

# THE NOTIONAL LEGISLATOR: THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION'S ROLE AS A LAW-MAKER

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## I INTRODUCTION

Socio-legal scholars have long recognised the importance of understanding the difference and the interaction between the 'law in the books' – the formal legal rules and doctrines made by parliaments and the courts, and the 'law in action' – the processes and practices by which those rules and doctrines are put into effect.<sup>1</sup> Similarly, public lawyers and regulatory theorists have highlighted the importance of understanding the role of regulatory discretion in the enforcement of rules.<sup>2</sup> The commonly understood message in these overlapping areas of research is that we cannot properly understand the law if we limit our attention to formal rules. A related point is that there is nothing necessarily improper about the exercise of regulatory discretion. Nor is there anything necessarily improper about the fact that the processes of rule enforcement can produce different outcomes than might be suggested by a simple reading of the rule itself.<sup>3</sup>

Corporate lawyers are familiar with all this. The financial and commercial context in which corporations operate is complex and fast-changing, and it is simply not

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<sup>1</sup> The terminology is credited to Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12. The distinction was revisited in the 1970s; see, eg, David Nelken, 'The "Gap Problem" in the Sociology of Law: A Theoretical Review' (1981) 1 *The Windsor Yearbook of Access to Justice* 35.

<sup>2</sup> See, eg, Robert Baldwin and Keith Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570; Robert Baldwin, *Rules and Government* (1995) ch 3; Robert Baldwin and Martin Cave, *Understanding Regulation – Theory, Strategy and Practice* (1999) ch 8.

<sup>3</sup> See John Griffiths 'Is Law Important?' (1979) 53 *New York University Law Review* 339 on the direct, indirect, intended and unintended effects of legal rules.

possible for laws promulgated at one point in time by Parliament (or the courts) to capture all the subtleties of current practice or the changes that inevitably occur later on. Consequently, corporate regulators are given discretionary power to decide how and when they will enforce the rules, along with the capacity to grant exemptions from the operation of the law. For example, the *Corporations Act 2001* (Cth) ('*Corporations Act*') gives the Australian Securities and Investments Commission (ASIC) the power to exempt persons or companies from a number of requirements in the Act.<sup>4</sup> All this is necessary so that the law can be applied appropriately in particular cases.

This article is concerned with the exercise of regulatory discretion, but the focus has more to do with the 'law in the books' than the 'law in action'. Specifically, the article examines ASIC's discretionary power to write the 'corporate law in the books'. Alongside its power to grant exemptions from the application of specific provisions in the *Corporations Act*, ASIC also has the power, in certain instances, to change the operation of the Act itself (and the *Corporations Regulations 2001* (Cth)) by omitting, modifying or inserting provisions.

It is important to be clear about the import of the preceding paragraph: along with its power to exercise 'on the ground' discretion to alter the way in which legislative rules are applied (for example, by granting exemptions in particular cases), the executive agency<sup>5</sup> that is charged with administering the corporations legislation<sup>6</sup> has the power to re-write aspects of that legislation. It can, in effect, do the work of Parliament.

This power is unique amongst Australian Federal regulatory agencies. It is also, as far as I can determine, unique amongst corporate regulatory agencies elsewhere. In the United Kingdom, for example, the Financial Services Authority has power to make and then modify or waive its own rules 'as appear to it to be necessary or expedient for the purpose of protecting the interests of consumers'.<sup>7</sup> In the United States, the Securities Exchange Commission (SEC) has similarly broad authority to make, amend and rescind 'such rules and regulations as may be necessary'.<sup>8</sup> These two examples are akin to a power to make delegated legislation whereas, by contrast, ASIC has the power to modify the primary legislation.<sup>9</sup> The closest that the SEC comes to ASIC's power of statutory modification is found in the *Securities Exchange Act of 1934* which gives the SEC power in an emergency to 'alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regulation by the Commission'.<sup>10</sup> 'Emergency' is defined as 'a major market disturbance' characterised,

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<sup>4</sup> See, eg, the list of sections in Table 1 of this article.

<sup>5</sup> ASIC is a statutory corporation established by the *Australian Securities and Investments Commission Act 2001* (Cth).

<sup>6</sup> *Corporations Act 2001* (Cth) s 5B states that 'ASIC has the general administration of this Act'. See also *Australian Securities and Investments Commission Act 2001* (Cth) s 11.

<sup>7</sup> *Financial Services and Markets Act 2000* (UK) c 8, s 138(1).

<sup>8</sup> *Securities Act of 1933*, 15 USC § 19. See also *Securities Exchange Act of 1934*, 15 USC § 23(a)(1), giving the Commission power to make rules and regulations.

<sup>9</sup> ASIC also has power to make rules that regulate market integrity in domestic licensed financial markets, see *Corporations Amendment (Financial Market Supervision) Act 2010* (Cth).

<sup>10</sup> *Securities Exchange Act of 1934*, 15 USC § 12(k)(2).

for example, by 'sudden and excessive fluctuations of securities prices generally'.<sup>11</sup> ASIC's power of modification is not limited in this way.

The existence and operation of ASIC's power has attracted little critical attention in the legal literature, be it academic, judicial, or professional. It did, however, come to momentary public prominence towards the end of 2008, in the depths of the global financial crisis, when ASIC modified sections in the *Corporations Act* that regulate short-selling.

## II THE SHORT SELLING MODIFICATIONS

By September 2008, the worst global financial crisis since the Great Depression was wreaking havoc in financial markets. One of the signal events in this crisis occurred on Monday 15 September, when the giant investment bank Lehman Brothers filed for bankruptcy protection in the United States, prompting a massive fall in financial markets around the world. It was in this climate that, late on Friday 19 September, ASIC issued a Class Order<sup>12</sup> under which Part 7.9 of the *Corporations Act*, which regulates the issue, sale and purchase of financial products, was to apply as if a new section was inserted. The new section (s 1020BC) imposed disclosure requirements on persons involved in covered short sales.<sup>13</sup> The Class Order was to commence operation on the following Monday, 22 September 2008.<sup>14</sup> The Explanatory Statement which accompanied the Class Order noted that it was being issued in response to 'abnormal levels of volatility' in global securities markets, adding that similar action was being taken by regulatory agencies overseas, including the United States and the United Kingdom. Major brokers were contacted by ASIC over the weekend of 20–21 September to inform them of the new requirements.

Before the end of that weekend, ASIC issued another Class Order<sup>15</sup> on Sunday 21 September which amended the Class Order that had been issued two days earlier. The new Class Order added another new section (s 1020BD) which prohibited covered short selling of securities traded on licensed financial markets in all but a limited number of situations. The Explanatory Statement noted that the amendment was a

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<sup>11</sup> *Securities Exchange Act of 1934*, 15 USC § 12(k)(7).

<sup>12</sup> Australian Securities and Investments Commission, *ASIC Class Order – Covered Short Sales*, CO 08/751, 19 September 2008. ASIC Class Orders usually are identified by the label 'CO', the year of issue (in this case, 2008) and an identifying number, in square brackets. In the text of this article Class Orders will be identified in this way.

<sup>13</sup> Short selling is the sale of securities which, at the time of the sale agreement, the seller does not own. The seller may at the time have an enforceable right to obtain the shares through an agreement with another party; this is known as a 'covered' short sale. Alternatively, in a 'naked' short sale there is no other agreement in place at the time of the sale agreement. The seller must then purchase or borrow the required shares before settlement of the sale agreement.

<sup>14</sup> Simultaneously on 19 September the Australian Securities Exchange, with ASIC's agreement, announced that it would abolish naked short selling from the opening of trading on 22 September: ASX Media Release, 19 September 2008.

<sup>15</sup> Australian Securities and Investments Commission, *ASIC Class Order – Variation of Class Order CO 08/751*, CO 08/752, 21 September 2008.

response to restrictions on short selling in various overseas markets. This Order was also to commence operation on Monday 22 September.

On Monday 22 September, a further Class Order<sup>16</sup> was issued which amended the new s 1020BD by adding managed investment products and stapled securities to the prohibition. The following day, Tuesday 23 September, ASIC issued further extensive amendments to the new s 1020BD, in yet another Class Order.<sup>17</sup> The purpose of these amendments was to permit certain forms of covered short selling.

So, in a period of just over four days, two new sections of the *Corporations Act* had come into operation, regulating a major form of market activity, and those sections had then been subject to several amendments,<sup>18</sup> all without any parliamentary involvement.<sup>19</sup> These were, of course, unusual times. Markets were experiencing some of the worst aspects of the global financial crisis, and governments and regulators around the globe were scrambling to respond. Acknowledging the uniqueness of the context, it is nevertheless important to note that there was nothing new about the powers being exercised by ASIC to modify the *Corporations Act*. The legislative provisions under which these Class Orders were issued predated the financial crisis. They had been, and have since been, used frequently in much more ordinary market situations.

The purpose of describing the short selling modifications is to illustrate the extent and operation of ASIC's legislation making power. This article is not concerned with the substance of these particular changes – I leave aside debates about whether short selling, covered or naked, should be regulated and, if so, how that should be done.<sup>20</sup> My interest lies with the modification power itself, and with its implications for ideas of parliamentary democracy, for the legislative process, and for certainty and clarity in the administration of corporate law in this country.

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<sup>16</sup> Australian Securities and Investments Commission, *ASIC Class Order – Variation of Class Order CO 08/751*, CO 08/753, 22 September 2008.

<sup>17</sup> Australian Securities and Investments Commission, *ASIC Class Order – Variation of Class Order CO 08/751*, CO 08/763, 23 September 2008.

<sup>18</sup> This was not the end of the story. Before the end of 2008 there were subsequent Class Orders. On 23 October ASIC Class Order [CO 08/801] added a further exemption to the prohibition in s 1020BD (see Australian Securities and Investments Commission, *ASIC Class Order – Variation of Class Order CO 08/751*, CO 08/801, 23 October 2008); with effect on 19 November, ASIC Class Order [CO 08/824] amended s 1020BD to permit covered short selling of non-financial securities, and amended the reporting regime in s 1020BC (see Australian Securities and Investments Commission, *ASIC Class Order – Variation of Class Order CO 08/751 and CO 08/764*, CO 08/824, 13 November 2008). In January 2009 ASIC Class Order [CO 09/1052] amended both s 1020BC and 1020BD, in anticipation of parliamentary amendments to the *Corporations Act 2001* (see Australian Securities and Investments Commission, *ASIC Class Order – Variation of Class Order CO 08/751*, CO 09/1052, 5 January 2009). On 25 May 2009, s 1020BD was omitted entirely by ASIC Class Order [CO 09/39] (see Australian Securities and Investments Commission, *ASIC Class Order – Variation of Class Order CO 08/751*, CO 09/39, 25 May 2009).

<sup>19</sup> The Federal Parliament did not sit until three weeks after these events. The process of parliamentary scrutiny of delegated legislation is described in Part VI of this article.

<sup>20</sup> For a comparative analysis, see Kym Sheehan, 'Principled Regulatory Action? The Case of Short Selling' (Paper presented at the Corporate Law Teachers Association Conference, Sydney, 3 February 2009).

Some particular aspects of the short selling story are worth emphasis, however. First, the modifications were initiated by ASIC in response to its concerns about the state of financial markets.<sup>21</sup> Secondly, the modifications received considerable publicity in the financial press, as well as being publicised via the Australian Securities Exchange.<sup>22</sup> As a consequence, it is likely that these modifications to the Act were widely noticed in the financial sector and business community. Thirdly, the provisions in the *Corporations Act* that deal with short selling were subsequently amended by the *Corporations Amendment (Short Selling) Act 2008* (Cth), which commenced in stages between December 2008 and December 2009. One aspect of the Amendment Act was the introduction of a section which declared, for the avoidance of any doubt, that the Class Orders made by ASIC regarding short selling were validly made.<sup>23</sup> On these points, the short selling Class Orders were something of an exception to the usual course of events. As the next part of this article notes, ASIC's usual practice is to decide modifications in response to applications made to it by market actors. Further, most of the legislative changes made by ASIC in the ordinary course of its work go unnoticed except by those in the corporate and finance sector who are specifically affected, and few of these changes subsequently result in parliamentary amendment of the *Corporations Act*. Finally, it should also be noted that the short selling modifications were unusual insofar as they created a prohibition on certain conduct and, thus, imposed potential liability on persons affected by those Class Orders.<sup>24</sup> In the more typical case, modifications made by Class Order are beneficial, providing relief from requirements in the Act for a class of persons.<sup>25</sup>

### III ASIC'S POWER TO MODIFY THE CORPORATIONS ACT

Currently there are fifteen sections in the *Corporations Act* which grant ASIC the power to modify specified provisions in the Act, as listed in Table 1.<sup>26</sup>

<sup>21</sup> Evidence to Senate Standing Committee on Economics (Supplementary Budget Estimates), Parliament of Australia, Canberra, 22 October 2008, 160-4 (Tony D'Aloisio, ASIC Chairman).

<sup>22</sup> In addition, as required by the *Legislative Instruments Act 2003* (Cth) s 24, each Class Order was registered and published on the Federal Register of Legislative Instruments. ASIC also publishes all of its Class Orders on its website Australian Securities and Investments Commission, *Instruments and Class Orders* (18 February 2011) <<http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Instruments>>.

<sup>23</sup> See *Corporations Act* s 1484 (commencing 11 December 2008), declaring ASIC Class Orders [CO 08/751], [CO 08/752], [CO 08/753], [CO 08/763] and [CO 08/801] to be 'validly made'. Sheehan suggests that the passage of this Act demonstrates that the process leading to making the Class Orders was known to have been deficient: above n 20, 28.

<sup>24</sup> A point noted by Sheehan, above n 20, 28.

<sup>25</sup> The *Corporations Amendment (Short Selling) Act 2008* (Cth) inserted s 1020F(8) which, amongst other things, states that a modification under s 1020F(1)(c) may prohibit any form of short selling of financial products.

<sup>26</sup> This Table omits *Corporations Act* ss 342A and 1073E(2), which authorise ASIC to make limited modifications in specified circumstances.

These sections are, for the most part, drafted in similar terms. They permit ASIC to declare that all or specified provisions<sup>27</sup> in a particular Chapter or Part of the Act will apply to 'all persons, specified persons, or specified class of persons', or to 'a person or class of persons', as if those provisions were 'omitted, modified or varied' as specified in the declaration. While ASIC can issue a declaration in relation to a single person,<sup>28</sup> the focus here is on declarations that omit, modify or vary provisions in the Act (for brevity's sake, I describe these changes simply as modifications) in relation to all persons, or to a large or open ended class of persons. The short-selling modifications were an example of this. When the discretionary power is exercised in relation to a large or open-ended class of persons (for example, takeover bidders, buyers and sellers of securities, or responsible entities of registered schemes), ASIC issues a Class Order which sets out the details of the changes to be made.

**Table 1**

Section	Grants power to modify
s 283GA(1)(b)	Ch 2L Debentures
s 601QA(1)(b)	Ch 5C Managed Investment Schemes
s 601YAA(1)(b)	Ch 5D Licensed Trustee Companies
s 655A(1)(b)	Ch 6 Takeovers
s 669(1)(b)	Ch 6A Compulsory Acquisitions and Buyouts
s 673(1)(b)	Ch 6C Substantial Shareholder Information
s 741(1)(b)	Ch 6D Fundraising
s 798D(1)(b)	s 205G and Chs 6, 6A, 6B, 6C, 6CA, and 7
s 926A(2)(c)	Pt 7.6 Licensing of Financial Services Providers
s 951B(1)(c)	Pt 7.7 Financial Services Disclosure
s 992B(1)(c)	Pt 7.8 Other Provisions re Financial Products & Financial Services
s 1020F(1)(c)	Pt 7.9 Financial Product Disclosure
s 1075A(1)(b)	Pt 7.11 Title and Transfer of Securities
s 1437(2)(b)	Aspects of Ch 10 Transitional
s 1442(2)(b)	Aspects of Ch 10 Transitional

ASIC's process for issuing Class Orders is described in its Regulatory Guide 51, *Applications for Relief*.<sup>29</sup> This document makes it clear that issuing Class Orders is only

<sup>27</sup> The term 'provisions' is defined to include a reference to regulations made for the purposes of that Chapter or Part (see, eg, s 601QA(5)).

<sup>28</sup> ASIC will sometimes make identical modifications for a number of successive individual applicants.

<sup>29</sup> Australian Securities and Investments Commission, 'Applications for Relief' (Regulatory Guide No 51, December 2009) <[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg51.pdf/\\$file/rg51.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg51.pdf/$file/rg51.pdf)>. The Commission has also issued regulatory guidance for specific exemption and modification powers, for example 'Fundraising: Discretionary Powers' (Regulatory Guide No 151, February 2000); 'Licensing: Discretionary Powers' (Regulatory Guide No 167, January 2007); and 'Foreign Collective Investment Schemes' (Regulatory Guide No 178, May 2004).

one aspect of the Commission's wider discretion to grant relief from the *Corporations Act*.<sup>30</sup> According to the Regulatory Guide, the exercise of this discretion is made in response to applications submitted to ASIC. This comprises a significant part of the Commission's work; for example, in the 12 months from December 2007 to November 2008, ASIC considered 3 385 applications for relief, and granted individual or class relief (whether by exemption, variation or modification) for 2 614 (77 per cent) of those applications.<sup>31</sup> However, as the short selling story indicates, ASIC may also act of its own accord, and the wording of the sections which grant the modification power permits this.<sup>32</sup>

ASIC classifies applications for relief as either 'standard' (where relief is sought in accordance with published ASIC policy), 'minor and technical' (seeking the application of existing policy to a new situation that is not contemplated by the Act), or 'new policy' (asking ASIC to formulate substantive new policy). According to the Regulatory Guide, in responding to applications ASIC seeks to exercise its discretion consistently with existing policy, and 'on the basis of principles which are definite and whose limits are clearly defined.'<sup>33</sup> A key principle is that the Commission will grant the relief being sought where it is demonstrated that there is a net regulatory benefit or that any regulatory detriment is minimal and is outweighed by commercial benefit.<sup>34</sup> Relief will take the form of a Class Order where 'it is not necessary to consider any relevant factual matters on a case-by-case basis.'<sup>35</sup> Further, the Regulatory Guide emphasises that:

In general, we will not use our discretionary powers to effect law reform. That is, relief will not be given to reverse the usual and intended effect of the *Corporations Act* ...<sup>36</sup>

On a broad view, of course, any modification or change to the way in which the *Corporations Act* applies to a class of persons constitutes a reform of the law, at least as far as it affects that class of persons, but presumably ASIC intends that it will not use its powers to make rules which implement entirely new policies which have not already been dealt with in the Act or Regulations.<sup>37</sup> The problem, nevertheless, is that no clear line can be drawn here. As will be seen in Part IV of this article, Class Order modifications are used to achieve a range of goals, from the relatively mundane (eg

<sup>30</sup> The Guide also deals with relief from the *Superannuation Industry (Supervision) Act 1993* (Cth), the *National Consumer Credit Protection Act 2009* (Cth), and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth).

<sup>31</sup> Data taken from ASIC quarterly reports on decisions on relief applications, available at Australian Securities and Investments Commission, *Reports* (30 March 2011) <<http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports>>.

<sup>32</sup> This is reinforced in Explanatory Memorandum, Financial Services Reform Amendment Bill 2003 (Cth) [3.65] which notes that 'in most situations' exemption and modification powers are exercised in response to requests.

<sup>33</sup> Australian Securities and Investments Commission, 'Applications for Relief' above n 29, [51.51]-[51.53].

<sup>34</sup> *Ibid* [51.57].

<sup>35</sup> *Ibid* [51.63].

<sup>36</sup> *Ibid* [51.62].

<sup>37</sup> Confirmed in an interview with ASIC officers (Sydney, 15 July 2010).

fixing errors in the Act) to anticipating upcoming legislative reforms. Certainly, the short selling Class Orders qualified as an example of law reform.<sup>38</sup>

The *Corporations Act* adds little to this picture. Only three of the sections listed in Table 1 specify any considerations to be taken into account by the Commission before it exercises its powers of modification or other relief. Sections 655A(2) (concerning takeovers) and 673(2) (substantial shareholdings) each require ASIC to consider the matters set out in s 602 of the Act when deciding whether to make an exemption or declaration. Section 602 contains a modified version of what are known as the Eggleston principles,<sup>39</sup> according to which the regulation of takeovers has four aims: the shareholders and directors of a company that is the subject of a takeover bid should know the identity of the bidder, have enough information to assess the merits of the offer, have a reasonable time to consider the offer, and have a reasonable and equal opportunity to participate in the offer. Additionally, the section states that the acquisition of control of a company should take place in an 'efficient, competitive and informed market'.<sup>40</sup> The third section – s 1075A(2) (dealing with title to and transfer of securities) – specifies a different set of preconditions and is expressed in stronger terms. ASIC may only exercise its power of exemption or modifications regarding pt 7.11 of the Act if it is satisfied that the interests of the holders of the financial products will have adequate protection, and that the exemption or modification will make the transfer of those financial products more efficient. It should also be noted that the exercise of any of the modification powers found in ch 7 of the Act must take account of s 760A which sets out the main objects of the Chapter, which include the facilitation of 'efficiency, flexibility and innovation in the provision of [financial] products and services', and the promotion of 'fair, orderly and transparent markets for financial products'.<sup>41</sup>

The absence of more specific legislative guidance on the boundaries of ASIC's discretionary power of modification has led the Federal Court to confirm that 'there is no statutory foundation for stating that the power [of modification] ... should be used "sparingly"'.<sup>42</sup> This has two potential consequences. First, to the extent that ASIC chooses to be cautious in the use of its power, this may lead to confusion or dissatisfaction amongst applicants for Class Order relief.<sup>43</sup> Alternatively, to the extent that ASIC does occasionally exercise the modification power more broadly it reinforces the appearance of a system in which the regulator can make rules of wide application that bypass the processes of substantive public scrutiny and accountability that can be applied to statutory rules. These issues are addressed later in this article.

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<sup>38</sup> Noted also by Sheehan, above n 20.

<sup>39</sup> Named after Sir Richard Eggleston, chair of the Committee whose 1969 report on takeover law first recommended these principles: Company Law Advisory Committee, Parliament of Victoria, *Second Interim Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* (1969).

<sup>40</sup> This last point is a more recent addition to the original Eggleston principles.

<sup>41</sup> *Corporations Act 2001* (Cth) s 760A(a) and (c). Similarly, the modification powers in Chapter 10 would take into account the objects for that Chapter set out in s 1370.

<sup>42</sup> *Otter Gold Mines Ltd v Australian Securities Commission & Ors* (1997) 15 ACLC 1 732, 1 738.

<sup>43</sup> A point suggested during an interview with Financial Services Council representatives (Sydney, 31 August 2010).



ASIC describes the new or amended sections which it creates via these Class Orders as 'notional sections' (thus, the Class Orders that dealt with short selling referred to 'notional s 1020BC'). Presumably this is intended to indicate that these provisions do not have formal status of sections in the legislation. The notional sections do, nevertheless, have force of law. Their effect is the same as that of formal legislative provisions. The High Court has noted that a modification operates 'to bind a court ... by requiring that court to apply the [Act], as varied, to a particular person or case. *It create[s] a new set of rights and obligations*'.<sup>44</sup> The result is that a given section or Part of the Act may be comprised of the formal legislative text plus a 'notional' or 'shadow' set of modifications that can only be determined by consulting the relevant Class Orders.

#### IV THE WORLD OF CLASS ORDERS

As an indication of the extent of activity in this area Table 2 lists the number of Class Orders made by ASIC per year since the commencement of the *Corporations Act* in 2001:<sup>45</sup>

Table 2

Year	No of Class Orders made
2001	35
2002	148
2003	65
2004	90
2005	53
2006	24
2007	37
2008	22
2009	25
2010	30 <sup>46</sup>

The Table shows that the production of Class Orders is clearly a regular part of ASIC's business.<sup>47</sup> In reading the Table it is important to bear in mind that not all Class

<sup>44</sup> *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321, 333 (emphasis added). The Court was referring to the modification power found in a forerunner to the current s 655A(1), found in s 58 of the *Companies (Acquisition of Shares) Code* of 1980.

<sup>45</sup> These figures are drawn from ASIC's website, see above n 22. As will be seen, the modification powers pre-date the *Corporations Act 2001* (Cth), and there are a number of pre-2001 Class Orders still in operation.

<sup>46</sup> 2010 figures as at 3 December 2010. Six of the 2010 Class Orders were made under the *National Consumer Credit Protection Act 2009* (Cth) or the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth).

<sup>47</sup> It is likely that the comparatively large number of Class Orders in 2002 resulted from the implementation of the new *Corporations Act 2001*, and similarly, the increase in 2004 may have resulted from the commencement of the *Financial Services Reform Amendment Act 2003* (Cth) between December 2003 and July 2004.

Orders modify the *Corporations Act*. Many, for example, specify exemptions from the Act. Indeed, according to officers from ASIC, exemptions are the preferable response where relief is to be granted because, compared to modifications, they can be drafted with greater certainty.<sup>48</sup> It is interesting to note, though, that modifications still account for a significant proportion of these Class Orders. For example, of the 77 Class Orders issued in 2008–10, approximately 40 per cent dealt with exemptions while another 40 per cent dealt with modifications to the statute or regulations.

Nor does Table 2 indicate how many Class Orders are currently in force because some of the Class Orders included in this count have either expired or have been withdrawn or revoked by subsequent Class Orders. Nevertheless, as the Commission has noted, 'a substantial number of ASIC class orders remain in effect for some time (many of these will be amended at various times).'<sup>49</sup> Of the 529 Class Orders listed in Table 2, 406 remained in force at the beginning of December 2010.

The reference to revocation and amendment of Class Orders points to a significant feature of this mode of law-making: the world of Class Orders is every bit as variable and complex as that of the primary and secondary corporations legislation. Class Orders can cross-refer to other Class Orders; they can amend or repeal other Class Orders. They can apply to a wide and open-ended class of persons or to a more closely defined group of corporate actors. They can be made in response to 'problems of the moment' (as with the short selling Class Orders), to perceived gaps in the legislation (for example, to accommodate new financial products that were not contemplated when the legislation was written),<sup>50</sup> to unintended or unanticipated consequences of the operation of the legislation in particular cases,<sup>51</sup> or in anticipation of foreshadowed amendments to the Act or Regulations.<sup>52</sup> They can give rise to legislative reform or, as is more commonly the case, simply co-exist with the Act. The subject matter of Class Orders is usually technical, detailed, and concerned with matters of procedure, as is typical of much delegated law-making. The following four examples, chosen somewhat randomly, provide a non-exhaustive illustration of this variety and of the uses to which the modification powers can be put.

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<sup>48</sup> Interview with ASIC officers (Sydney, 15 July 2010).

<sup>49</sup> Australian Securities and Investments Commission, Submission to LIA Review Committee: *Review of the Legislative Instruments Act 2003*, May 2008, 11.

<sup>50</sup> Explanatory Memorandum, Financial Services Reform Amendment Bill 2003 (Cth) [3.66].

<sup>51</sup> *Ibid* [3.65].

<sup>52</sup> For example, ASIC Class Order [CO 10/333], (Australian Securities and Investments Commission, *ASIC Class Order – Corporations Act 2001 – Paragraphs 601QA(1)(b), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) – Declaration and Exemptions*, CO 10/333, 5 May 2010), exempting funded representative proceedings from provisions in the *Corporations Act 2001* (Cth) that regulate managed investment schemes, was made in response to the Government's announcement that it intended to make Regulations to the same effect (Explanatory Statement in Australian Securities and Investments Commission, *ASIC Class Order – Corporations Act 2001 – Paragraphs 601QA(1)(b), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) – Declaration and Exemptions*, CO 10/333, 5 May 2010). This, in turn, was a response to the decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, holding that a funded representative action was a managed investment scheme as defined in *Corporations Act 2001* (Cth) s 9.

*Example 1 – fixing errors in the Act:* ASIC Class Order [CO 05/21] was issued in January 2005 and made a minor modification to s 990A of the *Corporations Act*. The amendment was necessary because at that time s 990A contained a cross-reference to another section in the Act, concerning the appointment of auditors. In July 2004 that other section had been repealed and replaced with a new set of sections, but s 990A had not been amended to reflect this. The Class Order was issued to 'remove undesirable uncertainty for many financial service licensees'.<sup>53</sup> It updated the cross-reference in s 990A so that it referred to the new section. The Class Order was revoked in October 2007 (by ASIC Class Order [CO 07/569]) after subsequent parliamentary amendments to s 990A removed the incorrect cross-reference.

*Example 2 – creating exemptions from the Act:* ASIC Class Order [CO 05/26] was issued in May 2005 and as of December 2010 was still in force. It deals with the requirement in Chapter 5C of the *Corporations Act* that the price at which interests in a registered managed investment scheme are issued must be governed by the terms of the scheme's constitution.<sup>54</sup> The purpose of the Class Order is to specify exemptions from this requirement. It does this by modifying the application of Chapter 5C; that Chapter now applies to a responsible entity as if the provisions of the Chapter were modified by the addition of three new sections (ss 601GAA-GAC). This Class Order revises and updates similar exemptions which had previously been specified in Class Order [CO 98/52], which is revoked by the new Class Order.

ASIC Class Order [CO 05/26] has been amended by a number of subsequent Class Orders with the consequence that, by December 2010, the new sections created by [CO 05/26] had been amended in various ways on seven occasions since they were made. As an indication of the self-referential nature of the world of class orders, one of those amendments – made by ASIC Class Order [CO 09/465] – changed the notional subsection 601GAA(4) to permit a responsible entity to set the issue price of interests 'in accordance with ASIC Class Order [CO 09/425]'.<sup>55</sup> So, in summary, since 2005 the *Corporations Act* has applied to responsible entities<sup>56</sup> of managed investment schemes with the operation of three added sections. Those notional sections have been amended frequently since then, including one amendment which incorporates requirements specified in another Class Order.

*Example 3 – expanding the operation of the Act:* ASIC Class Order [CO 07/429] was issued in June 2007 and as of December 2010 was still in force. It modifies the operation of ss 636 and 638 of the *Corporations Act* to permit certain takeover documents (a bidder's statement or a target's statement) to include a credit rating reference, a statement in a historical geographical report, or a trading data reference, without the

<sup>53</sup> Explanatory Statement in Australian Securities and Investment Commission, *ASIC Class Order Corporations Act 2001 – Paragraph 992B(1)(c) – Declaration*, CO 05/21, 14 January 2005.

<sup>54</sup> See *Corporations Act 2001* (Cth) s 601GA.

<sup>55</sup> ASIC Class Order [CO 09/425] specifies certain exemptions from provisions in the Act governing share and interest purchase plans; see Australian Securities and Investments Commission, *ASIC Class Order Corporations Act 2001 – Share and Interest Purchase Plans*, CO 09/425, 15 June 2009.

<sup>56</sup> Except for responsible entities of time-sharing schemes, see Australian Securities and Investments Commission, *ASIC Class Order – Constitutional Provisions about the Consideration to Acquire Interests*, CO 05/26, 4 May 2005 [4], [5] and [5A].

consent of the maker of that statement.<sup>57</sup> The Class Order applies to any bidder or takeover target. Originally this modification was made by inserting four new subsections into each of ss 636 and 638. In each of those sections, one of the new subsections (sub-s 636(4A) and sub-s 638(6A)) was subsequently deleted, as of January 2010, by ASIC Class Order [CO 09/1084], with the effect that credit ratings can no longer be cited without the consent of the credit rating agency. ASIC Class Order [CO 07/429] was also amended by [CO 09/422] to correct a typographical error.

*Example 4 – streamlining the operation of the Act:* ASIC Class Order [CO 09/38] was made in May 2009. It revokes a Class Order that was made in 2004 – [CO 04/1556]. The revoked Class Order had modified the operation of Part 7.7 of the *Corporations Act*, which regulates financial services disclosure. The modification had permitted financial advisers who provided additional advice to a retail client to issue a Statement of Additional Advice, rather than having to prepare a fresh Statement of Advice that repeated information previously given to that client. A Statement of Additional Advice could simply incorporate the previously provided information by reference. This earlier Class Order was revoked because in August 2007 the *Corporations Regulations 2001* (Cth) were amended to provide for incorporation by reference in Statements of Advice, thus making the earlier Class Order redundant. The amendments to the Regulations were preceded by an extensive consultation process conducted by the Treasury, between 2006 and 2007. Interestingly, none of the consultation papers released by Treasury, nor the Explanatory Statement to the amending regulations, made reference to the existence or operation of the pre-existing ASIC Class Order.

To repeat, in the context of ASIC's powers of statutory modification there is nothing unusual about these examples; indeed, they indicate the 'usual business' of Class Order modifications. Nor do they describe the entire range of purposes for which modification Class Orders might be issued. They are highlighted here to provide a picture of the likely circumstances in which ASIC uses its powers, of the different ways in which these Class Orders can operate, and of the variety of ways in which Class Orders can affect the Act and the Regulations.

## V THE HISTORY OF ASIC'S POWER OF MODIFICATION

The history of the sections which give the corporate regulator the power to modify the corporations legislation goes back to the *Companies (Acquisition of Shares) Code* of 1980 and the *Companies Code* of 1981. There was little comment at the time in any of the parliamentary debates, Explanatory Memoranda, or other associated documents about the inclusion of these powers. What comment there was seems to have regarded the need for such powers as self-evident. When introducing the *Companies (Acquisition of Shares) Code* to Parliament in 1980, the Minister for Business and Consumer Affairs simply noted in passing that 'the [Commission] also has power to declare that the

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<sup>57</sup> *Corporations Act 2001* (Cth) ss 636(3) and 638(5) provide, respectively, that bidder's statements and target's statements must not include a statement made by a person unless the person has consented to the inclusion of that statement.

[Code] applies to a person in a particular case as if the [C]ode were modified in a particular manner.<sup>58</sup>

There had been some prior consideration of the need for the new corporate regulator to have some form of rule-making power. In 1968 the Eggleston Committee had recommended the establishment of a Companies Commission with power to grant relief from statutory requirements relating to accounts 'and with power to add or vary those requirements' either in relation to individual companies or more generally to companies of a defined class.<sup>59</sup> Six years later, in its influential 1974 Senate Report on the regulation of Australian securities markets, the Rae Committee argued the need for creation of a national corporate and securities commission, established as a statutory corporation. In the course of putting its case, the Report noted simply that 'the regulatory body will need to exercise rule-making powers, [and] to exercise discretionary powers'.<sup>60</sup>

It appears that the idea of granting rule-making powers to the corporate regulator may also have been influenced by a report written by Professor Louis Loss from Harvard University.<sup>61</sup> Professor Loss was the author of a leading multi-volume treatise on securities regulation in the United States.<sup>62</sup> He was invited by the Secretary of the Commonwealth Attorney-General's Department to write a report on his views about the regulation of Australian company and securities markets. In his 1973 report, Loss urged that 'it would be well to give the [Australian] Commission a maximum of flexibility so far as rules (many of them inevitably experimental) are concerned'.<sup>63</sup> His view was based on his experience of the Securities Exchange Commission in the United States. As he explained:

a broad [rule-making] power is universally considered in the United States to be essential to complex legislation of the kind under discussion. For (1) legislative draftsmen cannot possibly anticipate all the problems and avoidance techniques that will be developed; (2) speed is apt to be required if the barn door is to be locked in time; and (3) the Government cannot be running back to Parliament every few months.<sup>64</sup>

Professor Loss was writing from a particular economic and regulatory background, and his recommendation must be understood in that light. Indeed, he acknowledged this in his report, pointing to the different size of the Australian economy and to differences between Australian parliamentary procedures and those in the US Congress. Professor Loss might also have based his recommendation on certain assumptions about the proper role or place of the regulatory authority in relation to the legislature. Certainly it seems (and the quote above bears this out) that Professor Loss

<sup>58</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980, Vol H of 117, 1635 (Victor Garland).

<sup>59</sup> Company Law Advisory Committee to the Standing Committee of Attorneys-General [the Eggleston Committee], Parliament of Victoria, *First Interim Report on Accounts and Audit* (1968) [41].

<sup>60</sup> Senate Select Committee on Securities and Exchange [the Rae Committee], Parliament of Australia, *Australian Securities Markets and their Regulation* (1974) 16.18.

<sup>61</sup> I am grateful to Tony Hartnell for alerting me to this.

<sup>62</sup> Louis Loss, *Securities Regulation* (Little, Brown and Company, 2<sup>nd</sup> ed, 1961).

<sup>63</sup> Louis Loss, *Proposals for Australian Companies and Securities Legislation: Comments from the American Experience* (Cth Attorney-General's Dept, 1973) 22.

<sup>64</sup> *Ibid* 23.

had in mind a command and control approach to corporate regulation in which the regulator's task is to catch attempts to avoid the rules and to 'lock the barn door' on non-compliant behaviour. As we have seen, however, this is not the sole or even primary use to which the modification powers have been put. The use of the modification powers frequently has a facilitative purpose; I return to this later in the article.<sup>65</sup>

The subsequent history of the modification provisions in the legislation shows a gradual broadening of the scope of these powers. The *Companies Code* of 1981 originally contained one such section, s 109(4), which gave the Commission the power to declare that the Division in the legislation relating to prospectuses would apply to 'a particular person' or 'persons in a particular case' as if a provision or provisions was or were omitted, modified or varied. A similarly worded provision was included in the *Companies (Acquisition of Shares) Code* of 1981 (which regulated takeovers), but in this case the exercise of the power was expressly subject to the Eggleston principles.<sup>66</sup> In 1983 the *Companies Code* section was replaced with a revised power which, in addition to prospectuses, also applied to those sections in the statute that dealt with debentures, prescribed interests and restrictions on allotment of shares. In addition, the power could be exercised 'in relation to particular securities or securities included in a particular class of securities'.<sup>67</sup>

With the advent of the *Corporations Law* in 1989, new provisions expanded the Commission's power of modification by adding sections that regulated the hawking of securities (and, in 1994, secondary trading in unquoted securities) to the existing list of provisions that could be modified. But more significantly, the Commission could now make modifications that applied to 'a particular person or persons, or a particular class of persons'.<sup>68</sup> This was described in the Explanatory Memorandum to the legislation as 'a significant extension of the modification powers' under the previous legislation.<sup>69</sup> Even so, it attracted no comment during the Bill's passage through Parliament.

In April 2010, ASIC gained similar powers of modification in relation to the *National Consumer Credit Protection Act 2009* (Cth).<sup>70</sup>

## VI PARLIAMENTARY SCRUTINY OF CLASS ORDERS

The final part of the background to ASIC's power of statutory modification concerns the process by which Class Orders are scrutinised and become enforceable.

Class Orders are classified as 'legislative instruments' under the definition of that term found in s 5 of the *Legislative Instruments Act 2003* (Cth) (the '*LIA*').<sup>71</sup>

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<sup>65</sup> See Part VII A of this Article.

<sup>66</sup> See above n 39. The modification power was found in s 58; the Eggleston principles were in s 59.

<sup>67</sup> *Companies Code* 1981 s 215C(6).

<sup>68</sup> See *Corporations Law* ss 1084(6)-(7) and the parallel provision for takeovers in s 730 (emphasis added). The latter section was still subject to the Eggleston principles, set out in s 731.

<sup>69</sup> Explanatory Memorandum, *Corporations Bill 1988* (Cth) 559.

<sup>70</sup> See ss 109(3)(d), 163(3)(d) of that Act.

Consequently, each Class Order must be registered on the Federal Register of Legislative Instruments (*LIA* s 24). Indeed, registration is necessary in order for a legislative instrument to be enforced (*LIA* s 31). Each legislative instrument must be accompanied by an explanatory statement which explains the purpose and operation of the instrument and either describes the nature of any consultation that was undertaken prior to the making of the instrument or explains why no consultation was undertaken.<sup>72</sup> Further, s 17 requires the rule-maker to 'be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken.' This particular requirement is examined later in this article.

After registration the Class Order is tabled in each House of Parliament (*LIA* s 38). Within 15 sitting days after tabling, a notice of motion to disallow the instrument (or a provision in the instrument) may be given, and within 15 sitting days after that a resolution may be passed disallowing the instrument whereon the instrument ceases to have effect (*LIA* s 42(1)).

There is no requirement for a legislative instrument to be debated in Parliament. The opportunity for debate or closer parliamentary scrutiny depends upon a motion for disallowance being made, and that, in turn, depends on the initiative of individual members of Parliament or of the Senate Standing Committee on Regulations and Ordinances (SCRO).<sup>73</sup> The SCRO is required to scrutinise each disallowable instrument to ensure:

- a) that it is in accordance with the statute [under which it is made];
- b) that it does not trespass unduly on personal rights and liberties;
- c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- d) that it does not contain matters more appropriate for parliamentary enactment.<sup>74</sup>

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<sup>71</sup> According to that definition a legislative instrument is an instrument in writing which is of a legislative character (in that it determines or alters the content of the law and has the effect of affecting a privilege or interest, imposing an obligation, creating a right or varying or removing an obligation or right), and it is made in the exercise of a power delegated by Parliament. Only two of the current sections in Table 1 above expressly provide that a modification which applies to a class or persons or financial products or estates is a legislative instrument, see *Corporations Act 2001* (Cth) ss 601YAA(3), 926A(4).

<sup>72</sup> *Legislative Instruments Act 2003* (Cth) s 26 and the definition of 'explanatory statement' in s 4.

<sup>73</sup> The author is presently the legal adviser to the Committee. The views expressed in this article are those of the author.

<sup>74</sup> Parliament of Australia, Senate, *Standing Order* 23.

The SCRO has published guidelines on how it applies these four principles.<sup>75</sup> In considering principle D, which has obvious relevance to a Class Order which modifies the *Corporations Act*, the Committee has regard to:

- [l]egislation which fundamentally changes the law;
- [l]egislation which is lengthy and complex;
- [l]egislation which is intended to bring about radical changes in relationships or community attitudes; [and]
- [l]egislation which is part of a uniform laws scheme.<sup>76</sup>

While a member of either House may move a disallowance motion on any matter raised by the legislative instrument, the SCRO is limited to disallowance motions based on the principles just described. The Committee does not engage in consideration of any policy or substantive issues raised by legislative instruments.

One particular aspect of the Senate's scrutiny process should be noted. As noted earlier, a prominent justification for a mechanism that permits ASIC to modify the Act or Regulations is that it allows a prompt response to problems that arise in an often fast-changing financial setting. Most Class Orders are expressed to commence operation on the date they are registered under the *LIA*. The Senate Committee's scrutiny always occurs after the legislative instrument has been made and, in most cases, after it has commenced operation (as was the case, for example, with the short selling Class Orders).<sup>77</sup> The gap between commencement and scrutiny of an instrument can sometimes be several weeks, which can mean that any problems that might be identified by the Committee (or, indeed, by an individual Member of Parliament) will have already been in operation for some period of time. In the context of financial securities markets, this can mean that large amounts of money and considerable numbers of securities may have been transacted during that period.

Finally, there is an argument that the process of parliamentary scrutiny can operate, in effect, as a substitute for the possibility of ex post administrative review by the Administrative Appeals Tribunal (the AAT). According to the Administrative Review Council, the AAT's jurisdiction should not extend to the review of decisions of a legislative character, at least where the decisions affect a broad class of persons and are 'subject to the regime of scrutiny and publication that applies to legislative instruments.'<sup>78</sup> This argument would clearly cover decisions to modify the *Corporations Act* via Class Order, although the matter has not yet been tested in the AAT.<sup>79</sup>

<sup>75</sup> See Senate Regulations and Ordinances Committee, Parliament of Australia, *Senate Guidelines on the Committee's Application of its Principles* (14 May 2003) <[http://www.aph.gov.au/Senate/committee/regord\\_ctte/guidelines.htm](http://www.aph.gov.au/Senate/committee/regord_ctte/guidelines.htm)>.

<sup>76</sup> *Ibid.*

<sup>77</sup> The SCRO meets only during weeks when the Senate is sitting and not during periods of parliamentary recess (sometimes up to five weeks in duration) or during estimates hearings, whereas legislative instruments, including Class Orders, are made and registered throughout the year.

<sup>78</sup> Administrative Review Council, 'What Decisions Should Be Subject to Merit Review?' (Administrative Review Council, 1999) [3.3]-[3.7].

<sup>79</sup> Whilst the AAT did hear the initial challenge to the Class Order modification that was eventually decided by the High Court in *ASIC v DB Management Pty Ltd* (1999) 199 CLR 321, discussed below n 100. That Order related to a specific takeover.



Whatever the merits of the argument, it should be noted, however, that s 1317B of the *Corporations Act* states that decisions made by ASIC under that Act are reviewable by the AAT.<sup>80</sup> Certain decisions, listed in s 1317C of the *Corporations Act*, are excluded from this conferral of jurisdiction. The list of excluded decisions includes only two of the sections listed in Table 1 above.<sup>81</sup>

## VII THE REGULATORY AND LEGISLATIVE CONTEXT

How are we to characterise the system of legislative modifications by Class Orders? Where does this system of notional legislation fit in our understanding of public regulation and of the legislative process? Before offering some answers, I should acknowledge that for some observers these questions may not be all that important. Corporate law, particularly in its statutory dimension, is affected by a noticeable pragmatism and so, perhaps, some corporate lawyers may wonder what the fuss is about. After all, the purpose of granting ASIC this power is to ensure that market participants can get on with their jobs and are not unnecessarily hampered by the unintended effects of the *Corporations Act*. What more, they may ask, needs to be said? Public lawyers, on the other hand, may identify other issues including the usurpation of parliamentary sovereignty, the public accountability of rule-makers and the different processes of scrutiny and consultation that apply to statutory law making and delegated law making. This part of the article identifies some issues that are raised by 'the world of Class Orders'.

### A Regulatory Issues

Class Order modifications are clearly an important part of ASIC's regulatory tool kit and so the emerging field of regulatory studies might offer guidance on how they can be characterised and understood.

In recent years regulatory policy in the finance sector has been dominated by discussion of 'principles-based regulation', an approach endorsed by ASIC.<sup>82</sup> As described by the Financial Services Authority in the UK, '[p]rinciples-based regulation means, where possible, moving away from dictating through detailed, prescriptive rules and supervisory actions how firms should operate their business.'<sup>83</sup> Instead, the regulator sets 'desirable regulatory outcomes in principles and outcome-focused

<sup>80</sup> By comparison the *National Consumer Credit Protection Act 2009* (Cth) s 327(1)(a) and (b) specifically excludes ASIC's power of legislative modification from AAT review.

<sup>81</sup> The two exclusions are s 655A (relating to takeovers) and certain decisions under s 673 which relate to securities of a target company in a takeover bid; see *Corporations Act 2001* (Cth) ss 1317C(ga)-(gb). Jurisdiction to review these particular decisions is conferred on the Takeovers Panel by s 656A.

<sup>82</sup> See, eg, Jeffrey Lucy (Deputy Chair of ASIC), 'The Impact of FSR on the Regulatory Culture of ASIC' (Speech delivered at the 7<sup>th</sup> Annual Conference of the Australian Compliance Institute, Sydney, 5 September 2003) <[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ACI\\_speech\\_5903.pdf/\\$file/ACI\\_speech\\_5903.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ACI_speech_5903.pdf/$file/ACI_speech_5903.pdf)>.

<sup>83</sup> Financial Services Authority, 'Principles-Based Regulation: Focusing on the Outcomes that Matter', (Financial Services Authority April 2007) 4.

rules'.<sup>84</sup> At first glance there might appear to be a principles-based element in the exercise of ASIC's discretion to modify the *Corporations Act*. As noted earlier, ASIC's stated policy is to exercise its discretionary power to modify the Act only where this is consistent with existing policy (assuming here that policy and principles mean the same thing).<sup>85</sup> And as we have also seen, in some instances the Act specifically requires ASIC to consider particular principles before exercising its powers of exemption or modification.<sup>86</sup> But it is nevertheless difficult to categorise Class Order modifications as an example of principles-based regulation. The notional modifications made by ASIC are, typically, detailed and prescriptive. They usually address specific process matters (for example, the process by which an issuer can make a non-traditional rights issue so as to be able to rely on certain other exemptions in the Act).<sup>87</sup> Moreover, these notional provisions are written to fit into a statutory regime that is itself detailed and prescriptive. This system of rule-making sits at the opposite end of the regulatory spectrum from principles-based or outcomes-based regulation which relies on broadly-drafted principles to specify desired outcomes, leaving matters of process to the market actors.

How else, then, might we characterise this particular regulatory system? The class order system is designed to allow the existing rules to be adjusted and amended to better suit the particular needs of market actors where this is consistent with existing policy. The desired result, it might be said, is to have specialised rules which cohere with broader policy objectives, which respond to the circumstances of those being regulated, and which are, therefore, more likely to be complied with and thus be more effective. These three criteria – coherence, responsiveness and effectiveness – have been identified by Christine Parker and colleagues as 'a useful heuristic' for analysing regulation.<sup>88</sup> In particular, based on the foregoing description of the process by which Class Orders are made, we might describe this as an example of 'responsive regulation'. Again, however, this label does not accurately describe what is happening. The mere process of application and response described by ASIC in Regulatory Guide 51 does not of itself equate with the idea of responsive regulation, at least not as that idea is described in the literature.<sup>89</sup> The literature on responsive regulation focuses on how rules are enforced, emphasising that regulators should be 'responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed'.<sup>90</sup> Responsive regulation seeks to integrate self-regulatory codes with state-backed sanctions in an 'enforcement pyramid' that works

<sup>84</sup> Ibid. See also Julia Black, 'Forms and Paradoxes of Principles Based Regulation' (2008) 3(4) *Capital Markets Law Journal* 425; Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1 *Law and Financial Markets Review* 191.

<sup>85</sup> Australian Securities and Investments Commission, 'Applications for Relief' above n 29, [51.39].

<sup>86</sup> See above n 39 and accompanying text.

<sup>87</sup> See Australian Securities and Investments Commission, *ASIC Class Order – Disclosure Relief for Rights Issues*, CO 08/35, 12 May 2008.

<sup>88</sup> Christine Parker et al, 'Introduction', in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 1, 10–11.

<sup>89</sup> See also Julia Black, 'Talking About Regulation' [1998] *Public Law* 77, 91–2.

<sup>90</sup> John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar Publishing, 2008) 88.

from the bottom-up, moving from less interventionist mechanisms up to the imposition of formal sanctions.<sup>91</sup> By contrast, the process of modification by Class Order is focused more narrowly on the creation of top-down, publicly-enforced prescriptions. It is responsive only in the sense that the notional sections can be made in response to applications by market actors. What is at stake here is not simply the way in which rules are enforced but the text of the rules themselves. The system of modification by Class Order is geared towards facilitating the operation of the financial markets by fine-tuning the rules so that they keep pace with new developments. Thus, rather than 'responsive regulation' this could more accurately be described as 'responsive rule-making'.

From a regulatory perspective, we might then characterise the system of modification by Class Order as a command-and-control system in which those who are subject to control have some opportunity to shape the commands.

## **B Rule of Law and Separation of Powers**

The legal literature is said to approach the study of rules from a different perspective than the sociological or regulatory literature.<sup>92</sup> As Parker et al observe, '[l]awyers have sometimes been concerned that the doctrinal coherence or values inherent in law's analytic framework can be threatened by the primacy of instrumental policy concerns in legislative regulation'.<sup>93</sup> Legal scholars who study regulation, they suggest, are likely to be concerned with issues such as the openness, accountability, consistency and predictability of rules.<sup>94</sup> These, of course, are values that are commonly associated with lawyers' depictions of the rule of law.<sup>95</sup> The desirability of having rules that are certain, stable and predictable might be seen as particularly important in the context of securities and investment transactions which involve large amounts of money and which can affect the financial security of large numbers of people. Equally, from this perspective it might appear to be problematic that, via Class Orders, ASIC can readily change the primary statute as it applies to an open-ended class of people for an indefinite period of time.<sup>96</sup> This concern may only be partially alleviated by the fact that in some instances those affected (or, at least, some of them) have asked for the legislative modification to be made.

However, these concerns can be at odds with the complex and fast-changing nature of modern finance and corporate operations. The risk with strict adherence to the idea that laws should be stable, predictable and not be subject to frequent change is that rules which do not respond to changing circumstances – new types of securities, ever more complex financing and trading arrangements, and so on – can result in regulatory gaps, unfairness and unnecessary cost. The better approach, as Leighton McDonald and others have argued, is to recognise that there is no necessary

<sup>91</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>92</sup> Insofar as clear lines can be drawn between these different areas of study.

<sup>93</sup> Parker et al, above n 88, 11.

<sup>94</sup> *Ibid* 12.

<sup>95</sup> See, eg, the discussion in Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 3<sup>rd</sup> ed, 2006) 63.

<sup>96</sup> Similar concerns apply to Class Orders that do not change the legislation but which change the way in which it operates, for example by granting wide-ranging exemptions.

inconsistency between rule of law concerns and contemporary legislative methods which grant government agencies wide regulatory discretion.<sup>97</sup> As McDonald observes, 'we might, for example, insist that collaboratively generated industry-wide or firm-specific rules/principles can comply as fully with rule of law requirements as legislatively generated norms.'<sup>98</sup> The point is that in this context we should be cautious about being too formulaic when addressing rule of law concerns.<sup>99</sup>

This appears to be the approach taken by the High Court on the rare opportunity that it has had to examine ASIC's modification power. In *ASIC v DB Management Pty Ltd*<sup>100</sup> the Court considered a challenge to a declaration by ASIC, under s 730 of the now repealed *Corporations Law*,<sup>101</sup> that the compulsory acquisition provisions of the statute should apply to a particular takeover as if they were modified or varied by adding, deleting and substituting certain words. In a joint judgment, the Court upheld the exercise of ASIC's power. Reviewing the history of the modification power, the Court observed that the grant of the power 'involved a compromise between the technique of general legislative prescription applying inflexibly to all cases, and that of administrative discretion addressing issues on a case by case basis.'<sup>102</sup> Whilst this case concerned a legislative modification that was specific to a particular takeover transaction, the Court was aware of the capacity of modifications to affect other persons generally, commenting that:

The new rights and liabilities created by such a declaration cannot be confined in their operation so as to affect no person other than the applicant for the declaration. It is difficult to understand how, in practice, the power could be limited so that its exercise did not affect, directly or indirectly, the rights of third parties.<sup>103</sup>

The Court held that full scope should be given to the wide discretionary powers granted by s 730 according to their literal meaning.<sup>104</sup> The Court noted, and did not disagree with, earlier judicial commentary on the terms of the modification power which had emphasised 'the difficulty of pointing to any basis upon which their operation could be confined.'<sup>105</sup>

<sup>97</sup> Leighton McDonald, 'The Rule of Law in the "New Regulatory State"' (2004) 33 *Common Law World Review* 197; see also Martin Krygier, 'The Rule of Law: Legality, Teleology and Sociology' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart Publishing, 2009) 45.

<sup>98</sup> McDonald, above n 97, 215-16.

<sup>99</sup> See generally Krygier, above n 97, describing the 'anatomical approach' to the rule of law.

<sup>100</sup> (1999) 199 CLR 321. This was an appeal from a decision of the Full Court of the Federal Court, upholding an appeal from a decision at first instance which, in turn, had affirmed an AAT decision affirming ASIC's declaration. See above n 79 and accompanying text.

<sup>101</sup> This was the *Corporations Law* as it stood prior to major amendments made in 1999. See now *Corporations Act 2001* (Cth) ss 655A, 669. Interestingly, and unlike current sections, s 730 required an application to be made by a person to the Commission before the modification power could be exercised.

<sup>102</sup> *ASIC v DB Management Pty Ltd* (1999) 199 CLR 321, 333.

<sup>103</sup> *Ibid* 341.

<sup>104</sup> *Ibid* 341-2.

<sup>105</sup> *Ibid* 338, referring to decisions of the Federal Court in *Otter Gold Mines Ltd v Australian Securities Commission* (1997) 15 ACLC 1732 and *TNT Ltd v National Companies and Securities Commission* (1986) 4 ACLC 624.

Related to rule of law concerns, questions about the separation of powers are also raised when an executive agency is granted legislative power. While we might agree with the idea that, for good practical reasons, agencies should have power to make rules, the modification powers granted to ASIC might also appear to challenge the idea, expressed by the Administrative Review Council, that '[t]he amendment of an Act of Parliament should only be made by another Act of Parliament', particularly where those amendments alter the obligations of people affected by those amendments.<sup>106</sup>

While the High Court made no specific comment in *DB Management* about the separation of powers, it has dealt with this question previously in relation to delegated legislation, albeit outside the corporate law context. In *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan*<sup>107</sup> the High Court heard a challenge to s 3 of the *Transport Workers Act 1928-1929* (Cth) which gave the Governor-General power to make regulations, not inconsistent with that Act, with respect to certain matters and which, notwithstanding anything in any other Act, would have the force of law. In concluding that the section was valid, the Court made a number of observations about the grant of legislative power to the executive. In their joint judgment, Gavan Duffy CJ and Starke J approved of Higgins J's statement in *Baxter v Ah Way*, that 'the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order, and good government' of the Commonwealth.<sup>108</sup> On the specific question of the constitutional validity of such a section, Dixon J held that:

a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and ... the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law.<sup>109</sup>

His Honour added that falling within the boundaries of Federal legislative power was necessary but not sufficient for the validity of such a law. As he put it, '[t]here may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.'<sup>110</sup> Evatt J pointed to the practical necessity of conferring such regulation-making power:

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<sup>106</sup> Administrative Review Council, 'Rule Making by Commonwealth Agencies', (Report No 35, Administrative Review Council, 26 March 1992) 16 [2.33].

<sup>107</sup> (1931) 46 CLR 73.

<sup>108</sup> *Ibid* 84, quoting (1909) 8 CLR 626, 646.

<sup>109</sup> *Ibid* 101.

<sup>110</sup> *Ibid*.

It is very difficult to maintain the view that the Commonwealth Parliament has no power, in the exercise of its legislative power, to vest executive or other authorities with some power to pass regulations, statutory rules, and by-laws which, when passed, shall have full force and effect. Unless the legislative power of the Parliament extends this far, effective government would be impossible.<sup>111</sup>

A similar argument has been made by Edward Rubin in his well-known article on the place of legislation in the modern administrative state.<sup>112</sup> Rubin notes that rule-making by agencies is 'an intrinsic and unavoidable part' of the modern administrative state, but he adds that rule-making and legislation are different things.<sup>113</sup> As he puts it:

[the] effort to equate rulemaking with legislative power springs from a premodern, judicially oriented attitude toward legislation. It assumes that all legislation must be external and transitive [that is, be stated precisely and be capable of being applied directly], since only such legislation can dispense with rule-making discretion by the implementation mechanism. ... [A]gency rulemaking is necessary to translate the legislature's directives into rules governing the ultimate subject of the statute.<sup>114</sup>

On the face of it, the combined effect of the decisions in *Dignan* and *DB Management* seems to confirm the legal validity of ASIC's powers of modification.<sup>115</sup> Nevertheless, some questions remain. *Dignan* was concerned with the now common case of a power given to the executive to make delegated legislation in the form of regulations that are not inconsistent with the parent statute – not with the power of an executive agency to make rules which effect changes to the operation and application of the parent statute. *DB Management* was concerned with a power of the latter type but the Court, without addressing the matter expressly, appears to have treated it analogously to the more usual delegated rule-making power that is exercised by, for example, the SEC in the United States.

One question is whether this is an accurate categorisation of ASIC's modification powers. Should the 'notional sections' promulgated by ASIC be classified simply as another instance of rule-making? The confounding factor, I suggest, is the form taken by these rules and their intent. They are drafted as modifications to the Act, not as rules regarding the operation of the Act, and, crucially, they are intended to alter the way in which the Act is read.

This distinction can be illustrated by comparing three particular ways in which primary legislation can be affected by delegated legislation.<sup>116</sup>

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<sup>111</sup> Ibid 117.

<sup>112</sup> Edward Rubin, 'Law and Legislation in the Administrative State' (1989) 89 *Columbia Law Review* 369.

<sup>113</sup> Ibid 391.

<sup>114</sup> Ibid.

<sup>115</sup> For a review of the High Court's approach to the power to make delegated legislation in general, see Gerald Ng, 'Slaying the Ghost of Henry VIII: A Reconsideration of the Limits Upon the Delegation of Commonwealth Legislative Power' (2010) 38 *Federal Law Review* 205.

<sup>116</sup> There are other possibilities. For example, *Trade Marks Act 1995* (Cth) s 189A(3) permits regulations to be made to enable performance of Australia's obligations under the Madrid Protocol. Such regulations may be inconsistent with the Act and will prevail over the Act to the extent of any inconsistency.

The first is the commonly encountered arrangement in which the primary legislation provides for the making of regulations which prescribe matters that are 'not inconsistent with' the parent statute<sup>117</sup> or which are 'necessary or convenient' for carrying out or giving effect to the parent statute.<sup>118</sup> These regulations will supplement or amplify provisions in the primary legislation, usually dealing with matters of technical detail or everyday administration. Although not addressed in this article, there are important questions about the appropriate balance between statute and regulations, and the extent to which regulations are used to do the job of primary legislation.<sup>119</sup> The important point is that while the regulations will affect the operation of the primary statute they do not amend the statute and they must be consistent with it.<sup>120</sup> In this scenario a full understanding of the legislative rules governing a particular area will require a reading of the statute alongside the regulations.

The second approach occurs where the primary legislation provides for the making of regulations which amend or repeal provisions in the primary legislation,<sup>121</sup> using what is known as a Henry VIII clause (because 'that King "is regarded popularly as the impersonation of executive autocracy"')<sup>122</sup>. There is a considerable body of literature that is critical of or, at least, cautious about the use of such provisions,<sup>123</sup> although there is some variation in the exact focus of concern. At its narrowest the term 'Henry VIII clause' refers to a statutory provision which authorises delegated legislation that makes an actual amendment to the parent statute. At its widest, the term has been used to refer to statutory provisions which authorise delegated legislation that alters the effect of the parent statute, even though the text of the statute remains unaltered.<sup>124</sup> The latter approach thus covers regulations made under the first scenario described above and this, I suggest, is unhelpful.<sup>125</sup> For present purposes I adopt the narrower usage.

The third possibility – the focus of this article – occurs where the primary legislation permits a statutory agency to expressly modify the primary statute, either

<sup>117</sup> See, eg, *Competition and Consumer Act 2010* (Cth) s 172.

<sup>118</sup> See, eg, *Corporations Act 2001* (Cth) s 1364(1)(b).

<sup>119</sup> See Edward C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Hart Publishing, 2001) ch 3; note also principle D of the Senate Standing Committee on Regulations and Ordinance terms of reference, requiring the Committee to ensure that delegated legislation does not contain matter more appropriate for parliamentary enactment: see above n 74 and accompanying text.

<sup>120</sup> On inconsistency of delegated legislation, see Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2005) ch 19.

<sup>121</sup> See, eg, *Corporations Act 2001* (Cth) ss 891B, 1200M.

<sup>122</sup> Sir David Williams, 'Subordinate Legislation and Judicial Control' (1997) 8(2) *Public Law Review* 77, 78 (quoting the UK Donoughmore Committee of 1932).

<sup>123</sup> See, eg, Pearce and Argument, above n 120, 14–15; N W Barber and Alison L Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] *Public Law* 112.

<sup>124</sup> See Scrutiny of Legislation Committee, Legislative Assembly of Queensland, *The Use of 'Henry VIII Clauses' in Queensland Legislation* (1997) 18–19.

<sup>125</sup> To confuse this picture, however, *Corporations Act 2001* (Cth) ss 742, 854B, 893A, 926B, 951C, 992C, 1020G, 1045A authorise the making of regulations which provide that specified provisions of the Act will apply 'as if' they were 'omitted, modified or varied', thus using the same language as the sections listed in Table 1 of this article.

generally or for specific classes of actors, on the basis that this does not actually amend the text of the legislation but creates a set of 'shadow' or 'notional' provisions having force of law but which may or may not subsequently be translated into formal amendments of the statute.

At first glance it may appear that changes made using the third approach are not all that different to amendments brought about pursuant to a Henry VIII clause and so should be considered in the same way. Both involve legislative instruments made under delegated authority which modify or change the operation of the parent statute. Both are subject to the process of parliamentary scrutiny and disallowance that was described earlier, although even at this procedural level, there are some differences: regulations are drafted by the Office of Legislative Drafting and Publishing and must then be executed by the Governor-General acting with the advice of the Federal Executive Council, prior to being registered.<sup>126</sup> This is not the case for Class Orders which are determined and drafted in-house by ASIC before being registered.

There are, however, more significant differences. Henry VIII amendments, strictly defined, result in an explicit change to the parent legislation for all users of the statute. Indeed, such amendments will, over time, be integrated into the text of the Act through the usual processes of statutory compilation and reprinting.<sup>127</sup> Again, this is not the case for changes made by Class Order. They are promulgated as 'notional' modifications, not as formal amendments to the Act, even though they are applied and enforced on the basis that they are legislative provisions. As the High Court confirmed in the *DB Management Case*, the notional sections create new rights and liabilities.<sup>128</sup> That is, while their legal effect is the same, their form is different. In form they appear to be another example of agency rule-making, and yet unlike agency-made rules they do not operate merely as supplements to or amplifications of the parent statute.

In short, modifications made by Class Order appear to be a hybrid. They are not primary legislation, although they are expressed to operate as if they were, but unlike 'ordinary' agency rules they do more than simply affect the operation of the Act — they modify the Act itself as it applies to a specified class of persons. For those in the defined class, the *Corporations Act* says what ASIC declares it to say.

### C Legislative Process

In Part VI of this article I outlined the process of parliamentary scrutiny that applies to Class Orders, noting briefly the consultation requirement. Under this present heading I consider in more detail the extent and nature of consultation that is conducted prior to making a notional amendment to the *Corporations Act*.

The Administrative Review Council has stated that 'consultation prior to law making is consistent with the principles of procedural fairness as it enables individuals and groups with a particular interest to put their views.'<sup>129</sup> Similarly, the Australian Law Reform Commission (ALRC) has noted that if 'the regulated community's

<sup>126</sup> The regulation making power in the parent Act is given to the Governor-General who, for this purpose, acts with the advice of the Executive Council: *Acts Interpretation Act 1901* (Cth) s 16A.

<sup>127</sup> See *Acts Publication Act 1905* (Cth) s 2.

<sup>128</sup> *ASIC v DB Management Pty Ltd* (1999) 199 CLR 321, 341.

<sup>129</sup> Administrative Review Council, above n 106, 30 [5.2].



perceptions of fairness are important for compliance ... there is considerable value in regulators consulting with regulated communities'.<sup>130</sup> To the extent that it precedes the formulation of a proposed rule, consultation can operate as a form of *ex ante* accountability. That is, the rule-maker can be asked to explain why the proposed rule is needed, why it should be drafted in a particular way and so on. There is the prospect that the rule-maker can be persuaded to change the text of the proposed rule or, indeed, to abandon the proposed rule change altogether.

Notwithstanding these arguments, there is no legal requirement that consultation must be undertaken prior to the making of a Class Order that modifies the *Corporations Act*. This is despite the fact that the legal and political structures within which Australian corporate law operates do place considerable emphasis on processes of consultation.

The current system for making and enforcing corporate law in Australia is based on a constitutional arrangement between the States, Territories and the Commonwealth. Relying on s 51(xxxvii) of the Constitution, the States have referred powers to the Commonwealth to permit the operation of a national scheme of legislation and regulatory administration. The details of this arrangement are set out in an inter-governmental agreement between the Commonwealth, the States and the Territories – the *Corporations Agreement 2002*.<sup>131</sup> The Agreement includes arrangements governing the public exposure of proposals to amend the legislation and the need in some instances to consult with and obtain the approval of the States and Territories for those amendments (via the Ministerial Council for Corporations<sup>132</sup>).

Under the *Corporations Agreement*, Bills which propose amendments to the national corporations law must be exposed for public comment for a period of three months.<sup>133</sup> There is an exception to this requirement. Public exposure may be shortened or dispensed with entirely when a Bill relates to any of the matters listed in cl 507(1) of the Agreement.<sup>134</sup> Without going into the details of that list it is sufficient here to note that it includes the majority of matters listed in Table 1 above.<sup>135</sup> Draft Regulations do not have to be exposed for public comment before being made.<sup>136</sup> However, where an amendment to the *Corporations Regulations* relates to one of the matters listed in cl 507(1), the Commonwealth may expose the amendment to public comment for as long as it determines. The Ministerial Council must be advised whether or not there will be exposure of draft Regulations, and be told the reasons for this.<sup>137</sup> The Ministerial Council must be consulted about *all* changes to the national

<sup>130</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 256 [6.178].

<sup>131</sup> *Corporations Agreement 2002* <[http://www.treasury.gov.au/documents/495/pdf/corporations\\_agreement\\_2002\\_as\\_amended.pdf](http://www.treasury.gov.au/documents/495/pdf/corporations_agreement_2002_as_amended.pdf)>.

<sup>132</sup> Consisting of one Minister from each party to the *Corporations Agreement*.

<sup>133</sup> *Corporations Agreement 2002* cl 509(1).

<sup>134</sup> *Ibid* cl 509(2).

<sup>135</sup> The list in cl 507(1) of the *Corporations Agreement 2002* does not include s 205G (notifiable interests of director of listed company), ch 5D (licensed trustee companies) or ch 10 (transitional matters).

<sup>136</sup> *Corporations Agreement 2002* cl 511(1).

<sup>137</sup> *Ibid* cl 511(2).

corporation laws that are made by Bill or Regulation.<sup>138</sup> However, Ministerial Council approval is not needed for Bills or Regulations which deal with any of the matters listed in cl 507(1) of the Agreement.

The Corporations Agreement does not refer to ASIC's powers of statutory modification nor to the possibility of notional modifications to the *Corporations Act* made by ASIC Class Orders. Consequently none of the provisions in the Agreement about public exposure or consultation with the Ministerial Council apply to those notional amendments.

The only legislative impetus (such as it is) for consultation on proposed Class Orders comes from the *Legislative Instruments Act 2003*. As described earlier, s 17 of the *LIA* merely requires the rule-maker to 'be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken', particularly where the proposed legislative instrument is likely to 'have a direct, or a substantial indirect, effect on business'.<sup>139</sup> In making this decision, the *LIA* adds that the rule-maker 'may have regard to any relevant matter', including whether the consultation has drawn upon the knowledge of experts in the field, and the extent to which persons affected by the proposed instrument have had adequate opportunity to comment.<sup>140</sup>

There are two things to note about these sections. First, the *LIA* does not assist in determining what 'consultation' actually means. In practice, consultation may vary according to:

- the scope and type of audience that is consulted – ranging from a select group of specialists or stakeholders with a particular interest in the proposed change (including other government departments and agencies), to the public at large;<sup>141</sup>
- the time at which the consultation takes place – moving from the initial consideration of ideas through to the publication of a final draft of the instrument; and
- the way in which the consultation is structured – including the duration of the consultation process, whether responses can be general or are confined to pre-determined questions, whether responses are to be made in writing (electronically or in hard copy) or in person or both, and whether responses are to be made public or may be given in-confidence.

Secondly, consultation is not mandatory.<sup>142</sup> It is left to the rule-maker to decide what, if any, consultation is appropriate. A rule-maker may decide that the nature of the instrument makes consultation unnecessary or inappropriate because, for example, it is minor or machinery in nature and does not substantially alter existing

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<sup>138</sup> Ibid cl 506(1).

<sup>139</sup> *Legislative Instruments Act 2003* (Cth) s 17(1).

<sup>140</sup> Ibid s 17(2).

<sup>141</sup> And as Edward Page notes, much so-called 'public consultation' usually equates to input from 'a specialist audience; mainly public interest groups': Page, above n 119, 129.

<sup>142</sup> The heading to s 17 misleadingly states 'Rule-makers should consult before making legislative instruments'.

arrangements, or because it is required as a matter of urgency.<sup>143</sup> The *LIA* also states expressly that a failure to consult does not affect the validity or enforceability of a legislative instrument.<sup>144</sup>

A third impetus for consultation may be supplied by the regulatory impact analysis regime that is administered by the Federal Government's Office of Best Practice Regulation (the OBPR).<sup>145</sup> These requirements are imposed by executive policy rather than legislative mandate. The OBPR advises government departments and agencies (including ASIC) as to whether a Regulation Impact Statement (RIS) should be prepared for a given regulatory proposal. This requirement will not apply if the regulatory impact is judged by the OBPR to be minor or machinery in nature.<sup>146</sup> In exceptional circumstances an exemption from the RIS process may be granted by the Prime Minister. The short selling Class Orders described in Part II of this paper were granted such an exemption.<sup>147</sup> If a RIS is required it must include, amongst other things, information about consultation that conforms to the government's best practice principles on consultation.<sup>148</sup> The OBPR then assesses the adequacy of the RIS after it has been prepared. In relation to consultation, the OBPR will assess whether the RIS describes how the consultation was conducted, whether the views of those consulted have been described, and how those views have been taken into consideration in finalising the regulatory proposal. If there was not full consultation, the RIS should explain this.<sup>149</sup> The OBPR publishes an annual report on the extent of compliance with these requirements.<sup>150</sup>

Only a small number of Class Orders have been required to have an RIS prepared.<sup>151</sup> Given this, and the latitude granted by the *LIA*, the conduct of consultation on Class Order statutory modifications depends largely on ASIC's discretionary judgment. The Commission's policy on consultation is set out in Regulatory Guide 51 which states that '[i]n general, we will only execute class orders on policy that is well settled or after undertaking public consultation.'<sup>152</sup> If the application for relief raises new policy questions, the Commission's policy states that it 'may seek public comment through hearings or submissions, either before or after the application is finalised.'<sup>153</sup> In practice,<sup>154</sup> the amount of consultation conducted by

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<sup>143</sup> *Legislative Instruments Act 2003* (Cth) s 18.

<sup>144</sup> *Ibid* s 19.

<sup>145</sup> The OBPR is an independent division within the Department of Finance and Deregulation.

<sup>146</sup> Australian Government, *Best Practice Regulation Handbook* (June 2010) 11 <<http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf>>.

<sup>147</sup> Australian Government, Department of Finance and Deregulation, Office of Best Practice Regulation, 'Best Practice Regulation Report 2008-09' (Report, Office of Best Practice Regulation) (2009) 15.

<sup>148</sup> Australian Government, above n 146, 51.

<sup>149</sup> *Ibid* 18.

<sup>150</sup> See, eg, Australian Government, Department of Finance and Deregulation above n 147.

<sup>151</sup> For example, only three of the 25 Class Orders issued in 2009 were accompanied by a RIS.

<sup>152</sup> Australian Securities and Investments Commission, 'Applications for Relief' above n 29, [51.64].

<sup>153</sup> *Ibid* [51.45].

ASIC ranges from none at all, where the modification is judged by ASIC to be minor or technical in nature, to general public consultation via the publication on ASIC's website of a Consultation Paper with a call for responses. In between these two extremes, ASIC engages in more limited informal consultation with specific groups including the Treasury, the Australian Securities Exchange, and industry and professional bodies. This informal, targeted consultation has certain advantages. It permits expert opinion to be brought to bear on the proposed changes, and it can be done promptly and without great cost. Equally, however, there is a risk that consultation of this type might be depicted as ad hoc.<sup>155</sup> It also risks the appearance of being a forum for special pleading from the select group of specialists who are consulted. It is left to ASIC to guard against this. Indeed this is the critical point about the consultation process for instruments such as Class Orders. Edward Page points out that processes such as this are dominated by the executive agency and by interest groups. As Page describes it:

the opportunities offered by consultation processes give groups a chance to make their points ... Influence is not guaranteed, but if their case can be made in a form that fits the conception of what government officials want to achieve with their proposed SIs [instruments], there is a chance that their views will be taken on board. ... [T]he opportunity to have an influence, limited though it may be, offers significant cause for satisfaction among those groups who do participate in this way.<sup>156</sup>

## VIII SOME REFORM PROPOSITIONS

Judging by the number of Class Order modifications that ASIC has issued, and the scarcity of critical commentary about the validity or operation of the modification powers, this appears to be a topic to which the aphorism 'if it ain't broke, don't fix it'<sup>157</sup> might apply. The scarcity of critical comment from the financial sector may be due to general satisfaction with the way in which the process operates, as Class Orders usually grant some form of relief from regulatory requirements. Equally, though, it may be due to uncertainty about the legal status of these modifications<sup>158</sup> or, perhaps, to a belief that it is better to maintain good relations with the regulator.<sup>159</sup> Notwithstanding this absence of critique, there are some ways in which the system of

<sup>154</sup> This description is based on statements about consultation found in the Explanatory Statements that accompany those Class Orders that are registered as legislative instruments.

<sup>155</sup> See, eg, Investment and Financial Services Association, 'IFSA – Towards Better Regulation: Policy on Future Regulation of Financial Services in Australia' (Headland Statement, Investment and Financial Services Association, February 2006) <[http://www.ifsa.com.au/downloads/file/PublicationsFile/2006\\_Publications\\_Regulation.pdf](http://www.ifsa.com.au/downloads/file/PublicationsFile/2006_Publications_Regulation.pdf)>.

<sup>156</sup> Page, above n 119, 154.

<sup>157</sup> According to my limited research, this saying is attributed to Thomas Bertram Lance, Director of the US Office of Management and Budget in 1977, as quoted in the newsletter of the US Chamber of Commerce, *Nation's Business*, May 1977.

<sup>158</sup> See Ng, above n 115, 225, noting that the validity of the modification provisions is 'a finely balanced matter.'

<sup>159</sup> This latter possibility was suggested in an interview with Financial Services Council representatives (Sydney, 31 August 2010).

statutory modification by Class Order could be improved in order to address some of the issues raised in this article. These ideas are presented here as a series of five propositions.

*Proposition 1* – wherever possible, changes to the *Corporations Act* which would affect a large or open-ended class of people, and would do so for a lengthy or an indefinite period,<sup>160</sup> should be made by direct formal amendment of the Act. The qualifier 'wherever possible' acknowledges that the process of statutory amendment is lengthy (especially given the consultation requirements that are part of the *Corporations Agreement*), and it is often necessary for changes to be made more promptly. In that situation it is appropriate for modification to be made by Class Order, but subject to Proposition 2.

*Proposition 2* – where a Class Order modifies the Act (or Regulations) for a large or open-ended class of people, and does so for a lengthy or an indefinite period, this should subsequently be confirmed through the ordinary process of parliamentary legislative reform at the earliest opportunity. This would also subject the modifications to the consultation and approval processes found in the *Corporations Agreement 2002*.

There are many instances where modifications made via Class Order have subsequently found their way into formal amendments made to the Act. There does not, however, appear to be a systematic process for this.<sup>161</sup> A modification may be caught up in a separate process of statutory review and reform (for example, the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007* (Cth), which resulted in the revocation of a number of Class Orders), but instances where Class Order modifications trigger the legislative reform are less common (the short selling amendments are one recent example).

These first two propositions are directed at modifications which affect a large or open-ended class of people. In practice, as described earlier, modifications made by Class Order can range from those that affect a relatively narrow range of actors in equally narrow circumstances through to changes that are wide-ranging. While there is an argument that the Act should not be cluttered with amendments of narrow scope, this should not apply to modifications with wide application.

*Proposition 3* – where ASIC finds that it is making a number of Class Order modifications for a particular part of the Act, even if only for small and defined classes of people or for short-term operation, this should trigger a formal review of those statutory provisions, with the prospect of parliamentary amendment of the statute. To modify the aphorism: if it has to be repeatedly fixed, it might be broke. As a part of this review process, ASIC can, under s 11(2)(b) of the *Australian Securities and Investments Commission Act 2001* (Cth), advise the Minister about changes to the corporations

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<sup>160</sup> It should be noted that the *Legislative Instruments Act 2003* (Cth) specifies mechanisms for the 'sunsetting' of legislative instruments. In broad terms, legislative instruments cease to have effect 10 years after being made (or in the case of instruments made before the commencement of that Act, 10 years after the deadline for registration). Parliament may resolve to continue the operation of legislative instruments before the sunset provision takes effect (s 53).

<sup>161</sup> Confirmed in interviews with staff at ASIC (Sydney, 15 July 2010) and the Commonwealth Treasury (Canberra, 5 August 2010).

legislation that are needed to overcome problems that the Commission has encountered in the exercise of its powers and functions.

*Proposition 4* – the process by which ASIC receives and considers applications for relief that result in Class Order modifications to the Act can work as a useful 'testing ground' for fine-tuning the regulation of the corporate and financial markets. It allows those who have detailed and expert knowledge of often esoteric areas of practice to bring to light any problems that are being created by 'the law in the books'. The important qualifier to this idea, however, is that after the testing has been done consideration must be given to formal amendments to the Act or to the Regulations.

The default principle that underlies these first four propositions is that legislative change should be done by and through Parliament. This is not because Parliament is necessarily gifted with unique insights and skills, especially in the area of corporate and financial markets law reform. It is because the parliamentary processes are open to wide public input – they are visible and publicly accountable. It is true that those processes can sometimes be flawed, but the flaws are also visible. As with all default positions, there must be exceptions, but they should be treated as such, not as an alternative or parallel system of rule-making.

*Proposition 5* – consolidated versions of the legislation showing both 'actual' and 'notional' sections (where they apply to a large or open-ended class) should be published by ASIC at regular intervals, to give all users and readers of the Act a clear idea of the full scope of its regulatory operations, and to give legislators and corporate law reformers a more accurate sense of where ASIC and industry perceive the gaps or problems to be.

In its review of different modes of regulation, the ALRC noted that '[a]ccessibility is fundamental to fairness.'<sup>162</sup> Accessibility is only part of the story, however; comprehensiveness is also important. Notwithstanding the fact that both the *Corporations Act* and the various Class Orders which affect its text and application are all publicly available in electronic format (eg through the ComLaw website<sup>163</sup>), there is no readily available version of the Act which integrates, rather than simply cross-references, this material.<sup>164</sup> The reader is left to bear the cost of piecing together complex legislative material, with the attendant risk of error or omission. The nature of the subject matter that is typically covered by Class Orders, which includes the regulation of managed investment schemes, takeovers, fundraising and financial services, is inherently complex. We should not add to that complexity by leaving it to those who are being regulated to piece the rules together. Nor should this task be left to commercial publishers; those who make the rules should have an obligation (and should be provided with the necessary resources) to ensure that comprehensive, comprehensible and contemporary compilations are available for the rule-users.

<sup>162</sup> Australian Law Reform Commission, above n 130, 218 [6.37]. Despite its wide coverage, the Report does not deal with legislative modifications of the type discussed in this article.

<sup>163</sup> See <[www.comlaw.gov.au](http://www.comlaw.gov.au)>.

<sup>164</sup> Some commercially published editions of the *Corporations Act* note the existence of relevant Class Orders but do not include the text of the notional sections.

## **IX CONCLUSION**

The article is prompted by a concern that the system of statutory modification via Class Order, while beneficial to the flexible regulation of the corporate and finance sector, has developed into a substantial and complex body of 'notional legislation'. The example of the short selling modifications, although not typical of the way in which this system usually operates, nevertheless suggests that it is timely to examine the scope and exercise of ASIC's modification power, and to assess how it should be understood within wider regulatory and legislative processes. It is necessary to strike a balance between the advantages of flexibility and the need for public accountability. The admittedly modest reform propositions put in Part VIII of this article are aimed at achieving that balance.

