

REGULATORY IMPACT STATEMENT

BACKGROUND

This regulatory impact statement considers the impact of the Trans-Tasman Treaty for the Mutual Recognition of Securities and the resulting regulatory regimes.

The Australian and New Zealand governments signed a Memorandum of Understanding on the Co-ordination of Business Law (MOU) in 2000, which established a work stream for the co-ordination of Trans-Tasman offerings of securities. In October 2001, the Australian Government invited New Zealand to work towards a regime co-ordinating the regulatory environment for Trans-Tasman securities offerings. Part 5 of the Securities Act 1978 was then enacted and allows regulations to be made for mutual recognition regimes of cross border securities offerings.

STATEMENT OF THE NATURE AND MAGNITUDE OF THE PROBLEM AND THE NEED FOR GOVERNMENT ACTION

The New Zealand and Australian governments are committed to working towards a single economic market. Regulatory arrangements in areas such as the supply of goods and occupational registrations have progressed. The requirements around securities offerings between the two jurisdictions have not kept pace with developments in these areas, thereby inhibiting the development of a single economic market between New Zealand and Australia.

The current regulatory regime for trans-Tasman offerings of securities generates high costs for issuers in both jurisdictions, which provides a disincentive to fundraise cross border. The problem is that issuers in one jurisdiction are generally unable to use the same offer documents for the offering of securities in the other jurisdiction. The resulting duplication of the offer documents increases costs for issuers wanting to offer securities across the Tasman. It is estimated that the costs imposed by the current regulatory arrangement, for Australian firms providing offer documents to New Zealand investors, may range from A\$10,000 to A\$50,000 per securities offering, inclusive of legal costs. There is no clear indication of the costs to New Zealand issuers wanting to offer securities in Australia, although it is conceivable that these costs would be proportionately similar. It should also be noted that the cost of offering securities across the Tasman would vary from issuer to issuer, depending on whether they fall within current exemptions. There are general exemptions in both jurisdictions that permit qualifying issuers from the home jurisdiction to offer securities without complying with some of the requirements of the host jurisdiction, which reduce some of the costs that arise from Trans-Tasman offerings of securities. Nonetheless, the current position continues to impose substantial costs on issuers wanting to offer securities in both Australia and New Zealand.

In submissions on the discussion document entitled *Trans-Tasman Mutual Recognition of Offers of Securities and Managed Investment Scheme Interests* (May 2004), members of the public confirmed that these costs discouraged the offerings of securities across the Tasman. These high costs have restricted offerings between the

two countries and have limited competition in the domestic capital markets of both jurisdictions. This has had the ultimate effect of reducing overall investor choice. It should be noted that there is no comprehensive quantification of the extent to which the costs has disincentivised cross border offerings of securities.

STATEMENT OF THE PUBLIC POLICY OBJECTIVE(S)

The primary objective is to remove unnecessary regulatory barriers to trans-Tasman securities offerings, and to thereby facilitate investment between New Zealand and Australia, enhance competition in domestic capital markets, reduce costs for business, and increase the choice for investors. A secondary objective is to significantly reduce compliance costs for issuers wishing to offer securities to investors in New Zealand and Australia.

STATEMENT OF FEASIBLE OPTIONS (REGULATORY AND/OR NON-REGULATORY) THAT MAY CONSTITUTE VIABLE MEANS FOR ACHIEVING THE DESIRED OBJECTIVE(S)

Status Quo

Overseas issuers of securities must comply with the substantive requirements of securities legislation in the host jurisdiction, including any requirements to prepare and lodge investment statements and prospectuses, before such issuers may offer securities to the public. Section 5(5) of the Securities Act 1978 (“the Act”) in New Zealand currently provides that the Securities Commission may exempt a person, class of persons or class of transactions from some of the requirements of the Act. There are two general exemptions at present that are salient to Australian issuers. If the Australian issuer falls within one of the two general exemption notices it would not have to comply with the substantive requirements of the Act. The exemptions allow Australian issuers to use an Australian prospectus for an offer of equity or debt securities in New Zealand. The issuer, however, would still be required to provide an investment statement that complies with New Zealand’s regulatory requirements and to comply with all other regulatory requirements, as set out in part 2 of the Securities Act.

New Zealand issuers similarly may be exempt from some of the Australian regulatory requirements. The Australian Securities and Investments Commission (ASIC) may exempt some class of persons from some of the requirements in the Corporations Act 2001 (Cth). For example, ASIC Class Order (00/177) provides some relief to issuers with prospectuses registered in New Zealand from the prohibition on offering a security beyond the date of expiry on the Australian prospectus.

It should be noted that the substantive legal requirements for the offerings of securities are quite extensive and are not covered in any great detail here. The status quo is not preferred as it does not meet the public policy objectives.

Regulatory Options

Mutual Recognition through the Disapplication of Domestic Law

One option to reduce costs would involve the disapplication of the law of the host country in favour of the home jurisdiction’s law in respect to offers of securities made by issuers from the home jurisdiction. These offers would be regulated solely by the law of

the home country and the law of the host country would have no force. This model would mean that it would be difficult for investors in the host jurisdiction to access dispute resolution processes in claims against issuers from the home jurisdiction, as these investors would need to seek relief from courts in the home country or through alternative disputes resolution processes available in the home country. This option is not preferred.

Mutual Recognition through the Incorporation of Foreign Law

Under this second option, the host jurisdiction would incorporate the law of the home jurisdiction within its domestic regulatory framework (which would only apply to conduct in the host country by entities offering securities from the home jurisdiction). It is likely that the host country would incorporate the law of the home jurisdiction either ‘word for word’, or by reference to law of the home country at a particular date. The practical problem with this model is that the host country would have to amend its law or regulations to reflect changes in the home country’s law. Such a process can be resource intensive and can lead to gaps in the mutual recognition regime where there is a lag between changes to the law in the home and host countries. This option is therefore not preferred.

Mutual Recognition for Securities Offerings through Entry and Ongoing Requirements (Preferred Option)

This option would allow an issuer offering securities or managed investment scheme interests to the public, to extend an offer that is being lawfully made in one country, to investors in the other country using the same offer documents and offer structure. The issuer would not be required to comply with most of the substantive requirements of the host jurisdiction’s domestic fundraising laws. Instead, issuers who wish to operate under the proposed regime will have to comply with a number of entry and ongoing requirements agreed between the two countries, and prescribed in the host jurisdiction’s law.

- The offer must be a “regulated offer” in the home jurisdiction, that is the offer must be subject to the home jurisdiction’s regulatory regime;
- The offer for securities may only be an offer for shares, debt securities, options to acquire securities, equitable interests in securities and participatory securities, excluding life insurance, superannuation products and any other derivatives not listed.
- The offeror must file a notice with the home and host jurisdiction regulators stating that it proposes to make an offer under the regime. This notice will include specified information, such as the name of the offeror, the securities being offered, an address for service in the host jurisdiction and confirmation that the offeror submits to the jurisdiction of the host country’s courts; and
- The offeror must provide the host jurisdiction regulator with a number of other documents, such as the home jurisdiction offer documents.

An offer made by an issuer from the home country under the regime in the host jurisdiction will be required to comply with the home country's securities law. The host country's law will also apply to offers made under the regime by imposing a specific set of requirements, including an ongoing requirement to comply with the relevant laws of the home jurisdiction. The key *ongoing* requirements of the regime would include:

- The "home country compliance requirement" – the issuer must comply with the requirements of its home jurisdiction securities laws in connection with the offer to investors in the host jurisdiction. The home jurisdiction will apply its securities laws to offers made under the regime to investors in the host jurisdiction.
- The offer must remain a regulated offer in the home jurisdiction.
- The offer must be open to acceptance by persons in the home jurisdiction at all times when the offer is open for acceptance by persons in the host jurisdiction.
- Offers to investors in the host jurisdiction must be accompanied by a prescribed warning statement that (among other things) domestic securities law requirements do not apply to the offer, and that the offer is subject to the securities laws of the other jurisdiction.

Failure to comply with the ongoing requirements would result in a breach of the host jurisdiction's laws; the consequences of this would be specified in the law of the host jurisdiction, including criminal sanctions, civil liability and/or stop orders issued by the host regulator.

The home jurisdiction regulator will have primary responsibility for supervising a cross-border offer. It will be able to exercise its powers of its own motion, at the request of the host regulator, or at the request of a person in the host jurisdiction. The host jurisdiction will be able to regulate to provide for its regulator to have certain powers in respect of offers made under the mutual recognition regime if the entry requirements are not satisfied, or the ongoing requirements are not complied with.

The Treaty for the Mutual Recognition of Securities Offerings records both Australia and New Zealand's agreement to the implementation of a regulatory regime along the lines of the preferred option. It will come into force when both Australia and New Zealand have notified the other country that the respective domestic implementation of the regime has been completed. The treaty is to be reviewed five years from the date of entry into force to make any necessary amendments. The treaty may also be terminated by both Australia and New Zealand at any time, so long as appropriate notice is given to the other state.

Sections 74 and 78 in Part 5 of the Securities Act 1978 provide authority for the New Zealand government to implement a Mutual Recognition regime in the terms outlined above.

STATEMENT OF THE NET BENEFIT OF THE PROPOSAL, INCLUDING THE TOTAL REGULATORY COSTS (ADMINISTRATIVE, COMPLIANCE AND ECONOMIC COSTS) AND BENEFITS (INCLUDING NON-QUANTIFIABLE BENEFITS) OF THE PROPOSAL, AND OTHER FEASIBLE OPTIONS

Government

The New Zealand government currently maintains a substantial degree of authority over Australia issuers. Under the proposed regime, however, the extent of this authority will be limited, as Australia issuers will be regulated by the securities regulator in Australia (the Australia Securities and Investments Commission). Any reduction in regulatory jurisdiction over Australia issuers, however, is mitigated by the requirement that the issuers will have to comply with the ongoing requirements of the regime.

The proposed regime, and the empowering treaty, will strengthen relations with Australia and facilitate the development of a single economic market in the Trans-Tasman arena. The proposed regime develops a more cohesive and comprehensive regime for the treatment of the Trans Tasman securities offerings when compared to the current regime.

The New Zealand government may incur costs in establishing new systems for the Securities Commission and the Registrar of Companies to deal with the changes created by the new regime. The cost of establishing these systems, however, has not been quantified at present.

The regime will also encourage a greater flow of capital into New Zealand. This may have some fiscal benefits for the government and encourage national economic growth more generally.

Issuers of Securities

There will be compliance cost implications to the issuers, which are detailed in the Business Compliance Cost Statement. Issuers of securities will incur substantially decreased costs under the proposed regime. Offerors from Australia will not have to produce a prospectus or an investment statement that complies with the substantive requirements of New Zealand law, which currently costs issuers in something in the vicinity of A\$10,000 to A\$50,000. At this stage of the project, however, it is difficult to quantify the difference in costs, as the decisions regarding the costs of lodgement are still outstanding, although early indications is that the reduction in costs are likely to be substantial. Accordingly, it will cost Australian firms less to offer securities to New Zealand investors. It is also likely that similar benefits will flow to New Zealand issuers offering securities in Australia.

Australian issuers will have to submit the offer documents to the Securities Commission on application for entry into the scheme. There will be a cost associated with the lodgement of these documents, although it is not currently clear what this cost will amount to. Section 70A (3) of the Securities Act allows regulations to be made that establish the fees that will be payable to the Securities Commission for the exercise of any power that the Act confers on the Commission. Regulations will have to be passed that will enable the Commission to charge a fee for the lodgement of the offer document. Officials have begun work on developing appropriate lodgement fees and a

further RIS will be prepared at this time. The fee for the lodgement of documents in Australia has not been set at present. Officials from both Australia and New Zealand will be meeting to discuss this issue before any decisions are made.

Smaller issuers of securities may also be affected by the increased number of issuers in the market, which may affect these firms' ability to remain competitive. This is mitigated by the fact that New Zealand issuers would have access to a greater number of investors than under the current regime. This is an especially salient benefit for New Zealand issuers given the relatively small pool of investors available in New Zealand relative to the pool of investors that are available in Australia. Issuers from New Zealand would be able to access investors from Australia at a lower cost, which would increase New Zealand issuers' ability to raise capital.

Investors

The proposed regime will result in an increased number of securities that are offered in New Zealand. Investors would benefit by having increased choice for investment and therefore greater scope for risk diversification. A greater number of issuers of securities in New Zealand may also lead to a more efficient allocation of capital to investors, which ultimately will provide more effective and appropriate products to investors. The on-going controls allow investors and the regulator in the host jurisdiction to pursue statutory remedies in their own country.

STATEMENT OF CONSULTATION UNDERTAKEN

Stakeholder Consultation

A discussion paper by the New Zealand Ministry of Economic Development and Australia Treasury, outlining the proposed regime was circulated to the public in Australia and New Zealand for comment in May 2004. Submitters were generally supportive of the regime. Some concerns were raised by submitters about the proposal including the manner in which the proposed regime would be enforced against overseas companies. It is considered that these issues are generic Trans Tasman legal enforcement issues and cannot be confined within this mutual recognition regime. A separate stream of work is being progressed on Trans Tasman Court Proceedings and Regulatory Enforcement that will consider the issue of enforcement in a wider context. Officials have agreed with most of the other submissions made and developed the regime accordingly.

Government Departments/Agencies Consultation

The Securities Commission, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the Treasury have been consulted. The Department of the Prime Minister and Cabinet has been informed. No significant concerns were raised.

BUSINESS COMPLIANCE COST STATEMENT

The proposed regime will reduce compliance costs to issuers that want to offer securities across the Tasman (to New Zealand from Australia or to Australia from New Zealand) by removing the need to comply with different disclosure requirements for offerings of the same securities in each jurisdiction.

However, some compliance costs will arise from the need to comply with the entry and on-going requirements of the regime. Australian firms wishing to offer securities in New Zealand or New Zealand firms wishing to offer securities in Australia are likely to obtain legal advice on the new regime before offering any securities.

It is difficult at this juncture to provide any quantification of the costs incurred. There have been some estimates by the Australian Securities Exchange ("ASX") that the cost to Australian issuers under the current regime ranges from A\$10,000 to A\$50,000. There were no indications of the legal costs that New Zealand issuers were likely to incur when offering securities in Australia under the current regime. The legal costs to New Zealand issuers under the current regime, however, are likely to mirror the costs estimated by the ASX. The costs arising from the proposed mutual recognition regime are likely to be substantially reduced in comparison to the current regime for issuers from both Australia and New Zealand. Further, it should be noted that many of the firms that will be offering securities under the proposed regime will be larger firms who are better placed to bear these costs.

Both governments are also intending to publicise details of the regime, to reduce the need for issuers to incur legal costs in seeking advice.