Corporations Amendment (Short Selling) Act 2008

No. 146, 2008

An Act to amend the *Corporations Act 2001*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

Contents

1 Short title 1
2 Commencement 2
3 Schedule(s) 2

Schedule 1—Amendments commencing on Royal Assent 3

Corporations Act 2001 3

Schedule 2—Amendments commencing on the 28th day after Royal Assent 5

Corporations Act 2001 5

Schedule 3—Amendments commencing on Proclamation 6

Corporations Act 2001 6

Corporations Amendment (Short Selling) Act 2008

No. 146, 2008

An Act to amend the *Corporations Act 2001*, and for related purposes

[*Assented to 11 December 2008*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Corporations Amendment (Short Selling) Act 2008*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	11 December 2008
2. Schedule 1	The day on which this Act receives the Royal Assent.	11 December 2008
3. Schedule 2	The 28th day after the day on which this Act receives the Royal Assent.	8 January 2009
4. Schedule 3	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments commencing on Royal Assent

Corporations Act 2001

1 At the end of section 1020F

Add:

(8) To avoid doubt, a declaration under paragraph (1)(c) may specify omissions, modifications or variations that have any or all of the following effects:

(a) suspending, prohibiting or limiting:

(i) any form of short selling of financial products; or

(ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;

(b) varying requirements under this Part that apply to:

(i) any form of short selling of financial products; or

(ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;

(c) removing some or all requirements under this Part that apply to:

(i) any form of short selling of financial products; or

(ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;

(d) imposing requirements that apply to:

(i) any form of short selling of financial products; or

(ii) any transaction that has the same or substantially similar market effect as a short sale of financial products.

2 At the end of Chapter 10

Add:

Part 10.10 Transitional provisions relating to the Corporations Amendment (Short Selling) Act 2008

1484 Declarations under paragraph 1020F(1)(c) relating to short selling

(1) To avoid doubt, an instrument mentioned in subsection (2) that was made at a particular time was validly made under paragraph 1020F(1)(c) at that time.

(2) The instruments are as follows:

(a) ASIC Class Order [CO 08/751], registered on the Federal Register of Legislative Instruments on 22 September 2008;

(b) ASIC Class Order [CO 08/752], registered on the Federal Register of Legislative Instruments on 22 September 2008;

(c) ASIC Class Order [CO 08/753], registered on the Federal Register of Legislative Instruments on 22 September 2008;

(d) ASIC Class Order [CO 08/763], registered on the Federal Register of Legislative Instruments on 23 September 2008;

(e) ASIC Class Order [CO 08/801], registered on the Federal Register of Legislative Instruments on 24 October 2008.

(3) To avoid doubt, an instrument (if any) that:

(a) was made at a time:

(i) after 24 October 2008; and

(ii) before the commencement of this section; and

(b) is of substantially the same nature as the instruments mentioned in subsection (2); and

(c) was registered on the Federal Register of Legislative Instruments:

(i) after 24 October 2008; and

(ii) before the commencement of this section;

was validly made under paragraph 1020F(1)(c) at that time.

(4) This section applies on and after 19 September 2008.

(5) In this section:

Federal Register of Legislative Instruments means the Federal Register of Legislative Instruments established under the *Legislative Instruments Act 2003*.

Schedule 2—Amendments commencing on the 28th day after Royal Assent

Corporations Act 2001

1 Subsection 1020B(1)

Omit "In this section and section 1020C", substitute "In this section".

Note: The heading to section 1020B is replaced by the heading "**Prohibition of certain short sales of securities, managed investment products and certain other financial products**".

2 Subsections 1020B(4), (5) and (6)

Repeal the subsections, substitute:

(4) Subsection (2) does not apply in relation to a sale of section 1020B products by a person who, before the time of sale, has entered into a contract to buy those products and who has a right to have those products vested in the person that is conditional only upon all or any of the following:

(a) payment of the consideration in respect of the purchase;

(b) the receipt by the person of a proper instrument of transfer in respect of the products;

(c) the receipt by the person of the documents that are, or are documents of title to, the products.

3 Section 1020C

Repeal the section.

4 Subsection 1200F(1) (table item 5)

Omit "sections 1020B and 1020C", substitute "section 1020B".

5 Schedule 3 (table items 301A, 301B and 301C)

Repeal the items.

Schedule 3—Amendments commencing on Proclamation

Corporations Act 2001

1 Subsection 1010A(1)

Omit “Divisions 5A and 6”, substitute “Divisions 5A, 5B and 6”.

2 Subsection 1010A(2)

Omit “Divisions 5A and 6”, substitute “Divisions 5A, 5B and 6”.

3 After Division 5A of Part 7.9

Insert:

Division 5B—Disclosure etc. in relation to short sales covered by securities lending arrangement of listed section 1020B products

Note: Section 1020B prohibits certain short sales of section 1020B products.

1020AA Definitions

(1) In this Division:

crossing: a ***crossing*** of section 1020B products is a sale of section 1020B products made by a financial services licensee:

(a) on behalf of both the buyer and the seller of the products; or

(b) on behalf of the buyer of the products and on its own behalf as seller of the products; or

(c) on behalf of the seller of the products and on its own behalf as buyer of the products.

section 1020B products has the meaning given by subsection 1020B(1).

securities lending arrangement means an arrangement under which:

(a) one entity (the ***lender***) agrees that it will:

(i) deliver particular securities, managed investment products or other financial products to another entity (the ***borrower***) or to an entity nominated by the borrower; and

(ii) vest title in those products in the entity to which they are delivered; and

(b) the borrower agrees that it will, after the lender does the things mentioned in paragraph (a):

(i) deliver the products (or equivalent products) to the lender or to an entity nominated by the lender; and

(ii) vest title in those products (or those equivalent products) in the entity to which they are delivered.

(2) To avoid doubt, for the purposes of this Division, treat the entering into of an agreement to sell section 1020B products as the sale of the products.

(3) To avoid doubt, for the purposes of this Division, treat a financial services licensee as making a sale on behalf of a person if the sale is, in economic substance, made by the licensee for the person.

Example: A request that the sale be made is passed from the person to the financial services licensee through a chain of intermediaries.

(4) For the purposes of this Division, treat a crossing of section 1020B products as being made on a licensed market.

1020AB Seller disclosure

(1) Subsection (3) applies if:

(a) either:

(i) a financial services licensee, on behalf of a person (the ***seller***), makes a sale in this jurisdiction of section 1020B products on a licensed market to a buyer; or

(ii) a financial services licensee (the ***seller***), on its own behalf, makes a sale in this jurisdiction of section 1020B products on a licensed market to a buyer; and

(b) before the time of the sale, the seller had entered into or gained the benefit of a securities lending arrangement; and

(c) at the time of the sale, the seller intends that the securities lending arrangement will ensure that some or all the section 1020B products can be vested in the buyer; and

(d) the following requirements are satisfied (if applicable):

(i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;

(ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;

(iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

(2) Subsection (3) applies regardless of whether the seller is inside or outside Australia.

Offence

(3) The seller must:

(a) give the entity mentioned in subsection (4) particulars specified in the regulations in relation to the circumstances mentioned in paragraphs (1)(a), (b) and (c); and

(b) do so:

(i) on or before the time specified in the regulations; and

(ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) The entity is:

(a) if subparagraph (1)(a)(i) applies:

(i) the financial services licensee mentioned in that subparagraph; or

(ii) if the regulations specify another entity—that entity; or

(b) if subparagraph (1)(a)(ii) applies:

(i) the operator of the licensed market mentioned in that subparagraph; or

(ii) if the regulations specify another entity—that entity.

1020AC Licensee disclosure

(1) Subsection (2) applies if:

(a) the seller mentioned in subparagraph 1020AB(1)(a)(i) gives a financial services licensee information in accordance with section 1020AB in relation to a sale of section 1020B products on a licensed market; and

(b) the following requirements are satisfied (if applicable):

(i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;

(ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;

(iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

Offence

(2) The financial services licensee must:

(a) give the entity mentioned in subsection (3) particulars specified in the regulations in relation to the circumstances mentioned in paragraph (1)(a); and

(b) do so:

(i) on or before the time specified in the regulations; and

(ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) The entity is:

(a) the operator of the licensed market mentioned in paragraph (1)(a); or

(b) if the regulations specify another entity—that entity.

1020AD Public disclosure of information

(1) Subsection (2) applies if:

(a) any of the following apply, in relation to a sale of section 1020B products on a licensed market:

(i) the seller mentioned in subparagraph 1020AB(1)(a)(ii) gives information to the operator of a licensed market (or to another entity) in accordance with section 1020AB;

(ii) the financial services licensee mentioned in paragraph 1020AC(1)(a) gives information to the operator of a licensed market (or to another entity) in accordance with section 1020AC;

(iii) if regulations for the purposes of subparagraph 1020AB(4)(a)(ii) provide that the entity to which information is to be given in accordance with section 1020AB is the operator of a licensed market (or another entity)—the seller mentioned in subparagraph 1020AB(1)(a)(i) gives information to the operator (or other entity) in accordance with that section; and

(b) the following requirements are satisfied (if applicable):

(i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;

(ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;

(iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

Offence

(2) The operator (or the other entity) must:

(a) make a public disclosure of particulars specified in the regulations in relation to the information mentioned in paragraph (1)(a); and

(b) do so:

(i) on or before the time specified in the regulations; and

(ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1020AE Licensee's obligation to ask seller about short sale

The financial services licensee must not make a sale in this jurisdiction of section 1020B products on a licensed market if:

(a) the sale is on behalf of a person (the ***seller***); and

(b) the seller will be obliged under section 1020AB to give the financial services licensee information in relation to the sale; and

(c) either or both of the following apply:

(i) before making the sale, the financial services licensee failed to ask the seller, orally or in writing, whether the seller will be obliged under section 1020AB to give the financial services licensee information in relation to the sale;

(ii) before making the sale, the financial services licensee failed to record, in writing, the seller's answer.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)).

Note 2: For the definition of ***writing***, see section 25 of the *Acts Interpretation Act 1901*. For the application of the *Acts Interpretation Act 1901* to this Act, see section 5C of this Act.

1020AF Regulations

(1) Regulations made for the purposes of this Division may specify a matter or thing differently for different kinds of persons, things or circumstances. For example, the regulations may:

(a) specify a matter or thing differently for different kinds of sellers mentioned in subsection 1020AB(1) or 1020AC(1); and

(b) specify a time differently for different kinds of circumstances.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

(2) Subsection (1) does not limit the regulations that may be made for the purposes of this Division.

4 Subsection 1020B(1)

Omit "In this section", substitute "In this section and in Division 5B".

5 Subsection 1200F(1) (table item 5)

Omit "other than section 1020B", substitute "other than sections 1020AB, 1020AC, 1020AD and 1020B".

6 Schedule 3 (after table item 300A)

Insert:

300AA	Subsection 1020AB(3)	25 penalty units or imprisonment for 6 months, or both.
300AB	Subsection 1020AC(2)	25 penalty units or imprisonment for 6 months, or both.
300AC	Subsection 1020AD(2)	25 penalty units or imprisonment for 6 months, or both.
300AD	Section 1020AE	25 penalty units or imprisonment for 6 months, or both.

[*Minister's second reading speech made in—*
House of Representatives on 13 November 2008
Senate on 27 November 2008]

(214/08)