



PROPOSAL TO ESTABLISH

A ROYAL COMMISSION FOR RESPONSIBLE CAPITALISM

**with the objective of improving the working of free market
capitalism in the United Kingdom**

“Financial Reforms, open to ethical considerations, would require a vigorous change of approach on the part of political leaders. I urge them to face this challenge with determination and an eye to the future”.

“What we need, then, is to give priority to actions which generate new processes in society and engage other persons and groups who can develop them to the point where they bear fruit in significant historical events. Without anxiety, but with clear convictions and tenacity”.

Pope Francis - Apostolic Exhortation - Evangelii Gaudium - 24th November 2013



About the Partism Foundation

Partism is a philosophy which believes that individuals, businesses, corporations, governments and nations operate more efficiently, effectively and fairly when in an active partnership.

The Partism Foundation researches, debates and promotes policies and ideas which accord to the Partism philosophy.

The Partism Foundation has no political allegiances or alliances. It is politically party agnostic.

Definition: A partnership is an arrangement in which two or more parties co-operate together to share a common task, to achieve their shared goals and to advance their mutual interests.

About the author

Charles Bunker is a chartered accountant. He was formerly head of Corporate Finance at a top ten international accountancy practice before founding Kerburn Rose, corporate finance house, where he specialises in raising money for companies and takeovers and mergers. He has been a director of a number of London Stock Exchange fully quoted and AIM quoted companies. Charles served two terms as a non-executive director of East Herts NHS Trust which ran a leading District General Hospital. Charles is formerly Executive Chairman of a UK based English Language teaching business which traded all around the world. He is a former Chairman of Hitchin and Harpenden Conservative Association, a former Chairman of Hertfordshire Area Conservatives and a former Deputy Chairman of Eastern Region Conservative.

Charles founded the Partism Foundation as a result of his profound belief in partnership, co-operation and collaborative working.

Foreword

In my early days training as an accountant, I can well remember thinking that I did not want to invest in any public company I was involved in auditing (even if I had been allowed) because the stock market appeared to know so very little about the business in which they had invested. The restatement of profits at Tesco, accompanied by a profits warning, announced in 2014, shows how little has changed since, with the alleged 'expert' analysts, paid fortunes to study a company, still knowing little of its real activities.

In the 1980's, at the start of my career, specialising in what we now call Due Diligence, I used to give a training lecture to accounting firms on "What the auditor could learn from DTI Inspectors' Reports". The lecture entertained with stories of skulduggery, gullibility and criminality. Interestingly, in nearly all the cases referred to in the lecture, the staff from the audit firm involved had diligently recorded on their files all the problematic issues. The audit failures nearly always came at partner level, caused either by concern for losing a lucrative audit contract, timidity, or a lack of moral fibre. The biggest lesson to be learned; partners in auditing firms should only appoint those persons to their ranks with the strength of character to stand up to the corporate bullies. I can only contemplate how the careers of Robert Maxwell, Tiny Rowland, Asil Nadir and, more recently, Fred Godwin might have been different if the audit functions had been as robust as the fees paid suggest they should.

To address the issues of Messrs Maxwell, Rowland, Nadir, Godwin et al, and other notorious failures in corporate governance, there have, over the years, been numerous reports written and many attempts made to define and implement corporate and social responsibility through both company law and a string of codes. On each occasion an attempt has been made to bring social responsibility into company law, the wording has been watered down by sound argument from vested interests. The codes, which undoubtedly bring some benefit, have not achieved what they should for two reasons. Firstly, they primarily set out to determine and define good practice. Secondly, in practice, they became box-ticking exercises which most executive directors saw as creating another bureaucratic problem to be passed off to functionaries so they can concentrate on the main task of "keeping their numbers up".

Each time I served as a non-executive or part-time Member on a board of a publicly quoted company, I became acutely aware of how little exposure one is given to the day-to-day issues of the business, as management reports are filtered so that the non-executive directors only get to hear what the executives want them to hear. The bigger and more complex the business, the further away the non-executive directors are from the key day-to-day issues which could well have a significant impact on the company for which they are responsible. One should not be at all surprised that the non-executive directors of the major banks knew little about the impending cash flow crisis in the wholesale money market at the start of the banking crisis. In more recent years there has been a direct relationship between the audit committee of the board and the auditors, but even this has not proven to be enough. Rona Fairhead, Chairman of the BBC Trust, was paid £512,000 for 100 days work a year to be a non-executive director of HSBC Bank. She had specific main board responsibility for Audit and Risk within HSBC Bank and yet, with a huge internal and external audit and compliance function, she apparently knew nothing about the tax avoidance and evasion industry being carried on by their Swiss subsidiary.

My experiences have led me to conclude that all the efforts toward good corporate governance have simply been a self-serving PR exercise in the promotion of motherhood and apple pie and that the key job of the non-executive director is to choose (and possibly remove) the Chief Executive Officer, and to counsel them on the rest of their team. To trust that non-executive directors have the ability to influence a company above this basic task seems, in my opinion, to rely on optimism rather than experience.

My general disillusionment, which was well established before the 2007 Financial Crises, turned to a feeling of despair during that time. This was then followed by a feeling of complete hopelessness for, whilst I joined in the populist cry that "something had to be done", the level of debate was well short of the critical thinking required.

It was Leslie Dighton, Chairman of the Chairman's Club, who introduced me to the work of Stephen Hockman QC and his suggestion for a Standing Commission on Responsible Capitalism¹. Leslie then very kindly shared with me the follow-up work in which he, Stephen Hockman QC, and Rod Dowler of Industry Forum, were involved. It was their genius of deciding not to try and define responsible capitalism, but to start from the other end and see if there was a way to define what was unacceptable or irresponsible. It was they who set the first test for unacceptable or irresponsible capitalism against which actions or inactions of individuals would be judged. It was on the bedrock of their work that I became convinced that a Royal Commission for Responsible Capitalism was an important body, missing from public life, which could help address the crises of trust between society, business and government. I am enormously indebted to them, not only for their original thinking, but for much of the content of this pamphlet which I have unashamedly purloined from their body of work. I have used many of their words and argument for they have said it before, and so much better than I could hope to say it. I hope they will forgive me in the excuse that my crime of plagiarism is hopefully for the greater good.

Needless to say, the errors and mistakes in this pamphlet are entirely mine.

Charles Bunker
Cambridge July 2016

¹ Legislating for Responsible Capitalism – “What it means in practice” published by Policy Network, December 2012

Introduction

Unfettered free market capitalism unquestionably hurts society. This paper argues the case for a Commission for Responsible Capitalism to be established under Royal Charter to:

- a) Identify acts of unacceptable and irresponsible capitalism.
- b) Help provide policy-makers with well-researched analyses of problems associated with free market capitalism together with conclusions and recommendations for action.
- c) Help develop principles of improved business and administrative governance that will help business, government and society work in closer and more productive harmony.
- d) Identify those persons who, the Commission considers, have behaved in an unacceptable or irresponsible manner in a business or administrative setting and then propose appropriate sanctions which might include a rebuke, reprimand, censure or admonish
- e) Identify and reward outstanding examples of responsible capitalism.

To move the debate forward, this paper proposes wording for a Parliamentary draft Bill to establish a Royal Commission for Responsible Capitalism (Appendix 2).

Something has to be done

The free market capitalist model has proved highly effective at achieving material growth and well-being for an ever-increasing number of people. In the UK, market capitalism is characterised by risk taking, competition, private finance and profit-seeking. In the past 200 years, it has played a central role in developing new products and services, increasing productivity and improving standards of living.

The ethos of free market capitalism is to seek efficient outcomes for itself without regard to any moral compass, such as fairness or social cohesion. Without regulation, market capitalism creates unacceptable levels of inequality, does untold harm to individuals, communities and the environment and can operate without sufficient regard for long term sustainable value creation. Accordingly, for a very long time, there has been a general acceptance that society has no place for unfettered free market capitalism and, quite properly, governments have regulated trade and commerce in an attempt to bring an element of order and fairness.

The primary agency for free market capitalism is the limited company. Its objective is to maximise its financial return for the benefit of its shareholders. Companies are given privileges, such as limited liability, in exchange for the economic benefits they bring. In addition, UK businesses benefit from state-funded infra-structure, scientific, technological and educational developments that firms can use for their own benefit. They also benefit from working in a rules-based society supported by an independent and impartial legal system. All this makes the UK a very desirable place to live and do business.

Sadly, the last decade has brought forward compelling evidence that businesses and markets are not working as they should. They are supposed to be stable and efficiently allocate resources, but recently there have been huge variations in asset prices, and globally there are vast unmet needs and huge un-utilised resources. The inability of the market to create secure jobs is one of its worst failures. In addition, it has concentrated wealth with very few, passed-on environmental costs to society and abused workers and consumers.

Individual governments, and inter government arrangements, have proven to be totally impotent when it comes to regulating the global market economy. It is now apparent that the few men who dominate the Bond Markets have far more influence on political decisions than all the votes of the electorate put together.

In 1961, President Eisenhower coined the term “military–industrial–congressional complex” when he warned about the incestuous relationship between a powerful military, a large arms industry and a dependant legislator. His warning was quite prophetic, as evidenced by the fact that, in 1991 there was one support contractor for each 100 front-line soldiers but, by the end of the second Gulf War, the privatisation of war had become main-stream, with more contractors involved in that war than there were front-line soldiers. War has become very big business. It is important to remember that over 1 million people marched through London in opposition to the war, the largest protest in UK history. The Chilcot Inquiry identified serious failing in the political, military and administrative governance but it paid no attention to the influence of business in the strategic decision making, particularly those that provide the weapons for war and financed it.

It is now obvious that there is a democratic deficit and political systems have not corrected, or put in place adequate mechanisms to protect against market failures. When governments have attempted to exercise control, their efforts have too often been influenced by self-servicing special interest groups, with the end result weakened and sometimes made completely ineffectual.

In 2008, there was a catastrophic meltdown in the banking system, even though it was supposed to have been under heavy governmental supervision. Bankers had taken bets which, if they had not been bailed out, would have brought both them and the entire economy down. Their actions resulted in the mainstream socialisation of capital losses with the taxpayer bearing the huge costs associated with these lamentable failures. It also highlighted a further systemic market failure for, at a time when liquidity was in short supply and interest rates should have risen to reflect the shortage of money, LIBOR rates were being criminally fixed artificially low, for the profits of the banks which society had to save.

The failure of market capitalism was further highlighted during the European Debt Crisis of 2010-12. Rather than bond investors accepting that they had invested unwisely in certain government bonds and should take a loss, politicians and central bankers threw the capitalist principal of moral hazard out of the economic toolbox, adopting programmes which included replacing private debt with public debt, debt restructuring, quantitative easing and austerity. This was all done under the banner of saving the Euro, when it was not the currency which was at risk, but the whole European Banking System. In addition, the rapid reduction in liquidity resulted in huge increases in European unemployment, particularly in youth unemployment. It highlighted the fact that the free market economic model, which treated employees as a flexible resource capable of being hired or fired dependent upon economic circumstances, was not capable of responding to the high unemployment created or the associated social problems.

Nevertheless, in the period following the Banking Crisis, the financial services industry continues to make extra-ordinary and extractive super-profits with the weight of money employed in this sector being out of all proportion to society’s needs. In the USA, the top 25 hedge fund managers make more money than all the CEOs of the S&P 500 combined. Since hedge funds compete in a global market, there is no reason to believe that the same principles do not apply in the UK. The huge amount of money these hedge fund managers are making is not being taken out of thin air. It is coming from trading in commodities, which results in increased costs for each consumer, or in managing investments, in the process reducing the gain which might be available to the ordinary

investor, or through exorbitant layers of charges imposed on ordinary investors, again reducing their available return.

Excessive executive pay is another clear sign that free market capitalism is not working. In the last five years there has been a significant widening of the gap between rich and poor, with those earning the most enjoying pay increases which far exceed those earning the least. Many of those businesses paying the most in performance-related bonuses to their highest earners have managed to achieve these high profits by keeping down the wages of the poorest. In fact, adjusting for inflation, the last five years has seen a real decline in average earnings. If the national minimum wage had kept pace with FTSE 100 CEO salaries since 1999, it would now be £18.89 per hour instead of £6.50. Today the top earners take three times the share of national income than they did 25 years ago.

Despite all the advantages that an advanced and modern economy can bring, businesses' responsibility to society appears to remain medieval in attitude and ignorant of social changes. Where there has been a failure in social expectation, most firms appear to feel no responsibility to update themselves to the new social and economic risk environment or to rectify the harmful consequences of their actions.

A classic example of deemed anti-social behaviour are the legal corporate tax avoidance activities practised by many of the world's largest companies (Google, Apple, Amazon, Starbucks etc.). When defending their actions, these companies always highlight the amount of taxes they pay in a country including in their figures both payroll taxes (PAYE) and sales taxes (VAT). They misleadingly claim for themselves the taxes paid by the employees on their earnings, as though it was the company itself which created the added value on which the tax was paid, and not the employee. They also claim for themselves the taxes charged to the consumer on their purchase as though this was part of their sales revenue taken by the state. At no time do these companies appear to see themselves as they legally are, which is as a person (albeit in corporate form) and therefore subject to the same social responsibilities to pay their taxes as every other person.

For the last half of the 20th Century, the UK's economy could fairly be described as being an inclusive economy², but it now has all the hallmarks of being an "extraction economy" where a few are taking the most gains for themselves. In the long run, this will lead to lower economic growth and exacerbate the unfairness. A society which is increasingly unfair puts its very fabric at risk and democracy in peril.

Research has shown the importance that individuals attach to fairness. More than anything else, a sense that economic and political systems are unfair motivates protest. If there is any doubt, reflect upon the popularity of Russell Brand and his call for revolution, or the public sympathy with the aims of the Occupy Movement, or the diffuse activities of Anonymous. For, whilst they provide no credible solutions, they reflect the mood of the times and the demand for change. It will not be possible to maintain the current open and global market system if, year after year, that system makes people worse off. Something will have to give and history suggests that the results could possibly be very frightening.

History has further proven that state-directed economic models are very inefficient at allocating resources. Communism and socialism are unable to provide the wealth and improvement in living standards which free market capitalism can provide. Where these have been associated with

² An inclusive economy is one that seeks to achieve equitable opportunities for all economic participants during economic growth with benefits enjoyed by every section of society. An extraction economy is one where a set of elites (political or criminal) skim a certain percentage off the top of others' economic activity and, instead of investing it in productive or social activities, spends it on non-productive or selfish activities. (Not to be confused with an extractive economy which is one based upon non-renewable resources.)

totalitarian governments, they have also deprived individuals of freedom. 'A third way', which was the economic model promoted by New Labour between 1997 and 2007, saw the UK Government incur huge debts and an economy reeling from what became known as the Great Recession. Accordingly, none of these appear to provide an alternative economic model fit for the twenty-first century.

Winston Churchill once said that "democracy is the worst form of government except for all the others that have been tried". Likewise, it can be said that free market capitalism is the worst of the economic systems except all the others that have been tried. For this reason, we have a duty to create the institutions which makes free market capitalism work for the benefit of all members of society. This paper proposes a Royal Commission for Responsible Capitalism as a new institution to do just that.

What will a Royal Commission for Responsible Capitalism Do?

As has been said, left to itself, free market capitalism creates unacceptable levels of inequality and welfare, and operates without sufficient regard to society or long term sustainable value creation.

To deal with the negative and damaging aspects of free market capitalism successive governments have introduced a mass of legislation, created regulators who then bring in their rule books and, in an attempt to self-regulate, vested interest groups then add a series of semi-voluntary codes. Each has been evolved, case by case, over many years and is widely distributed in statutes, the law of trusts, common law, market rules, governance codes, and across a wide range of regulatory authorities. As a result, the legislation and regulations established to govern the function and accountability of markets, and the companies that operate therein, have become extremely complex and the framework corporate governance has remained narrowly defined.

During the past thirty or so years, both in the UK and in the world economy, there has been a succession of major crises involving companies or sectors, surrounding questions of fairness and sustainability, which neither market capitalism nor governments had the capacity to deal with. This is because there are no defined limits on business practices that do not break laws or regulations, but are widely regarded as socially unacceptable.

In cases of major market failure investigations have followed each crisis. Individual initiatives have addressed some problems, such as the Banking review, and the recommendations have usually been, at least partially, implemented. However, such issues take a long time to address, and are often tackled in a piecemeal fashion and, most importantly, from only one perspective. No one body, with the appropriate skill set, looks at and reports upon, what are complex economic and social issues, in a rounded and impartial manner.

At present, we have a polarised and ineffective relationship between government, business and society. This is best demonstrated by the sometimes grand-standing of the House of Public Accounts Committee, which appears more interested in making headlines for news broadcasters than tackling the serious issues of the day. The sad fact is the committees of both Houses of Parliament are not structured to do the in-depth study and analysis which failures in free market capitalism require.

The lack of an integrated approach is not only unsatisfactory but it has also resulted in a widespread public view that not much has changed, and many risks have not been addressed. In recognition of the considerable concern in society about the social responsibility of companies beyond profit, the Companies Act 2006 did explicitly include duties on Boards to take decisions '*in the interest of their shareholders*' having regard to the long-term consequences and the intensity of other stakeholders including employees, the environment and the general community. If this is the best legal response to a public concern then it is not surprising that there remains huge public mistrust which, if not

rapidly addressed, will become irreversibly corrosive. It is already adversely affecting business and politics and the situation will not improve without appropriate action.

It is a reality of markets that they are in fast and constant evolution. Bankers have shown an incredible ability to create new financial instruments (some now proven to be of dubious quality) which were beyond the comprehension of their boards, their regulators and their customers. For each new rule which is created, there is an avoidance industry which tries to find its way around the rule, particularly if that rule hinders or impedes profits. This means that, at times, the conditions for effective markets are not present and the balance of power works to the disadvantage of other market participants. Lending of bank shares by Pension Funds to Hedge Funds for short selling activities is a clear example (see Appendix 1).

Restoring public trust requires a more integrated process and long-term engagement. The current political process does not provide for the comprehensive conversations and practical interactions which need to take place at all levels of government, business, NGO's, the media, and professional institutions. For that to happen, there needs to be a new and enduring forum for examining individual cases and exploring their practical application and repercussions from the multiple perspectives of fairness, long-term competitiveness and sustainability, and producing a policy framework for future legislation. It is proposed that this would be the purpose, and comprise the work of the Royal Commission for Responsible Capitalism ('The Royal Commission'). The objective is to create a highly prestigious and respected institution to which all public policy issues regarding business and free market capitalism can be referred.

The Royal Commission for Responsible Capitalism would take under referral matters where there is an alleged failure, or potential for failure, in market capitalism. It would examine the issues involved from the perspective of all interested parties, highlight the complexity and repercussions of the issues involved for public review, and then form a view of whether or not the activity involved comprised irresponsible or unacceptable capitalism and how, if necessary, business behaviour should be modified. The Royal Commission would try to help those concerned come to a form of consensus and, where necessary, set out concise arguments for legislative or regulatory interventions.

It would be explicit in the Royal Commission terms of reference that fairness and long-term sustainable value creation should be at the heart of their deliberations.

In the process of its work, the Royal Commission for Responsible Capitalism is likely to come across unacceptable and/or irresponsible behaviour of individuals. In these circumstances, it would be totally inappropriate for the Commissioners to stay silent. It is therefore proposed that they should have the power to rebuke, reprimand, censure or admonish those individuals they criticise, with resultant social (not legal) consequences.

Why is a Royal Commission for Responsible Capitalism needed after the passing of The Enterprise and Regulatory Reform Act 2014?

The Enterprise and Regulatory Reform Act 2014 established, inter alia, a new Competition and Markets Authority which brought together the competition functions of the Office of Fair Trading and the Competition Commission. Its primary role is to tackle anti-competitive behaviour and make markets work better for consumers. This is very different from the role of the proposed Royal Commission whose role would be to consult and to consider carefully matters of public policy surrounding markets, examine possible unethical or inappropriate business behaviour, and to look at the issues from all points of view including, investors, employees, customers, suppliers, and users

and not just from the view point of consumers, which is the focus of the Competition and Market Authority.

What is Irresponsible Capitalism?

Irresponsible (or unacceptable) Capitalism is defined, for the purposes of this paper and proposed legislation, as being:

The action or inaction by those responsible for the operation of an enterprise, agency, trust or organisation, or part thereof, which, in the eyes of the reasonable person, involves:

- a) the foreseeable risk of unjustified and unwarranted harm to any group of stakeholders who have an interest in, or an association with, any enterprise or organisation, including but not limited to investors, employees, customers, suppliers, users and those who rely upon it; or*
- b) the bringing, or the risk of bringing, that enterprise or organisation, and/or those associated with it, into disrepute; or*
- c) the unfair and unreasonable exploitation of others; or*
- d) the obvious disregard for the environment or the community.*

By defining irresponsible or unacceptable capitalism in the above way, government, business and society at large can have a rational discussion about how to address problems that have occurred, or even to anticipate and avoid future problems. However, for activities within acceptable limits, this approach adds no additional burden.

For completeness, it is important to reprise some of the rationale for the wording in the proposed definition.

Unacceptable or irresponsible capitalism

One of the questions which needed to be considered was whether the Royal Commission should take a name which is the opposite of irresponsible or unacceptable capitalism as it is essential that its work identifies both traits.

Unacceptable is defined in the dictionary as meaning 'not satisfactory or allowable' and is seen as being synonymous with such words as intolerable, insufferable, unsatisfactory, impermissible, inadmissible, inappropriate, unsuitable, undesirable, unreasonable, objectionable, insupportable, offensive, obnoxious, disagreeable, disgraceful, deplorable, terrible, distasteful, displeasing, improper, unseemly, beyond the pale, bad, and poor.

Irresponsible is defined in the dictionary as meaning, for a person, attitude, or action, not showing a proper sense of responsibility, and is associated with reckless, rash, careless, thoughtless, incautious, unwise, imprudent, ill-advised, ill-considered, injudicious, misguided, heedless, unheeding, inattentive, hasty, overhasty, precipitate, precipitous, wild, foolhardy, impetuous, impulsive, daredevil, devil-may-care, hot-headed, negligent, delinquent, neglectful, remiss, careless of one's duty, lax, slack, uncaring, casual, insouciant, and derelict.

After much debate, it was agreed that the Royal Commission should be for Responsible Capitalism as the behavioural test in the definition covered both aspects of irresponsible and unacceptable behaviour and it was hard to see exactly what, in the current environment, comprised acceptable capitalism.

Action or inaction

Irresponsible Capitalism has been defined to include both action and inaction, as an omission to do something, either willingly or negligently, can result in harm, and should be subject to scrutiny.

Enterprise or organisation – or part thereof

Irresponsible Capitalism has been defined to include enterprises, agencies, trusts and organisations so that it captures both the activities of the public and private sectors. The UK Government consistently spends over 40% of UK GDP so it would be unfair if failures in Responsible Capitalism by such bodies as the National Health Service, the Food Standards Agency, The Bank of England, and the Financial Conduct Authority did not come within the scope of the Royal Commission.

Further, Trade Unions have, through the ability to organise the withdrawal of labour, huge economic power. This was demonstrated during the 2008 Petrol Tanker Drivers strike which, if it had continued for another three days, would have seen supermarket shelves empty. In looking at Responsible Capitalism it is essential that the work and influence of Trade Unions are included in its purview whilst, at all times recognising that, in a free society, workers should, in the majority of circumstances, have an inalienable right to withdraw their labour.

The words 'part thereof' have been included as irresponsible capitalism can take place way below board level, for example, on a dealing floor with the rigging of Libor, or in a bank which sanctioned the uneconomic lending to private equity purchasers of nursing homes.

Reasonable person

The test for irresponsible or unacceptable behaviour has been set to be the judgement of the hypothetical reasonable person³ - the man on the Clapham omnibus, as Lord Denning referred to them. By setting the test at this level, it avoids the criticism that the Royal Commission has created another form of 'dogs' law' (you don't know you've done wrong until you have been hit), as the kind of people the Commission will be putting under scrutiny will generally have a level of education and experience which puts them well in to the category of being reasonable men.

The 'reasonable person' test also avoids the need to codify anything. It means that the Royal Commission will not have to spend its early days writing, preparing and debating papers on what is good practice against which bad practice will be judged. It will be able to get down to work, dealing with cases straight away. The Royal Commission, in publishing its decisions, will give a ratio decidendi and issue obiter dictum. This will allow a series of precedents to be established.

Foreseeable risk

Equity requires that a person is judged only on a risk which is reasonably foreseeable. The question is, how foreseeable. By setting the test as being 'in the eyes of the reasonable person' it enables this question to be answered.

Unjustified and unwarranted harm

Mankind cannot deny that most of its activity does some degree of harm. The test being proposed is unjustified and unwarranted harm to a specified group of stakeholders. For example, as a result of

³ 'A reasonable person' is not an average person or a typical person. Instead, the "reasonable person" is a composite of a relevant community's judgment as to how a typical member of said community should behave in situations that might pose a threat of harm (through action or inaction) to the public. The standard also holds that each person owes a duty to behave as such a reasonable person would under the same or similar circumstances.

excessive bank lending, a large nursing home chain was placed into administration. For some considerable time, the residents of this nursing home suffered anxiety from not knowing where they were going to live. The question, if it were put to the Royal Commission, is whether, in the eyes of the reasonable man, it was foreseeable that this leverage buyout would result in the risk of the residents being evicted and, if so, did that risk comprise unwarranted and unjustified harm to them.

Unfair and unreasonable exploitation of others

The unfair and unreasonable exploitation of others test has been specifically included because the UK operates in a global economy with its supply chain all around the globe. The failure of UK business to properly regulate its supply chain has resulted in untold misery for huge numbers of people which many UK consumers object to, but individually do not have the power to stop. A case in point is Primark, one of whose suppliers occupied part of the Rana Plaza building in Bangladesh which collapsed in April 2013 with the loss of 382 lives. Whilst Primark agreed to pay compensation to the victims, the share price of Associate British Foods plc ('ABF'), which owns Primark, actually rose from 1,844 pence on 12th April 2013 to 1,988 pence on 10th May 2013. ABF publishes its Corporate Responsibility Report and boasts on its website that it encourages ethical business. Clearly something went wrong between the ambition and the actuality, but it appears no one in ABF was actually held accountable for the failure.

What events might the Royal Commission for Responsible Capitalism study?

Included at Appendix 1 are vignettes which give an indication of the kind of matters which a Royal Commission might study and why. These include:

- Low pay
- Mergers and acquisitions
- BHS and the its pension deficit
- Volkswagen and the installation of emission cheat devices
- Horse meat adulteration scandals
- Share lending for short selling purposes
- High frequency share trading
- Money supply, quantitative easing and banking fines
- Zero hour contracts
- Corporation Tax avoidance by multinational companies

Why a Royal Commission?

There are two reasons why a Royal Commission established under Royal Charter is the appropriate body to consider the working of free market capitalism.

Firstly, the proposal for a commission to consider issues of free market capitalism should be non-contentious and therefore have broad cross political-party support. In such circumstance, it is common to establish a Royal Commission to carry out the work.

Secondly, it is a possibility that aspects of government administration will come under the scrutiny of the Royal Commission and for this reason it is essential that it is independent of government. It should therefore be established with the duties and obligations of the Royal Commissioners to the Crown and not to government.

Judicial Powers

It is not the purpose of the Royal Commission to investigate business activity which involves a break in the law. This aspect is adequately covered by existing legislation, including the Companies Acts, the Financial Service and Market Acts and other legislation.

The Royal Commission's focus is entirely different. Its purpose is to promote fairness and long term sustainable value creation through free market capitalism. To do this it needs to look at, and consider in detail, abuses which, whilst legal, run contrary to this proposition.

No-one will willingly want to subject themselves to the scrutiny of the Royal Commission if, even in the remotest of possibilities, it could result in an individual or corporation being subjected to possible public criticism or adverse press reaction. Accordingly, the Royal Commission should have certain prescribed powers, such as:

- a) Powers to require the delivery of documents and information.
- b) Powers to interview and cross examine witnesses under oath.

The refusal by any person to attend to the matters in a) and b) above, the destruction or mutilation of documents and the furnishing of false information should be treated as a contempt of court.

So as to protect witnesses and comply with Article 6 of the European Convention on Human Rights (Saunders v United Kingdom 1998) evidence gathered by the Royal Commission shall not be available for use in any criminal trial nor shall any report issued by the Royal Commission be admitted into evidence in a criminal trial.

Whilst the work of the Royal Commission should be in the public domain it may be that some witnesses may wish to give their evidence in private. This should be respected and such evidence and testimonial should remain confidential until any interim or final report is published.

Where matters come to light in the course of the Royal Commission's investigation which suggest that a criminal offence may have been committed, the Royal Commission shall have a duty to report that matter to the police and inform the individual(s) concerned that they have done so.

Since the Royal Commission's efforts are focused on matters of important public policy, it is proper that they should continue with their works and draw such conclusions as are appropriate as quickly as possible. However, as a matter of public policy, it is equally important that the work of the Royal Commission should not prejudice the rights of an individual to a fair trial. Consequently, the Royal Commission shall, in any report they give on a matter, not publish any evidence, nor make any comment nor criticize any individual known to be under investigation by the police for matters connected to their work, until such time as after the Crown Prosecution Service has determined that the matter shall not be prosecuted or a trial has been held and a verdict delivered.

There are, currently sitting in the Department of Business, three unpublished DTI Inspectors' Reports which were completed over 25 years ago. The excuse is that certain individuals criticised in the report could face criminal charges, but this excuse is lame following Saunders v United Kingdom (European Court of Human Rights 1998) which prohibits witness evidence gathered in a DTI investigation being used in a criminal trial. It is reasonable to assume that the real reason these reports lay unpublished is that the Inspectors were none too complimentary about the role of certain institutions referred to in their reports. To stop the Crown Prosecution Service being used as an engine of the State, to slow up or impede the work of the Royal Commission, there should be a presumption that, unless a matter has already resulted in a prosecution, their full report should be published no later than one year after the Commissioners have completed their work, as this should

be more than enough time for the Crown Prosecution Service to have made a decision of its intended course of action.

What sanctions, if any, should be available to a Royal Commission for Responsible Capitalism?

In addition to making recommendations for legislation and regulation, which are core to its work, the Royal Commission should have a statutory obligation to identify and express an opinion on unacceptable and irresponsible behaviour as judged by the reasonable man test, but only to this extent.

The Royal Commission's work will only be respected and listened to if it has appropriate sanctions. The Press Complaints Commission fell into disrepute because, inter alia, it did not have sufficiently effective sanctions.

It is proposed that the Royal Commission should have no powers to fine or impose any kind of criminal sanctions, for it cannot be both judge and jury. Further, its work will not test matters with the same degree of forensic intensity appropriate for a criminal prosecution or civil litigation as its focus will be primarily on public policy issues arising from capitalist failures, or potential failures.

The sanctions proposed are:

1. Individual Admonishment – a person who is Admonished by the Royal Commission should automatically be considered by the Secretary of State for the Department for Business, Innovation and Skills as being a person who should be banned from being a director of a company for a period of time or for life.
2. Individual Censure – a person who is Censured by the Royal Commission should be considered as not being a fit and proper person to be a director of any company whose shares are quoted on a regulated stock exchange, or of a fund management company managing third party monies.
3. Individual Reprimand – a person who is Reprimanded by the Royal Commission should be considered as not being a fit and proper person to hold charitable office, or hold public office, otherwise than by way of an election held under the supervision of the Electoral Commission.
4. Individual Rebuke – a person who is Rebuked by the Royal Commission shall have their reputation damaged but suffer no further sanctions.

The Royal Commission shall have the power to Admonish, Censure, Reprimand and Rebuke the same person arising from the same event which gave rise to the original criticism.

The Royal Commission's risk is that it acts unfairly and in the process defames someone. This will put the Commission under a duty of care not to act negligently. Further, it will operate within the laws of natural justice and with a duty to act fairly. For example, it would follow the Maxwellian Principles and allow any person who is threatened with being criticized, to see a draft copy of any report containing such criticism and to make representations thereon before any criticism is made public.

For a very long period, the City Code on Takeovers and Mergers, which was entirely voluntary, worked incredibly well because its sanctions included an ability to exclude a person from working or dealing with anyone who was a member of 'the Club'. Since membership of the club included all lawyers, accountants and stockbrokers, exclusion carried with it a severe business penalty. It is the similar principles of exclusion which are being proposed as the sanction for the Royal Commission. It is not depriving anyone of their liberty, or an ability to earn a living. It is simply judging the level of responsibility a person should be entrusted with in the future, given their historic behaviour.

Those who question whether the City Code provides a good example to be followed will point to the fact that Goldman Sachs floated Maxwell's company on the London Stock Exchange despite him having been heavily criticised in a Department of Trade Inspectors' report. Perhaps, if a Royal Commission were established and Goldman Sachs were to do the same thing again, then maybe, this time, those directors from Goldman Sachs responsible might find themselves in front of the Royal Commission to consider whether their actions comprised, in the eyes of the reasonable person, *an obvious disregard for the community* and in turn face criticism themselves from the Royal Commission and risk an appropriate sanction.

Who should be the Commissioners?

The Commission should comprise a multi-skilled team including lawyers, accountants, bankers, economists, tax experts, academics and people with management, trade union and employee relationship backgrounds. They should be of impeccable standing and background. Each should be of high intellect and have the skill set of being able to analyse issues across a range of legal, regulatory, and social boundaries and be able to provide a concise, objective summary of a problem, with recommendations for further regulatory, legislative or other action. Apart from the Chairman, the Commissioners should not work full-time for the Commission, as it is important that they remain grounded by their other activities. The Commissioners will be paid for their work. The Commission will be supported by a strong full-time secretariat.

It is very important that the Royal Commission is apolitical. For this reason it is proposed that anyone who has held any office in any registered political party, or stood for election under the banner of any registered political party, in the previous five years shall not be eligible to be a Commissioner.

Office of Externality

If the Commission is to judge irresponsible capitalism, then it will need the ability to measure the costs or benefits that affect a party who did not choose to incur that cost or benefit. An example might be the pollution from diesel cars and the cost to both lives and the NHS from all the additional health problems that diesel particulates cause. This means it must establish within it, an office of Externality to do this complex work.

Promoting Responsible Capitalism

The work of the Royal Commission will, by the very nature of its work, be heavily involved in identifying and resolving issues of irresponsible or unacceptable capitalism. There are two reasons for this. Firstly, it is much easier to identify irresponsible capitalism for immediate study as, paraphrasing Justice Potter Stewart in a leading US pornography test case, "I know it when I see it". Secondly, it would be a long and complex task to try and agree a definition of responsible or acceptable capitalism. Attempts to define good governance have achieved very little except further layers of bureaucracy and jobs for the boys, which is why the issue is now being considered from the other end.

However, it would be wrong for a Royal Commission established to consider responsible capitalism to deal only with those issues which might comprise irresponsible or unacceptable behaviour. For this reason the Commission should have included, in its terms of reference, the job of promoting Responsible Capitalism and what this means in practice. It can do this in a number of ways, including offering a substantial and highly prestigious international prize. For example, a potential winner might be Michael Woodford, who discovered and publicly exposed substantial corruption and false

accounting at the heart of Olympus Corporation⁴ soon after his appointment as President and CEO at much personal risk.

How a Royal Commission for Responsible Capitalism should be financed

It is proposed that the Royal Commission will be funded by a levy attached to the Annual Return filing fee paid by each company to Companies House. A fee of £5 per company would raise about £7.0 million a year. Funding the cost of the Royal Commission by a per company levy would also make it independent of any government or body.

Conclusions

Over the last ten to fifteen years there has been a systemic change in the structure of the world economy. Capitalism is now increasing the difference between the haves and the have-nots, and not reducing it. It is now creating a new form of natural selection where the have-nots are denied nutritional food, stimulating education and adequate forms of health care.

It is now obvious that public interest, risk and opportunity are not being quickly, fully or automatically incorporated into business models and markets. As a result, there has been, and continues to be, a transfer of risk from one section of the economy to another, and to society as a whole, whilst at the same time concentrating financial and political power to a much smaller and elitist group.

All the conditions are present for a major social upheaval unless something is done to address the fundamental failures mentioned above. However, the issues are complex and require careful study and considered judgement. For this reason, it is no longer possible to have a piecemeal, case by case, fire-fighting approach. It is why a Royal Commission for Responsible Capitalism is urgently required.

A Royal Commission for Responsible Capitalism would:

- a) Provide a constructive, impartial framework across all interested parties for putting problems into the public arena for integrated review and resolution. This would enable companies, governments and regulators to engage productively in addressing problems and avoid precipitous and unilateral policy actions.
- b) Provide policy-makers with well-researched analyses of problems with conclusions and recommendations for further consideration as a basis for quick action or further scrutiny as appropriate.
- c) Develop principles of improved governance of both companies and the economy that would help business and society work in closer and more productive harmony.
- d) Hear and investigate claims that business or regulatory behaviour crosses the boundary of what is socially acceptable and report its findings.
- e) Develop simple principles that will, over time, come to define what is meant by 'Responsible Capitalism'.
- f) Track and report annually on its investigations and the progress which has been made implementing previous Royal Commission recommendations.
- g) Provide a more efficient forum to address many of the issues which comprise, and have comprised, the agendas of Select Committees of the House of Commons.

⁴ Michael Woodford, "Exposure: Inside the Olympus Scandal", Portfolio Penguin, 2012

To quote Pope Francis, [the assumption that] *“economic growth encouraged by free markets will inevitably succeed in bringing about greater justice and inclusiveness in the world, is not proven. This opinion, which has never been confirmed by the facts, expresses a crude and naive trust in the goodness of those wielding economic power and in the sacralized workings of the prevailing economic system”*. *“The thirst for power and possessions knows no limits. [We now have an economic] system, which tends to devour everything which stands in the way of increased profits, whatever is fragile, like the environment, is defenceless before the interests of a deified market, which becomes the only rule. [We have to say] no to a financial system which rules rather than serves us.”*

A Royal Commission for Responsible Capitalism will assist in realigning the operation of free market capitalism as, through careful and considered study, it will provide the knowledge which will help transform the currently broken economic system to one which operates more fairly and, in particular, serves rather than rules us.

Charles Bunker
Cambridge, July 2016

Appendix 1

Examples of issues which a Royal Commission for Responsible Capitalism might consider

Low Pay

Low pay, together with the inequality between the lowest and highest paid, is a social problem but so is high unemployment. The capitalists' standard defence to the criticism of low pay is to argue that higher pay will threaten the overall level of employment. Further, business can argue that, as government has the ability to influence pay through the amount it sets as the minimum wage, provided it complies with this legislation, it has met its social obligations in this regard. This argument is made irrespective of the fact that the minimum wage is below the living wage and the government is subsidising work for some employees through the tax credit system. Whilst low pay is unacceptable to one of the identified stakeholders i.e. the employees, no doubt the shareholders or customers might have a different view if it lowered profits or increased prices. Further, it is not just low pay which can comprise exploitation, but also terrible working conditions or inordinately long working hours; particularly in those countries where there is no Working Time Directive. The question for the Commission is whether low pay is (i) *"action....leading to significant, foreseeable risk of material harm to the interest or wellbeing of stakeholders;* and/or (ii) *"the unfair and unreasonable exploitation of others";* and/or (iii) *"action bringing, or the risk of bringing, that enterprise or organisation, and/or those associated with it, into disrepute";* and therefore comprises, in the specific circumstances, Irresponsible Capitalism. As this brief summary shows, the issues are highly complex and worthy of consideration by a Royal Commission for Responsible Capitalism.

Mergers and Acquisitions

KPMG, PriceWaterhouseCoopers, and McKinsey's have all conducted and published studies on the effects of Mergers and Acquisitions. They have concluded that, in most cases, M&A deals did not add to shareholder value. They used these studies to promote their post integration services whilst, at the same time, conceding that the premium price paid by the acquirer made it difficult for an acquisition to meet, let alone exceed, expectations. Nevertheless, mergers and acquisitions remain keenly active and are a strong expression of free market capitalism.

In January 2010, Cadbury, a British global producer of confectionery, was acquired by Kraft in a deal worth £11.5bn of which £7.0bn of the purchase price was borrowed from a consortium of banks including HSBC Bank, Barclays Bank plc, and the Royal Bank of Scotland plc. Cadbury employed 45,000 people worldwide. Immediately post the deal, Kraft closed down a Cadbury factory in Keynsham which they had promised to keep open, resulting in the loss of 400 jobs. After the purchase, Kraft announced a 24% fall in net profits in the last quarter of 2010. It was claimed this was due to the cost of integrating the two firms and a fall in like-for-like sales in both Cadbury and Kraft. Warren Buffet, a shareholder in Kraft, warned against the deal, branding it as 'dumb' and afterwards reducing his shareholding from 9% to 6%. Kraft's strategy was rapidly changed in August 2011 and the business was split into two companies: a grocery business with sales of approximately \$16bn and a global snacks business with sales of \$32bn. It was argued that Cadbury's acquisition gave Kraft's snack division the critical mass, particularly in India, to allow the demerger to take place, although it is hard to understand this justification, when Cadbury's business comprised just £10bn of Kraft's global snack business.

As a result of the Kraft bid for Cadbury, the City Code on Takeovers and Mergers was changed in 2011 requiring bidding firms to give more information about their intentions towards the firm after the takeover, including potential repercussions for jobs and assets like factories and the locations of company headquarters. Further, representatives of the staff of the target company are now

expected to give their views on the takeover. These changes have had a profound effect on the way Pfizer conducted its 2014 bid to acquire AstraZenica. For example, pledging that if the deal went ahead, 20% of the combined company's R&D workforce would be based in the UK.

However, ignored in most of the Cadbury post acquisition reviews, was the fact that many of Cadbury's 45,000 employees banked with HSBC Bank, Barclays Bank plc, and the Royal Bank of Scotland plc and it was these customers' deposit monies which, in part, enabled this bank to lend money to Kraft. Also ignored was the fact that Cadbury's Employee Pension Fund had inevitably, through the allocation of its funds to fund managers, invested in Cadbury's shares. This deal highlighted the fact that the market had no mechanism for recognising an employee's indirect financial interest in a deal in a direct way. It might be something which a Royal Commission could consider.

Horse Meat Adulterating Scandal

In early 2013, horse DNA was discovered in processed beef products sold by a number of the UK's major supermarkets. For example, Tesco's Everyday Value Spaghetti Bolognese was found to contain 60% horsemeat. It resulted in tests by regulators across Europe and prompted a number of product recalls. The supermarket industry did everything it could to lay the blame at the Food Standard's Agency saying that they were outraged at the events. Notably, Malcolm Walker, Chairman of Iceland, dismissed questions about whether they tested for horsemeat in their products by saying, "we don't test for hedgehog". Well, maybe they should! It was a strange response for a man who has made a public commitment to "doing the right thing for the long term". Most consumers were really concerned to learn of this major failure in the food chain as they thought supermarkets took direct responsibility for the products they sold. Not unreasonably, customers expected them to sample test the products on their shelves, as part of a normal quality control procedure. Concern turned to anger when it was disclosed that some of the horsemeat contained traces of phenylbutazone; a drug which is known to cause cancer in humans. As a result of the scandal, supermarkets suffered a short-term loss in sales and a temporary fall in share price, but two years on it would appear nothing has happened within supermarkets to change their quality control practices.

BHS and the its pension deficit

In May 2000 Arcadia, a company owned by Lady Tina Green but managed by her husband, acquired BHS for £200 million. In 2014 BHS was sold to an unknown investor group with little or no retail experience for £1. This was after Sir Philip's family had taken out of BHS more than £580m in dividends, rental payments and interest on loans. In addition, there was the sale of certain property assets of BHS to Sir Philip's family on terms which appear to have been preferential.

In May 2016 BHS was placed into administration and in June 2016 it was placed into liquidation with a loss of 11,000 jobs. It is estimated that, as at the date of the liquidation, there was a pension fund deficit of between £450m and £570 million, depending upon the in BHS's assumptions used to calculate the net present value of all future liabilities.

The circumstances surrounding sale of BHS to Retail Acquisitions, and the background to the Pension Deficit, are currently being investigated by the a joint committee establish by the Work and Pensions Select Committee and Business, Innovation and Skills Select Committee of the House of Commons because the matter is of serious public concern. However, the primary job of House of Commons Select Committees is to examine the policies, spending and administration of each department they shadow and to hold the Government to account for the actions (or inactions) of the department. Sadly, Select Committees are ill equipped with the resources, lack the appropriate

forensic abilities and are not possessed with all the necessary skills to deal with the complexities surrounding BHS, its sale and its pension scheme.

Whilst it is easy to suggest that if Lady Green had not had her dividends, the company would have had the funds to support its Pension Scheme, this is only one of the very many issues which contributed to BHS demise; a lack of long term investment plan being another. A Royal Commission, investigating the matter has to consider the matter in much wider and greater detail. Terms of reference might, inter alia, include (i) an examination of role of the Pensioner Trustees in protecting the assets of BHS, (ii) The effect on the pension fund from the loss of tax credits as a result of the abolition of Advance Corporation Tax by Chancellor Gordon Brown in 1999 and (iii) the effect that Quantitative Easing has had on pension fund investment returns. Neither of these last two events could have reasonably been foreseen when Employee Final Salary Schemes were first introduced. Given these latter two factors are a direct result of government policy, select committees are far from the ideal place to consider these issues. It is why a Royal Commission, with a much wider patronage of examiners, would be a better vehicle.

Volkswagen ('VW') and the installation of emission cheat devices

Volkswagen ('VW') has admitted fitting cheat devices to its diesel engines which detected when their cars were being tested and accordingly changes its performance to improve emission results. VW initially said that it had found "irregularities in 800,000 cars in Europe. However, they later reduced this number dramatically to only 36,000 vehicles.

Diesel engines fitted with these cheat devices emit nitrogen oxide pollutants up to 40 times above the level allowed in the US when used on the road in normal driving condition. In the UK it is believed that there are approximately 30,000 additional deaths a year as a result of diesel pollutants.

Embedding cheat devices in the engine management system required sophisticated software programming so it was by no means an accident. It is now apparent that the Joint Research Centre, which is the EU's commission's science service, warned the EU Commission that they suspected car makers were cheating emissions test five years before the VW emissions scandal became public. In fact, as a result of standard setting negotiations between the EU and the diesel car manufactures the tests were made so exacting and precise that they had the effect of watering down their effectiveness. It would appear that not only was the need for safe emission control deliberately flouted by VW but the whole of the diesel engine manufacturing industry was complicit in setting standards which had, as it based line, the minimum standard.

In respect of VW, is it apparent that the regulated market capitalism has done its job, in part, in as much as VW has had set aside £4.8bn to pay for the cost sorting out the problem, but the required amount is likely to be much higher given the US Environmental Protection Agency has the power to fine it up to about \$18bn. There are also criminal investigations taking place. Further, there is long term damage to the VW brand and to the reputation of the diesel engine. All this has resulted in a dramatic fall in share price, badly hit hurting investors and their saving. Further, it means that the company has much less money to spend on product development and innovation affecting its long terms future and also that of its employees. Even though it is a German company, VW has a strong market presence in the UK and this makes the matter of it installing cheat devices one which might make it worthy of consideration by the Royal Commission

Share-lending for short selling purposes

For a very long time, it has been recognised that there has been an incongruity between, the responsibility of directors who have to carefully weigh up the short, medium and long term when

making their decisions, and the short termism of the stock market and the nano second responses of those who trade in shares.

The 2007 Banking Crisis highlighted the activities of pension fund managers lending shares that were owned in the pension funds they managed to hedge fund managers, for a fee typically around 0.4% of the value of the shares lent. The hedge fund managers then sold these shares in volume into the market, driving down the price, only to buy them back later at the lower price making a huge profit. The effect of lending shares for short selling had a devastating effect on employees and customers as well as shareholders who quite rightly felt aggrieved that the activities of a few had destroyed the wealth of many. So bad was the issue for the banking sector that governments around the world decided that short selling of bank shares was contrary to public policy, and they introduced legislation which prohibited it.

If it is proper for banks' shares to be protected from short selling by government action, then why shouldn't such protection be available to shareholders in other companies? As part of the process of rebuilding investor confidence for shareholders, should similar protection from this unscrupulous behaviour not be available in other publicly quoted companies?

Economists and hedge fund gamblers argue that short selling is important to the efficient running of capital markets as it makes prices "more accurate". Those shareholders who have lost money, as a result of the activities of hedge funds, consider the stock market to have been far from efficient. Further, "more accurate" is a nebulous concept as established by the fact that a clock which has stopped is more accurate than one which is running slow, on the basis that it is at least right twice a day. However, in all other respects the information it provides is misleading.

It is accepted that, in a free market economy, it is not the role of Government to prescribe commercial relationships, except on occasions of public policy. This is particularly the case if there is ability for the commercial community to regulate itself. In the UK, the Articles of Association of a company set out the contractual relationship between shareholders and the Company and the template for this is provided by Tables to the Companies Acts. Consequently, they provide the vehicle for the solution.

A Royal Commission might consider whether it should recommend to companies that they incorporate new clauses into their Articles of Association which contractually prohibit shareholders from lending shares for short selling purposes and so protect the majority of its shareholders from this activity. See appendix 3.

High Frequency Share Trading

Boards face problems of reconciling the immediate and day-to-day needs of their businesses with delivering on long term sustainable strategy. Against this backdrop, they have to deal with the fact that their shares price, which is used by analysts as a measure of management performance, is being influenced by high-frequency algorithmic trading, where traders move in and out of positions in fractions of a second as they take advantage of the varying delays in the processing of buy and sell orders. It is estimated that in 2012, 50% of all US equity trading volume was from high-frequency traders moving in and out of short-term positions as they attempted to capture, sometimes a fraction of a cent, profit on every trade. There are those who argue that high-frequency traders have been found to contribute to stock market volatility and their business does not add to market liquidity. Their activity simply involves scraping profits from the trades of ordinary investors.

A Royal Commission might consider whether the needs of both the company and investors, like pension funds, to plan for the long term are best served by a stock market which facilitates high frequency trading and, for example, whether a new stock market should be created in which shares

are only traded twice a day, once in the morning and again in the afternoon, along the same lines as the way the price of gold is fixed.

Money Supply, Quantitative Easing and Banking Fines

Between 2007 and 2012 there was a reduction every month in the UK money supply (M4). This contributed directly to the Great Recession lasting much longer than it should as, not only did Central Banks fail to take the action needed to increase the money supply, but Governments and Regulators led the charge in directly the opposite direction by introducing adverse changes in banks Minimum Capital Ratios and increasing the amounts held by them in Restricted Reserves. This was entirely counter intuitive as the history of central banks had been to increase bank reserves when an economy is overheating and reduce them when an economy is cooling. It was as though, in a rapid effort to make sure the banking crises could never happen again, there was a rush to introduce rules, which had the same effect as the re-introduction of the Gold Standard after the 1929 Crash, forgetting that economic historians had proved that this single act made the subsequent Great Depression much worse.

At the same time as governments were regulating to reduce liquidity in the market by changes to bank capitalisation rules, they hypocritically criticised the commercial banks for not lending to small businesses, at the same time allowing the Bank of England and the European Central Bank to enter into a huge experimental programme of Quantitative Easing in an unproven attempt to get liquidity in the market. It was as though one half of government was trying to put its foot on the economic brake whilst the other half was putting their foot on the accelerator.

Throughout the Great Recession, the world's largest companies were building, and remained sitting on, very large cash reserves, well beyond their needs, adding to the dead hand of economic expansion, for cash needs to circulate in an economy if it is to grow. In 2012, UK corporates were sitting on cash reserves of circa £754bn, or around half the country's annual GDP. A Royal Commission might well consider whether legislation should be re-introduced, using taxation to encourage the distribution of excess cash holdings by way of dividends to shareholders, and thereby stimulate cash into the economy.

In November 2014, the Financial Conduct Authority (FCA), together with regulators in the US and Switzerland, fined six banks \$4.3bn (£2.6bn) after they found that traders had colluded in chat rooms to manipulate foreign exchange benchmarks. Analysts have predicted the total bill faced by banks for currency rigging is expected to quadruple in the next two years to more than \$16.5bn and this is likely to bring the total penalties for foreign exchange manipulation, Libor-rigging, and pension and PPI mis-selling levied on the banking industry to above \$300bn (£190bn).

But, who do these fines hurt and what is their public policy benefit? They hurt the shareholders, many of whom are pension funds, pensioners and individuals. In most cases, they had nothing to do with the original offences, nor could they, under current company law, have influenced the offensive activity. These shareholders have good reason to complain that they are being treated as Whipping Boys, a practice which ended over 300 years ago. Fines hurt some of the directors of the banks but these were not the directors who created the mess but the ones who were called in to sort it out. Importantly, these fines have not stopped banks paying big bonuses. In the major part, these fines hurt small businesses as these fines reduced the reserves of banks and, in the process, took away £1 trillion of lending capacity from the cash starved SME business sector.

Until last year, the UK's share of the fine money went into the government's current account for general expenditure, but in November 2014, the Treasury stated that it intends to give money collected in Libor-related fines to military charities and in future they are likely to be earmarked for

specific issues. However, the important point is that this way the money can only be spent once, whereas if it had been retained in the banks and earmarked for business and social investment projects, then it would have had a multiple effect in the economy.

This section has tried, in just a few paragraphs, to highlight both the complexities and the lack of joined-up thinking by governments, regulators and business to the banking sector and the effect that their actions have on an economy and therefore livelihoods. It is something which would be worth detailed examination by a Royal Commission. For example, they might consider whether fines are an appropriate sanction when the banking sector is as important to an economy as any utility, and whether a new form of business Community Service Order should not be developed in which bank capital and employees' time is devoted to good causes.

Zero Hours Contracts

There is much criticism of zero hour contracts and the way in which these can be used to exploit the workforce. It is a requirement of employment law that every employee must have a contract of employment. There are no de minimis levels for an employee working just once for one hour. As a matter of practicality, employers need to be allowed to issue zero hour contracts so they have the flexibility they need. No hospital would be able to run if it were unable to issue zero hour contracts as they need the flexibility to cover holidays and illness which are manpower disruptive. For example, there are many nurses who like the flexibility of working through the hospital agency bank as it helps them in their work / life balance. The hospitality industry, particularly those involved in events management, would not be able to operate if it were not for the flexibility which zero hour contracts offer. It is not feasible to blanket ban them.

However, it is a fact that zero hour contracts are being used by some employers to exploit their staff and to shift the risk of running their business from them to their employees. Too often, staff engaged for a shift or an event, have been sent home early without pay because of changing circumstances or simply bad planning by management. This is socially unacceptable. The effect this has on the lowest paid employees is devastating. They are the least able to deal with rapid and unforeseen changes in their income. The growth in zero hour contracts can be correlated to the growth in food banks and pay day lending.

A Royal Commission might carefully consider the appropriate balance of risk between the employee and employer so that employment law can be appropriately amended.

Tax avoidance by multinational companies

Whilst Corporation Tax avoidance by multinational companies might be unacceptable to four of the stakeholders included in the definition of Irresponsible Capitalism (i.e. employees, customers, suppliers and host communities) it is difficult to see how such tax planning activity can be argued as "unacceptable" to the majority of shareholders. It is also hard to see how aggressive tax planning can be argued as comprising "*significant, foreseeable risk of material harm to the interest or well-being of stakeholders*". Businesses can reasonably argue that they use the money they save not paying tax by investing in their businesses and creating jobs. Further, businesses can quite reasonably argue that it is the responsibility of government to change the tax laws so that the rules encompass the reasonable expectation of society. They would properly point out the duplicity of government who, whilst competing on the world stage to have the lowest rate of corporation tax, criticise businesses in their domestic market for operating by the rules which they create. As demonstrated, it is a complex international problem which a Royal Commission, of the type proposed, could have provided considerable help to Government to develop the kind of solution

which was introduced in the Finance Act 2015 in the form of the Diverted Profits Tax much sooner than it did.

However, there still remains the inequality of VAT. It remains unacceptably unfair that a product ordered on line with a company based in Luxembourg, processed by a server placed anywhere in the world, and delivered from a warehouse could charge 5% VAT on that product where, if exactly the same item was sold through a UK shop it would have to charge VAT at a rate of 20%.

Royal Commission for Responsible Capitalism Bill 201[5]

CONTENTS

1. The establishment of a Royal Commission for Responsible Capitalism
2. Effective Date
3. Financial provisions
4. Short Title and Extent

A
BILL

To invite the Queen's most Excellent Majesty to establish, under letters patent, a Royal Commission for Responsible Capitalism.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The establishment of a Royal Commission for Responsible Capitalism

1.1. The Queen's most Excellent Majesty is honourable and graciously requested to establish under letters patent a Royal Commission for Responsible Capitalism in accordance with the purposes, objectives, remit of the Royal Charter set out in Schedule 1 which will operate within the terms and conditions thereof.

2. Effective Date

2.1. The Royal Charter for the establishment of a Royal Commission for Responsible Capitalism shall take effect on the day following the date the Royal Charter is sealed by the Queen's most Excellent Majesty

3. Financial provisions

3.1. There is to be paid out of money provided by Parliament any expenditure incurred under or by virtue of this Bill by the Chancellor of the Exchequer or by a Government Department.

4. Short title and extent

4.1. This Act may be cited as the Royal Commission for Responsible Capitalism Act.

4.2. This Act extends to the United Kingdom.

Schedule 1

ROYAL CHARTER FOR THE ESTABLISHMENT OF A ROYAL COMMISSION FOR RESPONSIBLE CAPITALISM

ELIZABETH THE SECOND by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith:

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING!

WHEREAS The First Lord of Our Treasury announced to Our Parliament holden at Westminster on the [date] the establishment of a Royal Commission for Responsible Capitalism under Royal Charter.

AND WHEREAS it has been represented to Us by Our right trusty and well beloved Counsellor [Insert Name] Our Leader of the Opposition that it is in the best interests of Our People that there should be established a Royal Commission for Responsible Capitalism under Royal Charter.

AND WHEREAS it has been represented to Us by Our right trusty and well beloved Counsellor [Insert Name] Our Principal Secretary of State for Business, Innovation & Skills that it is in the best interests of Our People that there should be established a Royal Commission for Responsible Capitalism under Royal Charter.

AND WHEREAS with the advice and consent of Our Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, it has been represented to us that it is in the best interests of Our People that there should be established a Royal Commission for Responsible Capitalism under Royal Charter.

AND WHEREAS it is in the best interests of Our People that there should be a body corporate established for the purpose of determining and promoting Responsible Capitalism.

NOW KNOW YE that We by Our Prerogative Royal and of Our especial grace, certain knowledge and mere motion do by this Our Charter for Us, Our Heirs and Successors will, ordain and declare as follows:

1. INCORPORATION

- 1.1. There shall be established a body corporate with the name the Royal Commission for Responsible Capitalism (hereinafter known as 'the Royal Commission').
- 1.2. There shall be a Board of the Royal Commission which shall be responsible for the conduct and management of the Royal Commission's business and affairs in accordance with the furtherance of this Charter.
- 1.3. The Members of the Board of the Royal Commission shall be the only members of the body corporate, but membership of the body corporate shall not enable any individual to act otherwise than through the Board to which he belongs.

2. TERM OF THE CHARTER

- 2.1. Article 3 (*Purpose*) Article 7 (*Appointments*) and Article 23 (*Definitions*) shall take effect on the day following the date the Charter is sealed.
- 2.2. The remainder of this Charter shall take effect from the day after the last date that the Chair and the initial Members of the Board of the Royal Commission are appointed, and the Royal Commission shall be duly established on that day.

3. PURPOSES

- 3.1. The purposes for which this Royal Commission is established and incorporated are to:
 - 3.1.1. Promote fairness and long term sustainable value creation through responsible free market capitalism.
 - 3.1.2. Develop simple principles that will, over time, come to define what is meant by 'Responsible Capitalism'.
 - 3.1.3. Receive, or to take under self-referral, matters of concern regarding the operation of free market capitalism which it shall carefully review and consider in a constructive and impartial manner and on which it shall give its opinion for possible resolution or future action.
 - 3.1.4. Help policy-makers with well-researched analyses of problems associated with free market capitalism together with conclusions and recommendations.
 - 3.1.5. Develop principles of improved governance of companies, public bodies and the executive branch of government that help businesses, the State and society work in closer and more productive harmony.
 - 3.1.6. Hear and investigate claims that business or regulatory behaviour has crossed, or might cross, the boundary of what is socially acceptable and report its findings.
 - 3.1.7. Establish within it an Office of Externality so it may consider and measure, in respect of matters it takes under review, the costs and / or benefits to a party who did not choose to incur or undertake that cost or benefit.
 - 3.1.8. Identify cases of irresponsible or unacceptable capitalism.
 - 3.1.9. Rebuke, reprimand, censure or admonish those persons who, the Commission considers, have behaved in an unacceptable or irresponsible manner in a business or administrative matter.
 - 3.1.10. Identify and reward outstanding examples of responsible capitalism.

4. IRRESPONSIBLE (OR UNACCEPTABLE) CAPITALISM

- 4.1. Irresponsible (or unacceptable) Capitalism means the action, or inaction, by those responsible for the operation of an enterprise, agency, trust or organisation, or part thereof, which, in the eyes of the reasonable person, involves:
 - 4.1.1. the foreseeable risk of unjustified and unwarranted harm to any group of stakeholders who have an interest in, or an association with, any enterprise, agency, trust or organisation, including but not limited to investors, employees, customers, suppliers, users and those who rely upon it; or
 - 4.1.2. the bringing, or the risk of bringing, that enterprise, agency, trust or organisation, and / or those associated with it, into disrepute; or
 - 4.1.3. the unfair and unreasonable exploitation of others; or
 - 4.1.4. the obvious disregard for the environment or the community.

5. DUTIES

- 5.1. Each Commissioner, in the exercise of their duties, will do right for all people without fear, favour, affection or ill will and act in accordance with the law.
- 5.2. In carrying out its Purpose the Royal Commission shall have a primary duty, but not a legal obligation, to:
 - 5.2.1. Engage and consult in an open and transparent manner with the public on all issues it takes under scrutiny or enquiry.

- 5.2.2. Protect commercially sensitive information.
- 5.2.3. Consider all issues with the object of creating and maintaining a Flourish Society.
- 5.2.4. Consider all issues with the objective of creating and maintaining a Vibrant Free Market Economy.
- 5.3. Consider all issues with the objective of preserving and enhancing the energy and innovation of the economy.

6. FUNCTIONS

- 6.1. The functions of the Royal Commission shall be public functions.

7. APPOINTMENTS

- 7.1. The Commission for Public Appointments shall be responsible for identifying candidates for the appointment as Chairman and Members of the Board of the Royal Commission.
- 7.2. The initial Chair of the Board and all subsequent Chairs of the Board will be appointed by the Commissioner for Public Appointments upon the advice of the Appointments Committee to be established hereunder.
- 7.3. The Chair of the Board will be appointed before any Members of the Board are appointed.
- 7.4. It will be the responsibility of the Chair of the Board, once identified, to decide how many initial Members shall be appointed taking into account Article 7.10.
- 7.5. The initial Members and all subsequent Members of the Board of the Royal Commission will be appointed by the Commissioner for Public Appointments upon the advice of the Appointments Committee to be established hereunder acting together with the Chair of the Board.
- 7.6. The appointment of the Chair and Members of the Board shall follow a fair, open and merit-based process, to be conducted in the manner described in this Article.
- 7.7. The Commissioner for Public Appointments shall establish an Appointments Committee and shall:
 - 7.7.1. appoint the Appointments Committee;
 - 7.7.2. decide how many people will serve on that Committee; and
 - 7.7.3. allow his Office to support the work of that Committee.
- 7.8. The Chair of the Appointments Committee shall be a Public Appointments Assessor (appointed pursuant to the Public Appointments Order in Council 2013).
- 7.9. A person shall be ineligible to be appointed to the Appointments Committee if they are ineligible to serve as a Member of the Board as set out in Article 7.11.
- 7.10. The criteria for appointment as a Chair and as a Member of the Board are:
 - 7.10.1. Every Member shall have senior level experience in a public, private or voluntary sector organisation.
 - 7.10.2. Every Member shall be of impeccable character with a record of acting with the highest of integrity.
 - 7.10.3. That at least one Member shall:
 - 7.10.3.1. have a legal qualification and skills of not less than 10 (ten) years' experience together with an understanding of the legal framework within which the Board must operate;

- 7.10.3.2. have financial skills and acumen with not less than 10 (ten) years' experience including the delivery of value for money;
 - 7.10.3.3. have experience of public policy;
 - 7.10.3.4. have experience of consumer rights;
 - 7.10.3.5. have experience of banking;
 - 7.10.3.6. have been a civil servant in a Department of State with not less than 10 (ten) years' in-post experience.
 - 7.10.3.7. have not less than (10) years' experience of employee relationship management;
 - 7.10.3.8. be, or shall have been, Chairman or Chief Executive Officer of a public company with not less than 5 (five) years' service whose shares have been included in the FTSE 250 Index;
 - 7.10.3.9. be, or shall have been, Chairman or Chief Executive Officer of a private SME (Small and Medium-sized Enterprise) employing not less than 50 (fifty) people nor more than 250 (two hundred and fifty) people;
 - 7.10.3.10. be, or shall have been, Chief Investment Officer of a Fund Management business with not less than £75 million (seventy-five million pounds) under management;
 - 7.10.3.11. be an economics professor at a recognised United Kingdom University of not less than 10 (ten) years' standing;
 - 7.10.3.12. be a professor lecturing on a Masters in Business Administration course at a recognised United Kingdom University of not less than 10 (ten) years' standing;
 - 7.10.3.13. be a sociology professor at a recognised United Kingdom University of not less than five years' standing;
 - 7.10.3.14. be, or shall have been, a trade union official with 5 years' of trade union experience;
 - 7.10.3.15. practice at the Tax Bar, or is a Member of the Tax Faculty of the Institute of Chartered Accountants in England Wales, or a member of the Institute of Taxation, a Member of the Tax Committee of the Law Society with not less than 10 (ten) years' experience.
- 7.11. A person shall be ineligible to be appointed, or to remain as, a Member of the Board if they are, or have in the previous five years been:
- 7.11.1. a Minister of the Crown, Member of the Scottish Government, a Northern Ireland Minister or a Welsh Minister;
 - 7.11.2. a Member of the House of Commons, the House of Lords, the Scottish Parliament, the Northern Ireland Assembly or the National Assembly for Wales the European Parliament;
 - 7.11.3. held any official affiliation with, or stood for election under the banner of, any registered political party;
 - 7.11.4. the Chair or Member of the Board of a Regulator;
 - 7.11.5. a member of staff working for a Regulator.
- 7.12. The Commissioner for Public Appointments and the Chair of the Board shall have regard to the importance of staggering the reappointment and retirement of Members to deliver appropriate continuity in the performance of its functions.

- 7.13. No appointment to the Board shall be valid unless it has been made by the Appointments Committee.

8. MEMBERSHIP

- 8.1. The Board of the Royal Commission shall consist of a Chair and no fewer than 16 (sixteen) and no more than 24 (twenty four) other Members.
- 8.2. The Board will elect and appoint one of their number to be Deputy Chair of their meetings and determine the period for which he is to hold office.
- 8.3. Each Member, including the Chair, shall hold and vacate his office in accordance with the terms of this Article 8.
- 8.4. Each Member shall be eligible to serve for an initial term of up to 5 years and shall be eligible to reappointment for a further period of up to 3 years.
- 8.5. Any Member of the Board may resign by giving notice in writing to the Chair of the Board and, if the Chair, to the Deputy Chair.
- 8.6. A Member of the Board shall be immediately dismissed from office upon:
- 8.6.1. becoming bankrupt or applying for any receiving order or having a receiving order made against him or her or making any composition with his creditors; or
 - 8.6.2. becomes of unsound mind or if an order is made in respect of him or her or his or her property under the Mental Health Act 1959; or
 - 8.6.3. be convicted of any criminal offence which carries as a punishment a term of imprisonment.
- 8.7. A Member of the Board shall be immediately dismissed from office if the Board is satisfied, by way of a majority of two thirds of the Members entitled to vote concurring, that the Member has:
- 8.7.1. committed, or given the Board reasonable grounds for believing that he has committed, any act of dishonesty;
 - 8.7.2. consumed alcohol to an extent which the Board reasonably regards as excessive, or consumed or supplied controlled drugs and/ or other illegal substances;
 - 8.7.3. engaged in any form of sexual or racial discrimination or other bullying or harassment;
 - 8.7.4. through their actions brought, or risked bringing, the Royal Commission into disrepute;
 - 8.7.5. behaved in a manner which the Board reasonably considers to be against the interests of the Royal Commission; or
 - 8.7.6. has been shown as being unwilling, unable or unfit to discharge the functions of a Member of the Board under this Charter.
- 8.8. The Member subject to a Board vote to be removed from office shall not be entitled to vote on the matter.
- 8.9. Any Member duly dismissed from office under Articles 8.6 and 8.7 shall be notified in writing of this fact, together with reasons, by the Chair of the Board.
- 8.10. A Member shall not be entitled to appoint an alternate.

9. GOVERNANCE

- 9.1. Subject to the provisions of this Article 9 the Members may meet together in person, or as permitted by Article 9.15, for the dispatch of business, and to adjourn and otherwise regulate their meetings as they think fit.

- 9.2. The Board shall determine and regulate its own procedures for conducting its business and discharging its purpose and functions under this Charter.
- 9.3. The Board shall publish its procedures.
- 9.4. The Board shall meet not less than 8 (eight) times a year and there shall not be a gap of more than 10 (ten) weeks between each Board meeting.
- 9.5. Every meeting of the Board shall be called on not less than five days written notice and an agenda and copies of any appropriate supporting documentation shall be sent to the Members along with the notice of the meeting.
- 9.6. A meeting may be called at short notice, not being less than 8 hours, provided a resolution is passed by 90% of the Members voting in favour of the meeting being held at short notice.
- 9.7. Notice of Board Meetings shall be deemed to be duly given to a Member if it is given to him personally by word of mouth or sent in writing to him at his last known address or any other address given by him to the Royal Commission for this purpose or sent by email to an email address given by him to the Royal Commission.
- 9.8. A Member absent or intending to be absent from the United Kingdom may request the Board that notices of Board Meetings shall, during his absence, be sent in writing to him at his last known address or any other address given by him to the Company for this purpose, whether or not outside of the United Kingdom.
- 9.9. If either the Chair or Deputy Chair are not present, at the time appointed for holding the Board Meeting, the Members present shall choose one of their number to be Chairman of such meeting.
- 9.10. A duly convened meeting of the Members for the time being at which a quorum is present shall be competent to exercise all or any of the authorities, powers, and discretions by or under these Articles for the time being vested in or exercisable by the Members generally.
- 9.11. The quorum for a meeting of the Members shall, throughout the meeting, be at least two-thirds of the number of Members appointed from time to time rounded down to the nearest whole person.
- 9.12. If any meeting of the Members is not quorate within one hour from the time appointed for the meeting then that meeting shall stand adjourned to the same time and same place on the following business day. If the adjourned meeting is not quorate within one hour of the appointed time then any 5 (five) Members shall constitute a quorum.
- 9.13. Other than as required by Article 9.14 (*Sanctions*), Article 21.5 (*Charter Amendments*) and Article 22.5 (*Dissolution*), questions arising at any meeting of the Members, or any Committee of the Board, shall be decided by a majority of votes present. In the case of equality of votes at any meeting of the Board or of a Committee, the Chairman shall not be entitled to a second or casting vote.
- 9.14. Questions arising at any meeting of the Members regarding Sanctions shall be decided by a two thirds majority of votes present, rounded up to the nearest whole person.
- 9.15. A Member shall be permitted to participate in the proceedings of Board and Committee meetings by means of a communication device (including a telephone) which allows all the other Members present at such meeting (whether in person or by means of such type of communication device) to hear at all times all other Members present at such meeting (whether in person or by means of such type of communication device) and they shall be deemed to be present at such meeting and shall be counted when reckoning a quorum. The place of the meeting will be the place where the majority of members are present when the meeting is held, and the minutes of the meeting will record those who were physically present and those who participated by means of a communication device.

- 9.16. A Resolution in writing signed or approved by letter, email, or facsimile transmission by all the Members or by Members of a Committee for the time being (which Resolution may consist of several documents in the like form each signed by one or more of the said Members or said members of such Committee) or a Resolution to which every such Member or every member Committee has signified his approval in writing by letter, email; or facsimile transmission shall be as valid and effectual as if it has been passed at a Meeting of the Members or of such Committee (as the case may be) duly called and constituted.
- 9.17. The Members shall cause minutes to be made of the following matters, namely:-
- 9.17.1. the names of all appointments of Members together with their service address;
- 9.17.2. Committees of the Board made by the Members, and the names of all Members and other persons appointed thereto, together with their service addresses;
- 9.17.3. the agreed remuneration of Members and other persons appointed to serve on a Committee of the Board;
- 9.17.4. the names of persons present at every meeting of the Board or of Committees of the Board, and all business transacted at such meetings; and
- 9.17.5. all orders, resolutions and proceedings of all meetings of the Board or of Committees of the Board.
- 9.18. Any such minutes as aforesaid shall be put for approval at the next succeeding meeting and if approved, or approved with agreed amendment, shall be signed by the chairman of the meeting which approved such minutes and such signed minutes shall be taken as prima facie evidence of the matters stated in such minutes without any further proof.
- 9.19. All acts done by a meeting of the Members, or of a Committee, or by any person acting as a Member, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any person or persons acting as aforesaid, or that they or any of them were or was disqualified from holding office or not entitled to vote, or had in any way vacated their or his office, be as valid as if every such person had been duly appointed, and were duly qualified and had continued to be a Member.
- 9.20. The Board shall put in place arrangements by which a Member can:
- 9.20.1. register his interests or any other matter he considers relevant to the Purpose of the Royal Commission;
- 9.20.2. determine whether any interest he holds, directly or indirectly, gives rise to a conflict of interest;
- 9.20.3. declare such conflicts to the Board; and
- 9.20.4. absent himself from decision-making where the Board determines it is appropriate so to do.
- 9.21. A Member who is in any way directly or indirectly interested in any contract, transaction, or arrangement, or proposed contract, transaction or arrangement, with the Royal Commission shall immediately declare the nature of his interest at the first available meeting of the Members.
- 9.22. A Member who is in any way related or involved in any matter under review or investigation or enquiry, or proposed review or investigation or enquiry, by the Royal Commission shall immediately declare the nature of his relationship or involvement at the first available meeting of the Members.
- 9.23. The Board shall not delegate the following decisions:

- 9.23.1. A decision to rebuke, reprimand, censure or admonish any person.
- 9.23.2. A decision to report any person to the Crown Prosecution Service for Contempt of Court.

10. COMMITTEES OF THE BOARD

- 10.1. The Board may delegate any of their powers to Committees consisting of:
 - 10.1.1. not less than three Members; or
 - 10.1.2. not less than two Members, together with such other persons as the Board thinks fit provided such other persons comply with Articles 7.10.1, 7.10.2 and 7.11.
- 10.2. A Committee meeting acting under Article 10.1.1 shall only be quorate if it has at all times present at least two Members.
- 10.3. A Committee meeting acting under Article 10.1.2 shall only be quorate if it has at all times present one Member and two-thirds of the number of other persons appointed rounded up to the nearest whole person and not being less than two in number.
- 10.4. All other persons appointed to a Committee, and not being a Member, shall meet the criteria set out in Articles 7.10.1 and 7.10.2. A person shall be ineligible to be a Committee member of the Board if they meet any of the criteria set out in Article 7.11.
- 10.5. All Committees shall, in the exercise of the powers delegated to them, and in the transaction of business, conform to any mode of proceedings and regulations which may be prescribed by the Members, and subject thereto may regulate their proceedings in the same manner as the Members may do.

11. REMUNERATION

- 11.1. The Board may make arrangements to pay or make provision for paying, in respect of any Member, such amounts by way of allowances or gratuities as the Board determines. The amount of any such allowances or gratuities shall be set having regard to the law and the prevailing rates payable to the members of boards of public sector bodies.

12. POWERS

- 12.1. The Royal Commission, acting through the Board or through anyone duly appointed in accordance with Article 7, may do all things that are lawful as may further the Purpose of the Royal Commission, and in particular, but without limitation may:
 - 12.1.1. call, interview and cross examine witnesses under oath;
 - 12.1.2. call for the delivery of books, accounts, vouchers, documents, papers emails, text messages, software and code;
 - 12.1.3. borrow or raise and secure the payment of money for the purpose of performing the Royal Commission's functions;
 - 12.1.4. procure professional legal or other advisory services;
 - 12.1.5. procure professional financial advice, including for the purpose of achieving best value for money;
 - 12.1.6. purchase, rent, lease or hire real property; and
 - 12.1.7. enter into contacts including, but not limited to, employment contracts, contract for services and contracts for supplies.

13. PROTECTION OF WITNESSES

- 13.1. The Royal Commission will at all times act fairly.

- 13.2. The Royal Commission will provide every witness with a fair and impartial hearing providing such courtesies as are normally and reasonably provided to witnesses.
- 13.3. Any witness may be represented or accompanied by legal counsel or a friend.
- 13.4. Any answers, replies or no-comment responses given by a witness to any question posed by the Royal Commission will not be admissible in any criminal proceedings, other than that which is necessary to support a charge of Contempt of Court under Article 15.
- 13.5. A witness may, if they so wish, give their evidence in private and such testimony shall remain confidential to the Royal Commission until such time as they publish an interim or final report.
- 13.6. Any submission or written representation given in evidence shall remain confidential to the Royal Commission until such time as they publish an interim or final report
- 13.7. All draft reports, working papers, files, and documents appertaining to any matter under consideration by the Royal Commission shall remain confidential to the Royal Commission and shall not be disclosed except:
 - 13.7.1. as required by Article 14.6; or
 - 13.7.2. otherwise to report a Contempt of Court under Article 15.
- 13.8. The Royal Commission shall not, in any report they publish, include any evidence which incriminates any person, or make any adverse comment on, or criticize any individual, where they know or have good reason to believe, that such a person is under investigation by the police for matters which are also under consideration by the Royal Commission until after such time as the Crown Prosecution Service has determined that the person shall not be prosecuted or a trial has been held and a verdict delivered.
- 13.9. Where the Royal Commission know that the Crown Prosecution Service is considering, or has considered bringing criminal charges against a person who has been a Royal Commission witness and if the Crown Prosecution Service has not authorised that witness to be charged within one year of the Crown Prosecution Service having the possible prosecution of the witness referred to them, then the Royal Commission shall have the unfettered right to publish their report containing such evidence, opinion and criticisms as they consider fit. There shall be a time of the essence obligation on the Crown Prosecution Service in all matters involving the Royal Commission.

14. **SANCTIONS AND PENALTIES**

- 14.1. The Royal Commission have no powers to fine or impose any kind of similar penalty.
- 14.2. Where the Royal Commission has thoroughly investigated and reviewed a matter, and during the course of their enquiries, they have come across instances of behaviour which, in the opinion of two thirds of the Board (rounded up to the nearest whole person), comprises unacceptable or irresponsible behaviour then they shall have a duty to report their findings, their opinion and their reasons. They shall also have a duty to consider whether any person should be subject to any sanction as permitted under this Article.
- 14.3. If during the course of their work the Royal Commission discover matters which they consider might have involved a criminal act then, subject always to Article 13.4 (*Witness Inadmissible Evidence*) they shall be under an obligation to report all their findings to the police and advise all persons, who they suspect of having committed a criminal offence, that they have done so.
- 14.4. The sanctions available to the Royal Commission, and their effect, are:

- 14.4.1. Admonishment – a person who is Admonished shall automatically be referred to the Secretary of State for the Department for Business, Innovation and Skills as being a person who they should consider banning from being a Member of any company for a specified period of time or for life.
- 14.4.2. Censure – a person who is Censured shall be considered as not being a fit and proper person to be a Member of any company whose shares are quoted on a regulated stock exchange, and any person who appoints any censured person to such a position shall themselves risk being censured by the Royal Commission.
- 14.4.3. Reprimand – a person who is Reprimanded shall be considered as not being a fit and proper person to hold charitable office, or hold public office, otherwise than by way of an election held under the supervision of the Electoral Commission and any person who appoints any censured person to such a position shall themselves risk being reprimanded by the Royal Commission.
- 14.4.4. Rebuke – a person who is rebuked shall have their reputation damaged but suffer no further sanctions.
- 14.5. The Royal Commission shall have the power to Admonish, Censure, Reprimand and Rebuke the same person arising from the same event.
- 14.6. No person shall be Admonished, Censured, Reprimanded or Rebuked unless and until they have been shown a copy of the draft report prepared by the Royal Commission in which it is proposed that they shall be Admonished, Censured, Reprimanded or Rebuked and they have had 20 clear business days to comment and make representation on that draft report and the Royal Commission shall have had time to carefully consider those comments and representations.

15. **CONTEMPT OF COURT**

- 15.1. It shall be a Contempt of Court if any individual shall:
 - 15.1.1. fail to co-operate with the Royal Commission;
 - 15.1.2. fail to attend for interview and / or cross examination;
 - 15.1.3. fail or refuse to deliver documents or information as required by the Royal Commission;
 - 15.1.4. destroy or mutilate any documents request by the Royal Commission; or
 - 15.1.5. furnish false or misleading information to the Royal Commission.
- 15.2. Contempt of Court shall be an Indictable Only Offence punishable by up to:
 - 15.2.1. two years in prison; or
 - 15.2.2. a fine of up to the maximum of the higher of:
 - 15.2.2.1. 10% of the person’s total income or turnover, or
 - 15.2.2.2. 10% of the person’s net worth.
- 15.3. The Royal Commission shall report all instances of Contempt of Court to the Crown Prosecution Service with all appropriate evidence.

16. **STAFF**

- 16.1. The Royal Commission may employ staff or otherwise engage people whose services are deemed expedient in order to carry out or promote the Purpose of the Royal Commission, and, in particular, to organise, assist with the work of, and advise the Board.

- 16.2. The Royal Commission may appoint a Chief Executive Officer and a Chief Financial Officer who, if appointed, will be ex-officio members of the Board with a right to attend all meetings and to be heard and to receive all Board papers but will have no right to exercise a vote.
- 16.3. The Board may authorise the payment of remuneration to members of staff or pay or make payments towards the provision of pensions, allowances or gratuities, at such rates or amounts as it determines and are lawful.
- 16.4. The Royal Commission shall not employ or otherwise engage (whether on a full-time or part-time basis) any person who is ineligible to be a Member of the Board for the reason set out in Article 7.11.

17. MONEY

- 17.1. The Exchequer shall grant to the Royal Commission such sums of money as are sufficient to enable the Board to commence its operations and fulfil its Purpose. The grant of such monies shall be in accordance with the general principles of Managing Public Money.
- 17.2. In addition, the Exchequer shall pay to the Royal Commission a grant of £5 per year for each limited company or limited partnership who files an Annual Return with the Registrar of Companies (England and Wales), the Registrar of Companies (Scotland), and the Registrar of Companies (Northern Ireland) in each Financial Year.
- 17.3. The Board shall, before the 31st March in each year, prepare and publish an annual budget for the forthcoming Financial Year with appropriate explanations and commentary and in doing so shall have regard to the need to ensure it achieves value for money.

18. ACCOUNTS

- 18.1. The Board must keep proper accounts and proper records in relation to the accounts. The accounts must be capable of showing a true and fair statement of the financial affairs of the Royal Commission at any time.
- 18.2. The Board must prepare a statement of accounts for each Financial Year, and must send a copy of the statement of accounts to the Comptroller and Auditor General as soon as practicable after the end of the financial year.
- 18.3. In accordance with any necessary arrangements made between the Comptroller and Auditor General and the Royal Commission, the Comptroller and Auditor General will examine, certify and report on the statement of accounts for each Financial Year.
- 18.4. The Royal Commission shall make arrangements for a copy of the certified statement of accounts and the Comptroller and Auditor General's report thereon to be laid before Parliament each year.

19. REPORTS

- 19.1. As soon as practicable after the end of each Financial Year the Board must prepare and publish a report about the activities of the Royal Commission during that year which shall be laid before Parliament each year.
- 19.2. Our Lord Chancellor shall provide such administrative assistance as is necessary for the Royal Commission to lay documents before Parliament.

20. INDEMNITY

- 20.1. The Royal Commission shall indemnify each and every Member of the Board, from the assets of the Royal Commission against any liability incurred by him by reason of any act or thing done by him in the proper discharge of his responsibilities, office or duty under this Charter.

- 20.2. No Member shall be liable for any loss, damage or misfortune which may happen to or be incurred by the Royal Commission in the execution of their duties otherwise than provided by statute or their wilful neglect or default.
- 20.3. The Royal Commission may purchase and maintain for any person who is or was at any time a Member or member of a Committee a policy of insurance against any liability which attaches to that person in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the Royal Commission.

21. CHARTER AMENDMENTS

- 21.1. A provision of this Charter may be added to, supplemented, varied or omitted (in whole or in part) if, and only if the requirements of Article 21.2, 21.3 and 21.5 are met.
- 21.2. Subject to Article 21.3, before any proposal (made by any person) to add to, supplement, vary or omit (in whole or in part) a provision of this Charter ('Proposed Change') can take effect, a draft of the proposed change must have been laid before Parliament, and approved by a resolution of each House.
- 21.3. Where a Proposed Change would be within the legislative competence of the Scottish Parliament, Article 21.2 shall apply with the reference to laying before Parliament taken to mean laying before the Scottish Parliament, and the reference to approval by a resolution of each House taken to mean approval by a resolution of the Scottish Parliament. This provision does not affect the requirement for approval of proposed changes by Parliament under Article 21.2 with respect to matters that do not fall within the legislative competence of the Scottish Parliament.
- 21.4. For the purpose of this Article, "approved" means that at least two-thirds of the members of the House in question or the Scottish Parliament who vote on the motion do so in support of it.
- 21.5. A proposed change must be ratified by a resolution that has been passed unanimously by all of the Members of the Board, who shall determine the matter at a meeting duly convened for that purpose.
- 21.6. The provisions of Article 21.2 and 21.3 do not apply to a proposed change to this Charter that is required merely to correct a clerical or typographical error with such corrections or changes being approved unanimously by all of the Members of the Board, who shall determine the matter at a meeting duly convened for that purpose.
- 21.7. Provided the terms of Article 21.2 and 21.3 have been met, any such addition, supplement, variation or omission shall, when approved by Us, Our Heirs or Successors in Council, become effective so that this Charter shall thenceforth continue and operate as though it had been originally granted and made accordingly.

22. DISSOLUTION

- 22.1. This Charter, and the Royal Commission created by it, shall continue in force until the twenty first anniversary of the date on which the Charter is sealed, at which date the Charter shall end and the Royal Commission shall dissolve.
- 22.2. This Charter, and the Royal Commission created by it, may continue after its twenty first anniversary provided, on or before the twentieth anniversary of the date on which the Charter is sealed, Parliament approves a motion for the Charter, and the Royal Commission, to continue.
- 22.3. Where Parliament approve the motion (which Parliament shall mean approval of each House) the Charter, and the Royal Commission shall continue uninterrupted.

- 22.4. The Charter shall be amended (without recourse to Article 21) to remove, modify or maintain such functions (and associated powers and responsibilities) of the Royal Commission as is directly necessary to implement the decision of each Parliament.
- 22.5. The Royal Commission may, if it appears necessary to the Board (acting unanimously) surrender this Charter and thereafter dissolve the Royal Commission with the permission of Us, Our Heirs or Successors in Council and upon such terms as We or They consider fit, but no such surrender of the Charter or dissolution of the Royal Commission shall take place unless information about the proposed dissolution has been presented to Parliament with a motion seeking approval to surrender the Charter and dissolve the Royal Commission and provided Parliament (which Parliament shall mean approval of each House) so approves the motion, after which the surrender and dissolution shall proceed.
- 22.6. The Board shall deal with the winding up of the affairs of the Royal Commission in such manner as they and Our Lord Chancellor consider fit, provided that all remaining funds (which remain once the debts of the Royal Commission have been paid in full) together with the proceeds from the sale of any assets belonging to the Royal Commission shall be paid to the Consolidated Fund.
- 22.7. The dissolution of the Royal Commission is subject to any applicable statutory provisions or other legal requirement (relating to the cessation of the body's operation, including as an employer or contractor).

23. DEFINITIONS

23.1. For the purposes of this Charter

‘Financial Year’	means the period beginning with the date this Charter becomes effective in accordance with Article 2.1 and ending with the following 31 March and thereafter each successive period of twelve months ending with 31 March.
‘Flourishing Society’	means a society in which its people are happy, healthy, educated, productive, and engaged, living with a feeling of well-being and without distress and insecurity.
‘Member of the Scottish Government’	has the meaning in section 44 of the Scotland Act 1998.
‘Minister of the Crown’	has the meaning in section 8 of the Ministers of the Crown Act 1975.
‘Northern Ireland Minister’	means a Minister as defined in section 7(3) of the Northern Ireland Act 1998 or a junior minister appointed under section 19 of that Act.
‘Vibrant Free Market Economy’	means an economy which is characterised by: <ul style="list-style-type: none"> (i) an absence of corruption, exploitation or controlling elites. (ii) an inclusiveness which enables each person to be able to participate in accordance with their ability and inclination. (iii) an ability for many participants to enter and exit the market at will.

- (iv) an absence of excessive control, regulation or barriers to market entry.
- (v) transparency and a free flow of accurate information.
- (vi) liveable safe communities within a healthy, balanced and sustainable ecosystem.
- (vii) the provision of education, training and infrastructure for the benefit of all
- (viii) adherence to the rule of law which is impartially applied.
- (ix) the State doing that which it is appropriate for the State to do for and the market to do that which it is appropriate for the market to do.
- (x) sufficient liquidity of a stable currency which enables trade to be carried on without creating or causing excessive inflation or deflation of the UK's currency.
- (xi) open and efficient government.
- (xii) An openness which enables the charitable sector to make such contribution to the community as its volunteers shall lawfully decide.
- (xiii) the efficiently and fair allocation of the available resources with the wants of the community which the economy serves.
- (xiv) low and easily understandable taxes.

‘Welsh Minister’

means a Minister appointed under sections 46 or 48 of the Government of Wales Act 2006.

- 23.2. Where reference is made to the Crown Prosecution Service in these Articles, in Scotland that reference shall be taken to mean The Crown Office and Procurator Fiscal Service and in Northern Ireland that reference shall be taken to mean the Public Prosecution Service for Northern Ireland.
- 23.3. Reference to “Managing Public Money” means the document entitled “Managing Public Money” last published by Our Treasury in July 2013 (including any amendments made by Our Treasury to that document, or any document that replaces or incorporates it).
- 23.4. A reference to a “Member” of the Board in the Articles of this Charter (including Schedule 1 (*appointment and terms of membership*)), includes a reference to the Chair of the Board, unless the context otherwise requires.
- 23.5. In interpreting this Charter, and except where the context requires otherwise, words importing the masculine gender include the feminine, and vice versa, and words in the singular include the plural, and vice versa.
- 23.6. In this Charter a reference to an article refers to a provision of the main body of this Charter.
- 23.7. In this Charter a reference to an Act of Parliament or an Order in Council includes any Act or Order that replaces or incorporates it.

24. GENERAL

- 24.1. The Royal Commission shall have perpetual succession, and shall continue to exist as a legal person, regardless of the changes in its composition which occur when particular individuals cease to be Members and are succeeded by other individuals.
- 24.2. The Royal Commission shall have a Common Seal. The Royal Commission may alter its Common Seal or replace it with a new one.
- 24.3. The Royal Commission shall have the capacity and powers of a natural person, and in particular shall have the capacity to sue and be sued.

Royal Commission for Responsible Capitalism Bill

A

BILL

TO

Establish under Royal Charter a Royal Commission for Responsible Capitalism

Appendix 3

Draft of a new section to be incorporated in the Articles of Association to prohibit share lending for short-selling purposes

X. Hedging and Short-Selling

- X.1 With the purpose of protecting [Members] [Shareholders] from short-selling or other similar trading, dealing or arbitrage transactions, this Section X shall apply to all share dealings in the Company by [Members] [Shareholders].
- X.2 A [Member] [Shareholder] shall not borrow shares in the Company from another [Member] [Shareholder] for the purposes of selling, trading or dealing with those shares.
- X.3 A [Member] [Shareholder] shall not lend or pledge their shares in the Company to any person for the purposes of that person selling, trading or dealing with those shares otherwise than in the circumstances prescribed in Clause X.4 below.
- X.4 Nothing in Clause X.3 shall prohibit a [Member] [Shareholder] from pledging their shares in the Company to a recognised bank or lending institution as security in support of any loans, borrowing, advances or other facilities usually granted by a bank or lending institution to the [Member] [Shareholder] [in the ordinary course of that Member's/Shareholder's business].
- X.5 Nothing in this Section X shall prohibit a [Member] [Shareholder] from granting an option for the purchase of their shares at a fixed price.
- X.6 Any [Member] [Shareholder] shall, upon being held by a Court of competent authority as having breached either Clause X.2 or X.3, forfeit such number of shares as are held by them in the Company as were subject to being lent or borrowed, and if they no longer own such shares as at the date they are adjudged by the Court as having been in breach, then they shall, in compensation, pay to the Company an amount equal to the value of the consideration they received for the shares which were subject to the breach.



The Partism Foundation
First Floor,
30 Market Place,
Hitchin,
Herts
SG5 1DY
United Kingdom
t. +44 (0)1462 626462
www.partismfoundation.org