

25 November 2022

Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
Parliament House  
Canberra ACT 2600



By email: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)

Dear Committee,

### **Submission to the inquiry into corporate insolvency in Australia**

Thank you for the opportunity to provide input to the inquiry into corporate insolvency in Australia. Our input is narrowly focused on responses to economic abuse based on casework experience.

### **Summary of recommendations**

*These recommendations are not inter-dependent, for example implementing internal guidance and staff training does not require legislative change.*

1. The defence in section 588H(4) of the *Corporations Act 2001* (Cth) should be expanded to specifically recognise family violence as a reason why a director may have not taken part in managing a company.
2. ASIC should have internal guidelines regarding how it applies its discretion not to prosecute for these breaches, which should involve staff appropriately trained to recognise and understand family violence, including economic abuse.
3. Receivers and liquidators should be trained to identify, understand and respond to family violence and economic abuse issues that arise in the course of their work.
4. The defence in section 269-35(1) of the *Taxation Administration Act 1953* (Cth) should be expanded to specifically include family violence as a reason why it would have been unreasonable to expect a person to take part, and they did not take part, in the management of the company at any time when they were a director.
5. The ATO should develop internal guidelines regarding how it applies its discretion not to pursue an individual for Director Penalty Notices or other tax debts in circumstances of family violence.
6. The ATO should develop clear and transparent processes for responding to matters involving family violence and economic abuse, including appropriate family violence training of relevant staff.

## Economic Abuse Reference Group

The EARG is an informal group of community organisations which work collectively to influence government and industry responses to reduce the financial impact of family violence. Members include DFV services, community legal services and financial counselling services, and we involve other organisations in our work where relevant.

This submission was prepared with input from [Dr Vivien Chen of Monash University](#) and contributors to the EARG. Some of our members have experience (as lawyers or financial counsellors) assisting clients who have experienced economic abuse in the context of corporate insolvency. See more details about EARG [here](#).

## Economic abuse and corporate insolvency

Economic abuse, also described as financial abuse, is a form of family, domestic and sexual violence. It has significant and devastating impacts at an individual, community and societal level. Economic abuse can take various forms, including accruing debt or other liabilities in the other person's name, not contributing to joint loans, controlling all finances, not making shared financial decisions, withholding necessities, preventing someone from obtaining or remaining in employment, and stopping someone from accessing education or a means to become financially independent. Around 85% of women who access DFV services in Australia say that they have experienced some level of financial abuse as part of the coercive control in their relationship. Between 78-99% of women presenting to family violence services report a history of economic abuse.<sup>1</sup>

Economic abuse can occur alongside other forms of abuse such as physical, emotional and sexual violence. A 2017 study into the prevalence of economic abuse between intimate partners found that 11.5% of Australians had experienced it and that women experience it at higher rates (15.7%) than men (7.1%).<sup>2</sup> These gender differences are important because it is well understood that family, domestic and sexual violence is gendered, and that women are the majority of victims and experience more severe consequences. Debts are a common factor forcing victim survivors to remain in or return to an abusive relationship. Victim survivors often experience financial impacts long after the relationship has ended.

The stories in this submission, provided by EARG members, are archetypal of the complex issues people face when experiencing economic abuse through company directorships and business debts (usually small family businesses). Common scenarios encountered by our caseworkers include:

- Abusive partners coercing the victim survivor to be a sole or joint director of the company while having no knowledge or control of the business;

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<sup>1</sup> Jozica Kutin, Roslyn Russell & Mike Reid, 'Economic abuse between intimate partners in Australia: prevalence, health status, disability and financial stress' (2017) 41(3) *Australian and New Zealand Journal of Public Health*, p269.

<sup>2</sup> Ibid.

- Abusive partners coercing victim survivors to sign loan agreements or guarantees. At times victim survivors may not be allowed to read the documents.
- Abusers fraudulently incurring liability in the victim survivor's name without their knowledge;
- Abusive partners obtaining credit when the company is insolvent, leaving the victim survivor to bear the consequences; and
- Abusive partners taking control of a business run by the victim survivor and sabotaging the business or siphoning off its assets.

Victim survivors are often appointed as director or co-director of a company which the perpetrator controls, without their knowledge or understanding of the implications of directorship. The company then borrows funds and enters into supply contracts and loans, with the victim survivor either being coerced to sign guarantees or having their signature forged. The perpetrator takes the funds and the benefit of those contracts, at times resigning as co-director, leaving the victim survivor with the debt. In the words of one victim survivor, "He had disappeared, so all the creditors were chasing me for the debts from the business – they couldn't find him." This is illustrated by Susan's story.

#### **Case Study: Susan's Story**

Susan\* was registered as a director of a company by her ex-husband fraudulently and without her knowledge. She only became aware of her directorship after separation when she received a letter from a finance company seeking immediate repayment of almost \$13,000 for a car loan which she had allegedly guaranteed as co-director. Although the debt could have been reduced through the finance company repossessing the vehicle, she had no idea where the vehicle was and had never been in possession of it. Further, it was not safe for her to make these enquiries. Following internal dispute resolution and despite providing her police statement with further evidence demonstrating the severity of the financial, physical and sexual abuse she had suffered at the hands of the perpetrator, the finance company insisted on "\$10,000 as full and final settlement". Susan continued to receive collections text messages and calls from the finance company even when they were aware that she was disputing her liability and the matter was under investigation.

*\* Name has been changed for safety and privacy*

Caseworkers report that they often see undischarged bankrupts perpetrating financial abuse by phoenixing companies in the victim survivor's name, leaving them to bear the liabilities when the company fails. Many victim survivors see no other option but to declare bankruptcy as a result of the financial abuse they have experienced.

While the focus of this submission is on economic abuse within intimate partner relationships, as this is where our members commonly see dummy directorships arise, consideration must also be given to circumstances of elder financial abuse. Some of our members have casework experience with elderly parents who have been coerced into taking out loans for a child's business, or signing personal guarantees for such loans, which often leave them with no choice but to declare bankruptcy.

## Insolvent trading

Victim survivors who are directors of an insolvent company contravene s 588G of the *Corporations Act 2001* (Cth) if they fail to prevent the company from incurring a debt when there are reasonable grounds for suspecting that the company is unable to pay its debts.<sup>3</sup> Victim survivors are still legally liable even though the decisions that led to insolvency were made by the perpetrator who had de facto control of the business, and the victim survivor had no say in the business or was unaware of the wrongdoing. Directors are expected to monitor the company's financial situation<sup>4</sup> and the law currently does not recognise that, in situations of family violence, victim survivors are often unable to do so. On the contrary, powerlessness to prevent the wrongdoing and a lack of involvement are regarded as inadequate reasons to justify a breach of s 588G.<sup>5</sup>

The penalties for insolvent trading are severe. Victim survivors are personally liable for debts incurred by the company when it is insolvent.<sup>6</sup> They may be subject to civil penalties of close to \$1 million or three times the amount of loss, whichever is higher.<sup>7</sup> In addition to their liability for debilitating debt, they may be prohibited from managing companies.<sup>8</sup> Such a prohibition is especially harsh for victim survivors who are trying to establish financial security following family violence, as this prevents them from running a small business and limits their capacity to be self-employed. Directors who breach the duty to avoid insolvent trading may also face criminal penalties of up to 15 years' imprisonment.

Victim survivors may be liable for insolvent trading by subsidiaries that they are not aware of.<sup>9</sup>

### Case Study: Sophia's Story

Sophia\* was married to Peter for a number of years and they had two children together. Sophia separated from Peter several years ago and they finalised their divorce. A family law agreement was reached by consent, under which the title of the family home was transferred solely into Sophia's name and she was to reside in it with their two children. Peter, who Sophia understands worked in finance and property development, was to provide financial support to Sophia and the children to cover daily household expenses in addition to the mortgage repayments on the property. Sophia was to continue her duties as a homemaker, having been unemployed while raising her children.

<sup>3</sup> *Corporations Act 2001* (Cth) s 95A. This includes debts that the company incurs in the ordinary course of business.

<sup>4</sup> *Morley v Statewide Tobacco Services Ltd* (1990) 8 ACLC 825, 847.

<sup>5</sup> *Elliott v Australian Securities and Investments Commission* (2004) 10 VR 369.

<sup>6</sup> *Corporations Act 2001* (Cth).

<sup>7</sup> *Corporations Act 2001* (Cth) s 1317G.

<sup>8</sup> *Corporations Act 2001* (Cth) s 206C.

<sup>9</sup> *Corporations Act 2001* (Cth) s 588V.

Several years ago, Peter was declared bankrupt and could no longer take out credit or conduct business in his own name. As a result, he coerced Sophia to sign several documents and contracts which she had no understanding of, and often was only presented with the signing pages. Sophia felt she had no choice but to sign the documents as Peter would threaten to cut off financial support for her and her children's living expenses if she did not sign. Sophia believes that her signature was also forged on at least one of these documents.

Two years later, Peter was charged with drug related offences and was remanded in custody awaiting trial. Sophia only discovered the extent of the financial abuse following Peter's incarceration, when she became aware that she had been left with a number of liabilities in her name or in company names of which she was the sole director and shareholder. As a result of the financial abuse, Sophia had very limited information and documents regarding these companies. Many of the companies were subsidiaries of the parent company, of which Sophia was the sole director/shareholder. Sophia was pursued for debts incurred by the companies.

*\* Name has been changed for safety and privacy*

### Existing corporate insolvency laws are inadequate

Victim survivors face an uphill battle in seeking release from liability incurred as a result of coercion or deception. In situations of family violence, victim survivors often have little or no say on matters relating to the business and are prevented from accessing information. The courts have refused to allow directors to rely on the defences to insolvent trading when they have not made the necessary inquiries to stay informed and were unaware of the company's financial position.<sup>10</sup>

Section 588H(4) of the *Corporations Act 2001* (Cth) allows directors a defence if they are absent from management because of illness or some other good reason. However, it remains challenging for victim survivors, particularly women who defer to their husbands, who manage the company, to rely on this defence. In *Deputy Commissioner of Taxation v Clark*,<sup>11</sup> the court found that deference to her husband, who managed the business, was not a sufficient reason for absence from management. Based on the case law, and our experience in using similar provisions in the *Taxation Administration Act 1953* (Cth) (see below), it appears that victim survivors of family violence face considerable challenges seeking to rely on the S588H(4) defence.

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<sup>10</sup> *Tourprint International v Bott* [1999] NSWSC 581. In this case, the director could not rely on s 588H(2) which allows directors to be excused if they had reasonable grounds to expect that the company would remain solvent.

<sup>11</sup> [2003] NSWCA 91.

### **Recommendation 1**

**The defence in section 588H(4) of the *Corporations Act 2001* (Cth) should be expanded to specifically recognise family violence as a reason why a director may have not taken part in managing a company.**

### **Creditor-defeating dispositions**

Where perpetrators have moved assets from companies out of the reach of creditors, victim survivors face risks of civil and criminal penalties for failing to prevent creditor-defeating dispositions.<sup>12</sup> They are also exposed to claims for compensation for such dispositions,<sup>13</sup> and in relation to any uncommercial transactions, unreasonable director-related transactions or unfair preferences which may have occurred up to 4 years prior to the relation-back day.<sup>14</sup>

We see significant flow-on consequences for victim survivors who have been appointed as dummy directors of companies controlled by their partner or ex-partner including: breaches of taxation law and associated tax debts; personal liability for company debts by way of personal guarantees incurred as a result of fraud or coercion; and significant family law consequences.<sup>15</sup> It is important that the regulators responsible for law enforcement, liquidators and creditors understand that economic abuse is at times perpetuated through directorships and family businesses, leaving victim survivors with legal liability for the perpetrators' wrongdoing.

We therefore recommend staff training for relevant personnel, as well as guidance for ASIC staff. While there is no exact equivalent example, we refer to the Australian Banking Association's Industry Guidelines for member banks [Preventing and responding to family and domestic violence](#) and [Preventing and responding to financial abuse](#), and the Australian Financial Complaints Authority's [Approach to Joint Accounts and Family Violence](#).

### **Recommendation 2**

**ASIC should have internal guidelines regarding how it applies its discretion not to prosecute for these breaches, which should involve staff appropriately trained to recognise and understand family violence, including economic abuse.**

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<sup>12</sup> *Corporations Act 2001* (Cth) s 588GAB.

<sup>13</sup> *Corporations Act 2001* (Cth) s 588FGAA.

<sup>14</sup> *Corporations Act 2001* (Cth) ss 588FB, 588FDA, 588FA, 588FE.

<sup>15</sup> Complex corporate structures are often used to conceal assets and defeat claims under the *Family Law Act 1975* (Cth).

## ASIC and liquidators

We also recommend that ASIC incorporate an approach to family violence, similar to AFCA, in its regulatory guidance for liquidators and enforcement policies. Guidance on appropriate responses, such as debt waivers when victim survivors incur liability through fraud or coercion, would help to facilitate fairer outcomes when liquidators are seeking to recover compensation for insolvent trading or voidable antecedent transactions.<sup>16</sup> The guidance should clarify that where victim survivors are coerced or defrauded into becoming dummy directors in the context of family violence, they should not be pursued for breaches of directors' duties. ASIC and liquidators should instead pursue the perpetrators as shadow directors who control the company.

### **Recommendation 3**

**Receivers and liquidators should be trained to identify, understand and respond to family violence and economic abuse issues that arise in the course of their work.**

## Taxation debts

Victim survivors who are left to bear the consequences of failed companies commonly receive director penalty notices for failure to withhold PAYG and failure to pay superannuation for employees. They also face liability for failure to complete tax returns or for lodging inaccurate historic tax returns (due to artificial income) and associated tax debts.

### **Case Study: Mary's Story**

Mary\* experienced consistent psychological and financial abuse throughout her relationship with her ex-husband Matt. She was entirely financially dependent on Matt and he unilaterally controlled the couple's finances and all financial decision-making, withholding financial information from Mary. He was physically and emotionally abusive when questioned. When he was facing the liquidation of his company and imminent bankruptcy, he established a new company and coerced Mary to become a director and sign loan documents and personal guarantees for business contracts. He forced Mary to sign documents without giving her an opportunity to read or seek independent advice about them. Mary had no access to any information about the company's financial position and no role in the management of the company's affairs. She had limited financial literacy, no previous business experience and was unaware of the legal implications of directorship.

Matt continued controlling the company while he was bankrupt, until this company was also liquidated and Mary was left with the fallout. After the relationship ended and the company was liquidated, the ATO began pursuing Mary for unpaid tax debt and director penalties. Mary owed approximately \$40,000 in PAYG withholding penalties and approximately

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<sup>16</sup> These include uncommercial transactions (s 588FB), unreasonable director-related transactions (s 588FDA), unfair preferences (s 588FA) and creditor-defeating dispositions (s 588FDB).

\$10,000 in superannuation guarantee charge penalties, which were deducted from each tax return. Mary only became aware of this ATO debt and significant other liabilities in her name following separation. By that point she was in severe financial hardship and relied on Centrelink payments to support her children.

*\* Name has been changed for safety and privacy*

With assistance from an EARG member, Mary was able to obtain pro bono legal representation and successfully argue that the defences in s 269-35(1) and (2)(b) of the *Taxation Administration Act 1953* (Cth) applied. It was unreasonable for her to take part in the management of the company due to the abusive relationship, and there were no reasonable steps she could have taken to comply with her legal obligations as she had no information about the company and was prevented from accessing any information. The ATO exercised its discretion not to pursue her for the tax debts.

However, most victim survivors do not have access to the legal representation required to successfully apply the *Taxation Administration Act 1953* (Cth) defence in circumstances of family violence. In our members' experience, this typically requires representation by specialist tax lawyers at large corporate firms. Many lawyers would not think to apply these defences unless they were familiar with family violence and financial abuse matters.

The fact the available defences do not explicitly contemplate family violence makes them inaccessible for most victim survivors, because they:

- do not know the defence is available;
- do not have the legal understanding and expertise to apply it to their situation; and
- do not have access to pro bono lawyers or advocates to make submissions on their behalf.

#### **Recommendation 4**

**The defence in section 269-35(1) of the *Taxation Administration Act 1953* (Cth) should be expanded to specifically include family violence as a reason why it would have been unreasonable to expect a person to take part, and they did not take part, in the management of the company at any time when they were a director.**

In addition to legislative reform, there is also a need for documented guidance for how the ATO responds to family violence matters, and for relevant ATO staff to receive family violence training. Problems EARG members see are:

- Inconsistent responses because victim survivors rely on the Commissioner for Taxation exercising their discretion not to pursue the victim survivor for the debt.



- An opaque process. Most victim survivors would never know these defences (269-35(1) and (2)(b)) were available to them. Many of our clients have been told by ATO staff that there is nothing they can do and that economic abuse is not a defence to a tax debt, and are often referred by ATO staff to a community financial counsellor for assistance with bankruptcy. This highlights the need for ATO guidance and staff training on DFV.
- A difficult and stressful process.

**Recommendation 5**

**The ATO should develop internal guidelines regarding how it applies its discretion not to pursue an individual for Director Penalty Notices or other tax debts in circumstances of family violence.**

**Recommendation 6**

**The ATO should develop clear and transparent processes for responding to matters involving family violence and economic abuse, including appropriate family violence training of relevant staff.**

Thank you for the opportunity to contribute our expertise to this inquiry. We would welcome any opportunity to discuss our submission further. We can be contacted by email at [earg@earg.org.au](mailto:earg@earg.org.au). We consent to this submission being made public.

Yours sincerely,

**Economic Abuse Reference Group**

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