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Opting Out of Shareholder Governance Rights: A New Perspective On Contractual Freedom in Australian Corporate Law

James McConvell* and Mirko Bagaric**

Abstract:
[One of the classic debates in corporate law relates to whether the rules of corporate law are or should be ‘mandatory’, in that companies must comply, or ‘enabling’- meaning a set of default rules which companies have the choice of adopting or ‘opting out’ of through alternative contractual arrangements. The so-called ‘mandatory/enabling’ debate has been especially prominent in the United States for numerous reasons, yet has also received some attention in Australia. That said, the extent to which companies can ‘opt out’ of corporate law has rarely been considered as a practical issue in Australia - particularly whether Australian companies can ‘opt out’ of provisions under the Corporations Act (“the Act”). However, just recently, two high-profile events in Australia have made ‘opting out’ of corporate law a relevant issue, especially the question of whether companies are free to ‘opt out’ of provisions of the Corporations Act which provide express governance rights to shareholders. These events were Boral’s constitutional amendment in 2003 to restrict the ability of shareholders to propose amendments to the company’s constitution, and the contemplation and introduction of so-called ‘pre-nuptial’ agreements- designed to bypass the right of shareholders to vote on removing directors in public companies. In light of these two recent events, in this article the authors revisit the mandatory/enabling debate. However, rather than going over old ground as to whether a mandatory or enabling approach to corporate regulation is desirable, the authors approach the issue from a fresh perspective: that Australian Securities and Investments Commission’s (“ASIC”) existing relief powers under the Act should be extended to provide a means for companies to opt out of provisions containing shareholder governance rights.]

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I. Introduction

A. Opting Out - The Intellectual Debate

The ability and desirability of companies to avoid the operation of corporate law rules by ‘opting out’, has been one of the more contentious issues in corporate law in the past two decades. Opting out of corporate law, what has also been described as ‘contractual freedom in corporate law’, has engendered lively debate, especially in the pages of United States law reviews. Opting out emerged as an issue in the United States as a result of the development of the so-called ‘contractarian’ theory of the corporation, and an increasing desirability of United States companies to avoid corporate law rules which were exposing directors to greater liability.

As will be explained in more detail later in this article, contractarians view the corporation not as a separate and distinct legal entity with its own personality and post office box, but rather as a ‘nexus of contracts’, a label representing the series of contracts exchanged and performed between suppliers, creditors, employees, employers and other stakeholders. Based on this view of the corporation, as the corporation is not a readily definable entity, the rules of corporate law are not mandatory like prohibitions on driving on the right side of the road or running down a public street in the nude, but are default terms, existing to fill gaps in the series of contracts being exchanged between stakeholders where stakeholders have not personally adopted the terms in their contracts.

Accordingly, on this view, companies can comply with the express rules that have been drafted, or ‘opt out’ by setting in place their own arrangements. However, there are questions as to the extent to which opting out can occur; for example, should this ability apply to all corporate law rules, or should it be limited to rules which do not impact on third party rights? More generally, there are issues as to whether corporate law rules actually are enabling in the sense that companies are free to opt out if they so choose, or merely should be enabling— in other words, is contractarian analysis operating on a normative level or a positivist level or both?

In Australia, opting out of corporate law has not received as much academic attention as in the United States, nor has it been a real issue in corporate practice. However, quite recently two key events have made opting out of corporate law an issue both from an academic perspective, and on a practical level. While these events have not to date been considered in the context of a classic debate regarding opt-
ing out of corporate law, in this article the authors will consider the events from this perspective.

B. Recent Events- Providing a Context

The two recent events which the authors are referring to are a controversial constitutional amendment approved at the 2003 AGM of Boral Ltd. (setting 5% of voting shares as the minimum threshold for shareholders to propose an amendment to the company's constitution), and the use of so-called 'pre-nuptial agreements' by public companies to allow for directors to be removed without having to convene a general meeting of shareholders to approve the amendment.1

As will be explained in this article, both of these arrangements were designed to avoid the operation of provisions of the Corporations Act ("the Act") expressing important participatory (or 'governance') rights of shareholders, based on the argument that this was in the commercial interests of shareholders. This is a very interesting development as governance rights of shareholders have generally been considered sacrosanct, and thus not subject to any modification or exclusion by companies- with or without the approval of shareholders. Indeed, while much has been written about opting out of corporate law, the great majority of this commentary relates to opting out of fiduciary duties owed by directors to the company. The authors were able to find very little in the way of opt out analysis directly relating to shareholder rights. Hence, when looking at the two recent events above in the context of opting out, it opens up quite a fresh area for inquiry regarding the ability and desirability of opting out of corporate law.

Another interesting point when looking more closely at the two events is the fact that on both occasions it cannot be said that companies were treating the Corporations Act as a set of default terms rather than strictly mandatory rules. Both occasions were not examples of blatant opting out; rather companies sort to justify the particular arrangements on the basis that they were consistent with the Corporations Act. This is perhaps why until now the events have not been considered to be contemporary examples of opt out arrangements. However, what is clear is that companies were trying to avoid the op-

1. There are other examples which also pop up from time to time. Indeed, it could even be said that the decision of Rupert Murdoch's News Corporation, announced in mid-2004, to move its corporate headquarters to Delaware USA, a state known for its lax corporate law rules in relation to shareholder rights, is another example of a company using a mechanism to opt out of Australian corporate law- and more specifically laws providing important shareholder governance rights.
eration of particular provisions of the Act which were considered to operate contrary to the commercial interests of the company, provisions which appear on their face to contain mandatory rules, just like any other ordinary piece of legislation. Hence, the effect of the measures was essentially the same as opting out, even if they were not expressed as being opt out arrangements.

C. Opting Out and Contemporary Corporate Governance

In looking at the two recent events from this perspective as indicating a trend towards opting out of corporate law provisions, and in particular provisions expressing important governance rights for shareholders, it is important to consider the extent to which such provisions can be avoided through opt out arrangements, and what can be done to protect the interests of shareholders. This is especially important now that shareholder participation, and more generally upholding the rights and interests of shareholders, has become a key objective in corporate law and governance. Both in Australia and overseas, recent statutory initiatives (for example, CLERP 9 in Australia) and corporate governance recommendations and policies include measures which recognize and facilitate a participatory role for shareholders in the corporation, particularly at the general meeting. However, there is no use giving greater attention to shareholder participation, and implementing measures with a view to enhancing the participatory rights of shareholders, if this is countered by a corresponding trend of public companies blatantly avoiding these provisions through opting out.

D. A 'New' Perspective- Taking Opting Out Public

It was discussed above that the ability and desirability of companies opting out of statutory provisions containing important governance rights for shareholders has rarely been considered in commentary on contractual freedom in corporate law, and there are few examples that come to mind where legislatures have provided companies with an avenue to opt out of statutory governance rights provided to shareholders (Delaware's General Corporation Law is the only prominent example that comes to mind).²

From our research, what struck the authors as being even more rarely discussed is the role (if any) of public regulators in relation to

². Much as been written in Australia's newspapers in recent times about the comparative strength of Australian corporate law compared to Delaware corporate law in establishing and protecting shareholder rights. This commentary was in relation to the proposed move of News Corporation's headquarters to Delaware, USA. See, e.g., Alan Kohler, Rupert's Shareholders Lose Out, SYDNEY MORNING HERALD, Sept. 22, 2004, at 25.
opting out of corporate law. That is, what powers do corporate or securities regulators have to grant exemptions or modifications from statutory or regulatory corporate law rules, and can the exercise of such a power, upon the application of a company or individual, be considered as a mechanism to enable opting out of corporate law? In other words, if such a dispensation power is attached to a provision in a piece of companies legislation, is the provision in question still strictly mandatory or is it appropriate and accurate to say that the attachment of such a power facilitates ‘opting out’ of that provision, and hence the provision is not strictly mandatory?

The impetus for this particular inquiry is the dispensation power which has been bestowed on the Australian Securities and Investments Commission ("ASIC") under the Corporations Act. Under the Act, and as will be explained in more detail below, the ASIC is provided with the power to grant modifications or exemptions, either on an individual case-by-case basis upon application, or on a class order basis, in relation to a number of provisions of the Act. What is interesting though, and what drove the authors to write this article, is the curious arrangement by which the ASIC has been provided with the powers. Rather than this power applying to the Act as a whole, and all the provisions contained in the Act, the power applies selectively to certain provisions- in particular, provisions regulating takeovers, fundraising and (more recently) financial services, but noticeably is not attached to provisions in the Act expressly providing governance rights for shareholders.

Indeed, when looking more closely at particular provisions expressing governance rights, and then at the Act as a whole, what becomes quite clear is that the situation of the ASIC's dispensation powers not applying to express governance rights of shareholders is deliberate. The authors trace the origins and development of the ASIC's dispensation powers in the Act and consider why the dispensation power has traditionally not attached to shareholder rights, and then explore the issues for consideration if the dispensation power were to be extended to apply also to provisions containing shareholder rights.

The reason why the authors engage in this exploration is because a key feature of this article is a proposal to expand the ASIC's dispensation power to apply to the governance rights of shareholders, in response to recent events which suggest that companies want the flexibility to be able to opt out of these provisions in particular circumstances. While opting out has traditionally been associated with 'contracting out', that is private ordering negotiated between the company and its shareholders, the authors argue that there is no practical
or conceptual barrier to characterizing the application of such powers as being a form of 'opt out'. It is explained that recent events justify this position.

The basic argument is that shareholder rights are included in the legislation to protect and respect the position of shareholders of the company, so that if express shareholder rights are actually operating contrary to the interests of shareholders in particular circumstances, shareholders should be given the opportunity to 'opt out' of these rights if they believe such rights are operating contrary to their best interests. It is argued that there is no difference in this sense between the fiduciary duties of directors, for which opt out arrangements have been readily accepted, and the governance rights of shareholders. The role of the ASIC as 'gatekeeper' in relation to opting out of shareholder rights, by ultimately deciding whether or not to approve of an exemption or modification to a statutory shareholder right, would ensure that any dispensation of the rights of shareholders is in fact in the best interests of shareholders as a whole. At times, shareholders may be apathetic or misinformed when voting, and thus the oversight of the ASIC would provide an ultimate protection to shareholders.

E. Brief Outline and Justification of Authors' Proposal

In the final part of the article, the authors will outline in detail the contents of our proposal, and provide some justification for the proposal. In order to paint a picture, however, of where the authors are ultimately heading with this article, it is worthwhile to briefly outline the main points in relation to our proposal for law reform.

What the authors are proposing is that the modification and exemption powers of the ASIC be extended to apply to the governance rights of shareholders included in the Corporations Act. Accordingly, if the company feels that on a particular occasion the strict application of a statutory shareholder right, like for instance having to call a meeting of shareholders to vote on the removal of a director, is not in their best interests, companies would have the opportunity to apply to be exempted from the provision, or for there to be a modification of the provision. It is important to make clear, however, that the dispensation power of the ASIC will not be extended to cover every single governance right of shareholders provided for in the Act. The authors will list what we believe to be the main governance rights of shareholders provided for in Act, and indicate which provisions will be subject to a dispensation power, and which provisions will not be. The reasons as to why a provision is or is not to be subject to a dispensation power will be explained.
Accordingly, if the dispensation power is extended to include these provisions, companies will be able to apply to the ASIC for an exemption or modification on a case-by-case basis. It is not proposed that class order relief will be given, as relief from the operation of particular shareholder rights will need to be justified based on particular circumstances present in each company that applies for relief. An important feature of the authors’ proposal, and one that distinguishes the proposal somewhat from the ordinary operation of the ASIC’s dispensation powers, is that the consent of a special majority of shareholders to the exemption or modification will be a prerequisite to the ASIC granting relief. The authors will go into more detail below about what this ‘special majority’ will entail. It is proposed that this requirement, as well as the general procedures involved in the exercise of the ASIC’s dispensation powers, will be expressed in a Policy Statement which the ASIC will follow and apply in determining whether or not to grant relief in each given case.

From a regulatory point of view, a strong benefit from this proposal, if implemented, is that it would encourage real and effective compliance with the Corporations Act, rather than ‘opportunistic’ compliance (a term that will be explained in the article) which as recent events have shown, does not provide for effective corporate regulation. Another important benefit of the proposal is that corporate regulation would be more in tune with facilitating the best interests of shareholders. What the proposal recognizes is that there will be occasions where the strict application of statutory shareholder rights will not be in the best interests of shareholders. Recent events, particularly relating to the difficulties in removing a director from the National Australia Bank due to the requirement to convene a shareholders meeting pursuant to section 203D to vote on removal, highlight that this may indeed be the case. Therefore, in such circumstances, shareholders should be free to opt out of the operation of the statutory right if they so choose. In giving shareholders this right to choose, and the right to vote on whether to approve the opt out arrangement, it is argued that the author’s proposal facilitates and promotes shareholder participation, countering any contrary view that accommodating an opting out of statutory governance rights of shareholders logically must undermine shareholder participation.

F. Structure of Article

In Part Two of this article, the authors discuss the two recent events in Australia suggesting that opting out of corporate law is now on the agenda. Part Three includes some more background to the issue of
opting out of corporate law by giving a brief overview of the debate relating to contractual freedom in corporate law—particularly the issues and arguments raised in academic commentary in the United States. The authors also examine the *Corporations Act* in the context of determining which provisions in the Act are 'mandatory', that is not subjected to contractual freedom, and those provisions which are not (that is, 'enabling'). The authors also look at the ability to opt out of statutory shareholder rights, and discuss the ASIC's powers of exemption and modification, asking why they have not been discussed before in the context of opting out of corporate law in Australia.

In Part Four, the authors focus on the ASIC's exemption and modification powers under the *Corporations Act*, and outline and then justify their proposal to extend these powers to attach to a number of important governance rights of shareholders. Before discussing the proposal in detail, the authors consider the rationale and origins of the ASIC's powers, and reflect on the scope of the ASIC's powers in terms of why the provisions apply to some provisions in the Act but not others. The authors also examine some issues which need to be addressed before extending the ASIC's powers. Much of Part Four is, however, devoted to explaining the authors' proposal. The authors conclude the article by urging legislators to implement the authors' proposal on the basis the proposal will be more effective in recognizing and respecting the rights and interests of shareholders, and in embracing the contemporary corporate governance objective of enhancing shareholder participation.

II. RECENT EVENTS IN AUSTRALIA: BORAL AND 'PRE-NUP TIAL' DIRECTOR AGREEMENTS

In the late 1980's and early 1990's, there was extensive academic analysis in the United States of the whether corporate law rules did or should facilitate opting out, and many states in that country introduced reforms to their corporations law to allow companies to adopt opt out arrangements (mainly in relation to fiduciary duties of directors), usually through making alternative arrangements in the constitution, or through ratification of director's actions by shareholders. This is explored in more detail in Part Three below. While some commentators in Australia, in particular Ian Ramsay and Michael Whincop, have incorporated and applied some of this analysis from an Australian perspective, it could not be said that opting out has been a major or even contentious issue in Australian corporate law—either from an academic perspective or at a practical level. An explanation for why opting out of corporate law inevitably became, and remains,
more of an issue in the United States compared to Australia is also considered in Part Three below.

Indeed, it is fair to say that opting out has not seriously considered by thinkers and practitioners in Australia—however quite recent events indicate that this may be changing. Companies in Australia have been exploring opportunities to avoid the operation of particular provisions of the Corporations Act, just as companies in the United States were faced with stronger rules in relation to directors’ duties in the late 1980’s and were considering how they could sidestep the strictures of the law. While the authors have not seen any reference to ‘opting out’ when commenting on these recent events in Australia, this may simply be due to the fact that opt out has not entered into the dialogue of corporate lawyers in Australia in the same way as it has in the United States. In the authors’ view, however, when looking at these events, two in particular, ‘opt out’ is certainly a label that can be attached to these arrangements. Contractual freedom may at last be arriving at the doorstep of Australian corporate law!

A. Boral’s 2003 AGM Resolution

At its 2003 annual general meeting (“AGM”), timber and building products company, Boral Ltd. proposed an extremely controversial resolution to adopt a new constitution. The new constitution included a clause that any proposal to modify or repeal the company’s constitution had to be approved either by a resolution of the board or be proposed by shareholders holding at least 5% of the votes that could be cast at the meeting.

The reason for including this provision was to negate the right of 100 shareholders of the company to requisition a general meeting to propose an amendment to the company’s constitution (provided for under section 249D(1) of the Corporations Act), or to give notice of a resolution that they propose to move at a general meeting (section 249N(1) of the Act). The directors of Boral sought to restrict the rights of shareholders in this way as a shareholder lobby group, Boral Green Shareholders (which was established out of a concern about the effect of Boral’s business activities on the environment) had been quite active in using the 100 member rule to propose a number of resolutions at Boral shareholders meetings—thus essentially ‘hijacking’ the agenda of the company meeting.

Due to this resolution, the 2003 Boral AGM was a fiery encounter, however as a result of strong institutional investor support, the contentious resolution passed with 94% of votes in favor. The effect of this resolution was that rather than 100 shareholders being able to
initiate a resolution to amend the constitution, to be proposed such a resolution would instead require the backing of shareholders holding approximately 28 million votes (5% of the issued voting capital in Boral).

The Labor Party’s corporate governance spokesperson, Senator Stephen Conroy, said that the new rule demonstrated ‘an arrogance towards shareholders and small shareholders in particular. . . . To lift this threshold from 100 votes to 28 million votes . . . is breathtaking’.  

The Australian Shareholder Association’s Stephen Matthews compared the plight of Boral shareholders to feminist in the late 19th century: ‘They tried to prevent women getting the vote, just as you are attempting to prevent small shareholders from putting special resolutions on the notice paper. Shame on you, Mr. Chairman, Shame.’

Prior to Boral’s resolution at the 2003 AGM, the Federal Government had tried unsuccessfully to remove the 100 member threshold in 249D, thus limiting the right of shareholders to requisition general meetings through a higher threshold tied to a percentage of voting shares held. As explored further below, section 249D(1A) allows for the making of Regulations to alter the 100 member rule, as does section 249N(1A) in relation to the threshold placing a notice of a resolution with the company under section 249N(1). The Government introduced Regulations to amend section 249D in the second half of 2001, however the Regulations were opposed in the Senate. Thus, Boral’s decision to propose the resolution at the 2003 AGM was seen not only as a response to activist shareholders, but also a frustrated reaction to the failure of the political process to confine the scope of section 249D.

The Boral resolution is interesting in the context of the topic of opting out of corporate law, particularly when considering the legal argument raised by Boral in support of the resolution. Boral was not arguing that section 249D or 249N were enabling provisions for which the company could freely decide whether to comply with or set in place alternative arrangements in the company’s constitution. The company did not utilize contractarian theory to argue that the Act was
merely a set of default rules, or suggest more specifically that the shareholder rights expressed in sections 249D and 249N were default terms which the shareholders could vote to dispense with.

Rather, what Boral sought to do was rely on an alternative provision in the Corporations Act, suggesting that this provision operated to enable a similar outcome to opting out, without explicitly opting out of the provision, or indicating that the provision was enabling rather than mandatory. In legal literature, this is referred to as 'opportunistic' or 'creative' compliance, which is usually considered less desirable than true compliance. The relevant provision which was relied upon by the company was section 136(3) which states that a company can pass a resolution to set in place a ‘further requirement’ for the company’s constitution to be amended, in addition to the requirement for a special resolution in section 136(2).

According to Boral, the resolution that any proposal to modify or repeal the company's constitution needs to be approved by a resolution of the board or by shareholders holding at least 5% of the votes that could be cast, merely imposed a further requirement for the amendment of the constitution going beyond sections 249D and 249N—the company was not explicitly ‘opting out’ of the 100 member rule. Thus, the company could avoid the operation of the 100 member rule, and thus achieve the same outcome as ‘opting out’, but the argument runs that the company was not opting out, but rather was simply complying with the Act which allows companies to introduce further requirements for amending the constitution. In more general terms, it could be said that the company sought to avoid the operation of the 100 member rule in sections 249D and 249N, yet not by characterizing the provisions as default terms which the company could comply or dispense with at its liberty—rather it was prepared to work within the confines of the Corporations Act to try and find a way to avoid the operation of 249D and 249N.

However, there remains a very large question mark over whether Boral’s resolution was in fact valid. The clearest and most significant consequence of the resolution being passed is that 100 shareholders no longer have the right to propose a resolution, and by implication call a meeting including this resolution, to amend the company’s constitution. Rather, at least 5% of voting shares in the company is the minimum threshold requirement to requisition a meeting and propose

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a resolution to amend the company's constitution. Accordingly, it can hardly be said that the resolution does not remove the 100 member rule, but merely introduces a further requirement. As 100 members cannot get together and propose a resolution or requisition a meeting, their right is lost. There is authority for the proposition that section 136(3) cannot be used in this way; a further requirement imposed under section 136(3) must not be inconsistent with the remaining provisions of the Act.  

Further, at least in relation to section 249D, it is clear that the 100 member rule cannot be limited or ignored. Section 249D(1A) states that the only way in which the 100 member rule can be changed is by passing Regulations to this effect; moreover, section 249E states that if a meeting is not called within 21 days after the directors receive a request under section 249D, the shareholders can calling a meeting anyway, with the reasonable expenses of the meeting to be paid by the company. Both provisions highlight an obvious legislative intention that the operation of the 100 member rule in section 249D cannot be negated through a resolution passed under 136(3).  

In response to Boral's resolution at the 2003 AGM, in June 2004 the Labor Party introduced a proposed amendment to the Corporations Act to make it clear that any further requirement created pursuant to 136(3) must not be inconsistent with the Act, and thus any inconsistent requirement would be void. However, the Government did not agree to the amendment and hence it was not introduced. It may still, however, be introduced at a later time.  

B. 'Pre Nuptial' Agreements for the Removal of Public Company Directors  

A more recent example of companies entering into arrangements with a view to avoiding the operation of a certain provision(s) of the Corporations Act related to the process for removing directors of public companies.  

The procedures involved in removing directors from public companies became an issue as a result of a very public boardroom stoush within the National Australia Bank (NAB) in early 2004, which erupted as a result of a $360 million foreign currency scandal. The board of the NAB sought to remove one of its fellow directors, Cathe-
rine Walter, who had spoken out against the board in relation to its response to the scandal. Due to section 203D of the *Corporations Act*, which states that in public companies the removal of directors must be approved by an ordinary resolution of shareholders at a general meeting, the board had to organize a general meeting to support a resolution removing Ms. Walter from the board, rather than being able to remove Ms. Walter through a simple vote of no confidence (which would have been possible as 6 out of the 7 directors supported Ms. Walter’s removal). Section 203E of the Act provides that any ‘resolution, request or notice’ of the board or a director which purports to remove a director from office is void. While the meeting was subsequently cancelled as Ms. Walter agreed to resign, the organization of the meeting (in terms of obtaining professional advice, and printing and distributing information about the meeting to shareholders), and the bad publicity caused by the stoush which continued throughout this period, cost the company millions of dollars. This money could have been saved if the board was simply allowed to remove Ms. Walter, through a vote of no confidence, when tensions first arose.

In response to the NAB boardroom battle, and the difficulties involved in removing Ms. Walter despite the fact the majority of the board no longer wanted her to remain a director, it was reported in July 2004 that a number of ‘public companies’ had drafted, or were contemplating introducing, so-called ‘pre-nuptial agreements’ with incoming directors. The basic design of the pre-nuptial agreement was that the director agreed to resign if the board resolves to pass a vote of no-confidence in the director, thus avoiding the time and expense involved in following the procedure for director removal by shareholder vote under section 203D of the *Corporations Act*.10

Hence, it can be seen that the pre-nuptial agreements were basically a mechanism to opt out of the procedure for removal under section 203D. Interesting also, like with the Boral constitutional amendment, it was not suggested that 203D was merely an enabling provision which companies were free to opt out of, because clearly it is not. It contains a mandatory procedure for the removal of directors in public companies. Instead, again like with Boral, companies endeavoring to use the agreements were relying on other provisions in the Act to try and avoid the operation of 203D- here, by structuring the agreements so that they dealt with ‘resignation’ by a director rather than ‘removal’ by the board, one argument was that the agreements were authorized.

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by section 203A- a replaceable rule which provides that directors can resign from their position at any time through written notice to the board.

Therefore, when looking at the Boral amendments and the 'pre-nuptial' agreements together, it can be said that there is some desire on the part of Australian public companies to try and avoid the operation of mandatory rules in the Corporations Act when these rules are considered to operate contrary to the commercial interests of the company and its shareholders. More specifically, these recent events also indicate that while there is some resurgence in the view that there should be a degree of contractual freedom in corporate regulation, this is not necessarily based on support for a contractarian view of the corporation and corporate law. In fact, recent events highlight that companies do recognize that the Corporations Act contains mandatory rules, but they are simply trying to avoid the operation of some rules by relying on alternative rules in the Act. Accordingly, it could perhaps be said that recent events indicate a trend of 'opportunistic' or 'creative' compliance with the Corporations Act, rather than a clear and explicit trend of companies opting out of corporate law.

III. 'OPTING OUT' OF AUSTRALIAN CORPORATE LAW: MORE THAN JUST A MANDATORY/ENABLING DEBATE

It is not intended in this article to go over old ground in terms of exploring whether corporate law is comprised of mandatory rules or default terms, or indeed whether corporate law should be made up of mandatory rules requiring compliance, or default terms by which companies are free to adopt or opt out of through alternative arrangements in the corporate contract. This has been done in sufficient detail already.


In order, however, for the reader to understand and appreciate the fresh perspective that the authors provide in Part Four below on opting out of corporate law, and more specifically opting out of provisions of the Corporations Act expressing governance rights for shareholders, it is necessary to at least provide a short background report on the issue of opting out of corporate law and the models of corporate regulation in Australia. This is provided below.

A. Contractual Freedom in Corporate Law: Opt Out/ Opt In

The debate relating to opt out of corporate law has principally involved questioning whether corporate regulation is made more effective through having mandatory rules or enabling rules to deal with corporate activities and the relationship between corporate stakeholders. According to Professor Ian Ramsay ("Professor Ramsay" or "Ramsay")

A fundamental question is whether [the] functions or goals of corporate law are best achieved with a system of corporate regulation which is mostly enabling in nature, or mostly mandatory in nature. What do we mean by these terms? Mandatory rules cannot be varied by the parties. Enabling rules can be.

Issues relating to the ability and desirability of opting out of corporate law became an integral part of academic discourse relating to corporate law as a consequence of the development of a 'contractarian' analysis of the corporation, which perceives the corporation not as a separate legal entity, but rather as an abstract entity describing the series or 'nexus' of contracts negotiated and exchanged between companies and their stakeholders. As a consequence of describing the corporation in this way, the series of constructed rules constituting the 'corporate law' were seen not as mandatory terms, but default provisions to be used as terms in the series of contracts forming the 'corporation', saving parties the time and expense of drafting the terms themselves.


Many forests have been culled to give commentators the opportunity to explain what a contractarian perspective of the corporation entails, and to explore the consequences of viewing the corporation as a ‘nexus of contracts’ rather than a separate and distinct legal entity—including issues to do with opting out of corporate law. In sifting through the mountain of analysis on contractarianism and opting out, the clearest explanation of the contractarian theory of the corporation, and the link between contractarian analysis and the issue of opting out of corporate law, that the authors encountered was by then Dean and Professor of Harvard Law School, Robert C. Clark (“Professor Clark”), in an article published in the *Columbia Law Review*. According to Professor Clark:

The strong form of the contractual theory [of the firm] has three essential elements. First, the corporation is simply a fictional entity that serves as the center of a complicated nexus of contractual relationships. It is wrong to view it as organizing production in a radically different way than markets do; it is wrong, for example, to see firms as “hierarchies” in which decisions are made by “fiat” in contrast to the contractual arrangements that characterize markets. And it is wrong to see corporations as being creatures of the state in any important or fundamental sense.

Second, the proper function of corporate law is simply to provide an efficient set of starting or “default” rules to govern the nexus of contracts. Most of these rules concern issues of governance: rights and duties among directors, officers and investors. Their aim is or should be to mimic the rules that most managers and investors would agree to after a full session of costless but informed bargaining. . . .

Third, except when there are bad third-party effects (alias “negative externalities”), managers and investors should be free to change any of the default rules by mutual agreement. Moreover, most rules described traditionally as being within the subject of corporate law, such as the universal rules against unfair self-dealing by officers and directors or the equally widespread rule against the taking of corporate opportunities, do not involve any significant third-party effects; they concern only the welfare of managers and investors. Consequently, private contracts should almost always dominate over legal rules. . . . To sum up the strong form of the contractual theory in a motto: Everything is negotiable.15

An important point coming out of Professor Clark’s analysis is that opting out of corporate law has traditionally been associated with a private contractual arrangement negotiated between the company and

15. Clark, supra note 12, at 1705-06 (emphasis added).
its shareholders or other stakeholders. Professor Lucian Bebchuk ("Professor Bebchuk"), again of Harvard Law School, also makes this clear:

The advocates of freedom to opt out start from the view that the corporation is a contractual creature, a "nexus of contracts". This view of the corporation, they argue, implies that the parties involved should be generally free to shape their contractual arrangements. The function of corporate law, they claim, should be to facilitate the process of private contracting by providing a set of "standard-form" provisions. These standard-form provisions should not be mandatory; private parties should be free to adopt charter provisions opting out of them.

This characteristic of opting out of corporate law will be explored in more detail below, given that what the authors are later suggesting is that the ASIC, a public regulator, does and should play an important part in facilitating opting out of corporate law rules in Australia.

Another important aspect of contractarian analysis of corporate law rules is that the analysis operates on both a normative and positivist level. Contractarians argue both that corporate law rules are enabling and default terms which companies are free to opt out of through alternative arrangements in the corporate contract, and that corporate law should be enabling rather than mandatory on the basis that contractual freedom in corporate law is more efficient and effective than having strict, mandatory rules. Accordingly, there are two different strands of commentary on opting out of corporate law: descriptive analysis of the rules which are or are not enabling and subject to opt out arrangements, and more abstract, academic commentary exploring whether particular forms of corporate law rules should or can be enabling.

However, opting out of an corporate law does not exist on a purely academic level- it is also a significant issue that has confronted corporate lawyers in the real world of practice, again particularly in the United States. According to the plethora of articles and books on American corporate law which explore the topic of opting out, the key

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17. See Limiting Contractual Freedom, supra note 12, at 1821.
18. Whincop, supra note 12, at 189. The article provides a good summary of the issues: Contractarianism has both normative and positive theses. The normative implication of the theory is that corporate law should be structured as a corpus of default rules, which the parties may vary or exclude, and not as immutable, mandatory rules. The positive contractarian thesis asserts that corporate law is organised as a corpus of default rules and that mandatory rules are not adopted.

Id.
event which triggered the interest of practitioners in the ability to opt out of corporate law was the decision of the Delaware Supreme Court in *Smith v Van Gorkom*,¹⁹ which imposed a strict duty of care on directors. In response to this decision, in 1986 the state of Delaware amended its companies legislation to enable shareholders of Delaware companies to limit or eliminate the personal liability of directors for breaching their duty of care. As Professor Ramsay has written: "A number of reasons were advanced in support of the amendment. These included: difficulties in obtaining directors' and officers' liability insurance; court decisions holding directors personally liable for duty of care violations; and perceived difficulties in obtaining and retaining directors of the required quality."²⁰

As Ramsay also indicates in his paper, following the decision of the state of Delaware in 1986 to enable companies to 'opt out' of stricter rules imposing personal liability on directors, almost all of the remaining United States states adopted similar legislation to provide for contractual freedom- at least in relation to directors' duty of care.²¹ The reaction of the other states to the more liberal and flexible rules pertaining to directors' duty of care was the result of the 'charter mongering' which occurs in the United States-²² a competition between the states to have the most attractive corporate law rules for companies given that companies can chose which state to incorporate in, with associated taxation and employment benefits which flow to a state from a company incorporating there.²³ Having in place more lenient and flexible rules relating to fiduciary duties is attractive to directors and management deciding on a place to incorporate, and thus such an

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²¹. According to Bebchuk, states in the US have also implemented 'default arrangements' in relation to the regulation of takeover bidders and permitted defensive tactics. *See Why Firms Adopt Antitakeover Arrangements, supra* note 13.
²³. *See* Romano, *supra* note 12, at 85:

Modern corporation codes tend to be enabling rather than mandatory statutes: they are standard form contracts specifying the rights and obligations of managers and shareholders, which can often be altered by private agreement to suit the circumstances of particular firms. The enabling approach is a function of the contractual nature of the corporation. Participation in a firm is voluntary; common stock is one of a vast array of available investment vehicles. . . .

...The mandatory-enabling debate [raises the question]: does state competition produce too few mandatory corporate laws? Because of the ease of reincorporation, a provision in one state's code will not be truly mandatory unless it is included in all other state codes.

*Id.*
approach to corporate regulation is very important to the state’s economy. As was written by Professor Jeff Gordon of Columbia Law School:

In light of the competition among states for incorporation ... private wealth maximization is likely to be the shaping force of corporate law. If shareholders and managers perceive that a state’s corporate law does not operate in their joint interest, they can simply move elsewhere. This is not to deny the importance of regulatory objectives, but to suggest that corporate law will tend to squeeze out those interests.24

This is why opting out of corporate law is such a huge issue in the United States, and also why it has not been so significant an issue in countries such as Australia and the United Kingdom. Corporate law in both Australia and the United Kingdom is regulated at a federal level, rather than at the state level. Accordingly, ‘charter mongering’ is not a practice which exists in these countries, and thus opting out does not need to be considered as a practical device to make corporate law rules more attractive to companies.

There is case law in Australia and the United Kingdom indicating that there is an avenue for companies to avoid the operation of particular fiduciary duties of directors to the company, in particular through shareholder ratification of transactions in breach of directors’ fiduciary duties,25 however the legislatures in both countries have not felt the need to expressly facilitate opt out arrangements in the main companies legislation.26 It is beyond the scope of this article to provide an

24. See Gordon, supra note 12, at 1552.

25. See generally, Deakin & Cook, supra note 6; Pippa Rogerson, Modification and Exclusion of Directors’ Duties, in The Realm of Company Law 93 (Barry K. Rider ed. 1998) (considering the question whether it should be possible for directors duties to be modified or excluded in the United Kingdom); Christopher A Riley, Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts, 55 Modern L. Rev. 782, 784 n.10 (1992) (explaining that the introduction of the Companies Act 1989 permits greater freedom for private companies to contract out of some of the otherwise mandatory provisions of company regulation.) But see Brian Cheffins, Company Law: Theory, Structure, and Operation 226 (1997):

Shareholders may authorize a waiver of these duties in certain circumstances but ascertaining precisely when this is permitted is not a simple process. One difficulty is determining the scope of s 310 of the Companies Act 1985. This measure renders invalid any provision in the corporate constitution or in a contract which exempts corporate officials from a breach of duty. It would seem, therefore, that a company’s articles of association cannot displace the duties which directors owe. Still, section 310’s precise ambit is uncertain. It may be permissible for instance for a company’s articles to define and limit the range of situations where there is an actionable conflict between a director’s personal interests and his duties to the company.

Id.

26. See Ford et al., supra note 7. In relation to the position in Australia, it is explained that there are different considerations that apply to the statutory duties of directors under Part 2D.1
exploration of the law in relation to opting out of directors' fiduciary duties.\textsuperscript{27} What is clear, however, is that in the United States, Australia and the United Kingdom opting out is discussed almost exclusively in relation to director's fiduciary duties, and rarely intrudes into other areas of corporate law- including shareholders rights (discussed below).\textsuperscript{28}

B. Australia's Corporations Act: A Set of Mandatory or Default Rules?

1. Models of Corporate Regulation in Australia: An Examination by Professor Ramsay

In a paper written in 1998 titled 'Models of Corporate Regulation-The Mandatory/Enabling Debate',\textsuperscript{29} Professor Ramsay engaged in a detailed exploration of Australian corporate law in an attempt to characterize the number of rules included in the then Corporations which do not apply to the fiduciary duties of directors, making it less likely that courts would accept opt out arrangements in relation to the statutory duties. At [8,385], the authors write:

It is clearly envisaged that breaches of Part 2D.1 will be subject to public enforcement rather than private enforcement of director's duties. Moreover, it is difficult to see ratification by shareholders eliminating a contravention of a statutory duty in Part 2D.1, particularly given that there can be criminal proceedings resulting from a contravention of the duties, other than the duty of due care and diligence.

\textit{Id.}

27. See Whincop, \textit{supra} note 12, at 222-23 (discussing and analysing the ability to opt out of fiduciary duties in Australia:

This article has shown that the common law and equity traditionally permitted contractual variation of the duties imposed on officers on an ex ante basis and allowed contracting around its prohibitions ex post. Statute, however, has greatly restricted ex ante contracting, except for the conflict rule in proprietary companies and the possibility of cases where proper purposes are expanded. . . . This article has shown that common law and equity treated directors' duties as default rules, which could be modified ex ante and which courts were sometimes prepared to tailor ex post. . . . The case law implies that while fiduciary duties and duties of care permit modification and tailoring, a standard of good faith limits and informs this process. This analysis supports Coffee's theory that good faith is an essential mandatory principle in officers' liability . . . However, the intensity of the good faith standard varies greatly. In the context of duties of care, it requires little more than honesty.

\textit{Id.}

28. For a different perspective on opting out, suggesting that it is possible that opting out of corporate law could apply more broadly than simply fiduciary duties, see John C. Coffee Jr., \textit{No Exit? Opting Out, The Contractual Theory of the Corporation, and the Special Case of Remedies}, 53 \textit{Brook. L. Rev.} 919, 924 (1988). Coffee poses the question, 'Can we find criteria by which to define a boundary line, separating those areas where contracting out from the common law's basic norms should be permitted, even in the absence of specific authorizing legislation, from those components of corporate law that should be viewed as mandatory in character?' \textit{Id}. Specifically, Coffee suggests that, with an impetus being tort reform in the US, there should be avenues for ADR mechanisms substitute judicial remedies for shareholders.

29. See Ramsay, \textit{supra} note 12.
Law (now Corporations Act), as well as the common law and equity, as being mandatory or enabling. Professor Ramsay went even further in classifying the mandatory rules into four different categories: procedural, power allocating, economic transformative and fiduciary standard setting.30

Although it is not the purpose of this article to discuss the extent to which Australian corporate law is mandatory or enabling, or to re-examine the different types of rules that can be said to exist under the Corporations Act, it is useful to have some understanding of the extent to which opting out is presently accommodated in the Corporations Act before moving on to outline a law reform initiative which is designed to extend the ability of companies to opt of corporate law rules contained under this Act. To highlight Ramsay’s findings, follow are extracts of the pertinent points made by Ramsay in his paper:

Although it is relatively easy to identify mandatory rules which form part of Australian corporate law, it would not be true to say that Australian corporate law is entirely mandatory, and this includes certain aspects of directors’ duties. The High Court in Whitehouse v Carlton Hotel Pty Ltd [(1987) 162 CLR 285, 291], stated that the shareholders of a company may agree to modify the duties owed by company directors. More particularly, the Court stated that the articles of a company may be drafted so that they “expressly or impliedly authorize the exercise of the power of allotment of unissued shares for what would otherwise be a vitiating purpose”. . . . Consequently, the basic common law prohibition of conflicts of interest and duty can be viewed as a ‘default rule’ which shareholders in companies are free to modify and which they typically do modify.

. . . Other examples of default rules can be provided. Section 249 of the Corporations Law provides that in a company which has share capital, every member has one vote for each share unless the articles provide otherwise. It is, of course, very common in private companies to alter this default rule and to issue shares with different voting rights attached to them. . . .

. . . Section 164 of the Corporations Law may also be regarded as a default rule. This section allows persons contracting with companies to make certain assumptions in regard to those agents and officers who execute contracts on behalf of companies. In particular, sections 164(3) allows a person contracting with a company to assume that a person who is held out by the company to be its officer or agent has been duly appointed and has the authority to exercise the powers and perform the duties customarily exercised or performed by an officer of the kind concerned. . . . Section 164 can be regarded as a default rule because it is possible for the company to

30. See Gordon, supra note 12, at 1591-93.
vary what is regarded as the customary authority of an officer of the company . . .

There are some enabling rules which cannot be classified as default rules. . . . Default rules are those which apply unless they are modified or varied by the parties. Some rules are simply enabling in the sense that they facilitate corporate transactions. An example is Section 255 of the Corporations Law which allows members of a private company to pass resolutions "on paper" without requiring the formality of a meeting provided all the members of the company sign the document.

. . .

There is another category of enabling corporate rules. These are rules which allow the court to give effect to the intention of parties where that intention was thwarted because of some mistake or irregularity. For example, Section 1322 of the Corporations Law provides that certain matters or proceedings are not invalid because of irregularities. The court has a discretion whether or not to validate an irregularity. . . . Section 194 of the Corporations Law, which allows the court to validate an improper share issue, can be regarded as an enabling rule which operates to give effect to the intention of parties where the carrying out of that intention has been thwarted by an irregularity.31

There are a few points to be made about Professor Ramsay's analysis. One is that the paper was written prior to the introduction of the 'replaceable rules' regime under the Company Law Reform Act 1998. The replaceable rules regime, as will be discussed below, provides a great deal of contractual freedom to companies in relation to provisions regulating the internal affairs of the company. Another point is that a number of provisions identified in Professor Ramsay's analysis have now changed location and the relevant legislation is now the Corporations Act rather than the Corporations Law, so that the analysis does not precisely reflect the present state of the law. Finally, what is quite intriguing about Professor Ramsay's analysis is that it includes some inventive examples of what may be described as enabling rules. However, there is not a single reference to the ASIC's powers to grant exemptions or modifications to various provisions in the Act. Is not this also an example of the Act facilitating opt out arrangements? The authors consider below why the ASIC's powers have not been considered in the context of opting out of Australian corporate law.

2. Replaceable Rules

In Professor Ramsay's paper on models of corporate regulation in Australia, the ultimate finding was that the Corporations Law, now

Corporations Act, is comprised predominantly of mandatory rather than enabling rules, far more so than in the United States where ‘charter mongering’ has meant that there has been a shift towards enabling rules. Professor Ramsay’s characterization of corporate law rules certainly provides strong justification for this finding, but what confirms that the Corporations Act consists mainly of mandatory rather than enabling rules is the replaceable rules regime. The replaceable rules regime was introduced in 1998. The key objective behind the move to replaceable rules was to provide a simplified procedure for setting up and running a company. It is explained in the Explanatory Memorandum to the Company Law Reform Bill 1997 that:

The concept of memorandum of association will be abolished (the memorandum of existing companies will be treated as part of their constitution). Also, the adoption of a constitution will be optional. The basic rules that are available to the internal management of companies (Table A of the Law) will be updated and moved into the main body of the Law as replaceable rules. Companies will be able to adopt a constitution displaying some or all of these rules. These reforms will reduce the cost of registering a company for the approximately 80,000 new companies that are registered each year.32

With this amendment to the Act, a number of provisions (41 to be precise) regulating the internal affairs of the company (listed under section 141 of the Act)33 became ‘replaceable rules’, meaning that companies are free to opt out (‘replace’) a particular replaceable rule by including an alternative arrangement in the company constitution. The replaceable rules listed in section 141 of the Act essentially reflect the rules contained in old Table A to the Corporations Law. The replaceable rules apply only to companies that were incorporated after the introduction of the replaceable rules regime on July 1, 1998, and to companies incorporated before July 1, 1998 who repeal their existing constitution.34 As companies no longer are required to have a constitution, the replaceable rules can entirely govern the internal affairs of the company if the company so chooses.

33. Section 141 of the Corporations Act sets out a list of 41 provisions which apply as replaceable rules, which companies can use as their internal governance arrangements. The replaceable rules are divided into provisions dealing with officers and employees, inspection of books, directors’ meetings, meetings of members, shares and transfer of shares. For a useful discussion of the replaceable rules regime, in terms of when the replaceable rules will or will not be useful, see Pamela Hanrahan et al., Commercial Applications of Company Law 112-15 (5th ed. 2004).
34. See Corporations Act, 2001, § 135(1) (Austl.).
As an amendment to the company constitution needs to be approved by at least 75% of shareholders pursuant to section 136(2) of the Corporations Act, the replaceable rules regime ensures that there is strong shareholder involvement in the process of the company organizing to opt out of one or more of the replaceable rules. The replaceable rules regime essentially has the same operation as an opt out regime in enabling companies to avoid having to follow the procedures in a provision designated as being a replaceable rule. As explained by Campbell immediately prior to the introduction of the replaceable rules regime:

The proposed system of ‘replaceable rules’, part of the Second Corporate Law Simplification Bill, explicitly recognizes this “enabling” function of the law. The rules relate to governance arrangements and will have the same effect as provisions of the corporation’s charter. A public corporation will be able to modify or displace some, but not all, of the rules by provisions of its charter. Accordingly, a logical conclusion to make is that if particular sections in the Act are specifically designated as being enabling rules, the remaining provisions of the Act which are not replaceable rules, and which do not include an avenue for the company to opt out of (by, for example, including the statement “unless the company’s constitution provides otherwise”- see, for example, the procedure for varying and canceling class rights under section 246B) are mandatory provisions. The replaceable rules regime is discussed in more detail below when considering why the ASIC’s exemption and modification powers only apply to certain provisions of the Act and not others. Given that the replaceable rules regime applies to a significant number of provisions concerning internal governance arrangements in the company, it is suggested that this may be one reason why the ASIC’s powers do not apply to these provisions. It is also considered whether subjecting express governance rights of shareholders to contractual freedom should be achieved through extending the replaceable rules regime or through extending the ASIC’s power to grant exemptions and modifications.

3. Corporations Regulations- A Means of Opting Out?

Another interesting feature of the Corporations Act which has not been considered before in Australian commentary on opting out of corporate law, is the availability of Regulations to modify the operation of particular provisions under the Act. Regulations to the Corporations Act are normally drafted upon instruction by the Government,

35. See Campbell, supra note 6, at 206 n.42.
and only need to be tabled in Parliament rather than following the same process of approval in both Houses of Parliament which is required for an actual amendment to the *Corporations Act*. That is, the power to make Regulations does not give the Government *carte blanche* to amend the Act as they please. All Regulations are capable of being disallowed by way of a resolution of either House of Parliament.\(^{36}\)

Under the *Corporations Act*, some provisions contain a clause authorizing Regulations to be made to modify the operation of the provision in some way. This regulation-making power is particularly prominent in Part 2G.2 of the Act which provides shareholders with some important participatory rights, including to requisition an extraordinary general meeting (section 249D(1)) and to propose a resolution at a general meeting (section 249N) with the support of 100 members (the ‘100 member rule’, discussed in Part Two above). The 100 member rule contained in these provisions can be modified through the passage of Regulations relating either to a particular company or a class of companies. Thus, this power could also be described as another mechanism in the Act facilitating companies to opt out of what could otherwise be described as mandatory provisions. However, as will be discussed later in this article, the ability to make Regulations is quite different to private arrangements between the company and its shareholders, or arrangements where the ASIC is involved, to opt out of statutory provisions. Can it really be said that having to approach the Government to make Regulations for a provision to be modified in some way really provides for contractual freedom in corporate law?

4. Opting Out of Shareholder Rights - Rights can be Waived by Right Holders

As was explained above, commentary to date on opting out of corporate law has almost exclusively related to opting out of fiduciary duties and director liability. Rarely do we see academic commentary exploring the desirability of opt out arrangements in relation to shareholder rights,\(^ {37}\) or practical examples of opt out arrangements apply-

\(^{36}\) See Acts Interpretation Act, 1901, § 48(1)(c), (4) (Austl.).

\(^{37}\) One of the rare discussions of opting out of shareholder rights that the authors could find was a passing reference in Robert C. Clark’s discussion of opting out of voting rights. In this article, Clark discusses the then recent trend in the US of large companies creating capital structures with dual classes of common stock: a class with superior voting rights (to be held mostly by management), and a class with no or limited voting rights (to be held by ordinary shareholders), thus undermining the participatory rights of the second class of shareholders. The impetus for this structure is that they make hostile takeover bids virtually impossible- in order to get effec-
ing to statutory provisions containing shareholder governance rights. More recently, there has been some commentary in the United States on so-called ‘optimal default arrangements’, arguing that opting out should be restricted so as not to limit or undermine the rights of shareholders, however this has been discussed in relation to takeover laws, rather than directly dealing with shareholder governance rights. There has also been some discussion of opting out of shareholder remedies in the United States, however this is still quite different to opting out of shareholder governance rights.

Why has opting out not been given serious attention in relation to shareholder governance rights? As will be discussed further below, it...

38. Of course, much has been written in the United States about the flexibility of Delaware’s corporate law statute. In that State, many of the express shareholder rights in the legislation are subject to the phrase, ‘unless otherwise provided in the certificate of incorporation’, thus facilitating the opting out of certain shareholder rights. See Gordon, supra note 12, at 1554.

39. See Why Firms Adopt Antitakeover Arrangements, supra note 13. According to Professor Bebchuk, default arrangements placing limitations on the rights of shareholders are not desirable. Id. Professor Bebchuk presented this argument in the context of takeovers law, in light of the recent trend in the US of firms going public placing antitakeover provisions in their IPO charters (namely poison pills), which in effect place a “board veto” on takeover attempts for the company, and thus diminish the right of shareholders to vote on the takeover (a key governance right of shareholders in the US). Id. According to Professor Bebchuk, board veto arrangements in relation to takeovers are unlikely to serve shareholders in companies with dispersed ownership and should not be chosen as a default. Id.

For an earlier analysis see Melvin Eisenberg, The Structure of Corporation Law, 89 Colum. L. Rev. 1461 (1989) (engaging in a theoretical effort to identify those elements of corporation law that should remain mandatory. After identifying behavioural rules (such as the duty of care, and the duty of loyalty) that should be mandatory, Eisenberg adds to this list ‘structural rules’ which ‘double as fiduciary rules’ because they address positional (principal-agent) conflicts. Id. at 1480. According to Eisenberg, these core structural rules fall into several categories. Importantly, the final set of mandatory structural rules identified by Eisenberg are those which “protect the integrity of shareholder voting.” Id.

40. See Coffee, supra note 28.
is most likely based on the view that tinkering with these rights would inevitably be contrary to the best interests of shareholders. If the rights of shareholders have been expressly provided for under statute, does not such an argument make sense? The authors agree that shareholder participation in the corporation is an important and desirable objective, but this does not mean that it will always be in the best interests of shareholders for their statutory governance rights to be strictly applied. An important characteristic of a 'right' is that the holder should be able to choose whether or not they want to exercise that right, and if the strict application of the right will actually operate contrary to the best interests of the holder of the right, they should have the opportunity to waive that right. This follows from a basal aspect of the nature of rights.

Rights by there very nature are controversial, this is so at several different levels. There is considerable uncertainty not only in relation to the scope and content of rights, but also to rudimentary issues regarding the definition of a right. There is no shortage of definitions which have been advanced.

Following the work of Wesley Hohfeld,41 there has been much useful discussion in this area. Henry J. McCloskey believes rights to be simply entitlements,42 while in Timothy L. S. Sprigge's view 'the best way of understanding . . . that someone has a right to something seems to be to take it as the claim that there are grounds for complaint on their behalf if they do not have it'.43 Still further, rights have been defined as: claims and entitlements to benefit from the performance of obligations;44 'those minimum conditions under which human beings can flourish [as moral agents] and which ought to be secured for them, if necessary by force';45 and the liberties each man hath, to use his own power, as he will himself, for the preservation of his own nature'.46

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41. Wesley N. Hohfeld defined four categories of rights: claim-rights, privileges, powers and immunities. He qualifies this by stating that a 'claim right' accords with the proper meaning of the term, right. See Wesley N. Hohfeld, Fundamental Legal Conceptions (1919).
Finally, Denis J. Galligan defines a right as a 'justified claim that an interest should be protected by the imposition of correlative duties'.

Although for the purpose of this discussion it is not necessary to examine at length which definition is the most persuasive, it is important to note that are three necessary conditions associated with the definition of a right. The first is that it is universally accepted that a right is at the bare minimum a positive quality or a 'plus'. None of the definitions state or even imply that a right could involve a minus or a disadvantage. As was noted by the High Court in Petty and Maiden v. R (in the context of discussing the right of pre-trial silence) 'an incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer questions or provide information. To draw such an adverse inference would be to erode the right of silence or to render it valueless' (emphasis added).

A second core aspect of a right is that it is a presumptive benefit or protection one can assert against another individual or the community in general. Presumptive, because it is never indefeasible or absolute. By benefit, we mean a positive entitlement such as the right to welfare. A protection is a negative entitlement, such as the right to be free from a particular violation.

The third core aspect of a right, and the most relevant for the purposes of this article, is that it can be waived by the right holder. Rights by their very nature are individualizing concepts; providing a sphere of protection for individuals from the wants and needs of others. Indeed this aspect of rights is at the base of the main general argument in support of rights-based moral theories. This argument is aptly stated by John Rawls who claims that only rights-based theories take seriously the distinction between human beings, and protect certain interests that are so paramount that they are beyond the demands of net happiness.

Linking these elements together it has been argued that a right is a presumptive benefit or protection one can elect to assert against another individual or the community in general. Thus, despite the philosophical uncertainty associated with the nature and content of rights, it is uncontroversial that in nearly all cases individuals can elect to

49. JOHN RAWLS, A THEORY OF JUSTICE (Oxford University Press 1971).
relinquish rights. People should be entitled to waive a right where, according to their own rights, application of the right will adversely set back their interests.

The relevance of this premise is further developed below when suggesting why the ASIC's exemption and modification powers should be extended to give shareholders the opportunity to 'opt out' of their governance rights when it is in their best interests to do so.

C. ASIC's Exemption and Modification Powers: An Open Invitation to 'Opt Out?"

The authors provide a more detailed explanation and analysis of the ASIC's exemption and modification powers in Part Four below. For present purposes, it is sufficient to say that under the Corporations Act, the ASIC is given the power to grant exemptions and modifications to a number of provisions of the Act— but in particular provisions dealing with takeovers, fundraising and financial services. Relief in the form of an exemption or modification can be provided on an individual case-by-case basis or through a class order.

As will be explained in Part Four, the ASIC's power to grant exemptions and modifications is extremely important in terms of injecting flexibility into the Act, and applications for exemptions and modifications comprise a significant component of the work of both the ASIC and corporate lawyers. The authors were therefore quite astonished when researching for this article to find very little in the way of descriptive and theoretical analysis of the ASIC's powers to grant relief. Corporate lawyers in Australia have been quick to write on the intricacies of the Gambotto decision, the implications of Daniels v Anderson and the complexities of Re Wakim, however one of the, if not 'the', most important aspects of Australian corporate regulation has been close to ignored. Accordingly, it is not surprising that this power of the ASIC has not been raised for discussion in the context of opting out of corporate law, even though it is commonly utilized to avoid the operation of particular provisions of the Act either in whole or in part. Quite clearly, use of the ASIC's powers to grant relief has the same effect of opting out of corporate law, the only dif-
ference being that the company is applying to the corporate regulator the ASIC for approval to sidestep having to comply with certain provisions of the Act when compliance would be contrary to the commercial interests of shareholders, rather than seeking the approval of shareholders to do so.

Is it therefore appropriate to classify the ASIC's relief powers as a formal mechanism in the Act facilitating opt out arrangements?

A very important point to note here is that out of all the articles and books from a number of different countries that the authors have read, there is next to no reference to dispensation powers of corporate or securities regulators as being formal mechanisms facilitating opting out.\(^5\) The only discussion of the role of public regulators in the context of opting out of corporate law was in passing, with no real acknowledgment of the importance of this role.\(^4\) While many countries do not have a corporate regulator similar to the ASIC, or a corporate regulator vested with the dispensation powers that the ASIC enjoys, many countries do- so surely there has to be a reason why such an important aspect of corporate law has previously not been given serious consideration when discussing opt out arrangements.

In the authors' opinion, undoubtedly the main reason why dispensation powers of corporate regulators have not been seriously considered as formal mechanisms facilitating opting out of corporate law is

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53. In the US, the point has only been touched on in passing, with recognition that the role of regulators (amongst other bodies) in the context of opting out 'deserves to be the subject of scholarly debate': see Bebchuk, supra note 12, at 1851:

Although the main concern of this article to demonstrate the desirability of limits on midstream opting out rather than in the exact details of implementation, it might still be useful to note briefly some of the implementation issues that arise in designing these limits. One question that arises is institutional. With respect to any given issue, which legal institution should be charged with the role of shaping the standard legal arrangement governing the issue and with selecting those aspects of this arrangement from which opting out in midstream should not be possible? The options include legislatures (federal or state), courts, and agencies. (emphasis added)

54. See Coffee, supra note 28, at 972 in which the author gives fleeting consideration to the possibility of regulators having some involvement in opt outs (through the Securities and Exchange Commission ('SEC') approving amendments to stock exchange rules etc), and Bebchuk, supra note 12, at 1397-9 who comments very briefly on regulatory relief by SEC, as a kind of 'opting out'. Professor Bebchuk writes that:

The freedom-to-opt-out advocates have already had much influence. On the practical side, they have had an impact on the direction of law reform and law change. The American Law Institute Reporters, for example, recently proposed permitting opting out with respect to some significant issues. The SEC recently requested comments on a proposal to provide companies with substantial freedom to opt of federal takeover rules. And the state of Delaware recently permitted corporations to adopt charter provisions that eliminate or restrict director liability for breach of their duty of care. Id. (emphasis added)
the company and its shareholders do not have complete freedom to decide whether or not to opt out of a relevant provision(s) - relief being dependant on the regulator, e.g. the ASIC, providing consent. Thus, on this view, attaching a dispensation power to a particular provision does not alter the mandatory nature of the provision - companies are required to comply with the provision unless and until the regulator decides to provide relief. In other words, the ultimate discretion as to whether or not a company will comply or opt out of a provision is not with the company, but with the regulator.

Accordingly, continuing this argument, there is a fundamental gulf between traditional private ordering or ‘contracting out’ of a corporate law rule by obtaining the approval of shareholders within the corporation, and the operation of a dispensation power by the public regulator outside of the corporation. The former involves literally opting out of a corporate law rule, the latter does not involve opting out of corporate law, but instead entails an alternative form of corporate law rule - abide by the procedure of obtaining approval by the regulator to be relieved from complying with a specific obligation or procedure in the Act.\(^5\) Put simply, opting out of corporate law must be a strictly private affair - once there is the ‘public’ involvement of the regulator, the arrangement cannot be described as ‘opting out’ but rather compliance with an alternative form of corporate law rule.

In the authors’ opinion, however, this is a rather specious argument to run. The authors want to make it quite clear that one can never truly escape corporate regulation, even if the purpose of an arrangement or legislative initiative is to ‘avoid’ corporate law rules. To be able to avoid or limit the application of a corporate law rule to a particular entity, person or circumstance itself requires some form of consenting action for this - either through the enactment or adoption of a legislative or executive rule authorizing this, or judicial endorsement of a particular arrangement (e.g., ratification by shareholders of a

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\(^5\) On this point, Professor Cheffins would not associate regulatory waiver with opting out of corporate law, but would instead label such a regulatory waiver as the exercise of a ‘presumptive rule’ - another form of corporate law rule to a mandatory rule. In his book, supra note 25, at 257, Cheffins divides corporate law rules into three basic categories: permissive (‘may’) rules, presumptive (‘may waive’) rules and mandatory (‘must’ or ‘must not’) rules. Cheffins states that:

Presumptive measures play a central role in this process. Unlike permissive standards, where opting in is required, laws of the presumptive variety apply unless the parties opt out. Hence, with issues which company participants have not addressed explicitly in documentation governing their relations, presumptive rules will apply by default and thereby fill the contractual gaps.
transaction in breach of a director’s duty to avoid conflicts of interest).\(^56\)

Accordingly, just like an individual’s “freedom” in society does not provide a license to kill a person or steal from others, contractual “freedom” in corporate law does not exist in its purest possible form—freedom is necessarily subject to ‘boundaries’. Contractual freedom in corporate law is embraced to provide for flexibility tempered by efficiency, and its reach therefore cannot extend to any opting out arrangements when many of these default arrangements would be inefficient. Professor John Coffee (“Coffee”) once wrote, in an important contribution on the judicial role in opting out of corporate law, that the courts have developed ‘standards’ which companies endeavoring to opt out of particular corporate law rules need to work within to prevent their default arrangements being struck down by the court once challenged, thus constructing a boundary around the freedom that companies have to opt out of particular corporate law rules that are enabling in nature.\(^57\) According to Coffee:

If the new breed of lawyer-economists is to be listened to by the courts, they must, in turn, listen to how courts think. How then do courts think about contractual freedom and opting out? Clearly, they do not view statutory corporate law as simply a body of default rules, which shareholders may waive at will. Rather, courts exercise substantial discretion to accept or reject a contractual innovation, depending upon whether they attribute a “fat” or a “thin” policy to the statutory norm asserted to be in conflict with the charter provision. As a statute begins to seem obsolete or superfluous, courts have recurrently shown a willingness to shirk their conception of its

\(^{56}\) See Black, supra note 22, at 584 (On the judicial role in opting out of corporate law, Black describes judicial power to interpret legal rules broadly or narrowly as a “counterweight” to legislative accommodation to “corporate preferences”). *Id.* See also Sandra K Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609 (2004) (explaining how in the context of LLC’s (limited-liability companies), courts are developing minimum standards of conduct through restricted interpretation of contractual waivers, vigorous application of the ‘entire fairness standard’, and recourse to contractually broad concepts of good faith). *Id.* See also Michael J Whincop, *The Immanent Conservatism of Corporate Adjudication: Thoughts on Kingsford Smith’s ‘Interpreting the Corporations Law’* 22 SYDNEY L. REV. 273 (2000) (for an Australian perspective on the judicial role).

Because the forms of opportunism vary between contracts, the freedom to contract in relation to matters of governance is strongly desirable. There is ample doctrinal proof that until statute intervened and gradually removed those freedoms, the law took a highly enabling approach to governance, including changes to or amendments of legal principles and duties. The law was characterised by a strong preference for resolving particular issues by ongoing private ordering and dispute resolution. *Id* at 279-80.

underlying policy, but only on a few occasions have courts converted a mandatory norm into a default one.58

In his article, Coffee considers the cases where courts have been confronted with attempts to contract out of corporate law, and attempts to understand how courts might and should respond to innovative departures from the 'traditional norms of corporate governance'. The article also focuses on the process of statutory interpretation and asks when, if ever, courts should make new mandatory rules or change old default rules. In reviewing the cases, Coffee explains that it can be seen that the courts develop standards for opting out so that shareholders are not able to opt at will- and makes it clear that it cannot therefore be said that there is complete contractual freedom.59 One example Coffee provides to support his contention is judicial decisions indicating that the courts prefer transaction-specific modifications or exemptions from fiduciary duties as opposed to ongoing relief.60 Furthermore, opting out of fiduciary duties has always been subject to the limitation that directors continue to meet a standard of good faith in their commercial behavior.61

In light of the above, the authors believe that there is no conceptual barrier to labeling dispensation powers of a corporate regulator, and particularly the ASIC's power to grant exemptions and modifications,

58. Id. at 1690.
59. Id. at 1665.
60. Id. at 1677.
61. Id. at 1655-6. Given this role of the courts in setting the standards for opting out to ultimately protect shareholders and provide for effective corporate regulation, Coffee constructs a proposed 'black letter' rule providing an exploratory vehicle 'by which to examine possible trade-offs between the desire to permit innovation and the fear of opportunism'. Coffee explains the rule (comprised of five basic limitations), and then makes reference to a series of cases which have adopted aspects of the various approaches contained in the rule. Coffee states:

A court should uphold and give effect to a contractual provision that would otherwise be deemed invalid as in conflict with the corporate law of the jurisdiction if and only if:

(1) the provision does not:
   (A) reduce or restrict the obligation of persons occupying a fiduciary relationship to the corporation to deal fairly and to act in good faith; or
   (B) conflict with the clear purpose of any statutory provision or with an established public policy intended to protect persons or interests other than shareholders;

(2) either the provision:
   (A) is sufficiently specific and limited in its application that the parties reasonably could believe it would better serve their interests;

(3) if the provision was adopted by a charter amendment, it was approved by a disinterested majority of the shareholders under circumstances where a rejection of the amendment would not cause them to be worse off than they were prior to the proposal of the amendment. Id.
as a formal mechanism to 'opt out' of corporate law rules. There is no major difference between a private arrangement between the company and its shareholders or some other stakeholder which is subject to court challenge if constructed in a manner operating outside the realm of traditional norms of corporate governance (e.g. allowing commercial behavior by directors which does not comply with standards of good faith), and the power of a corporate regulator to grant an exception or modification to a particular company from the operation of a corporate law rule.

Both mechanisms are subject to supervision, explicitly or implicitly, by a public body- placing limits on the discretion of the company; both mechanisms allow for the avoidance of a corporate law rule(s) in particular circumstances; both mechanisms are designed to ultimately accommodate a greater sense of flexibility and efficiency in corporate regulation; and both mechanisms are themselves constructed by a corporate law rule and thus ultimately operate inside rather than outside

62. This view is also supported by the unique nature, or 'peculiarities', of relational contracts (typically arrangements between the company and its shareholders- including arrangements to amend the company constitution- and thus also labeled 'inter-shareholder contracts') which are the mechanism usually used to opt out through private ordering. As discussed in Riley, supra note 25, some judicial and legislative intervention is a necessary characteristic in order to effectively organize the various relationships and interests involved in such contracting. According to Riley:

[A]lthough contracts provide the most appropriate theoretical framework for conceptualising the inter-shareholder relationship, the precise nature of this contract, and more importantly its normative treatment, can be understood only in the context of the specific and peculiar nature of that relationship itself. Ordinary contractual analysis . . . applies uneasily here. In consequence, the corporate contract is characterised by a process of active judicial construction rather than mere passive judicial discovery, a constructive process in which contractual freedom becomes, of necessity, limited. Id. at 785 [The necessary limitations of contractual freedom in this sense is the main point which is to emphasized]

The article goes on to say that agreements between shareholders represent a typical long-term relational contract, where the parties are bound together and do business over a long period of time, therefore requiring different considerations than for discrete, on-off agreements.

[W]hile the relationship between shareholders might be described as contractual, that label needs adapting to the peculiarities of the corporate context in a number of ways. . . . The long-term nature of the contract, and its consequential incompleteness, also entails an unusually high degree of legislative and judicial intervention. Such intervention inevitably limits the contractual sovereignty enjoyed by shareholders. Id. at 790 (emphasis added).

Riley also states:

. . . [C]ontract provides the most appropriate model for comprehending corporations and for comprehending corporations and for theorizing the relationship between corporate actors. . . . However, . . . the peculiarities of that relationship imply that complete contractual freedom is neither descriptively accurate nor normatively desirable. The inter-shareholder contract has to be controlled by the legislature and constructed by a judiciary alert to those peculiarities. Id. at 802.
the realm of corporate law. Accordingly, if there is general consensus that traditional private arrangements, or 'private ordering', can be said to constitute 'opting out' of corporate law, then surely it can convincingly be said that the utilization of dispensation powers by a corporate regulator provides for 'opting out' of corporate law.

Now that the authors are satisfied that the dispensations power of a corporate regulator, and more specifically the ASIC's power to grant exemptions and modifications, can be characterized as a mechanism to facilitate opting out of corporate law rules, in the next Part the authors outline their proposal to extend the ASIC's relief powers to provide companies with the opportunity, in defined circumstances, to 'opt out' of provisions of the Corporations Act expressing important governance rights for shareholders.

IV. Towards an Extension of the ASIC's Exemption and Modification Powers: 'Quasi-Opt Out' of the Corporations Act

In the preceding part of this article, the authors suggested that the statutory power provided to the ASIC to grant exemptions and modifications from the operation of various provisions of the Corporations Act may be considered as a formal mechanism to 'opt out' of these provisions of the Act. The authors also explained, however, that, curiously, very little has in fact been written about the ASIC's dispensation powers, either on a descriptive level or from a normative basis. Another curious feature of the ASIC's powers is that they do not apply in relation to provisions of the Act providing direct participatory rights for shareholders. Yet, as the recent events explored in part two of this article show, it is in fact these provisions which companies have sought to work around. In part three above, the authors provided an explanation as to why we believe the ASIC's dispensation powers should be considered as a mechanism facilitating opt out arrangements. In this part, the authors will propose that these powers should be extended to apply to provisions containing participatory (or 'governance') rights for shareholders (including sections 203D and 249D discussed above). Before doing this, however, it is important to fill in a gap in the commentary on the ASIC powers, by briefly exploring the history and rationale of these powers, and to determine whether there is an explanation for why the ASIC's powers apply only selectively to some provisions of the Corporations Act- and not to others.
A. Commentary to Date on the ASIC’s Exemption and Modification Powers

1. History and Rationale of the Powers

The power of the corporate regulator to provide relief is said to originally derive from the Companies (Acquisition of Shares) Act 1980 ("Takeovers Code"), as one of a number of important developments in the regulation of takeovers law in Australia introduced under this enactment. The regulator at the time, the National Companies and Securities Commission ("NCSC") was provided with this discretion to grant relief from the provisions of the Takeovers Code as it was readily acknowledged that many provisions in the Code were quite complex and volatile, and strict application of the provisions to instances of takeover conduct could produce unintended and undesirable consequences. Furthermore, it was considered impossible to construct a black-letter takeovers law which would cover all the unforeseen circumstances which arise from takeover activity, and again the ASIC’s dispensation powers were considered important here in providing for flexibility in takeovers regulation.

Before the adoption of the Takeover Code, there was some suggestion that Australia should adopt a ‘general principles’ approach to national takeovers regulation like in the United Kingdom, rather than a ‘black letter law’ approach like in the United States. It was ultimately settled that a ‘black letter law’ approach was preferable, but only on the basis that the new regulator, the NCSC, would have discretionary power to grant relief from the operation of takeover provisions. In one of the first evaluations of the 1980 Takeover Code and its provisions, Quentin Digby wrote that:

The enactment of the Companies (Acquisition of Shares) Act 1980 (Cth) heralded an important development in the regulation of corporate takeovers in Australia. The National Companies and Securities Commission (the NCSC), which under the legislation became the body primarily responsible for administering the Takeover Code, was given an unprecedented level of discretionary power. The principal discretions accorded to the NCSC empowered the Commission to extend or reduce the coverage and effect of the Code in its application to particular instances of takeover conduct.

... The 1980 Takeover Code represents a unique regulatory mix. As had been the case with earlier codes, the law spelt out in a detailed "black letter" form. However, to introduce flexibility and to enable
enforcement of the "spirit" of the Code, wide discretions were vested in the NCSC to modify the effect and coverage of the law. Quentin Digby went on to explain that the dispensation powers given to the NCSC in the Code ensured that there was a 'commercial realistic approach' to the operation of the Takeover Code.

In the High Court of Australia's decision of *ASIC v DB Management Pty Ltd. and Others; Southcorp Wines Pty Ltd. v DB Management Pty Ltd. and Others,* handed down in 2000, a useful discussion on the origins and rationale of the corporate regulator's dispensation power was also provided. According to the Court:

Sections 57 and 58 of CASA [the *Companies (Acquisition of Shares) Act 1980* (Cth)] contained provisions corresponding to Sections 728 and 730 of the Law. Section 57 empowered the [NCSC] to exempt a person from compliance with all or any of the requirements of the Code. Section 58 empowered the NCSC to declare that the Code should have effect in its application to or in relation to a particular person or persons in a particular case as if a provision or provisions of the Code was or were omitted or varied or modified as specified, and 'where such a declaration is made, the Code has effect accordingly'.

This represented a legislative response to a problem of policy concerning regulation of takeovers. It involved a compromise between the technique of general legislative prescription applying inflexibility to all cases, and that of administrative discretion addressing issues on a case by case basis. The NCSC was given power, not merely to determine that, in certain cases, the legislative scheme would not apply, but also to modify or vary the operation of the scheme... *It created a new set of rights and obligations.*

Since this relief power was first introduced in the Takeover Code, it has over time been extended to apply to many other areas of Australia's corporations law. A similar power was considered necessary when a complicated regime facilitating share buy-backs was introduced later in the 1980's (although does not operate under the present buy-back provisions in the Act which have been significantly rationalized), and has since also been utilized to provide for commercial flexibility in relation to the financial reporting provisions (except the removal of auditors under section 329) in part 2M, the fundraising provisions (Ch 6D), provisions regulating managed investment schemes (Ch 5C) and, most recently, was incorporated as a very important component of the financial services regime under Chapter 7 of

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64. Id. at 218.
65. 33 ACSR 447 (2000).
66. Id. at 464 (emphasis added).
the Corporations Act. The power was first vested in the NCSC, then the Australian Securities Commission ("ASC") and now the ASIC.

Although over time the reach of the ASIC's relief powers has extended to apply to most substantive provisions under the Corporations Act, what is very interesting is that the powers do not apply to provisions in the Act containing important participatory rights for shareholders, such as section 203D and the 100 member rule in section 249D(1). This has not been an accidental omission. When one looks at the Corporations Act in its entirety, it is quite clear that the exclusion of the ASIC's powers of relief from these provisions is quite deliberate. For example, the ASIC is given the power to exclude or modify the operation of particular provisions of part 2M of the Act regulating financial reporting, however specifically excluded from this power is the provision stating that the removal of a company's auditor(s) is to be approved by an ordinary meeting of shareholders. Moreover, the various rights of shareholders in relation to company meetings under part 2G.2 (e.g. the power of 100 shareholders to requisition a shareholder meeting under section 249D(1)) can be modified, but only by the passage of Regulations under the Act, not by the ASIC.

As the authors are proposing to extend the ASIC's relief powers so that they do apply to these shareholder-empowering provisions, what follows below is a brief exploration of why the ASIC's powers have been limited in this way, and whether these reasons act as a barrier to utilizing and extending the ASIC's powers of relief to facilitate opt out arrangements in relation to shareholder rights.

2. Scope of the ASIC's Powers: Why do the Powers apply to some Provisions but Not Others?

To exclude the operation of the ASIC's relief powers from the shareholder-empowering provisions of the Act seems to be quite an arbitrary and unjustifiable restriction, but is there any convincing explanation highlighting why the ASIC's powers are limited in this way? The authors do not think so. Following is a brief explanation of the main factors that could be relied upon to oppose extending the ASIC's powers in the way the authors are intending, along with our response to each.

a. Purpose of ASIC's Relief Powers

In the Explanatory Memorandum to the Financial Services Reform Amendment Bill 2003, the following explanation of the origins and rationale of ASIC's powers was provided:
ASIC uses its exemption and modification powers to provide administrative relief from the operation of various provisions of the legislation in circumstances where it judges that application of those provisions is not warranted, or that they should apply in a modified way. In most situations, the exemption and modification powers are exercised in response to requests for relief from parties who are experiencing difficulties complying with a particular provision of the legislation or where the application of the provisions is not appropriate in particular circumstances.

Depending on the circumstances, the strict operation of the legislation may produce unintended or unreasonable results. Moreover, exemptions and modifications will often be necessary to facilitate innovative products that were not contemplated at the time the legislation was drafted, while maintaining an appropriate degree of investor protection.

The limitation mentioned above which prevents ASIC from declaring that a provision is modified such that it applies in relation to a person and/or financial product to which it would not otherwise apply presents a substantial impediment to the effective use of the exemption and modification powers.67

In the previous section of this article it was explained that the dispensation powers of the corporate regulator were originally introduced to provide for some flexibility in the application of very complex and difficult provisions of the companies legislation, where unforeseen consequences may arise from strict application of the provision(s). Based on this, it could be argued that it is totally understandable that shareholder-empowering provisions do not allow for modification or exemption by the ASIC, as the provisions are typically clear and simple to apply. For example, we know that by including section 203D in the Corporations Act, a consequence is that shareholders must be notified of, and be given the opportunity to vote for or against, any resolution to remove a director from office. Similarly, we know that even in the largest of corporations, with hundreds of thousands of shareholders, as little as 100 shareholders can demand that the company convene a extraordinary general meeting, pursuant to section 249D(1) of the Act. It may be at times inconvenient to the company and its directors, but it is not an unforeseen consequence of the provision.

The above statement from the particular Explanatory Memorandum also makes clear that a purpose of the ASIC's powers is to ensure that if complex provisions cause unintended or unforeseen consequences, something can be done about it. Yet, as the Explanatory Memorandum highlights, this is only one reason for the application of

the ASIC's powers. No longer are the powers in place simply to supplement black-letter takeover code provisions; the regulator's powers now extend quite widely to provide for commercial flexibility in the application of a range of different areas of Australian corporate law.

Relief powers can be used by the ASIC when a company has difficulties complying with a particular provision or provisions of the Act, or when the strict application of the Act would produce unreasonable results.\textsuperscript{68} This is precisely what has occurred recently in relation to some of the shareholder rights provisions in the \textit{Corporations Act}, in particular sections 203D and 249D, and why some companies have attempted what is in effect opt out arrangements to try and avoid the operation of these provisions. Accordingly, the authors believe it is quite justifiable to at least make available the option of avoiding the strict application of shareholder rights provisions. There will, of course, need to be safeguards built into an extension in the ASIC's powers in this way, and this is provided for in the authors' proposal outlined below.

\begin{itemize}
\item[b. Replaceable Rules]
\end{itemize}

Another explanation that may be raised for why the ASIC's relief powers do not apply to shareholder participatory rights, is that such rights relate to the internal governance arrangements of the corporation, and provisions dealing with these arrangements are included as 'replaceable rules', which shareholders can essentially 'opt out' of already. As was explained earlier in this article, in 1998 the old Table A provisions was replaced with 'replaceable rules'. Section 141 provides quite an extensive list of the provisions in the Act which are 'replaceable rules'. The company can 'opt out' of a replaceable rule by including alternative arrangements in the company's constitution, which requires the approval of a special resolution of shareholders. Only provisions which are designed to assist companies in organizing the internal governance arrangements within the organization are 'replaceable rules'.

Accordingly, the argument would be as shareholder participatory rights do relate to the internal governance relationship between companies and its shareholders, if it is felt that there should be some avenue for companies to 'opt out' of a shareholder right if it produces difficulties or unintended consequences, the provision should simply be amended to become a replaceable rule, rather than attaching a dis-

\textsuperscript{68} So long as the relief is consistent with ASIC's general policy towards relief applications under Policy Statement 51, which states that ASIC will consider granting relief were the regulatory detriment is minimal and is clearly outweighed by the resulting commercial benefit.
pensation power to be exercised by the ASIC. The authors believe that this is probably the strongest argument against extending the ASIC’s dispensation power to apply to shareholder rights, given that it involves some input by shareholders and would certainly simplify corporate regulation given that there is a workable replaceable rules regime already in operation.

The authors believe, however, that providing for flexibility in the application of shareholder rights provisions through an ASIC relief power, rather than by expanding the replaceable rules regime, would provide for greater shareholder protection and participation. This will become clear when the authors outline and explain their proposal for law reform below, in particular when we explain that a ‘special majority’ of shareholders will be required to approve any relief application, and the ASIC will need to absolutely satisfied that granting relief (in the form of an exemption or modification) would be in the best interests of shareholders as a whole for the duration of time in which relief is granted.

Thus, the authors do not consider the existence of the replaceable rules regime in the Act to be any reason not to go ahead with our proposed extension of the ASIC’s dispensation powers to apply to shareholder rights which form part of the internal governance arrangements of the corporation.

c. Avenue for Corporations Regulations in Shareholder Rights Provisions

In part three, reference was made to the fact that there are a few provisions in the Act-especially provisions in Pt 2G.2 giving shareholders certain participatory rights in relation to company meetings-which allow for modification of shareholder rights, yet by way of making regulations under the Act, rather than through ASIC relief. For example, section 249D(1A) allows for the modification of the rule contained in section 249D(1) allowing shareholders to call an extraordinary general meeting.

Therefore, at least in relation to those provisions where there is the option available of making regulations to modify a particular shareholder right, it could be argued that the ASIC’s dispensation powers are not required. Isn’t it more desirable that the Government, which is elected by the people and is subject to public scrutiny, should be given the authority to modify or exclude important participatory rights of shareholders, rather than delegating this power to a corporate regula-
tor which is un-elected and subject to very little public scrutiny?\textsuperscript{69} Notwithstanding the availability of this regulation-making power, there are, however, a number of reasons why the authors believe a dispensation power is required.

Perhaps the strongest reason why the regulation-making power is not an effective substitute for an the ASIC dispensation power is due to the difficulty in actually getting regulations enacted. First, the Government needs to be satisfied that there is a case for the making of regulations to modify the operation of a shareholder rights provision, which is going to be unlikely due to effective shareholder participation being such an important objective in corporate law reform. Any proposal to limit or restrict the application of a shareholder right, even if such limitation or restriction would be in the overall best interests of shareholders, would not be picked up. Furthermore, if a proposal to amend a rule through regulations is adopted, there is still a strong chance that any measure which ostensibly reduces the rights of shareholders would be disallowed by the Parliament. This was seen with the difficulties the Howard Government had back in 2001 in trying to amend the 100 member rule in section 249D(1) through regulations. The Senate disallowed the making of that particular regulation as it was considered to impact adversely on shareholders, in particular minority shareholders.

Due to these difficulties with the political process, the application of this regulation-making power is not considered a realistic option by companies to modify the strict operation of the shareholder rights provisions in the Act. This is demonstrated by the fact that Boral, in the example discussed in Part Two of this article, resorted to a constitutional amendment- relying on section 136(3)- to try and work around the application of sections 249D and 249N of the Act, rather than approach the Government to introduce regulations so that the 100 member rule in these provisions would be modified for Boral.

What is also a significant weakness of the regulation-making option to avoid or modify certain statutory shareholder rights is that there is no requirement to consult shareholders or for shareholders to approve a modification of a particular shareholder right through regulations. As discussed above, an important feature of the regulation-making power is that regulations can be made for a particular company, or a particular class of companies. Therefore, if say Telstra or Optus approached the Government to amend by regulations the 100 member

\textsuperscript{69} See Bottomley, supra note 52 (for an excellent recent exploration and evaluation of the increase in delegated law-making in corporate law).
rule in section 249D(1) to increase the threshold requirement to 10,000 shareholders, the Government drafted regulations to this effect and they were not disallowed by the Senate, the rights of shareholders would be significantly impacted upon, without a shareholder vote on this change, and perhaps without shareholders even being notified until the following annual general meeting of the company. This does not seem to be consistent with strong shareholder democracy or effective corporate regulation.

While it is usually the case that shareholder approval is also not required for the ASIC to grant relief in the form of an exemption or modification from a rule, under the authors’ proposal for extending the ASIC’s dispensation power to apply to shareholder participatory rights, it will be a requirement that a special majority of the relevant company’s shareholders must first support the relief application. The ASIC will also need to be satisfied that the relief application relating to a shareholder right will be in the best interests of shareholders as a whole before relief can be granted. Accordingly, in terms of ensuring that shareholders are adequately informed and participate in any proposal to modify their statutory rights, the authors’ proposed use of the ASIC’s dispensation power is certainly preferable to the use of regulations to achieve flexibility in the application of these shareholder rights.

B. Structuring the Author’s Law Reform Proposal

1. Overview of the Author’s Proposal

It has been noted a number of times in this article that the ASIC’s power to grant exemptions and modifications does not attach to provisions of the Corporations Act containing shareholder governance rights, and that the authors intend to extend the ASIC’s powers so that they do apply to provisions of the Act dealing with these shareholder rights. In the previous section of this article, the authors provided some explanation for why the ASIC’s powers have not to date applied to these provisions. As will be explored below, we do not believe that this explanation justifies limiting the ASIC’s powers in this way. Given that the two key recent examples of opting out of corporate law in Australia both related to provisions of the Act containing such shareholder governance rights, it is obviously important to focus on this development, and consider how to respond in the best possible manner to ensure effective regulation.

At this point, so that readers begin to understand exactly what the authors are proposing, it is important to provide a brief summary of
the authors' proposal, which will be clarified in more detail below. The main features of the proposal are:

- The ASIC's existing power to grant exemptions or modifications from the Act will be extended to apply to provisions containing 'governance rights' exercisable by shareholders. The concept of 'governance rights' is defined below.
- The bulk of the detail about how the ASIC will approach applications for relief from these 'governance rights' provisions of the Act will be contained in a Policy Statement to be issued by the ASIC, after consultation with the Department of Treasury (with a memorandum of understanding drafted following this consultation). Key features to be contained in the Policy Statement will be:
  - (a) in order for relief to be granted, a 'special majority' of shareholders of the company will need to approve of the application for relief.
  - (b) the ASIC can set the duration of time for which relief is granted, with the maximum time being five years.
  - (c) in all applications for relief to the ASIC, the company will need to outline their case as to why the proposed exemption or modification is in the best interests of shareholders as a whole.
  - (d) all declarations of relief, being either a modification or exemption from a provision of the Act containing a governance right for shareholders, will contain a condition that relief will only continue while it is being utilized by the company in the best interests of shareholders. The ASIC will be able to withdraw a declaration of exemption or modification at any time if it is satisfied that the company is abusing the exemption or modification.

Given that an application for an exemption or modification from the operation of express shareholder governance rights needs to be approved by a special majority of shareholders, and the ASIC will only be able to approve an application if it is satisfied that the relief will operate in the best interests of shareholders, it is envisaged that the main provisions where relief will be sought and granted would be section 203D (in situations where- like with the National Australia Bank example- convening a general meeting to vote on a resolution for removal of a director is considered a major inconvenience to all stakeholders in the company), and the '100 member rule' in section 249D-which it is regularly argued gives too much power to minority shareholders in large corporations where 100 shareholders is but a fraction of a fraction of the entire shareholder base.
2. Scope of the Authors' Proposal

In the above outline, reference is made to the 'governance rights' of shareholders. But what are the authors referring to when using this term? Does this mean any provision in the Act which empowers shareholders in some way?

To provide some context for what the authors are describing, it is useful to start with a working definition of 'corporate governance'. In his Report to the Royal Commission into the HIH Collapse, Justice Owen attempted to define the concept in this way:

While numerous renditions of the term can be found in the literature, many of them useful, corporate governance is not a term of art. At its broadest, the governance of corporate entities comprehends the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations. It includes the practices by which that exercise and control of authority is in fact affected.

The relevant rules include applicable laws of the land as well as the internal rules of a corporation. The relationships include those between the shareholders or owners and the directors who oversee the affairs of the corporation on their behalf; between the directors and those who manage the affairs of the corporation and carry out its business, and within the ranks of management, as well as between the corporation and others to whom it must account, such as regulators.70

The emphasized part of the above extract states that the concept of corporate governance encapsulates, amongst other things, the relationship between the shareholders and the directors in relation to the oversight by directors of the affairs of the corporation on the shareholders' behalf. The 'governance rights' of shareholders are therefore the rights provided to shareholders so that they have a sense of empowerment and participation within the corporation to ensure that directors do have the interests of shareholders in mind when overseeing the corporation. The OECD, its recently-revised Principles of Corporate Governance (released in April 2004) referred to such rights as being 'fundamental' rights which facilitate effective shareholder participation in the corporation,71 and Australia's Companies and Securities Advisory Committee ("CASAC"), in its June 2000 report, Shareholder Participation in the Modern Listed Public Company, ex-

explained that these rights arise by making shareholder approval a requirement for certain 'key decisions' made by the corporation.\textsuperscript{72}

In defining the governance rights of shareholders in this way, for the purposes of this article it is important to make a few things clear. First, the concept of governance rights strictly relates to 'rights'- while the remedies available to shareholders (for example, section 1324 injunctions, the oppression remedy, and a number of other commercial remedies) might also empower shareholders and facilitate a participatory role for shareholders in the corporation, we exclude such remedies from our proposal. Secondly, the authors strictly confine their concept of 'governance rights' to those rights expressed in the \textit{Corporations Act}. The concept does not extend to rights available to shareholders under common law or in equity, or under other statutory schemes. Third, we exclude all the provisions of the \textit{Corporations Act} which are expressed to be 'replaceable rules', or which include a clause stating 'unless the company constitution provides otherwise' (e.g. the procedure for varying and canceling class rights under Part 2F.2) from the concept of 'governance rights'. While some of these provisions may provide some sense of empowerment to shareholders in relation to the internal affairs of the company (e.g. the replaceable rule in section 201G that shareholders must assent to the election of a director to the company), companies and their shareholders can already 'opt out' of these provisions through including alternative arrangements in the company's constitution, and we do not see any need to change this system. Fourthly, the authors exclude from the concept of 'governance rights', rights which form part of mechanisms under the Act in where court approval or authorization is required. Examples include the right of shareholders under section 247A to apply to inspect the books of a company or managed investment scheme, and the right of shareholders to vote on a scheme of arrangement (usually designed to effect a merger of two companies) under part 5.1 of the Act. It is the opinion of the authors that court oversight in relation to these procedures, particularly for schemes of arrangements under part 5.1 which are heavily supervised by the court, ensures that they are utilized in the best interests of shareholders already, and therefore replacing court supervision with the ASIC supervision would not provide any major benefit to shareholders. Finally, the 'governance rights' which the authors are referring to in this article are provisions for which the ASIC's exemption and modification powers do not al-

ready attach (which is not significant because, as discussed, the powers do not at this time attach to shareholder rights).

In establishing these parameters, it is important to now outline the particular provisions in the Corporations Act which the authors believe contain 'governance rights', as defined, for shareholders. We believe that the following provisions contain the entirety of shareholder governance rights in the Corporations Act, however we certainly remain open to including in our proposal any further provisions which fit within the parameters of 'governance rights' mentioned above. The relevant provisions are:

- Section 136(2)- Shareholders must approve amendments to the company's constitution through a special resolution.
- Sections 200B and 200E- Termination benefits under Pt 2D, Div 2 require the approval of members (approval under s 200E).
- Section 203D- Shareholders are given the power to remove directors through an ordinary resolution. As a consequence of attaching a dispensation power to section 203D, it is also proposed that section 203E- stating that a resolution, request or notice by directors of a public company purporting to remove a fellow director from office is void- would also be amended to include a dispensation power, even though the section does not strictly contain a 'governance right'.
- Chapter 2E- Section 208 of the Act provides that shareholder approval of non-exempt related party transactions is required in accordance with the procedure under sections 217-227.
- Section 249D(1)- The directors of a company must call and arrange to hold a general meeting on the request of:
  ii. members with at least 5% of the votes that may be cast at the general meeting; or
  iii. at least 100 members who are entitled to vote at the general meeting.
- The equivalent provision to section 249D(1) for members of managed investment schemes- section 252B.
- Section 249F(1)- Members with at least 5% of the votes that may be cast at a general meeting of the company may call, and arrange to hold, a general meeting. The members calling the meeting must pay the expenses of calling and holding the meeting.
- The equivalent provision to section 249F(1) for members of managed investment schemes- section 252D.

73. We base this conclusion on the examples of such rights referred to in the OECD's Principles of Corporate Governance and the CASAC's report on shareholder participation, supra notes 72-73, and also the parameters set out supra.

74. One of the authors has also written recently that the law with the removal of directors should be changed so that companies can 'opt out' of the procedures under Section 203D by incorporated a performance assessment policy in the corporate constitution, which facilitates removal by the board if a director falls below certain performance criteria. See McConvill, supra note 9. That proposal builds upon, rather than conflicts with, the authors' proposal in this article.
• Section 249N(1)- Shareholders with at least 5% of the votes that may be cast on a resolution or at least 100 shareholders who are entitled to vote at a general meeting, may give a company notice of a resolution that they propose to move at a general meeting.

• Section 249P(1)- Shareholders may request that a company give to all its members a statement provided by the shareholders making the request about a resolution which is proposed to be moved at a general meeting, or any other matter that may be properly considered at a general meeting. Under subsection (2), the request must be made by: (a) members with at least 5% of the votes that may be cast on the resolution, or (b) at least 100 members who are entitled to vote at the meeting.

• The equivalent provision to section 249P(1) for members of managed investment schemes- section 252L.

• Part 2J.2- Provisions for the approval of various transactions affecting share capital (including shareholder approval of reductions of capital under section 256C, ordinary resolution for non-selective buy-backs- see section 257C, and a special resolution for selective buy-backs- see section 257D, and shareholder approval for non-exempt financial assistance under section 260A).

• Section 329- Removal of auditors by resolution of the company at a general meeting.

The authors have included sections 249D, 249F, 249N and 249P in our list, and the equivalent provisions applying to managed investment schemes, despite the fact that with these provisions they can already be modified through the passage of regulations under the Act. As the authors have already noted above, however, the regulation-making power is not really an effective mechanism for opting out of a provision due to the difficulties involved in getting the Government to pass regulations.

In the course of thinking about, researching for and developing this article, there was one question which weighed heavily on the minds of the current authors: what should be the scope of our proposal? If we are to propose utilizing and extending the ASIC's relief powers in order to facilitate opt out arrangements in relation to the governance rights of shareholders expressed in the Corporations Act, should this proposal apply to all the above-mentioned governance rights, the majority of governance rights, or only a select few? If the proposal is to apply to only certain express governance rights, what is going to be the basis for determining which rights will be covered by the proposal, and which rights will not be?

It must be said that the initial feeling of the authors was that the proposal would need to be confined in some way: perhaps only applying to the provisions of the Act which companies have recently entered into arrangements to avoid- sections 203D and 249D section
Why extend the proposal any further when these seem to be the only express shareholder rights which companies have sought to work around? Further, isn't it too simplistic to say that the ASIC's power of relief should apply across the board to all the governance rights mentioned above? Wouldn't this be too much of an intrusion upon shareholders' rights? On this issue, the authors also considered whether the governance rights of shareholders which already allow for 'opting out' through the passage of regulations should, like the replaceable rules under the Act, be excluded from the authors' proposal. Ultimately, given the difficulties highlighted in part two in utilizing this regulation-making power, the authors resolved that these provisions should also be included as part of the proposal.

At a general level, the authors also spent some time reflecting on whether it is actually necessary in the first place to facilitate opting out arrangements in relation to express shareholder rights included in the Corporations Act. The nature of most governance rights included in the Corporations Act (the main exception being the procedure for removing directors of public companies under section 203D) is that they do not automatically apply; rather shareholders are given the opportunity to choose whether or not they will exercise a particular right. Accordingly, for most governance rights, an opt out arrangement will not be required, as the relevant provisions containing these rights are not mandatory provisions- rather, they are essentially in the form of 'enabling' provisions which shareholders can opt into or chose not to do so. For example, shareholders are not forced to exercise their right to inspect the register of members.

That said, shareholders' governance rights must be considered in the context of the overall operation of the corporation, which exists not to sprinkle rights upon individual shareholders, but rather to benefit shareholders as a whole. The governance rights of shareholders are not solely the concern of individual shareholders; rather we must consider the impact of these rights on the corporation and the majority of shareholders. The utilization of a governance right may benefit an individual shareholder or small group of shareholders, but ultimately be detrimental to the interests of shareholders as a whole.

Therefore, it is reasonable to argue that if the utilization of a governance right by an individual shareholder would be detrimental to the interests of the overriding majority of shareholders, the majority should have some avenue to avoid or modify the application of that

75. See Part II, supra.
76. The 'one hundred member rule' for requisitioning a company meeting or proposing a resolution at a meeting. See Corporations Act, 2001, §§ 249D and 249N (Austl.).
right. Using simple parlance, the majority should rule. Thus we see that there is an avenue for extending the ASIC's dispensation powers to the governance rights of shareholders expressed in the Act. As was discussed above when outlining the authors' proposal for reform, and which will be explained in more detail below, a key feature of the authors' proposal for law reform is that in extending the ASIC's powers to cover provisions containing shareholders' governance rights, a special majority of shareholders would need to approve of the exemption from or modification to a special shareholder right before the ASIC could decide to approve the exemption or modification.

Because of this extra requirement, there would be little or no value in the company going through with an application for exemption or modification if on only one occasion the application of a shareholder right would have unfavorable consequences for the general body of shareholders. Rather, an application for modification or an exemption would need to be for a sizeable period (at least a couple of years) to have a real tangible benefit for the company. On this basis, the authors see no problem in expanding the coverage of the ASIC's dispensation powers to apply to all the governance rights of shareholders, including the requirement for a special resolution of shareholders to amend the company's constitution. Let us explain why.

Having a requirement that a special majority of shareholders (say 90%, see discussion below) must approve of the plan for an express governance right to be excluded or modified in some way means that companies will usually have to structure the relief proposal so that it extends over a sizeable period to make the time and expense of obtaining shareholder approval for the relief worthwhile. Therefore, if a proposal which involves limiting or restricting the operation of shareholders' governance rights for such a period of time is to receive the approval of a special majority of shareholders, the company will have to demonstrate that there are significant benefits for shareholders in dispensing with their rights in the manner proposed. On most occasions, the benefits involved would not justify such a substantial intrusion into shareholders' governance role in the corporation, and therefore would be rejected by shareholders, or would not even be proposed by the company in the first place. If there are such demonstrable benefits to a significant majority of shareholders, and the proposed modification or exemption is approved by such a majority, then the authors see no reason in a company or companies being granted an exemption or modification to a particular right of shareholders.

Another important feature of the authors' proposal which supports applying the ASIC's dispensation power to all the express governance
rights of shareholders mentioned above, rather than limiting the proposal to only some rights, is that before an opt out arrangement is approved, the ASIC will closely scrutinize the exemption or modification to ensure that is in the best interests of shareholders as a whole. This encompasses any minority shareholders who were not represented in the special majority of shareholders who voted in support of the proposal. There are occasions when shareholders are rationally apathetic when voting (believing that however they vote will not have much impact on the outcome of the resolution), or are not sufficiently informed about the resolution which they voted on, and therefore the ASIC's oversight ensures an added degree of protection for shareholders.

Accordingly, no matter what shareholder governance right is sought to be opted out of, whether it be voting to approve of amendments to the company constitution or deciding whether a director should be removed from office, the ASIC will not approve of any form of exemption or modification unless it is comfortable that the interests of shareholders are more favorably represented, and will not be adversely affected, by granting the exemption or modification. Therefore, there shouldn't be any concern in applying the dispensation power as widely as possible, because if an application for modification or exemption will only ever realize if there is overwhelming shareholder support for the proposal and the ASIC is satisfied that it is in the best interests of shareholders for relief to be granted, what logical sense is there in complicated things by saying that the power applies to some rights but not others?

One response to this is that the concern is not necessarily with the immediate reason or circumstance that led the company to propose opting out of a particular shareholder right or numerous shareholder rights, but rather the long-term implications of limiting or completely removing a shareholders' right(s). For example, in reliance upon the factual scenario of the recent NAB boardroom battle, suppose that shareholders approve a resolution to enable the board of a public company to remove a director through the passage of a vote of no-confidence, thus bypassing the operation of section 203D. Shareholders approve this resolution due to the time and cost that has been involved in convening extraordinary meetings in the past to vote on resolutions for removal (given that there are over 2 million shareholders in the company), and the ASIC support the company's action for the same reasons, believing that this means the exemption from Section 203D is in the best interests of shareholders as a whole. That's all fine and reasonable, but what if a small gang of directors (comprising
a simple majority of the board) then use the ASIC's exemption to remove all the remaining directors on the board whom they don't like because, say, they went to Melbourne Grammar School rather than Scotch College, even though those directors had done a good job in terms of increasing profits and producing a healthier share price? Surely such a mutiny within the boardroom is not in the best interests of the company. But what can be done about it?

The authors certainly recognized in constructing our proposal that this potential problem could arise, which is why- as part of our proposal- the ASIC would have the authority to actually withdraw an exemption or modification at any time, if the ASIC considers that the exemption or modification has been utilized by the company or its directors in a manner contrary to the best interests of shareholders. At present, with the ASIC's existing relief powers, when the ASIC grants approval of an exemption or modification, it will often do so subject to certain conditions, upon which if those conditions are not satisfied, the particular exemption or modification will not be available. Given that the interests of shareholders is what the ASIC will principally be concerned about when scrutinizing a proposed application for relief, and when structuring an exemption or modification from a shareholder governance right, it is envisaged that a key condition that the ASIC will impose is that the relief only applies to company actions that are (in the opinion of the ASIC), in the best interests of shareholders as a whole. Accordingly, once the ASIC is alerted to any outlandish behavior by the company or its directors relating to a matter for which relief was granted, the relief will cease then and there. Another important feature of the authors' proposal which should limit the instance of abuse of an exemption or modification occurring is that relief will only be for a limited occasion, not exceeding five years (in most instances, however, it is envisaged that relief will be for the maximum period of five years so that the application was worthwhile). Due to this confined period of relief, therefore, instances of abuse will not be allowed to continue in perpetuity, and companies will seek to avoid any abuse to ensure that when it comes time to renew a modification or exemption, the ASIC will not oppose relief.

Therefore, the necessary structures are in place to protect shareholders at all times if relief in the form of modification or an exemption is approved by the ASIC, and thus there is no strong reason to limit the authors' proposal in any way so that it only applies to some provisions containing shareholders rights and not others.
C. Details of the Authors’ Proposal

1. General

a. Extension of the ASIC’s Relief Power

When one looks at the ASIC’s existing dispensation powers in the Corporations Act, what can be seen is that they provide very little detail. Usually the provision will simply say that the ASIC can provide individual relief on a case-by-case basis from a particular provision or provisions of the Act, or class order relief, and typically will also provide that the ASIC can provide relief subject to conditions.\(^77\) Information about what considerations the ASIC takes into account when determining whether to grant relief, how companies go about applying for relief, and what companies need to include in an application for relief are instead contained in the ASIC policy statements - with the main Policy Statement dealing with applications for relief being PS 51.\(^78\)

With the authors’ proposal, it is intended the dispensation provisions be similarly brief, and simply state that the ASIC can grant relief in the form of an exemption or modification in relation to the relevant provision(s), and that general conditions be imposed on a declaration for relief. While, however, a number of existing dispensation provisions facilitate both individual case-by-case relief and class order relief, the authors’ proposal will only provide for companies’ individual case-by-case relief. Given that the purpose of the proposal is to allow shareholders of a particular company, rather than all companies or a class of companies, some flexibility to decide whether the strict application of an express shareholder right is warranted in the circumstances of that particular company, it is not appropriate to grant wider relief to, say, all companies within a particular industry. It is only one company’s circumstances which justifies the granting the relief. There will be occasions where more than one company in a class may experi-

\(^77\) See Corporations Act, §§ 655A(1) (for relief from Chapter 6 (takeovers)), 669 (for relief from Chapter 6CA (compulsory acquisition)), 741(1) (for relief from Chapter 6D (fundraising)), and 1020F(1) (for relief from Chapter 7 (financial services reform)).

\(^78\) ASIC Policy Statement 51, Applications for Relief, (1996) (Austl.) Contains ASIC’s general policy in relation to applications for relief under the Act, with the statement providing that [PS 51.41]:

When considering new policy applications the [ASIC] attempts to weigh the commercial benefit and any net regulatory benefit or detriment which would flow from granting the sought relief on the conditions proposed. The [ASIC] will grant relief where:

(a) it considers that there is a net regulatory benefit; or

(b) the regulatory detriment is minimal and is clearly outweighed by the resulting commercial benefit.

Id.
ence the same difficulties with the strict application of an express shareholder right. However, the authors believe that when this is the case, each company should individually demonstrate that relief would be in the best interests of its shareholders.

In designing the proposal so that the new dispensation provisions would be consistent in design with the existing provisions in the Act, it is intended that the full details of when and how these provisions can be utilized will be included in a new the ASIC Policy Statement, to which the ASIC will refer to when determining whether to grant relief.

b. Use of the ASIC Policy Statement

1) Background

In setting out the authors' proposal for law reform, the development of a new ASIC Policy Statement to deal with applications for relief from shareholder governance rights forms a very large component of the proposal, even though the ASIC policy statements exist outside of the Corporations Act.

It is proposed that at the same time as amendments to the Corporations Act to extend the ASIC's dispensation powers are being drafted and passed through Parliament, the Government (more specifically, Treasury) should and would negotiate a Memorandum of Understanding with the ASIC so that it is specifically clear what will need to be satisfied before the ASIC can grant relief pursuant to the new dispensation powers of ASIC, and how the ASIC will approach applications for relief.

The main points which are agreed upon and expressed in the Memorandum of Understanding would then be incorporated into an ASIC Policy Statement, adding flesh to the bones of the dispensation provisions in the Act, and making clear what is the rationale for the ASIC's new dispensation powers, and what requirements need to be satisfied in order for relief to be granted. The authors initially contemplated using regulations to set out these requirements so that there would be complete assurance that the ASIC would work within these requirements in dealing with applications for relief. It was ultimately decided, however, that if the requirements are contained in the regulations to the Corporations Act, they would be susceptible to political maneuverings given the sensitivity of interfering with shareholder rights at a time when shareholder participation is proclaimed as being such an important corporate governance objective. This was seen quite clearly with the unsuccessful attempt by the Government in 2001
to amend by regulations the 100 member rule in section 249D(1). Such ‘politicization’ of the extended powers of the ASIC would work to undermine the objectives of the scheme and thus would be totally undesirable. In any event, the Memorandum of Understanding with the Government will ensure that the ASIC exercises its new powers in the manner intended. Whilst the document would not necessarily be legally enforceable, the credibility of the ASIC as an effective or impartial regulator would be diminished if it did not act in accordance with the Memorandum of Understanding- thus ensuring compliance.

The following features of the author’s proposed extension of relief powers will be expressed in the ASIC’s Policy Statement, and taken into account and applied each time it deals with a relief application under the new dispensation provisions.

2) Features of the ASIC’s Proposed Policy on Relief from ‘Governance Rights’

a) Requirement for ‘Special Majority’ of Shareholders

It is not currently a feature of the ASIC relief applications that companies need to demonstrate significant shareholder approval of a particular exemption or modification that is sought. This is because in most cases, any impact on the rights of shareholders is merely a secondary consequence of granting relief. However, as the authors’ proposal involves extending the ASIC’s dispensation power to cover express shareholder rights, we believe it to be necessary and appropriate to include, as a prerequisite to granting relief, a requirement that the ASIC is satisfied that a ‘special majority’ of shareholders support the relief application.

For the purposes of the authors’ proposal, we have defined ‘special majority’ to mean 90% of shareholders with voting rights. In determining the appropriate threshold requirement, the authors based their decision on the existing 90% threshold under the compulsory acquisition provisions of the Act. Under chapter 6CA of the Act, once a shareholder of a company, or the bidder for the company under a takeover, has a full beneficial interest (in the case of the former) or a relevant interest (in relation to takeovers) in 90% of the shares of that company, they can essentially ‘follow through’ and acquire the remaining 10% of shares- so long as a fair and reasonable price is paid for those shares. The authors’ believe there is a strong similarity between our proposed statutory mechanism for relief and the existing compulsory acquisition provisions as both mechanisms operate to take away in some manner statutory rights of shareholders- whether it is
rights vested in particular shares, or the right to remove a director from office by ordinary resolution.

The 90% threshold for compulsory acquisition is considered to be appropriate as once 90% of shareholders are in support of a particular arrangement or have agreed to sell to a particular bidder, the 10% or less of remaining shareholders are really holding up what the great majority of shareholders truly want. It is very unlikely that a single shareholder or small group of shareholders would command 90% of the voting rights, so 90% approval (unlike, say, 75% which is the threshold for special resolutions under the Act) means that there is truly representative support and the small minority shareholders should out of fairness succumb to what the great majority of shareholders desire. The requirement under the compulsory acquisition provisions that a fair and reasonable sum is paid to minority shareholders for their shares ensures that the interests of these shareholders are not just ignored - rather, they are clearly protected under the Act.

The above considerations equally apply to shareholder approval of modifications or exemptions in relation to shareholder governance rights to justify a 90% threshold before it is possible for the ASIC to grant relief. In setting this 90% threshold, the authors do not think it to be necessary, however, to convene a general meeting of shareholders to vote on a resolution seeking relief from the operation of a particular express shareholder right. We believe it to be sufficient for a circulating resolution to be arranged, by which 90% of shareholders would need to indicate their support for the resolution. This would help in reducing the cost of obtaining shareholder approval for the proposed relief.

The authors originally thought that rather than 90% approval, unanimous approval would be the appropriate requirement for relief to be a possibility, when one considers that the effect of granting a modification or exemption is that the rights of all shareholders, not just a select group, would be affected. However, while unanimous approval appears to be a desirable threshold, in reality it would be next to impossible, if not literally impossible, to obtain 100% shareholder support for a proposed relief application - especially in large public corporations when there are hundreds of thousands, if not millions, of shareholders. Some shareholders will be apathetic and simply not vote, whilst other shareholders will vote against the resolution simply because they don't like it (they may value having certain participatory rights) or vote down the resolution to try and influence an alternative, more favorable offer by the company. In relation to the difficulties of
obtaining unanimous shareholder approval in relation to any resolution, Professor Brian Cheffins of Cambridge Law School has written that:

...requiring unanimous consent... is not practical. In a company with a substantial number of shareholders obtaining the approval of all members is likely to be time-consuming. Also, value-maximizing changes could be blocked by shareholders who opportunistically withhold their consent in order to extract some extra benefits for themselves.\textsuperscript{79}

Indeed, it has even been suggested that 'supermajority' voting thresholds, like the 90\% approval threshold that the authors are proposing, are undesirable because it becomes too difficult to obtain the sufficient level of shareholder approval for a proposal. Professor Lucian Bebchuk of Harvard Law School has recently argued that:

One major and natural way in which the approval procedure may be tightened is by requiring that an amendment be approved by a supermajority rather than by a simple majority. In examining this possibility, we should first recognize the clear undesirability of any supermajority requirement that is close to unanimity. Because many shareholders, aware of the very small effect of their vote, are unlikely to bother to participate in any corporate vote, a demanding supermajority requirement, one of 90\% for example, would make it difficult to adopt even quite desirable amendments. Furthermore, such a supermajority requirement would likely give an undesirable veto power to some shareholders.\textsuperscript{80}

The present authors do not, however, see any problem with making it difficult to have approved a proposal which limits the operation of statutory rights of shareholders. A 'supermajority' requirement for such resolutions is highly appropriate to ensure that the overwhelming majority of shareholders are in fact in support of a proposal which will limit their statutory rights. Thus, overall the authors are comfortable with setting 90\% as the threshold requirement.

Relevant documentation indicating that at least 90\% of shareholders entitled to vote supported the relief application would need to be provided by the company to the ASIC as part of its application of relief.

b) Duration of Relief by the ASIC

Another important feature of the authors' proposal is that if the ASIC does in fact decide to grant relief, after giving due consideration of how the relevant interests of shareholders will be affected, the

\textsuperscript{79} Cheffins, \textit{supra} note 25, at 238.

\textsuperscript{80} \textit{Limiting Contractual Freedom, supra} note 12, at 1856.
ASIC must indicate in the declaration of relief how long the relief lasts. The Policy Statement will explain that all declarations of relief will last for a set period of time, and will not exceed five years. At the time that relief is about to expire, if the company wants the particular relief to continue it will need to again go through the process of obtaining shareholder approval and the approval of the ASIC in order for the relief to continue.

Limiting the duration of relief in this way, and requiring that companies have to demonstrate that relief is warranted, helps in ensuring that companies continue to use the exemption or modification granted for the benefit of shareholders. Furthermore, as the composition of shareholders in a company changes quite regularly, it is appropriate that every so often the current shareholders in the particular company are given a say as to whether they—rather than previous shareholders in the company—support the limiting of their governance rights under the Act.

On similar lines, it has recently been argued by Professor Bebchuk that embedding ‘sunset arrangements’ in opt out arrangements in relation to takeover laws works for the benefit of shareholders. According to Professor Bebchuk:

The law should make greater use of the strategy of allowing firms to adopt some arrangements only for a certain period after they are approved by shareholders... Because of the board’s control over charter amendments, there is concern that entrenching arrangements which were chosen at the IPO stage for an efficiency reason will remain in place long after they outlive their value. A sunset strategy would mean that, in such a case, there will be a resetting after a certain period of time following the IPO. This resetting would in turn ensure that an entrenching mechanism remains in place only if it serves shareholder value.81

c) Case for Relief by Applicant Companies

It is the usual practice when companies apply for relief to the ASIC that they outline their reasons why they are applying for relief, and explain why the benefits of relief being granted sufficiently outweigh the regulatory burden of dispensing in whole or in part with a particular provision as it applies to a particular company (or class of companies). During the process of determining whether to grant the relief, the ASIC officer(s) involved typically will give due consideration to the commercial reasons and justification outlined by the companies,

81. Anti-takeover Arrangements, supra note 13, at 751-2 (emphasis added).
however are not bound to take this information into account when making the ultimate decision as to whether relief is granted or not.

It is intended that a similar procedure will occur in relation to applications for relief under the new dispensation powers of the ASIC, yet with some specific elements. Under the authors' proposal, the ASIC Policy Statement will provide that when applying for relief, companies will need to include in their applications a pro forma 'case for relief' applicable when seeking relief from the operation of shareholder governance rights. The pro forma 'case for relief' will specifically relate to how the application for relief, if granted, would benefit the interests of shareholders as a whole. It will include a series of questions, to be addressed by the company, leading the company to clearly demonstrate how the granting of relief would be in the 'best interests of shareholders' as a whole.

The ASIC's Policy Statement would include an explanation of what its understanding of the 'best interests of shareholders' means for the purposes of these relief applications, and it is intended that in the Policy Statement, the ASIC would include hypothetical examples of what is and what is not in the best interests of shareholders. It will be made clear that while the 'best interests' of shareholders will be quite a broad and flexible concept, obtaining 90% shareholder approval for the proposed relief in and by itself will not necessarily be enough to satisfy the ASIC that the proposal is in the best interests of shareholders as a whole. Much is written in corporate governance literature about why overwhelming shareholder approval for a proposal does not necessarily mean that the proposal has overwhelming shareholder support. This is because, particularly in larger public companies, many shareholders will simply abstain from voting due to the belief that their vote could not possibly have any impact on the outcome of the resolution. This is referred to as 'rational apathy'. Furthermore, many other voters may indeed vote in support of resolution, but on the basis of misinformation (or, perhaps, sheer ignorance) about the nature and consequences of the resolution.

Accordingly, by specifying that shareholder approval is not the only factor to take into account when determining whether relief will be in the best interests of shareholders, the ASIC will be invited to consider and examine other issues and circumstances relating to the proposed relief which shareholders themselves may not have considered or examined before voting on the resolution relating to the relief applica-

tion. The ASIC oversight therefore provides an added layer of protection for shareholders. This leads on nicely to the next key feature of the authors’ proposal: the ability of the ASIC to include conditions upon relief, and withdraw relief if necessary.

d) Conditions on, and Withdrawal of, Relief

A fundamentally important feature of the authors’ proposal is that whenever the ASIC decides to grant relief from statutory shareholder governance rights, it must do so on the condition that the relief will only apply if it is utilized in the best interests of shareholders as a whole. Therefore, if it is relied upon contrary to the best interests of shareholders, the relief will simply not be able, or the ASIC will be able to apply to the Court to enforce compliance with the relief. Furthermore, if the relief is taken advantage of in a way which is contrary to the best interests of shareholders, as determined by the ASIC, the regulator will be able to withdraw the relief at any time. The ASIC’s ability to impose conditions on relief, and withdraw relief if necessary, will be made explicitly clear in the Policy Statement dealing with relief applications under the ASIC’s new dispensation powers.

This is not at all radical. As explained above, in relation to its existing dispensation powers, the ASIC already can and does grant relief subject to conditions, and can withdraw relief at any time given that the power is exercisable in the best interests of shareholders. The only difference is that under the author’s proposal, it will be a mandatory requirement that in granting relief, the ASIC include a condition that relief must at all times be utilized in the best interests of shareholders, whereas at present it is totally up to the ASIC whether or not it imposes conditions upon relief.

This mandatory condition on applications for relief further emphasizes that relief is only to be granted when it is clearly for the benefit of shareholders, and will only continue to be available so long as it is utilized for the benefit of shareholders. If the directors of the company abuse the relief in a manner which is inconsistent with the best interests of shareholders, or deny the application of an express shareholder right in circumstances where this would clearly be against the best interests of shareholders on that occasion (and the ASIC are fully satisfied of this, even though it has previously granted relief), not only will conditions upon relied not be satisfied, but the ASIC can actually use this as the basis for justifying withdrawal of relief.
An interesting issue that the authors were presented with when researching arrangements for opting out of corporate law is that commentators, particularly in the United States, distinguish between opt out arrangements adopted at ‘initial charter’ stage (i.e., when the company’s constitution is first presented to shareholders for approval), and arrangements adopted at ‘midstream’ stage- that is during the life of the company. It is argued by some commentators that there is a stronger case for opt out arrangements adopted at ‘initial charter’ stage than at ‘midstream’ stage, mainly because there is a greater likelihood that ‘value-decreasing’ arrangements will be adopted at ‘midstream’ stage. This has been illustrated by Professor Bebchuk in the following hypothetical example:

Compare the adoption of provision X in a company's initial charter with its adoption through a charter amendment from the perspectives of the shareholders and of the party designing the provision. Looking first at the shareholders’ perspective, consider an investor who values the company’s stock at $99 with provision X but at $100

83. See, e.g., Limiting Contractual Freedom, supra note 12, at 1825:
[There are] differences between the initial charter stage and the charter amendment stage and . . . differences between opting out at either stage. Because a charter amendment cannot be viewed as a contract, opting out in midstream cannot be defended in the same way as opting out in the initial charter- but not to opting out in midstream.

Id.
See also Campbell, supra note 6, at 201:
The mandatory rules debate- alternatively the contractual freedom debate- has proceeded on two distinct but related fronts. The first is the arrangements made when the company is formed. These arrangements are laid down in the corporation's constitution (the charter), as well as by law and by the operation of markets. The second is the “latecomer term” or “opting out in midstream”, a charter amendment proposed after the company has been formed. The incentives of management differ across the two stages of the corporation’s life: there is the possibility of management opportunism at the second.’

Id. (emphasis added).
For an Australian perspective, see, e.g., Whincop, supra note 12, at 193-4:
The idea that shareholders do not bear the agency costs of opting out needs to be scrutinized at two different points. The first, which Jensen and Meckling studied, is when a company does public by making an initial public offering (‘IPO’). The offeror of shares must take a lower price or convince the market (or the underwriter where one exists) of the value of the proposed opt-out. . . . The other point in time is a ‘midstream’ amendment, in which managers put a proposal to opt out to a shareholder vote at some time after the company goes public (for example, by a change to the articles). Critics have argued that managers can manipulate the amendment process. Also, shareholders fail to become sufficiently informed about the nature of the change because of their problems of acting collectively.’

Id.
without X. If X is adopted at the initial charter stage, the investor can take X into account when deciding whether to buy shares. Because X is introduced before he parts with his money, it cannot reduce the value of anything that he owns. He will buy shares only if the required price does not exceed $99 a share. In contrast, adopting X through a charter amendment after the investor has purchased shares would reduce the value of stock he already owns. He would suffer the adverse consequences of X without being compensated for the $1 loss in value by a reduction in the shares' purchase price; he would be unable to undo the purchase transaction and get some of the purchase price back.84

Another unfavorable feature of 'midstream' amendments compared to 'initial charter' amendments is that only a special resolution is required to pass a 'midstream' amendment, whereas the unanimous approval of shareholders is required for an 'initial charter' arrangement to opt out of corporate law provisions also making it less likely that opt out arrangements unfavorable to the interests of shareholders will be adopted at this stage. Again, to quote from Professor Bebchuk:

Unlike initial charters, charter amendments cannot be viewed as contracts; consequently, one cannot rely on the presence of a contracting mechanism as the basis for upholding opt-out charter amendments. Furthermore, the amendment process is quite imperfect and cannot be relied on to preclude value-decreasing amendments. Although an amendment requires majority approval by the shareholders, voting shareholders do not have sufficient incentive to become informed. And although the amendment must be proposed by the board, the directors' decision might be shaped not only by the desire to maximize corporate value but also by the different interests of officers and dominant shareholders.

Rational and informed shareholders forming a corporation would recognize the desirability of an amendment procedure that permits charter changes without unanimous shareholder consent. But they also recognize that allowing any given opt-out freedom might produce value-decreasing amendments and thus involve an expected cost.85

This preference for 'initial charter' versus 'midstream' opt out arrangements is certainly an important issue to consider, particularly when the authors' proposal entails mostly 'midstream' amendments, as companies would usually apply for relief after operating for some time and come to believe that the application of a shareholder governance right operates contrary to the best interests of shareholders. Given that the desirability of 'initial charter' amendments arises mostly due to the requirement for the unanimous consent of share-

84. Limiting Contractual Freedom, supra note 12, at 1828.
85. Id. at 1400-1.
holders, shouldn't the authors' proposal also include a requirement for the unanimous consent of shareholders before the ASIC grants relief?

The authors thought about this question carefully, but ultimately resolved- as already discussed above- that the requirement for a 90% shareholder approval threshold is more appropriate. It is expected that, due to the provisions for which relief will be available, it will be public companies, typically with a large shareholder base, that will be utilizing the proposed new dispensation powers. Accordingly, a unanimous approval requirement would simply be too onerous for relief applications to succeed. But isn't anything less than a unanimous approval requirement disadvantaging shareholders, especially minority shareholders? Doesn't this mean that there is a greater likelihood that value-decreasing opt out arrangements, which are contrary to the interests of shareholders, would pass?

The authors have already explained that this would not be the case, as the shareholder approval requirement in the authors' proposal, is supplemented by an additional requirement that the ASIC needs to be satisfied that the relief will be in the best interests of shareholders as a whole before a declaration of relief can be granted. Accordingly, there is no basis for including a unanimous approval requirement, or developing separate procedures for opting out at 'initial charter' stage compared to opting out at 'midstream' stage.

The key features of the authors' proposal outlined earlier, despite making no distinction between 'initial charter' opt outs and 'midstream' opt outs therefore remain acceptable.

V. Conclusion

Two recent events in Australia have shown that many companies want the ability to avoid the strict application of shareholder governance rights under the Corporations Act, when the strict application of these rights provide difficulties for the company. It was explained in this article that companies have not blatantly opted out of these rights, but have constructed arrangements to rely on alternative provisions of the Act, in effect relying on one provision of the Act to avoid the strict application of another. Such 'creative' or 'opportunistic' compliance with the Act does not provide for effective corporate regulation, as it is much better to try and design rules which will be fully complied with, and still facilitate the same, or indeed improved, outcomes for the companies that are being regulated and their stakeholders.

Taking all of this into account, in this article the authors have outlined a proposal for law reform which we believe will provide for
more effective regulation in relation to shareholder governance rights. We believe that our proposal, which involves expanding the ASIC’s dispensation powers to cover a number of shareholder governance rights provisions (including sections 203D and 249D), will provide for greater flexibility in the application of the provisions of the Act containing these governance rights, and in doing so will simultaneously encourage real rather than opportunistic compliance with the Act, and will be more conducive to the best interests of shareholders as a whole.

Shareholder participation has certainly been one of the buzzwords in corporate law and governance regulation over the last couple of years. It must be remembered, however, that the main reason for encouraging and promoting shareholder participation is that this is for the benefit of shareholders and is intended to be in their best interests. But some recent events in Australia have shown, and as the authors have articulated in this article, that there are occasions where the strict application of shareholder participatory rights will actually operate contrary to the best interests of the shareholders. When this occurs, it must be remembered that shareholder participation is intended to be synonymous with the best interests of shareholders. Corporate law must therefore have in place a facility in this situation to ensure that the best interests of shareholders are upheld. In this article, the authors have proposed such a facility, and we sincerely hope that it is adopted in the not too distant future.

The capacity to opt out of any law should not be readily conferred. Laws by their very nature should generally be of universal application. However, there is a fundamental difference between laws that on the one hand impose duties and those which on the other hand confer rights or protections or facilitate the means through which citizens can enter into (often) mutually beneficially transactions. In the case of the latter types of laws, citizens ought to be able to bypass the operation of the law if, according to their assessment of the situation, the law will have an adverse impact on their interests, especially where the impact was unintended by the law-makers. Laws conferring governance rights on shareholders fit neatly into the second category of laws. Hence there should be a legal mechanism by which the operation of such laws can be circumvented.

The law reform proposal in this article will ameliorate the harshness or inefficiencies associated with the operation of shareholder governance laws in unforeseen circumstances. However, procedural safeguards need to be implemented to ensure that opting out of a certain provision does not in fact adversely affect shareholders to a greater extent than if the law was observed. Due to the complexity of corporate regulation, shareholders will not always be appropriately placed to make an assessment of the full ramifications associated with opting out of a shareholder governance rights provision. The impartiality and knowledge that the ASIC will bring to the process will ensure that a decision by shareholders to opt out of such a law will be not be self-defeating.