

HIDDEN RISKS OF ECONOMIC ABUSE THROUGH COMPANY DIRECTORSHIPS

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Economic abuse is a form of family violence that severely inhibits victim survivors' capacities to rebuild their lives. Although its effects are widely felt, it remains a hidden problem. This article contributes to the burgeoning scholarship on economic abuse by investigating its perpetuation through family-owned companies. Victim survivors commonly bear the liability for business failure and phoenix activity as 'straw' directors. Recent reforms introduced to deter and penalise illegal phoenix activity have increased the risks for survivors who are coerced or defrauded into becoming directors. The study examines how corporate law and the courts have responded to straw directors in the context of family companies. It interrogates the notion that victim survivors assume responsibility for business decisions voluntarily, as rational economic men with relatively equal bargaining power. This article proposes reforms to disrupt harm from economic abuse through coerced directorships, and to militate against the unintended consequence of recent reforms.

I INTRODUCTION

The problem of violence against women and children has been jointly described by state and territory governments as having reached 'epidemic proportions in Australia'.¹ Fear of homelessness and the inability to provide for their children is a major deterrent to women leaving violent relationships.² Victim survivors are often faced with the difficult choice of living with violence or poverty.³ Economic abuse

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1 Department of Social Services (Cth), *National Plan to End Violence against Women and Children 2022–2032* (2022) 14.

2 Ibid; National Council to Reduce Violence against Women and Their Children, *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and Their Children, 2009–2021* (March 2009) 44.

3 Anne Summers, 'The Choice: Violence or Poverty' (Research Report, University of Technology Sydney, July 2022) 9–12 <<https://doi.org/10.26195/3s1r-4977>>; Tanya Corrie and Magdalena McGuire, 'Economic Abuse: Searching for Solutions' (Research Report, Good Shepherd Youth & Family Service and Kildonian UnitingCare, May 2013) iv.

has a significant impact on victim survivors' financial security and their capacity to rebuild their lives. At its core, economic abuse involves coercion, deception or unreasonable control of victim survivors by denying them economic autonomy or withholding 'financial support necessary for meeting reasonable living expenses'.⁴ Described as a problem that is hidden in 'plain sight',⁵ economic abuse remains 'under-recognised and under-reported' as a form of family violence.⁶ Nonetheless, emerging data suggests that it affects 78–99% of women seeking assistance from family violence services, and that, overwhelmingly, the victims of economic abuse are women.⁷

This article investigates the problem of economic abuse through business debts, focusing on the lesser known problem of directors' liability for failed companies. In these situations, the perpetrator takes the financial benefits generated through the company, leaving their partner with penalties and liability for debts incurred as a consequence of the perpetrator's business decisions which led to insolvency. In a recent submission to the Parliamentary Joint Committee on Corporations and Financial Services, the Economic Abuse Reference Group ('EARG')⁸ described victim survivors being coerced into assuming liability for corporate wrongdoing as 'straw' directors of family companies controlled by the perpetrator.⁹ With little or no decision-making power nor access to critical information, they are often unable to assume an active role in monitoring the company's financial situation, and to take steps to prevent the company from engaging in insolvent trading, as required by law.¹⁰ Victim survivors are left to bear the liability for breaches of directors' duties including severe penalties and significant debts incurred, often without their knowledge.¹¹ At times, this occurs as part of illegal phoenix activity which involves the 'stripping and transfer of assets from a company to another entity ... with the intention of defeating the interests of the first company's

4 Carolyn Bond and Madeleine Ulbrick, Economic Abuse Reference Group, *Responding to Financial Abuse* (Report, January 2020) 10, citing *Family Violence Protection Act 2008* (Vic) s 6.

5 Nicola Sharp-Jeffs and Sarah Learmonth, 'Into Plain Sight: How Economic Abuse Is Reflected in Successful Prosecutions of Controlling Behaviour' (Research Report, Surviving Economic Abuse, December 2017).

6 Bond and Ulbrick (n 4).

7 Jozica Kutin, Roslyn Russell and Mike Reid, 'Economic Abuse between Intimate Partners in Australia: Prevalence, Health Status, Disability and Financial Stress' (2017) 41(3) *Australian and New Zealand Journal of Public Health* 269, 269 <<https://doi.org/10.1111/1753-6405.12651>>; Adrienne E Adams, Angela K Littwin and McKenzie Javorka, 'The Frequency, Nature, and Effects of Coerced Debt among a National Sample of Women Seeking Help for Intimate Partner Violence' (2020) 26(1) *Violence against Women* 1324, 1324 <<https://doi.org/10.1177/1077801219841445>>.

8 The EARG is an informal group of community organisations which collaborate to reduce the financial impact of family violence. Their members include community legal centres, financial counsellors and family violence services.

9 Economic Abuse Reference Group, Submission No 3 to Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia* (25 November 2022) 2–5.

10 *Corporations Act 2001* (Cth) s 588G ('*Corporations Act*'); *Statewide Tobacco Services Ltd v Morley* (1990) 8 ACLC 825, 847 (Ormiston J).

11 Economic Abuse Reference Group (n 9).

creditors'.¹² Recent reforms aimed at strengthening the detection and deterrence of illegal phoenix activity, including mandatory director identification numbers and heavier penalties, have increased the risks posed to victim survivors from coerced directorships. Following the COVID-19 outbreak, reports reflect an increase in economic abuse, both in frequency and intensity.¹³

The study builds on emerging evidence of victim survivors' lived experiences to investigate three primary objectives. The first objective is to ascertain the way in which the law and the commercial courts respond to the uninformed or straw director in the circumstances described by victim survivors. Second, this article examines assumptions that underpin the failure to adequately consider family violence arising in the context of family companies. The discussion then turns to consider the third research objective which focuses on reforms to disrupt the perpetuation of abuse through family companies. Studies indicate that economic abuse is a gendered issue and the existing evidence centers primarily on the experiences of women in heterosexual relationships.¹⁴ While the experiences of victim survivors in other types of relationships are equally important, the further research required to gain a deeper understanding of liability for debt in these situations is beyond the scope of the current study.

Part II explains the problem of economic abuse in the context of family companies. Part III describes the regulatory framework and judicial decisions, while the assumptions that underpin existing laws are critically examined in Part IV. The critical analysis contributes to a deeper understanding of the legal and conceptual basis for potential reforms. Part V examines reform proposals that adopt a more equitable approach towards victim survivors of family violence. Part VI concludes.

II ECONOMIC ABUSE

A Economic Abuse: Its Perpetuation and Impact

Economic abuse has been described as a 'deliberate pattern of control in which individuals interfere with their partner's ability to acquire, use and maintain economic resources'.¹⁵ Legislation in most Australian states and territories

12 Explanatory Memorandum, Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Cth) 5 [1.3] ('Explanatory Memorandum, Illegal Phoenixing').

13 Department of Social Services (Cth) (n 1) 53, citing Hayley Boxall and Anthony Morgan, 'Intimate Partner Violence during the COVID-19 Pandemic: A Survey of Women in Australia' (Research Report No 3/2021, Australia's National Research Organisation for Women's Safety, October 2021).

14 Australian Law Reform Commission, *Equality before the Law: Women's Equality* (Report No 69, 1994) pt II [13.11] ('*Equality before the Law*').

15 Judy L Postmus et al, 'Economic Abuse as an Invisible Form of Domestic Violence: A Multicountry Review' (2020) 21(2) *Trauma, Violence and Abuse* 261, 262 <<https://doi.org/10.1177/152483801876416>>, citing Adrienne E Adams et al, 'Development of the Scale of Economic Abuse' (2008) 14(5) *Violence against Women* 563 <<https://doi.org/10.1177/1077801208315529>>. The terms 'economic abuse' and 'financial abuse' are often used interchangeably, although financial abuse often focuses on money and finances, while economic abuse is broader, encompassing economic resources such as employment, education and housing: Postmus et al (n 15) 262.

includes economic abuse in the definitions of family violence.¹⁶ Economic abuse is a criminal offence in Tasmania.¹⁷ Coercive control, which includes economic abuse, has recently been criminalised in New South Wales ('NSW').¹⁸ In Victoria, economic abuse is defined as behaviour by a person that is 'coercive, deceptive or unreasonably controls another person' without their consent that denies them 'economic or financial autonomy'.¹⁹ It also includes 'withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses' for victim survivors and their children, if they are 'entirely or predominantly dependent' on the perpetrator 'for financial support to meet those living expenses'.²⁰

Common scenarios include coercing victim survivors to sign contracts for loans or guarantees, refusing to pay for their portion of joint debt,²¹ stealing money or property, fraudulently using personal information to take out credit in her name online,²² and restricting access to economic resources by sabotaging employment or credit histories.²³ Victim survivors have reported that confronting the perpetrator or 'reporting the fraud – as one might do in a non-abusive relationship – means risking harm',²⁴ and that they 'felt powerless over an abuser's financial behaviour due to the fear and threat of reprisal'.²⁵ Economic abuse often occurs in tandem with other forms of family violence such as coercive control and emotional or verbal abuse.²⁶ Physical violence may or may not be involved and in the absence of physical harm, law enforcement agencies, the community and victim survivors themselves at times fail to recognise economic abuse as a form of family violence.²⁷

Studies on coerced debt have revealed that in addition to coercing victim survivors to 'sign financial documents against their will' and to purchase items

16 *Family Violence Act 2016* (ACT) s 8(1)(a)(iv); *Domestic and Family Violence Act 2007* (NT) s 5(e); *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1)(c); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(1); *Family Violence Act 2004* (Tas) s 8; *Family Violence Protection Act 2008* (Vic) s 5; *Restraining Orders Act 1997* (WA) ss 5A(1)(b), (2)(g)–(h).

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

18 *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW).

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

20 *Ibid* s 6(b).

21 Bond and Ulbrick (n 4) 10.

22 Angela Littwin, 'Coerced Debt: The Role of Consumer Credit in Domestic Violence' (2012) 100(4) *California Law Review* 951, 987 <<https://doi.org/10.15779/Z38vr6g>>.

23 Adams, Littwin and Javorka (n 7) 1325.

24 *Ibid*, citing Littwin (n 22).

25 Cynthia K Sanders, 'Economic Abuse in the Lives of Women Abused by an Intimate Partner: A Qualitative Study' (2015) 21(1) *Violence against Women* 3, 19 <<https://doi.org/10.1177/1077801214564167>>.

26 Heather Douglas, *Women, Intimate Partner Violence, and the Law* (Oxford University Press, 2021) 50 <<https://doi.org/10.1093/oso/9780190071783.001.0001>>.

27 Kerryne Barwick, Paul McGorrey and Marilyn McMahon, 'Ahead of Their Time? The Offences of Economic and Emotional Abuse in Tasmania, Australia' in Marilyn McMahon and Paul McGorrey (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 135, 149–51 <https://doi.org/10.1007/978-981-15-0653-6_7>; Supriya Singh, 'Economic Abuse and Family Violence across Cultures: Gendering Money and Assets through Coercive Control' in Marilyn McMahon and Paul McGorrey (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 51, 61 <https://doi.org/10.1007/978-981-15-0653-6_3> ('Economic Abuse and Family Violence across Cultures').

on credit, perpetrators often prevent victim survivors from accessing information about their finances.²⁸ Adrienne E Adams, Angela K Littwin and McKenzie Javorka observe that ‘71% of women surveyed had partners who hid financial information from them’.²⁹ Littwin’s study revealed that perpetrators obtain credit in victim survivors’ names through deception and forgery of their signatures, concealing the existence and extent of coerced debt by hiding mail. Victim survivors are commonly unaware of debt incurred in their names and of their financial position.³⁰

In undermining their financial security, perpetrators present victim survivors with one of the most significant barriers to leaving abusive relationships.³¹ Adams, Littwin and Javorka observe that ‘starting a new life away from an abuser becomes extremely difficult’.³² Impaired credit histories lead to difficulties in securing rental accommodation, utilities, affordable credit and at times even employment.³³ A disproportionate number of women become homeless after fleeing abuse.³⁴ Studies have found that economic abuse can persist for years after separation³⁵ with detrimental effects on economic security, mental health and wellbeing of victim survivors and their children.³⁶ Such abuse exacerbates the economic insecurity already experienced by women as a result of the ‘gendered nature of care’ and ‘undervaluing of women’s paid and unpaid work’, compounding their social and economic disadvantage.³⁷

Scholars have highlighted the instrumentality of law in the perpetuation of economic abuse and, in particular, the assumption that victim survivors enter into contractual obligations voluntarily as rational actors with equal bargaining power who are ‘free, throughout the bargaining process, to act to secure the best possible deal from the transaction’.³⁸ Such assumptions that underpin contract law accept and reinforce the notion that ‘by signing the relevant contract’, victim survivors manifest their intentions to accept legal responsibility for their partners’ debts.³⁹ According to Evgenia Bourova, Ian Ramsay and Paul Ali, ‘[c]ontract law thereby

28 Adams, Littwin and Javorka (n 7) 1326.

29 Ibid 1334.

30 Littwin (n 22) 982–98.

31 *Royal Commission into Family Violence: Summary and Recommendations* (Report, March 2016) 95.

32 Adams, Littwin and Javorka (n 7) 1327.

33 Littwin (n 22) 1001.

34 Sanders (n 25) 5, citing Joan Zorza, ‘Woman Battering: A Major Cause of Homelessness’ (1991) 25(4) *Clearinghouse Review* 421.

35 Kristin Natalier, ‘State Facilitated Economic Abuse: A Structural Analysis of Men Deliberately Withholding Child Support’ (2018) 26(2) *Feminist Legal Studies* 121, 128–31 <<https://doi.org/10.1007/s10691-018-9376-1>>; Anniina Kaittila, Mia Hakovirta and Heini Kainulainen, ‘Types of Economic Abuse in Postseparation Lives of Women Experiencing IPV: A Qualitative Study from Finland’ (2024) 30(2) *Violence against Women* 426, 430, 433–7 <<https://doi.org/10.1177/10778012221127727>>.

36 Laura Johnson et al, ‘Examining the Impact of Economic Abuse on Survivors of Intimate Partner Violence: A Scoping Review’ (2022) 22 *BMC Public Health* 1014:1–19, 17 <<https://doi.org/10.1186/s12889-022-13297-4>>.

37 Postmus et al (n 15) 262.

38 Nicola Howell, ‘“Sexually Transmitted Debt”: A Feminist Analysis of Laws Regulating Guarantors and Co-borrowers’ (1995) 4(1) *Australian Feminist Law Journal* 93, 97 <<https://doi.org/10.1080/13200968.1995.11077158>>.

39 Ibid.

accepts and enforces a woman's responsibility for debts that were incurred as a result of gendered dynamics of power and control, rather than through her own free and informed consent'.⁴⁰ Likewise, corporate law fails to consider the impact that family violence has on the way that small incorporated family businesses are run. Implicit assumptions that 'actors are fully knowledgeable, know the law, and act rationally to further their economic self-interest'⁴¹ are at odds with the experiences of victim survivors who are frequently prevented from accessing the necessary information and from making decisions.

B Economic Abuse through Company Directorships

In its report on women's equality before the law, the Australian Law Reform Commission ('ALRC') emphasised the risks of financial ruin that women face as non-participating company directors 'who have no knowledge of business affairs, no control over the running of the business, and little or no information about its financial position'.⁴² The ALRC further noted that '[t]he wife often feels it is her duty to be a part of her husband's business affairs and sign documents and so on. Women in this position often do not stand to gain much benefit for the risks they run, and it is difficult to gain relief in the courts'.⁴³ In the mid-1990s, law reformers sought to alleviate the problem by amending corporations legislation to allow companies to have a sole director and sole member, reasoning that women would 'stand most to gain from this change'⁴⁴ and that it would help to 'overcome the problem with "silent directors" and "sexually transmitted debt"'.⁴⁵ Nonetheless, economic abuse through company directorships continues to occur, and the ways in which it is perpetuated and its impact on victim survivors have remained largely hidden.

In their recent submission, EARGL members comprising family violence services, community lawyers and financial counsellors who assist victim survivors reveal a number of ways in which economic abuse is perpetuated through company directorships and business debts.⁴⁶ Abusive partners coerce victim survivors into becoming a co-director or sole director of companies controlled by the abuser, while denying them decision-making power and access to financial information.

40 Evgenia Bourova, Ian Ramsay and Paul Ali, 'Limitations of Australia's Legal Hardship Protections for Women with Debt Problems Caused by Economic Abuse' (2019) 42(4) *University of New South Wales Law Journal* 1146, 1150 <<https://doi.org/10.53637/SMCG9343>>.

41 Melvin A Eisenberg, 'Why There Is No Law of Relational Contracts' (2000) 94(3) *Northwestern University Law Review* 805, 808.

42 *Equality before the Law* (n 14) [13.56], quoting R Evans, 'Spouse Directors Run Grave Risks, Report Says' (1994) 68(4) *Law Institute Journal* 234.

43 *Equality before the Law* (n 14), quoting Evans (n 42).

44 Parliamentary Joint Committee on Corporations and Securities, Parliament of Australia, *Report on the First Corporate Law Simplification Bill 1994* (Report, 2 March 1995) [2.60] ('*Report on the First Corporate Law Simplification Bill*'), quoting Australian Securities Commission, Submission No 5 to Parliamentary Joint Committee on Corporations and Securities, *First Corporate Law Simplification Bill* 1–2.

45 *Report on the First Corporate Law Simplification Bill* (n 44) [2.61], quoting Corporations Law Simplification Task Force, Submission No 1 to Parliamentary Joint Committee on Corporations and Securities, *First Corporate Law Simplification Bill* 4. Following the report, the *First Corporate Law Simplification Act 1995* (Cth) was enacted.

46 Economic Abuse Reference Group (n 9) 2–3.

These situations commonly resonate with characteristics of coerced debt such as being pressured to sign documents without knowing what they entail, and facing threats if they resist or raise questions.⁴⁷

This is illustrated in the EARG's case study of Mary who was psychologically and financially abused by her ex-husband and was entirely financially dependent on him.⁴⁸ He controlled their financial decisions, withheld information from her, and was abusive when questioned. He forced Mary to sign documents without giving her the opportunity to read them or seek advice. As a result, she became a director of a company which he controlled and signed personal guarantees and loan documents but had no role in the company's management or access to information about its financial position, nor knowledge of her legal obligations as a director. When the company became insolvent, Mary was pursued for liability for unpaid tax and director penalties.

As perpetrators have access to their personal information, victim survivors have also been registered as directors of a company fraudulently without their knowledge, becoming aware of their directorship years later when pursued for liability. According to the EARG:

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 ... 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.'⁴⁹

Abusers have been known to take 'control of a business run by the victim survivor and [sabotage] the business or [siphon] off its assets'.⁵⁰ Economic abuse through business debts can occur after separation or divorce and victim survivors have told of being pressured to sign documents while unaware of their legal consequences amidst threats by the perpetrator to cut off financial support to them and their children.⁵¹ Mothers who give up their careers to focus on caring for the children and remain financially dependent on their ex-husband post-separation are particularly at risk of such pressure.

Coercive debts could potentially also occur through family businesses involving the perpetrator's extended family. Women from some culturally and linguistically diverse ('CALD') backgrounds may be more susceptible to this, particularly where cultural norms allow 'men across generations' control over the family's financial resources.⁵² Supriya Singh observes that in patrilineal Hindu joint families, for instance, money is often perceived as belonging to the family rather than the couple.⁵³ Against this backdrop, pressuring women to assume liability for

47 Ibid. See nn 28–30.

48 Ibid 7. The victim survivor's name was changed for safety and privacy.

49 Ibid 3.

50 Ibid.

51 Ibid 4–5.

52 Singh, 'Economic Abuse and Family Violence across Cultures' (n 27) 58. One survivor's account in Singh's study mentions 'coercive debts' through her directorship in the family business: at 67.

53 Ibid 58.

debt on behalf of the family or the family business may be more easily masked as part of cultural norms. Economic abuse among immigrant and refugee women in Australia has remained relatively under-researched due to various barriers including language and social isolation. Emerging research suggests that they are ‘more likely to experience multi-perpetrator family violence, involving extended families and community members’.⁵⁴

In situations where victim survivors are left with liability for business debts or breaches of legal obligations, they are often pursued for such liability even when evidence of family violence is given to creditors or the authorities.⁵⁵ The consequences for victim survivors are diverse, far-reaching and debilitating and, in many cases, the adverse effects flow on to their children. Their liability for business debts can arise from guarantees, breaches of the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) and tax laws. Failure to declare their ‘salaries’ from the directorship which they may never actually have received can give rise to social security debt.⁵⁶ They may face risks of criminal prosecution and civil penalties.⁵⁷ They are harassed for debt repayments despite not having had the benefits of the loans, enduring financial difficulties and jeopardising their credit histories if payments are late.⁵⁸ As noted earlier, poor credit records lead to housing insecurity and difficulties obtaining affordable credit. Statistics indicating that single mothers are the highest users of multiple, concurrent payday loans, often for household expenses,⁵⁹ resonate with concerns of financial difficulties post-separation.⁶⁰ Such reliance on high-cost credit runs risks of being caught in increasing debt which can lead to entrenched financial disadvantage.⁶¹ Bankruptcy or entry into a debt agreement results in the inability to work in some professions.⁶² If victim survivors are disqualified from managing companies as a consequence of breaching

54 Cathy Vaughan et al, ‘Promoting Community-Led Responses to Violence against Immigrant and Refugee Women in Metropolitan and Regional Australia: The ASPIRE Project’ (Research Report, Australia’s National Research Organisation for Women’s Safety, December 2016) 11.

55 Economic Abuse Reference Group (n 9) 3, 7.

56 Sally Cameron, ‘How Well Does Australia’s Social Security System Support Victims of Family and Domestic Violence?’ (Research Report, National Social Security Rights Network, August 2018) 15.

57 See Part III(A).

58 Lucinda O’Brien et al, ‘An Impending “Avalanche”: Debt Collection and Consumer Harm after COVID-19’ (2021) 49(2) *Australian Business Law Review* 84, 100 <<https://doi.org/10.2139/ssrn.3917247>>.

59 Good Shepherd Microfinance and Digital Finance Analytics, *Women and Pay Day 2018* (Report, January 2018) 6–8.

60 A study by O’Brien, Ramsay and Ali found that bankruptcy among older women is linked to the long term ‘financial cost of single motherhood’, often without child support from former partners: Lucinda O’Brien, Ian Ramsay and Paul Ali, ‘The Distinctive Features of Women in the Australian Bankruptcy System: An Empirical Study’ (2019) 54(2) *Australian Journal of Social Issues* 173, 186 <<https://doi.org/10.1002/ajs4.64>>.

61 Exposure Draft Explanatory Materials, National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 (Cth) ch 6 [6.10]–[6.11].

62 For example, undischarged bankrupts are prohibited from managing corporations: *Corporations Act* (n 10) s 206B(3); their licence to operate as an estate agent will automatically be cancelled in Victoria: *Estate Agents Act 1980* (Vic) s 22; their right to practise in the legal profession may be jeopardised: *Legal Profession Uniform Law 2014* (NSW) ss 6 (definition of ‘bankruptcy-related event’), 86.

their duties under the *Corporations Act*,⁶³ the capacity for self-employment is significantly limited. This is especially detrimental to women who are seeking to re-establish themselves in the marketplace after significant career interruption to care for children. The multiple and persistent effects of economic abuse have detrimental consequences for victim survivors' mental and physical health, and social and economic inclusion, prolonging the harmful impacts of family violence.

In light of reforms that have increasingly imposed higher standards of accountability on directors, heightened efforts to detect and penalise phoenix activity, and higher penalties for breaches of duties,⁶⁴ there is an urgent need to consider the way in which the law and the courts respond to victim survivors who are coerced into becoming straw directors. Reports of economic abuse have increased since the COVID-19 outbreak, further underscoring the need to prevent corporate law from being misused as an instrument of coercive control.⁶⁵

III REGULATORY FRAMEWORK

Survivors' experiences discussed in Part II involve legal frameworks that directors of companies commonly interact with. Directors' obligations under legislation are described in Part III(A). The *Corporations Act* sets out directors' duties and liabilities in relation to corporate insolvency. These are explained in Part III(A)(1). Subsequently, the defences to such liabilities are discussed. In addition, when companies fail to comply with obligations under the *Taxation Administration Act 1953* (Cth) ('*Taxation Administration Act*'), directors face penalties and personal liability for tax debts. Part III(A)(2) examines these tax-related liabilities. The discussion then turns to examine additional barriers to justice which victim survivors face in Part III(A)(3). Directors commonly sign guarantees for loans to the company which are governed by contract law. A substantial body of case law has developed around the issue of wives who sign guarantees for their husband's business debts. Equitable principles have at times intervened in favour of wives who signed guarantees in response to egregious conduct. These cases are examined in Part III(B) to gain a deeper understanding of the way in which the courts have responded to allegations of domestic abuse in relation to business debts.

A Legislation

1 *Liability for Corporate Failure*

Directors of a company face risks of personal liability for business debts and other penalties as a result of several obligations arising under the *Corporations Act*. These include the duty to avoid insolvent trading and, more recently, the duty

63 *Corporations Act* (n 10) s 206C.

64 See, eg, *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth); *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

65 Kerry Carrington et al, 'The Impact of COVID-19 Pandemic on Australian Domestic Violence Services and Their Clients' (2021) 56 *Australian Journal of Social Issues* 539, 547.

to prevent creditor-defeating dispositions which involve severe civil and criminal penalties.⁶⁶ Directors are required to continually monitor the company's financial situation to ensure that it is not trading while insolvent.⁶⁷ They are judged according to an objective standard of a 'director of ordinary competence' who is 'expected to be capable of reaching a reasonably informed opinion about the financial capacity of the company'.⁶⁸ If a company is unable to pay all its debts as and when they become due, the directors must take steps to prevent the company from trading and incurring further debt.⁶⁹ If they fail to do so, the directors are personally responsible for paying compensation to creditors for debts incurred while the company is insolvent.⁷⁰ This also applies to subsidiaries that continue to trade while insolvent.⁷¹ They may face civil penalties such as disqualification from managing companies and pecuniary penalties of up to \$1.565 million.⁷² Directors may face criminal penalties which include imprisonment to a maximum of 10 years for breaching the duty to prevent creditor-defeating dispositions.⁷³

Victim survivors have at times found themselves liable for breaches of duties in relation to companies and subsidiaries that they were not aware of.⁷⁴ When abusive partners move assets from companies out of the reach of creditors, victim survivors who are directors or recipients of such assets are exposed to claims for compensation and recovery. Liquidators may bring proceedings to recover the value of such assets based on several grounds. Reforms that have been introduced to combat illegal phoenix activity allow recovery against directors and others where there has been a disposal of corporate assets for less than the market value, preventing or hindering the assets from becoming available to creditors in a winding up.⁷⁵ The *Corporations Act* also allows recovery of assets or compensation from

66 *Corporations Act* (n 10) ss 588G, 588GAB.

67 *Ibid* ss 180(1), 588G; *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113, 141–2 [118]–[121] (Spigelman CJ, Handley JA agreeing at 150 [171], Hodgson JA agreeing generally at 150 [172]) ('Clark').

68 *Credit Corporation Australia Pty Ltd v Atkins* (1999) 30 ACSR 727, 741 [44] (O'Loughlin J) ('*Credit Corporation Australia*'). Likewise, a director's duty to exercise care and diligence is underscored in cases such as *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 321 [124] (Middleton J).

69 *Corporations Act* (n 10) ss 95A, 588G.

70 *Ibid* s 588M.

71 *Ibid* s 588V.

72 A director who breaches section 588GAB may be ordered to pay a pecuniary penalty of up to 5,000 penalty units: *ibid* s 1317G(3). From 1 July 2023, the value of a penalty unit was increased to \$313: Australian Securities & Investments Commission, *Fines and Penalties* (Web Page, 2 July 2023) <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/fines-and-penalties>>, citing *Crimes Act 1914* (Cth) s 4AA. The court may order the director to pay three times the amount of benefit derived or detriment avoided and if this amount is higher than \$1.565 million, the director may be ordered to pay the higher amount: *ibid* s 1317G. A pecuniary penalty of up to 2,000 penalty units can be imposed on directors who breach the duty to avoid insolvent trading: *ibid* s 588G(3), sch 3.

73 *Corporations Act* (n 10) s 588GAB(1), sch 3.

74 Economic Abuse Reference Group (n 9) 4.

75 *Corporations Act* (n 10) s 588FGAA.

those involved in any uncommercial transactions, unreasonable director-related transactions or unfair preferences occurring up to 4 years before liquidation.⁷⁶

Nonetheless, there are defences in the legislation to such liability which could be better utilised to facilitate fairer outcomes for victim survivors. These are discussed below.

(a) *Defences to Insolvent Trading*

Several defences are available to directors in situations where the company continues to trade while insolvent. They may be excused from liability if they are able to demonstrate that they: had reasonable grounds to expect solvency; reasonably relied on information provided by others; were absent from management due to illness or some other good reason; or took reasonable steps to prevent the company from incurring the debt.⁷⁷ Nonetheless, the courts have been unsympathetic towards straw directors who rely on their husbands to make business decisions and manage the company's finances, insisting that every director must participate in the company's management and keep informed of its financial situation.⁷⁸ At times, attempts to rely on defences may also fail on evidential grounds.

Several judicial decisions illustrate the challenges that wives or former wives who are straw directors face when a company becomes insolvent. In *Deputy Commissioner of Taxation v Clark* ('*Clark*'), the Court found that Mrs Clark had breached the duty to prevent insolvent trading. Mrs Clark was primarily a housewife and mother who signed documents when Mr Clark requested her to do so without explaining the implications, usually with 'a frying pan in one hand and ... [signing] with the other'.⁷⁹ The Court held that Mrs Clark's 'total reliance on her husband' to manage the company was 'not a "good reason" ... for her non-participation in' management.⁸⁰ Spigelman CJ noted that 'there is no justification for a doctrine' which would relieve 'sleeping directors' of their liabilities.⁸¹

In *Credit Corporation Australia Pty Ltd v Atkins*, Mrs Atkins and her former husband were the only two directors of the company.⁸² She had minimal involvement in the affairs of the company. The company had previously been profitable, becoming insolvent while she had relocated to another state, was in the midst of a divorce and wanted 'little or nothing to do' with her ex-husband and his

76 Ibid ss 588FA–588FB, 588FDA, 588FE–588FF. For more on the intersection between family law and corporate insolvency, see Suelen McCallum and Karina Ralston, 'Bankruptcy and Family Law: Oil and Water Still Do Not Mix' (2017) 18(9) *Insolvency Law Bulletin* 192. See generally Peter Leech, 'Impugning a Binding Financial Agreement as an Unreasonable Director-Related Transaction' (2017) 18(9) *Insolvency Law Bulletin* 210; David Brown, 'Consent Orders in the Family Court and Unreasonable Director-Related Transactions under s 588FDA of the *Corporations Act 2001: D Pty Ltd (in liq) v Calas (Trustee)*' (2017) 18(9) *Insolvency Law Bulletin* 214.

77 *Corporations Act* (n 10) ss 588H(2)–(5).

78 *Clark* (n 67) 141–2 [118]–[121] (Spigelman CJ, Handley JA agreeing at 150 [171], Hodgson agreeing generally at 150 [172]), 138–141 [98]–[114].

79 Ibid 117 [10] (Spigelman CJ).

80 Ibid 149–50 [168] (Spigelman CJ, Handley JA agreeing at 150 [171], Hodgson JA agreeing generally at 150 [172]).

81 Ibid 149 [167].

82 *Credit Corporation Australia* (n 68) 729 [2].

company.⁸³ She sought to be excused from liability for insolvent trading, arguing that she was not the party who incurred the debts, had no knowledge of them and was entitled to rely on the accountant to ‘advise her that the company should cease trading if there was a cause for concern’.⁸⁴ She was found liable for breaching her duty as she ‘could not rely on her ignorance of the company’s affairs’ and had impliedly consented to the debts.⁸⁵ O’Loughlin J observed:

A lazy director or an inefficient director cannot hide behind the shield of ignorance, laziness or inefficiency; if for any unjustified reason, such a director chooses to leave the affairs of the company to another, at a time when that director had every opportunity to be aware of the incurring of debts, that director has a heavy responsibility in satisfying the court that she or he was not impliedly consenting to the incurring of the company’s debts.⁸⁶

His Honour further reasoned that ‘[i]t would be absurd for a defendant to be able to establish a defence simply on the basis of what he in fact knew. This would reward the incompetent director who ought to have known a great deal more than he in fact knew’.⁸⁷

Similarly, the wife and only other director and shareholder of the company was held liable for breaching the duty to avoid insolvent trading in *Group Four Industries Pty Ltd v Brosnan* (‘*Group Four Industries*’).⁸⁸ Mrs Brosnan was a dressmaker by trade who had very little business experience. Her role in the company was limited to answering the phone, accepting deliveries made to the house and some banking. She was not involved with creditors, leaving her husband to manage the business and had very little knowledge of the company’s financial situation.⁸⁹ The Supreme Court of South Australia found that she had implicitly acquiesced and consented to her husband incurring debts while the company was insolvent.⁹⁰ Further, Debelle J asserted that the capacity to draw the inference that she had reason to suspect that debts will be incurred on behalf of the company may be stronger in situations where the two directors are husband and wife, and the wife leaves the management to him.⁹¹ Ignorance was no excuse and the question of whether she had the power to prevent the debt from being incurred was irrelevant.⁹²

The principle that a director who failed to make the necessary inquiries cannot hide behind ignorance of the company’s affairs⁹³ is problematic for victim survivors who are coerced into becoming directors without access to financial information or any say on how the business is managed. The underlying assumption that directors

83 Ibid 765 [125], [127].

84 Ibid 766–7 [131]–[133].

85 Ibid 767 [133], 771–2 [143]–[145].

86 Ibid 768–9 [134].

87 Ibid 769 [137], citing *Commonwealth Bank of Australia v Freidrich* (1991) 5 ACSR 115, and quoting *Rema Industries and Services Pty Ltd v Coad* (1992) 107 ALR 374, 382 (Lockhart J).

88 (1992) 59 SASR 22 (‘*Group Four Industries*’).

89 Ibid 26.

90 Ibid 72.

91 Ibid 69.

92 Ibid 59–60 (Olsson J), 69 (Debelle J).

93 *Metal Manufactures Ltd v Lewis* (1986) 4 ACLC 739, 749–50 (Hodgson J).

accept their legal obligations voluntarily as rational actors with equal bargaining power is at odds with the lived realities of family violence.

(b) *Absence from Management Due to Illness or Some Other Good Reason*

Victim survivors who are coerced into becoming straw directors and prevented from involvement in management decisions ostensibly have legitimate reasons for their lack of knowledge concerning the company's financial situation and absence from management. Section 588H(4) states that it is a defence if it is proved that, because of illness or for some other good reason, they did not take part at that time in the management of the company. The *Taxation Administration Act* has an equivalent defence,⁹⁴ and EARG observes that this defence has been relied on by pro bono lawyers representing a survivor to negotiate a waiver of liability with the Australian Taxation Office ('ATO').⁹⁵ However, in many cases, survivors do not have access to such legal representation and, in any event, '[m]any lawyers would not think to apply these defences unless they were familiar with family violence and financial abuse matters'.⁹⁶

In addition, the existing case law poses a challenge as the courts are critical of straw directors, viewing them as irresponsible. The Court of Appeal in *Clark* noted that the reforms in 1995 which allowed companies to be incorporated with one director were meant to address the 'element of unfairness in making spouse directors responsible for the company's debt on insolvency'.⁹⁷ This reform, coupled with the directors duty of care and diligence, further bolsters the view that there is no excuse for the wife's lack of involvement and total reliance on her husband.⁹⁸

Subsequent judicial decisions involving section 588H(4) indicate that the defence continues to be interpreted narrowly. For example, in *Walsh Engineering Services Pty Ltd (in liq) v Walsh Group (Aust) Pty Ltd*, Mrs Walsh produced a medical report of several medical conditions that affected her cognitive function, memory and speech.⁹⁹ She argued that she was unsure of what she had signed because of her health conditions, was routinely asked to sign documents and 'simply trusted her husband'.¹⁰⁰ The medical evidence was held to be insufficient, Hetyey AsJ noting that Mrs Walsh was able to run her own business as a beauty therapist.¹⁰¹ In a similar vein, evidence of episodic illness was rejected in *Star v Green* as an explanation for the director's failure to take part in management at other times.¹⁰² Scepticism towards claims of illness preventing directors from being involved in management is also reflected in *Williams v Scholz*, where the director's

94 *Taxation Administration Act 1953* (Cth) sch 1 s 269-35(1) ('*Taxation Administration Act*').

95 Economic Abuse Reference Group (n 9) 8.

96 *Ibid.*

97 *Clark* (n 67) 147-8 [155]-[157] (Spigelman CJ).

98 *Ibid* 140 [108], 149-50 [167]-[168].

99 [2021] VSC 206, [80] (Hetyey AsJ).

100 *Ibid* [78]-[80].

101 *Ibid* [85].

102 [2009] FMCA 612, [35] (Smith FM).

advanced age and diagnosis of cancer were rejected as insufficient evidence of illness that prevented participation in the company's management.¹⁰³

While the cases discussed above did not raise allegations of family violence, Jenny Lovric and Jenni Millbank's analysis of wives as guarantors provides insights into the way in which issues of violence have been treated in commercial litigation before the courts.¹⁰⁴ A comparison between their empirical findings and the EARG members' observations suggests that there are many similarities and substantial overlap between the ways in which wives' liability for the husband's business debts arise, whether as guarantor or company director. In many cases, wives are pressured into signing documents without knowing the legal obligations that they entail, and wives who are coerced into becoming straw directors are often also guarantors for business debts.

Lovric and Millbank observe that the courts 'tended to disregard or discount' evidence of violence 'because of the way in which it emerged or because of its lack of proximity to the transaction in question'.¹⁰⁵ They note that the courts downplayed domestic abuse in several cases, citing *Elkofairi v Permanent Trustee Co Ltd*¹⁰⁶ in which 'evidence of threats and violence given by the wife during the trial was largely disregarded and barely discussed in the trial judgment'.¹⁰⁷ Similarly, in *Sialepis v Westpac Banking Corporation*,¹⁰⁸ Hunter J was dismissive of the wife's claims of duress and undue influence as 'the evidence disclosed that there was no act of violence – only threats of violence – committed by the husband towards his wife for several years prior to the execution of the mortgage'.¹⁰⁹ According to Lovric and Millbank, '[t]he wife had earlier deposed to violence in the marriage in an affidavit filed in Family Court proceedings'.¹¹⁰ Nonetheless, the proceedings on her liability as guarantor were not framed around any allegations of violence, and the court rejected her counsel's application to amend her pleadings to include a claim of undue influence and duress. In the separate Family Court proceedings, the wife gave evidence of violence and of a restraining order against her husband after he had threatened her, saying that 'it will only cost \$800 to get rid of you. You could be sunk to the bottom of Sydney Harbour with a slab of concrete'.¹¹¹

103 [2007] QSC 266, [44] (Chesterman J).

104 Jenny Lovric and Jenni Millbank, 'Darling, Please Sign This Form: A Report on the Practice of Third Party Guarantees in New South Wales' (Research Report No 11, New South Wales Law Reform Commission and University of Sydney, October 2003) 134 [7.56].

105 Ibid.

106 (2003) Aust Contract Reports ¶90-157.

107 Lovric and Millbank (n 104) 135 [7.58]. In that case, Mrs Elkofairi testified that her husband 'continually abused and yelled at her, that she had attempted to leave her husband on 3 or 4 occasions and attempted suicide because of the way her husband treated her. She feared violence if she did not do as he said and in April 1996 she obtained an apprehended violence order against her husband': at 135 [7.58], citing Elkofairi, Submissions in *Elkofairi v Permanent Trustee Co Ltd*, CA 41071/01.

108 [2001] NSWSC 101.

109 Lovric and Millbank (n 104) 135, citing *ibid* [133].

110 Lovric and Millbank (n 104) 134 [7.57].

111 *Ibid*, citing *Sialepis v Sialepis* (Supreme Court of New South Wales, Hunter J, 1 September 2000) [20].

(c) Forgery

When their signatures are forged on contracts executed on behalf of the company, directors face additional challenges as a result of the statutory assumptions in sections 128 and 129 of the *Corporations Act*. Creditors are entitled to assume that contracts are properly executed¹¹² and directors are bound by them unless the creditor knew or suspected that there was an irregularity.¹¹³ In situations where the wife leaves her husband to run the business as managing director, and they are the only directors and shareholders, a creditor who deals with the husband may not suspect a forgery.¹¹⁴ She cannot claim the forgery as a defence to liability even if this was done without her knowledge. In *Story v Advance Bank Australia Ltd*, Mrs Story's signature was forged by her husband who controlled the business.¹¹⁵ The contract was binding as a result of the statutory assumptions.¹¹⁶ Mrs Story left business matters to him as she was looking after their children. Her lack of involvement in the business was perceived as her choice, Gleeson CJ observing that she had a tertiary education and understood business matters but did not complain about the mortgage when she found out subsequently, until marital disputes arose.¹¹⁷

2 Tax Liabilities

Directors are personally liable for payments to the ATO for amounts such as pay-as-you-go ('PAYG') and superannuation guarantee charges that the company fails to pay.¹¹⁸ They are also personally liable to compensate the ATO if payments are recovered by liquidators from the ATO as unfair preferences.¹¹⁹ According to the EARG:

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.¹²⁰

When they raise problems of economic abuse with the ATO, victim survivors are often told by ATO staff that 'there is nothing they can do' and that 'economic

112 *Corporations Act* (n 10) ss 128, 129(5)–(6). See also *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 200 (Dawson J).

113 Creditors are not entitled to assume that contracts are properly executed if they know or suspect that the assumption is not true: *Corporations Act* (n 10) s 128(4).

114 See also *Bank of New Zealand v Fiberni Pty Ltd* (1993) 14 ACSR 736 where it was held that the bank ought to have known that the signatories did not have authority: at 744, 746–7 (Kirby P), 750 (Priestley JA, Clarke JA agreeing at 752).

115 (1993) 31 NSWLR 722, 725–6 (Gleeson CJ).

116 *Ibid* 737 (Gleeson CJ, Cripps JA agreeing at 742).

117 *Ibid* 726–7 (Gleeson CJ, Cripps JA agreeing at 742); Belinda Fehlberg, 'Women in "Family" Companies: English and Australian Experiences' (1997) 15(6) *Company and Securities Law Journal* 348, 353 ('Women in "Family" Companies').

118 *Taxation Administration Act* (n 94) sch 1 div 269–20.

119 *Corporations Act* (n 10) s 588FGA.

120 Economic Abuse Reference Group (n 9) 7.

abuse is not a defence to a tax debt'.¹²¹ ATO staff commonly refer victim survivors to a 'community financial counsellor for assistance with bankruptcy'.¹²² Nonetheless, the *Taxation Administration Act* has defences similar to those available in relation to insolvent trading.¹²³ These include taking all reasonable steps to ensure that an administrator or small business restructuring practitioner was appointed.¹²⁴ Likewise, it is a defence if because of illness or some other good reason, it would have been unreasonable for her to take part in the management of the company.¹²⁵

Several judicial decisions illustrate the challenges that uninvolved directors face in seeking to rely on the defence that they had good reasons for absence from management. For example, in *Deputy Commissioner of Taxation v Robertson*, a wife agreed to be a director of her former husband's company during the marriage 'to sign cheques' when he was suffering from cardiac problems.¹²⁶ She subsequently resigned but the resignation was not lodged with the Australian Securities & Investments Commission ('ASIC').¹²⁷ She was held liable despite explaining her absence on the ground that she believed she had resigned, with the judgment emphasising that it was unacceptable for her to 'entirely abdicate her responsibilities'.¹²⁸ Likewise, an effort to rely on the defence on the ground that the director was 'shut out from the [c]ompany' was dismissed as an inadequate excuse in *Deputy Commissioner of Taxation v Holton*.¹²⁹

In *Deputy Commissioner of Taxation v Pavlinovich*, the wife became a director at the insistence of her husband.¹³⁰ He assured her that it would only be 'for the term of his Part X administration', she would not incur any personal liability, the company's employees would continue to manage the business and she would not be required to take part in its management.¹³¹ Her reasons were rejected as 'incapable of satisfying the requirements of ... a "good reason"' for her failure to take part in the company's management.¹³²

As noted in Part III(A)(1)(b) above, the defence has been successfully relied on to negotiate a victim survivor's release from liability with the assistance of pro bono legal experts.¹³³ However, most victim survivors do not have access to legal representation. Even when represented, victim survivors have encountered

121 Ibid 9.

122 Ibid.

123 *Taxation Administration Act* (n 94) sch 1 s 269-35. See Part III(A)(1)(a)-(b).

124 Ibid sch 1 s 269-35(2)(a).

125 Ibid sch 1 s 269-35(1).

126 Her husband had reassured her that she would not need to be involved in managing the business as 'others would look after the ... business' and 'when I get better you will no longer be required on the record': (2009) 234 FLR 35, 47 [36] (Harrison J).

127 Ibid 48 [38].

128 Ibid 67 [105], 69 [115].

129 [2016] VCC 516, [48] (Judge Kennedy). The Court reiterated the decision in *Clark* (n 67), emphasising that 'non-participation per se is impermissible. Accordingly, reasons which cause a director never to participate in management are not capable of constituting "good reason" for not participating': at [50].

130 (2001) 47 ATR 23.

131 Ibid 28-9 [21].

132 Ibid 29 [22].

133 Economic Abuse Reference Group (n 9) 8.

difficulties negotiating with the ATO despite evidence that their failure to meet tax obligations was due to severe family violence.¹³⁴ The strain of dealing with the ATO, its reluctance to reconsider the victim survivors' degree of 'culpability', and ongoing coercive control by abusers who use these tax obligations as leverage against victim survivors, have adverse impacts on survivors' mental health and ability to recover from family violence.¹³⁵

The need for more effective intervention to safeguard victim survivors who have been coerced into liability for small business tax debts is all the more urgent given the ATO's resumption of debt collection after temporary reprieve during the COVID-19 pandemic.¹³⁶ Pre-pandemic reports highlight concerns over the ATO's use of garnishment that can severely impact small businesses and their capacity to continue trading,¹³⁷ which may in turn precipitate a victim survivor's liability for insolvent trading as a straw director. The ATO's wide powers allow them to issue garnishee notices to employers, banks and others who owe money to the taxpayer.¹³⁸ Such garnishment has the potential to further exacerbate the deprivation and financial difficulties that victim survivors often face while fleeing violence.

3 Barriers to Justice for Victim Survivors

In addition to the difficulties that victim survivors face in seeking release from liability when they are straw directors, several other barriers to redress add to their challenges. These include the lack of legal representation, poor understanding of family violence and the perception that commercial transactions ought to be separate from intrafamilial arrangements. Victim survivors often have limited resources and lack access to affordable legal advice. The EARG underscores the challenges that many victim survivors face in getting pro bono legal representation as such cases often require specialist knowledge.¹³⁹ Consequently, '[m]any victim survivors see no other option but to declare bankruptcy as a result of the financial abuse they have experienced'.¹⁴⁰ Similarly, a study on wives as guarantors, a situation which commonly arises where victim survivors are directors, indicates that the costly, protracted legal proceedings are a serious impediment for impecunious litigants.¹⁴¹

The need for better understanding of family violence in the legal system poses an additional challenge for victim survivors. The ALRC's report on family violence highlighted the lack of knowledge and the importance of education and training for judicial officers and practitioners to foster a better understanding of

134 Law Council of Australia, Business Law Section, Submission to Australian Taxation Office, *Working with Vulnerable Clients* (30 November 2021) 17–18.

135 *Ibid.*

136 Josh Needs, 'ATO's Debt Recovery Campaign Hits NSW Hardest', *Accountants Daily* (online, 28 February 2023) <<https://www.accountantsdaily.com.au/business/18220-ato-s-debt-recovery-campaign-hits-nsw-hardest>>.

137 Australian Small Business and Family Enterprise Ombudsman, *Australian Tax Office: Enforcement of Debt Recovery* (Report, 2019) 4.

138 *Taxation Administration Act* (n 94) sch 1 s 260-5.

139 Economic Abuse Reference Group (n 9) 8.

140 *Ibid.* 3.

141 Lovric and Millbank (n 104) 120 [7.11].

family violence.¹⁴² In interviews conducted by the Women's Legal Service Victoria, survivors raised concerns about 'being believed by the judge when they raised allegations of family violence and having those allegations of family violence taken seriously by the court', echoing concerns raised by the ALRC's report concerning the '[j]udiciary's lack of understanding of the complex dynamics and impacts of family violence'.¹⁴³ Lawyers often do not recognise the relevance of family violence in relation to liability for business debts 'unless they [are] familiar with family violence and financial abuse'.¹⁴⁴

Some of the difficulties in recognising the relevance of family violence to directors' liabilities are attributed to the tendency to maintain a clear distinction between commercial matters and family relationships.¹⁴⁵ Inadequate understanding of the dynamics of family violence and of its intersection with corporate and commercial law acts as a disincentive to victim survivors' disclosure of threats or coercion, leading to the view that family violence commonly remains hidden and unreported as

[b]oth victim and perpetrator are unlikely to disclose these matters to a bank or even a solicitor consulted for the purpose of obtaining independent legal advice for a transaction. ... Further a guarantor who consults a solicitor once problems arise with the guarantee may also be reluctant to reveal that violence to a solicitor she is consulting about a business or commercial matter.¹⁴⁶

The courts also have power to grant a person relief from liability where they have acted honestly and should 'fairly' be excused 'having regard to all the circumstances of the case'.¹⁴⁷ Nonetheless, the EARG contends that as the legislation does not expressly contemplate family violence, victim survivors and lawyers are often not aware of the possibility of raising family violence as a defence.¹⁴⁸ Even when victim survivors are able to obtain pro bono legal representation, negotiating with creditors on the basis of family violence is usually a 'difficult and stressful process'.¹⁴⁹

Heather Douglas' interviews with victim survivors reveal the multiple challenges faced in dealing with the legal system which have been described as 'secondary abuse'.¹⁵⁰ Legal proceedings were often 'initiated and prolonged by the abuser as an aspect of coercive control'.¹⁵¹ Lack of access to legal aid and the high cost of retaining a private lawyer further undermined financial security, and victim survivors were pressured to 'settle cases unfairly or unsafely'.¹⁵² While the

142 Australian Law Reform Commission, *Family Violence: A National Legal Response* (Final Report No 114, October 2010) vol 1, 735–6 [16.169]–[16.176].

143 Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Research Report, Women's Legal Service Victoria, September 2015) 43, citing *ibid.*

144 Economic Abuse Reference Group (n 9) 8.

145 *Group Four Industries* (n 88) 32 (Matheson J); Howell (n 38) 105.

146 Lovric and Millbank (n 104) 135 [7.59].

147 *Corporations Act* (n 10) ss 1317S(2), 1318(1).

148 Economic Abuse Reference Group (n 9) 8.

149 *Ibid.* 9.

150 Douglas, *Women, Intimate Partner Violence, and the Law* (n 26) 150.

151 *Ibid.*

152 *Ibid.*

victim survivors in Douglas' study had relatively positive experience with their lawyers who were familiar with the dynamics of family violence, other studies have documented the experiences of women who have encountered lawyers who lacked understanding, prioritised physical violence or who encouraged them not to mention the violence in litigation.¹⁵³ Part V below considers the potential for reforms, and the existing body of case law and literature on the liability of surety wives which draws on equitable principles is instructive in this regard.

B Surety Wives and Equitable Relief

The courts have taken a more benevolent view of sureties particularly where vulnerable individuals are pressured into signing guarantees from which they obtain little or no benefit and which may leave them impoverished. Equitable principles have been applied with a view to striking a balance between commercial certainty and safeguarding the interests of vulnerable sureties. At times, sureties have been relieved from liability on grounds that they signed the contract under undue influence or it was unconscionable for the creditor to enforce the guarantee.

1 Undue Influence

Undue influence relates primarily to relationships in which one party has influence over another. Where the stronger party's influence prevents the weaker party from exercising independent and informed judgment, such that the latter's acts are not free and voluntary, equity has at times intervened to set aside the transaction.¹⁵⁴ Undue influence may be actual or presumed. There is no presumption of undue influence in relationships between a wife and her husband. However, the 'wives' special equity' described in *Garcia v National Australia Bank Ltd* has provided relief to some surety wives particularly where they do not understand the nature and effect of the transaction nor obtain any real benefit.¹⁵⁵

The majority of the High Court of Australia reasoned that although the role of women in society has changed since *Yerkey v Jones*, a significant number of women in Australia are still 'in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties'.¹⁵⁶ The underlying rationale for the wives' special equity lies not in 'notions based on the subservience or inferior economic position of women', nor of 'vulnerability to exploitation because of their emotional involvement'.¹⁵⁷ Rather, it is premised on trust and confidence between marriage partners which may lead a wife to

153 Ibid; Mariachiara Feresin et al, 'Family Mediation in Child Custody Cases and the Concealment of Domestic Violence' (2018) 33(4) *Affilia* 509, 511–12, 518–19 <<https://doi.org/10.1177/0886109918766659>>; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 51–3 [3.11]–[3.15].

154 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 8th ed, 2023) 217.

155 (1998) 194 CLR 395, 408–9 [31] (Gaudron, McHugh, Gummow and Hayne JJ) ('*Garcia*'), citing *Yerkey v Jones* (1939) 63 CLR 649 ('*Yerkey*').

156 *Garcia* (n 155) 403–4 [20] (Gaudron, McHugh, Gummow and Hayne JJ), citing *Yerkey* (n 155).

157 *Garcia* (n 155) 404 [20].

assume liability as surety for her husband's business debts as the husband may not have given her a sufficient explanation of the transaction's nature and effect.¹⁵⁸ In these circumstances, the lender has an obligation to ensure that they explain the transaction to her or that she has received independent advice. Failure to do so would make it unconscionable for the lender to enforce the guarantee against her.¹⁵⁹

Judicial decisions and empirical analyses lend strength to the argument that wives continue to assume such liability for a range of reasons such as economic dependence.¹⁶⁰ To obtain relief, the surety must be a volunteer, in a sense that she obtained no real benefit from the contract guaranteed.¹⁶¹ This may be challenging to prove, particularly if she had some involvement in the family business.¹⁶² 'Active and substantial interest in the conduct ... and fortunes of, the business run by her husband' or a 'significant degree of control' over the company's management and financial affairs will preclude her from relief on the basis of the wives' special equity.¹⁶³ Even if she can satisfy the court that she is a volunteer, she will not be relieved from liability if the bank took the necessary steps ensure that she received adequate explanation of the transaction and its implications.¹⁶⁴

The case of *Chandran v Narayan* illustrates the predicament that wives who are directors and sureties encounter where creditors provide independent advice, resulting in wives being bound by the transaction regardless of how improvident it is.¹⁶⁵ Mrs Narayan was a migrant from Fiji of Indian descent who was sole director and shareholder of several companies which were controlled by her husband.¹⁶⁶ She 'did as her husband requested', 'did not know there was any alternative' and

158 Ibid 404 [21].

159 Ibid 408–9 [31].

160 Susan Barkehall Thomas, Becky Batagol and Madeleine Ulbrick, 'Intimate Partner Economic Abuse in Loans and Guarantees: An Empirical Review of 10 Years of Cases' (2022) 35(3) *Australian Journal of Family Law* 252, 256.

161 *Garcia* (n 155) 408 [31] (Gaudron, McHugh, Gummow and Hayne JJ). One example of a 'real benefit' was renovations to a property owned solely by the surety: *State Bank of New South Wales v Chia* [2000] NSWSC 552, [214] (Einstein J) ('*Chia*'). Further examples include where the wife expects to reap direct benefit from the transaction: *State Bank of New South Wales v Vecchio* (Supreme Court of New South Wales, Kirby J, 10 November 1998); and where guarantee is for monies used to purchase an asset equally with her husband: *Commonwealth Bank of Australia v Hourie* [1998] VSC 128, cited in *Chia* (n 161) at [169]. Incidental benefits flowing from time to time from the husband's business to the family are not sufficient to prevent a surety from relief: *Armstrong v Commonwealth Bank of Australia* (1999) 95 BPR 17,035, cited in *Chia* (n 161) at [169].

162 Shareholding or directorship in a company controlled by her husband does not disqualify her from being a volunteer if she had little or no involvement in or understanding of the company's management or financial affairs. Examples include *Bank of Western Australia Ltd v Abdul* [2012] VSC 222 ('*Bank of WA*') where Mrs Abdul was a director whose role in the company was limited to routine administrative tasks: at [60], and *Brueckner v Satellite Group (Ultimo) Pty Ltd* (2002) 15 BPR 28,885 in which the surety wife was a director 'in name only', took no interest in the business controlled by her husband and was preoccupied with raising children: at 28,920–1 [189]–[192].

163 *Amtel Pty Ltd v Ah Chee* [2015] WASC 341, [276]–[277] (Pritchard J) ('*Amtel*'); *Chia* (n 161) [169], citing *Radin v Commonwealth Bank of Australia* [1998] FCA 1316.

164 *National Australia Bank Ltd v Wehbeh* [2014] VSC 431, [59], [67] (Macaulay J); *Amtel* (n 163) [250] (Pritchard J).

165 [2006] NSWSC 104.

166 Ibid [4], [36] (Young CJ in Eq).

was of the view that as his wife she was ‘obliged to do as he said in regard to repaying the loan because of her dependence on him and because of her respect for her husband’.¹⁶⁷ However, she could not rely on the wife’s special equity for relief as she had received independent advice of the transaction’s nature and effect. Susan Barkehall Thomas, Becky Batagol and Madeleine Ulbrick emphasise the ‘extraordinary difficulty’ of proving an undue influence defence against lenders who are often protected once independent advice requirements have been met.¹⁶⁸

2 Unconscionable dealing

In exceptional circumstances, equitable jurisdiction has intervened in favour of surety wives to set aside guarantees on the ground of unconscionable dealing. Such equitable intervention is premised on proof that the weaker party is under a special disadvantage which the stronger party has unconscientiously exploited.¹⁶⁹ In *Commercial Bank of Australia v Amadio* (*Amadio*), Mason J explained that the disability should seriously affect ‘the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party’.¹⁷⁰ Examples include disability, illiteracy, lack of education, sickness, poverty, and age.¹⁷¹

The ALRC observed that ‘[t]he doctrine of unconscionable conduct has seldom led to guarantees given by women being set aside’.¹⁷² It further notes that ‘[t]he only successful cases have showed some supervening disability such as a medically certified condition or blatant misconduct by the bank. Proving blatant misconduct is difficult and rare’.¹⁷³ Equitable relief is often also confined to the more egregious and calculated cases of misconduct on the part of the husband, such as in *Teachers Health Investments Pty Ltd v Wynne*.¹⁷⁴ Mrs Wynne signed a full recourse mortgage in circumstances in which her will had been overborne. These included a ‘difficult marriage’ without adequate financial support and long absences by her husband. He then returned to the matrimonial home promising ‘that he was a “changed man” and wished to resume the marital relationship’.¹⁷⁵ The trial judge found that his false assurances and lavish gifts were ‘a cynical exercise ... to obtain the matrimonial home’ as security for urgently needed funds and that she had been bullied into signing the mortgage.¹⁷⁶ Referring to *Amadio*,

167 Ibid [21].

168 Thomas, Batagol and Ulbrick (n 160) 266.

169 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J) (*Amadio*). Sections 12CA and 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) also prohibit unconscionable conduct.

170 *Amadio* (n 169) 462.

171 *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J), cited in *Amadio* (n 169) 474–5 (Deane J).

172 *Equality before the Law* (n 14) [13.19].

173 Ibid. See, eg, *Bank of WA* (n 162) where the bank failed to ensure that the wife obtained independent advice: at [96].

174 (1992) 2 ACCR 424 (*Teachers Health Investments*).

175 Ibid 426.

176 Ibid 437.

Beazley JA opined that ‘the relevant disability arose from ... [her] vulnerable emotional position which was such that she was unable to judge for herself the providence of the transaction’.¹⁷⁷ The bank’s failure to ensure that she received adequate advice on the financial risks was critical, and the mortgage was set aside for unconscionable conduct.¹⁷⁸

Lovric and Millbank observe that the courts have tended to be dismissive of claims involving family violence, particularly where the violence is less immediate or less visible.¹⁷⁹ Victim survivors then face a second obstacle – independent advice which prevents them from obtaining equitable relief. In the context of family violence, commentators observe that such independent advice serves to protect banks but does little to assist victim survivors who, in reality, often have little or no choice as a result of economic dependence and coercive control.¹⁸⁰

The case of *Akins v National Australia Bank* illustrates the challenges of seeking equitable relief despite evidence of her husband’s violence.¹⁸¹ At first instance, Giles J found that she ‘did not say that she had signed any of the documents in fear of violence if she declined, or that she was influenced to do so by any physical or verbal assault which may have occurred at any time beforehand’.¹⁸² Mrs Akins was a qualified nurse who became a homemaker, left financial matters to her husband and understood that she was signing a guarantee secured by the matrimonial home.¹⁸³ Clarke JA observed that the bank had explained the guarantee to her and she had enjoyed the material benefits flowing from her husband’s business, finding that she was not under a special disadvantage and that there was no unconscionability.¹⁸⁴ It mattered little that her husband had misrepresented his financial position.¹⁸⁵

Thomas, Batagol and Ulbrick underscore the limitations of equitable doctrines in the context of family violence in their recent empirical study of cases over a 10-year period, observing that these

do not provide sufficient protection nor adequate means of legal redress for vulnerable spouses or intimate partners who act as guarantors or borrowers, in circumstances where the spouse or partner obtains little or no benefit from the loan. In the case of intimate partner debt abuse caused by family violence, the legal system is not able to account for, nor address the gendered inequalities of bargaining power.¹⁸⁶

177 Ibid 439 (Mahoney P agreeing at 425, Waddell AJA agreeing at 444), quoting *Amadio* (n 169) 468 (Mason J), 469 (Wilson J).

178 *Teachers Health Investments* (n 174) 440 (Beazley JA, Mahoney P agreeing at 425, Waddell AJA agreeing at 444).

179 Lovric and Millbank (n 104) 134 [7.56].

180 Ibid 36–8; Thomas, Batagol and Ulbrick (n 160) 267; Belinda Fehlberg, ‘The Husband, the Bank, the Wife and Her Signature: The Sequel’ (1996) 59(5) *Modern Law Review* 675, 678, 694 <<https://doi.org/10.1111/j.1468-2230.1996.tb02686.x>> (‘The Husband, the Bank, the Wife and Her Signature’).

181 (1994) 34 NSWLR 155 (‘*Akins*’).

182 Ibid 158–9 (Clarke JA), quoting *Carrington Confirmers Pty Ltd v Akins* (Supreme Court of New South Wales, Giles J, 23 April 1991) 30 (‘*Carrington Confirmers*’).

183 *Akins* (n 181) 157, 159, 166, quoting *Carrington Confirmers* (n 182) 34.

184 *Akins* (n 181) 173–4 (Clarke JA, Sheller JA agreeing at 175).

185 Ibid 173.

186 Thomas, Batagol and Ulbrick (n 160) 253.

Their study revealed that victim survivors fared better under the *Contracts Review Act 1980* (NSW).¹⁸⁷ However, the court's power to set aside an unjust contract does not extend to contracts entered into in the course of a business.¹⁸⁸ Consequently, victim survivors who are coerced into liability for business debts have limited prospects for relief from liability under existing laws and judicial decisions. Where their liability arises as a straw director of a company, they face even greater obstacles. The courts have reasoned that in corporate law, undue influence and other equitable grounds relied on by guarantor wives should not apply, the rationale being that outsiders who deal with the company should be able to assume that the company's internal management is sound.¹⁸⁹

IV RE-EXAMINING ASSUMPTIONS

A Lived Realities

The cases collectively indicate that women directors who have little or no involvement in managing companies controlled by her husband face risks of liability for breaches of directors' duties, business debts, tax debts and penalties. At the same time, victim survivors' accounts of economic abuse indicate that they are often coerced into those circumstances with little or no say in business decisions nor access to relevant information. Victim survivors find themselves pursued for significant amounts of debt which they knew little or nothing about. The law takes a critical view of the uninvolved director as 'lazy, ignorant and inefficient'.¹⁹⁰ As a result, they face an uphill battle in a legal system that holds such directors personally liable for corporate debts when a company engages in insolvent trading.¹⁹¹ If her signature is forged on corporate guarantees or contracts that she is not aware of, the *Corporations Act* allows third parties to assume that documents have been duly executed,¹⁹² exacerbating the risk of incurring liabilities without her knowledge or consent. Directors face further risks of having to pay compensation to creditors if corporate assets are shifted out of the reach of creditors and if she denies knowing of the impropriety she is likely to be met with scepticism.¹⁹³ Trying to prove to the court that her ignorance and deference to her husband were driven by abuse is difficult when the courts have insisted on proximity between acts or threats of violence and the specific instances in which she failed to carry out her duties or signed a document. Lovric and Millbank argue that such insistence on proximity of violent acts is based on an artificial and erroneous understanding of family violence.¹⁹⁴ Previous experience of violence and coercive control are also

187 Ibid 281.

188 *Contracts Review Act 1980* (NSW) ss 6(2), 7.

189 *Clark* (n 67) 144 [134], [136] (Spigelman CJ).

190 *Credit Corporation Australia* (n 68) 768–9 [134] (O'Loughlin J).

191 *Corporations Act* (n 10) s 588G.

192 Ibid ss 128(4), 129(5). See above Part III(A)(1)(c).

193 See above Part III(A)(1).

194 Lovric and Millbank (n 104) 135–6 [7.59].

likely to propel victim survivors into conceding to his demands. Such issues of gender, power and privilege remain hidden ‘behind the language of objectivity and neutrality and the abstract formalism of many [central] legal concepts’ that underpin directors’ liability for failed companies.¹⁹⁵

Commentators attribute the hard line taken against wives as passive company directors to the tendency to judge them by the standard of the rational, self-interested economic man with equal bargaining power.¹⁹⁶ The cases in Part III reflect the view that the wives chose to leave business matters to the husband and, if they had only asked him, they would have known what the company’s financial situation was. There are implied assumptions that they could have intervened to prevent the problems but did not make the effort, only complaining after the marriage deteriorated or ended. They reflect underlying assumptions that these wives had the power and capacity to take necessary action, and if they chose to be neglectful of their duties, they should have to bear the consequences of the husband’s business decisions. After all, they had also enjoyed the benefits of prosperity flowing from the family business. Belinda Fehlberg observes a ‘judicial tendency to assume that formal officeholding or shareholding translates to real power in corporations, and also that profit will necessarily percolate through from a husband’s business in adequate amounts to the family’.¹⁹⁷ However, the assumption that ‘couples share’ has been disputed by scholars who assert that when marriages break down, former wives’ rights to any benefits from ‘family’ businesses controlled by the husband become precarious.¹⁹⁸ Liability as surety for past business debts remains even when benefits have ceased, contributing to their impoverishment after separation.¹⁹⁹

Where there is family violence, a very different picture from that of the rational economic man emerges. Far from being able to make choices on the basis of equal bargaining power, financially dependent victim survivors commonly perceive that they do not have a choice. In a study of guarantors, women reported: ‘I was too scared not to sign – he’d leave or kill me’ and ‘I had one week to sign but I was hassled every day. Even the neighbours knew what was going on we were yelling so much. What could I do? I had 2 small children and he’d leave if I didn’t sign.’²⁰⁰ They reported feeling bullied, ‘really harassed’, emotionally drained, fearful of physical threats and losing sight of perspective when he was ‘aggro – out of control’.²⁰¹ Even in the absence of physical violence, a combination of economic and emotional pressure can be overwhelming. Lovric and Millbank observe that

195 Katharine Hall, ‘Theory, Gender and Corporate Law’ (1998) 9(1) *Legal Education Review* 31, 44 <<https://doi.org/10.53300/001c.6063>>.

196 Fehlberg, ‘The Husband, the Bank, the Wife and Her Signature’ (n 180) 693; Megan Richardson, ‘Protecting Women Who Provide Security for a Husband’s, Partner’s or Child’s Debts: The Value and Limits of an Economic Perspective’ (1996) 16(3) *Legal Studies* 368, 381 <<https://doi.org/10.1111/j.1748-121x.1996.tb00535.x>>.

197 Fehlberg, ‘Women in “Family” Companies’ (n 117) 356.

198 Ibid 362; Peta Spender, ‘Family Companies and Women’s Proprietary Entitlements’ (1997) 11(2) *Australian Journal of Family Law* 196, 196.

199 Fehlberg, ‘Women in “Family” Companies’ (n 117) 362; Spender (n 198) 196.

200 Lovric and Millbank (n 104) 37–8 [3.57]–[3.60].

201 Ibid 38 [3.60]–[3.62].

‘in some instances, there was really no other option to sign’ if she wished to remain in the relationship.²⁰² Likewise, a barrister remarked that ‘for the sake of domestic harmony there is usually irresistible pressure on the guaranteeing spouse to sign’.²⁰³

Victim survivors have reported being registered as a company director fraudulently, without their knowledge, only becoming aware of the directorship after separation when pursued by creditors for amounts they had allegedly guaranteed.²⁰⁴ As observed in Part II(B), economic abuse through directorships also occurs after divorce and parenting orders, particularly when financial dependence remains.²⁰⁵ Former wives have been coerced into signing documents to avoid homelessness and extreme financial hardship for them and their children.²⁰⁶

Miranda Kaye highlights the ‘systemic inequality of bargaining power’ that gives rise to women’s susceptibility to sexually transmitted debt.²⁰⁷ As a result of caring and domestic roles and interrupted careers, women are often financially dependent on husbands who assume the dominant economic role. Even in non-violent relationships, Singh’s study found high levels of ‘informed powerlessness’ where women lack the power to make decisions relating to family businesses despite being informed.²⁰⁸ Singh attributes this to the ‘husband’s greater expertise in the business, coupled with the woman’s fear of endangering the marriage’.²⁰⁹ Interviewees described the challenges, one saying that although she knew it was a bad decision she gave in after prolonged arguments because she ‘couldn’t take it’ any more. In her words: ‘When you’re in partnership with your husband you tend to make emotional decisions rather than business decisions. ... You can make business decisions when you have got a proper business partner, whom you are not married to.’²¹⁰ In reality, it is difficult to ‘separate business decisions from the marriage’ as conversations about business commonly encroach on family life.²¹¹ Such disparities in bargaining power are magnified many times in the context of family violence.²¹² Despite this, the cases reflect the ‘tendency for legal doctrine to privilege commercial rights over domestic rights’,²¹³ and gendered inequalities are ignored in favour of commercial certainty for creditors.

Nicola Howell highlights the public-private dichotomy that pervades much of the law governing commercial bargains and its failure to recognise

202 Ibid 36 [3.54].

203 Ibid.

204 Economic Abuse Reference Group (n 9) 3.

205 See, eg, *Woolwich plc v Gomm* [2000] 79 P & CR 61.

206 Economic Abuse Reference Group (n 9) 4–5.

207 Miranda Kaye, ‘Equity’s Treatment of Sexually Transmitted Debt’ (1997) 5(1) *Feminist Legal Studies* 35, 38 <<https://doi.org/10.1007/bf02684855>>.

208 Supriya Singh, *For Love Not Money: Women, Information and the Family Business* (Consumer Advocacy and Financial Counselling Association of Victoria, 1995) 76.

209 Ibid.

210 Ibid 75.

211 Ibid.

212 Kaye (n 207) 41.

213 Spender (n 198) 207.

the reality of sexually transmitted debt.²¹⁴ The tension inherent in the public-private dichotomy is reflected in Matheson J's remark in *Group Four Industries* that, 'given the true nature of the relationship between the respondent and her husband, her reaction was entirely understandable. ... But [that is] not a reaction which the Code permitted her to take'.²¹⁵ In the context of small family-owned companies, the distinction maintained in law between the private family domain and its public commercial counterpart is often artificial and illusory, especially where violence is involved. In essence, the law expects individuals to behave as the ideal rational economic man regardless of the threats they face, whether of physical harm, emotional abuse or the risk of them and their children going without the necessities required for daily living.²¹⁶

The emphasis on commercial certainty, expectations that directors should behave as the rational economic man with equal bargaining power, and detachment from the dynamics of intrafamilial relationships, collectively form a smokescreen that masks the reality of economic abuse in family companies. Through legal reasoning such behaviour acquires the appearance of legitimacy, with the result that corporate law can and has at times been used instrumentally to facilitate the perpetration of family violence. Part V considers reforms aimed at addressing the gap in the regulatory framework while the remainder of this Part considers the basis for reforms.

B Legal Bases for Relief

The discussion now turns to consider situations of family violence in which such assumptions may be refuted, querying whether there are legal grounds for relief from liability. First, legislative intent is analysed, focusing on liability for insolvent trading and defences. Subsequently, the question of consent and vitiating factors to contractual obligations are considered. Lastly, in light of the increased efforts to curb phoenix activity, the underlying purpose of recent reforms is examined. These critiques form the basis of reform proposals in Part V.

1 The Defence in Section 588H(4)

Where victim survivors are coerced into taking on liability for corporate wrongdoing and business debts by abusive partners, there are compelling arguments in favour of releasing them from such liability. The Law Reform Commission's 1988 *General Insolvency Inquiry*, referred to as the Harmer Report, considered the

214 Howell (n 38) 105–6. The term 'sexually transmitted debt' refers to the practice of women taking legal responsibility for the debts of their partners from which they receive little or no benefit, primarily on the basis of the personal relationship: at 93. In the United Kingdom, there are also limited grounds in consumer law for legally challenging demands to pay coerced debt. The Economic Justice Project report observes that in many cases, victim survivors rely on the goodwill of creditors to waive coerced debt, and on pro bono assistance from lawyers and financial counsellors to negotiate with creditors: *Surviving Economic Abuse, Recognising and Responding to the Scale of Coerced Debt: Final Evaluation of the Economic Justice Project* (Report, September 2020) 54, 74.

215 *Group Four Industries* (n 88) 32.

216 See above Part IV(A).

reforms which led to the existing duty to avoid insolvent trading and the defences in section 588H, observing that ‘in some circumstances, it is not appropriate for a provision designed to establish a proper standard of conduct by directors to impose liability on a director who was not in a position to influence the management of the financial affairs of the company at the relevant time’.²¹⁷ The defence to insolvent trading in section 588H(4) allows directors to be excused where there are good reasons for absence from management such as illness.

In situations of family violence, victim survivors who are unable to access information about the company’s financial affairs or participate in management decisions as a result of the perpetrators’ actions have a reasonable explanation for their lack of involvement. When victim survivors are fraudulently registered as directors without their knowledge or consent, or where they are coerced to sign documents without the opportunity to understand the implications and face real risks harm if they refuse, the grounds for excusing them are ostensibly as compelling as illness. In both situations, the absence from management is engendered by externalities beyond the director’s control. Victim survivors’ reports in Part II(B) of inability to access financial information about the business is consistent with research findings that perpetrators commonly prevent victim survivors from accessing information about their finances.²¹⁸

2 Consent

In circumstances of coercive control, such as when victim survivors sign documents to avoid harm, or when their signatures are forged, there are valid reasons for considering relief from liability. Scholars assert that there is a need for a more nuanced understanding of vitiating factors that may affect consent in relationships where there is a significant imbalance of power, particularly where the dominant party exploits, bullies, harasses or abuses an intimate relationship.²¹⁹

Voluntariness lies at the heart of contractual obligations and enforcing contracts made by fraud or coercion runs contrary to this central tenet.²²⁰ Jurists such as HLA Hart have emphasised the deep respect for individual liberty that underpins the enforceability of contracts.²²¹ Mindy Chen-Wishart posits that ‘[w]hat amounts to improper coercion depends on the nature of the relationship and character of the parties’.²²² Equitable principles in the cases examined in Part III(B) took more of

217 Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 30 September 1988) vol 1, 139.

218 Adams, Littwin and Javorka (n 7) 1326.

219 Richardson (n 196) 382; Mindy Chen-Wishart, ‘Undue Influence: Vindicating Relationships of Influence’ (2006) 59(1) *Current Legal Problems* 231, 262–3 <<https://doi.org/10.1093/clp/59.1.231>>.

220 Rick Bigwood, ‘Undue Influence: “Impaired Consent” or “Wicked Exploitation”?’ (1996) 16(3) *Oxford Journal of Legal Studies* 503, 505 <<https://doi.org/10.1093/ojls/16.3.503>>, quoting Alan Wertheimer, *Coercion* (Princeton University Press, 1987) 21.

221 HLA Hart, ‘Legal Responsibility and Excuses’ in HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008) 28. See generally John Stuart Mill, *On Liberty 1859* (Batoche Books, 2001).

222 She observes that ‘threats to abandon’ can be ‘highly coercive to someone who cares enormously about the relationship and its continuity’: Chen-Wishart (n 219) 263.

these factors into account in comparison with corporate law cases.²²³ However, when viewed against various forms of family violence such as coercive control described in the *National Domestic and Family Violence Bench Book* ('*Bench Book*'),²²⁴ judicial insistence on proximity between physical harm or explicit threats and the impugned conduct of claimants seeking equitable relief is excessively narrow.²²⁵

In light of an increase in family violence and financial strain experienced by small businesses following the COVID-19 outbreak, there is a greater need for better recognition of the way in which family violence affects the governance of some family businesses.²²⁶ Several industries that interact with consumers have introduced policies on responding to family violence.²²⁷ However, enforcement mechanisms that directors of failed companies deal with have lagged behind. The need for a fairer approach in situations involving economic abuse is heightened in view of the increased likelihood of enforcement action for illegal phoenix activity following the introduction of director identification numbers and higher penalties.²²⁸

3 *Illegal Phoenix Activity*

EARG members have observed situations where perpetrators engage in phoenix activity, leaving their partners to bear the liability.²²⁹ In some instances, undischarged bankrupts who are disqualified from managing companies register their partner as a straw director while remaining in control of the business. While the individual who was the directing mind and will of the company remains off the record and escapes liability, victim survivors are left with the consequences of the perpetrators' poor business decisions and debt arising from contracts they have been coerced to sign. As the underlying purpose of recent reforms is to deter and penalise phoenix activity,²³⁰ it would serve these aims better to pursue the mastermind responsible for the wrongful decisions who would be a shadow director or de facto director and, hence, liable under the *Corporations Act*.²³¹ At the same time, there is a need to disrupt abuse perpetrated through the instrumentality

223 *Clark* (n 67) 144 [134], [136] (Spigelman CJ).

224 Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (2022) [3.1.3], [3.2] <<https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/>> ('*Bench Book*').

225 *Ibid*: 'Economic abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person' and physical violence that 'occurred early in the relationship ... establishes the abuser's capacity and potential for physical violence'.

226 Susan Black, Kevin Lane and Laura Nunn, 'Small Business Finance and COVID-19 Outbreaks (Bulletin, Reserve Bank of Australia, September 2021); Victorian Government, *Ending Family Violence: Annual Report 2021* (Report, March 2022) 15.

227 See, eg, Safe and Equal, 'Guidelines for Better Practice Responses to Family Violence for the Essential Services Commission and Essential Service Providers' (Guidelines, May 2022).

228 See generally Explanatory Memorandum, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (Cth) [2.8]; Explanatory Memorandum, *Illegal Phoenixing* (n 12).

229 Economic Abuse Reference Group (n 9) 3.

230 Explanatory Memorandum, *Illegal Phoenixing* (n 12) 6–7 [1.9], 68 [6.18].

231 *Corporations Act* (n 10) s 9 (definition of 'director'). In cases such as *Gilford Motor Co Ltd v Horne* [1933] Ch 935, the courts lifted the corporate veil when wrongdoers used the separate legal entity as a façade to avoid legal obligations: see, eg, at 961–2 (Lord Hanworth MR), 965 (Lawrence LJ), 969 (Romer LJ).

of corporate law which at present can be manipulated to set victim survivors up as straw directors to take the blame for corporate failure.

The weaponisation of corporate law resonates with the definition of systems abuse as the ‘manipulation of legal and other systems by perpetrators of family violence, done so in order to exert control over, threaten and/or harass a current or former partner’.²³² Studies highlight the role of ‘legal systems abuse’ as a means of exerting control over victim survivors after separation.²³³ Interviews with survivors have revealed multiple legal proceedings and interactions with the law instigated by perpetrators over a range of issues, such as family law, intervention orders, leases, immigration, and credit, as part of broader patterns of coercive control.²³⁴ Legal threats are used to gain tactical advantages over victim survivors, deplete their resources and force them to deal with the abusers.²³⁵ The harm from such systems abuse is exacerbated by conflicting positions adopted by various courts in relation to family violence in different contexts.²³⁶

The propensity for systems abuse may be reduced through reforms that promote fairer and more consistent responses towards victim survivors who are coerced into liability as straw directors. The reforms could potentially build on leading industry guidelines such as the Australian Banking Association’s (‘ABA’) which educate members on signs of financial abuse and appropriate responses.²³⁷ In addition to staff training, the ABA recommends working with victim survivors to manage financial hardship and liabilities they have been coerced into, including releasing them from joint debt where appropriate.²³⁸ The Australian Financial Conduct Authority (‘AFCA’) sets out expectations that financial firms should ‘be alert to the warning signs of potential financial abuse’, such as borrowers not benefitting from a loan, emphasising the need for a proactive approach and sensitivity, to avoid

232 Department of Social Services (Cth) (n 1) 60 n iii.

233 Heather Douglas, ‘Legal Systems Abuse and Coercive Control’ (2018) 18(1) *Criminology and Criminal Justice* 84, 96 <<https://doi.org/10.1177/174889581772838>>; Lyndal Sleep, ‘Entrapment and Institutional Collusion: Domestic Violence Police Reports and the “Couple Rule” in Social Security Law’ (2019) 44(1) *Alternative Law Journal* 17, 22 <<https://doi.org/10.1177/1037969X18796900>>; Cameron (n 56) 15.

234 Liz Kelly, Nicola Sharp and Renate Klein, ‘Finding the Costs of Freedom: How Women and Children Rebuild Their Lives after Domestic Violence’ (Research Report, Solace Women’s Aid, 2014) 62–3, 115–6; Douglas, *Women, Intimate Partner Violence, and the Law* (n 26) 62–5, 83.

235 Ellen Reeves, ‘Family Violence, Protection Orders and Systems Abuse: Views of Legal Practitioners’ (2020) 32(1) *Current Issues in Criminal Justice* 91, 92–3 <<https://doi.org/10.1080/10345329.2019.1665816>>.

236 Rae Kaspiew et al, ‘Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs’ (Research Paper No 4/2017, Australia’s National Research Organisation for Women’s Safety, June 2017) 5–6. For example, the Parliamentary inquiry into a better family law system heard evidence of victim survivors being advised not to raise family violence during family law proceedings as it can lead to their being penalised as ‘unfriendly’ parents and children being ordered to reside with the father, exposing them to further violence: House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 52–5 [3.12]–[3.19].

237 These include appearing or sounding distressed or scared, and having income or social security paid to another person’s account: Australian Banking Association, ‘Preventing and Responding to Family and Domestic Violence’ (Industry Guideline, March 2021) 3–4 [3.2].

238 *Ibid* 9–10 [4.82]–[4.83].

putting victim survivors at risk of harm from abusers.²³⁹ Like the ABA, AFCA's approach envisages that debt waivers may be appropriate in situations involving family violence.²⁴⁰

V THE CASE FOR CHANGE

Regulatory reforms aimed at curbing illegal phoenix activity, and the harsh consequences that ensue, may be weaponised against victim survivors through threats to 'dob them in'.²⁴¹ The risk of fines of up to \$13,000 for failure to obtain a director identification number before 30 November 2022 provides perpetrators leverage to threaten and control victim survivors who have been set up as straw directors.²⁴² At the same time, the criminalisation of coercive control in NSW²⁴³ and an increasing recognition of the propensity for abuse through coerced directorships provide impetus for reforms aimed at disrupting such abuse.

The risks arise primarily in the context of small family businesses.²⁴⁴ As family businesses comprise 67% of all Australian businesses,²⁴⁵ the risks potentially extend to a significant number of Australian families. About a third of small businesses are estimated to be migrant-owned,²⁴⁶ and although less is known about family violence among CALD communities, the nascent studies indicate that victim survivors commonly face additional barriers to assistance including language, limited social support, cultural acceptance of violence at times, immigration problems and less access to social security benefits.²⁴⁷ Hence, along with regulatory reforms proposed below, an integral aspect of interventions to disrupt harm from coerced liability as straw directors is the need for community education. The problem of victim survivors being coerced into liability as company directors is poorly recognised in Australia and internationally. There is a need for better understanding of the nature and scale of problem, the appropriate responses and potential solutions

239 Australian Financial Conduct Authority, 'The AFCA Approach to Joint Accounts and Family Violence' (Approach Document, June 2022) 6–8 <<https://www.afca.org.au/media/549/download>>.

240 Ibid 14 [3.7].

241 See, eg, Sally Cameron and Linda Forbes, 'Debt, Duress and Dob-Ins: Centrelink Compliance Processes and Domestic Violence' (Research Report, Economic Justice Australia, 2021) 7.

242 Emilia Terzon, 'Federal Body Announces Grace Period on Director IDs, after Concerns about \$13,000 Fines', *ABC News* (online, 30 November 2022) <<https://www.abc.net.au/news/2022-11-30/director-id-grace-period-fines-abrs-ato/101715272>>.

243 See above n 18 and accompanying text.

244 Economic Abuse Reference Group (n 9) 2.

245 KPMG Australia and University of Adelaide, *Family Business Report 2021: Transition, Diversity and Entrepreneurship* (Report, May 2021) 2.

246 Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into Migration and Multiculturalism in Australia* (Report, March 2013) 208 [12.4], citing Jim Walmsley, Alison McIntosh and Raj Rajaratnam, 'Produced and Financial Capital: Product Diversity' in Kerry Carrington, Alison McIntosh and Jim Walmsley (eds), *The Social Costs and Benefits of Migration into Australia* (Centre for Applied Research in Social Sciences, University of New England, 2007) 93.

247 Linda Murray et al, 'Between "Here" and "There": Family Violence against Immigrant and Refugee Women in Urban and Rural Southern Australia' (2019) 26(1) *Gender, Place and Culture* 91, 91–3, 101–4 <<https://doi.org/10.1080/0966369X.2018.1553862>>; Reeves (n 235) 99.

available to victim survivors.²⁴⁸ Given the relatively high representation of migrant communities in the small business sector, such community education should also be extended to CALD communities.

The risk of systems abuse may be curtailed by adopting a more informed approach to family violence in the corporate insolvency regulatory framework. The *National Plan to End Violence against Women and Children 2022–2032* ('*National Plan*') emphasises the importance of identifying and eliminating such systems abuse.²⁴⁹ In line with the *National Plan*, this article proposes legislative reform to allow victim survivors a defence to personal liability for corporate debts incurred as a result of family violence, and regulatory guidance to promote fairer outcomes.

At present, the defences to insolvent trading in section 588H(4) of the *Corporations Act* allow directors who are absent from management because of illness or some other good reason to be excused from liability. An amendment to section 588H(4) specifying family violence as a good or legitimate reason for absence from management would reduce the likelihood of systems abuse and contribute to better outcomes for victim survivors. Section 588H also applies to the directors' duty to avoid creditor-defeating dispositions. Survivor advocates have lobbied for the amendment citing the problem of widespread misconceptions that there are no alternatives for victim survivors apart from declaring bankruptcy when they are left to bear the liability for their ex-partner's business debts.²⁵⁰ The proposed amendment would foster a greater awareness in the community of the intersectionality of corporate law with family violence and of the potential to seek relief from liability. Victim survivors often lack the resources to seek the highly specialised and costly legal representation required. Greater clarity on the position of victim survivors who are straw directors may also facilitate more efficient bargaining in the shadow of the law which currently tends to be difficult and stressful.²⁵¹

Legislative reform would appear to be necessary in light of judicial decisions which reflect the assumption that uninformed directors who leave management decisions to husbands are inefficient and incompetent. Judicial decisions such as *Group Four Industries* have defended this perspective on the basis of legislative interpretation.²⁵² An amendment to section 588H(4) would avoid the challenging task of displacing this presumption through costly litigation which most survivors cannot afford. It would rectify misconceptions about straw directors in situations of family violence and foster a better understanding of victim survivors' lived experiences in a corporate context.²⁵³ Likewise, section 269-35(1) of the *Taxation Administration Act* should be amended to include family violence as a legitimate reason for absence from management.²⁵⁴ Specific mention of family violence in the legislation would arguably assist in overcoming judicial reticence in acknowledging

248 Barwick, McGorrey and McMahon (n 27) 151.

249 Department of Social Services (Cth) (n 1) 60.

250 Economic Abuse Reference Group (n 9) 1, 3.

251 Ibid 9.

252 *Group Four Industries* (n 88) 38–40.

253 Department of Social Services (Cth) (n 1) 68.

254 Economic Abuse Reference Group (n 9) 8–9.

the relevance of domestic matters in a corporate setting.²⁵⁵ Scepticism towards claims of violence are refuted in the *Bench Book* which notes that

research to date indicates that it is more likely that they will be reluctant to raise allegations for fear of having their motives questioned, and that the making of false allegations is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimisation of abuse by perpetrators.²⁵⁶

As the government agencies responsible for enforcing corporate law and tax law respectively, ASIC and the ATO are expected to act according to ‘the highest standards of probity and fair dealing’.²⁵⁷ In light of evidence of family violence being perpetrated through coerced directorships, adopting family violence policies along the lines of AFCA and the ABA would be consistent with their inherent obligations.²⁵⁸ Valerie Braithwaite observes that democratically elected governments are expected to ‘show care in arriving at accurate assessments of citizen obligations without inflicting unnecessary harm on those they govern’.²⁵⁹ Such standards are necessary for a relationship of trust with its citizens and are integral to the social contract in democracies.²⁶⁰ In *Melbourne Steamship Co Ltd v Moorehead*, Griffith CJ described the requirement of ‘fair play to be observed by the Crown in dealing with subjects’ as ‘elementary’, ‘traditional and almost instinctive’.²⁶¹ As the ‘source and fountain of justice’,²⁶² the government has obligations to assist the judiciary to achieve justice²⁶³ and to lead by example.²⁶⁴ The private sector and not-for-profits are currently leading the policy reforms that incorporate a fairer approach to survivors of family violence.²⁶⁵ A similar response by regulators responsible for the relevant law enforcement processes is warranted.

ASIC is also responsible for the administration of the *Corporations Act* and supervision of liquidators.²⁶⁶ As regulator, ASIC’s obligations include promoting market integrity and advising the Minister of changes to corporations legislation that are needed to overcome problems it encounters.²⁶⁷ Braithwaite posits that when the government is callous towards the needs of vulnerable citizens, as seen in the

255 Lovric and Millbank (n 104) 134 [7.56]. See also Patricia Eastal et al, ‘A Jurisdictional Collision? Responses to Family Violence and Family Law in the ACT’ (2022) 47(1) *Alternative Law Journal* 23, 24 <<https://doi.org/10.1177/1037969X211054217>>.

256 *Bench Book* (n 224) [3.1.11].

257 *Sebel Products v Commissioner for Customs and Excise* [1949] Ch 409, 413 (Vaisey J) (*‘Sebel Products’*).

258 *Legal Services Directions 2017* (Cth) issued under the *Judiciary Act 1903* (Cth) s 55ZF.

259 Valerie Braithwaite, ‘Beyond the Bubble that is Robodebt: How Governments that Lose Integrity Threaten Democracy’ (2020) 55(3) *Australian Journal of Social Issues* 242, 248 <<https://doi.org/10.1002/ajs4.122>>.

260 *Ibid* 244.

261 (1912) 15 CLR 333, 342.

262 *Sebel Products* (n 257) 413 (Vaisey J).

263 Gabrielle Appleby, ‘The Government as Litigant’ (2014) 37(1) *University of New South Wales Law Journal* 94, 96.

264 *Ibid*, citing *Kenny v South Australia* (1987) 46 SASR 268; *Hughes Aircraft Systems International v Airlservics Australia* (1997) 76 FCR 151.

265 Australian Banking Association (n 237); Australian Financial Conduct Authority (n 239).

266 *Corporations Act* (n 10) s 5B, sch 2.

267 *Australian Securities and Investments Commission Act 2001* (Cth) ss 11(2), 12A(2).

Robodebt debacle, such unfairness and lack of responsiveness to the needs of those they govern erodes the social contract between the government and the people.²⁶⁸ According to her, '[w]hat happens in one part of government affects the whole' and such mistrust propels people towards the 'underground or informal economy' to avoid harassment through state-sanctioned mechanisms.²⁶⁹ To mitigate the risk of deepening mistrust as a result of corporate laws that are susceptible to being weaponised as tools for family violence, there is a need for ASIC to take a more proactive stance in disrupting systems abuse against coerced straw directors pursued by liquidators who, in turn, are regulated by ASIC.

Regulatory guidance that draws from AFCA's approach to family violence could be introduced to foster a more informed response by liquidators.²⁷⁰ ASIC's regulatory guide on insolvent trading,²⁷¹ for example, could incorporate an approach of bringing enforcement proceedings against the individual who was the directing mind and will of the company responsible for phoenix activity as shadow or de facto directors. This would ensure that the underlying objectives of recent reforms are met, including creditor protection and deterrence of phoenix activity, and that perpetrators are held accountable in line with the *National Plan*.

In many cases, the point of contact for victim survivors who are pursued for business debts would be debt collectors, creditors and liquidators. Liquidators are responsible for debt recovery on behalf of creditors.²⁷² Providing guidance to them on how to recognise and respond to economic abuse serves as early intervention which, in similar circumstances, has been found to be highly effective in mitigating harm from family violence.²⁷³ Initiatives by WEStjustice and partner organisations demonstrate that by working with creditors to gain a better understanding of the impact of economic abuse, many creditors have granted debt waivers.²⁷⁴ At the same time, a more coordinated response among those assisting victim survivors, and information sharing while maintaining confidentiality, minimises the number of times victim survivors have to disclose the abuse while promoting better outcomes.²⁷⁵ Such survivor-centred initiatives have substantially improved their financial security, lifted them and their children out of homelessness and destitution, and towards recovery.²⁷⁶

268 Braithwaite (n 259) 249.

269 Ibid 249–50.

270 The AFCA's approach suggests that where a survivor discloses family violence, the firm should 'take this on face value and not require the customer to provide evidence, for example, in the form of an intervention order': Australian Financial Conduct Authority (n 239) 14. This contrasts with the more stringent requirements of evidence in the *Migration Regulations 1994* (Cth) regs 1.24–1.26.

271 Australian Securities & Investments Commission, 'Duty to Prevent Insolvent Trading: Guide for Directors' (Regulatory Guide No 217, August 2020).

272 *Corporations Act* (n 10) s 588M.

273 Stephanie Tonkin, 'Restoring Financial Safety: Collaborating on Responses to Economic Abuse' (Project Report, WEStjustice, July 2018) 23.

274 Dacia Abela and Shifrah Blustein, 'Restoring Financial Safety: The Transforming Financial Security Project' (Project Report, WEStjustice, May 2021) 29.

275 Amanda L Robinson, 'Reducing Repeat Victimization among High-Risk Victims of Domestic Violence: The Benefits of a Coordinated Community Response in Cardiff, Wales' (2006) 12(8) *Violence against Women* 761, 783–4.

276 Abela and Blustein (n 274) 29; Bond and Ulbrick (n 4) 6.

VI CONCLUSION

Corporate law has often viewed uninvolved directors as irresponsible individuals who should bear the consequences of their negligence. Few have considered the possibility that in some cases, the straw director's absence from management may be the result of family violence. This article examines legal responses to the lived realities of economic abuse in the context of family companies. The courts have been unsympathetic towards straw directors who leave the husband to manage the business. The courts have also held that equitable grounds for relief, such as undue influence, do not constitute good reasons for absence from management and cannot be relied on as a defence to liability for insolvent trading.²⁷⁷ Victim survivors whose signatures are forged face difficulties in seeking relief from liability in the face of provisions such as section 128(3) of the *Corporations Act*.

These collectively leave victim survivors who are coerced and defrauded into assuming liabilities for failed companies with an uphill battle in seeking release from liability on grounds of family violence. For many, the inadequate understanding in the community and the legal system of family violence and its intersection with business debts poses additional barriers to victim survivors being able to seek relief through the law and the courts. Victim survivors who are fleeing violence face severe resource constraints that further limit their capacity to seek legal advice or engage in litigation. Many victim survivors end up declaring bankruptcy. This article proposes reforms aimed at mitigating harm from such economic abuse and from systems abuse perpetuated through the manipulation of existing corporate law.

In light of the increase in family violence, financial stress for small businesses and efforts to curb phoenix activity in recent years, there is a pressing need for better recognition of family violence that is perpetrated through family companies. Amending the defence in section 588H(4) to include family violence as a legitimate reason for absence from management will send a clear message to the community and the courts that economic abuse should not be condoned. Regulatory guidance on the appropriate responses to economic abuse is an important step towards better outcomes. Pursuing the shadow or de facto director who was the directing mind and will responsible for the breaches of duties will ensure that creditors' interests are protected and that wrongdoers are held accountable. The guidance should include consideration of debt waivers where liability has been coerced. Similar initiatives in the banking industry have been instrumental in disrupting harm from economic abuse and strengthening financial security for victim survivors and their children.²⁷⁸

²⁷⁷ *Clark* (n 67) 144 [134], [136] (Spigelman CJ).

²⁷⁸ Australian Banking Association (n 237); Abela and Blustein (n 274) 27; Bond and Ulbrick (n 4) 6.