



Corporations Amendment (Short Selling) Bill 2008

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Corporations Amendment (Short Selling) Bill 2008

Date introduced: 13 November 2008

House: House of Representatives

Portfolio: Treasury

Commencement: Schedule 2 of the Act commences on the 28th day after the day the Act receives the Royal Assent. Schedule 3 commences on a day to be fixed by Proclamation, or 12 months after Royal Assent, whichever occurs first. The remainder of the Act commences on the day the Act receives Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To give effect to three key measures:

- to clarify ASIC's powers to regulate and ban short selling of financial products
- to amend the *Corporations Act 2001* (the Corporations Act) to prohibit naked short selling, and
- to increase disclosure requirements related to covered short sale transactions.

Background

Global financial crisis

The immediate genesis of the current global financial crisis occurred around the end of 2004 with a spike in loan delinquencies in the United States. This spike was triggered by the federal funds target rate (the US equivalent of the Reserve Bank of Australia's cash rate target) increasing from 1 per cent in mid-2004 to 5.25 per cent by mid-2006, where the rate stayed, until September 2007. The problem of rising housing defaults did not manifest itself immediately (the US mortgage market is substantively different from Australia's, with a much heavier reliance on fixed-rate mortgages and adjustable-rate mortgages, rather than variable rate mortgages).

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Due to innovations in securitization, the risks related to the inability of homeowners to meet mortgage payments have been distributed broadly, with a series of consequential impacts. The crisis can be attributed to a number of factors, such as the inability of homeowners to make their mortgage payments due to rising adjustable mortgage rates; poor judgment by either the borrower or the lender (or both), and inappropriate mortgage incentives. Further, declining home prices have made re-financing more difficult.

Since the end of 2007, what began as a bursting of the U.S. housing market bubble and a rise in foreclosures had ballooned into a global financial crisis. Some of the largest and most venerable banks, investment houses, and insurance companies have either declared bankruptcy or have had to be rescued financially. In October 2008, credit flows froze, lender confidence dropped, and one after another the economies of countries around the world dipped toward recession. The crisis exposed fundamental weaknesses in financial systems worldwide, and despite coordinated easing of monetary policy by governments and trillions of dollars in intervention by governments and the International Monetary Fund, the crisis continues.¹

Policy-makers around the world have responded to these developments in a number of ways. Central banks have been adding liquidity to their financial systems, and they have been cutting official interest rates. Some governments, including Australia, have announced substantial fiscal stimulus packages. Governments around the world have taken direct measures to strengthen their financial systems, including capital injections, enhanced protection for retail deposits, and the offer of guarantees to various types of wholesale lending. These steps should help to stabilise conditions over time, but sentiment is still fragile.²

In net terms, US equity prices have fallen by around 30 per cent since the Lehman Brothers' collapse (15 September 2008) and the Australian market is down by 25 per cent over the same period.³ From their 2007 peak, the US S&P 500 Index is down by around 40 per cent and Australia's ASX 200 Index is down by almost 50 per cent.

Coupled with declining trends in several other economic indicators, these developments led experts to believe that Australia would expect a contraction of the economy and a higher rate of unemployment in the coming months. Reserve Bank of Australia stated:

With the ongoing stresses in financial markets, it is possible that the deterioration in the external environment could continue. Even if this did not occur, the effects

1 US Congressional Research Service (CRS) Report: 'The U.S. Financial Crisis: The Global Dimension, with Implications for U.S. Policy', November 18, 2008.

2 Malcolm Edey, Assistant Governor (Economic), Reserve Bank of Australia, 'The Economy in Late 2008: Conditions and Prospects', speech presented at the Australia & Japan Economic Outlook Conference 2008, Sydney, 19 November 2008.

3 *ibid.*

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on domestic activity of the deterioration that has already occurred could be deeper or more persistent than expected in this outlook. In particular, a more rapid unwinding of the resources boom than (sic) has been assumed would have significant negative effects throughout the economy, resulting in softer growth in domestic incomes and spending...⁴

Against this backdrop of chain of events, the Australian Government has embarked upon a series of measures so as to contain the fallout of the crisis in the financial markets. The restriction and tightened regulation of short selling on the stock exchange is one such measure.

What is short selling?⁵

When individuals invest in shares they will generally want to 'buy low and sell high', that is, they purchase shares which they expect will go up in price. This is known as 'buying long', as any profits will be delivered down the track.

'Short sellers' do the opposite. They want to gain from a fall in price, so they are looking for shares they think will go down in price.

Unlike other share traders, short sellers do not own the shares they sell. They sell them hoping that the price will fall before they have to hand over shares in settlement of the sale.

In a conventional short sale, the investor – usually a hedge fund or large investment bank – takes the view that shares in a particular company are set to fall. The investor then borrows shares in that company from someone who does own them. Most often the owner will be a large pension fund or insurance company. The investor then sells the shares in the market. Once the shares have fallen in value, the investor buys them back at the lower price and returns them to the original owner. If all goes according to plan, the investor will pay less to buy back the shares than they received for selling them. There are some costs involved, notably that the lender of the shares charges a fee for loaning out the shares. However in a market where the price of the particular shares is dropping the short seller can still make a profit.

The chart below⁶ provides an example of how short selling works. There is a share valued at \$5.00 which the short seller thinks will go down in price. On day 0 the short seller enters into a contract to sell that share for \$5.00.

4 *ibid.*

5. The material in this heading is from Australian Securities and Investments Commission: financial tips and safety checks, available at: <http://www.fido.gov.au/fido/fido.nsf/byheadline/Short+selling+-+what+is+it+anyway%3F?openDocument> [accessed on 25 November 2008].

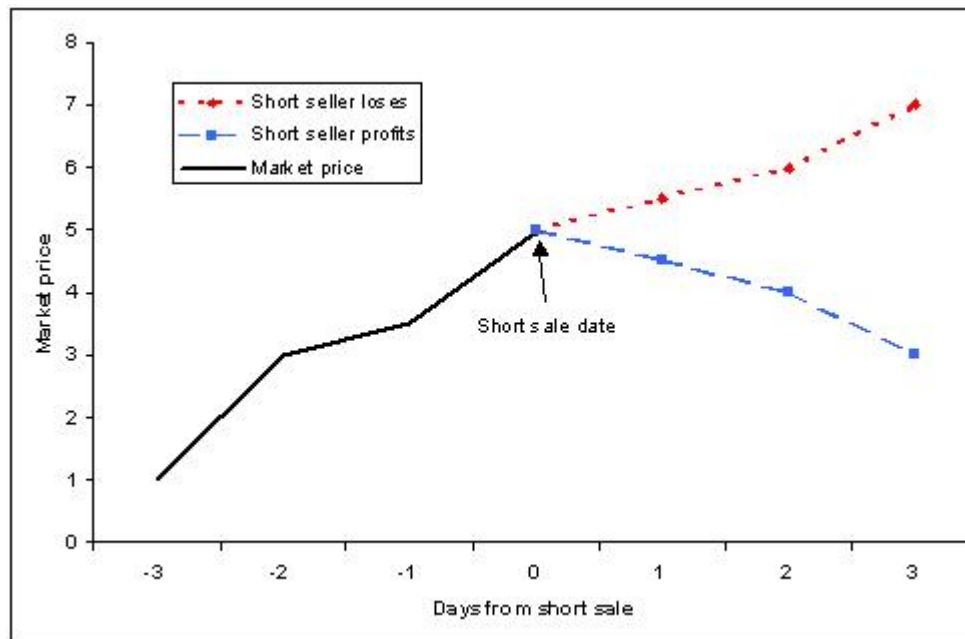
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If, prior to the settlement date for the sale, the price falls from \$5.00 to \$3.00 as in the blue line, the short seller makes a gain. To settle the sale the short seller can buy the share for \$3.00 and then use that share to fulfil the contract, making \$2.00 profit.

However, if the price of the share goes above \$5.00 to \$7.00 as in the red line, the short seller makes a loss of \$2.00. To settle the contract, the short seller now has to buy the share for \$7.00.



Short selling takes two forms, namely *covered short selling* and *naked short selling*. One approach to facilitating the practice of short selling is where the investor who is borrowing the relevant shares has in place an arrangement whereby another person (the lender) makes securities available to settle the short sale. Under the arrangement, the investor will have an obligation to transfer equivalent securities to the lender at a later time. The practice of short selling securities with an arrangement of this kind in place is a form of *covered short selling*.⁷

The practice of short selling securities without such an arrangement is known as *naked short selling*. In a naked short sale, the seller does not own and has not borrowed or

6. From Australian Securities and Investments Commission: financial tips and safety checks available at: <http://www.fido.gov.au/fido/fido.nsf/byheadline/Short+selling+-+what+is+it+anyway%3F?openDocument> [accessed 25 November 2008].

7. Explanatory Memorandum, *ASIC Class Order [CO 08/751]*, p. 1, available at [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ES-co08-751.pdf/\\$file/ES-co08-751.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ES-co08-751.pdf/$file/ES-co08-751.pdf) [accessed 24 November 2008]

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arranged to borrow securities at the time of sale, but intends to purchase or borrow securities in order to meet the delivery obligation.⁸

Why Short?

There are two main motivations to engage in short selling:⁹

For speculation

The most obvious reason to short is to profit from an overpriced stock or market. A famous example of this was when George Soros, an American financial speculator and stock investor, "broke the Bank of England" in 1992. He risked \$10 billion that the British pound would fall and he was right. The following night, Soros made \$1 billion from the trade. His profit eventually reached almost \$2 billion.¹⁰

For hedging

Very few sophisticated money managers short as an active investing strategy (unlike Soros). The majority of investors use shorts to hedge. This means they are protecting other long positions with offsetting short positions.¹¹

Why does short selling reduce share prices?¹²

If lots of traders are short selling a particular share then the first thing they do is borrow the shares. Once they have borrowed the shares they must sell them. This means that at the current share price, more people are trying to sell the share than are trying to buy it and that pushes down the share price.

This is particularly so where an institution is known to be a specialist short seller. Once it is known that such an institution has sold a large amount of shares in a particular company, then there is a danger that there will be a panic in the market as other shareholders worry that the price could plunge.

8. Explanatory Memorandum, Corporations Amendment (Short Selling) Bill 2008, p. 25.

9. *Short Selling: What is Short Selling?*, Investpedia.com, available at <http://www.investopedia.com/university/shortselling/shortselling1.asp> [accessed 16 November 2008]

10. *ibid.*

11. *ibid.*

12. The material in this section is from BBC News available at: <http://news.bbc.co.uk/2/hi/business/7519190.stm> [accessed on 25 November 2008].

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Current regulation

Section 1020B of the Corporations Act regulates the short selling of certain financial products. Under current provisions, while short selling is technically prohibited, there are some exceptions provided in the legislation that allow covered and some naked short selling to occur. These include where the seller:

- has in place before the time of the sale an arrangement that will enable delivery of the product within three business days; or
- effected the sale in accordance with the Australian Stock Exchange (ASX) Market Rules.

In both of these cases a person selling through a financial services licensee must tell the licensee that the sale is of this kind.¹³ Licensees (brokers) who are participants in the financial market operated by ASX must give the ASX certain aggregated information about such sales on a daily basis.

There is a view in the financial markets that securities acquired under at least some short selling arrangements (for instance, those where the short seller has an arrangement already in place to borrow the relevant securities) give rise to a 'presently exercisable and unconditional right to vest' those securities for the purposes of section 1020B. In these circumstances, the securities may in substance be short sold without complying with the reporting and other requirements applying to some of the exceptions to the short selling prohibition.¹⁴

Australia's Response to Short Selling

In September 2008, the Australian Securities and Investments Commission (ASIC) responded to turmoil in international and Australian financial markets by introducing measures aimed at limiting the potential for Australian markets to become disorderly due to short selling. Under ASIC Class Order [CO 08/751] (as amended by ASIC Class Orders [CO 08/752], [CO 08/753], [CO 08/763] and [CO 08/801]), ASIC prohibited covered short

13 Explanatory Memorandum, *ASIC Class Order [CO 08/751]*, p. 1.

14 To have a 'presently exercisable and unconditional right to vest' means a person must, at the time of the sale, have power to direct a transfer of the product. The transfer must also provide the person with the absolute ability to give the buyer title to the product. A person who holds legal title to the product at the time of sale would have a 'presently exercisable and unconditional right to vest' for the purposes of s1020B – Australian Securities and Investment Commission, *Regulatory Guide 196: Short Selling: Overview of s1020B*, September 2008, p. 4, available at [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rg196.pdf/\\$file/rg196.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rg196.pdf/$file/rg196.pdf) [accessed 24 November 2008].

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selling of all securities, managed investment products and stapled securities quoted on licensed markets in Australia, subject to certain exceptions.

ASIC also provided relief under ASIC Class Order [CO 08/764] for a person from having to comply with subsection 1020B(2) in relation to the naked short sale of a security or managed investment product that results from the exercise of an ASX exchange traded option.

Where covered short selling is permitted, the short selling transaction is subject to a reporting regime in accordance with ASIC Class Order [CO 08/751]. The prohibition on covered short selling came into effect on 22 September 2008.

The class order was made under paragraph 1020F(1)(c) of the *Corporations Act 2001*, which effectively allows ASIC to apply all or any part of Part 7.9 of the Corporations Act (Part 7.9 deals with the issue, sale and purchase of financial products) to particular persons and/or financial products, or classes of persons or products.

On 13 November 2008, ASIC lifted the ban on short selling of non-financial securities effective 19 November, but kept the lid on short selling of financial securities until 27 January 2009.¹⁵

The securities (**non financial securities**) for which covered short selling will be permitted are those which are not constituents of the S&P/ASX 200 Financials index or one of the five entities named in the instrument.¹⁶

Recent Global Regulatory Response

In the US, *Regulation SHO* was the Security and Exchange Commission's (SEC's) first update to short selling restrictions since 1938. It established 'locate' and 'close-out' requirements for broker-dealers, in an effort to curb naked short selling.¹⁷

Regulation SHO (most recently amended on 17 October 2008), which became fully effective on 3 January 2005, sets out the regulatory framework governing short sales. Among other things, Regulation SHO imposes a close-out requirement to address failures to deliver stock on trade settlement date and to target potentially abusive 'naked' short

15. Australian Securities and Investment Commission, *ASIC lifts ban on covered short selling for non-financial securities*, media release, 13 November 2008, available at <http://www.asic.gov.au/asic/asic.nsf/byheadline/AD08-65+ASIC+lifts+ban+on+covered+short+selling+for+non-financial+securities?openDocument> [accessed 24 November 2008]

16. *ibid.*

17. U.S. Securities and Exchange Commission, *Release No. 34-58775; File No. S7-19-07*, available at <http://www.sec.gov/rules/final/2008/34-58775.pdf> [accessed 24 November 2008].

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selling in certain equity securities. While the majority of trades settle on time, Regulation SHO is intended to address those situations where the level of ‘fails to deliver’ for the particular stock is so substantial that it might impact the market for that security.¹⁸

In the US, initial public offerings (IPOs) cannot be sold short for a month after they start trading.¹⁹ This mechanism is in place to ensure a degree of price stability during a company's initial trading period.²⁰ Canada and other countries do allow selling IPOs (including U.S. IPOs) short.

In the US, a similar response was made by the Securities and Exchange Commission with a ban on short selling on 799 financial stocks from 19 September 2008 until 2 October 2008. Greater penalties for naked short selling, by mandating delivery of stocks at clearing time, were also introduced. Some state governors have been urging state pension bodies to refrain from lending stock for shorting purposes.²¹

In the UK, the Financial Services Authority has a moratorium on short selling 29 leading financial stocks, effective from 2300 GMT, 18 September 2008 until 16 January 2009.²²

Germany, Ireland, Switzerland and Canada have banned short selling leading financial stocks,²³ and France, The Netherlands and Belgium have banned naked short selling leading financial stocks.²⁴

By contrast, Chinese regulators have responded by allowing short selling, along with a package of other market reforms.²⁵

18 *ibid.*

19 *Short Selling explained*, available at http://www.stockmarketsblog.com/stock_talk/post-328.html [accessed 24 November 2008].

20. Tim Jenkinson and Howard Jones, *The economics of IPO stabilization, syndicates and naked shorts*, December 2006, available at: http://www.finance.ox.ac.uk/file_links/finecon_papers/2006fe14.pdf [accessed 24 November 2008].

21 Michael Tsang, ‘Short Sellers Under Fire in U.S., U.K. After AIG Fall’, *Bloomberg*, 19 September 2008.

22 BBC, ‘FSA clamps down on short-selling’, *BBC News*, 18 September 2008.

23 Sarah McDonald, ‘Australian short selling ban goes further than other bourses’, *The National Business Review*, 22 September 2008, available at <http://www.nbr.co.nz/article/australian-short-selling-ban-goes-further-other-bourses-35494> [accessed 24 November 2008]

24. Vidya Ram, ‘Europe spooked by the revenge of the commodities’, *Forbes.com*, 22 September 2008, available at http://www.forbes.com/markets/2008/09/22/briefing-europe-update-markets-equity-cx_vr_0922markets12.html [accessed 24 November 2008]

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Committee consideration

The issue of short selling was considered by the Parliamentary Joint Committee on Corporations and Financial Services in June 2008 (before the stock market crash in September which sparked Governments to temporarily ban or restrict short selling in many countries). The Committee was examining trading practices in the Australian equities market, remarking that ‘there was a widespread view that (short selling activities) are not subject to sufficiently rigorous disclosure requirements to ensure shareholders remain adequately informed’.²⁶ In the Committee’s inquiry, the disclosure requirements for the practice of short selling attracted considerable attention. The committee reported that:

The committee is of the view that while short selling is a legitimate trading tool, it is necessary to ensure it is appropriately disclosed to the market to ensure that undesirable practices that potentially accompany short sales can be identified by regulators. Further, the committee does not oppose institutional investors lending their stocks to maximise returns, but considers that funds should be required to disclose their stock lending practices or policies to members.²⁷

There appears to have been no formal Government response to the Parliamentary Joint Committee report as yet.

The Bill has been referred to the Senate Economics Committee for inquiry and report by 27 November 2008. Details of the inquiry are at the [Committee Inquiry page](#).

Financial implications

The Explanatory Memorandum states that the Bill has no significant impact on Commonwealth expenditure or revenue.²⁸

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25. Samuel Shen and Lu Jianxin, ‘China to launch stocks margin trade, short sale’, *Reuters*, 5 October 2008, available at: <http://www.reuters.com/article/rbssFinancialServicesAndRealEstateNews/idUSSHA10179120081005?sp=true> [accessed 24 November 2008].
 26. Parliamentary Joint Committee on Corporations and Financial Services, *Better shareholders – Better company: Shareholder engagement and participation in Australia*, June 2008, p. 36.
 27. *ibid.*, p. 41.
 28. Explanatory Memorandum, Corporations Amendment (Short Selling) Bill 2008, p. 3.

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Key issues

Impact of ban on short selling in Australia

It is hard to estimate the impact of withdrawing the ban on covered short selling at this stage. Only about A\$60 billion of stock is short in the Australian market, but of that, it is estimated that only A\$15 billion is reported.²⁹ The Bill's Regulation Impact Statement states that:

.... it is estimated that the upper limit of short selling activity in Australian securities is approximately \$60 billion. This equates to approximately 4 per cent of the total capitalisation of Australian listed securities (based on a total ASX market capitalisation of \$1.5 trillion). The majority of this is expected to be in the form of covered short sales. The current uncertainty surrounding the actual level of short selling activity in Australian securities is compounding the direct impact of this activity as it is resulting in rumour and speculation in the marketplace.³⁰

The Australian ban imposed in September 2008 went further than its international counterparts by covering all listed companies.³¹ In the United States and in the UK, the ban is limited to financial stocks only. This reflects the fact that banks in those countries are the most exposed to massive write-downs of structured-debt products, which have lost most of their values, blowing holes in their balance sheets and undermining investor and counterparty confidence.³²

The broader ban reflected concerns that, given the relatively small size of the share market, non-financial services firms carrying large amounts of debts (such as real estate investment trusts), could be targeted by hedge funds shut out of short-selling strategies in other majority markets.³³

Position of significant interest groups/press commentary

According to some critiques of such a wholesale ban:

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- 29 Patrick Duncan, 'Naked short selling exposed', *Australian Financial Review*, 28 April 2008, available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FEU9Q6%22> [accessed 24 November 2008].
- 30 Explanatory Memorandum, p. 26.
- 31 Matthew Drummond, 'ASIC bans all short selling', *Australian Financial Review*, 22 September 2008, available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F1WLR6%22> [accessed 24 November 2008].
- 32 *ibid.*
- 33 *ibid.*

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...(the government has) restricted the efficiency of the market... Short-selling basically refers, generally takes place because people have a view about where a price is going. It's not necessarily that they intend to manipulate the price.³⁴

AMP Capital Investors chief economist Shane Oliver said the ban on all stocks - over and above moves by international markets - may reflect a degree of panic.³⁵

In a clarifying statement on 28 September 2008, ASIC said that the ban would not apply to market makers' hedging of positions that were taken out prior to 28 September 2008. The ASX also issued a statement, noting that certain market instruments would be exempted from the short-selling ban.³⁶

The Investment and Financial Services Association and the Australian Council for Super Investors, which represents pension funds, reiterated their support for the practice of short-selling despite the temporary ban. They consider that withdrawal of the ban would contribute to market liquidity, efficiency and assist to ensure market price efficiency for both underlying securities and a variety of derivative contracts that are used for risk management and hedging.³⁷

While appreciating the measures to introduce a greater transparency in the short selling regime, the Australian Financial Markets Association (AFMA) have raised some concerns about the exclusive power conferred on ASIC in imposing restriction in the market:

The objective of the amendment to section 1020F is to clearly indicate that ASIC has the power to impose restrictions and prohibitions on covered short selling in the future. Granting ASIC the express power to impose a temporary restriction is a sensible measure to provide legal certainty.

However, the proposed new subsection 1020F(8) contains a number of broad powers allowing ASIC to introduce new and varied rules. The rules under which a future prohibition of covered short selling should operate should be governed by regulations which are the subject of policy development and control by the Government. Such

34 Richard Lindell, 'Caton against ban on short-selling', *PM (ABC)*, 22 September 2008, transcript available at <http://www.abc.net.au/pm/content/2008/s2371278.htm> [accessed 24 November 2008].

35 Susan Murdoch, 'Australian shares surge after short selling ban', *Dow Jones Business News*, 22 September 2008, available at <http://www.easybourse.com/bourse-actualite/marches/-rd-update-australian-shares-surge-after-short-selling-ban-525748> [accessed 24 November 2008].

36 *ibid.*

37 *ibid.*

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rules should be developed in consultation with stakeholders and available before the event so that they can be factored into contingent business system plans.³⁸

The Australian Custodial Services Association (ACSA), a registered entity representing members holding securities in excess of \$1.3 trillion in custody and administration, raised a point of dichotomy in the legislative provisions. They argued that:

...due to contractual arrangements, a custodian cannot provide additional information to the market unless it has legal obligation to do so. Accordingly, any requirement to disclose must be a market mandate to ensure custodians do not breach client agreements.³⁹

In conclusion they stated that:

Imposing a requirement on custodians to disclose all lending related activity is not only impractical, but would result in the collection of a large quantity of information which would be of questionable use. This could lead to a lack of transparency surrounding the activity of covered short sellers in Australian securities and cause investors to make an incorrect determination regarding the real level of securities lending and short selling in the Australian market.⁴⁰

Main provisions

Item 1, Schedule 1 inserts a **new subsection 1020F(8)** to the Corporations Act. The new subsection clarifies that the power to make a declaration under existing subsection 1020F(1) can be used to restrict or change the rules relating to short selling (including activity that has substantially the same effect as short selling) on the stock exchange. The purpose of the subsection is to remove any doubt of the authority to make such declarations under the Corporations Act. Of particular note is **new paragraph 1020F(8)(c)** which clarifies that a declaration by ASIC under existing paragraph 1020F(1)(c) can exempt a transaction from the rules against short selling (i.e. thereby allowing short selling to occur once a declaration has been made). No specific information is provided about the sources of the possible ‘doubt’ in ASIC’s powers that this item seeks to address.

38 AFMA, Submission No. 5, Senate Economics Committee, *‘Inquiry into Corporations Amendment (Short Selling) Bill 2008’*, 2008, p. 5.

39 ACSA, Submission No. 7, Senate Economics Committee, *‘Inquiry into Corporations Amendment (Short Selling) Bill 2008’*, 2008, Attachment A.

40 *ibid.*

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Item 2 inserts a **new Part 10.10** into the Corporations Act to clarify that certain instruments made under paragraph 1020F(1)(c) earlier in 2008 were validly made under the authority of the Corporations Act. Technically, **item 2** has a retrospective effect, although an amendment of this kind is not uncommon and should not be controversial.

Schedule 2, item 2 repeals existing subsections 1020B(4), (5) and (6) from the Corporations Act, and replaces them with a **new subsection 1020B(4)**. Existing subsection (4) allows for some instances of naked short selling to occur. The proposed subsection clarifies that a person can sell products previously purchased under agreement, even though they have not yet acquired the rights to vest the products (due to a condition of the purchase agreement). According to the explanatory memorandum, ‘the existence of the prior purchase agreement means that the transaction falls short of true naked short selling. For this reason, it is not necessary to repeal this exception’.⁴¹

The remainder of the items in **Schedule 2** are consequential to the repeal of subsections 1020B(4), (5) and (6) in **item 2**.

Schedule 3 inserts a number of new disclosure requirements for allowable (i.e. covered) short sales. **Item 3** inserts a **new Division 5B** into the Corporations Act. **Proposed section 1020AA** contains the definitions which are relevant to the Division. In that Division, **new section 1020AB** deals with seller disclosure. It requires a person who is making a short sale to notify their financial services licensee that the sale is a short sale (or, if the seller is a financial services licensee, to notify the ASX). The particulars that must be provided in the notification are to be set by regulation. Failure to comply is a criminal offence under subsection 1311(1) of the Corporations Act – see item 6 below.

New section 1020AC deals with licensee disclosure. The section creates an obligation on financial services licensees to disclose to the ASX (or any other entity specified in regulations) when they have been instructed to make a short sale for a seller, and pass on all the particulars that have been provided to them by the seller under section 1020AB. Failure to comply is a criminal offence under subsection 1311(1) of the Corporations Act. The manner and timeframe for the disclosure will be set by regulation.

New section 1020AD deals with public disclosure of information. Where disclosure has occurred (whether from seller to financial services licensee, or financial services licensee to market operator, or to another entity prescribed by regulation), the market operator (or other entity, if prescribed) must make public disclosure of the information about the short sale. Failure to comply is a criminal offence under subsection 1311(1) of the Corporations Act. The manner and timeframe for the disclosure will be set by regulation.

New section 1020AE creates an obligation for financial services licensees to ask short sellers for a confirmation about whether they will need to make a declaration under section 1020AB (and thereby confirm that the sale is a short sale), and to record that answer in

41. Explanatory memorandum, p. 13.

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writing. Similar to the other proposed provisions in the Division, failure to comply is a criminal offence.

New section 1020AF provides a regulation-making power, and enables regulations to be made for specific matters or circumstances.

Item 6 inserts the offences for **new sections 1020AB – 1020AE** into a table containing penalties for offences under the Act. The new offences contained in this Bill all attract a penalty of 25 penalty units or imprisonment for 6 months, or both.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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