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By email to [short.selling.ap@asic.gov.au](mailto:short.selling.ap@asic.gov.au)

**CP 299 – Short Selling: Naked Short Selling Relief, Position reporting Amendments and Sunsetting Class Orders**

Dear Olivia

Thank you for the opportunity to comment on CP 299.

In general ASX supports the proposals to continue and consolidate the various Class Orders into one instrument.

ASX also welcomes proposals that acknowledge the role that legitimate market makers play in the vitality of financial markets by promoting liquidity, price efficiency and transparency in less liquid exchange traded products. This provides real benefits to investors in these products through providing an efficient trading environment and lower transaction costs.

As ASX has previously submitted, in relation to ASIC's ETF project finalised earlier in 2018, ASX agrees that it is desirable for there to be more market makers in ETPs and that ASX is very supportive of making intraday 'naked' short sale relief more streamlined to help reduce the regulatory and financial barriers for market makers to enter our market.

These issues and cost recovery from market makers, which is likely to have a significant impact on the attractiveness of providing market making services, are a key concern in being able to attract and retain market makers to continue to develop liquid markets and meet the needs of investors.

We have a number of comments in relation to some of the specific proposals and questions in the consultation paper. These are set out in Annexure A.

If you have any queries on these matters please contact Sally Palmer at [Sally.Palmer@asx.com.au](mailto:Sally.Palmer@asx.com.au) or +61 (0)2 02 9227 0920 or Catherine Sullivan at [Catherine.Sullivan@asx.com.au](mailto:Catherine.Sullivan@asx.com.au) or +61 (0)2 02 9227 0833.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sally Palmer', written over a horizontal blue line.

**Sally Palmer**  
Deputy General Counsel

## Annexure A

### Comments on CP 299 – Short Selling: Naked Short Selling Relief, Position Reporting Amendments and Sunsetting Class Orders

| Proposal  | Feedback  |
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| <b>B1Q1</b> Should we grant legislative relief or continue to issue individual no-action letters on a case by case basis upon application? Please give detailed reasons in your response.   | <p>ASX agrees that legislative relief should be granted.</p> <p>Such relief will provide greater certainty for participants (particularly prospective market makers) and reduce the compliance costs associated with applying for relief.</p> <p>ASX's experience is that it has been difficult to attract market makers to new products due to the regulatory and financial burden for the market maker of making multiple applications for individual no-action relief.</p>   |
| <b>B1Q2</b> The relief is currently only applicable to ETFs and MFs (see definition of 'exchange traded fund' and 'managed fund' in the draft instrument at Attachment 1). Should we extend the relief to other exchange traded products, such as structured products? Please give detailed reasons in your response.   | <p>The relief should only be provided to the existing product groups that have met the criteria. The extension of relief to other product groups should be assessed on a case by case basis, as the need for relief may vary depending on the features of the product.</p>  |
| <b>C1</b> We propose to grant legislative relief to permit naked short sales of unissued section 1020B products during a deferred settlement trading period by a person with an unconditional entitlement to be issued with the products under a particular corporate action, and by a purchaser of unissued section 1020B products who makes a further sale of those products: see the draft instrument at Attachment 1. | <p>ASX supports the proposal to formalise the relief for deferred settlement trading.</p> <p>If the relevant short selling relief is not granted, whether on a general basis (e.g. through the proposed legislative instrument) or on a case by case basis, the ability to facilitate such trading would be severely curtailed.</p> <p>Allowing trading on a deferred settlement basis provides the following benefits to the market:</p> <ul style="list-style-type: none"><li>• greater liquidity in the securities;</li><li>• more efficient price discovery; and</li><li>• allowing investors to manage their exposure to market risk.</li></ul> <p>ASX intends to undertake further consultation of its own on deferred settlement trading.</p> <p>ASX has also previously indicated to ASIC that it should consider granting general relief for conditional markets to save it from having to</p> |

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do so on a case by case basis.

***Potential extension of case by case relief for conditional trading in pre-transfer securities***

The CP contemplates the granting of short selling relief in relation to conditional markets on a case by case basis for a corporate action in respect of **unissued** securities. As conditional markets facilitated by ASX under ASXOR 3330 could also deal with pre-transfer trading in **issued** securities, i.e. where the **transfer** of those securities under the offering is contingent on satisfaction of the underlying conditions for the conditional market, where ASIC took a view that a person who is selling such pre-transfer securities in a conditional market did not have a *presently exercisable and unconditional right to vest the products in a buyer* then similar relief should be provided by ASIC to address such instances (i.e. in addition to the case by case relief contemplated for unissued securities sold in a conditional market).

***Potential extension of case by case relief for conditional trading in Warrant and AQUA Products***

The case by case short selling relief contemplated to be provided by ASIC in respect of underlying instruments the subject of a conditional market in connection with an IPO should also extend to conditional markets established in warrants (and potentially AQUA Products) over those underlying instruments (if applicable).

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**C1Q3** Do you agree with the proposed drafting of the draft instrument at Attachment 1? Please give reasons for your view.

ASICs draft Instrument grants short selling relief for persons selling unissued securities during a deferred settlement trading period which is limited to where those persons have an *“unconditional entitlement to be issued with the products under an eligible arrangement”*.

Under the Instrument, *eligible arrangement* means: *“(a) a disclosure document or Product Disclosure Statement; (b) a compromise or arrangement under Part 5.1; (c) a rights issue (d) a dividend or distribution reinvestment plan; or (e) a bonus issue.”*

In addition to the circumstances allowed for above, ASX consider that an *eligible arrangement* should also cover the following scenario where deferred settlement trading

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|           |  | <p>could be facilitated under clause 6 of Appendix 6A of the ASX Listing Rules prior to the issue of the relevant section 1020B products:</p> <ul style="list-style-type: none"> <li>new securities issued pursuant to the conversion of convertible notes and expiry of listed options.</li> </ul> <p>We assume that for a reorganisation of capital involving a share split occurring under s254H, that any deferred settlement trading facilitated in the larger number of shares resulting from the conversion would be not be treated as trading in unissued shares. If however the share split was considered by ASIC to involve trading in unissued shares, then the following scenario should also be covered in the draft instrument as an 'eligible arrangement':</p> <ul style="list-style-type: none"> <li>new securities issued pursuant to a reorganisation of capital involving a share split."</li> </ul> |
| <b>C2</b> | <p>We propose to grant relief from s1020B for IPO sell-downs conducted by a saleco under either a prospectus or a pathfinder document. Our proposed relief will only extend to offers of securities in connection with a listing on ASX where the listing company is also making an offer to issue securities under the prospectus. We will continue to consider case-by-case relief for more unusual IPO sell-downs, including where the shares have not yet been issued due to a group restructure that is conditional on the IPO.</p>   | <p>ASX supports these proposals because they maintain the status quo and provide efficiency and certainty for listing companies during the IPO process.</p>   |
| <b>D1</b> | <p>D1 We propose to modify the definition of 'short position' so that the obligation applies to short positions held as at the end of the calendar date (Global Calendar End Time) in the location of the reporting entity that created the short position. For example, for a UK-based entity, short positions on Australian shares would be calculated based on UK time. We propose that this would be the case even if the entity operates globally using trading desks in multiple jurisdictions. Accordingly, the Global Calendar End Time for the UK entity would be based on UK time even where the relevant trading desk is located elsewhere. We propose modifying this by amending the relief currently granted in [CO 10/29] (discussed in Section E as one of the proposed 'sunsetting' instruments to be remade).</p> | <p>ASX supports these proposals as they will provide a more accurate picture of the entire short position held in a position of a corporate group.</p>  |
| <b>E1</b> | <p>We propose to continue the relief provided in [CO 08/764] beyond the expiry of that instrument on 1 October 2018. See the current instrument: [CO</p>   | <p>ASX supports these proposals on the basis that this class order is operating effectively. ASX notes that there has been no change in</p>   |

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|                  | <p>08/764]. We propose to incorporate the relief currently given by [CO 08/764] into a new consolidated legislative instrument: see section 9 of the draft instrument at Attachment 1. The only changes proposed to the relief are to: (a) consolidate this and related relief into one instrument; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.</p>   | <p>market practice regarding the exercise of ETOs.</p>  |
| <p><b>E2</b></p> | <p>E2 We propose to continue the relief provided in [CO 09/1051] beyond the expiry of that instrument on 1 April 2019. See the current instrument: [CO 09/1051]. We propose to incorporate the relief currently given by [CO 09/1051] into a new consolidated legislative instrument: see sections 10 and 11 of the draft instrument at Attachment 1. The only changes proposed to the relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.</p>                             | <p>ASX supports these proposals on the basis that this class order is operating effectively. Without the continued relief the process of short selling by ASX ETO Market Makers would be inefficient, which would ultimately affect the quoted prices and liquidity on this market. This would have a direct impact to end clients.</p> <p>ASX queries the proposed change in terminology to the relief currently provided in paragraph 4(a) of [CO 09/1051]. The existing relief in [CO 09/1051] applies to a "person" where there is "a sale of financial products that is done by the <i>giving or writing</i> of an exchange traded option." The relief in paragraph 10(1)(a) of the draft instrument applies to an "issuer" in relation to "a sale of section 1020B products that is done by <i>issuing</i> the option." In this regard:</p> <ul style="list-style-type: none"> <li>• ASX considers that the existing language of "giving or writing" an ETO is better understood by the market.</li> <li>• If the terms "issuer" and "issued" are intended to refer to the definitions for these terms in section 761E of the Corporations Act, ASX recommends that this made clear.</li> </ul> |
| <p><b>E3</b></p> | <p>E3 We propose to continue the relief provided in [CO 09/774] beyond the expiry of that instrument on 1 October 2019. See the current instrument: [CO 09/774]. We propose to incorporate the relief currently given by [CO 09/774] into a new consolidated legislative instrument: see section 8 of the draft instrument at Attachment 1. We further propose to amend the relief currently provided in [CO 09/774] to: (a) clarify that relief does not extend to preemptive hedging; and (b) extend relief to short sales in the STW ETF to hedge the risks arising from making a market in listed options over the STW ETF. The only additional changes proposed to the relief are to: (a) consolidate this and related relief into one instrument and update the</p> |   |

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|             | instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors. |   |
| <b>E3Q1</b> | Do you agree that the relief under [CO 09/774] should continue? Please give detailed reasons for your view.  | Yes. Without the continued relief the process of short selling by ASX ETO Market Makers would be inefficient, which would ultimately effect the quoted prices and liquidity on this market. This would have a direct impact to end clients.   |
| <b>E3Q2</b> | Do you consider that the relief should apply to pre-emptive hedging by market makers? What are the reasons for your view?  | <p>No the relief should not apply to pre-emptive hedging, on the proviso the definition of "pre-emptive hedging" does not have the effect of:</p> <ul style="list-style-type: none"> <li>• preventing a Market Maker (subject to a market making agreement with a market operator) from executing a hedge trade before transacting an ETO contract; or</li> <li>• preventing a Market Maker from executing "Gamma" hedging (an options hedging strategy designed to reduce, or eliminate the risk created by changes in an option's delta).</li> </ul> <p>The definition of "pre-emptive hedging" should make it clear that the above hedging activity is excluded otherwise this will impact the ability to engage and retain Market Makers in less liquid products.</p> |
| <b>E3Q3</b> | Do you agree with our proposal to extend the relief to apply to naked short sales of STW ETF units for the purposes of hedging market making activities in options over the STW ETF? Please provide reasons  | Yes. For the same reasons that relief is granted for options over stocks. Market Makers need an efficient way to short the underlying of an option contract.  |
| <b>E3Q4</b> | Should relief also extend to short sales by market makers of options over other ETFs? What are the reasons for your view?  | <p>Yes. In order to create an efficient options market there needs to be relief to allow naked short selling of the underlying products. Without this relief Market Makers may be unwilling to make markets.</p> <p>ASX is looking to expand the options over ETFs in the future as there is investor demand for these products and as such this relief is very important.</p>  |
| <b>E3Q5</b> | Should relief to market makers of options instead be given on a case-by-case basis?  | No it should not be on a case-by-case basis. This would create an administrative burden for Market Makers who would need to continually apply for relief when expanding the group of products over which options are available. A "case by case" basis could also be interpreted as being unfair or inconsistent,   |

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|           |   | <p>due to a perception that different applications may be influenced by different factors. It would be better and more transparent to have a clear Class Order requirement which applies to all Market Makers and appropriate products.</p> <p>We note that ASX has guidelines in place which set minimum criteria for products over which exchange traded options can be listed on ASX.</p>   |
| <b>E4</b> | <p>E4 We propose to continue the relief provided in [CO 10/111] beyond the expiry of that instrument on 1 April 2020. See the current instrument: [CO 10/111]. We propose to incorporate the relief currently given by [CO 10/111] into a new consolidated legislative instrument: see section 12 of the draft instrument at Attachment 1. The only changes proposed are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.</p>  | <p>ASX supports these proposals on the basis that this class order is operating effectively and provides certainty to the market.</p>  |
| <b>F1</b> | <p>We propose to continue, in its current form, the relief provided in [CO 10/29] beyond the expiry of that instrument on 1 April 2020 with the exception of: (a) the transitional arrangements set out in paragraph 157(a) above which are no longer required; and (b) the clarification of the timing of short position reporting set out in paragraph 157(d) which we have proposed to amend in proposal D1 above. See the current instrument: [CO 10/29]. We propose to incorporate the continuing relief into a new consolidated legislative instrument: see sections 17, 18 and 19 of the draft instrument at Attachment 1. The only additional changes proposed to this relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (a) correct any minor drafting errors.</p> | <p>ASX does not object to the specific proposal but requests that ASIC undertake a review of the effectiveness of the existing short selling reporting regime, in particular the gross short sale reports that participants are required to report to a market operator.</p> <p>ASX believes that gross data does not provide meaningful information to investors, particularly when compared to the net short sale reports that ASIC receives.</p> <p>Removing the requirement to report gross short sales would reduce the regulatory burden for participants without any material loss of information for investors.</p> <p>A review of the reporting regime would be timely.</p> |
| <b>F2</b> | <p>We propose to continue the relief provided in [CO 10/135] beyond the expiry of that instrument on 1 October 2020. See the current instrument: [CO 10/135]. We propose to incorporate the relief currently given by [CO 10/135] into a new consolidated legislative instrument: see sections 17</p>   | <p>ASX supports these proposals on the basis that this class order is operating effectively, provides certainty to the market and is cost effective.</p>   |

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and 18 of the draft instrument at Attachment 1. The only changes proposed to this relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) reflect current drafting practice and update the format of the current document; (c) simplify the drafting to give greater clarity; (d) update legislative references and definitions; and (e) correct any minor drafting errors.

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**F3**

We propose to continue the relief provided in [CO 10/288] beyond the expiry of that instrument on 1 October 2020. See the current instrument: [CO 10/288]. We propose to incorporate the relief currently given by [CO 10/288] into a new consolidated legislative instrument: see sections 15 and 16 of the draft instrument at Attachment 1. We propose to extend the relief in [CO 10/288] so that it is also applicable to ETP market makers who make a covered short sale of units of a quoted ASX-managed fund, in the course of making a market in those units. Note: If this instrument is remade the scope will be extended to include market makers in ETFs quoted on the Chi-X market only (as MFs are not available on Chi-X at this time). This extension in scope has already been the subject of public consultation. See paragraph 167 above. The only additional changes proposed to this relief are to: (a) consolidate this and related relief into one instrument and update the instrument's name; (b) refine the wording so that the instrument is more market neutral; (c) update the format of the current document; (d) simplify the drafting to give greater clarity; (e) update legislative references and definitions; and (f) correct any minor drafting errors.

ASX supports these proposals as they facilitate efficient market making activities and promote liquidity and transparency.