not involve breaches of civil penalty provisions. Unfortunately, if the Bill is passed, Chapter 3 will no longer apply to credit contracts over $2,000 (non-SACCs) which will limit the value of AFCA, and in some cases remove the option entirely, for victim survivors who are sold unsuitable credit.

In our submission, we describe *Debbie*[14] who lost the home she owned outright after being coerced into a succession of home loans that provided cash for her partner's gambling. The lender's risk was very low because the loan was secured by the home so they recovered their money and profited from receiving interest, fees and charges.

Debbie made a complaint to AFCA on the basis that the lender had failed to meet their obligations under Chapter 3 of the NCCP Act, specifically that the lender failed to make reasonable inquiries of her requirements and objectives for the home loan and therefore

[13] https://treasury.gov.au/review/review-australian-financial-complaints-authority
[14] Economic Abuse Reference Group Submission 50, p 8-9.

missed the signs of economic abuse. AFCA accepted the complaint, investigated the lending under Chapter 3 and made recommendations which influenced a settlement for compensation.

AFCA must exclude complaints about a lender's risk assessment unless it is a complaint about maladministration (failure to meet a legal duty or obligation).[15] If legal duties and obligations are removed there is a real question about whether AFCA will consider the dispute, what duties or obligations they may have reference to in doing so, and what remedies may apply if the complaint is upheld.

If Debbie tried to resolve this matter under the Bill, we are of the view AFCA would not be able to consider Debbie's complaint that the lender failed to make reasonable inquiries of her requirements and objectives, because the Bill removes that requirement for all credit products other than SACCs.

AFCA aims to resolve complaints based on the law, relevant codes, good industry practice and what is fair, in all the circumstances.[16] In relation to fairness, this is a process which is heavily influenced by how the law would apply to the situation, and AFCA is required to have regard to legal principles, which are drawn from relevant legislation and case law.[17] Jurisprudence regarding legal principles of unfairness, unjustness and unconscionability have generally looked at what was known by the lender at the assessment stage. Removing the requirement for lenders to make reasonable inquiries of the borrower's requirements and objectives, and introducing borrower responsibility in relation to the financial information provided, will reduce the information available to the lender at the time.

It is all interconnected and in combination will result in worse outcomes for victim survivors who make complaints to AFCA because the legal obligations of all lenders in relation to lending assessments will be significantly reduced, leaving AFCA decision-makers with very little guidance from the legislation (and in turn, from the case law, as these matters stop reaching the courts) in how to resolve complaints. As a result, the protections that victim survivors can invoke in AFCA when they are sold unsuitable credit products will be far weaker.

Non-ADIs

For Non-ADI lenders, the first hurdle for a complainant to face is that the right to damages under the NCCP flows from a breach of a civil penalty provision or offence.[18] A single breach of the new Non-ADI standards does not constitute a civil penalty provision, and therefore does not trigger the entitlement to compensation. It is also explicitly excluded in the Bill from constituting an obligation under the credit legislation for the purposes of licensing, banning or the general conduct obligations for licensees.

The EM states that a borrower will have access to redress via AFCA if the lender has failed to meet the Non-ADI Standards in their particular dealing, as this will constitute a (non-civil penalty) breach of the NCCP Act.[19] The fact that the EM says this does not make it so – this will be a matter of interpretation of the law and the application of the AFCA Rules.

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[15] AFCA Rule C.1.3 (a), Maladministration means an act or omission contrary to or not in accordance with a duty or obligation owed at law or pursuant to the terms (express or implied) of the contract between the Financial Firm and the Complainant (Section E.1 of the AFCA Rules).
[16] AFCA, *Operational Guidelines to the Rules*, April 2020, p 87.
[17] AFCA, *Complaint Resolution Scheme* Rules, 25 April 2020, Rule A.14.2.
[18] National Consumer Credit Protection Act 2009 (Cth) s 178.
[19] EM at paragraph 1.76.

Even accepting that AFCA will consider a single breach of the Non-ADI standards as the basis of a complaint, and are prepared to use their broad toolbox of remedies in the absence of a clear right to compensation, the complainant will still face a number of hurdles they do not face under the current law:

- They would need to know whether the lender has a relevant plan and what it is. There is no legal right for consumers to obtain copies of these written plans and they are likely to be considered *commercial-in-confidence*;
- They would need to know whether the plan is adequate to comply with the standard, which would generally be a matter on which they would need expert advice;
- They would need to demonstrate that the lender has failed to comply with the plan in the particular instance which forms the subject of the complaint.

This is much more difficult than establishing a potential breach of the responsible lending laws, which is largely a matter of principle and does not require access to information about the lender's systems and processes.

Presuming a complainant can overcome the above hurdles, there are then a number of issues and uncertainties introduced by the draft Non-ADI standard which do not exist in the current law:

- There would be no requirement for lenders to enquire about the requirements and objectives of the consumer seeking the credit and to ensure the credit provided meets those criteria;
- The lender would be entitled to rely on information provided by the consumer, unless there are reasonable grounds to believe it is unreliable – this is a real problem in cases of coercion and economic abuse that could have been picked up by seeking verification of the information provided;
- Lenders will be entitled to make reasonable estimates of expenses which will not necessarily reflect the consumer's true position.

The sum of all of this is that even if a consumer can show their personal circumstances and objectives were not considered in a lending assessment, AFCA is far less likely to grant a remedy, or a comparable remedy, under the proposed regime than under the current regime.

ADIs

Paragraph 1.77 of the EM seems to indicate that the proposed sections 133EA-EC of the NCCP Act would also give borrowers a hook to take ADIs to AFCA if necessary. This is difficult to follow because for ADIs, there would be no breach of the NCCP Act at all – any arguable failure to meet a legal duty or obligation would need to be characterised as a breach of the APRA Prudential Standards or of a relevant Code of Practice.

APS 220 is largely dedicated to risk monitoring, prudential reporting and capital provisioning, things that are rightly the concern of a prudential regulator. Paragraph 41, even as amended, is sound in principle but is very general and a poor substitute for the specific responsible lending obligations currently contained in Chapter 3 of the NCCP Act. There are also relevant clauses in Prudential Practice Guide APG 223 Residential Mortgage Lending, including references to income verification, buffers and the use of benchmarks to estimate income. However, all of these reference a lender's overall systems rather than creating any requirements in an individual case and they do not create individual rights or enforceable obligations. In fact, the document envisages exceptions to these rules by having a section dedicated to over-rides of these general principles in individual cases, suggesting they be limited in number and their justification well documented. It is difficult to see how AFCA can

extract sufficiently unambiguous obligations from these standards except in the most egregious of cases.

The Banking Code is also of limited value because it only provides special protections for co-borrowers if it identifies a problem "on the information that you have provided to us in the course of applying for this loan". We are concerned that without the requirement to make reasonable inquiries about a borrower's requirements and objectives, ADIs won't ask the right questions and they will just rely on whatever the perpetrator has put in the loan application. Therefore, the flags of economic abuse may not be picked up. Further, this will only be apply to joint loans, but our members overwhelmingly assist victim survivors who have been coerced into loans only in their name.

No access to remedies post-default judgment

AFCA cannot consider a dispute where the matter has already been determined by a court or Tribunal, except in very limited circumstances which are not relevant in this case.[20] Many victim survivors seek assistance from financial counsellors and legal services after the creditor has already obtained a default judgment in a court. In our experience, it is not uncommon for the victim survivor to first learn about an unpaid debt only at the stage when their wages are garnisheed or the sheriff arrives to seize their goods, which can be months after a default judgment has been given in court. The case below illustrates this problem:

A woman who lives in Victoria and has no connection to NSW discovered a judgment debt against her in NSW when her wages were garnisheed. The debt pertains to a car loan taken out by her now ex-husband a number of years ago and the judgment is for an amount in excess of $42,000. At the time the loan was taken out, she was heavily pregnant with their third child, and was a stay at home mum. She was introduced to her husband by her family when she was 15, and they married overseas when she was almost 18. She was financially dependent, as he did not let her work. He developed a drug dependency and their life was chaotic.

She does not recall obtaining a loan or signing up for a credit contract – she thinks he probably presented her with documents to sign and she signed them. He had complete control of their finances. She understood that, as his wife, she had to do what he asked when it came to money and paperwork. She remembers that he got a car and crashed it within a short time after purchase. They separated 5 years ago and she is trying to rebuild her life with a new partner. She currently works nights in a supermarket and has 3 children. She says if her wages kept being garnisheed she would not be able to feed the family and keep a roof over their head.

The plaintiff initially refused to set aside the default judgment. The matter was in the general division of the Local Court. To set aside the default judgment, as well as the irregularity of obtaining judgment in a different state, the client needed a defence to the claim. She had an arguable case that the loan was a breach of the responsible lending provisions of the NCCP. AFCA indicated verbally it was not able to progress the matter while a court judgment was in place, and ultimately dismissed the matter for want of jurisdiction.

Under the existing law in such circumstances, if the person has a defence, it can be argued as part of an application to set aside the judgment. The alleged debtor can then make a complaint in AFCA after the judgment has been set aside.

If the Bill is passed, borrowers will have no legal right to allege a breach of the APRA or Non-ADI Standards in court, and thus have no legal right to set aside the judgment. As

[20] AFCA's Operating Guidelines, Section C.1.2 (d).

AFCA is not available post judgment (unless the judgment has been set aside), these debtors will have no opportunity at all for redress for breaches of these standards. Further, lenders who have breached the standards will have an incentive to pursue judgment debts more hastily in order to oust AFCA's jurisdiction. This represents a major step backwards in access to justice.

Remediation of systemic non-compliance

AFCA is not a regulator. It is not empowered to undertake monitoring and enforcement action. While it has a systemic issues team which watches for trends in complaints which are likely to affect a class of persons beyond any individual person who lodged a complaint or raised a concern, all AFCA can do is report those issues to the appropriate regulator. AFCA is not able to take systemic action except to "work collaboratively with financial firms to resolve any issues" in order to "avoid recurrence of the issue where appropriate."[21]

On the other hand, APRA has no history of instigating consumer remediation on either an individual or systemic basis. They are not being given the power or the impetus to do so now, even as the Bill seeks to remove ASIC's jurisdiction in this area.

Extensive remediation has been paid under the responsible lending laws since their commencement. A proportion of this has been paid by ADIs, including major banks. There is no capacity to ensure this continues under the proposed amendments, to the great detriment of victim survivors, like Jessica, whose case we describe in our submission on page 12.

Jessica received $25,000 compensation from a remediation scheme after she was coerced into buying her partner an expensive luxury car under a loan for which she was the principal borrower and her partner contributed nothing. Jessica was only on a provisional licence and couldn't even drive the car. The lender spoke exclusively to her partner in Korean and failed to acknowledge clear signs of economic abuse.

Jessica's community lawyer made submissions to the remediation scheme regarding the lender's failure to assess Jessica's requirements, objectives and financial situation when approving the loan and the subsequent personal and financial loss. As a result, the lender's initial offer of $3000 compensation was increased to $25,000.

ASIC may retain this capacity in relation to Non-ADIs for systemic breaches of the new standards, but this in itself creates problems because of the different rights and likelihood of being compensated for victim survivors using different market segments.

There will be no check on AFCA for courts to determine test cases

AFCA was not designed to be the single source of redress available to consumers against financial service providers. The AFCA scheme is designed to operate as an alternative and more accessible avenue to traditional legal avenues, such as tribunals and courts.[22] A key check and balance on the EDR process is that consumers retain the right to go to court, lenders have the potential to request a matter be litigated as a test case, and the evolving law is reflected in AFCA decisions as new court decisions are handed down. It is not fair to say that court is cost prohibitive to victim survivors of economic abuse because they are in fact a priority client group for representation from Legal Aid, Community Legal Centres and pro bono law firms and barristers.

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[21] https://www.afca.org.au/about-afca/systemic-issues

[22] AFCA, *Operational Guidelines to the Rules*, April 2020, p 8.

As the Bill does not provide a legal cause of action for consumers for individual instances of irresponsible lending, AFCA would then function as the final decision maker on the issue; the sole interpreter of this law as it applies to individuals, including determining appropriate remedies, despite the fact AFCA is not bound by precedent or required to strictly apply legal principles. If consumers or lenders believe AFCA is not interpreting the law accurately, they will have no recourse except to appeal to government to amend the law. This represents another major step backwards in access to justice.

Concluding Remarks

Thank you again for the opportunity to provide further submissions to this inquiry.

If you have any questions or concerns regarding this submission please do not hesitate to contact us by email to earg@earg.org.au

Yours Sincerely,
Economic Abuse Reference Group

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About the Economic Abuse Reference Group

The Economic Abuse Reference Group is an informal group of community organisations which influences government and industry responses to the financial impact of domestic and family violence. Our members include family violence services, community legal services and financial counselling services.

Initially established to consider recommendations of the Royal Commission into Family Violence in Victoria, EARG has input to national issues such as banking and insurance. The Victorian and New South Wales chapters have input to state issues (for example energy, tenancy and fines).

Not all organisations contribute on every issue – and other organisations may contribute from time to time.

Organisations which contribute to EARG's work include:

- Care Financial Counselling Service & Consumer Law Centre (ACT)
- Centre for Women's Economic Safety
- Consumer Action Law Centre
- Council of the Single Mother and Her Children
- Domestic Violence NSW
- Domestic Violence Victoria
- Financial Counsellors Association of NSW
- Financial Counselling Australia
- Financial Counselling Victoria
- Financial Rights Legal Centre (NSW)
- Good Shepherd Youth and Family Services Australia & New Zealand
- Justice Connect
- Legal Aid NSW
- Legal Aid Qld
- No to Violence
- Northern Rivers Community Legal Centre
- Redfern Legal Centre's Financial Abuse Service NSW
- Social Security Rights Victoria
- Thriving Communities Partnership
- Uniting Kildonan
- Victoria Legal Aid
- WestJustice
- Women's Information & Referral Exchange (WIRE)
- Women's Legal Service NSW
- Women's Legal Service Qld
- Women's Legal Service Victoria