



Short Sale Disclosure & Reporting in Australia

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Executive Summary

Part 7.9 of the Corporations Act and the Corporations Regulations regulate short selling in Australia.

In September 2008, during an extended period of volatile trading on international securities markets, ASIC took emergency action and exercised its power to temporarily prohibit certain “covered short sales” of securities, managed investment products and stapled securities quoted on a licensed market. The covered short selling ban was lifted on 25 May 2009.

The Australian Government introduced new legislative requirements to regulate the use of short selling in Australia in December 2008 and December 2009.

The purpose of the new requirements was to provide greater transparency on short selling in Australia. The legislation imposed a ban on naked short selling (subject to some minor exceptions) and new reporting and disclosure obligations. The obligations on short sellers to report short positions commenced on 1 June 2010.

This paper provides an overview of these requirements including the following key points.

- Naked short selling is generally prohibited in Australia (except for certain very limited exceptions).
- Sales of securities which are covered by a securities lending arrangement (“**Covered Short Sales**”) must be reported by seller or to the executing broker.
- If a covered sale of securities (or certain permitted naked short sales) is executed AND the person holds a short position in those securities as at 7pm on a reporting day, then that short position must be reported to ASIC by 9am on the day which is 3 reporting days after the date of the short position and continuing short positions must be reported daily.
- There are low threshold exemptions on covered short sale reporting.
- A short position report does not need to be filed on a reporting day if the value of the short position is less than A\$100,000 (calculated by reference to the last sale share price or valuation price published by ASX) AND the short position is less than 0.01% of the number of securities on issue.

Failure to comply with the short sale reporting obligations is an offence under the Corporations Act.



1. Introduction

Short selling is the practice of selling securities or other financial instruments with the intention of subsequently repurchasing them at a lower price.

The purpose of this paper is to provide an overview of short selling reporting and disclosure regime under Australian law.

Short selling is regulated by the Corporations Act 2001 (Cth) ("**Corporations Act**") and the Corporations Regulations (2001) ("**Corporations Regulations**").

For the purpose of this paper we define a "short" seller as a person who purports to sell something, which that person does not then legally or beneficially own, while a person who owns the property sold at the time of the sale is said to sell the property "long".

The Australian Securities and Investments Commission ("**ASIC**") has published "Regulatory Guide 196: Short Selling" which summarises the Australian short selling provisions that can be accessed at the following link:

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg196-short-selling-20110429-updated-ASX200-to-ASX300.pdf/\\$file/rg196-short-selling-20110429-updated-ASX200-to-ASX300.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg196-short-selling-20110429-updated-ASX200-to-ASX300.pdf/$file/rg196-short-selling-20110429-updated-ASX200-to-ASX300.pdf)

2. Short Sale

2.1 Covered Short Sales

Generally, where a person executes a short sale and relies on an existing securities lending arrangement to have a "presently exercisable and unconditional right to vest" the securities in the buyer at the time of sale, the sale is a covered short sale.

A person has a "presently exercisable and unconditional right to vest" the securities in the buyer if:

- They have the power to direct a transfer of the product, that is, the person must have the absolute ability to give the buyer title to the product; or
- They hold the legal title to the product at the time of sale;¹

Securities lending arrangements typically involve the transfer of securities from the owner (lender) to another party (borrower), under an arrangement whereby the borrower is obliged to return the securities (or equivalent value) either on demand or at the end of the loan term. The borrower usually gives the lender collateral as security for the loan. A borrower will satisfy the "presently exercisable and unconditional right to vest" requirement if the lender has given the borrower (or a third party as the borrower may direct or procure), at the time of the borrower's on sale, a legally binding commitment to deliver the securities.²

Covered short sales are permitted under the Corporations Act and certain reporting and disclosure obligations apply to those transactions.

2.2 Naked Short Sales

The practice of short selling securities without a securities lending arrangement, is known as "naked" short selling.

Persons are prohibited from selling securities in Australia if at the time of the sale, they do not have a "presently exercisable and unconditional right to vest" the securities in the buyer (Corporations Act s 1020B).

¹ Para 196.28-196.29, Australian Securities & Investments Commission, "ASIC Regulatory Guide 196: Short Selling", April 2011.

² *ibid*, para 196.32.



The Section 1020B prohibition extends to:

- Securities;
- managed investment products (i.e. interests in registered managed investment schemes);
- debentures;
- stocks or bonds issued or proposed to be issued by a government; and
- financial products of any other kind prescribed by regulations.

For the sake of convenience the term “securities”, where used in this paper, extends to all of the s 1020B financial products.

The naked short sale prohibition is subject to the following limited exceptions:

- Prior purchase agreement – a short sale by a person who before the time of sale has entered into a contract to buy those securities and has a right to have those securities vested in the person that is conditional on payment of consideration, receipt of proper instrument of transfer or receipt of title documents³;
- Giving or writing of certain exchange traded options – a short sale of securities that is done by the giving or writing of certain exchange traded options⁴;
- Unobtained financial products – a short sale of financial products where, at the time of sale, the person is able to obtain at least the number of financial products of the same class by exercising exchange traded options⁵;
- Certain bonds/debentures of a body corporate and government bonds – a short sale of bonds issued by a government or bonds/debentures issued by a body corporate (where amount of issue exceeds \$100 million), by a person as principal, provided the seller believes on reasonable grounds that arrangements can be put in place for settlement by the relevant time⁶;
- Exercise of exchange traded options – a short sale resulting from the exercise of exchange traded options⁷;
- Selling before completing a recall of loaned securities – a short sale by the owner (seller) of a portfolio of securities or managed investment products placed in an established securities lending program, where, at the time of sale, the seller is entitled to recall from the program at least the number of securities or products that are the subject of the sale;
- Hedging risk from market making activities – a short sale or managed investment product that is a constituent of the S&P/ASX 300 by a market maker (who must hold or be exempt from holding an Australian Financial Services licence) to hedge risk from its market making activities. At the time of sale, the market maker must believe on reasonable grounds that a securities lending arrangement can be put in place to allow delivery, and by the end of each day, acquire or borrow sufficient products to ensure it can deliver all products sold on the day delivery is due⁸;
- Deferred purchase agreements – a short sale of an ASX listed security or managed investment product (delivery product) as a result of entering into a deferred purchase agreement which complies with certain conditions (ASIC Class Order 10/11).

³ s 1020B(4) of the Corporations Act

⁴ ASIC Class Order 09/1051

⁵ ASIC Class Order 09/1051

⁶ ASIC Class Order 09/1051

⁷ ASIC Class Order 08/764

⁸ ASIC Class Order 09/774



ASIC will also consider issuing individual no-action positions permitting:⁹

- Market makers of certain ETF products to make naked short sales of those ETF products subject to certain conditions;
- Naked short selling of certain CHESS Depository Interests (“**CDIs**”) by a person who has a presently exercisable and unconditional right to vest equivalent underlying securities in a buyer in certain circumstances. Persons who rely on this no-action position to execute naked short sales will be required to make transactional reporting of these sales to ASX; and
- Brokers who make naked short sales of securities in the course of certain types of client facilitation services.

A no-action letter issued by ASIC states that ASIC does not intend to take regulatory action in relation to a particular state of affairs or conduct. ASIC has published “Regulatory Guide 108: No Action Letters” which sets out the factors ASIC considers when dealing with a request for a no action letter which can be found at the following link:

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg108.pdf/\\$file/rg108.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg108.pdf/$file/rg108.pdf)

2.3 Short Selling Disclosure Requirements

Short selling disclosure requirements are categorised as:

- Short sale Transaction Reporting
Reporting the volume or number of securities short sold in a transaction (otherwise known as gross short sales).
- Short Position Reporting
Reporting a position in relation to securities where the quantity of the securities that a person has, when acting in a particular capacity, is less than the amount of securities that the person has an obligation to deliver, when acting in the same capacity. For example, if a seller (acting in a particular capacity) has an obligation to deliver 5000 securities and acting in the same capacity, has only 2000 securities, the seller’s short position is 3000 securities.

Sections 3 and 4, of this paper, contain a discussion of each of these disclosure obligations.

3. Short Sale Transaction Reporting

3.1 Purpose

The purpose of this requirement is to inform the market of the proportion of trades in a particular security that are short sales and the overall level of short selling that takes place on market each day.¹⁰

The Australian Securities Exchange (“**ASX**”) publicly discloses the total number of each security which has been short sold on a particular day and disclosed to ASX.¹¹ This disclosure is made on the day the sales are reported to ASX and at present includes reports on short sale trades made on ASX and on Chi-X Australia.

Reports can be accessed at:

<http://www.asx.com.au/data/shortsell.txt>

⁹ para 196.64-196.73, Australian Securities & Investments Commission, “ASIC Regulatory Guide 196: Short Selling”, April 2011.

¹⁰ Para 196.84, Australian Securities & Investments Commission, “ASIC Regulatory Guide 196: Short Selling”, April 2011.

¹¹ Para 196.103, Australian Securities & Investments Commission, “ASIC Regulatory Guide 196: Short Selling”, April 2011.



Short sale transaction reporting information assists investors and companies in explaining share price movements and is useful to regulators in carrying out market surveillance and investigating market misconduct.

3.2 Reporting Obligations

Under S 1020AB(1) of the Corporations Act, a short sale transaction must be reported if:

- A “seller” makes a sale of securities to a buyer on a licensed market in Australia; and
- Before the time of sale, the seller had entered into or gained the benefit of a securities lending arrangement; and
- At the time of the sale, the seller intends that the securities lending arrangement will ensure that some or all of the securities can be vested in the buyer.

The following terms are relevant in the interpretation of this provision:

- Seller

The “seller” may be either a person who engages an intermediary who is an Australian Financial Services (“**AFS**”) licensee to make the sale on the person’s behalf or an AFS licensee who makes the sale on its own behalf.

- Securities Lending Arrangement

An arrangement (which must be between two separate entities) under which:

- (i) one entity (lender) agrees it will deliver particular securities (or managed investment products or other financial products) to another entity (borrower) and vest title in those products in the entity to which they are delivered; and
- (ii) the borrower agrees that it will, after the lender does the things in (i), deliver the products (or equivalent) to the lender (or nominated entity) and vest title in those products (or equivalent) in the entity to which they are delivered.

A short sale transaction must be reported regardless of whether the seller is in or outside of Australia.

3.3 Disclosure Requirements

- Information Provided

If a disclosure obligation arises, the following particulars must be provided:

- (i) The number of securities that the seller will vest in the buyer under the securities lending arrangement;
- (ii) A description of the securities; and
- (iii) Name of entity that issued the securities or other s 1020B products.

- Timing & Responsibility

Where an AFS licensee is engaged to make a sale on behalf of a person, that person must give the required information to the AFS licensee on or before the time of entering into an agreement to sell.

Where an AFS licensee is making a sale on its own behalf or is given information on the short sale transaction by a seller after the start of a trading day but before 7pm, the person must



give the required information to ASX by 9am the next trading day after entering into an agreement to sell (or after the information is given by the seller to the AFS licensee).

If the transaction is made after 7pm on a trading day but before the start of the next trading day, the person must give the particulars outlined in (a) to ASX by 9am on the second trading day.

3.4 Additional Reporting Requirements

In July 2012, ASIC introduced new market integrity rules (applicable from 10 March 2014) which require ASX and Chi-X “market participants” (e.g. stockbrokers and traders that have been admitted under the relevant market operating rules) to identify, when an order is placed, the number of products in the sell order that are short.

Rule 5.12.1 of the ASIC Market Integrity Rules (ASX Market) 2010 does not change the existing obligation to disclose short sale transactions rather it changes the method of reporting of short sale transactions.

This rule requires market participants to:

- include in a Reportable Short Sale Order transmitted to the market, the number of securities that the seller will vest in the buyer under the relevant securities lending arrangement; and
- include in a report of a Reportable Short Sale Transaction, provided to the market operator under Rule 5.1.1 of the Competition Market Integrity Rules, the number of securities that the seller will vest in the buyer under the relevant securities lending arrangement.

The term “Reportable Short Sale Order” means an order to sell securities which, if executed would result in a “Reportable Short Sale Transaction” and a “Reportable Short Sale Transaction” is a transaction for the sale of securities which the seller is required to comply with under s 1020AB(3) of the Corporations Act.

Disclosure should be made at the time a seller enters into an agreement to sell, based on the seller’s position at that time (Reg 7.9.100(2)(a)).

The maximum penalty for non-compliance with this rule is \$1,000,000.

The ASIC Market Integrity Rules (ASX Market) 2010 rules can be accessed at:

<http://www.comlaw.gov.au/Details/F2013C00192>

An Information Sheet published by ASIC which sets out the relevant reporting requirements under the rules can be accessed at:

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/info158-short-sale-tagging.pdf/\\$file/info158-short-sale-tagging.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/info158-short-sale-tagging.pdf/$file/info158-short-sale-tagging.pdf)

4. Short Position Reporting

4.1 Purpose

The purpose of the short position reporting regime is to provide an indication of the bearish sentiment within a particular stock at any point in time and also the amount of overhang in the stock that will need to be covered at some point by short sellers purchasing shares.



ASIC publicly discloses the total of short positions in securities issued by a listed entity that have been disclosed to ASIC the previous trading day (i.e. total short positions held in a product on day T will published on T + 4).¹²

These reports can be viewed at:

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Short+position+reports+table?openDocument>

4.2 Reporting Obligations

Subject to the threshold exemptions discussed in Section 4.4, a person has an obligation to report a short position in relation to securities in a listed entity:

- If the person makes a covered short sale of the securities on ASX, Chi-X Australia Pty Ltd (“**Chi-X Australia**”) or another Australian licensed market AND at 7pm on the day the person makes that sale, the person has a short position in those securities AND that short position is above the reporting threshold; and
- If at 7pm on subsequent reporting days after a person has reported a short position, the person continues to have a short position above the reporting threshold.

For that purpose:

- A person has an obligation to deliver securities for the purposes of determining a short position, if the person:
 - (i) Has an obligation to deliver under a sale agreement where the securities have not been delivered (Reg 7.9.99(4)(a));
 - (ii) Has a contingent/non-contingent obligation to vest title in a lender under a securities lending arrangement (Reg 7.9.99(4)(b)); or
 - (iii) Has any other non-contingent legal obligation to deliver (Reg 7.9.99(4)(c)).
- A person has securities for the purposes of determining a short position if:
 - (i) The person is holding the securities on the person’s own behalf (Reg 7.9.99(3)(a));
 - (ii) The person is holding the securities on behalf of another person except where that other person has the sole discretion to decide whether the securities will be sold (Reg 7.9.99(3)(aa));
 - (iii) Another person is holding the securities on the person’s behalf but only where the person has sole discretion to decide whether the securities will be sold (Reg 7.9.99(3)(b));
 - (iv) The person has entered into an agreement to buy the securities but has not received the results (Reg 7.9.99(3)(c));
 - (v) The person has vested title in the securities in a borrower, or in an entity nominated by the borrower under the securities lending arrangement (Reg 7.9.99(3)(d)).

The short position reporting obligation arises regardless of whether the seller is in or outside of Australia.

4.3 Disclosure Requirements

- Information

¹² Para 196.143, Australian Securities & Investments Commission, “ASIC Regulatory Guide 196: Short Selling”, April 2011.



A short seller may lodge its own short position reports or authorise a submitting entity to lodge short position reports on its behalf. ASIC receives all short position reports via “Financial Information Exchange” (“**FIX**”) protocol “position report” messages. FIX is an electronic communications protocol for international real time exchange of information related to securities transactions and markets.

Short sellers and entities submitting on behalf of short sellers will rely on their IT team or an external system provider to develop a FIX-compliant reporting solution to send FIX position report messages to ASIC. The link below sets out a list of companies who offer reporting solutions:

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Short-selling-reporting?openDocument>

ASIC has published “Short Selling: Short Position Reporting – FIX Rules of Engagement” which sets out the ASIC FIX specifications for IT system developers. This document can be found at the link below:

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Short-selling-rules-of-engagement-July-2010-v3.pdf/\\$file/Short-selling-rules-of-engagement-July-2010-v3.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Short-selling-rules-of-engagement-July-2010-v3.pdf/$file/Short-selling-rules-of-engagement-July-2010-v3.pdf)

ASIC uses the FIX protocol to confirm receipt of short position reports. If ASIC does not provide confirmation, the short position report must be resubmitted. ASIC may reject a short position report if the format or information does not comply with FIX protocol or with data validation rules as specified in the FIX Rules of Engagement.¹³ ASIC will provide a rejection reason for rejected short position reports, and where a short position report is rejected, it must be resubmitted in the correct format.

- Timing and Responsibility for Provision of Information

A person must report its short position at 7pm on each reporting day.

Short position reports must be received by ASIC before 9am three reporting days after the date of the short position (Reg 7.9.100(1)(d)).

A reporting day is a day on which ASIC is open for business in Sydney.

To report short positions, a person must have a unique identifier, which may be an Australian Company Number, Australian Registered Body Number or SWIFT Bank Identifier Code (for overseas persons). Alternatively, persons may register with ASIC to obtain a unique identity code. Registrations can be completed at:

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Register-to-report-short-selling?openDocument>

4.4 Exemption

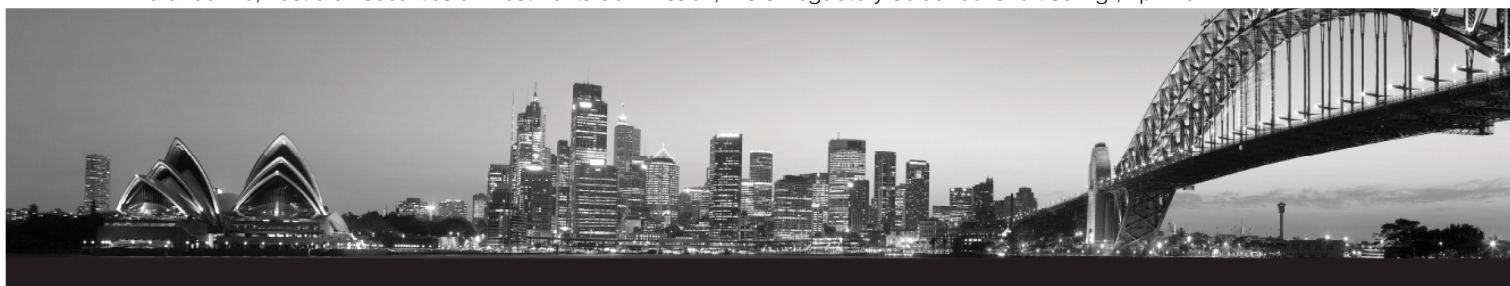
ASIC has granted relief exempting sellers from reporting a short position where the seller’s short position as at 7pm on a particular day is less than or equal to:

- \$100,000; and
- 0.01% of the total quantity of securities or products in relevant class of securities or products.

Both conditions must be satisfied before this relief can be relied on.

However, a seller may choose not to rely on this relief and to report all its short positions to ASIC.

¹³ Para 196.140, Australian Securities & Investments Commission, “ASIC Regulatory Guide 196: Short Selling”, April 2011.



This threshold is established at a level intended to relieve sellers with small short positions from having to report those positions while giving a reasonable representation of the market's overall short positions.¹⁴

The value of the threshold is calculated by reference to either the last sale price of a security or product for the day OR the price determined and published by the market operator after the close of trading that day.¹⁵

5. Offences

Failure to comply with the disclosure requirements is an offence under s 1311 of the Corporations Act. At present, the penalty for a first offence against s 1020B(2) is a fine of 25 penalty units (currently equivalent to \$4,250)¹⁶ or imprisonment for six (6) months or both. For a second or subsequent offence, the penalty is 100 penalty units (currently equivalent to \$17,000)¹⁷ or imprisonment for two years of both (Sch 3, Corporations Act).

Injunctive relief may be sought under s 1324(1) where a person has engaged or is engaging or is proposing to engage in, unlawful short selling. This relief can be sought by ASIC or a person whose interests have been, are or would be affected by the conduct.

6. Market Surveillance

The short sale reporting regime assists regulators (ASIC and ASX) in carrying out market surveillance and investigating alleged cases of market misconduct.

On 1 August 2010 ASIC took over responsibility from ASX for market supervision. ASIC's responsibilities include undertaking real-time market surveillance and post trade analysis to detect market misconduct.

ASIC has an integrated market surveillance system in place and has developed a streamlined markets analysis methodology and relationship management model.

In a six-month period, the surveillance system produces more than 20,000 alerts for review. Not all alerts are investigated. For example, the period 1 January to 30 June 2011 led to 121 preliminary inquiries, with 35 of these subsequently referred to the ASIC market integrity team for investigation.

The objective of these systems are to ensure that cases of market misconduct (including failure to comply with short sale reporting requirements) are detected and investigated by ASIC in a timely manner.

For further information please contact Danny Farrugia on +61 2 9043 4009 or dlf@aequus.net.au

¹⁴ Para 196.130, Australian Securities & Investments Commission, "ASIC Regulatory Guide 196: Short Selling", April 2011.

¹⁵ Para 196.131, Australian Securities & Investments Commission, "ASIC Regulatory Guide 196: Short Selling", April 2011.

¹⁶ Effective from 28 December 2012, the Crimes Legislation Amendments (Serious Drugs, Identity Crimes and Other Measures) Act 2012 (Cth) amended the value of a penalty unit, increasing it from \$110 to \$170 (Crimes Act 1914(Cth), s 4AA(1)).

¹⁷ *Ibid.*



