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Re-Constituting Corporations?
Graeme Orr and Andrew Johnston

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Formalise COAG's Place in the Australian Federation?
Paul Kildea and Andrew Lynch

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Climate Change in Australia
Wayne Gumley and Natalie Stoianoff

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Laura Barnett

COMMENT

The Rise, Fall and Proposed Rebirth of the Australian
Military Court *Henry Burmester*

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ARTICLES

The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker
STEPHEN BOTTOMLEY 1

The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population
BRIAN OPESKIN 33

Does the Corporations Power Extend to Re-Constituting Corporations?
GRAEME ORR AND ANDREW JOHNSTON 71

Entrenching 'Cooperative Federalism': Is it Time to Formalise COAG's Place in the Australian Federation?
PAUL KILDEA AND ANDREW LYNCH 103

Carbon Pricing Options for a Post-Kyoto Response to Climate Change in Australia
WAYNE GUMLEY AND NATALIE STOIANOFF 131

The Process of Law Reform: Conditions for Success
LAURA BARNETT 161

COMMENT

The Rise, Fall and Proposed Rebirth of the Australian Military Court
HENRY BURMESTER 195

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

Stephen Bottomley*

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.¹ Similarly, public lawyers and regulatory theorists have highlighted the importance of understanding the role of regulatory discretion in the enforcement of rules.² 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.³

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

* Professor of Commercial Law, ANU College of Law, The Australian National University. My thanks to the anonymous referees, and to Emma Armson, Peter Bailey, Peter Cane, Michael Coper, Kath Hall, Peta Spender, Leslie Zines and other participants at a work-in-progress seminar held at the ANU College of Law for helpful comments. Thanks also to Nick Swan for his diligent research assistance. The arguments developed in this article were assisted greatly by interviews with representatives from the Australian Securities and Investments Commission, the Department of Treasury and the Financial Services Council. Needless to say, the responsibility for any errors is mine.

¹ 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.

² 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.

³ 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.⁴ 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 agency⁵ that is charged with administering the corporations legislation⁶ 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'.⁷ 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'.⁸ These two examples are akin to a power to make delegated legislation whereas, by contrast, ASIC has the power to modify the primary legislation.⁹ 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'.¹⁰ 'Emergency' is defined as 'a major market disturbance' characterised,

⁴ See, eg, the list of sections in Table 1 of this article.

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

⁶ *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.

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

⁸ *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.

⁹ 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).

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

for example, by 'sudden and excessive fluctuations of securities prices generally'.¹¹ 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 Order¹² 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.¹³ The Class Order was to commence operation on the following Monday, 22 September 2008.¹⁴ 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 Order¹⁵ 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

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

¹² 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.

¹³ 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.

¹⁴ 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.

¹⁵ 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 Order¹⁶ 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.¹⁷ 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,¹⁸ all without any parliamentary involvement.¹⁹ 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.²⁰ 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.

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

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

¹⁸ 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).

¹⁹ 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.

²⁰ 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.²¹ Secondly, the modifications received considerable publicity in the financial press, as well as being publicised via the Australian Securities Exchange.²² 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.²³ 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.²⁴ In the more typical case, modifications made by Class Order are beneficial, providing relief from requirements in the Act for a class of persons.²⁵

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 1.²⁶

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

²² 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>>.

²³ 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.

²⁴ A point noted by Sheehan, above n 20, 28.

²⁵ 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.

²⁶ 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 provisions²⁷ 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,²⁸ 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*.²⁹ This document makes it clear that issuing Class Orders is only

²⁷ 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)).

²⁸ ASIC will sometimes make identical modifications for a number of successive individual applicants.

²⁹ 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*.³⁰ 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.³¹ 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.³²

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'.³³ 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.³⁴ 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'.³⁵ 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* ...³⁶

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.³⁷ 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

³⁰ 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).

³¹ 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>>.

³² 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.

³³ Australian Securities and Investments Commission, 'Applications for Relief' above n 29, [51.51]–[51.53].

³⁴ Ibid [51.57].

³⁵ Ibid [51.63].

³⁶ Ibid [51.62].

³⁷ 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.³⁸

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,³⁹ 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'.⁴⁰ 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'.⁴¹

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"'.⁴² 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.⁴³ 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.

³⁸ Noted also by Sheehan, above n 20.

³⁹ 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).

⁴⁰ This last point is a more recent addition to the original Eggleston principles.

⁴¹ *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.

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

⁴³ 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'.⁴⁴ 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 2001.⁴⁵

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 ⁴⁶

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

⁴⁴ *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.

⁴⁵ 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.

⁴⁶ 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).

⁴⁷ 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.⁴⁸ 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).'⁴⁹ 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),⁵⁰ to unintended or unanticipated consequences of the operation of the legislation in particular cases,⁵¹ or in anticipation of foreshadowed amendments to the Act or Regulations.⁵² 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.

⁴⁸ Interview with ASIC officers (Sydney, 15 July 2010).

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

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

⁵¹ Ibid [3.65].

⁵² 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'.⁵³ 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.⁵⁴ 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]'.⁵⁵ So, in summary, since 2005 the *Corporations Act* has applied to responsible entities⁵⁶ 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

⁵³ 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.

⁵⁴ See *Corporations Act 2001* (Cth) s 601GA.

⁵⁵ 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.

⁵⁶ 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.⁵⁷ 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

⁵⁷ *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.⁵⁸

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.⁵⁹ 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'.⁶⁰

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.⁶¹ Professor Loss was the author of a leading multi-volume treatise on securities regulation in the United States.⁶² 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'.⁶³ 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.⁶⁴

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

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

⁵⁹ 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].

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

⁶¹ I am grateful to Tony Hartnell for alerting me to this.

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

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

⁶⁴ *Ibid* 23.