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DIRECTORS & OFFICERS — STRATEGIC LEADERSHIP OR BONDAGE?

DAVID G MILLHOUSE¹

Scholarly empirical analyses provide guidance to policy makers in Australia's ascent from the viral abyss to entrepreneurial sunlit uplands on which post-Covid prosperity might be built. These analyses provide regulatory options which can substantially diminish or lengthen the damage inflicted by the present crisis. They are policy choices only exercisable by the federal government. Damage reduction rests upon releasing the entrepreneurial spirits of directors, most of whom control SME's of various corporate forms. Present regulatory policy and the posture adopted by the regulators is achieving the opposite — being responses to demonstrated egregious behaviours of the past. In the present environment, this is akin to fighting the last war. Present policy initiatives focus on tax and economic policy rather than the removal of the dead-hand of spirit-crushing regulation. This paper proposes three options to facilitate entrepreneurship — to increase business capital availability, consistency in definitions, and to address the insurability of directors and officers. Each are consistent with Hayne's law simplification proposals and none re-open opportunities for a return to egregious behaviours.

INTRODUCTION

'The law can facilitate economic development and not simply coerce, regulate and control'.² It can also have the opposite result. There is 'a positive relationship between financial sector functions and economic growth'.³ '[T]he [S]tate should create the framework — the rules of the game for the economy'.⁴ These sentiments were echoed by Hayne — '[T]here is every chance that adding a new layer of law and regulation would only serve to distract attention from the very simple ideas that must inform the conduct of financial services entities ... Their simplicity points firmly towards a need to simplify the existing law ... in the blizzard of [statutory] provisions it is too easy to lose sight of those simple ideas ...'.⁵

It is the directors of companies and of financial services entities who must shoulder the heavy burden of carrying Australia from its viral abyss into the sunlit uplands of an entrepreneurial economy. Yet most directors are lay persons drawn from the general populace — motivated to lead and employ, but instead subjected to regulatory bondage

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² Justice Michael Kirby, 'The company director: past, present, and future' (Speech, Australian Institute of Company Directors, Tasmanian Division, Hobart 1998).

³ Jeffrey Carmichael and Michael Pomerleano, 'The development and regulation of Non-Bank Financial Institutions' (Report, World Bank, 2002) 12, citing Ross Levine, Norman Loaya and Thorsten Beck, 'Financial Intermediation and Growth: Causality and Causes' (World Bank Development Research Group, 1999).

⁴ Matthew Qvortrup, *Angela Merkel Europe's most influential leader* (Duckworth Overlook, 2017) 338.

⁵ Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 2018) (Commissioner Hayne) ('Hayne Interim') vol 1 290, quoted in David G Millhouse, 'W[h]ither Australia? Will Parliament Act?' 14(2) *Law and Financial Markets Review* (2020) 84 <<https://doi.org/10.1080/17521440.2020.1759218>>.

and exposed to significant life-changing personal risk. Focussed on virus-induced survival rather than the opportunities crises can provide.⁶ The vast majority of those directors are to be found in Australia's Small and Medium Enterprises (SME) sector and need to participate in 'reinvigorat[ing] the country's growth and productivity agenda'.⁷

How can those earlier sentiments of the law — being to facilitate commerce in the public good, now echoed by Hayne, be achieved? Recent financial press is replete with examples of the need for law and regulatory reform.⁸ But most of the government response targets economic and tax policy rather than the regulatory impediments for directors in rebuilding the economy. Whilst there has been some deferral of additional compliance costs associated with statutory interventions,⁹ there is no change in regulator posture,¹⁰ an example of how litigation if successful could choke off credit to consumers and business, particularly SME's where bank finance is contingent on provision of personal security. Indeed, and despite scholarly research to the contrary, regulatory policy and its compliance implementation is becoming increasingly onerous for directors, imposed as statutory and regulatory responses to previous egregious behaviours. Nor is there any obvious implementation of the most important of the Hayne recommendations, despite proposals from the Australian Law Reform Commission (ALRC).¹¹ This could provide the circuit breaker to the present position, adopting a military metaphor — fighting the last war.

Some authors suggest the capital investment required to replace virus induced foregone investment be c. AUD104 billion.¹² Whatever the actual aggregate investment may need to be, it is clear that the Australian economy needs to grow sustainably beyond its historical annual performances,¹³ to provide increased supplies of goods and services and to stimulate domestic and international demand for them. Capital investment is but one part of that story — it is the directors of entrepreneurial enterprises that must be the driving force. If they are not, then the burden of income support will fall heavily upon government.

There is no one legal reform solution, but there are identifiable themes which can be enacted by government in the short run. Two themes are — reform of private capital markets to facilitate investment, and removal of unnecessary director risks. These assist the elimination of unnecessary compliance and cost burdens and commence Hayne's

⁶ See, eg, Adam Creighton, 'Hollow rhetoric missed opportunity', *The Australian* (Sydney, 13 May 2020).

⁷ Philip Lowe, An Economic and Financial Update (Speech, Reserve Bank of Australia, Sydney 21 April 2020).

⁸ See, eg, Chris Berg, 'This silent deregulation should become a new pillar of recovery', *Opinion The Australian Financial Review* (Sydney, April 27 2020) citing Christian Bjørnskov, 'Economic freedom and economic crises' 45 *European Journal of Political Economy* (2016) 11–23; Janet Albrechtsen, 'Just a word if I may, PM: Vorsorgeprinzip', (*Commentary The Australian* (Sydney, 18 March 2020).

⁹ See, eg, John Kehoe, 'Banking inquiry laws delayed', *The Australian Financial Review* (Sydney 9–10 May 2020) 3.

¹⁰ See, eg, *ASIC v Westpac Banking Corporation* [2020] FCAFC 111 (26 June 2020) (Middleton, Gleeson, Lee JJ).

¹¹ Millhouse (n 5) 85 citing Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020–25* (Report, December 2019) 31–36.

¹² Pradeep Philip and Stephen Smith, 'A \$104bn investment crisis is on the horizon', *The Australian* (Sydney, June 1 2020).

¹³ See, eg, Sinclair Davidson, 'JobKeeper cannot be for keeps', *The Australian Financial Review* (Sydney, 20 May 2020).

proposed simplification of the law. They also provide the basis for longer term systemic modernisation of the law so that, once again, it serves the needs of the economy in the public interest. None of these proposals permit a return to the egregious behaviours identified by Hayne and quantified by this author.¹⁴

RESEARCH BACKGROUND

Empirical analysis illustrates how best regulatory regimes should respond to crises.¹⁵ This scholarly research analyses economic freedom and crisis risk (212 crises in 175 countries) for the period 1993-2010, concluding that ‘economic freedom is robustly associated with smaller peak-trough ratios and shorter recovery times’.¹⁶ It also acknowledges that policy derived from this empirical analysis is ‘politically contested’,¹⁷ as it would be here in Australia in efforts to meet the challenges of a changed economy. The primary dichotomy is whether regulatory institutions or market forces can best assist a post-crisis economy. Paternalism versus entrepreneurship. Australian statutory and regulatory policy has a long history of oscillating between the two, continuing today.¹⁸

‘Entrepreneurs are arguably specifically important during the period of recovery of a crisis, as firms and jobs have been destroyed ... [f]ollowing a crisis, entrepreneurial opportunities are likely to increase ... [but] public regulations such as licensing requirements and other entry barriers can prevent entrepreneurs from realizing new profit opportunities ...’¹⁹

From an economy-wide opportunity cost perspective, the research concludes that the difference between the two postures is a recovery period of 3 years versus 5 years and a diminution of economic activity of less than 10% or more than 20%.²⁰ Applied to post-Covid Australia, it implies recovery can at best take until 2023 with a much lower diminution of economic activity than otherwise. For this to occur, then the spirits of individual entrepreneurship must be unleashed.

There are multiple components of economic freedom, in this analysis statistically attributed to ‘regulatory efficiency’²¹ and ‘licensing regulations ... as well as regulatory transparency of their enforcement’.²² Ipso facto, removal of barriers to entrepreneurial endeavour ‘limit[s] economic and social losses during crises’.²³ These are important in ‘normative’ times, but they assume critical importance in crisis response. Apart from

¹⁴ David G Millhouse, ‘Empirical Analysis supports the Hayne long run reform thesis’ 13(2–3) *Law and Financial Markets Review* (2019) 162–187 <<https://doi.org/10.1080/17521440.2019.1602923>>.

¹⁵ Christian Bjørnskov, ‘Economic freedom and economic crises’ 45 *European Journal of Political Economy* (2016) 11–23.

¹⁶ *Ibid* 11, 20.

¹⁷ *Ibid*.

¹⁸ David G Millhouse, ‘From Campbell to Hayne: W[h]ither Australia? Australian financial regulation and supervision at a cross-roads’ 13(2) *Law and Financial Markets Review* (2019) 81–98 <<http://doi.org.10.1080/17521440.2019.1602696>>.

¹⁹ Bjørnskov (n 15) 14.

²⁰ *Ibid* 19. Crisis sample size = 80.

²¹ *Ibid* 21.

²² *Ibid* 22.

²³ *Ibid* 22.

deferral of some compliance measures, flawed as they are, there appears to be little recognition of this research.

REFORM OF PRIVATE CAPITAL MARKETS

Entrepreneurial endeavour is a function of individual effort and skill, usually in a director and officer role throughout the investment chain. Traditionally in Australia, these efforts have been structured in a company or trust (Managed Investment Scheme (MIS)) format, with interfaces into the superannuation and non-superannuation capital markets. Historical discombobulations resulted in Hayne and multiple statutory and regulatory responses. Some of these now serve to diminish the ability of the economy to respond to its present crisis. However, even without the simplification of the law recommended by Hayne,²⁴ there are immediate reform options which could facilitate economic revival and which are consistent with Hayne's longer run reform recommendations. They would allow directors to pursue opportunities, provide necessary financial consumer protections, and better manage director risks. Reform would also make Australia more internationally competitive in attracting outbound Hong Kong capital flows. The financial product passporting regime remains incomplete and uncompetitive despite ten years in the making,²⁵ and high barriers to entry make it very restrictive for Australian funds managers.

Managed Investment Schemes

In broad terms, Australian MIS (Collective Investment Scheme (CIS) in Singapore) are either registered or unregistered.²⁶ The *Corporations Act* treats each typology differently with consequential diminished investor protections in unregistered schemes. Unregistered MIS are typically smaller, with fewer than 20 scheme members with up to \$2.0 million capital raised in a 12-month period (similar to unlisted companies), and usually (not always) do not require the issuance of a Product Disclosure Statement (PDS). There are significant differences for investors in those unregistered MIS which are subject to winding-up proceedings. Empirical analysis²⁷ identified 27.77% of 126 MIS appearing in a senior court in the study period were unregistered. Unregistered MIS have considerable economic importance, particularly in regional agribusiness and property development small capital raisings. However, given the limitations of the *Corporations Act*, investors have not been well-served — law reform is needed.

²⁴ Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2018) (Commissioner Hayne) (*Hayne Final*) 494–496.

²⁵ Originally proposed by Johnson in 2009, legislation for Asian Region Funds Passport (ARFP) and Corporate Collective Investment Vehicles (CCIV) incorporates new chs 8A and 8B in the *Corporations Act 2001* (Cth). *Corporations Amendment (Asian Region Funds Passport) Act 2018* (Cth) received Royal Assent on 29 June 2019. Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 remains in the legislature. These allow for multi-jurisdictional financial product distribution (New Zealand, Hong Kong, South Korea, Thailand, Singapore, Philippines, Japan and Australia have participated in consultations). The Passport is based on mutual recognition principles. Related party transactions are regulated in the home country. UCITS principles are accorded world's best practice for custody. The legislation provides for the SLE model in both corporate and limited partnership forms, with directors' duties giving priority to investors over shareholders.

²⁶ Alan Jessup, *Managed Investment Schemes* (The Federation Press, 2012) 40–43.

²⁷ Millhouse (n 14).

Singapore has balanced small-CIS economic importance with enhanced legal protections. The *Business Trusts Act*²⁸ specifically regulates actively managed special purpose investment schemes in property development but can be applied to any defined duration actively managed asset class investment. Directors and officers have statutory personal fiduciary liability to unit holders in its proscriptive formulation. This personal fiduciary liability extends to agents of the trustee-manager appointed to perform some of its functions.²⁹

Singapore business trusts regulation only partly follows the Australian MIS Responsible Entities (RE) model (where directors of the Australian corporate trustee owe fiduciary duty to it, and a best interest duty to unit holders which does not necessarily confer direct fiduciary liability to them), and is similar to the (unenacted) Australian Single Legal Entity (SLE) proposal.³⁰ It also has similarity with Australian superannuation entity trustee directors whose fiduciary duty is directly statutorily owed to the beneficiaries³¹ ‘to [ensure] that fiduciary responsibility towards unitholders of a business trust is clearly placed on a single entity’, being the trustee-manager.³² This is not the case for Singapore CISs (real property or securities), resulting in business trust unit holders having more fiduciary protection than those in CISs, which retains the traditional split trustee-manager model. In Singapore, the distinction in regulation is whether the trust is an active or managed one. This distinction was to facilitate cross-border investment.³³

All Australian MISs should be registered — unregistered MISs should be abolished. There is a market need for small, actively managed collective investment schemes, particularly in small-scale property development and agriculture and especially in regional areas. These would be regulated using the Singapore business trust or the previously proposed SLE models, amending Pt 5C of the *Corporations Act*. That is, all Australian collective investment schemes are de jure registered MISs unless they come under these new active trust provisions.

Ideally, the proscriptive formulations in the Singapore *Business Trusts Act* could be extended to include the prescriptive fiduciary-like duty of care elements found in the German *untreue* principles, now encoded in European statute — adherence to the spirit of the law as well as its specific provisions. This moves Australian law closer to that pure liability model and could provide the legal platform for enhanced retail investor protection. For consistency, this enhanced legal protection should allow an increase in the amount that can be invested and an increase in the number of unit holders³⁴ in these proposed Australian business trusts. An alignment with the crowd-sourced funding provisions³⁵ for an annual capital raise of \$5.0 million from all sources,³⁶ and with reform of s 708(1)(b) of the *Corporations*

²⁸ *Business Trusts Act 2004* (Singapore, Act 30 of 2004) pt III ss 11(1)(a)-(b), (2), (3), (5).

²⁹ *Ibid* s 11(5)(a).

³⁰ Australian Government, Corporations and Markets Advisory Committee (CAMAC), *Managed Investment Schemes* (Report, 2012). See generally David G Millhouse, *Corporate Governance in Non-Bank Financial Entities* (LexisNexisButterworths, 2019) 70–86 [2.119].

³¹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(8). See also Millhouse (n 30) 70–79 [2.102].

³² L S Fern, ‘Real Estate Investment Trusts in Singapore — Recent Legal and Regulatory Developments and the Case for Corporatisation’ (2010) 22 *Singapore Academy of Law Journal* 36, 57.

³³ *Ibid* 65.

³⁴ *Corporations Act 2001* (Cth) ss 601ED(1), 1012E(2).

³⁵ *Corporations Amendment (Crowd-sourced Funding) Act 2017* (Cth).

³⁶ *Ibid* s 738G(2).

Act for company raisings would result in three consistent parallel regimes for small unlisted entrepreneurial entities. Further retail investor protection can be provided by extension of consumer finance law to these products. The benefit for entrepreneurial directors is a closeness to those whom they are there to serve arising from a clear fiduciary relationship, a reduction in ‘box-ticking’ compliance obligations, and simpler offer documentation than a PDS, most of which are complex and costly to create and administer.

BROADENING INTERPRETATIONS

Recent law has enriched the definition of officer, of who is a ‘retail’ investor, and greatly increased liability on directors for the issuance of financial products, the latter being a new bespoke statutory regime which can greatly reduce investment availability for new and existing financial products.

Definition of Director and Officer

‘Director’ and ‘Officer’ are defined terms.³⁷ ‘Officer’ has a wider meaning than ‘director’. From a liability perspective, it is the practical activities that the officer undertakes, being ‘the capacity to affect significantly the corporation’s financial standing.’³⁸ *ASIC v King* does not change the statutory definition, but does provide recent unanimous judicial clarity that titles are irrelevant — it is the facts relating to activities and duties which determine officer status. Doubtless, the operation of s 9(b)(ii) will be tested in future cases, particularly where there are related or associated parties. Complaints of a literal interpretation ‘are misplaced’.³⁹ This is particularly important in SME’s⁴⁰ where there are often counterparties, sometimes associated with a director, and with legal rights who may exercise a threat.

In such a case, that person may fall within either or both of para (b)(i) or (ii) of the definition. But that depends on the facts of the case as to the nature and extent of the counterparty’s control of, or capacity to control, the corporation’s decision making qua management; it does not depend on the counterparty’s legal rights.⁴¹

Importantly, those who influence investment decisions, financial commitments,⁴² policy or decision making⁴³ cannot rely on the professional or business relationship exclusion in para (b)(iii). They may find themselves with officer liability, including from conflicts of interest arising therefrom and with no business judgment defence.⁴⁴

³⁷ *Corporations Act 2001* (Cth) ss 9(b)(ii) for each of director and officer.

³⁸ *ASIC v King* [2020] HCA 4 [39], [44], [53].

³⁹ *Ibid* [38].

⁴⁰ *Ibid* [93].

⁴¹ *Ibid* [41].

⁴² *Ibid* [53].

⁴³ *Ibid* [44].

⁴⁴ *Millhouse* (n 30) 160 [385].

Investor Typology

Australia has three differing overlays of investor typology continuing its tradition of ‘obscure and convoluted’ legislation.⁴⁵ Some parts of the regulatory framework only apply if the client is a retail client [or investor].⁴⁶ This requires holistic reform — investor typology does not always reflect their competencies.⁴⁷ ‘Professional’,⁴⁸ ‘sophisticated’,⁴⁹ ‘wholesale’ (being not retail),⁵⁰ ‘retail’⁵¹ overlap. Separately, the Financial Adviser Standards and Ethics Authority (FASEA)⁵² introduced further confusion into the retail/wholesale investor typology extending the interpretation of retail investor to include financial comprehension⁵³ and applies to ‘relevant providers’⁵⁴ not only to traditionally termed financial advisers.⁵⁵ A person ‘may be a retail client for some purposes and a wholesale client for others.’⁵⁶ A Self-Managed Super Fund (SMSF) trustee director may be retail, but the SMSF is not. Similarly, the interface with the non-FASEA financial advice provisions⁵⁷ has bizarre consequences.

[This] new law applies to some financial services firms who are not fiduciaries with respect to the giving of that advice at general law. However, because of the narrow definition of retail client, many financial advisers who are fiduciaries ... are not subject to the new law.⁵⁸

These examples are all consequences of accretive statutory change.

Design and distribution of financial products

The *DDO Act*⁵⁹ amends the *Corporations Act*, *National Consumer Credit Protection Act* and the *Australian Securities and Investment Commission (ASIC) Act*, its Design and Distribution Obligations (DDO) implementation deferred until 5 October 2021. Its product

⁴⁵ Pamela Hanrahan, ‘Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households’ *Royal Commission in the Banking, Superannuation, and Financial Services Industry* (Background Paper 7) 13 citing *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] FCAFC 50 [152]–[153] (Young JA).

⁴⁶ *Ibid* 21 [2.4].

⁴⁷ See, eg, Millhouse (n 30) 194 [4.17]–[4.30].

⁴⁸ *Corporations Act 2001* (Cth) s 9 reg 7.6.02AE.

⁴⁹ *Ibid* ss 708(8), 761GA.

⁵⁰ *Ibid* ss 761G(4), 761G(7)(c)(ca), reg 7.128.02AB.

⁵¹ See, eg, *Corporations Act 2001* (Cth) ss 738D, 760A(a), 761A, 761G, 761GA, 994A(1), 1012E.

⁵² *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth).

⁵³ David G Millhouse, ‘Best Interest Duties of Financial advisers — More Law, More Confusion’ (2020) *Enterprise Governance eJournal*, Centre for Commercial Law, Bond University 11.

⁵⁴ *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth) s 910A.

⁵⁵ A relevant provider can be any person or entity licensed and engaged in transactional personal advice to FASEA’s interpretation of retail client. It could include stockbrokers, accountants, mortgage brokers, and sales representatives. See especially FASEA, *Financial Planners and Advisers Code of Ethics* (Guidance FG002, 2019) 6.

⁵⁶ Hanrahan (n 45) 22 [2.4].

⁵⁷ *Corporations Act 2001* (Cth) s 961B.

⁵⁸ Hanrahan, ‘The relationship between equitable and statutory “best interests” obligations in financial services law’ (2013) 46(1) *Journal of Equity* 7 para [V]. See also, Millhouse (n 30) 234–235 [5.66].

⁵⁹ *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth); *Corporations Act 2001* (Cth) pt 7.8A.

intervention powers have been in force since 6 April 2019. Originally proposed by Murray⁶⁰ in 2014, its objective is to regulate the sale of financial products to retail consumers of those products. It seeks to do so by introducing statutory tests of appropriateness,⁶¹ target market determinations⁶², and financial product distribution conduct⁶³ by regulated persons⁶⁴. ASIC may exempt persons or classes of persons.⁶⁵ Orders may be sought and made to redress loss of damage to financial consumers including declarations that a contract be void or void *ab initio*.⁶⁶ There is some subjectivity — ‘[i]n considering whether a financial product has resulted in, or will or is likely to result in significant detriment to retail clients...’⁶⁷ Civil penalties apply.⁶⁸ Similar amendments are made to the *National Consumer Credit Protection (NCCP) Act*.

Financial products include home mortgages, savings accounts, term deposits, prospectus and PDS offers of securities, hybrids, derivatives, all financial products regulated by the *ASIC Act* in respect of conscionability and consumer protection, and NCCPA products. In short, those products around which modern life exists. It applies to existing financial (including MIS) products and to new ones sold to retail investors, each of which will now require a ‘target market determination’ by a ‘regulated person’. If ASIC applies its financial product intervention powers policies to DDO, then all issuers of financial product offers will not have to have breached fundraising law to trigger a DDO intervention and there is no ASIC obligation to act confidentially. Murray originally conceived these powers to have a limited life span. This now seems unlikely.

A more useful approach might be reform of the three overlapping typologies of investor with ASIC using its exemption powers to limit the types of investor to whom a product can be sold, an option considered by Murray.⁶⁹ There is a distinction in required regulatory skills sets between ASIC’s product intervention powers and its DDO powers although they were introduced in the same statute, the latter requiring a broader and deeper comprehension of financial product markets than statutory compliance alone.

EXPANSION OF DIRECTOR RISKS

Directors and Officers Insurance and class actions

Media reporting consistently reports director and officer risks becoming unaffordable even if they are available at all, many insurers reportedly having withdrawn from the Australian Directors and Officers (D&O) insurance market. The financial press is replete with calls for interventions into the class action industry. As an example, in a succinct op-

⁶⁰ David Murray, *Financial System Inquiry Final Report* (Australia Treasury, 2014) 198–212 (*Murray*) recs 21 and 22.

⁶¹ *Corporations Act 2001* (Cth) Div 2 s 994B(8).

⁶² *Ibid* s 994B.

⁶³ *Ibid* ss 994A, 994D,

⁶⁴ *Ibid*.

⁶⁵ *Ibid* s 994L.

⁶⁶ *Ibid* s 994Q.

⁶⁷ *Ibid* s 1023E(1).

⁶⁸ *Ibid* s 1023Q.

⁶⁹ Murray (n 60) 210.

ed, Albrechtsen⁷⁰ identifies four reform needs including remediation of the ‘director’s and officer’s insurance crisis’. Similar issues exist with the cost of professional indemnity insurance for financial advisers with blame being attached to class action litigation.⁷¹

Poor insurability is likely to ‘suffocate entrepreneurial [endeavour] and investment and growth-focussed decisions in Australia, as boards become more risk averse’.⁷² Australian directors are potentially exposed to liabilities arising from ‘more than 600 pieces of legislation’.⁷³ Important risks for SME’s, including securities claims and special excess limits for non-executive directors ‘have been restricted or removed’.⁷⁴ Marsh says ‘it is not just publicly listed companies that are experiencing premium and retention increases and reduced capacity, [claiming] [t]he effects of litigation funded class actions have rippled through all D&O policies, as well as management liability policies commonly purchased by [SMEs]...’⁷⁵ Reliance on a company deed of indemnity may be possible (not always)⁷⁶ but its efficacy relies on solvency and liquidity, or the establishment of a trust or reserve available to directors and officers as self-insurance.

Special types of MIS — litigation financing and Workers Entitlement Funds

Media reporting can have a negative feedback loop acquiring influential global momentum of its own whereas legal scholarship, even when reported, does not. Scholarly empirical analysis of class action litigation⁷⁷ does not support the claims made by Marsh or similar claims in the financial press. Questions therefore arise as to the underlying reasons for the rise in premium costs and the reductions in cover. Legal scholarship is not replete with empirical analysis so in the present debate on D&O costs and availability, sober analysis is essential and should be heeded.

Morabito, based on his data contends — ‘no balanced or objective assessment of the volume of class action litigation in Australia could possibly lead to the conclusion that there has been an explosion in the number of class actions filed in Australia.’⁷⁸ His research also shows that ‘after 2018 there has been a decrease in the number of (a) Australian class actions; (b) federal class actions; (c) Australian funded class actions; and (d) federal funded

⁷⁰ Janet Albrechtsen, ‘This lavish lawyers’ picnic must be brought to an end’, *Commentary The Australian*, (Sydney, June 24 2020) 10.

⁷¹ See, eg, Sarah Kendall, ‘Compensation firm slams AMP’s arrogance’, *Daily News Investor Daily*, (Sydney, 6 July 2020).

⁷² Marsh Pty Ltd, Submission No 14 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) 6[D]. See also Marsh Pty Ltd, Submission to the Australia Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders ‘Directors’ and Officers’ Liability Insurance* (27 July 2018).

⁷³ *Ibid* 4[B].

⁷⁴ *Ibid* 3 [B].

⁷⁵ *Ibid* 3 [A].

⁷⁶ See, eg, Millhouse (n 30) 71 [2.85].

⁷⁷ Vince Morabito, ‘An Evidence-Based Approach to Class Action Reform in Australia — Shareholder Class Actions in Australia—Myths v Facts’ (Research Paper, Department of Business Law and Taxation Monash Business School, November 2019) 9 <srn.com/abstract3484660>.

⁷⁸ Vince Morabito, Submission No 6 to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and Regulation of the Class Action Industry*, (10 June 2020) 4.

class actions.⁷⁹ It is shareholder class actions that seem to be the subject of financial press and insurer attention, including claims that shareholder class action litigation was not originally proposed to be an outcome of Pt IVA.⁸⁰ In the four class action jurisdictions analysed,⁸¹ there have been 634 class actions over Morabito's study period of 27 years and 4 months. These concerned 420 disputes.⁸² Of these, 122 were shareholder cases involving 63 companies or groups,⁸³ only 9 of which were in financial services and products. He also reports a declining trend in shareholder class actions declining from 44.7% of all actions in 2016–17 to 32.2% in 2019-20.⁸⁴ Of the 122, 67% were brought against the companies only, not the directors. In only 4.9% of the cases, the actions were brought against the directors alone.⁸⁵ The proportion of cases joining directors in the action have declined from 18.8% of the total sample to 10% of cases filed in the 2018–19 financial year.⁸⁶

Morabito's data leads to the conclusion that there needs to be a more thorough government review of the D&O insurance sector, perhaps by the Australian Competition and Consumer Commission (ACCC) or Productivity Commission into the underlying issues contributing to both insurance availability and cost. A review may determine whether this historical data is an accurate predictor of future trends. Morabito's data covers shareholder actions, not investor actions which would capture MIS. This is an artificial dichotomy and both sectors should be included in the proposed review.

Legal analysis demonstrates the very broad application in private law of class actions⁸⁷ in seeking redress to imbalances of power. These are not only shareholder or investor originated actions.⁸⁸ Since inception to 2016, of the 329 Pt IVA proceedings in the Federal Court, only 89 were on behalf of investors.⁸⁹ From a director perspective, every organisation needs a potential class action risk analysis.

Historically, since the introduction of the class action provisions in March 1992,⁹⁰ third party litigation funders did not require an Australian Financial Services Licence (AFSL) but were and are subject to general law interventions and court oversight.⁹¹ 'In July 2013, litigation funders were specifically exempted ... from the requirement to hold an [AFSL]...' ⁹² Their exemptions extended to Pt 5C of the *Corporations Act* and the *National Consumer Credit Code*.⁹³ These exemptions have been supported by scholarly opinion if there

⁷⁹ Ibid.

⁸⁰ Morabito (n 77) 9.

⁸¹ Federal Court, Victoria, NSW, and Queensland Supreme Courts.

⁸² Morabito (n 77) 12–13 tab 1.

⁸³ Ibid 15–16 tab 2

⁸⁴ Ibid 16.

⁸⁵ Ibid 19.

⁸⁶ Ibid.

⁸⁷ Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons — An Australian Study' (2016) 35 (1) *Civil Justice Quarterly* 61.

⁸⁸ Morabito (n 78) 3.

⁸⁹ Morabito (n 87) 87.

⁹⁰ *Federal Court of Australia Act 1976* (Cth) pt IVA.

⁹¹ Ibid.

⁹² *Corporations Amendment Regulation 2010 (No 6)* cited in Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, December 2018) 62 ('ALRC 2018').

⁹³ Ibid.

is a net benefit argument,⁹⁴ by the ALRC (initially)⁹⁵ and by ASIC.⁹⁶ Scholarly opinion however does acknowledge that ‘attention instead be placed on giving courts presiding over this type of litigation adequate powers to ensure class members are treated fairly and receive adequate compensation in successful class actions.’⁹⁷ Of itself, this justifies the application of Parts 5 and 7 to these types of MIS and access to the considerable jurisprudence available since the advent of the *Managed Investments Act* in 1998. This reform of itself does not restrict the access of claimants to the courts in redress of grievances. Indeed, it may reduce costs over those of a bespoke statutory regime, being a new body of law. It may also allow more transparency to counterparty directors.

As is often the case in Australia, definitional boundaries became contentious. ‘All that the word “scheme” requires is that there be some programme, or plan of action’.⁹⁸ It is not a defined term, but there are constituent statutory elements. Judicial analysis concluded a litigation funding scheme was indeed a MIS,⁹⁹ satisfying these five essential elements in s 9 of the *Corporations Act*.

This previous and now reformed exemption¹⁰⁰ from the financial advice and managed investment scheme provisions of the *Corporations Act*¹⁰¹ for litigation financing and contingency fee charging were an example of Hayne’s ‘special rules, exceptions and carve-outs’,¹⁰² there being considerable but unsuccessful support for ‘a bespoke licensing regime that sat outside the [AFSL] regime but imposing comparable obligations’.¹⁰³ Some participants support AFSL and MIS reform to include class action financiers.¹⁰⁴ Others, perhaps conflicted, do not.¹⁰⁵

Another example is the continuing exemption of Workers Entitlement Funds (WEF) afforded by ASIC. WEFs are established, normally as joint ventures, to provide for

⁹⁴ Morabito (n 78) 1.

⁹⁵ *ALRC 2018* (n 80) 161 [6.37].

⁹⁶ Morabito (n 78) 1.

⁹⁷ Morabito (n 78) 5.

⁹⁸ *ASIC v Chase Capital Management Pty Ltd* [2001] WASC 27 [57] (Owen J) citing *Australian Softwood Forests* [1981] HCA 49 [11] Mason J. See Millhouse (n 30) [3.117], [3.133].

⁹⁹ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 (Sundberg, Dowsett, and Jacobson JJ).

¹⁰⁰ Proposed to take effect on the 22 August 2020.

¹⁰¹ Pts 5 and 7 respectively.

¹⁰² *Hayne Final* (n 24) 16, 495 rec 7.3.

¹⁰³ *ALRC 2018* (n 92) [6.17]–[6.42].

¹⁰⁴ See, eg, Norton Rose Fulbright, Submission to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (June 2020) 2 [1.2]; King&WoodMalleasons, Submission to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (22 May 2020) <www.kwm.com/en/au/knowledge/insights/litigation-funding>.

¹⁰⁵ See, eg, Woodsford Litigation Funding, Submission No 16 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) 18; Omni Bridgeway, Submission to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (June 17 2020) 1; Premier Litigation Funding Management Submission to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (10 June 2020) 5 [5].

employee entitlements, particularly in the construction industry. WEFs are MIS's but are exempted from Pt 5C of the *Corporations Act*.¹⁰⁶

Both types of funds facilitate essentially private law actions in protection of the vulnerable from asymmetries of power — which have a long history in Australia.¹⁰⁷ But their implementation has been open to abuse,¹⁰⁸ with 2017 statutory reform of WEF's remaining before Parliament,¹⁰⁹ better enabling public enforcement. Proposed reforms include registration,¹¹⁰ employee choice,¹¹¹ expenditure policies,¹¹² authorised use of contributions,¹¹³ and disclosable arrangements¹¹⁴ to reform the egregious deficiencies identified by Heydon.

CONCLUSION — WHAT CAN DIRECTORS DO?

For short run survival, directors can display prudence in capital, skills and customer preservation using where possible the various Federal and State fiscal interventions and compliance deferrals. The more important picture is for the survivors in the Covid after-life. Bjørnskov's observations¹¹⁵ are likely to be replicated in Australia and provide new entrepreneurial opportunities — but only if the impediments to entrepreneurship are removed or diminished.

What is required, in addition to the specific options in this paper is fulfillment of the Hayne promise — simplification of the law. It also requires a change in posture of the regulatory agencies to enable entrepreneurs to fight this new war, not just deliver reparations for the wrongs of the past. Why not litigate? is an easy-to-use metaphor arising directly from previous egregious behaviours by some, but with unintended consequences in fighting this new war. It requires a change of regulatory posture to a Responsive Regulation¹¹⁶ approach — consultative, educational, aligning of regulatory interests with those of a dynamic economy in the public good. The economic and military security of the nation will depend on it. (Re)building supply chains for civil and military consumption, rebuilding employment in capital and regional areas all requires access to capital by entity directors,

¹⁰⁶ ASIC, CO 02/314, *ASIC Class Order — Employee Redundancy Funds: Relief*, class order, 2002, repealed but with interim extension to 17 December 2015. See generally CP 238, *Remaking ASIC Class Order on employee redundancy funds*, 4 September 2015, and ASIC Report 463, *Response on submissions to CP 238*, December 2015. ASIC has fashioned a new legislative instrument [CO 02/314] — *ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150* — to extend relief from 25 September 2018 with no reported end date.

¹⁰⁷ See V E Martin, 'Pocket full of change' (Report), *Parliamentary Inquiry into the Australian Banking Industry* (1991) cited in Millhouse (n 30) 45 [2.6]–[2.8].

¹⁰⁸ Commonwealth, *Royal Commission into Trade Union Corruption and Governance*, Final Report, December 2015, ch 5 [76].

¹⁰⁹ Fair Work Laws Amendment (Proper Use of Workers Benefits) Bill 2019 (Cth).

¹¹⁰ *Fair Work Act 2009* (Cth) sch 2 ss 12, 151A.

¹¹¹ *Ibid* s 151A(b).

¹¹² *Ibid* div 5 s 293N.

¹¹³ *Ibid* ss 329LC, LD.

¹¹⁴ *Ibid* s 329PA.

¹¹⁵ Bjørnskov (n 15).

¹¹⁶ See, eg, Dimity Kingsford Smith, 'A harder nut to crack? Responsive Regulation in the financial services sector' (2011) 44 (3) *University of British Columbia Law Review* 702; Dimity Kingsford Smith, 'ASIC regulation for the investor as consumer' (2011) 29 (5) *Companies and Securities Law Journal* 336.

most of which are in the SME sector. It requires consistency and certainty in the law. It requires reduction in personal and family risks associated with those director responsibilities. Presently the risks are extremely onerous and can ruinously affect family security.

For Australia to escape its viral abyss and drive to the sunlit uplands depends on such reforms. They are unlikely without sustained lobbying at the micro-level. Most reform discussion is of tax and economic policy conducted mostly by representatives of large organisations with their own sectoral interests in fora remote from the needs of SME's. Micro-level means direct contacts with members of parliament in both houses and a considerable widening of industry association lobbying to them. This paper and others¹¹⁷ can be a basis for those approaches.

¹¹⁷ See, eg, Millhouse (n 5).