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New Zealand

Discussion Paper

TRANS-TASMAN MUTUAL RECOGNITION OF OFFERS OF SECURITIES AND MANAGED INVESTMENT SCHEME INTERESTS

DEPARTMENT OF THE TREASURY AND
MINISTRY OF ECONOMIC DEVELOPMENT
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Department of the Treasury
Langton Crescent
Parkes ACT 2600
Australia
<http://www.treasury.gov.au>

Ministry of Economic Development
PO Box 1473
Wellington
New Zealand
<http://www.med.govt.nz>

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Process

The Department of the Treasury (Australia) and the Ministry of Economic Development (New Zealand) have prepared this discussion document following consultation with other government officials and agencies. Written submissions on the issues raised in this document are invited from all interested parties. The closing date for submissions is Friday 16 July 2004. Comments received after this date may not be taken into account. After receipt of submissions, the Department of the Treasury and the Ministry of Economic Development will evaluate them and seek further comments where necessary before developing recommendations for their governments to consider.

Where you should send your comments

Your comments should be sent to:

In Australia

Ruth Smith

Manager

Market Integrity Unit

Department of the Treasury

Langton Crescent
PARKES ACT 2600

Or by fax to (02) 6263 2882

Or by email to rsmith@treasury.gov.au

In New Zealand

Bianca Garwood

Analyst

Regulatory and Competition Policy Branch

Ministry of Economic Development

PO Box 1473
WELLINGTON

Or by fax to (04) 471 2658

Or by email to bianca.garwood@med.govt.nz

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This paper sets out a proposal for the establishment of a trans-Tasman mutual recognition regime governing offers of securities and interests in managed investment schemes, and seeks submissions on the proposal.

1. THE CONCEPT OF MUTUAL RECOGNITION

The fundamental objective of a mutual recognition regime is to confer benefits upon businesses and individuals by reducing barriers to cross-border commercial activity. Mutual recognition achieves this by enabling entities from a participating jurisdiction to operate in other participating jurisdictions on the basis of compliance with a single substantive regulatory framework.

The main advantages of such arrangements are that they overcome inconsistent requirements between national regulatory frameworks which pursue the same policy objectives in different ways (for example, different requirements relating to the structure of collective investment vehicles), and reduce compliance costs associated with the need to comply with the differing regulatory requirements of different jurisdictions (for example, the rules relating to the format and content of disclosure documents).

In the trans-Tasman context, mutual recognition contributes to the broader goal of achieving a single market for goods, services and capital. The Trans-Tasman Mutual Recognition Arrangement ('TTMRA') provides mutual recognition for the supply of goods and occupational registration. The mutual recognition proposal set out in this paper is intended to complement the TTMRA, in the context of a trans-Tasman securities market.

2. THE PROPOSED TRANS-TASMAN MUTUAL RECOGNITION REGIME

The proposed trans-Tasman mutual recognition regime for offers of securities and interests in managed investment schemes will allow an issuer to extend an offer that is being lawfully made in one country (the home jurisdiction) to investors in the other country (the host jurisdiction) without being required to comply with most of the substantive requirements of the host jurisdiction's fundraising laws that apply to domestic offers.

The objective of the proposed regime is to remove unnecessary regulatory barriers to trans-Tasman securities offerings, and to thereby facilitate investment between the two countries, enhance competition in capital markets, reduce costs for business, and increase choice for investors. The proposed regime will reduce costs for issuers wishing to offer their securities or managed investment scheme interests in both jurisdictions, since issuers (that have access to the regime) will only have to comply with a single set of substantive requirements. The proposed regime is also expected to reduce the cost of capital for issuers, as they will have access to a larger investor base. The proposed regime will also benefit investors, by increasing the range of investment choices and providing greater scope for risk diversification.

The proposed regime applies to issuers but not to other parties who, for example, provide financial advice in relation to, or deal in, the securities or interests in managed investment schemes.

The proposed regime is being developed as part of a general initiative for greater coordination of business law between Australia and New Zealand. The framework for the coordination of business law between Australia and New Zealand is set out in the Memorandum of Understanding between the Government of Australia and the Government of New Zealand on the Coordination of Business Law (the MOU), the most recent version of which was signed in August 2000.¹

1 The coordination of Australian and New Zealand business laws had its genesis in the Memorandum of Understanding on the Harmonisation of Business Laws, which was signed in July 1988. This memorandum formed part of the 1988 review of the Australian New Zealand Closer Economic Relations Trade Agreement (which came into effect on 1 January 1983). The current memorandum (signed in August 2000) replaced the 1988 memorandum. A copy of the current memorandum is available at <http://www.mft.govt.nz/foreign/regions/australia/tradeeconomic/austlaw.html>.

3. THE CURRENT POSITION

3.1 OFFERS BY AUSTRALIAN OFFERORS IN NEW ZEALAND

Under the *Securities Act 1978* (NZ), a security may not be offered to the public unless there is a registered prospectus and the offer is accompanied by an investment statement relating to the security.

Australian issuers making an offer in New Zealand must comply with the disclosure requirements of the *Securities Act 1978* (NZ), unless they fall within an exemption notice issued by the Securities Commission.² Two relevant exemption notices are the Securities Act (Australian Issuers) Exemption Notice 2002 ('Australian Issuers Notice') and the Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 2003 ('ARMIS').

The Australian Issuers Notice provides relief from the prospectus requirements by allowing Australian issuers to use an Australian prospectus for an offer of equity or debt securities in New Zealand (subject to certain conditions). The exemption also allows Australian issuers to use an Australian trustee and trust deed for offers of debt securities in New Zealand. The conditions include requirements that:

- a trustee be appointed under Australian law;
- there is an Australian prospectus relating to the securities at the time that offers of those securities are made or are open for acceptance in New Zealand; and
- that the Australian prospectus and other documents relating to the schemes, and any amendments, be deposited with the Registrar of Companies in Wellington.

Similarly, ARMIS allows investment products in Australian registered managed investment schemes to be offered to the public in New Zealand without a New Zealand registered prospectus, as long as the conditions of ARMIS are complied with, including that:

- there is an Australian Product Disclosure Statement (PDS) relating to the interests in the scheme at the time that offers of those interests are made or are open for acceptance in New Zealand; and
- the Australian PDS and other documents relating to the scheme, and amendments to these documents, be deposited with the Registrar of Companies in Wellington.

An issuer operating under the Australian Issuers Notice is still required to prepare an investment statement to accompany offers in New Zealand that meets the requirements of the *Securities Act 1978* (NZ) and the Securities Regulations 1983 (NZ). An issuer operating under ARMIS does not need to prepare an investment statement if the offer is made using a PDS.

The Securities Commission has also issued a number of issuer-specific exemption notices.

² *Securities Act 1978*, subsection 5(5).

3.2 OFFERS BY NEW ZEALAND OFFERORS IN AUSTRALIA

Under Chapter 6D of the *Corporations Act 2001* (Cth), an offer of securities³ must be accompanied by the relevant disclosure document.⁴ The type of document that is required depends upon the specific nature of the offer, for example, an 'offer information statement' may be used instead of the standard prospectus if the amount raised by the offeror is \$5,000,000 or less (this includes the amount of money to be raised in the offer, and amounts raised in previous offers). Under Part 7.9 of the Act, offers relating to the issue of other types of financial products (including interests in managed investment schemes) are generally accompanied by a PDS.

The Corporations Act defines a managed investment scheme as an arrangement where investors' contributions are pooled and managed on an arms-length basis. The investor acquires rights to share in the benefits of the scheme. Such schemes require registration and are therefore regulated by the Australian Securities and Investments Commission (ASIC). A PDS is required for a particular scheme, subject to any exemptions⁵, if the investors in that scheme are classified as 'retail investors' (for example, they invest amounts of \$500,000 or less, or there are more than 20 investors in the scheme, subject to a \$2,000,000 ceiling).

Under the Corporations Act, ASIC has the power to exempt a person, or class of persons, from any of the provisions of Chapter 6D and Part 7.9. For example, ASIC Class Order (CO 00/177) provides relief from section 711(6) of the Act to offerors whose prospectuses are registered in New Zealand. Section 711(6) relates to the issue of securities beyond the expiry date specified in the prospectus. The details of other ASIC exemptions relating to fundraising are contained in Appendix 1.

3.3 EFFECT OF CURRENT REGIMES ON TRANS-TASMAN OFFERS

New Zealand and Australian issuers cannot use their home jurisdiction offer documents when making a trans-Tasman offer of securities, and must comply with the relevant requirements in relation to the structure of the investment scheme in the host jurisdiction, unless the issuer is operating under an exemption in the host jurisdiction.

Even where an exemption for issuers from the other country applies, a significant number of additional requirements must be complied with under the host jurisdiction's laws – for example, the requirement that Australian issuers making offers in New Zealand prepare and provide an investment statement that complies with New Zealand law, and the requirement that New Zealand issuers making offers in Australia comply with Australian law requirements in relation to the structure of collective investment vehicles.

³ For the purposes of Chapter 6D, a security is defined as:

- a share in a body;
- a debenture of a body;
- a legal or equitable right or interest in a share or debenture; or
- an option to acquire, by way of issue, a share, debenture or equitable right or interest.

⁴ Unless the offer is an excluded offer under section 708. Excluded offers include offers: on a small scale (personal offers to 20 or less investors that raise \$2 million or less in a 12 month period); to sophisticated investors (defined by wealth, income, investment experience or the value of the investment); and to professional investors (including financial services licensees, listed entities, and persons who control over \$10 million).

⁵ See, for example, section 1012D.

This means that there are additional costs associated with extending an offer from the offeror's home jurisdiction to the other jurisdiction. In some cases, the offer will be made in both countries, but the additional compliance costs will increase the offeror's cost of raising funds. In other cases, the additional costs will mean that the offer is not extended to the other country. This reduces the offeror's access to potential investors, and reduces investment options for investors in the other country.

Although the detailed requirements of Australian and New Zealand securities law differ in a number of respects, the underlying policy goals are the same. Stepping back from the detail of the legislation and focusing on those shared policy goals, it seems likely that the relevant goals can be achieved by allowing issuers to use their home jurisdiction offer documents when offering securities in the other jurisdiction, with limited additional requirements designed to draw offerees' attention to the fact that the offer is required to comply with the requirements of the other jurisdiction's regulatory regime, rather than with the requirements of the host jurisdiction's laws that apply to domestic offers.

4. THE PROPOSED MODEL FOR THE MUTUAL RECOGNITION ARRANGEMENT

A model for the mutual recognition of offers of securities and managed investment scheme interests is currently being developed by the Commonwealth Treasury and the New Zealand Ministry of Economic Development (NZ MED), in consultation with the Australian Securities and Investments Commission (ASIC), the New Zealand Securities Commission (NZSC), the Australian Attorney General's Department and the New Zealand Ministry of Justice.

4.1 AN OVERVIEW OF THE PROPOSED MODEL

The proposed model aims to allow securities of issuers from the home jurisdiction to be offered to investors in the host jurisdiction on the basis of compliance with the substantive requirements of the home jurisdiction's securities laws. It is envisaged that this will be achieved by providing that an offer made under the mutual recognition regime is subject to a different set of requirements under the law of the host country, including a requirement to comply with the relevant securities laws of the home country, and is not subject to the requirements of the 'fundraising laws' of the host jurisdiction that apply to domestic offers.

The fundraising laws of the home jurisdiction will apply to offers made to investors in the host jurisdiction. The law of the host jurisdiction will also apply to such offers, imposing a set of requirements that is specific to offers made under the mutual recognition regime, including, as noted above, an ongoing requirement to comply with the relevant laws of the home jurisdiction.

The basic principle that underpins the proposed regime is that an offer of securities which is a regulated offer in one country and can lawfully be made in that country, can lawfully be made in the other country in the same manner and with the same offer documents, provided that:

- (a) the entry requirements for the regime are satisfied; and
- (b) the offeror complies with the ongoing requirements of the regime.

Under the proposed model, issuers who wish to operate under the mutual recognition regime will have to comply with a number of entry and ongoing requirements prescribed in the host jurisdiction's law. Entry requirements will include, among others, a condition that an offeror opt into the mutual recognition regime in respect of a particular offer, by filing a notice with the host jurisdiction regulator that contains prescribed information in relation to the offeror and the offer. An offer that did not meet the entry requirements would fall outside the recognition regime, and would therefore be treated as an ordinary offer under the host jurisdiction's law and as such would need to meet the standard requirements under the laws of the host jurisdiction.

Ongoing requirements will include, among others, a condition that an offeror must comply with the home jurisdiction's relevant fundraising laws in relation to the making of offers as they apply from time to time. If an issuer breaches the home jurisdiction's fundraising laws, the proposed model will allow investors in the host jurisdiction to pursue statutory remedies in the host jurisdiction's courts as well as in the courts of the home jurisdiction. The

consequences of a breach of the ongoing requirements in the host jurisdiction, both civil and criminal, will be prescribed by the law of the host jurisdiction.

The ability to comply with the legal requirements that apply to an activity in one jurisdiction by meeting the requirements of the corresponding laws of another jurisdiction is a standard feature of mutual recognition regimes, both in the trans-Tasman context and in other parts of the world. Under the TTMRA, for example, goods may be sold in one participating jurisdiction if they have been produced in or imported through another participating jurisdiction, and they meet the relevant requirements of the jurisdiction of origin.

Because compliance with the host country's laws can be achieved through complying with the current requirements of the home country, a change in the laws of the home country has the effect of altering the substantive compliance requirements in the host country for goods or services supplied under a mutual recognition regime, even though the laws of the host country do not change. This is an integral feature of all mutual recognition regimes: they cannot operate effectively, and achieve their policy goal of ensuring that the activity is subject to only one set of requirements at any given time, on any other basis.

This approach does create the risk, at least in theory, that the laws of one country will change in a manner that affects the equivalence of the regulatory regimes, giving rise to concerns about the appropriateness of continuing to operate the mutual recognition regime. Under the proposed model, this risk would be managed by including provisions in the intergovernmental agreement (the Agreement)⁶ governing the mutual recognition regime that:

- (a) require each jurisdiction to give the other jurisdiction advance notice of any proposed legislative changes that have implications for the mutual recognition regime;
- (b) provide for consultation where a proposed change in one jurisdiction gives rise to concerns in the other about the operation of the regime;
- (c) enable either party to terminate the mutual recognition arrangement, in the unlikely event that serious concerns arise and cannot be resolved.

4.2 THE MERITS OF OTHER POSSIBLE MODELS

The proposed model would be preferable to other possible models, such as those which require the incorporation of foreign law into domestic legislation (model 1) or which involve the disapplication of domestic law, leaving the offer to be regulated solely by the laws of the home jurisdiction (model 2).

Model 1: incorporation of foreign law

Under model 1, the host jurisdiction would incorporate the laws of the home jurisdiction within its domestic regulatory framework (which would apply in relation to conduct within its boundaries by entities from the home jurisdiction). It is likely that the host jurisdiction would incorporate home jurisdiction law either 'word for word' or by reference to the home

⁶ See section 5.6 below.

jurisdiction law as at a particular date. The practical difficulty with model 1 is that the host jurisdiction would have to amend its law or regulations to reflect changes in the home jurisdiction'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 in the law in one jurisdiction and changes in the law in the other jurisdiction. The proposed mutual recognition model minimises these difficulties and allows for the legal regimes in both jurisdictions to work in a more harmonised manner consistent with a mutual recognition regime.

Model 2: disapplication of domestic law

Model 2 would involve the disapplication of the law of the host jurisdiction in favour of the applicable law of the home jurisdiction. There would be no ongoing requirements under the law of the host jurisdiction – the offer would be regulated solely by the law of the home jurisdiction. The securities regulator of the host jurisdiction would have no involvement in the regulation of the offer, and would have no supervisory or enforcement powers.

The proposed model is preferable to model 2, as model 2 raises a number of concerns in respect of appropriate regulatory outcomes in the host jurisdiction. The host jurisdiction would depend entirely upon regulatory enforcement in the home jurisdiction with regard to the conduct of overseas based issuers in the host jurisdiction. This would be likely to limit the extent to which a host jurisdiction would be willing to exclude or modify its domestic regulatory framework, thereby limiting the usefulness of the arrangement. An additional concern with the model relates to the increased difficulty for investors in the host jurisdiction of accessing remedies available to them under the regulatory framework of the home jurisdiction, as they would need to seek relief before the (more distant and, for them, less convenient) courts of the home jurisdiction in all cases.

Compared with model 2, the proposed model would create more complexity for issuers (as they would have to interact more extensively with overseas regulators) as well as for host jurisdiction regulators and courts (as they would be required to enforce compliance with different substantive requirements within their respective jurisdictions). However the advantage of the proposed model is that it is more likely to ensure the maintenance of appropriate regulatory outcomes in relation to the conduct of overseas based issuers in the host jurisdiction. Under model 2, the conduct of overseas based issuers is essentially unregulated under the law of the host jurisdiction (depending on the degree of disapplication of host jurisdiction law).

The proposed mutual recognition model seeks to provide a 'middle-ground' between these two models.

5. DETAILS OF THE PROPOSED MODEL

5.1 THE SCOPE OF THE PROPOSED MUTUAL RECOGNITION REGIME

Under the proposed regime, an offer of securities which is a ‘regulated offer’ in one jurisdiction and is able to be lawfully made in that jurisdiction will be able to be lawfully made in the other jurisdiction in the same manner and with the same offer documents, provided that the entry criteria for the regime are satisfied and the offeror complies with the ongoing requirements of the regime (both these issues are discussed later).

An offer will be treated as a ‘regulated offer’ for these purposes if the home jurisdiction requires the offer to be made using a regulated offer document⁷, and if the offeror is amenable to the jurisdiction of the home jurisdiction, that is, is incorporated or constituted under the home jurisdiction’s laws, has an established place of business in the home jurisdiction, or is registered in the home jurisdiction as an overseas company.

The regime will apply to offers of all securities (including shares, debt securities/debentures, participatory securities, options to acquire securities and equitable interests in securities) and interests in collective investment schemes.⁸ It will not extend to other financial products such as life insurance, superannuation products, or derivatives (other than options to acquire securities).

The regime will only be relevant in practice where offers of the security in question are regulated under the securities laws of both Australia and New Zealand, and a regulated offer document is required in both countries.

The regime will encompass the activities that are inherent in the making of offers, including:

- content and registration requirements for offer documents;
- requirements in respect of trust deeds, trustees, custodians and supervisors;
- the manner in which offers may be made;
- advertising and other communications with offerees in relation to offers; and
- the manner of acceptance of offers and other consequential matters (such as the handling of subscribers’ funds, allotment, and obligations to provide information to subscribers at the time of acceptance or allotment, and subsequently).

The regime will not cover financial advice that extends beyond offer documents. Because the requirements under Australian and New Zealand law in respect of the provision of financial advice are not sufficiently similar at present, mutual recognition in this regard would not be readily achieved.

⁷ In New Zealand this is a prospectus or a short form prospectus under Part II of the *Securities Act 1978* (NZ); in Australia this is a disclosure document under Chapter 6D of the *Corporations Act 2001* (Cth) or a PDS under Part 7.9 of the Act.

⁸ The regime will not apply to ‘excluded securities’ as defined in section 9 of the *Corporations Act 2001*.

It is envisaged that the scope of the regime will be specified in an inter-governmental agreement , and that domestic legislation will implement it in each country.

5.2 REQUIREMENTS TO BE MET BY ISSUERS UNDER THE MUTUAL RECOGNITION REGIME

For an offer of securities to be made under the proposed regime, the offer must comply with certain entry criteria and ongoing requirements.

Entry requirements

The regime will apply if, and only if, an offer complies with certain entry criteria, which will be prescribed in domestic law.

First, the offer must be subject to the home jurisdiction's regulatory regime, that is, it must be a 'regulated offer' in the home jurisdiction, which requires use of a regulated offer document (for example a prospectus, offer information statement, or PDS). In addition, the offeror must be entitled to offer the securities to the public under the law of the home jurisdiction, and any offer documents required to be filed with the home jurisdiction regulator must have been filed (and any waiting period before an offer can be made or accepted must have expired).

The offeror must file a notice with the host jurisdiction regulator stating that it proposes to make an offer under the regime. The notice must:

- specify certain particulars, including the name of the offeror and the securities to be offered, and any other matters that the regime may require to be specified;
- specify the period in which it is proposed to offer the securities in both the host and home jurisdictions;
 - the proposed offer period in the home jurisdiction must include any period during which the securities are to be offered in the host jurisdiction;
- specify an address for the service of proceedings in the host jurisdiction;
- confirm that the offeror submits to the jurisdiction of the host jurisdiction courts; and
- be signed by a person with authority to act on behalf of the issuer.

The offeror must also provide the host jurisdiction regulator with a number of other documents:

- the offer documents that have been filed with the home jurisdiction regulator, or under which the offer can be made in the home jurisdiction without filing;
- any relevant constitutional documents;
 - for shares, the company's constitution; for other issuers, the relevant scheme constitution or trust deed;
- a copy of the warning statement that will accompany offers in the host jurisdiction;

- the warning statement will state that the offer is regulated under the home jurisdiction’s securities laws and that the standard host jurisdiction securities law requirements that apply to domestic offers do not generally apply to the offer;
- other specified warnings may also be required, for example, in relation to tax differences and currency risk;
- a copy of any exemption granted by the home jurisdiction regulator that is specific to the offer or the offeror; and
- the particulars of any general exemption granted by the home jurisdiction regulator that is relevant to the offer.

An offer that does not meet the entry requirements will fall outside the regime. Such an offer will be treated as an ordinary domestic offer in the host jurisdiction, and therefore will be unlawful if domestic regulatory requirements are not met, with consequences prescribed by domestic law.

Ongoing requirements

Under the proposed regime, the offer must comply with certain ongoing requirements. These will be specified in the legislation of the host jurisdiction. It is anticipated that the ongoing requirements would include the following:

- the offer must remain a regulated offer in the home jurisdiction;
- the offer must comply with the home jurisdiction’s substantive rules in relation to the making of such offers, as they apply from time to time;
- the offer must be open to acceptance by persons in the home jurisdiction at all times at which it is open for acceptance by persons in the host jurisdiction;
- no person should be concerned in the management of the offeror who is prohibited from being concerned in the management of such a body in the host jurisdiction;
- the principal offer document must be accompanied by a specified warning (see above);
- the offeror must file information concerning certain changes to the offer with the host jurisdiction regulator;
 - any amendments to the regulated offer documents must be filed as soon as practicable and in any case within five business days⁹ of filing/use in the home jurisdiction;
 - any amendment to, or revocation of, an exemption relevant to the offer granted by the home jurisdiction regulator that is specific to the offer or the offeror must be filed as soon as practicable and in any case within five business days of its issue;
 - any amendment to the warning statement must also be filed with the host jurisdiction regulator prior to its use;

⁹ References to business days in this paragraph are to business days in the host jurisdiction.

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- the offeror must provide an offeree, on request, with copies of the relevant constitutional documents;
 - in accordance with the entry requirements, these documents are required to be filed with the host jurisdiction regulator at the start of the offer;
 - any amendments to the relevant constitutional documents must also be filed with the host jurisdiction regulator as soon as practicable and in any case within five business days of filing/use in the home jurisdiction; and
- the offeror must notify the host jurisdiction regulator (as soon as practicable and in any case within five business days) of any enforcement action or exercise of statutory power by the home jurisdiction regulator in relation to the offer, for example a stop order or a notice to produce documents.

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

The sanctions for a breach in the host country of the ongoing requirements of the mutual recognition regime will be determined by the host country and set out in the relevant host country laws governing the mutual recognition regime. The sanctions that apply in the host country may differ from the sanctions provided for under the laws of the home country, although the applicable substantive requirements in terms of offer documents will be the same. Likely sanctions for a breach of the ongoing requirements in New Zealand are civil liability for resulting loss, civil penalties of up to \$1,000,000, or a fine of up to \$300,000. Likely sanctions for a breach of ongoing requirements in Australia are civil liability for resulting loss, and civil or criminal penalties, the details of which are yet to be determined.

A breach of the ongoing requirements would not take the offer outside the regime, and would therefore not render the entire offer unlawful in the host jurisdiction.

Breaches of the home jurisdiction's securities laws in connection with an offer made to an investor in the host country under the mutual recognition regime would also expose the offeror to civil action, criminal sanctions and other enforcement action in the home jurisdiction in the same manner as if the breach had occurred in the home jurisdiction.

It is envisaged that the host jurisdiction regulator would have primary responsibility for taking action against issuers for failure to comply with the ongoing requirements other than the home jurisdiction compliance requirement, and that the home jurisdiction regulator would have lead responsibility for taking action in respect of breaches of the substantive requirements of the home jurisdiction securities laws. However, a breach of the home jurisdiction's substantive requirements in the course of making an offer to investors in the host country would also constitute a breach of the host jurisdiction's ongoing requirements, and thus could be the subject of enforcement action by the host jurisdiction regulator in appropriate cases. In this regard, the two regulators will need to establish regimes (possibly set out in a memorandum of understanding) for communication and co-ordination of action in connection with recognised offers. This would ensure that an issuer who breached a home

jurisdiction law would be prosecuted only once.¹⁰ There may be circumstances, however, where ASIC may wish to commence proceedings notwithstanding that proceedings have been commenced in New Zealand.¹¹

5.3 THE MODIFICATION OF APPLICABLE OFFERING REQUIREMENTS

The mutual recognition model requires the host jurisdiction to legislate to provide that if an offer is made under the mutual recognition regime, the (entry and ongoing) requirements that apply to offers made under that regime will apply in place of the standard domestic fundraising requirements. In New Zealand, for example, an offer made by an Australian issuer under the mutual recognition regime would need to comply with the requirements specified in Part 5 of the *Securities Act 1978* (NZ) and in regulations made under Part 5, although they would not need to comply with the requirements of Part 2 of the *Securities Act 1978* (NZ) and of the *Securities Regulations 1983* (NZ) from which the offer would be exempted by regulations made under Part 5.

The home jurisdiction would need to legislate to provide that its fundraising laws apply to offers made by offerors in that country to investors in the host jurisdiction under the mutual recognition regime.

Exemption from host jurisdiction offering requirements

Each jurisdiction will need to legislate to provide that the usual requirements for domestic offers of securities do not apply in relation to offers made by issuers from the other jurisdiction under the regime. That is, offers will be exempted from these requirements if the regime's entry requirements are met. This approach would be provided for in the Agreement, and domestic legislation in each country would specify the requirements of its fundraising laws that do not apply to offers under the regime.

It is envisaged that New Zealand will provide for exemptions from certain provisions of Part II of the *Securities Act 1978* (NZ), and that Australia will provide for exemptions from certain provisions of the *Corporations Act 2001* (Cth). Details of the specific provisions in respect of which there will be exemptions for offers made under the regime are set out in Appendix 2.

In place of the standard domestic requirements, from which offers under the regime will be exempted, the requirements of the mutual recognition regime will apply. That is, the law of the host country will continue to specify certain requirements which must be met by an offer made under the regime, but those requirements will be the entry requirements and ongoing requirements of the mutual recognition regime, rather than the requirements that apply to standard domestic offerings.

Application of home jurisdiction securities laws

Both jurisdictions will need to legislate to provide that specified substantive requirements of their securities laws apply in connection with offers made to investors in the other jurisdiction under the mutual recognition regime. In other words, where an offer made in one jurisdiction

¹⁰ There could only be one conviction in respect of the same conduct even if prosecutions were brought in both countries, as the double jeopardy principle applies whether the previous acquittal or conviction occurred before a domestic court or a foreign court: see e.g. *R v Lipohar* [1999] HCA 65; *R v Treacy* [1971] AC 537 at 562.

¹¹ For example, ASIC may wish to commence civil penalty proceedings in order to seek an accompanying compensation order for Australian investors.

is extended to the other jurisdiction under the mutual recognition regime, the securities laws of the home jurisdiction will apply to the offer whether the investor is in the home jurisdiction or the host jurisdiction. It is envisaged that this approach would be provided for in the Agreement, and that domestic legislation in each country will specify which particular laws will apply to offers made to investors in the other country under the mutual recognition regime.

It is envisaged that New Zealand will apply all of Part II of the *Securities Act 1978* (NZ) (except for section 35) and the Securities Regulations 1983 (NZ) to offers made by New Zealand offerors to investors in Australia under the mutual recognition regime, and that Australia will apply all of the relevant securities fundraising and managed investment scheme provisions of the *Corporations Act 2001* (Cth), including those provisions relating to disclosure to investors under Part 7.9 (see above), to offers made by Australian offerors to investors in New Zealand under the mutual recognition regime. The requirements that apply under Australian law in respect of hawking and alternative dispute resolution ('ADR') will apply to offers by New Zealand issuers under the mutual recognition regime, either by direct application of the existing statutory provisions, or by mirroring these provisions in the mutual recognition regime provisions (see Appendix 2).

Application of general laws

Laws other than securities laws of the home and host jurisdiction will apply to the extent that general principles of statutory interpretation and private international law result in their application.

A claim in contract against an offeror by an investor in the host jurisdiction could be filed in the host jurisdiction, and served at the address for service specified in the notice supplied by the offeror as part of the entry requirements. Whether the law of the host jurisdiction was the proper law of the contract, and to which issues it would be applied, would depend on normal private international law rules. In most cases it is likely that the terms of the offer will provide that the proper law of the contract is the law of the home jurisdiction. The effect of this provision will be determined by reference to normal private international law rules.

A claim in tort (for example for negligent misrepresentation) arising out of conduct in the host jurisdiction could be filed in the host jurisdiction, and could be served in the host jurisdiction at the address for service specified in the initial notice. It is likely that normal private international law rules would lead to the application of the substantive tort law of the host jurisdiction in most, if not all, cases concerning information provided to persons in the host jurisdiction.

So far as liability for misleading and deceptive conduct in connection with an offer is concerned, each host jurisdiction would be permitted (but not required) to apply its domestic legislation. In this regard, it is envisaged that New Zealand would continue to apply the *Fair Trading Act 1986* (NZ) and the *Consumer Guarantees Act 1993* (NZ) to offers made to New Zealand investors under the mutual recognition regime. Likewise, Australia would continue to apply the corresponding provisions of the Australian Securities and Investments Commission Act 2001 (Cth) (in Part 2, Division 2) and the relevant provisions of the *Corporations Act 2001* (Cth) (Chapter 6D and Part 7.9) to offers made to Australian investors under the mutual recognition regime. In addition, other host jurisdiction market misconduct regimes, such as insider trading and continuous disclosure regimes, would continue to apply

in the normal manner, regardless of whether the offer was made under the domestic offer regime, or the mutual recognition regime.

The proposed regime would not affect the common law or any applicable State/Territory laws.

5.4 THE ROLE OF THE REGULATORS

The role of the home jurisdiction regulator

Under the proposed regime, the home jurisdiction regulator will have primary responsibility for supervising a cross border offer.

The Agreement will require that each jurisdiction provide for the application of its standard enforcement agency powers in respect of offers made by offerors in that jurisdiction to investors in the other jurisdiction under the mutual recognition regime. Domestic legislation in each jurisdiction will give effect to this. Thus, the home jurisdiction regulator will have all its usual powers (in the home jurisdiction) in connection with offers made in the host jurisdiction under the regime. These powers include the power to suspend or stop the offer being made, and the power to prohibit advertisements in relation to the offer. These powers will be exercisable in respect of offers to investors in either country.¹²

The home jurisdiction regulator 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 Agreement will require (as a general principle) that both countries ensure that home jurisdiction regulators accord complaints from persons in the host jurisdiction no less priority than complaints from persons in the home jurisdiction.

The role of the host jurisdiction regulator

The Agreement will provide that the host jurisdiction can legislate to provide for its regulator to have certain powers in respect of offers made under the mutual recognition regime if entry requirements are not satisfied, or ongoing requirements are not complied with. Legislation in each country will, to the extent necessary, expressly provide for the application of these powers. It is envisaged that the host jurisdiction regulator will have its usual powers under domestic legislation to investigate suspected breaches of the law, including breaches of entry requirements or ongoing requirements (including the home jurisdiction compliance requirement). The host regulator will have the power to suspend or stop an offer in the host jurisdiction, and/or prohibit advertisements in the host jurisdiction, if entry requirements are not satisfied or ongoing requirements are not complied with. The host regulator will also have its usual powers to take action in respect of misleading conduct (for example, through issuing a stop notice).

¹² Each regulator will exercise powers only in its own country, for example, using ASIC as the example, where ASIC issues a stop order to an Australian company at its address in Australia, such a power may be exercised in relation to offers and associated conduct (eg advertising) taken by that Australian company in either or both countries. For example, ASIC could issue a direction in Australia to the Australian company to refrain from making offers or publishing a particular advertisement in Australia, or in New Zealand, or in both countries. Similarly ASIC could exercise its information gathering powers in Australia in respect of a breach of the requirements of the Corporations Act 2001 (Cth) in connection with an offer to a New Zealand investor under the mutual recognition regime. However, under the scheme ASIC would not be granted additional powers to exercise its coercive powers outside Australia with regard to New Zealand investors – for example, ASIC would not be granted additional powers to require a person in New Zealand to provide information to ASIC.

The Agreement will encourage regulators to enter into understandings with regard to communication and the co-ordination of enforcement activity.

Regulators' investigative powers

No special provisions are needed to enable the regulator in one jurisdiction to investigate matters relating to the conduct of issuers in the other jurisdiction in connection with the operation of the mutual recognition regime.

Consider, for example, a New Zealand offeror making an offer in New Zealand, which is extended to Australia under the mutual recognition regime. New Zealand securities law requirements apply to the offer, whether directed to New Zealand or Australian investors. Any suspected breach therefore, whether it concerns a New Zealand investor or an Australian investor, is a breach of New Zealand securities law- the standard investigation and information gathering provisions apply. Those powers can be exercised by the NZSC on its own initiative, or at the request of ASIC. A breach of any of the entry requirements or ongoing requirements in connection with an offer made to an investor in Australia constitutes a breach of Australian law, which ASIC can investigate on its own initiative. If ASIC has an independent interest in the matter, ASIC can also investigate at the request of the NZSC. Any breach of New Zealand securities law requirements in connection with an offer made to an Australian investor under the mutual recognition regime will also be a breach of the ongoing requirements of the Australian mutual recognition legislation, so ASIC's usual domestic powers to investigate breaches of Australian securities law will apply.

Exemption powers of the home jurisdiction regulator

It is envisaged that the home regulator will retain the usual exemption powers in respect of offers which will be made in both jurisdictions under the regime.¹³ A copy of any exemption granted by the home regulator that is specific to the issuer, or to the particular issue of securities, will need to be filed in the host jurisdiction in accordance with the regime's entry requirements. The 'home country compliance requirement' under the law of the host jurisdiction will then require compliance with the home country's securities laws as modified by that exemption.

However if the home regulator were to grant an exemption to an issuer that removed the need to use a regulated offer document in the home jurisdiction, the offer would no longer be a regulated offer for the purposes of the proposed mutual recognition regime, so the regime would not apply.

5.5 JURISDICTION AND ENFORCEMENT REGARDING CIVIL AND CRIMINAL PROCEEDINGS

A breach by an issuer of the requirements of the regime could be the subject of both civil and criminal proceedings, in the home jurisdiction or the host jurisdiction.

¹³ Both ASIC and the NZSC have broad powers under their domestic fundraising legislation to grant exemptions from the standard requirements prescribed by that legislation. These powers are regularly exercised to adapt the legislation's requirements to the circumstances of particular offers or classes of offer. Exemptions may be class exemptions that apply to a specified class of offerors or offers (see the examples referred to in Appendix 1), or may be specific to a particular offeror or offer.

Civil proceedings

With regard to civil matters, an aggrieved investor in the host jurisdiction could bring proceedings in the home jurisdiction or in the host jurisdiction by serving the proceedings at the address for service specified in the notice filed by the offeror¹⁴ (As noted earlier, the entry requirements of the proposed model would require a person wishing to make an offer under the mutual recognition regime to file a notice with the host jurisdiction regulator specifying an address for the service of proceedings in the host jurisdiction).

Similarly, civil penalty proceedings in respect of a breach of the regime's requirements in the host jurisdiction could be brought in that jurisdiction by serving the proceedings at the address for service specified in the notice filed by the offeror, or could be brought in the home jurisdiction (provided, in each case, that the law of the relevant jurisdiction provides for civil penalties for the breach in question – sanctions for breach are, as noted above, a matter for each jurisdiction to determine and prescribe in its domestic legislation).¹⁵

Criminal proceedings

A breach of the requirements of the regime may be the subject of criminal proceeding in the home jurisdiction or the host jurisdiction.

A breach of the home jurisdiction's securities law requirements may be the subject of criminal proceedings in the home jurisdiction, whether the breach occurs in respect of an offer made to an investor in the home jurisdiction or in the host jurisdiction (the home jurisdiction's laws will apply to the offer in either case, as discussed above).

A breach in the host jurisdiction of the ongoing requirements of the regime (including a breach of the home jurisdiction compliance requirement) could be the subject of criminal proceedings in the host jurisdiction. A decision on whether or not to bring criminal proceedings in the host jurisdiction would be made by the relevant enforcement agency in that jurisdiction.¹⁶

Trans-Tasman enforcement of fines and penalties?

A fine or penalty imposed in one country cannot normally be enforced in any other country. In the context of the proposed mutual recognition regime, however, it may be desirable to ensure that fines and penalties imposed in the host jurisdiction for breach of the ongoing requirements are enforceable in the home jurisdiction, where the issuer is based and is likely to have the bulk of its assets. The regime could facilitate trans-Tasman enforcement of fines and penalties by providing for a simple mechanism for enforcing in the home jurisdiction fines or penalties relating to breaches of the mutual recognition regime requirements imposed by the courts of the host jurisdiction. In New Zealand, Part 5 of the *Securities Act 1978* would enable regulations to be made to provide for Australian penalties (civil or criminal) to be enforced by registering them in the High Court of New Zealand. This possibility raises a number of issues that are still under consideration by the New Zealand Government. The

¹⁴ An investor that is unsuccessful with a claim in one jurisdiction would also be able to commence the same claim (that is, re-litigate the matter) in the other jurisdiction.

¹⁵ See also footnote 11 above.

¹⁶ A breach of the ongoing requirements is a breach of a legal requirement imposed by the law of the host country: this would be a standard criminal prosecution before a court of the host jurisdiction, for breach of a requirement imposed by legislation in the host jurisdiction. It would not be a prosecution for breach of the home jurisdiction's securities laws: it is not possible to bring a prosecution in one country for an offence committed under the law of another country.

Australian Government is not currently reviewing its general policy on the enforcement of foreign punitive judgments.

5.6 THE WAY FORWARD

An inter-governmental agreement

An inter-governmental agreement (referred to in this paper as the Agreement) would provide the political underpinning for the proposed mutual recognition regime. It is envisaged that this would take the form of a treaty.

It is envisaged that the treaty will be a high-level agreement, concerned with the principles of the mutual recognition regime. Details of the regime will be included in domestic legislation (for example, the specific provisions to be applied by the home jurisdiction to offers made to investors in the host jurisdiction under the mutual recognition regime, and the requirements of the host jurisdiction's securities laws that would not apply to offers made under the mutual recognition regime).

Legislation

Legislation and/or regulations will be needed in both Australia and New Zealand to implement the proposed mutual recognition regime.

The New Zealand Government has already inserted a new Part 5 in the *Securities Act 1978* to provide for mutual recognition regimes regarding offers of securities. The proposed mutual recognition regime would be implemented by regulations made under Part 5 of the 1978 Act. When the model regarding the trans-Tasman mutual recognition of offers of securities and managed investment scheme interests has been finalised, the New Zealand Government will consider whether it is necessary or desirable for this legislation to be amended in the light of the particular features of the final model.

Australia has no such provisions in its legislation. Consequently, when the model has been finalised, the Australian Government will need to amend the *Corporations Act 2001* (Cth), possibly in a manner comparable to Part 5 of the *Securities Act 1978* (NZ).

Australia and New Zealand will also need to work together to draft the necessary provisions.

6. CALL FOR SUBMISSIONS

The Australian and New Zealand Governments seek submissions from interested parties on the following issues:

- 1 What costs do the current requirements for trans-Tasman offers of securities impose on Australian and New Zealand issuers?
- 2 Should Australia and New Zealand put in place a mutual recognition regime for offers of securities and interests in managed investment schemes broadly along the lines described in this paper?
- 3 Are there any features of the proposal set out in this paper which you see as particularly important in order to ensure that the regime achieves the objectives of facilitating investment between the two countries, enhancing competition in capital markets, reducing compliance costs for business, and increasing choice for investors?
- 4 Are there any features of the proposal that you see as inappropriate or undesirable, and that you consider should be changed? How should they be changed?
- 5 Are the proposed exemptions from the standard domestic requirements of each country's fund-raising laws for offers made under the mutual recognition regime, as set out in Appendix 2, appropriate? Should additional requirements be excluded? Should any of these requirements continue to apply to offers under the mutual recognition regime?
- 6 Is it appropriate to provide for special arrangements for enforcement of civil and/or criminal penalties for breach of the host jurisdiction's ongoing requirements, along the lines described in section 5.5 of this paper?
- 7 Are there any other aspects of this proposal on which you wish to comment?

APPENDIX 1: ASIC CLASS ORDERS RELATING TO FUNDRAISING

ASIC Class Orders and Policy Statements that specifically make reference to exempting NZ entities

[CO 00/177] — Fundraising exemption: NZ prospectuses

Class Order [CO 00/177] provides relief from subsection 711(6) of the *Corporations Act 2001* (Cth) (the Act) on condition that the prospectus is registered in New Zealand. Section 711(6) relates to the issue of securities beyond the expiry date specified in the prospectus. The prospectus must otherwise comply with Australian prospectus content standards as prescribed in Chapter 6D of the Act (Fundraising), and be lodged with ASIC.

[CO 00/180] — Foreign securities: publishing of reports and notices

Class Order [CO 00/180] provides relief for the publication in Australia of certain notices or reports which relate to the securities of a foreign corporation, and which may otherwise breach section 734 of the Act (which relates to restrictions on advertising and publicity). Among other requirements, the notice or report must be either:

- a notice or report by a body about its affairs to an approved foreign exchange (approved by ASIC); or
- a notice or report of a general meeting of a body which is listed on an approved foreign exchange.

[CO 00/181] — Foreign securities: publishing of reports and notices

Class Order [CO 00/181] gives conditional relief from the requirement that a prospectus be one document and from the requirement in subsection 711(6) of the Act – see above. The relief is available to foreign companies issuing securities quoted on an approved foreign exchange provided that certain additional requirements are met.

[CO 00/183] — Foreign rights issue

Class Order [CO 00/183] provides a foreign company, the securities of which have been quoted on an approved foreign exchange throughout the 36 month period preceding the offer, with relief for certain pro-rata issues of rights in Australia. If certain conditions are met the foreign company has relief from various procedural provisions of Chapter 6D of the Act.

[CO 00/185] — Foreign securities

Class Order [CO 00/185] provides a foreign corporation listed on an approved foreign exchange offering its securities in connection with a foreign takeover scheme or foreign scheme of arrangement with conditional relief from various provisions of Chapter 6D of the Act.

[CO 00/214] — Foreign securities: listed foreign companies making 20 or fewer offers in Australia in 12 months

Class Order [CO 00/214] gives conditional relief to foreign companies that are listed on approved foreign exchanges and that wish to make 20 or fewer personal offers in Australia in 12 months.

[CO 02/263] — Foreign interests in a managed investment scheme traded on an approved foreign exchange: 20 or fewer offers in Australia in 12 months

Class Order [CO 02/263] gives conditional relief to foreign issuers of interests in managed investment schemes that are able to be traded on approved foreign exchanges where 20 or fewer personal offers are made in Australia in 12 months.

[CO 03/184] — Employee share schemes

Class Order [CO 03/184] provides conditional relief from disclosure and licensing provisions of the Act for certain offers involving shares made to full time or part time employees under an employee share scheme. It also provides conditional relief from the advertising, hawking and managed investment provisions for some employee share schemes.

[PS 178] — Foreign collective investment schemes

Policy Statement 65 currently provides guidance on relief to foreign collective investment schemes subject to certain conditions being met. Policy Statement 178, which ASIC is about to finalise and which will replace PS 65, will provide guidance on relief to particular types of managed investment schemes from Part 7.9 of the Act.

ASIC Class Orders that make reference to foreign companies in general

[CO 00/238] — Dividend reinvestment plans (amended by [CO 03/68])

Paragraph 708(13)(a) of the Act and regulation 6D.2.02 of the Corporations Regulations have the effect of exempting certain offers by companies and foreign companies under dividend reinvestment plans and bonus share plans from the disclosure requirements in Chapter 6D of the Act. Class Order [CO 00/238] extends the exemption to registrable Australian bodies and ensures that companies are able to take advantage of the exemption outside their jurisdiction of registration.

[CO 02/311] — CHESS Depository Nominees Pty Ltd — CHESS Depository Interests

Class Order [CO 02/311] gives relief from provisions in Chapter 6D and Part 7.9 of the Act in relation to the issue of CHESS Depository Interests (CDIs) by CHESS Depository Nominees Pty Ltd (CDN). CDIs enable the beneficial ownership of certain foreign financial products that are quoted on Australian Stock Exchange Ltd to be recorded and transferred electronically in the Clearing House Electronic Subregister System (CHESS) operated by ASX Settlement & Transfer Corporation Pty Ltd (ASTC). This class order revokes [CO 00/182].

[CO 02/316] — CHESS Depository Nominees Pty Ltd — Foreign Depository Interests

Class Order [CO 02/316] gives relief from provisions in Chapter 6D and Part 7.9 of the Act in relation to the issue of Foreign Depository Interests (FDIs) by CHESS Depository Nominees Pty Ltd (CDN). FDIs enable the beneficial ownership by Australians, of certain foreign financial products that are not quoted on an Australian market, to be recorded electronically in the Clearing House Electronic Subregister System (CHESS) operated by ASX Settlement & Transfer Corporation Pty Ltd (ASTC). This class order revokes instruments [01/84] and [01/1165].

APPENDIX 2: FUNDRAISING PROVISIONS THAT WOULD NOT APPLY TO OFFERS UNDER THE REGIME

New Zealand

It is envisaged that New Zealand would exempt offers under the mutual recognition regime from all of Part II of the *Securities Act 1978* (NZ), except for:

- Section 35 Restrictions on door-to-door sales
- Section 38B Prohibition of advertisements
- Section 58 Criminal liability for misstatement in advertising or registered prospectus

New Zealand will also exempt offers under the mutual recognition regime from the provisions of the *Securities Regulations 1983* (NZ).

Australia

It is envisaged that Australia would exempt offers under the mutual recognition regime from the following provisions of the *Corporations Act 2001* (Cth).

In relation to shares, options to acquire securities and equitable interests in securities:

- Chapter 6D Fundraising
- Section 1017F Confirming transactions¹⁷

In relation to debentures:

- Chapter 2L Debentures
- Chapter 6D Fundraising
- Section 1017F Confirming transactions

In relation to managed investment schemes:

- Chapter 5C Managed investment schemes
- Part 7.6 Licensing of providers of financial services
- Part 7.7 Financial services disclosure
- Part 7.8 Other provisions relating to conduct etc connected with financial products and financial services, other than financial product

¹⁷ Part 7.6 of Chapter 7 is not disapplied in relation to offers of shares, so investment companies that are 'dealing' in their own shares will require an Australian Financial Services Licence by virtue of subsection 766C(5).

disclosure

- Part 7.9 Financial product disclosure and other provisions relating to issue and sale of financial products, except the short selling provisions (sections 1020B, 1020C)

Other issues for Australia

Hawking and alternative dispute resolution requirements

It is proposed that the:

- current prohibitions on hawking and requirement for alternative dispute resolution arrangements would not apply to an issuer under the proposed mutual recognition regime (as indicated above); and
- in the place of the current prohibitions, a prohibition on hawking and the Australian requirements for an issuer to have alternative dispute resolution arrangements would be included in the mutual recognition regime as ongoing requirements.