Law Council
OF AUSTRALIA

Business Law Section

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Treasury
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By email: coerceddirectorships@treasury.gov.au

Dear Secretariat

Combatting financial abuse perpetrated through coerced directorships

1. Thank you for the opportunity to respond to the Treasury's Consultation Paper *Combatting financial abuse perpetrated through coerced directorships*. This submission has been prepared by the Taxation Committee and the SME Business Law Committee of the Law Council of Australia's Business Law Section (together, the **Committees**). The Committees provide this submission drawing on the practical experience of legal practitioners in dealing with these issues, both in tax and tax-adjacent regulatory contexts.

2. This is a submission of the listed Committees of the Business Law Section. Should the views of other Business Law Section committees or other parts of the Law Council (for example the Family Law Section, constituent bodies, advisory committees) be of assistance, we would be pleased to arrange this.

Questions on the experience of coerced directorships

Are there any additional ways companies are misused to perpetuate financial abuse and coercive control?

3. In the experience of members of the Committees, there are two other situations in which corporate directorships and shareholdings are frequently used to accomplish financial abuse of victim-survivors:

   (a) Family law property settlements and binding financial agreements being undermined by the operation of Division 7A of Part III of the *Income Tax Assessment Act 1936* (Cth). Perpetrators may manipulate company loan accounts or encourage court orders regarding asset transfers that inadvertently trigger 'deemed dividends' for the victim-survivor. The court often operates on the assumption that its orders override tax obligations, leaving the victim-

survivor with a massive, unexpected tax liability that effectively destroys the value of their settlement.

(b) Manipulation of reported taxable income to negatively impact on payment obligations to the custodial parent under the *Child Support (Assessment) Act 1989* (Cth).

What types of debts, liabilities or harms are typically created through coerced directorships?

4. Examples of debts, liabilities or harms that are typically created through coerced directorships include:

- damage to creditors, often leaving the only director on the record being the coerced director, rather than the true controller, the perpetrator—who generally has extracted the relevant funds from the company covertly and is likely to retain control over the remaining assets for the family unit;
- Director Penalty Notices (**DPN**s) arising from coerced directorships;
- unpaid present entitlements from related trusts—despite having been 'declared' to be payable to the victim-survivor—leading to excessive tax liabilities, without cash receipts to pay them (including extraction from theoretically joint accounts, in practice solely controlled by the perpetrator); and
- unpaid dividends from private companies—despite having been 'declared' to be payable to the victim-survivor—leading to excessive tax liabilities, without cash receipts to pay them (including extraction from theoretically joint accounts, in practice solely controlled by the perpetrator).

Questions on the director appointment process

How is the director registration or appointment process being weaponised by perpetrators of domestic and family violence to coerce victim-survivors into becoming directors of a company?

5. As indicated in the Consultation Paper, experience suggests that many victim-survivors are:

- Appointed fraudulently, without any knowledge that they have even been appointed. These false appointments can be facilitated by Australian Securities and Investments Commission (**ASIC**) registered agents (either knowingly or unknowingly (e.g. receiving false records of consent)). These should never really be seen as valid director appointments, as they are *void ab initio*. (The **Fraud** category).
- Forced into signing relevant documents by their perpetrator, and then denied access to information or any real power to be involved in the decision-making regarding the company, often through threats, or actual application, violence to the victim-survivor, their children or even their pets. In these cases, the role of ASIC registered agents, and often also tax agents, could be considered, as they

will play a role in registration transactions. They may be unknowingly involved in the preparation of signatures for company records in a manner that assists the perpetrator. In these cases, there is no real free consent to act as a director by the victim-survivor, and the directorship should not be seen as truly valid, as a result. (The **Duress** category).

- Misled by their perpetrator, who provides false information to induce the victim-survivor to become a director, and then subsequently feeds them false information over time regarding the company's affairs. Again, the role of ASIC registered agents (often also tax agents) in this process should be looked at, to determine whether they unknowingly take a role in both the preparation of registration forms, and in subsequent transactional documents. In these cases, the consent of the coerced director is vitiated by that deception, and so are any actions that they may innocently take in reliance upon the false information provided by the perpetrator. (The **Deceived** category).

6. In this context, aside from fraud cases, the question of timing is also a relevant factor as (not infrequently) an existing company director may become subject to duress or deception *after* they have previously been validly and voluntarily appointed as a director. This situation is considered later in this submission.

How can the director registration or appointment process be strengthened to prevent or mitigate the risks associated with coerced directorships?

7. The theoretical requirements of the Director Identification Number (**DIN**) regime can be subverted by the perpetrator's control of telecommunications devices, email accounts and postal mail channels often used as verification mechanisms, like 2-Factor-Authorisations (**2FA**).

8. To make such misconduct more difficult for perpetrators to achieve, we recommend leveraging the existing Director ID and myGov infrastructure to help prevent fraudulent appointments. Consideration should be given to directors being required to log in to their personal myGov account annually to actively 'acknowledge and confirm' their directorship appointments. Such a regular 'digital handshake' would also help to alert any directors (including coerced directors) to the directorships they currently hold.

9. The potential for ASIC registered agents (and tax agents) to be unwittingly involved in the verification process should, as noted, also be considered. The (often very persuasive) perpetrator may either mislead the practitioner or otherwise induce them to facilitate the abusive registration process and the ongoing maintenance of the company structure, potentially involving the preparation of false records.

Questions on pathways for director removal and resignation

What are the limitations of the current removal processes for coerced directors and how could these be addressed to better support coerced directors seeking to be removed from the Companies Register?

10. It is currently quite difficult for a coerced director to have their role in the company removed, especially where they may be the sole director of that company, absent seeking and obtaining a court order.

11. The current statutory regime in the *Corporations Act 2001* (Cth) does not provide any easier or more expedient process to achieve this end, other than court action. Again, the issue of single-director companies poses an additional barrier to the usual path of a director seeking to remove themselves from the Register (such as via the non-consenting director pathway), as at least one Australian resident director is required to remain on the Register for each company.

12. In addition, in general, the administrative practices of ASIC as the corporate regulator do not currently provide any easy or specialist pathway for victim-survivors to use any relevant administrative discretions to correct the director information in the Companies Register, nor is there any guidance on the evidence necessary for a victim-survivor to provide to properly engage with ASIC staff on these issues.

13. The concept of retrospective annulment of directorships in the three categories of coerced directors that is canvassed in the Consultation Paper is seen as being well worth consideration by the Committees. If the directorship were annulled by a newly introduced mechanism in the Corporations Act, this would have the immediate effect of removing liability for potential insolvent trading and for DPNs.

Are there any unintended consequences of allowing coerced directors to access the existing process for the removal of non-consenting directors, particularly in the context of protecting the rights of third parties engaging with the company in good faith?

14. While the interests of third-party creditors may be relevant as a constraint on potential solutions, the [lack of] reality of a victim-survivor director's consent to act and their subsequent [lack of] effective ability to be involved in the real management of the company would appear to be a paramount consideration, from a policy perspective. In a sense, this is similar to the common law doctrines that protect vulnerable people from being subject to abuse, such as the law of undue influence, the doctrine of '*non est factum*', or the defence of duress.

15. It is also important to recognise that there is an alternative party to whom creditors could be directed for redress: the perpetrator. As such perpetrators are often secretly controlling or influencing their victim-survivor as a director or, in effect, acting as a director without their victim-survivor's knowledge, they should be found to be a shadow or *de facto* director, even where they are not already also listed as a director on the Register. This might be achieved by a rebuttable presumption being created

for the alleged perpetrator, once the coerced director successfully raises their defence to have their directorship annulled.

16. The role of any such rebuttable presumptions may be seen as overlapping the existing legislative regime in the Corporations Act that already recognises potential de facto/shadow directors. However, the practical difficulties for a party under the existing legislative and administrative regime revolve around the evidentiary burden on the party seeking to demonstrate that a perpetrator was operating as a de facto/shadow director in the relevant sense. Conversely, a rebuttable presumption would reverse that onus of proof to instead require the alleged perpetrator to provide evidence to rebut that presumption.

What are the consequences of enabling resignation of a sole director who is subject to a coerced directorship? Would deregistration or winding up of the company help limit adverse consequences?

17. The current legislative regime for single-director companies would appear to lead to the logical conclusion that any such company should be deregistered, if it fails to have any director, at all. While this would seem to be a sensible outcome to prevent further abusive transactions affecting the victim-survivor and further liabilities being incurred for creditors, requiring the appointment of an external administrator (in the form of a liquidator) to conduct an investigation into past transactions and to support making the perpetrator directly responsible might be a useful feature to consider applying to protect the integrity of the system.

18. There may be situations where an affected creditor may wish to seek to reinstate the company, if it were simply deregistered—so that the company could be placed into liquidation to seek to recover funds from shareholders or associates who may have been involved in non-arm's-length dealings with the company. Conversely, the recommended appointment of a liquidator would be preferable in skipping that situation, so that creditors and the coerced director are both protected from damage to their respective positions, while the perpetrator may be brought to account through the liquidation process.

Does the proposed expansion of removal and resignation pathways adequately manage the risk of perpetrators retaliating against victim-survivors for accessing these pathways?

19. While such improvements appear necessary, the current proposals are not specific as to what those improved safeguards might look like. Some suggestions worthy of consideration may include:

    - requiring 2FA checks for appointments as directors, not just for obtaining a DIN;
    - requiring ASIC registered agents to verify the identity and authorisation of directors in one-to-one meetings, rather than simply accepting a signed consent to act form from a single contact for the company (i.e., the perpetrator in these coercive control situations);

- requiring tax agents filing tax returns or statements on behalf of companies to verify the identity and authorisation of directors in one-to-one meetings, rather than simply accepting a signed return or statement form or even a confirming email from a single contact for the company (i.e., the perpetrator in these coercive control situations); and/or
- imposing professional sanctions on ASIC registered agents or tax agents who do not follow such enhanced safeguard requirements may be a proportionate response to any such instances of non-compliance, in light of the nature, extent and impact of coercive directorships on the system.

Questions on strengthening defences for insolvency-related directors' duties

Are there any unintended consequences associated with strengthening defences to insolvency-related directors' duties to explicitly include experience of coercive control as a reason for not taking part in the management of the company?

20. As outlined above, the Committees strongly support the concept of annulment of directorships where a coerced director can successfully demonstrate that their directorship was vitiated by fraud, duress or deception.

21. The Committees also support the introduction of enhanced specific defences for coerced directorships, where appropriate evidence supports the claims made by the victim-survivor.

22. The major question for any such defences to be based on sufficient suitable evidence, which presents real challenges—as practitioner experience shows that the entire behaviour of coercive control operates behind a veil of secrecy, where the perpetrator conceals what is happening from those outside the family unit, so contemporaneous, independent, corroborating evidence may be lacking.

23. The Committees recommend that the appropriate evidence should be mandated to be from a suitably qualified treating health professional (or perhaps two—like a GP and a clinical psychologist), who has examined the victim-survivor claiming a coercive control situation, and who supports the diagnosis that the victim-survivor has suffered psychological damage consistent with their claims of abuse.

24. In addition, many victim-survivors of coercive control may have engaged with an independent financial counsellor to provide assistance with dealing with the broader financial damage that the perpetrator's abuse has covered. In such cases, evidence from such financial counsellors may also be useful in assessing the reality of the claimed circumstances. However, as not all coerced directors will have accessed such services, so practitioners do not feel that such evidence should be mandated for all claims to be accepted, the Australian Taxation Office (**ATO**) might rely rather on medical and psychological evidence.

25. This safeguard should prevent false claims being sustained, and avoid administrative agencies (ASIC or the ATO) from needing to 'second-guess' serious mental health issues in assessing testimonial evidence from the victim-survivor, while also avoiding

're-traumatising' those victim-survivors by subjecting them to inquisitorial examinations of the relevant (traumatic) circumstances.

Should any expanded or new defence include a temporal requirement for coercive control to have occurred at the time in which the contravention occurred?

26. Experience suggests that, as mentioned above, infrequently some directors of existing companies may subsequently become subject to coercion through duress or deception that prevents them from then being able to effectively participate in the management of their company. In those rarer cases, it appears inappropriate that the director should escape any potential liability for periods when they were not being coerced—while they should be able to seek relief for the period when they can demonstrate that they were subject to vitiating coercion.

27. Otherwise, the specification of any such temporal condition should be carefully considered, as the normal progression of coercive control is that it is an insidious program of smaller steps and actions by the perpetrator to achieve their coercive outcomes, rather than a single 'coercive event' of the type that would be easy to describe and demonstrate a particular time at which the relevant conduct occurred.

28. Feedback from practitioners and practical experience suggest that these longer-term programs of coercive control represent an essential element in the entire relationship between perpetrator and victim-survivor, which may 'ebb and flow' at times—with the perpetrator engaging in behaviours to diminish the victim-survivor's understanding of the circumstances, and then (physically or emotionally) abusive conduct that erodes the victim-survivor's self-confidence and ability to resist the perpetrator's control of their financial affairs.

Should any expanded or new defence include circumstances where a coerced director did take part in the management of the company, but their actions were under coercion?

29. The Committees strongly endorse this suggestion, as this is the major deficiency in the current defences for both Corporations Act insolvent trading actions and for DPN defences in the tax-related liability contexts.

30. Without that specific coverage, practical experience with the ATO by practitioners suggests that the act of merely signing a document or taking a phone call regarding the corporation's affairs under coercion would be sufficient to deny them the application of the current statutory defences of 'medical condition or other good excuse', as that test requires not participating in the management *at all*, in order to qualify. Although not addressing coerced directorships, the relevant case law suggests that intermittent or relatively minor interactions involving the company, such as talking with the ATO regarding the outstanding debts or signing documents, may be enough to prevent the relevant defences from applying, because the relevant director cannot demonstrate that they were incapable of effectively participating in the management of the company for the whole period—see *Deputy Commissioner of*

Taxation v Lister[1]*, Deputy Commissioner of Taxation v George*[2] *or Deputy Commissioner of Taxation v Snell*[3]*.*

Questions on director penalty processes

How can the ATO assist a coerced director to engage with them as soon as possible and bring their circumstances to the Commissioner's awareness

31. Firstly, as discussed above, the current DPN defences represent a poor fit for dealing with coerced directorships—in addition to being difficult for *any* director to successfully defend against liability, based on the narrow wording of the defence provisions and the even narrower interpretation of them in the case law.

32. However, there are practical difficulties for coerced directors in particular in raising a valid defence (under the current limitations) to a DPN within the initial 60-days after its issue. All forms of coercive control involve concealment and deception, as Fraudulent appointments need to be concealed from the unknowingly (falsely) appointed director; Duress cases feature perpetrators concealing problems and controlling communication channels (such as screening mail or emails), and Deception cases involve lies and concealment of true circumstances as their central feature. As a result, the temporal limitation to raise a defence to a DPN is faced by a barrier to effective service on the coerced director, because of the actions of the perpetrator.

33. Further, the ATO processes, structure and external website communications do not provide any specific channels for coerced directors to seek specialist assistance in dealing with these very complex and highly sensitive circumstances. Instead, victim-survivors are faced with attempts to engage through routine call centre channels, with long wait-times to speak to inexperienced client service representatives who are governed by generalised scripting intended to deal with more routine matters. While there are some limited channels for financial counsellors and Tax Clinics to engage with a small team of specialists, this mechanism is not well-recognised, or sign-posted for victim-survivors to access and is extremely limited in scope by excluding other types of practitioners who most frequently encounter these situations in practice, being lawyers and tax agents.

34. It would therefore be helpful for to ensure that coerced directors have access to specialist legal assistance so that victim-survivors can engage effectively with the ATO at the earliest possible point in the process. The ATO should also been ensuring that it has well-trained specialist staff to make decisions regarding DPN defences raised by coerced directors, in line with its usual decision-making processes. Points of ATO contact and referral to independent specialist advice would need to be well-advertised, and clarity provided regarding the types of evidence that would be required for such defences to be made,

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[1] [2002] QCA 270 at [14]
[2] [2002] NSWCA 336
[3] [2019] NSWDC 159

How can additional time be provided to coerced directors to obtain advice and determine the appropriate actions to take for their circumstances, while also upholding the DPN regime's intended purpose to recover employee entitlements from non-compliant directors in a timely manner?

35. The most obvious gap in the DPN procedural regime would appear to be a complete lack of discretion for the Commissioner to provide an extension of time for any director to lodge their defence to the relevant DPN/s. Practical experience demonstrates that the ATO response to DPN defence submissions out of time (beyond the initial 60-days) is for a case officer to give a fairly low-level formulaic response, which includes a carve-out statement to the effect that: 'This is not a formal decision and no review rights therefore arise'. From experience, this can have devastating effects on coerced directors (and other highly vulnerable people), who become disheartened and even suicidally depressed, upon receipt of a negative response, with no further avenue suggested to agitate their defence.

36. While the aim of the DPN regime is to secure the Commissioner's position as a creditor against directors who have engaged in conduct that causes PAYG, SGC and GST amounts to accrue and to remain unpaid, this is *not* the situation represented by coerced directors. They are themselves innocent of responsibility for those debts accruing and remaining unpaid, as that is the consequence of the actions of the abusive perpetrator. Therefore, leaving the victim-survivor to be subject to financial liabilities for the DPN is problematic.

37. Instead, the reciprocal assignment of liability for the misconduct that caused those debts to accrue upon the perpetrator is a more appropriate reflex for the system to take, once a coerced director makes a successful defence on that basis. This is the reason that the Committees recommend consideration being given to the creation of a rebuttable presumption that the alleged perpetrator will become liable for those debts as a shadow/de facto director (or remain solely liable, if already a director).

What are the benefits and risks of extending timeframes for coerced directors to take steps to have a DPN remitted or submit a defence?

38. From practical experience, the initial 'brightline' 60-day requirement in the current DPN defence process leads to the above-mentioned difficulties for coerced directors, in particular (and, in the interests of broader justice, for all directors subject to such a DPN). Providing a statutory discretion for the Commissioner to be able to accept late lodgment of DPN defences in suitable circumstances would appear to be a proportionate mechanism to address that current deficiency. In addition, there are very many such instances of administrative discretion available to the Commissioner in other contexts, such as the power to accept late lodgment of objections under Part IVC of the *Taxation Administration Act 1953* (Cth).

39. The Committees do not foresee any significant risks for the integrity of the system arising from allowing coerced directors (or any other director) greater time to raise with the Commissioner legitimate defences to DPN liabilities.

40. In practice, this may reduce risks from unnecessary subsequent debt enforcement litigation by the Commissioner which may otherwise be pursued in ignorance of the coercive control circumstances that should vitiate any potential DPN liability for the relevant coerced directors.

41. In other words, allowing more time to raise a defence would permit just claims for a defence to be dealt with by the Commissioner more easily, quickly and cheaply, without tying up court time and parties' respective costs in doing so through litigation.

42. In addition, it is worth noting that practitioners report that there are many instances where a coerced director simply lacks the financial resources, emotional energy or psychological health to properly contest a DPN defence through the courts, while they would be able to do so, if the process were done administratively.

Questions on defences for directors' duties relating to tax and superannuation liabilities

Are there any unintended consequences associated with introducing a new defence to explicitly include experience of coercive control?

43. The Committees do not foresee any significant difficulties or unintended consequences with the introduction of a specific DPN defence category for victim-survivors of coercive control.

44. However, the Committees recognise that the question of acceptable evidence to support claims made for that defence will be an important element in how well such a new category of DPN defence should be applied in practice.

Where director penalties also relate to a period before the victim-survivor experienced coercive control, should the victim-survivor be relieved of liability for the whole period or only for the period they experienced coercion?

45. As mentioned above, the vast majority of coerced directorships are likely to run for the entire period of that directorship, with only a smaller percentage of cases representing directors of existing companies who then subsequently become subject to coercive control by a perpetrator of such financial abuse. However, there may be a logical basis upon which a temporal restriction might be addressed in the framing of the legislation—to only permit a coerced director to be protected for the period in which they were coerced.

46. From practical experience with the existing 'medical condition or other good excuse' defences for the entire period of being a director, there may however be a risk to imposing such a temporal element into the design of a coerced director defence. This risk involves the potential creation of a similarly difficult problem for coerced directors of then having to not only *prove* coercion by the perpetrator, but also to demonstrate conclusively that it applied for the entire period—which may make an already difficult situation more difficult or even entirely unworkable.

What are the benefits and risks of expanding the existing defence or introducing a new standalone defence for coercive control?

47. The Committees recommend the introduction of an entirely new category of DPN defence specifically focusing on coerced directorships, as this will avoid confusion with either of the existing categories of defence and provide a clearer platform for ATO actions in applying that new defence.

48. Even if the existing defences theoretically already applied to defend coerced directors from liability under the DPN regime, the lack of success and practical difficulties experienced by coerced directors in dealing with the legislative and administrative tests at the moment would be substantially addressed by providing clear and unequivocal statutory signposting of a new specific coerced director defence that would put the protection for coerced directors in these situations beyond doubt.

Are there any differences or considerations that should be accounted for between the corporate and tax systems when considering strengthening defences for directors' duties?

49. The Committees recognise that there needs to be symmetry and alignment between the corporate regulatory system and the tax administration system on these issues. However, it is worth noting that the DPN regime primarily relies upon the relevant director being listed as such on the Companies Register with ASIC, in order for Division 269 to apply to create DPN liabilities. As a result, an absolute annulment of directorship for Corporations Act purposes would also have the effect of removing any relevant DPN liability for the coerced director.

50. As discussed above, there are currently three defences[4] which a director can raise in response to a DPN. Broadly speaking, they are:

    - that the director, "because of illness or some other good reason", could not take part in the management of the company "at any time" when they were a director during the entire period when the relevant obligations arose and thereafter while it remains unpaid, and it would have been unreasonable to expect the director to have done so;[5]
    - that the director took all reasonable steps which could have been taken, or there were no reasonable steps that could have been taken, to ensure that the company complied with the relevant obligation or that an administrator or small business restructuring practitioner was appointed or that the winding up of the company began;[6]
    - for unpaid SGC or GST liabilities, the company treated the relevant legislation as applying in a way that could be reasonably argued, was in accordance with the law, and took reasonable care in doing so.

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4 *Taxation Administration Act 1953* (Cth), Sch. 1, s. 269-35.
5 *Taxation Administration Act 1953* (Cth), Sch 1, s269-35(1).
6 *Taxation Administration Act 1953* (Cth), Sch 1, s 269-35(2).

51. However, the case law indicates that, as a matter of practical application, the first two defences are narrow and difficult to establish—see *Deputy Commissioner of Taxation v Lawson*[7], *Snell v Deputy Commissioner of Taxation*[8], *Canty v Deputy Commissioner of Taxation*[9], *Deputy Commissioner of Taxation v George*[10], *Deputy Commissioner of Taxation v Lister*[11], *Deputy Commissioner of Taxation v Robertson*[12], *Miller v Deputy Commissioner of Taxation*[13], *Roche v Deputy Commissioner of Taxation*[14], *etc*.

52. From a Corporations Act perspective, the Committees recommend that it would be appropriate to amend section 269–35 of the *Taxation Administration Act 1953* (Cth) to incorporate a 'reasonable reliance upon advice from another' defence, similar to that contained within subsections 588H(2)-(3) of the *Corporations Act 2001* (Cth). In this context, it is worth noting that sections 588G (prohibiting directors from allowing companies to trade while insolvent) and 588H (providing defences to action in contravention of that prohibition) were introduced at the same time as the original DPN regime,[15] and contains the parallel 'medical condition or other good excuse' and 'all reasonable steps/no other steps' defences—but for some reason did not include the 'reasonable reliance' defence.

53. Largely mirroring the DPN statutory defences, subsections 588H(4) and (5) set out the following defences:

> ***Director** who did not take part in management*
>
> *(4) If the person was a director of the company at the key time, it is a defence if it is proved that, because of illness or for some other good reason, he or she did not take part at that time in the management of the company.*
>
> ***Reasonable steps taken to prevent debt or disposition***
>
> *(5) It is a defence if it is proved that the person took all reasonable steps to prevent the company from incurring the debt or making the disposition of its property.*
>
> *(6) In determining whether a defence under subsection (5) has been proved, the matters to which regard is to be had include, but are not limited to:*
>
> *(a) any action the person took with a view to appointing an administrator of the company or a restructuring practitioner for the company; and*
>
> *(b) when that action was taken; and*
>
> *(c) the results of that action.*

54. However, in addition to the above, section 588H provides a defence (which is *not* mirrored in the DPN regime) to specified insolvent trading offences where the director can prove that they had reasonable grounds to expect, and did expect, that the

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[7] [2017] VDC 789
[8] [2020] NSWCA 29
[9] [2005] NSWCA 84
[10] [2002] NSWCA 336
[11] [2002] QCA 270 at [14]
[12] [2009] NSWSC 597; (2009) 234 FLR 35 at 66-67 [102]
[13] (1997) 38 ATR 51.
[14] [2015] WASCA 196.
[15] By the *Corporate Law Reform Act 1992*, as canvassed in the *Harmer Discussion Paper* and as recommended in the *Harmer Report*.

company was solvent at the relevant time and would remain solvent despite all its debts incurred.[16] Specifically, that defence can be established if the director proves:

> *(a) that they had reasonable grounds to believe, and did believe that:*
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> *(i) a competent and reliable person was responsible for providing them with adequate information about whether the company was solvent; and*
>
> *(ii) that other person was fulfilling that responsibility; and*
>
> *(b) that they expected, on the basis of information provided to them by that other person that the company was relevantly solvent and would remain solvent.*

55. Placing a victim-survivor in the awkward position of needing to prove that they had "reasonable grounds" to believe [albeit, in their subjective circumstances] that their perpetrator was "a competent and reliable person" and that their perpetrator was providing them with "adequate information" may represent a problematic proposition. Often in domestic violence situations, as discussed above, the victim-survivor is not given meaningful information about the affairs of the company and, if they attempt to seek it, they are subjected to further abuse.[17] Victim-survivors who are coerced under duress into signing off on decisions without being given information are likely to have difficulty establishing such a defence. However, for the deception category of coercive control behaviours, the introduction of a 'reasonable reliance upon information from another person' might prove to be highly effective in dealing with such situations—in addition to removing an apparently distortionary asymmetry between corporate regulation and tax administrative provisions that should otherwise from a public policy perspective be aligned.

Questions on opportunities to hold perpetrators to account

Would the introduction of new criminal and civil penalties for perpetrators involved in coerced directorships operate as an effective deterrent and punishment to perpetrators?

56. The Committees note that many perpetrators are not likely to be rational decision-makers, who would be appropriately influenced by risk/benefit considerations in deciding whether to engage in these types of financial abuse. As a result, criminal or civil penalties may not be an effective form of general or specific deterrence, in the design of a suite of legislative solutions to this reprehensible type of misconduct.

57. Conversely, the Committees recognise that it may be seen as an appropriate signal to the community that such criminal or civil sanctions be imposed on perpetrators of such substantial misconduct. If so, then the design of any such sanctions should be the subject of further specific consultation, given the risks of them applying to potentially innocent parties.

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[16] *Corporations Act 2001* (Cth), s.588H(2).

[17] Economic Abuse Reference Group, *Submission to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Corporate Insolvency in Australia* (25 November 2022).

58. In addition, it is worth noting that fraudulent director appointments would already be covered by existing criminal sanctions for the making of false statements, the keeping of false records, fraud, and/or conspiracy to defraud.

59. However, as recommended above, the proposal for a rebuttable presumption that an alleged perpetrator would become liable for the DPN liability, once the coerced director succeeds with their DPN defence would appear to deliver the liability to the party actually responsible for the misconduct.

How and when do intermediaries and professionals enable or facilitate the weaponisation of company directorships? Should penalties apply to intermediaries and professionals in these circumstances?

60. A clear distinction is required upfront between unwitting enabling and facilitation, and deliberate collusion or recklessness which are contrary to a professional advisor's ethical duties and professional obligations.

61. Perpetrators of coercive control are by their nature and purpose adept at deception, but such deception does not automatically or *prima facie* translate into culpability of a professional advisor.

62. Any proposals made to introduce new regulatory obligations and penalties in this context should have careful regard to existing professional regulation frameworks and avoid dual regulation.

63. In this context, it is important to highlight that the legal profession is one of the most extensively regulated professions in Australia. A lawyer who engages in professional misconduct may be struck off the roll of persons admitted or face other disciplinary consequences. The Law Council's recent 'Lawyer Regulation in Australia' paper provides an overview of the regulatory framework under which legal practitioners operate.[18]

64. Under the Australian Solicitors' Conduct Rules (**ASCR**),[19] which are a single set of professional conduct rules for all of Australia's solicitors, the key relevant professional standard for solicitors is expressed by ASCR rule 8, which states that a solicitor must [only] give effect to a client's lawful and proper instructions.[20]

65. It has long been recognised that determining that a client's instructions are for a lawful and proper purpose is not always a straightforward task. In 1926, in *R. v Tighe & Maher*, Street CJ observed:

> *It is expected of course of every solicitor that he shall act up to proper standards of conduct, that he shall give his clients sound advice to the best of his ability, and that he shall refrain from doing anything likely to mislead a Court of Justice;*

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[18] Law Council of Australia, 'Lawyer Regulation in Australia: An Overview', 16 October 2024.

[19] Law Council of Australia, Australian Solicitors Conduct Rules 2021 (**ASCR Rules**), available here. See also Law Council of Australia, Australian Solicitors' Conduct Rules 2022 Commentary, March 2024 (**ASCR Commentary**), available here.

[20] Further, the duty of the solicitor to the court and to the administration of justice is paramount and prevails to the extent of inconsistency with any other duty: ASCR Rules, 3.1.

> *but in the course of his practice he may be called upon to advise and to act for all manner of clients, good, bad or indifferent, honest or dishonest and he is not called upon to sit in judgment beforehand upon his client's conduct, nor, because he does his best for him as a solicitor within proper limits, is he to be charged with being associated with him in any improper way.*[21]

66. In 1998, in *re Moage Limited (in liq.)*,[22] Burchett J said:

> *It is the nature of legal practice that solicitors act for all sorts of clients, whose real motives and intentions may be concealed from their advisers. Therefore, if a knowledge of the impropriety of what a client is doing is to be alleged against a solicitor, the allegation should be made in clear terms; the reader of a pleading should not be left to spell out such an allegation by inference from the engagement of the solicitor to act in the client's affairs.*

67. While it is incumbent upon a solicitor to make enquires to establish that the client's instructions are for a lawful and proper purpose[23], the obviousness of the comments by Street CJ and Brennan J. is that the nature and extent of the enquiries that ought to be made necessarily depends upon the facts and circumstances of the client and the matter to which the instructions relate.

68. For tax practitioners operating under the *Tax Agent Services Act 2009* (Cth) (**TASA**), their reporting obligations and the terms of their Code of Professional Conduct would already appear to apply, as the preparation of tax returns, statements or other taxation forms or documents would already fall within the definition of 'taxation services'. Therefore, any such intermediaries facilitating misconduct of this kind would be subject to the range of appropriate sanctions available under TASA and the Regulations.

69. ASIC registered agents are an administrative creation of ASIC, where there are 'terms and conditions' applicable to the continued recognition of an organisation or individual as being permitted to operate as an ASIC registered agent. In that context, the only limitations that ASIC would appear able to apply would be by either withdrawing that ASIC registered agent status or attempting to impose quasi-contractual conditions on continuation of that status for the relevant organisation or individual. Given the experience with such issues in the tax system, for Electronic Lodgment Service availability prior to the enactment of TASA, the Committees suggest that it may be worth considering introducing a similar supervised regulatory regime for ASIC registered agents as was done for tax agents. It would be important to avoid potential overlap/dual regulation of legal practitioners in this context should this option be pursued.

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[21] ASCR Commentary, 27 citing *R. v Tighe & Maher* (1926) SR (NSW) 94, [108].
[22] Ibid, citing Moage Limited (in liquidation) v Joseph Grant Jagelman & Ors [1998] FCA 296, [11].
[23] Ibid, citing G. E. Dal Pont, Lawyers' Professional Responsibility (7th ed. 2021) [19.10]- [19.25]

Are there opportunities to further empower parties such as liquidators, creditors and ASIC to identify and hold perpetrators accountable for debts incurred in their capacity as shadow directors?

70. The Committees strongly support the provision of both Government funding for indemnification of liquidators and increased ASIC administrative funding to specifically focus on this pernicious form of corporate misconduct that currently allows perpetrators to escape liability, while leaving their victim-survivors (usually solely) liable (through insolvent trading actions and/or DPNs) for the damage done to creditors (including the ATO).

71. As raised above, one option would be to trigger an immediate liquidation of single-director companies, when a coerced director successfully demonstrates a sound basis for their defence against such liabilities. However, without follow-up funding for liquidator action to conduct investigations and ASIC action against perpetrators, it does not seem likely that many such perpetrators may actually suffer any consequences from their misconduct.

Are there other opportunities to ensure perpetrators are held to account and face appropriate consequences for the harms they create?

72. As discussed above, the Committees recommend:

- consideration for a rebuttable presumption that an alleged perpetrator be found to have acted as a shadow or de facto director and thus become liable for both insolvent trading and DPN consequences, accordingly (if they cannot rebut that presumption); and
- consideration of immediate winding up of a single-director companies where a coerced director successfully proves their defence, with consequent special funding to be provided for ASIC and liquidator activities against the alleged perpetrator.

Questions on defining coercive control

To what extent does the existing definition of coercive control in the Telecommunications Industry Standard appropriately capture the scope of harms and different cohorts of victim-survivors and perpetrators?

73. The Committees recognise the practical difficulties in determining a general definition for a course of misconduct that may include substantial variation in how that control may be implemented, depending on the circumstances of the victim-survivor. However, the definition provided in the *Telecommunications (Domestic, Family and Sexual Violence Consumer Protections) Industry Standard 2025* provides a sensible starting point for understanding the broad scope and range of this area of misconduct.

What are the appropriate types of evidence that would demonstrate the occurrence of coercive control?

74. Feedback from practitioners demonstrates that the degree of evidence of financial abuse and coercive control varies widely. Some matters will have contemporaneous evidence of police reports and medical interventions to treat injuries, while others have no external indications until after the victim-survivor has left their abusive situation (or the perpetrator has died) and the victim-survivor has begun to rebuild their life, while dealing with the chaotic aftermath.

75. For the cases where there is a lack of contemporaneous evidence, practitioners suggest that it would be appropriate for victim-survivors to obtain evidence from independent treating medical and mental health practitioners to validate their claims, after the fact. The feedback from tax and legal practitioners is that almost every victim-survivor has experienced profound psychological and often physical health effects from their abusive relationship with the perpetrator.

76. As a result, the Committees recommend that both ASIC and the ATO should accept (either through primary legislation or under a delegated instrument) the following as suitable evidence to support a covered directors' claims to have been subject to coercive control vitiating their activities as a director, being at least two of the following:

- medical evidence from a treating medical professional (potentially dealing with physical health conditions and mental health diagnoses and treatment plans);
- mental health evidence from a suitably qualified treating mental health professional recognised by a relevant professional association (dealing with mental health diagnoses and treatment plans);
- financial counselling evidence from suitably qualified financial counsellor recognised by a relevant professional association (dealing with financial abuse confirmation);
- police records demonstrating physical abuse and/or threats made by the perpetrator; and
- evidence from professionally qualified and registered intermediaries regarding their observations as to the conduct of the perpetrator in providing instructions to the intermediary, either without the victim-survivor being present or with minimal input from them, while the perpetrator dominated communications.

What difficulties may a victim-survivor encounter in providing evidence of experience of coercive control? What types of evidence may a victim-survivor have access to?

77. See above for types of evidence.

78. The main difficulties are two-fold:

- Domestic violence and financial abuse in particular involve secretive misconduct by the perpetrator against their victim-survivor, which is always subject to attempts to conceal what is truly happening from third parties. As a result, there will frequently be a lack of contemporaneous independent corroborative evidence of the course of misconduct available to the victim-survivor, as they cannot prove what was being effectively concealed by the perpetrator. This is the reason why retrospective evidence from independent assessment by treating professionals may be the only practical form of evidence that a victim-survivor may be able to produce to demonstrate that they were coerced directors (or in other relevant contexts).
- Re-traumatisation is a substantial risk for victim-survivors, who may find that re-telling their tale to a Government agency (whether ASIC, the ATO or both) can lead to post-traumatic flashbacks and substantially damage their recovery. This is one reason why the Committees recommend that reports from treating professionals are a preferred form of evidence to demonstrate abuse occurred, through the use of professional diagnostic instruments that will act as a filter against false claims being sustained by those (regulated) professionals, while protecting the mental health and recovery of the victim-survivor.

Do other key terms need to be defined?

79. The terms to describe the parties who are most frequently involved in instances of financial abuse and coercive control might be useful to define, such as:

- perpetrator (alleged);
- coerced director (claimed); and
- intermediary (potential facilitator).

Conclusion and further contact

80. The Committees would be pleased to discuss any aspect of this submission.

81. Please contact Bruce Collins, Chair, SME Business Law Committee [redacted] if you wish to do so.

Yours sincerely



Adrian Varrasso
Chair, Business Law Section