



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 63

# Market stabilisation

March 2005

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### **Your comments**

**You are invited to comment on the proposals and issues for consideration in this paper, including the explanation sections.**

**We will not treat your submission as confidential unless you specifically request that we treat the whole or part of your submission as confidential.**

**Comments are due by Friday 22 April 2005 and should be sent to:**

**Kate O'Rourke  
Regulatory Policy Branch  
Australian Securities & Investments Commission  
GPO Box 9827  
Sydney NSW 2001  
Fax: (02) 9911 2316  
email: [Kate.O'Rourke@asic.gov.au](mailto:Kate.O'Rourke@asic.gov.au)**

**You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.**

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# What this policy proposal is about

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**1** This policy proposal paper outlines our proposed policy on market stabilisation. This paper is not final ASIC policy.

**2** Market stabilisation is the purchase of, or the offer to purchase, securities for the purpose of preventing, or slowing, any fall in the market price of those securities following an offer of those securities.

**3** An offer of securities often leads to a fall in the price of those securities because of:

- (a) the sudden increase in supply; and/or
- (b) imperfections in the pricing and allocation process.

To counter this effect, the underwriter of the offer may attempt to stabilise the price of the securities by purchasing, or offering to purchase, the securities for a period after the issue or sale of the securities.

**4** This policy proposal paper outlines:

- (a) our approach to market stabilisation, including our use of no-action letters (**Section A**);
- (b) when we will provide a no-action letter for market stabilisation (**Section B**);
- (c) the conditions we will impose on such market stabilisation (**Section C**); and
- (d) how to apply for a no-action letter (**Section D**).

**5** This policy proposal paper is based on our Information Release [IR 00/31] *ASIC interim guidance on market stabilisation*, but proposes some modifications to that interim policy.

# Policy proposals

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We have four sets of policy proposals. For each of these proposed policies, we have listed various aspects of those proposals which we are considering and have raised issues which we would like you to comment on. When necessary we have also included some explanations of our proposals.

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## Contents

<b>What this policy proposal is about .....</b>	<b>3</b>
<b>Policy proposals.....</b>	<b>4</b>
A Our approach to market stabilisation.....	5
B When will ASIC provide a no-action letter for market stabilisation?.....	9
C What conditions will we impose? .....	15
D How to apply for a no-action letter .....	25
<b>Schedule 1: Sample standard no-action letter .....</b>	<b>26</b>
<b>Regulatory and financial impact .....</b>	<b>32</b>
<b>Development of policy proposal .....</b>	<b>34</b>
<b>Key terms.....</b>	<b>35</b>
<b>What will happen next?.....</b>	<b>37</b>

# A Our approach to market stabilisation

## Policy proposal

**A1** ASIC will provide, upon application, a no-action letter on conditions to persons involved in market stabilisation where such stabilisation:

- (a) facilitates the offer of securities; and
- (b) does not lead to or is unlikely to create a false, misled or uninformed market in the securities.

Note: For our policy on no-action letters in general, see Policy Statement 108 *No-action letters* [PS 108].

## Standard no-action letters

**A2** We consider market stabilisation satisfies the conditions in policy proposal paragraph A1 if it:

- (a) is conducted in relation to an offer of the type described in Section B; and
- (b) complies with the conditions set out in Section C.

Therefore, we propose to generally provide a standard no-action letter to persons who intend to engage in market stabilisation in these circumstances.

Note: For a sample standard no-action letter, see Schedule A.

## Non-standard no-action letters

**A3** We may provide a no-action letter to persons who wish to engage in market stabilisation other than as set out in policy proposal paragraph A2. In these circumstances, the applicant will need to convince us that the conditions in policy proposal paragraph A1 are satisfied.

## Your feedback

**A1Q1** Does market stabilisation pose any risks to issuers, underwriters or investors (particularly long-term investors)?

**A1Q2** Should we express a class no-action position in our policy statement rather than providing individual no-action letters on application?

**A1Q3** Have we correctly identified the circumstances in which ASIC should provide no-action letters to persons involved in market stabilisation? If not, what other factors should we consider?

**A3Q1** Should we provide no-action letters in circumstances other than those described in policy proposal paragraph A2?

# Explanation

## Market stabilisation and the Corporations Act

**1** Market stabilisation may contravene Part 7.10 of the *Corporations Act 2001* (Act). In particular, persons who engage in market stabilisation may breach s1041A (market manipulation), 1041B–1041C (false trading and market rigging), 1041H (misleading and deceptive conduct) and 1043A (insider trading).

## Benefits of market stabilisation

**2** Market stabilisation aims to achieve a more orderly secondary market for securities following an initial issue or sale. This enhances confidence in the market for new issues or sales of securities and thereby facilitates corporate fundraising. In particular, market stabilisation increases investor confidence; investors know there will probably be a market for the security at a price that is not artificially deflated by the sudden increase in supply or other factors. Companies are also more likely to raise funds through the issue or sale of securities if they know there will be some initial support for the price of those securities.

**3** Stabilisation is permitted in other key jurisdictions: see, for example, §9a(6), *Securities and Exchange Act 1934* (US) and Rule 104 of Regulation M, Securities Exchange Commission 17 F.C.R. §242.104 (2003); s118(8), *Financial Services and Markets Act 2000* (UK) and MAR 2: Price Stabilising Rules, Financial Services Authority Handbook; and, s282 and 306, *Securities and Futures Ordinance (Cap. 571)* (HK) and the Securities and Futures (Price Stabilizing) Rules made by the Hong Kong Securities and Futures Commission. Permitting market stabilisation in Australia facilitates simultaneous offers of securities in Australia and those other jurisdictions and is more likely to allow for an orderly cross-border market in the securities.

## When will we give a no-action letter?

**4** While market stabilisation may facilitate the offer of securities, there is a risk that it may create a false, misled or uninformed market. We will give a no-action letter, stating that ASIC does not intend to take action against those involved in a particular market stabilisation, if we are of the clear view that it would not advance the policy of the legislation to take enforcement action on that conduct: see Policy Statement 108 *No-action letters* [PS 108]. We will take such a view if we are satisfied that the market stabilisation will facilitate the offer of

securities and the risk of a false, misled or uninformed market being created is mitigated by certain constraints and conditions.

## Standard no-action letters

**5** We believe that market stabilisation will facilitate the offer of securities and not create a false, misled or uninformed market when it occurs:

- (a) in the circumstances described in Section B; and
- (b) subject to the conditions in Section C.

## Non-standard no-action letters

**6** We also accept that, in some circumstances, the risk of a false, misled or uninformed market being created by market stabilisation can be controlled in situations other than those described in Section B or through the imposition of conditions other than those in Section C. We may also provide a no-action letter in these circumstances.

**7** For example, market stabilisation conducted in an overseas jurisdiction in accordance with that jurisdiction's stabilisation rules may be unlawful in Australia because of the effect on the price of securities here. We may provide a no-action letter for such market stabilisation if:

- (a) it facilitates the offer of the securities; and
- (b) the risk that market stabilisation will create a false, misled or uninformed market is sufficiently addressed.

**8** However, in each of these circumstances the onus is on the applicant to convince us to depart from our standard policy. An applicant will need to establish that market stabilisation will facilitate the offer of securities and will not lead to a false, misled or uninformed market in the securities. We also note that it will take us longer to consider an application for a no-action letter in these exceptional cases: see Section D.

## What is the effect of a no-action letter?

**9** [PS 108] sets out in full the effect of a no-action letter. Essentially, a no-action letter is an indication of the future regulatory or enforcement action that ASIC may take and this indication is based on the information available to ASIC at the time it provides the letter. Even where a no-action letter has been issued, ASIC reserves its right to take action. Additionally, a no-action letter does not preclude third parties from taking legal action on conduct covered by the no-action letter, nor will it impede a court from holding that such conduct infringes the Act.

Therefore, a no-action letter will not prevent market stabilisation giving rise to liability at the suit of any person who suffers damage from the stabilisation: s1317J(3A) and 1041I of the Act.



## B When will ASIC provide a no-action letter for market stabilisation?

Policy proposal	Your feedback
<p><b>B1</b> We propose to provide a standard no-action letter to persons involved in market stabilisation of offers that satisfy our proposed criteria on:</p> <ul style="list-style-type: none"> <li>(a) the nature of the offer;</li> <li>(b) the type of security;</li> <li>(c) the size threshold;</li> <li>(d) over-allotment of securities; and</li> <li>(e) the appointment of a stabilisation manager.</li> </ul> <p><b>Nature of offer</b></p> <p><b>B2</b> The offer of securities must be:</p> <ul style="list-style-type: none"> <li>(a) by way of an initial public offering (IPO), secondary offering or secondary sale;</li> <li>(b) made in, or accompanied by, a disclosure document; and</li> </ul> <p>Note: For the definition of “disclosure document”, see s9 of the Act.</p> <ul style="list-style-type: none"> <li>(c) for cash.</li> </ul> <p>Note: An offer for cash is an offer that is to be, is or has been, made at a specified price payable in Australian dollars or any other currency.</p> <p><b>Type of security</b></p> <p><b>B3</b> The offer must relate to:</p> <ul style="list-style-type: none"> <li>(a) shares or equivalent securities (see policy proposal paragraph B4); and</li> <li>(b) securities that are quoted, admitted for quotation, or subject to an application for admission for quotation on a financial market conducted by Australian Stock Exchange Ltd (ASX).</li> </ul>	<p><b>B2Q1</b> Should market stabilisation be confined to IPOs?</p> <p><b>B2Q2</b> Should market stabilisation be confined to certain types of secondary sales (e.g. sales of a company’s securities by a person controlling that company)?</p> <p><b>B2Q3</b> Are there circumstances in which market stabilisation should be permitted even though the offer is not made in, or accompanied by, a disclosure document?</p> <p><b>B2Q4</b> Should market stabilisation be permitted for non-cash offers?</p> <p><b>B3Q1</b> Should we permit stabilisation of securities quoted on financial markets conducted by prescribed financial market operators other than ASX?</p>

Policy proposal	Your feedback
<p><b>B4</b> Equivalent securities include:</p> <ul style="list-style-type: none"> <li>(a) instalment receipts;</li> <li>(b) foreign depository instalments;</li> <li>(c) managed investment products; and</li> <li>(d) stapled securities where each of the stapled securities is a share, instalment receipt, foreign depository instalment or managed investment product.</li> </ul> <p>Equivalent securities do not include derivatives, debt securities, instalment warrants or options.</p>	<p><b>B4Q1</b> Should derivatives, debt securities, instalment warrants or options be considered equivalent securities?</p>
<p><b>Size threshold</b></p> <p><b>B5</b> The total value of the securities offered (excluding securities allocated under the over-allotment option) must be greater than \$50 million.</p>	<p><b>B5Q1</b> Is it appropriate to impose a size threshold on the offer of securities? If so, is \$50 million an appropriate threshold?</p>
<p><b>Over-allotment</b></p> <p><b>B6</b> The issue must meet the following criteria for over-allotment:</p> <ul style="list-style-type: none"> <li>(a) the stabilisation manager must have an option granted to the stabilisation manager by the issuer or seller of securities (or, more unusually a third party who already holds issued securities) enabling the stabilisation manager to acquire additional securities at the issue or sale price under the prospectus (the over-allotment or greenshoe option);</li> <li>(b) the over-allotment option must be no greater than 15% of the total number of securities being made available under the offer;</li> <li>(c) the stabilisation manager may over-allot the issue (the over-allotment), with the size of the over-allotment limited by the size of the over-allotment option; and</li> <li>(d) the stabilisation manager may only acquire securities under the market stabilisation up to the size of the over-allotment.</li> </ul>	<p><b>B6Q1</b> Is 15% an appropriate limit on the over-allotment option?</p>

Policy proposal	Your feedback
<p data-bbox="277 296 695 338"><b>Stabilisation manager</b></p> <p data-bbox="277 359 873 506"><b>B7</b> One person must have responsibility for ensuring compliance with the conditions imposed on any market stabilisation (the stabilisation manager). The stabilisation manager:</p> <ul data-bbox="277 527 873 688" style="list-style-type: none"><li data-bbox="277 527 873 604">(a) must be a participant on the financial market conducted by ASX; and</li><li data-bbox="277 615 873 688">(b) can delegate activities to an agent or agents, including agents in other jurisdictions.</li></ul>	<p data-bbox="899 359 1338 506"><b>B7Q1</b> Is the requirement to appoint a stabilisation manager appropriate? What practical difficulties, if any, may it create?</p>

# Explanation

## Nature of offer

**1** We propose to permit market stabilisation for initial public offerings (IPOs), secondary offerings and secondary sales. We have not confined market stabilisation to IPOs because we believe that the aim of market stabilisation (namely, to smooth price volatility that is sometimes triggered by a sudden increase in supply of a particular security and/or by imperfections in the bookbuild process) is just as relevant to secondary offerings and sales.

**2** We propose to restrict market stabilisation to offers for which there is a disclosure document to:

- (a) ensure that investors will receive a document in which information about the market stabilisation may be included (see policy proposal paragraph C3); and
- (b) confine stabilisation to offerings that have a sufficiently public character.

**3** We propose to limit market stabilisation to offers that are for cash. Non-cash offers are unlikely to have an objective value or price. Market stabilisation is designed to prevent or slow a fall in price of a security, so uncertainty over the objective value or price of a security would make market stabilisation difficult. The lack of a clear, objective price for non-cash offers would also make it more difficult to impose conditions on price.

## Type of security

**4** We propose routinely to permit market stabilisation for the offer or sale of securities that will be quoted on a financial market and are equivalent to shares (in addition to shares) because these securities may also be subject to price volatility after a public issue. We have not included debt securities as they are less likely to be subject to price volatility compared to shares. We have not included derivatives, instalment warrants or options as they are less likely to be used to raise capital by corporations.

**5** Restricting market stabilisation to securities that are quoted, admitted for quotation or subject to an application for admission for quotation on a financial market conducted by ASX increases the likelihood that the securities are widely traded, and ensures that market stabilisation is undertaken in an environment where it may be more readily disclosed and monitored: see policy proposal paragraph C4. We will review this

policy as financial markets conducted by other prescribed financial market operators grow in size and volume of trading.

## Size threshold

**6** We propose to set a size threshold for the total value of the securities offered (excluding securities allocated under the over-allotment option) of \$50 million. The size threshold applies to the total value of the offering when all payments or instalments are received; that is, partly-paid offers of less than \$50 million may be stabilised if the total value of the offer will be at least \$50 million.

**7** A size threshold ensures that the offer of securities is sufficiently large and broadly distributed to justify stabilising action. Both the United Kingdom and Hong Kong impose size thresholds under their price stabilisation rules.

## Over-allotment

**8** Under our proposals, the stabilisation manager must have in place an over-allotment option. Without the over-allotment option, over-allotment of securities may breach s1020B of the Act (short selling).

Generally, the stabilisation manager will also have a securities loan arrangement, under which the stabilisation manager may borrow securities up to the size of the over-allotment option from the issuer or seller of securities or a third party. Such a securities loan arrangement permits the stabilisation manager to deliver the allotted securities, including over-allotted securities, upon the close of the issue or sale. At the end of the stabilisation period, the stabilisation manager may satisfy its obligations under the securities loan arrangement either with securities purchased on market through stabilisation bids, by exercising the over-allotment option, or a combination of the two.

**9** We have set the limit on the size of the over-allotment option at 15% of the total number of securities being made available under the offer. This is in accordance with historical practice in Australia and with international practice.

**10** The stabilisation manager may only acquire securities for the purposes of market stabilisation up to the stabilisation manager's over-allotment. This is because, in these circumstances, market stabilisation is arguably less likely to breach the market misconduct provisions in Part 7.10 of the Act.

## Stabilisation manager

**11** One of our criteria for permitting market stabilisation is the appointment of a stabilisation manager. The stabilisation manager will generally be one of the underwriters of the offer and will be responsible for managing and co-ordinating the market stabilisation, as well as ensuring compliance with the conditions imposed in the no-action letter provided by ASIC.

**12** Having a stabilisation manager establishes clear accountability for compliance with our conditions and provides a central point of inquiry for any regulatory intervention. The stabilisation manager must be an existing ASX participant to enable ASX to monitor compliance with the stabilisation conditions.

**13** The stabilisation manager may delegate activities to an agent or agents, including agents in other jurisdictions. We envisage that, in many cases, the stabilisation manager will appoint a broker to make stabilisation bids and purchases (the stabilisation broker).

## C What conditions will we impose?

Policy proposal	Your feedback
<p><b>C1</b> In our standard no-action letter, we propose to impose conditions on:</p> <ul style="list-style-type: none"> <li>(a) the issuer(s) (or selling shareholder, in the case of a secondary sale);</li> <li>(b) the stabilisation manager; and</li> <li>(c) the stabilisation broker.</li> </ul> <p><b>C2</b> Our proposed conditions cover:</p> <ul style="list-style-type: none"> <li>(a) disclosure of stabilisation;</li> <li>(b) the maximum price of bids;</li> <li>(c) how bids must be made;</li> <li>(d) preventing insider trading;</li> <li>(e) reporting and record-keeping;</li> <li>(g) period of stabilisation; and</li> <li>(h) limitations on refreshing the over-allotment option.</li> </ul> <p>In exceptional circumstances, we may impose different conditions: see policy proposal paragraph A3.</p> <p><b>Disclosure of stabilisation</b></p> <p><b><i>Disclosure document</i></b></p> <p><b>C3</b> The issuer (or selling shareholder, in the case of a secondary sale) must disclose the nature and anticipated effect of the market stabilisation in the disclosure document.</p> <p><b><i>On-market disclosure (tagging)</i></b></p> <p><b>C4</b> All bids by the stabilisation broker in connection with the market stabilisation (stabilisation bids) must be identifiable as such on ASX's automated trading system.</p>	<p><b>C3Q1</b> Should issuers also be obliged to provide disclosure about the market stabilisation in communications other than the disclosure document, such as press releases or market announcements?</p> <p><b>C4Q1</b> To what extent may tagging of stabilisation bids undermine the stabilisation manager's efforts to stabilise the price of the securities?</p>

## Policy proposal

### ***Disclosure to issuer and ASX (for public disclosure)***

**C5** Each day before trading commences, the stabilisation manager or the stabilisation broker must notify the issuer (or selling shareholder in the case of a secondary sale) and ASX of:

- (a) the number of securities purchased by the stabilisation broker on the previous trading day under the market stabilisation; and
- (b) the total number of all securities purchased under the market stabilisation.

ASX will disclose this information to the market.

### **Price of bids**

**C6** Stabilisation bids must be the lower of:

- (a) the highest current independent bid on ASX's automated trading system; and
- (b) the lowest price payable for securities by institutions under the offer (the final price).

**C7** If, after the opening of trading on the first day of quotation of securities, there have been no trades executed and there are no independent bids on ASX's automated trading system, stabilisation bids must be no higher in price than the final price.

**C8** If, at any time after trades have been executed, there are no independent bids on ASX's automated trading system, stabilisation bids may be placed at a price no higher than the lower of:

- (a) the price of the last automatically executed trade in the securities; and
- (b) the final price.

## Your feedback

**C5Q1** To what extent may public disclosure of this information undermine the stabilisation manager's efforts to stabilise the price of the securities?

**C6Q1** Should the final price be determined by reference to the price paid by institutional investors, or should a more general formulation be adopted?



## Policy proposal

**C9** The stabilisation manager and the stabilisation broker must not, directly or indirectly, effect any stabilising purchase at a price that the person knows or suspects, or has reason to know or suspect, is a result of activity that is fraudulent, deceptive or manipulative.

## Mechanics of bidding

### *Automated trading system*

**C10** The stabilisation broker (in its capacity as stabilisation broker for the stabilisation manager) may only enter stabilisation bids on an automated trading system run by ASX.

### *Stabilisation agreement letter*

**C11** One of the issuer (or selling shareholder, in the case of a secondary sale), the stabilisation manager or the stabilisation broker must apply for (and each must comply with) a stabilisation agreement letter from ASX setting out the terms upon which ASX will issue an automated trading system stabilisation privilege to the stabilisation broker.

### *Nature of bids*

**C12** Stabilisation bids may only be made for the security being stabilised. That is, market stabilisation may not be pursued through offers to purchase securities that are derivatives of, or convertible into, the security being stabilised.

**C13** The stabilisation broker must identify the price and quantity of stabilisation bids and no undisclosed bids may be made.

## Your feedback

**C10Q1** Is it appropriate to limit stabilisation bids to automated trading systems?

**C13Q1** Are there circumstances in which it would be appropriate to permit stabilisation bids that are undisclosed, or which do not identify the price or quantity of the bid?

Policy proposal	Your feedback
<p><b><i>Multiple bids</i></b></p> <p><b>C14</b> Multiple bids are only permitted on the following conditions:</p> <ul style="list-style-type: none"> <li>(a) there may be no more than two stabilisation bids in the market at one time;</li> <li>(b) the stabilisation broker may only use two bids if the market conditions are such that two bids are required; and</li> <li>(c) multiple bids must not be used in a way which causes, or may cause, a false, misled or uninformed market developing in the relevant securities.</li> </ul> <p><b><i>Trading against other orders</i></b></p> <p><b>C15</b> The stabilisation broker may trade other orders against stabilisation bids, provided the stabilisation bids comply with the proposed price constraints: see policy proposal paragraphs C6–C9.</p> <p><b><i>Time of day for trading</i></b></p> <p><b>C16</b> The stabilisation broker (in its capacity as stabilisation broker for the stabilisation manager) may only make stabilisation bids or purchase the relevant securities during normal trading and the closing phase on ASX’s automated trading system.</p> <p><b><i>Preventing insider trading</i></b></p> <p><b>C17</b> The stabilisation broker must satisfy ASX that it has adequate information barriers (also known as ‘Chinese walls’) and other procedures to prevent information on the market stabilisation or the relevant securities passing:</p> <ul style="list-style-type: none"> <li>(a) between the stabilisation broker and any other broker; or</li> <li>(b) between the designated trading</li> </ul>	<p><b>C14Q1</b> Under what market conditions would multiple bids be required?</p> <p><b>C14Q2</b> Should our policy specify whether multiple bids must be at the same price, or whether they may be a different price?</p> <p><b>C15Q1</b> Does this run the risk of allowing market misconduct? Are the information barriers required by policy proposal paragraph C17 sufficient to address this issue?</p> <p><b>C16Q1</b> Is it reasonable to limit stabilisation bids and purchases to these times?</p> <p><b>C16Q2</b> Should the stabilisation broker be permitted to carry a bid over from the closing phase of one day into the normal trading period of the following day?</p>

## Policy proposal

representatives nominated by the stabilisation broker for the stabilisation bids and any other brokers, dealers or other employees of the stabilisation broker who are engaged in its securities dealing business.

## Reporting and record-keeping

### *Advance notification*

**C18** The stabilisation manager (itself or through the stabilisation broker) must:

- (a) notify ASX in advance of its intention to engage in market stabilisation; and
- (b) submit information to ASX at such times and in such form as ASX requests, making it clear at the time whether the information has been provided to the financial market for regulatory reporting or public disclosure purposes.

### *Availability of information*

**C19** The stabilisation manager (itself or through the stabilisation broker) must make available to ASX in its regulatory capacity all information reasonably required by ASX about:

- (a) the activities of the stabilisation manager and the stabilisation broker; and
- (b) the aggregate short positions and net over-allocation of securities under the market stabilisation.

### *Record-keeping*

**C20** The stabilisation manager (itself or through the stabilisation broker) must establish and maintain the following records which it must provide to ASX and ASIC upon request:

- (a) the name of the entity whose securities were subject to market stabilisation and the class of any security stabilised;
- (b) the price, date and time at which each stabilising purchase was effected;

## Your feedback

**C18Q1** Will the requirements in policy proposal paragraphs C18–C21 create any practical difficulties?

Policy proposal	Your feedback
<p>(c) the size of each stabilising purchase;</p> <p>(d) information on independent trades for the purpose of determining a maximum price for stabilisation;</p> <p>(e) details of counterparties;</p> <p>(f) the names and addresses of the stabilisation manager and stabilisation broker; and</p> <p>(g) all agreements relating to the market stabilisation.</p> <p><b>Independent report</b></p> <p><b>C21</b> We may ask the issuer or the stabilisation manager to appoint an independent market analyst to prepare a report at the issuer’s cost on:</p> <p>(a) the effect of the market stabilisation on the market for the relevant securities; and</p> <p>(b) the effectiveness of the conditions imposed by ASIC on the market stabilisation.</p> <p>We may also ask that the report cover additional specific issues. The report must be provided to ASIC within 30 days of the end of the stabilisation period, for the purpose of conducting a review of the process.</p> <p><b>Period of stabilisation</b></p> <p><b>C22</b> The stabilisation manager and the stabilisation broker may purchase securities under the market stabilisation for a maximum of 30 calendar days starting on the first day of trading of securities in the offering.</p> <p><b>Refreshing the over-allotment option</b></p> <p><b>C23</b> The stabilisation broker may sell securities that have been previously purchased under the market stabilisation. However, this does not increase the net number of securities that the stabilisation broker can acquire under the market stabilisation. The stabilisation broker can only</p>	<p><b>C22Q1</b> Is 30 days sufficient time for the market stabilisation to take effect?</p> <p><b>C23Q1</b> Are there any circumstances in which it would be appropriate to permit refreshing of the over-allotment option?</p>

**Policy proposal**

acquire securities under the market stabilisation up to the size of the over-allotment. If the stabilisation broker sells shares purchased under the market stabilisation, the stabilisation manager may need to exercise its over-allotment option to cover the shortfall (see policy proposal paragraph B6).

**Your feedback**

## Explanation

**1** We propose to include in our no-action letter conditions under which market stabilisation will be permitted.

**2** The proposed conditions are designed to:

- (a) minimise the risk of a false, misled or uninformed market developing in the relevant securities;
- (b) enable ASX to monitor trading in the relevant securities so as to identify at an early stage situations that may lead to a false, misled or uninformed market in the relevant securities; and
- (c) allow ASX and ASIC to take appropriate action in such situations.

**3** The proposed conditions are based on the conditions in [IR 00/31] because we have generally found those conditions to be workable and appropriate. In the following paragraphs, we describe the basis for these conditions and any modifications to [IR 00/31] we are proposing.

## Disclosure of stabilisation

### *Disclosure document*

**4** The proposed condition will help ensure that a false, misled or uninformed market will not develop in the relevant securities because investors will be forewarned that market stabilisation may occur.

### *Disclosure to issuer and ASX (for public disclosure)*

**5** Under [IR 00/31], the number of securities purchased under the market stabilisation was disclosed only to the issuer. We have expanded this disclosure obligation to include providing this information to ASX for public disclosure. This is because of developments in market practice, and because we believe it is useful for the market to have a daily (and final) snapshot of the degree to which market stabilisation has been undertaken to support the price of the securities.

## Price of bids

**6** It is important that a maximum price of stabilisation bids be imposed to ensure that stabilisation is only used to prevent or slow a fall in the price of securities, rather than to lift the price of securities. Policy proposal paragraphs C6–C8 set the maximum price in different circumstances, that is, when there is:

- (a) a current independent bid;

- (b) no current independent bid and no executed trades; and
- (c) no current independent bid and an executed trade.

**7** Our proposed conditions define the final price by reference to the lowest price payable for securities by institutions under the offer. This would include firm commitments made by sub-underwriters in advance of the offer. [IR 00/31] did not define final price. This caused confusion when more than one price was paid for an offer (e.g. when one price was paid by institutions and a discounted price was paid by retail purchasers).

**8** The practical application of our policy proposals on price is that stabilisation bids may not be entered so that they have priority on the bid side or are executed directly against sell orders. Our policy proposals also mean that stabilising bids at priority may not be amended to increase quantity if there are no other independent bids at that price.

## **Mechanics of bidding**

### ***Automated trading system***

**9** We are proposing that stabilisation bids be made only through an automated trading system because such a system provides a means by which:

- (a) all bids can be tagged, and
- (b) the time of bids can be limited to periods during which active trading is more likely to occur: see policy proposal paragraph C16.

### ***Stabilisation agreement letter***

**10** [IR 00/31] provided that the issuer must apply for and comply with a stabilisation agreement letter from the ASX. We propose to recast this obligation to extend compliance with the letter to the stabilisation manager, broker and (in the case of a secondary sale) the seller, as well as the issuer.

### ***Nature of bids***

**11** We propose to impose a condition that stabilisation bids may be made only for the securities being stabilised. This was arguably implicit in [IR 00/31]. Nonetheless, we believe it is appropriate to explicitly confirm that market stabilisation may not be pursued through the offer to purchase securities that are derivatives of, or convertible into, the securities subject to market stabilisation.

## Reporting and record-keeping

**12** The proposed reporting and record-keeping conditions ensure that market stabilisation arrangements may be appropriately monitored so as to identify at an early stage situations that may lead to a false, misleading or unformed market developing.

## Period of stabilisation

**13** We propose to retain the condition in [IR 00/31] that market stabilisation may be undertaken in the 30 calendar days from the first day of trading in the securities. This is consistent with international practice, and we have had no indication that this length of time is inappropriate.

## Refreshing the over-allotment option

**14** We are proposing to prohibit the stabilisation broker from refreshing the over-allotment option (this is sometimes referred to as ‘refreshing the greenshoe’). That is, the stabilisation broker may sell securities that have previously been purchased under the market stabilisation, but they may not increase the net number of securities they acquire under the market stabilisation. The stabilisation broker can only acquire securities under the market stabilisation up to the size of the over-allotment.

**15** We propose to adopt this prohibition because we believe that the 15% over-allotment option will create a sufficient margin for the stabilisation manager to effectively address the sudden increase in supply and the imperfections in the pricing and allocation process.

**16** Permitting the over-allotment option to be refreshed might distort the dynamic of the market stabilisation process and may encourage inappropriate profit-making by those conducting market stabilisation. Persons who wish to be able to refresh the over-allotment option may apply for a non-standard no-action letter under policy proposal paragraph A3.



# D How to apply for a no-action letter

Policy proposal	Your feedback
<p><b>D1</b> Applications for no-action letters should be addressed to Corporate Finance and sent to any ASIC State or Territory Office.</p> <p>Note: For the addresses of ASIC State or Territory Offices, go to <a href="http://www.asic.gov.au/asicoffices">www.asic.gov.au/asicoffices</a>.</p> <p><b>D2</b> There is no fee for requesting a no-action letter.</p> <p><b>Standard no-action letters</b></p> <p><b>D3</b> Applicants for a standard no-action letter should confirm that:</p> <ul style="list-style-type: none"> <li>(a) the no-action letter they are applying for relates to market stabilisation for an offer of the type described in Section B; and</li> <li>(b) that they are willing to comply with the conditions set out in Section C.</li> </ul> <p>Note: Applicants should also refer to [PS 108.20]–[PS 108.24] for general information on how to prepare an application for a no-action letter.</p> <p><b>Non-standard no-action letters</b></p> <p><b>D4</b> If an applicant proposes to conduct market stabilisation for an offer that is not of the type described in Section B or in a manner that does not conform with the conditions in Section C, the applicant will need to provide extensive arguments in support of their application and the departure from the provisions in Sections B and C. It will generally take us longer to consider applications for non-standard no-action letters.</p>	<p><b>D1Q1</b> Are the procedures in policy proposal paragraphs D1–D4 reasonable and workable? Please explain your answer.</p>

# Schedule 1: Sample standard no-action letter

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This Schedule sets out a sample standard no-action letter for market stabilisation. This sample assumes that the relevant offer is an IPO.

Note 1: For details of how to apply for a standard no-action letter, see Section D.

Note 2: For our approach to non-standard no-action letters, see policy proposal paragraphs A3 and D4.

## **Your feedback**

We have included questions about the information in this letter in previous sections of this policy proposal paper. However, we welcome any other feedback you may have on the sample letter and attachment.

<b>SAMPLE STANDARD NO-ACTION LETTER</b>
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Dear *[insert name]*

**Proposed float of *[insert name of company]* Limited—Market stabilisation**

We refer to your letter dated *[insert date]* applying for a no-action letter on behalf of *[insert name of company]* Limited (ACN *[insert number]*) and *[insert name of stabilisation manager]* (the stabilisation manager) as a participant on the financial market conducted by Australian Stock Exchange Limited (ASX) (collectively, the applicants).

In your letter, you asked the Australian Securities and Investments Commission (ASIC) to issue a no-action letter about the application of certain sections of Part 7.10 of the *Corporations Act 2001* (Act) to a proposed market stabilisation.

Note: The relevant sections of Part 7.10 are s1041H (misleading and deceptive conduct, 1041A (market manipulation), 1041B–1041C (market rigging) and 1043A (insider trading).

According to your letter, the market stabilisation would involve:

- (a) a proposed public offering of securities in *[insert name of issuer]* (the offer) and the listing of *[insert name of issuer]* on a financial market conducted by ASX;
- (b) an over-allotment by the stabilisation manager in connection with the offer; and
- (c) the purchasing of *[insert name of issuer]* securities on a financial market conducted by ASX for the purpose of absorbing price volatility.

As you are aware, it is not part of ASIC's function to provide legal advice on the interpretation and application of the laws it administers. However, because regulatory consequences may attach to the proposed market stabilisation, in this case, ASIC is prepared to state how it will administer the Act in relation to this conduct.

ASIC will not take any action on arguable breaches of s1041A–1041C, 1041H and 1043A of the Act:

- (a) which occur solely as a result of the applicants or the broker appointed as agent for the stabilisation manager (the stabilisation broker) participating in the proposed market stabilisation;
- (b) if the market stabilisation is conducted in the way summarised in your letter; and
- (c) the applicants comply with the conditions in Attachment A of this letter on:
  - (i) disclosure of stabilisation;
  - (ii) price of bids;
  - (iii) mechanics of bidding;
  - (iv) preventing insider trading;
  - (v) reporting and record-keeping;
  - (vi) period of stabilisation; and
  - (vii) limitations on refreshing the over-allotment option.

ASIC is providing this letter on the basis that ASX believes that the combination of disclosure to it and to the market required by the conditions will (when combined with ASX's existing systems and rules) provide adequate and appropriate mechanisms to:

- (a) minimise the risk of a false, misleading or uninformed market developing in [*insert name of issuer*] securities on a financial market conducted by ASX;
- (b) enable ASX to monitor trading in [*insert name of issuer*] securities on a financial market of ASX so as to identify at an early stage situations that may lead to a false, misleading or uninformed market in [*insert name of issuer*] securities on a financial market conducted by ASX; and
- (c) allow ASX to take appropriate action in such situations.

This letter conveys a policy decision, not a legal opinion. It does not preclude third parties (including the Director of Public Prosecutions) from taking legal action in relation to conduct relating to the proposed market stabilisation or other conduct of that kind, nor will it necessarily impede a Court from holding that such conduct infringes the Act. ASIC does not represent that such conduct will not be held to contravene the Act, nor does it undertake to intervene in an action brought by third parties in respect of such conduct.

This letter is specific to the facts and circumstances of this particular case.

This letter is only a statement of ASIC's present intentions on the information available to it at this time. ASIC reserves its right to take action in the future; in particular, if there has been incomplete disclosure when the application for the no-action letter was submitted.

Please provide written confirmation that the applicants agree to the attached conditions.

Yours sincerely

[*insert name of ASIC officer*]

## ATTACHMENT A: CONDITIONS OF MARKET STABILISATION

### Disclosure of stabilisation

**1** [*Insert name of issuer*] must disclose the nature and anticipated effect of the market stabilisation in the disclosure document for the offer.

**2** All bids to purchase [*insert name of issuer*] securities by the stabilisation broker in connection with the market stabilisation (stabilisation bids) must be identifiable as such on the automated trading system of Australian Stock Exchange Limited (ASX).

**3** Each day before trading commences, the stabilisation manager or the stabilisation broker must notify [*insert name of issuer*] and ASX of:

- (a) the number of securities purchased by the stabilisation broker on the previous trading day under the market stabilisation; and
- (b) the total number of all [*insert name of issuer*] securities purchased under the market stabilisation.

### Price of bids

**4** Stabilisation bids must be the lower of:

- (a) the highest current independent bid on ASX's automated trading system; and
- (b) the lowest price payable for securities by institutions under the offer (the final price).

**5** If, after the opening of trading on ASX on the first day of quotation of the [*insert name of issuer*] securities, there have been no trades executed and there are no independent bids on ASX's automated trading system, stabilisation bids must be no higher in price than the final price.

**6** If, at any time after trades in [*insert name of issuer*] securities have been executed, there are no independent bids on ASX's automated trading system, stabilisation bids may be placed on ASX's automated trading system at a price no higher than the lower of the price of the last automatically executed trade in [*insert name of issuer*] securities and the final price.

**7** The stabilisation manager and the stabilisation broker must not, directly or indirectly, effect any stabilising purchase at a price that the person stabilising knows or suspects, or has reason to know or suspect, is a result of activity that is fraudulent, deceptive or manipulative.

### Mechanics of bidding

**8** The stabilisation broker (in its capacity as stabilisation broker for the stabilisation manager) may only enter stabilisation bids on ASX's automated trading system.

**9** One of [*insert name of issuer*], the stabilisation manager or the stabilisation broker must apply for (and each must comply with) a stabilisation agreement letter from ASX setting out the terms upon which ASX will issue the automated trading system stabilisation privilege to the stabilisation broker.

**10** Stabilisation bids may only be made for the security being stabilised. That is, market stabilisation may not be pursued through offers to purchase securities that are derivatives of, or convertible into, the security being stabilised.

**11** The stabilisation broker must identify the price and quantity of stabilisation bids and no undisclosed bids may be made.

**12** Multiple bids are only permitted on the following conditions:

- (a) there may be no more than two stabilisation bids in the market at one time;
- (b) the stabilisation broker may only use two bids if the market conditions are such that two bids are required; and
- (c) multiple bids must not be used in a way which causes, or may cause, a false, misled or uninformed market developing in the relevant securities.

**13** The stabilisation broker may trade other orders against stabilisation bids, provided the stabilisation bids comply with the price constraints in paragraphs 4–7 inclusive.

**14** The stabilisation broker (in its capacity as stabilisation broker for the stabilisation manager) may only make stabilisation bids or purchase [*insert name of issuer*] securities during normal trading and the closing phase on ASX’s automated trading system.

### Preventing insider trading

**15** The stabilisation broker must satisfy ASX that it has adequate information barriers (also known as ‘Chinese walls’) and other procedures to prevent information on the market stabilisation or the relevant securities passing:

- (a) between the stabilisation broker and any other broker; or
- (b) between the designated trading representatives nominated by the stabilisation broker for the stabilisation bids and any other brokers, dealers or other employees of the stabilisation broker who are engaged in its securities dealing business.

### Reporting and record-keeping

**16** The stabilisation manager (itself or through the stabilisation broker) must notify ASX in advance of its intention to engage in

market stabilisation and must submit to ASX information at such times and in such form as ASX requests, making it clear at the time whether the information has been provided to ASX for regulatory reporting or public disclosure purposes.

**17** The stabilisation manager (itself or through the stabilisation broker) must make available to ASX in its regulatory capacity all information reasonably required by ASX about the activities of the stabilisation manager and the stabilisation broker and the aggregate short positions and the net over-allocation of [*insert name of issuer*] securities under the market stabilisation.

**18** The stabilisation manager (itself or through the stabilisation broker) must establish and maintain the following records which it must provide to ASX and ASIC upon request:

- (a) the name of the entity whose securities were subject to market stabilisation and the class of any security stabilised;
- (b) the price, date and time at which each stabilising purchase was effected;
- (c) the size of each stabilising purchase;
- (d) information on independent trades for the purpose of determining a maximum price for stabilisation;
- (e) details of counterparties;
- (f) the names and addresses of the stabilisation manager and the stabilisation broker; and
- (g) all agreements relating to the market stabilisation.

**19** ASIC may ask the issuer or the stabilisation manager to appoint an independent market analyst to prepare a report at the issuer’s cost on:

- (a) the effect of the market stabilisation on the market for the relevant securities; and

- (b) the effectiveness of the conditions imposed by ASIC on the market stabilisation.

ASIC may also ask that the report cover additional specific issues. The report must be provided to ASIC within 30 days of the end of the stabilisation period, for the purpose of conducting a review of the process.

#### **Period of stabilisation**

**20** The stabilisation manager and the stabilisation broker may purchase securities under the market stabilisation for a maximum of 30 calendar days commencing on the first day of trading of [*insert name of issuer*] securities on a financial market conducted by ASX.

#### **Refreshing the over-allotment option**

**21** The stabilisation broker may sell [*insert name of issuer*] securities that have been previously purchased under the market stabilisation. However, this does not increase the net number of securities that the stabilisation broker can acquire under the market stabilisation. The stabilisation broker can only acquire securities under the market stabilisation up to the size of the over-allotment. If the stabilisation broker sells shares purchased under the market stabilisation, the stabilisation manager may need to exercise its over-allotment option to cover the shortfall.

# Regulatory and financial impact

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We have considered the likely regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating commercial activity and investor protection. To ensure that we have achieved an appropriate balance, we are also developing a Regulatory and Financial Impact Statement (RIS). All RISs are submitted to the Office of Regulation Review.

The RIS will address the following seven key elements:

## **1 Issue / problem**

The RIS will identify the nature and magnitude of the issue or the problem that we are seeking to address.

## **2 Objective(s) / analysis of the problem**

The RIS will identify what the objective is, or the outcome sought, in relation to the identified issue / problem.

## **3 Options / solutions**

The RIS will identify all the alternative options that could achieve the objective(s) stated above for dealing with the issue being considered (eg no specific action; ASIC policy proposal; media release; information statement; self regulation/quasi regulation; codes of conduct; co-regulation, compliance and enforcement strategies).

## **4 Impact analysis (costs and benefits) of each option**

Impact analysis will include:

- (a) analysis of the benefits and costs of each of the options identified above, including any restriction on competition for different persons affected;
- (b) a consideration of how each of the proposed options will affect existing laws, regulations or policies;
- (c) identification of persons or bodies affected by the problem; and those persons that will be affected by the proposed solutions or options identified (ie applicant/proponent of issue, consumers, business, government or any other interested parties/stakeholders);



- (d) identification and /or categorisation of the expected impacts (ie likely benefits and costs) of each of the proposed options for each of the person/bodies that are likely to be affected by the PPP;

We will try to quantify these effects where possible:

Costs to businesses affected by a regulatory initiative might include: administrative costs; complying with new regulatory standards; licence fees; delays, etc.

Costs to consumers affected could also include higher prices for goods and services; reduced utility of goods and services; delays; and more difficult or expensive options for seeking redress.

- (e) benefits of each of the options will also be identified (even where they are not quantifiable); and
- (f) the data sources used and assumptions made in making these assessments will be identified.

## **5 Consultation**

We will provide details about our consultation process.

## **6 Conclusions and recommended option**

The RIS will state what our preferred option is, and reason(s) why.

## **7 Implementation and review**

The RIS will discuss how the proposed option will be administered, implemented, or enforced (eg instrument of relief, policy statement, practice note, no-action letter etc).

### **Important details sought from you**

In order for us to fully assess the financial and regulatory impact of our proposals, as part of our consultation process, we invite you to consider:

- (a) possible options that would achieve our objectives, and
- (b) comment on the impact that these policy proposals might have, and in particular, give consideration to the costs and benefits of these proposals. Where possible, we are seeking both quantitative and qualitative data.

**Any comments that we receive will be taken into account when preparing our RIS.**

# Development of policy proposal

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We have developed this policy proposal by considering:

- (a) existing ASIC policy and practices relevant to the regulation of market stabilisation under the law (in particular, [IR 00/31]);
- (b) relevant comparisons with current legislative requirements for the regulation of market stabilisation in similar overseas jurisdictions (in particular, the United States, United Kingdom and Hong Kong);  
and
- (c) existing ASIC policy and practice in relation to no-action letters (in particular Policy Statement 108 *No-action letters* [PS 108]).

# Key terms

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In this policy proposal:

**Act** means the *Corporations Act 2001* and includes regulations made for the purposes of that Act

**ASIC** means the Australian Securities and Investments Commission

**ASX** means Australian Stock Exchange Limited

**CHESS Depository Interest (CDI)** has the meaning given in Rule 2.13.1 of the settlement rules of ASX Settlement and Transfer Corporation Pty Limited (ACN 008 504 532)

**CHESS Unit of Foreign Securities (CUFS)** has the meaning given in Rule 2.13.1 of the settlement rules of ASX Settlement and Transfer Corporation Pty Limited (ACN 008 504 532)

**closing phase** means the period of time between 4.05 pm and 5.00 pm (Sydney time) on days the ASX is open

**disclosure document** has the meaning set out in s9 of the Act

**final price** has the meaning set out in policy proposal paragraph C6 of this paper

**foreign depository instalment** means a CHESS Depository Interest or a CHESS Unit of Foreign Securities

**independent bid** means a bid for a security other than a stabilisation bid

**instalment receipt** means a security that provides the right of the holder, on payment of the final instalment, to be registered as the holder of the underlying share. Legal title to the underlying share is held by a trustee who exercises the instalment receipt holder's various rights as a shareholder on behalf of the instalment receipt holder until the final instalment is paid and legal ownership transfers to the holder of the instalment receipt

**[IR 00/31]** means ASIC Information Release [IR 00/31] *ASIC interim guidance on market stabilisation*

**managed investment product** has the meaning set out in s761A of the Act

**market stabilisation** means the purchase of, or the offer to purchase, securities for the purpose of preventing, or slowing, any fall in the market price of those securities following an offer of those securities

**normal trading** means the period of time between 10:00 am and 4.00 pm (Sydney time) on days the ASX is open

**prescribed financial markets** has the meaning set out in reg 7.1.01

**[PS 108]** means ASIC Policy Statement 108 *No-action letters*

**stabilisation bids** means bids by the stabilisation broker in connection with the market stabilisation

**stabilisation broker** means a broker appointed by the stabilisation manager to make stabilisation bids and purchases in connection with the market stabilisation

**stabilisation manager** means the person with responsibility for ensuring compliance with the conditions imposed on the market stabilisation: see policy proposal paragraph B7.

# What will happen next?

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## Stage 1

11 March 2005 ASIC policy proposal paper released

## Stage 2

22 April 2005 Comments due on the policy proposal

May-July 2005 Review of public comments and drafting of final policy

## Stage 3

August 2005 Policy statement released

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### Your comments

**We invite your comments on the proposals and issues for consideration in this paper, including the explanation sections.**

**We will not treat your submission as confidential unless you specifically request that we treat the whole or part of your submission as confidential.**

**Comments are due by Friday 22 April 2005 and should be sent to:**

**Kate O'Rourke  
Regulatory Policy Branch  
Australian Securities & Investments Commission  
GPO Box 9827  
Sydney NSW 2001  
email: [Kate.O'Rourke@asic.gov.au](mailto:Kate.O'Rourke@asic.gov.au)**

**You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.**

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