

EXPOSURE DRAFT OF THE
CORPORATIONS AMENDMENT
(NZ CLOSER ECONOMIC RELATIONS)
BILL 2006

COMMENTARY

Table of Contents

1. INTRODUCTION	1
2. ABBREVIATIONS.....	3
3. REGULATION IMPACT STATEMENT	5
Schedule 1 — Mutual recognition of securities offers	5
Problem Identification	7
Objectives	9
Description of Options	9
Impact Analysis.....	12
Consultation.....	21
Conclusion and recommended option.....	23
Implementation & review	24
Schedule 2 — Reduced filing requirements for foreign companies	25
4. MUTUAL RECOGNITION OF SECURITIES OFFERINGS	26
A The background.....	26
B Outline.....	27
C A guide to the mutual recognition provisions.....	28
D Commentary on the detailed provisions	30
E Role of the regulators	37
F Australian offers recognised in foreign jurisdictions	39
G Other issues.....	41
5. REDUCED FILING REQUIREMENTS FOR FOREIGN COMPANIES	49
Background.....	49
Key Changes	50

1

Introduction

1.1 The draft Corporations Amendment (NZ Closer Economic Relations) Bill (the draft Bill) addresses:

- mutual recognition of securities offerings; and
- reduced filing requirements for certain foreign companies carrying on business in Australia.

1.2 These initiatives are consistent with the *Australia-New Zealand Closer Economic Relations Trade Agreement* which has shaped the economic and trade relationship between the two nations since 1983. They are also included in the work programme attached to the Memorandum of Understanding on Coordination of Business Law between Australia and New Zealand. Implementation of the proposals will be a further step towards a single economic market, based on common regulatory frameworks.

1.3 The mutual recognition scheme embodied in the draft Bill is intended to reduce duplicated regulation, and thereby facilitate investment between the two countries, enhance competition in capital markets, reduce costs for business and increase choice for investors. Mutual recognition achieves this by enabling entities from, say, New Zealand to offer securities into Australia on the basis of compliance with the New Zealand fundraising requirements with minimal additional requirements imposed by Australian law.

1.4 The second initiative included in the bill is also clearly deregulatory, reducing the paper burden for those companies established in New Zealand which wish to carry on business in Australia.

1.5 The Bill is framed in the context of Australia's relationship with New Zealand and is seen as one of a series of initiatives to coordinate the business law of the two countries. However, it is drafted in such a way that it could be extended to other countries if comparable arrangements were reached with them.

Introduction

1.6 Your views and comments on the exposure draft are sought by 13 October 2006. They should be sent to:

Corporations Amendment (NZ Closer Economic Relations) Bill 2006
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

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2

Abbreviations

The following abbreviations are used in this commentary:

ARMIS	Australian Registered Managed Investment Schemes
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	Australian Stock Exchange
the draft Bill	Corporations Amendment (NZ Closer Economic Relations) Bill 2006
Corporations Act	<i>Corporations Act 2001</i>
EU	European Union
MIS	Managed Investment Schemes
NZX	New Zealand Stock Exchange
Treaty	Agreement between the Government of Australia and the Government of New Zealand in Relation to Mutual Recognition of Securities Offerings

3

Regulation Impact Statement

Schedule 1 — Mutual recognition of securities offers

Background

3.1 The proposed trans-Tasman mutual recognition regime for offers of securities and interests in managed investment schemes 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 most recent version was signed on 22 February 2006.

3.2 Earlier memoranda were signed in 1988 and 2000. The 1988 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).

3.3 On 4 October 2001, the then Australian Minister for Financial Services and Regulation, the Hon Joe Hockey MP, wrote to the then New Zealand Minister of Commerce, the Hon Paul Swain, proposing that Australia and New Zealand consider formal processes of mutual recognition in financial services regulation.

3.4 Under the current regulatory regime, issuers from one country (the home jurisdiction) who wish to offer securities to investors in the other country (the host jurisdiction) need to comply with two substantive regimes (subject to some exceptions).

Regulation impact statement

Offers by Australian offerors in New Zealand

3.5 Under the *Securities Act 1978* (NZ) (the Securities Act), 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.

3.6 Australian issuers making an offer in New Zealand must comply with the disclosure requirements of the Securities Act, unless they fall within an exemption notice issued by the New Zealand Securities Commission (Securities Commission). 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').

3.7 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.

3.8 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.

3.9 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 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 Product Disclosure Statement.

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

Offers by New Zealand offerors in Australia

3.11 Under Chapter 6D of the *Corporations Act 2001* (Cth) (the Corporations Act), an offer of securities must be accompanied by the relevant disclosure document. 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. Under Part 7.9 of the Corporations Act, offers relating to the issue of other types of financial products (including interests in managed investment schemes) are generally accompanied by a product disclosure statement.

3.12 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 product disclosure statement is required for a particular scheme, subject to any exemptions, 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).

3.13 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 Corporations 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. These do not significantly reduce the cost of complying with the two regimes.

Problem identification

The need to regulate offers of securities

3.14 The aim of regulating the primary market for securities, the market in which capital is raised by the issue of new securities, is to ensure, as far as possible, that intending investors are supplied with adequate information so that they can make informed judgments.

3.15 The intangible nature of investment opportunities means that their merits cannot be assessed by inspection as in the case of, for example, land or goods. There is a need, therefore, for disclosure to the general public by the persons making the offer.

Two regulatory regimes

3.16 As indicated above, Australian and New Zealand issuers cannot use their home jurisdiction offer documents when making a trans-Tasman offer of securities or managed investment scheme interests. Instead, issuers must comply with the relevant requirements in the host jurisdiction unless the issuer is operating under an exemption in the host jurisdiction.

3.17 Issuers of securities report that the current regulatory arrangements impose significant costs on both sides of the Tasman.

3.18 Costs borne by Australian offerors, which have increased over time, include: fees for legal advice and corporate advisory services for New Zealand

Regulation impact statement

requirements; preparing, filing and disseminating New Zealand investment statements (although the costs are reduced for issues relying on exemption notices); preparing New Zealand compliant advertisements; and compliance with conditions of exemption notices.

3.19 Costs borne by New Zealand issuers are similar to those of Australian issuers in relation to advisory fees for Australian requirements and preparing and disseminating Australian disclosure documents. If no specific exemptions are available, New Zealand issuers also need to comply fully with the Corporations Act requirements.

The effect of the current regulatory regime

3.20 The effect of such costs is that, 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.

3.21 A study has not been undertaken quantifying the aggregate costs to issuers of offering securities in the host jurisdiction. According to the Australian Stock Exchange (ASX), however, a number of companies listed on the ASX have advised the ASX that the cost of providing offer documents to New Zealand investors may range from \$10,000 to \$30,000 on average. These figures encompass circumstances where there may be only ten to twenty New Zealand investors. The ASX also understands that costs for larger companies could total approximately \$50,000 although in such cases the shareholder base is likely to be substantially larger.

3.22 However, a number of submissions on the discussion paper on this matter issued on 18 May 2004 noted that the option identified in the discussion paper (that is option three) would involve a significant reduction in costs for companies who were issuing securities both in Australia and New Zealand.

3.23 A study in relation to the number of trans-Tasman offers that have not proceeded due to the additional costs of compliance with the host jurisdiction has not been conducted. It can be said, however, that there is an opportunity cost involved in not accessing a potential overseas investment market. While such an opportunity cost would appear to be greater for New Zealand offerors (because of Australia's relatively larger investment market), the cost to Australian offerors cannot be discounted.

3.24 While the electronic provision of disclosure documents may marginally reduce the costs to some extent, a significant element of the cost of such documents is the advice and checks needed to produce the offer documents.

There is no way of quantifying the level of electronic provision of offer documents or quantifying the difference in costs between electronic and hard copy provision of offer documents. This is in part due to the number of variables that impact on costs, including the type of offer, the size of the offer (and the size of the offeror) and the location of the offeror. Nevertheless, anecdotal evidence from business suggests that many companies make offer documents available both electronically and in hard copy form, and that the cost of printing such material is minimal. In other words, the vast majority of costs arise from the advice and checks needed when making an offer and there is a minimal cost difference in relation to issuing prospectuses and product disclosure statements electronically or by hard copy.

The problem

3.25 The problem to be addressed, therefore, is the regulatory barriers currently facing issuers wishing to offer securities in the host jurisdiction of complying with the relevant requirements in relation to the structure of the investment scheme in that jurisdiction and preparing further offer documents, unless the issuer is operating under an exemption in the host jurisdiction.

Objectives

3.26 The fundamental objective is to address the problem of trans-Tasman regulatory barriers currently facing issuers of securities and managed investment scheme interests, and to thereby facilitate investment between Australia and New Zealand, enhance competition in capital markets, reduce costs for business, and increase choice for investors.

Description of options

3.27 Mutual recognition arrangements aim both to overcome mutually inconsistent requirements that may exist between national regulatory frameworks and to reduce compliance costs associated with the need to comply with the different regulatory requirements of different jurisdictions.

3.28 Mutual recognition arrangements achieve these aims by enabling an issuer in the home jurisdiction to operate in the host jurisdiction on the basis of compliance with a single substantive regulatory framework (that of the home jurisdiction). Compliance with the regulatory framework of the home jurisdiction operates as a 'passport' that allows an entity to carry on business in the host jurisdiction under the same regulatory framework.

Regulation impact statement

3.29 Three alternative options were identified for a trans-Tasman mutual recognition arrangement for offers of securities and managed investment scheme interests. The three regimes are outlined below.

Option one — disapplication of domestic law

3.30 Option one is the simplest model of mutual recognition. It involves, for home jurisdiction issuers that satisfy the host jurisdiction's domestic access regime, the host jurisdiction disapplying parts of its own regulatory framework (in relation to certain conduct by the home jurisdiction issuer) in favour of the applicable law of the home jurisdiction. There are no ongoing requirements under the law of the host jurisdiction (other than, for example that the home jurisdiction issuer remains regulated in its home jurisdiction) — the offer is regulated solely by the law of the home jurisdiction. The securities regulator of the host jurisdiction has no involvement in the regulation of the offer, and has no supervisory or enforcement powers.

3.31 Disapplication by the host jurisdiction of aspects of its domestic regulatory framework in relation to conduct by home jurisdiction issuers may be subject to additional specific requirements, such as to appoint a local agent.

3.32 This option appears to be the basis of the model of mutual recognition adopted in the European Union (EU). Under the EU arrangements, EU countries have agreed to disapply their domestic licensing requirements in relation to entities that are subject to regulation in other EU jurisdictions. A licence granted in one EU jurisdiction operates as a regulatory 'passport' across the EU. However, EU countries have not disappplied their respective 'conduct of business' rules. These rules continue to apply and differ significantly across EU jurisdictions.

3.33 This approach can also be adopted by a host jurisdiction in the absence of any agreement from other jurisdictions that are to be recognised under the arrangement (although in these circumstances the approach should be more accurately characterised as unilateral, rather than mutual, recognition).

Option two — incorporation of foreign law

3.34 Under option two, the host jurisdiction, in common with option one, disappplies aspects of its domestic regulatory framework in favour of the applicable law of the home jurisdiction. Unlike option one, however, the host jurisdiction incorporates the laws of the home jurisdiction within its domestic regulatory framework, which applies in relation to conduct within its boundaries by entities from the home jurisdiction. The host jurisdiction incorporates home jurisdiction law either 'word for word' or by reference to the home jurisdiction law as at a particular date.

3.35 Option two differs from option one in that the host jurisdiction is responsible for regulating the conduct of the home country issuer, which will satisfy the requirements of the host jurisdiction by complying with the requirements of the home jurisdiction. (Home country issuers will also need to satisfy the entry requirements of the mutual recognition arrangement.)

3.36 A mutual recognition arrangement based on option two provides a greater role for regulators in the host jurisdiction than an arrangement based on option one. Offerors would still be able to issue securities in the host jurisdiction under a single substantive regulatory framework. However, they would be required to deal with more regulators (and would be subject to multiple court systems). Each domestic regulator would have responsibility for regulating the conduct of all issuers within its respective jurisdiction. Regulators would regulate overseas-based issuers under different regulatory frameworks to those that apply to domestically-based issuers.

Option three — compliance with substantive requirements of domestic law

3.37 Option three seeks to provide a ‘middle ground’ between option one and option two. It is based on applying the substantive fundraising laws of the home jurisdiction to offers made in the host jurisdiction. The basic principle that underpins this option is that an offer of securities that is a regulated offer in the home country and can lawfully be made in that country, can lawfully be made in the host country in the same manner and with the same offer documents, provided that: (i) the entry requirements are satisfied; and (ii) the offeror complies with the ongoing requirements.

3.38 Entry requirements include, for example, requirements to:

- opt into the mutual recognition regime in respect of a particular offer, by filing with the host country regulator a notice that contains prescribed information in relation to the offeror and the offer; and
- provide an address for service of legal documents in the host country and submit to the jurisdiction of the courts of that country.

3.39 An offer that does not meet the entry requirements falls outside the mutual recognition regime. It is treated as an ordinary, domestic offer under the host jurisdiction’s law and needs to meet the standard requirements under the laws of that jurisdiction.

3.40 Ongoing requirements are imposed by domestic legislation in the host jurisdiction and include, among others, conditions that:

- the offer must remain a regulated offer in the home jurisdiction;

Regulation impact statement

- the offeror must comply with the home jurisdiction's relevant fundraising laws in relation to the making of such offers as they apply from time to time; and
- the principal offer document be accompanied by specified warnings in relation to, for example, the governing law, tax differences and currency risk.

3.41 Failure to meet the ongoing requirements results in a breach of the host country's laws (that specify ongoing requirements).

3.42 Under option three, the home jurisdiction regulator has primary responsibility for supervising a cross-border offer and can exercise powers of its own motion, at the request of the host country regulator, or at the request of a person in the host country. The host country regulator has the power to suspend or stop an offer, to prohibit advertisements in the host country if entry requirements are not satisfied or if the ongoing requirements are not complied with and to investigate suspected breaches of the law, including breaches of entry requirements or ongoing requirements (including the home jurisdiction compliance requirement).

3.43 Under any option, ASIC will not send officers to New Zealand to undertake investigations or enforcement activity there. ASIC's powers do not extend to New Zealand and it would be inappropriate to amend the law to purport to provide for this. Instead, ASIC may exchange relevant information with the New Zealand Securities Commission and Registrar of Companies under their respective governing laws. Their co-ordination is facilitated by Memoranda of Understanding between the regulators.

Impact analysis

3.44 The groups currently most affected by the regulation of trans-Tasman securities offerings and likely to be most affected by the options include:

- issuers of securities in Australia and New Zealand (particularly public companies);
- investors in Australia and New Zealand; and
- ASIC, the New Zealand Securities Commission and the New Zealand Registrar of Companies (the New Zealand Regulators).

3.45 The costs and benefits of the identified options, which this impact analysis compares against the current regulatory environment (and against each other), can be evaluated under four headings:

- The benefits of overcoming mutually exclusive regulatory requirements and the costs for offerors and regulators.
- Consistency with providing appropriate regulatory outcomes in host jurisdictions (especially in relation to foreign issuers operating under mutual recognition).
- Impact on national and parliamentary sovereignty.
- The extent of associated complexity.

3.46 The first two of these headings are probably the most significant. They are also closely related to one another. The extent to which host jurisdictions realise the benefits associated with them disapplying their domestic regulatory frameworks under mutual recognition arrangements is likely to depend on the capacity of these arrangements to ensure the maintenance of appropriate regulatory outcomes within each host jurisdiction.

Benefits from overcoming mutually exclusive regulatory requirements

3.47 The most immediate benefit derived from overcoming the need to comply with different regulatory requirements in Australia and New Zealand that pursue the same policy objectives is removing/reducing the compliance costs associated with multiple market participation currently borne by Australian and New Zealand issuers. Other, derivative benefits include:

- Facilitating cross-border fundraising (and investment) activity by Australian and NZ entities.
- Enhancing competition in domestic capital markets by facilitating market entry.
- Providing significant potential to reduce the cost of capital to issuers by enabling them to access wider capital markets at lower cost than is currently available.
- Providing investors with more opportunities to manage risk through geographical diversification of their investments by increasing the range of investment choices.

3.48 These benefits derive in large part from the disapplication of aspects of the host jurisdiction's regulatory framework. From this perspective, each option has the potential to yield these benefits. The extent to which these benefits will be realised under each of the options, however, depends on two, related, factors:

Regulation impact statement

- The extent to which the host jurisdiction disapplies its domestic regulatory framework.
- The particular parts of its regulatory framework that the host jurisdiction disapplies.

3.49 The second factor is particularly important, as some regulatory requirements are likely to be more burdensome and generate higher compliance costs than others. As discussed above, fundraising regulation, which the host jurisdiction would disapply under each identified option, in both Australia and New Zealand, is relatively onerous and generates significant compliance costs for issuers.

3.50 Under all three options, potential issuers are likely to face initial familiarisation costs, with these being greater the more complex the option.

Option one

3.51 It can be argued that option one may involve lower compliance costs than options two and three because an issuer may not be required to interact with host regulators (or courts) under option one. ASIC advises that option one is likely to have the lowest costs for regulators, though they note that in the event of difficulties, to the extent that the home regulator is expected to ensure compliance with the home jurisdiction requirements in the host jurisdiction, option one potentially involves complexities and costs that may not arise under the other options.

Options two and three

3.52 Options two and three may involve slightly higher compliance costs and pose a slightly higher regulatory risk for offerors issuing securities in the host jurisdiction. This is because issuers would be required to interact with the host jurisdiction regulator and would be subject to multiple liability frameworks (albeit under the same substantive law).

3.53 Under option two, the host country regulator would also be likely to face greater costs associated with understanding, and supervising and enforcing the home jurisdiction's securities laws, with the potential for inconsistent administration of the provisions.

3.54 Compliance costs would potentially be marginally higher under option three than option two because of the existence of ongoing requirements — features not present in option two. However, these costs are expected to be small.

3.55 From this perspective, option three may be less attractive to potential trans-Tasman issuers than options one and two. However, if option three is better able to ensure the maintenance of appropriate regulatory outcomes in the host jurisdiction, these costs may be offset by their potential to facilitate the more extensive disapplication of host jurisdiction legislation.

3.56 ASIC has advised that between options two and three, all other things being equal, option two is likely to involve greater costs for regulators than option three. This is essentially because option three assumes that the home regulator will be playing a 'lead regulator' role in relation to an offering, while option two does not envisage the host regulator being able to rely on the home regulator in dealing with matters arising under the locally adopted foreign law.

3.57 ASIC, however, notes that the costs for offerors and regulators under either options two or three would probably not be high in absolute terms.

3.58 There would not be any significant costs for investors under any of these three options, beyond the initial familiarisation costs.

Maintenance of appropriate domestic regulatory outcomes

3.59 Mutual recognition arrangements aim to overcome regulatory barriers facing offerors issuing securities in multiple jurisdictions while maintaining appropriate regulatory outcomes in host jurisdictions. The key issue in this regard concerns the adequacy of the protection available to investors dealing with home jurisdiction issuers operating in the host jurisdiction (although market integrity and financial stability are also important considerations). The protection available to investors in these circumstances should be similar in its effectiveness to the protection available to investors acquiring domestically-issued securities.

3.60 This requires that home and host jurisdictions have equivalent regulatory frameworks and that the enforcement provisions and remedies available under these frameworks should apply to issuers when they operate outside their respective home jurisdictions.

Option one

3.61 Under option one, host jurisdictions do not impose their own regulatory frameworks. Rather, they rely on the cross-border effects of regulation in the home jurisdiction. A benefit associated with this approach is that the financial burden of the host regulator's supervisory, investigative and enforcement roles is removed entirely.

3.62 This means that there is total reliance on the home jurisdiction's fundraising requirements and regulator — there is no capacity for the host

Regulation impact statement

regulator to issue a stop order on the issue where there is a contravention of a disapplied provision. In addition, as indicated above, the home jurisdiction regulators would not be entitled to exercise their own investigation and examination powers in the host jurisdiction.

3.63 This approach may be appropriate in relation to parts of the regulatory framework that have the indivisibility and non-excludability characteristics of a public good — for example, investors in both home and host jurisdictions may all benefit from a prohibition in the home jurisdiction on offer documents containing false or misleading statements. It may be less appropriate where regulation does not have strong public good characteristics. In these circumstances, a home country regulator may be able to choose not to regulate a domestic issuer in relation to conduct by that issuer beyond its territorial boundaries or provisions in the home jurisdiction may not apply to conduct in a host jurisdiction that has disapplied its domestic legislation. Further, disapplication is inappropriate where there is the possibility of the issuer undertaking separate conduct, such as advertising, in the host jurisdiction, which is not also being undertaken in the home jurisdiction.

3.64 While option one may reduce the marginal costs of extending an offer into the host jurisdiction, the host jurisdiction is likely to limit the application of such a regime when it has no means of regulation or responsibility over offers of securities made inside its jurisdiction.

3.65 Option one also raises issues relating to the ease with which investors in the host jurisdiction may access remedies that may be available to them under the home jurisdiction's regulatory framework. Most importantly, such investors may be required to incur the additional expense of pursuing remedies through the court system of a foreign jurisdiction. This aspect of the model may even dissuade host jurisdiction investors from taking up the securities being offered by home jurisdiction issuers.

3.66 Option one has the least capacity to ensure the maintenance of appropriate regulatory outcomes and may decrease investor confidence.

Options two and three

3.67 Options two and three have a number of potential advantages over option one in terms of their capacity to ensure the maintenance of appropriate regulatory outcomes in the host jurisdiction.

3.68 Firstly, an issuer offering securities across the Tasman would be subject to oversight by the host jurisdiction regulator, who retains responsibility for regulating conduct within its jurisdiction. Host jurisdiction regulators are more likely than home jurisdiction regulators to have both the capacity and

willingness to exercise effective regulatory oversight in relation to issuers operating in the host jurisdiction.

3.69 Secondly, host jurisdiction investors can pursue statutory and other remedies in their domestic court system (and would not be required to pursue these remedies in the court system of the home jurisdiction). This would reduce the difficulty and expense of pursuing legal remedies in comparison with option one.

3.70 Option three also enables host jurisdiction investors to pursue civil proceedings against a foreign issuer for a contravention of the home jurisdiction regulatory framework in the courts of the host jurisdiction.

3.71 This is because the foreign issuer will have an address for service in the host jurisdiction, and will have in effect submitted to the jurisdiction of its courts. However, the investor may still need to enforce his or her judgment in the home jurisdiction. Investors will be given notice of such practical difficulties by the 'health warnings' associated with these offers.

3.72 The arrangements for enforcing in the home jurisdiction fines and penalties imposed in the host jurisdiction for breaches of the ongoing requirements are currently being examined by the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement. The Working Group, comprised of officers of the New Zealand Ministry of Justice and Commonwealth Attorney-General's Department, is reviewing legal co-operation in such areas as service of process, the taking of evidence, the recognition of judgments in civil and regulatory matters and regulatory enforcement, and issued a discussion paper for public consultation in 2005.

National/parliamentary sovereignty

3.73 All of the options have implications for national/parliamentary sovereignty because host countries must disapply parts of their domestic regulatory frameworks and, therefore, surrender (at least while the mutual recognition arrangement is operational) to various extents their capacity to directly regulate certain conduct within their jurisdictions. Each option would also require Australia and New Zealand to consult with one another before amending their domestic regulatory frameworks because this may have implications for regulating conduct in each other's jurisdictions.

3.74 Reductions in national sovereignty may be inevitable, however, in order to address problems that result from the existence of national regulatory frameworks.

Regulation impact statement

Option one

3.75 Under option one, the host jurisdiction surrenders the capacity to influence the development and implementation of regulation and, instead, relies on the cross-border effects of regulation within an issuer's home jurisdiction to ensure appropriate conduct when it operates across borders. The disadvantage of this approach is that the host jurisdiction must accept any adverse consequences of the regulation adopted by the home jurisdiction or end the arrangement by introducing its own regulatory framework.

Option two

3.76 A significant difficulty with option two is the parliamentary sovereignty issues it raises. The host jurisdiction would have to amend its law or regulations to reflect changes in the home jurisdiction's law. Not only would national parliaments not have control over certain aspects of the content of the laws of their jurisdiction, such a process would be likely to be resource intensive and could lead to gaps in the mutual recognition regime where there is a lag between changes in the laws of the respective jurisdictions. Such lags could delay proposed or existing trans-Tasman securities offerings and could constitute a disincentive for issuers contemplating entering the regime. This is a key weakness that option three does not share.

Option three

3.77 Because compliance with the host jurisdiction's laws can be achieved through complying with the current requirements of the home jurisdiction, a change in the laws of the home jurisdiction has the effect of altering the substantive compliance requirements in the host jurisdiction, even though the laws of the host country do not change. This approach creates the theoretical risk 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. This risk is addressed by including in the treaty provisions:

- requiring consultation in relation to the implementing legislation (and proposed amendments to it) and material changes to the scope of a jurisdiction's securities legislation; and
- enabling each jurisdiction to terminate the treaty for any reason (in the unlikely event that serious concerns arise and cannot be resolved).

3.78 The treaty also provides the capacity to add to the prescribed list of entry and ongoing requirements if there is agreement between Ministers.

3.79 The provision requiring consultation is likely to reduce only marginally the flexibility with which Australia may amend its regulatory framework. This is because the Commonwealth is already under an obligation to consult the States and Territories before any such amendment. Consultation with New Zealand will take place at this time and the views expressed taken into account.

Complexity

3.80 The aim of the proposed mutual recognition arrangement is to reduce complexity for issuers offering securities across the Tasman by enabling them to carry on business under a single substantive regulatory framework (that of their home jurisdiction). Each of the identified options has the potential to reduce complexity for companies wanting to offer securities in Australia and in New Zealand.

3.81 All three options increase complexity for investors in the sense that the offer documents will not be in compliance with the usual Australian fundraising requirements (although they are functionally equivalent). It may therefore prove harder to compare the offer with the usual Australian offer.

Option one

3.82 Option one is the least complex option since the host jurisdiction simply disapplies particular aspects of its regulatory framework. This would marginally reduce ASIC's costs, however it would increase the complexity for investors (and hence their costs) as they would be required to familiarise themselves with the issuer's home system of regulation, make a judgement regarding its appropriateness and (potentially) seek relief in the issuer's home judicial system.

Options two and three

3.83 Options two and three may involve greater complexity for issuers since they would be required to interact more closely with regulators in two jurisdictions and would be exposed to multiple liability frameworks. This complexity is illustrated particularly with respect to option three by the existence of entry requirements and ongoing requirements.

3.84 Understanding the entry and ongoing requirements also increases the complexity for investors. However, options two and three may also result in less complexity for investors seeking to pursue statutory remedies against issuers since they could be pursued within an investor's home jurisdiction rather than the issuer's home jurisdiction.

3.85 Options two and three are likely to increase complexity for host jurisdiction regulators (and courts) as they would be required to monitor and

Regulation impact statement

enforce compliance with the laws of different substantive requirements within their respective jurisdictions.

3.86 However, complexity may be less evident under option three than option two since the host regulator performs a role secondary to that of the home regulator. ASIC indicates that the impact on regulators in relation to complexity is likely to be minimal. Options two and three are less complex than the current regime.

Summary

3.87 The following table summarises the likely impacts of each option.

	Option one	Option two	Option three
Benefits from overcoming mutually exclusive regulatory requirements	Removing or reducing compliance costs associated with multiple market participation (plus derivative benefits).	Same as option one.	Same as option one.
Compliance costs	Lower than the current system. Arguably lower than options two and three.	Lower than the current system. Higher than option 1 and marginally lower than option 3.	Lower than the current system. Higher than option 1 and marginally higher than option 2.
Maintenance of appropriate regulatory outcomes	Not capable.	Capable.	Most capable.
National/ parliamentary sovereignty	Raises significant issues	Raises significant issues and is unlikely to be acceptable to the Parliament.	Best addresses the significant issues.
Complexity	Least complex.	Complex (though less complex than the current system).	Marginally more complex than option 2 (though less complex than the current system).
	Option one	Option two	Option three
Impact on administration/Government	Some reduction in administration. Some reduction in the Government's ability to legislate in	No significant increase or decrease in administration. Significant reduction in the	No significant increase or decrease in administration. Minimal reduction in the Government's

Regulation impact statement

	this area.	Government's ability to legislate in this area.	ability to legislate in this area.
Impact on investors	Improved choice, most reduction in regulatory protection.	Improved choice, some reduction in regulatory protection.	Improved choice, with an appropriate level of regulatory protection.
Impact on issuers of securities	Reduction in costs.	Reduction in costs.	Reduction in costs.

3.88 In conclusion, while options one and two may involve smaller overall compliance costs, option three provides for a reduction in compliance costs compared to the current system, while maintaining appropriate regulatory outcomes, a point recognised in many of the submissions. As the Australian Stock Exchange noted in their submission: 'Importantly, the proposals outlined in the discussion paper [option three] will have the effect of lowering costs in both jurisdictions [over the current requirements] while achieving the same regulatory outcome.'

Consultation

3.89 The main parties affected by the regulation of trans-Tasman securities offerings are: issuers of securities in Australia and New Zealand; investors in Australia and New Zealand; and ASIC and the New Zealand Regulators.

3.90 The Australian Treasury and New Zealand Ministry of Economic Development jointly wrote a discussion paper relating to the establishment of trans-Tasman mutual recognition arrangement for offerings of securities and managed investment scheme interests. The discussion paper was released on 18 May 2004 for two months' public consultation. A total of 29 submissions on the discussion paper were received from Australian and New Zealand respondents, including from regulators, corporations, industry bodies and groups representing investors.

3.91 Treasury has discussed the options with ASIC, which expressed considerable concerns with option two (and will continue to do so). Treasury has also liaised with the New Zealand officials extensively in relation to the terms of the arrangement and the implementing legislation. New Zealand officials favour adopting option three.

3.92 Subject to various comments, nearly all respondents strongly supported putting in place a mutual recognition regime along the lines of option three, which was described in the paper together with options one and two.

Regulation impact statement

3.93 Respondents to the paper raised various issues, including:

- the scope of the mutual recognition arrangement;
 - whether the regime should apply to issuers registered in the home jurisdiction as foreign companies (as this may lead to the regime’s abuse);
- entry and ongoing requirements;
 - the standardisation between Australia and New Zealand of entry and ongoing requirements (so that application of the arrangement is not unbalanced);
 - the consistent interpretation of the requirements by courts and regulators;
 - the content of, and guidance on, warning statements;
- consequences of breach of entry and ongoing requirements;
 - proportionality between the penalty for non-compliance with particular requirements and the nature of the breach (and whether particular breaches should result in an offer being voided);
- regulatory enforcement
 - whether existing arrangements are the most efficient way of fostering regulatory cooperation;
 - the potential for respective regulators/courts to take different approaches to the interpretation and application of home jurisdiction laws.

3.94 Since respondents to the paper are parties that have a familiarity with, and an appreciation of, the mechanics and subtleties involved in trans-Tasman offerings of securities and managed investment scheme interests, their submissions are significant in shaping the scope and terms of the final arrangement and its implementation.

3.95 The majority of issues raised by respondents were technical issues that are best addressed by the implementing, domestic legislation (see below).

3.96 Broader issues that were raised and that have been assessed and incorporated into option three include that:

- The mutual recognition regime should not encompass financial advice that extends beyond offer documents and investment statements;
 - since 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;
- the home jurisdiction regulator should issue guidance notes to the host jurisdiction regulator setting out their approach to interpreting and applying home jurisdiction laws;
 - since there is potential for Australian and New Zealand regulators to take different approaches to interpreting and applying their domestic laws, co-operation of this nature is desirable.

Conclusion and recommended option

3.97 The Government has therefore taken the view that option three (based on compliance with the substantive requirements of domestic law) provides a better basis for a mutual recognition arrangement than option one (based on the disapplication of domestic law) or option two (based on the incorporation of foreign law). The Government has thus adopted option three as the arrangement for establishing a trans-Tasman mutual recognition framework for offers of securities and managed investment scheme interests.

3.98 This conclusion is based on a weighted assessment of the following criteria, where the first two are probably the most significant:

- The benefits of overcoming mutually exclusive regulatory requirements.
- Consistency with providing appropriate regulatory outcomes in host jurisdictions (especially in relation to foreign issuers operating under mutual recognition).
- Impact on national and parliamentary sovereignty.
- The extent of regulatory complexity.

3.99 It is acknowledged that option three, compared to options one and two, is perhaps more complex and may contain marginally higher compliance costs for issuers (as they would have to interact more extensively with the overseas regulator) as well as for the host jurisdiction regulator and courts (as they would be required to enforce compliance with different frameworks within their respective jurisdictions). Nevertheless, option three will still lower costs for

Regulation impact statement

issuers compared to the current system, a point that was made in many of the submissions.

3.100 Further, the advantage of option three (compared to option one) 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 option one, 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).

3.101 While option two would probably also ensure the maintenance of appropriate regulatory outcomes in the host jurisdiction, it is considered unrealistic for Australia to formally incorporate relevant parts of New Zealand's laws as part of its own framework.

3.102 Finally, the vast majority of respondents to the discussion paper strongly supported putting in place a mutual recognition arrangement based on option three. New Zealand also strongly supports option three.

Implementation and review

3.103 The Agreement between the Government of Australia and the Government of New Zealand in relation to mutual recognition of securities offerings (the treaty) specifies the scope of the trans-Tasman mutual recognition regime and domestic legislation will implement the arrangement in Australia and New Zealand. Account was taken of the submissions received on the discussion paper in framing the treaty and has been taken in framing the draft domestic legislation.

3.104 The treaty provides for:

- Consultation if, for example, a party considers that the achievement of any of the objectives of the treaty are being or may be frustrated.
- Review of the effectiveness of the mutual recognition regime no later than five years after the entry into force of the treaty.
- Termination of the treaty by either Australia or New Zealand at any time.

3.105 The following paragraphs indicate the steps involved in signing the treaty, implementing it via domestic legislation and reviewing the effectiveness of the mutual recognition regime.

3.106 The treaty was signed by both Australia and New Zealand Ministers on 22 February 2006 and tabled in both Australian Houses of Parliament 28 March 2006. It is available at:
<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/ED1FD8029677CB61CA2571310080BF78>.

3.107 It was then examined by the Joint Standing Committee on Treaties which issued a report on 15 August 2006. The treaty then goes to the Executive Council for authorisation of ratification and is then ratified by the Minister for Foreign Affairs.

3.108 Concurrently with this process, the implementing legislation is drafted and exposed for public consultation. The Ministerial Council for Corporations will also be consulted, in accordance with the Corporations Agreement 2002, and the comments received from the public and the Ministerial Council taken into account before the Bill is introduced into the Parliament.

3.109 The treaty will come into effect after an exchange of diplomatic notes with New Zealand, confirming the completion of the respective domestic procedures for the entry into force of the treaty. In Australia's case, this means that the treaty can only enter into force after all the legislative changes have been put in place.

3.110 A review will be conducted no later than five years after the date of entry into force of the treaty. This process will review the effectiveness of the scheme, with a view to agreeing to and implementing any necessary improvements.

3.111 In terms of ongoing implementation, the Australian Treasury and the New Zealand Ministry of Economic Development will continue to liaise in order to coordinate details of the implementing legislation. ASIC and the New Zealand regulators will also liaise in order to ensure that offers made under the mutual recognition scheme are regulated appropriately. This is not expected to significantly increase the work load of these or other Government agencies.

3.112 Any problems that may arise in the context of the mutual recognition scheme will be dealt with through mutual understanding and dialogue between the relevant parties.

Schedule 2 — Reduced filing requirements for foreign companies

3.113 The Office of Regulation Review has advised that no regulation impact statement is required for these draft amendments. The ORR reference is 7417.

4

Mutual recognition of securities offerings

4.1 Schedule 1 of the draft Bill contains amendments to the Corporations Act in respect of mutual recognition of securities offers. This includes the insertion of a new Chapter 8 of the Corporations Act.

4.2 Schedule 2 contains amendments to the Corporations Act in respect of requirements placed on foreign companies which carry on business in Australia.

4.3 This chapter of the commentary focuses on Schedule 1.

4.4 Chapter 5 focuses on Schedule 2.

A The background

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

4.6 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 offeror will decide that the additional costs are justified. In others, the additional costs may 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.

4.7 The proposed regulatory framework will encompass the activities that are inherent in the making of offers, including:

- content and registration requirements for offer documents;
- structural requirements in respect of managed investment schemes and debentures;

- 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, and allotment).

4.8 There has already been public consultation on the proposal. A discussion paper, *Trans-Tasman Mutual Recognition of Offers of Securities and Managed Investment Scheme Interests*, was jointly issued in May 2004.

4.9 A total of 29 submissions on the discussion paper were received from Australian and New Zealand respondents. Subject to various comments, nearly all respondents strongly support putting in place a mutual recognition regime along the lines described in the paper. Certain refinements to the model were made in the light of the submissions received including the requirement that an opt-in notice be served on the home regulator.

4.10 The submissions also raised a number of technical points that will need to be addressed at the implementation stage — for example, the contents of warning statements. A number of the issues raised in submissions are addressed in Section G of this Chapter. These consultations provided valuable feedback on the reform proposals, and were integral to the development of the details of the mutual recognition scheme.

4.11 The mutual recognition scheme is underpinned by the Agreement between the Government of Australia and the Government of New Zealand in relation to mutual recognition of securities offerings, which was signed in Melbourne on 22 February 2006 by the Hon Peter Costello MP and the Hon Lianne Dalziel (the New Zealand Minister of Commerce). The treaty is to be found at:

<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/ED1FD8029677CB61CA2571310080BF78>.

4.12 New Zealand is preparing to make regulations to implement the treaty in that country. Draft regulations are expected to be released for public comment soon.

B Outline

4.13 The trans-Tasman mutual recognition regime 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.

Mutual recognition of securities offerings

4.14 The new framework will apply to offers of securities and interests in managed investment schemes.

4.15 The regime focuses on the obligations on offerors in relation to conduct directly related to the provision of the offer documents. It does not relate to the provision of financial advice.

4.16 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. These powers will be exercisable in respect of offers to investors in either country.

4.17 The host jurisdiction regulator will 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. These powers include the power to investigate suspected breaches of law and to issue stop orders.

4.18 While the legislation is being implemented in the context of the recent treaty with New Zealand, it is being phrased in such a way that it can apply in relation to other countries with which Australia enters into such an agreement.

C A guide to the mutual recognition provisions

1 Inward offers

Becoming eligible to be a recognised offer

4.19 If:

- the offer is from a recognised jurisdiction such as NZ (draft sections 1200A and B)
- the offeror meets the criteria in draft subsections 1200B(3) and (4) — for example, the offeror incorporated in NZ
- the proposed offer is of a kind prescribed by the regulations in relation to the recognised jurisdiction (draft subsection 1200B(5))
- the offeror lodged the documents and information required by 1200B(6) with ASIC and 14 days have elapsed

then the offer is ‘eligible to be a recognised offer’.

Becoming a recognised offer

4.20 If, on the day the offer is first made in this jurisdiction the conditions in draft section 1200B are met, then the offer is a recognised offer (draft section 1200F).

The advantages of becoming a recognised offer

4.21 Certain rules in the Corporations Act do not apply — see draft section 1200H.

4.22 The remainder will apply, according to their terms — for example, continuous disclosure (as modified by draft section 1200LA).

The obligations on the offeror

4.23 These are:

- Supplementary lodgement conditions — for example, notifying a change in an offer document — see draft section 1200J;
- Notifying change of address for service — see draft section 1200JA;
- Complying with the ‘offering conditions’ — for example, the offer must comply with the law of the recognised jurisdiction — see draft section 1200K;
- If the offer relates to interests in a managed investment scheme, having dispute resolution processes — see draft section 1200L.

Remedies and enforcement

4.24 These include:

- ASIC has stop order powers (see draft section 1200M) and power to ban a person from using the scheme if they have contravened a relevant provision (draft section 1200N);
- Offence provisions (see draft subsections 1200M(7) and (8), sections 1200P-R, proposed amendments to Schedule 3);
- Other routes are available under the existing Australian corporations legislation — for example, section 1101B of the Corporations Act and action under Part 2, Division 2 of the ASIC Act;

Mutual recognition of securities offerings

- Action by the home jurisdiction regulator and civil action under the home jurisdiction law.

2 Outward offers

4.25 In addition to compliance with Australian law, the relevant provisions are:

- Opt-in notice to be given to ASIC (draft section 1200U);
- Certain provisions of the Corporations Act are extended to the recognised jurisdiction in relation to these offers (draft section 1200V);
- ASIC has stop order power for advertising in a recognised jurisdiction (draft section 1200W).

D Commentary on the detailed provisions

Commencement

4.26 As indicated above, when enacted, the draft Bill will amend the Corporations Act to:

- provide a regime for the mutual recognition of security offerings between Australia and recognised foreign jurisdictions, such as New Zealand (Schedule 1, which inserts a new Chapter 8); and
- reduce disclosure requirements on certain foreign companies (Schedule 2).

4.27 Sections 1 to 3 are formal provisions and will commence on Royal Assent. Schedule 1 is to commence on a date to be fixed by proclamation, and Schedule 2 the day after the amending Act receives the Royal assent.

4.28 The Schedule 2 amendments are addressed in Chapter 5.

Key definitions

4.29 The key definitions for the purpose of the proposed regime for the mutual recognition of securities offers are to be found in Part 8.1 (draft subsection 1200A(1)) and include:

- recognised jurisdiction — the foreign country to which the mutual recognition provisions apply;

Mutual recognition of securities offerings

- foreign recognition scheme — the laws of that foreign country to which the mutual recognition provisions apply;
- recognised offer — an offer, that at the time it opens, meets the requirements imposed by draft section 1200B (draft subsection 1200F(1)).

4.30 Despite the fact this legislative amendment is a direct response to the Treaty between Australia and New Zealand, the legislation is drafted in general terms. For this reason the term ‘recognised jurisdiction’ (defined in draft subsection 1200A(1)) refers to a foreign country, rather than specifically to New Zealand. The details of these definitions will be filled out in regulations. This means that if comparable arrangements are reached in the future with other countries they will be able to be implemented through these provisions, possibly with amendment only of the regulations.

4.31 The other significant definition is that of ‘securities’. This term is defined in draft subsection 1200A(1) to include shares, debentures and interests in managed investment schemes, and certain derivatives over these financial products. It therefore includes ‘securities’ as defined in s 761A of the Corporations Act and ‘managed investment schemes’ as defined in s 9 of the same Act.

4.32 The regime will not apply to:

- ‘excluded securities’ as defined in section 9 of the Corporations Act 2001;
- other financial products such as life insurance, superannuation products, or derivatives (other than the derivatives over securities referred to above).

Terminology

4.33 Some of the terminology used in the treaty differs to that used in the draft Bill. This is necessary for consistency within the Corporations Act. The treaty, on the other hand, needs to be understandable in both Australia and New Zealand.

Entry requirements

4.34 The entry requirements relate to:

- the offeror (draft subsections 1200B(3) and (4));
- the kind of offer (draft subsection 1200B(5); and
- lodging a notice of intention to use the scheme, and required documents and information with ASIC (draft subsection 1200B(6) and 1200C).

Mutual recognition of securities offerings

4.35 If an offeror does not meet these requirements, then the offer will be considered under the usual Australian fundraising and managed investment scheme requirements.

The offeror

4.36 A person proposing to offer securities in Australia must be:

- incorporated by or under the law of the foreign jurisdiction; or
- a natural person residing in the foreign jurisdiction; or
- a legal person who is established by, or under, the laws of the recognised jurisdiction (draft subsection 1200B(3)).

4.37 The third class listed in the paragraph above is intended as a residual clause to cover circumstances not described in the first two instances. This takes into account situations under foreign laws which do not necessarily equate to Australian provisions. For example, in relation to New Zealand it encompasses the structure of New Zealand 'participatory securities'.¹

4.38 The result of the limitations on who can be an offeror under the proposed regime is that companies incorporated in third countries will not initially be able to use this regime to issue securities in Australia when they have complied with New Zealand fundraising law. It is anticipated that Australia will review this limitation after the regime has been in place for two years. The regulation-making power in paragraph 1200B(3)(d) could then be utilised.

4.39 The definition of 'offeror' in draft subsection 1200A(1) also includes the power to prescribe the kind of person who is the offeror. This has been included to encompass the possibility, in relation to collective investment vehicles, that the trustee will be caught by the concept of 'offeror' but the obligations should instead be imposed on the promoter.

4.40 ASIC is empowered to ban a person who has contravened the mutual recognition provisions from using the regime again (draft section 1200N). Such a person will not meet the entry requirements (draft subsection 1200B(4)).

4.41 In addition, it needs to be noted that one of the offering conditions (draft section 1200K(6)) requires that there must be no person concerned in the management of the offeror who:

¹ Under the *Securities Act 1978* (NZ) participatory securities are securities other than equity securities, debt securities, units in unit trusts, interests in superannuation schemes and life insurance policies.

- has been banned by ASIC under section 920A;
- has been banned by the court under subsection 921A(2)(a); or
- would be prohibited by the Corporations Act from being concerned in the management of an offeror, if the Corporations Act applied.

The kind of offer

4.42 The offer must be an offer of a kind prescribed by the regulations in relation to the recognised jurisdiction (draft subsection 1200B(5)).

Notice and documentation to ASIC

4.43 For an offer to be recognised under the mutual recognition scheme, the offeror must file a notice with ASIC stating that it proposes to make an offer under the regime (draft subsection 1200B(6)(a)).

4.44 The offeror must also lodge a number of documents and information (referred to in draft subsection 1200B(6)(b) and listed in draft section 1200C), including:

- the offer documents required by the law of the recognised jurisdiction;
- 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 Australia (discussed further below);
- details of any exemption granted by the foreign jurisdiction which is relevant to the offer or the offeror; and
- an address for service in Australia.

4.45 These documents must be lodged with ASIC at least 14 days prior to the offer first opening for acceptance.

4.46 The only exceptions are:

- where the information has already been lodged with ASIC in relation to registration as a foreign company or registered body under Division 2 or 3 of Part 5B.2; or

Mutual recognition of securities offerings

- because the information or document is covered by the draft provisions in Schedule 2 of the draft Bill which reduce the filing requirements for foreign companies.

4.47 The warning statement, referred to above and in draft section 1200D, is intended as notice to potential investors that the security offering is subject to foreign laws. 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.

4.48 Other specified warnings may also be required, for example, in relation to tax differences and currency risk. (This is discussed further in Section G below.)

When is an offer a recognised offer?

4.49 An offer is a recognised offer from a recognised jurisdiction if, when it is first made here, it meets all of the conditions in draft section 1200B, which are described above (draft subsection 1200F(1)).

4.50 However, it is possible that there has been a minor or technical failure to meet these requirements which only becomes apparent at some later time.

4.51 To address this possibility, draft subsection 1200F(3) provides that ASIC may declare in writing that such an offer is a recognised offer. Subsection 1200F(6) provides that such a declaration is not a legislative instrument. This subsection is included merely to assist readers as the notice is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

4.52 An offer that is a recognised offer continues to be such after the first day the offer is made in this jurisdiction, even if a condition in draft section 1200B ceases to be met after that day (draft subsection 1200F(2)).

Which provisions are 'turned off'?

4.53 Provisions of the Corporations Act in respect of which there will be exemptions for recognised offers are set out in the table at draft subsection 1200H(2). They are:

- In relation to shares, options to acquire securities and equitable interests in securities:
 - Chapter 6D (fundraising).

- In relation to debentures:
 - Chapter 2L (debentures);
 - Chapter 6D (fundraising);
- In relation to managed investment schemes:
 - Chapter 5C (managed investment schemes);
- Also:
 - 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 disclosure except the hawking provision (section 992AA)); and
 - Part 7.9 (financial product disclosure and other provisions relating to issue and sale of financial products, except the hawking provisions (sections 1020B, 1020C)).

Which provisions will not be ‘turned off’?

4.54 Not all of Part 7.9 of the Corporations Act will be ‘turned off’:

- The short selling and hawking provisions will continue to apply (see Items 3, 4 and 5 of the table at draft subsection 1200H(2));
- Further, it is intended to use the regulation power of section 1020G to make regulations to continue the effect of sections 1012A-1012C but provide that the document required would be the offer document required under the recognised offer.
- The requirement for the issuer of units in a managed investment scheme, for an internal dispute resolution procedure and membership of an external dispute resolution scheme is retained through draft section 1200L.

4.55 In addition, the continuous disclosure provisions are not ‘turned off’ — see ‘Ongoing Requirements’ below.

Mutual recognition of securities offerings

Flexibility

4.56 Draft subsections 1200H(3) and (4) provide that the Regulations may apply the provisions, previously excluded in subsection 1200H(2) to certain offers. This includes the power to omit, modify or vary requirements applied.

4.57 This regulation making power is included principally to address the possible application of the regime to foreign countries other than New Zealand. The fundraising requirements in another country may be largely comparable with those of Australia but need supplementation in particular minor respects.

4.58 These respects could be addressed through regulations — which would have the effect of enlivening some of the provisions ‘turned off’ by draft subsection 1200H(2). The most significant and obvious circumstances are anticipated in the current Bill, and the powers contained in draft subsections 1200H(3) and(4) are only intended for minor alterations to make a good fit with the requirements of any potential recognised jurisdiction.

Ongoing requirements

Chapter 8 specific

4.59 The offer must comply with certain ongoing requirements. These are referred to as:

- Supplementary lodgement conditions (draft section 1200J);
- Address for service condition (draft section 1200JA);
- Offering conditions (draft section 1200K);
- Long term condition (draft section 1200L).

4.60 These provisions, among other things, impose obligations where there has been an amendment to the initial offer documents, or the circumstances of the offeror. The reason for separating the various obligations is that they are triggered for various periods during the offer process and thereafter.

4.61 In combination, the requirements they impose include the following:

- the offeror must comply with the law of the recognised jurisdiction;
- the offer must be open to acceptance by persons in the foreign jurisdiction at all times at which it is open for acceptance by persons in Australia;

Mutual recognition of securities offerings

- the offeror must file information concerning certain changes to the offer with ASIC, including any amendments to the regulated offer documents or the warning statement;
- the offeror must notify ASIC of any exercise of statutory power by the foreign jurisdiction in relation to the offer;
- the offeror must lodge written notice of any change of address for service; and
- an offeror of interests in managed investment schemes must comply with the dispute resolution provisions of the Corporations Act.

4.62 Failure to comply with these requirements is addressed below.

Continuous disclosure

4.63 Schedule 1 contains draft amendments to Part 1.2A of the Corporations Act. These amendments expand the definition of ‘ED securities’ to securities issued under a recognised offer (as defined in draft section 1200F). Consequently, the continuous disclosure provisions of Chapter 6CA of the Corporations Act will apply should 100 or more people hold securities or managed investment products in the class.

4.64 The accounting requirements which are triggered by being a disclosing entity (section 111AO) will have no application because the foreign offerors will not be ‘companies’ as defined for this purpose, registered schemes or the set of disclosing entities referred to in subsection 285(2).

4.65 The continuous disclosure obligations which apply to unlisted disclosing entities would be modified by draft section 1200LA.

E Role of the regulators

Australian and New Zealand responsibility

4.66 ASIC will have primary responsibility for taking action against foreign issuers into Australia for failure to comply with the ongoing requirements, other than the requirement to comply with the foreign jurisdiction law. The foreign jurisdiction regulator (the ASIC equivalent as prescribed under draft subsection

Mutual recognition of securities offerings

1200J(4)²) will have lead responsibility for taking action in respect of breaches of the substantive requirements of foreign jurisdiction laws.

4.67 A breach of a foreign jurisdiction's substantive requirements in the course of making an offer to investors in Australia will also constitute a breach of Australia's ongoing requirements, and thus could be the subject of enforcement action by ASIC in appropriate cases.³

4.68 As a consequence of the inclusion of compliance with the home jurisdiction requirements as an ongoing requirement in the host jurisdiction, ASIC will have a wide interest in the conduct of the issuer in Australia, as a host jurisdiction. This will enable it to use the powers in Part 3 of the ASIC Act in relation to investigations of the issuer's conduct in the host jurisdiction.

4.69 Information gained in this way can be disclosed to the foreign jurisdiction regulator in accordance with section 127, particularly paragraph 127(4)(c) of the ASIC Act.

4.70 Furthermore, ASIC has signed Memoranda of Understanding with the New Zealand Companies Office and the New Zealand Securities Commission which reflect an ongoing interest in aligning the regulatory functions of the respective agencies and provide for cooperation and the exchange of information to assist each regulator, particularly on operational and enforcement matters.

ASIC's powers

4.71 ASIC may exercise 'stop orders' against recognised offerors in a variety of circumstances (draft section 1200M). This includes circumstances where ASIC is satisfied that there is a misleading or deceptive statement or a material omission from the offer document.

4.72 These 'stop orders' relate to, among other things, breaches of draft sections 1200B and 1200C and may take the form of:

- prevention of the offer while the order is in force; or
- prevention of specified conduct in respect of the securities while the order is in force.

4.73 The procedure for issuing 'stop orders' is set out in draft section 1200M. This includes a hearing and reasonable opportunity for submissions to be made

2 Draft subsection 1200J(5) addresses the possibility that there is more than one relevant regulator, as is the case in New Zealand.

3 Proposed section 1200M.

Mutual recognition of securities offerings

by interested parties (see draft subsection 1200M(3)). The method and form of orders issued by ASIC are prescribed in later subsections. ASIC is also empowered to make an interim order.

4.74 ASIC also has the power to ban persons from making any subsequent recognised offers if, for example, that person has been convicted of an offence or a court has made a civil penalty order against the person in relation to a recognised offer (draft section 1200N).

4.75 A New Zealand offer into Australia that does not meet the entry requirements at the time of the first offer will fall outside the regime. Such an offer will be treated as an ordinary domestic offer in Australia and, therefore, will be unlawful if domestic regulatory requirements are not met, with consequences prescribed by Australian law.

4.76 Failure to comply with the ongoing requirements will result in a breach of Australia's laws. The consequences of non-compliance include criminal sanctions, civil liability and/or stop orders issued by ASIC. Draft sections 1200P to 1200R create offences for breaches of the ongoing requirements (supplementary lodgement conditions, address for service, offering conditions, and long term conditions).

4.77 Draft amendments to Schedule 3 of the Corporations Act to provide the maximum penalties for these offences are included at Item 9 of Schedule 2 of the draft Bill.

4.78 At present the Commonwealth Attorney-General's Department is undertaking a review of penalties in general terms.⁴ It is thus likely that the penalties in the draft provisions will be revisited.

F Australian offers recognised in foreign jurisdictions

4.79 Part 8.3 provides requirements for an Australian offer of securities into a foreign jurisdiction under the proposed mutual recognition scheme.

4.80 In accordance with existing provisions of the Corporations Act, any offeror that intends to make an offer in Australia (and have an offer recognised in a foreign jurisdiction) must first satisfy the Australian requirements set out in Chapter 6D or Part 7.9.

4 On 23 February 2006, the Minister for Justice and Customs, Senator Chris Ellison, announced the Terms of Reference for the *Review of Criminal Penalties in Commonwealth Legislation*.

Mutual recognition of securities offerings

Requirements of the offer

4.81 If an offeror wishes to opt into the mutual recognition scheme, then it will need to lodge a notice that it is opting into the regime with ASIC (draft section 1200U).

4.82 Draft subsection 1200V(1) extends the operation of the provisions listed in the table at draft subsection 1200H(2) to conduct under the mutual recognition scheme in a recognised foreign jurisdiction. This is essential to the mutual recognition principle as it extends the ambit of the Corporations Act for regulated offers in Australia to foreign jurisdictions, in this specific instance New Zealand. This does not mean that ASIC officers will visit New Zealand, or other countries, and exercise the Commission's powers there.

4.83 Draft subsections 1200V(2) and (3) provide that the Regulations may apply or modify the provisions referred to in the table at draft subsection 1200H(2).

4.84 This regulation making power is included principally to address the potential scope of the draft Bill. At present the scheme relates only to New Zealand, however it is drafted in such a way that it can be extended to offers in other foreign jurisdictions if a comparable agreement is reached with them. It is difficult to foresee all likely scenarios involved in foreign laws and legislate for each of them. Therefore the regulation making power is essential to the flexibility of this regime and its possible expanded operation. The authority contained in draft subsections 1200V(2) and(3) is intended to be used for necessary minor alterations to make a good fit with the requirements of any potential recognised jurisdiction.

Australian and New Zealand regulators

4.85 ASIC will have lead responsibility for taking action in respect of breaches of the substantive requirements of Australian law, which extends to the foreign jurisdiction by virtue of draft section 1200V. The foreign jurisdiction regulator will have primary responsibility for taking action against Australian issuers into their jurisdiction for failure to comply with the ongoing requirements imposed by that jurisdiction, other than the requirement to comply with the Australian law.

ASIC's powers

4.86 ASIC will have its ordinary powers relating to a securities offer in Australia (see Chapter 6D and Part 7.9 of the Corporations Act; Part 2 of the ASIC Act).

G Other issues

4.87 This segment of the commentary addresses a number of issues which have arisen in the drafting process or were drawn to our attention in submissions made in response to the discussion paper.

General approach to offences

4.88 A range of mechanisms will be available to ensure that the requirements in the draft provisions can be effectively and appropriately enforced. These include prosecution or an ASIC stop order. In addition, following a contravention of the new provisions ASIC may stop the offender from using the scheme again. The misleading and deceptive conduct and other provisions in Part 2, Division 2 of the ASIC Act will also apply, as will remedies available to the offeree under the home jurisdiction law.

Specific offences

4.89 Offences for contraventions of proposed requirements are created by draft subsections 1200M(7) and 1200M(8), and sections 1200P, 1200PA, 1200Q, 1200R and 1200U.

4.90 In determining appropriate penalties, those for similar offences elsewhere in the existing Corporations Act were taken into account. It is therefore possible that the penalties are not the same as New Zealand penalties for the same conduct.

4.91 The Australian Government is currently conducting a review of criminal penalties in Commonwealth legislation to ensure that criminal penalties in Commonwealth legislation reflect community standards. The Review will consider issues such as the ratio of penalty units to months of imprisonment. Details of this Review are available on the Attorney-General's Department website at: www.ag.gov.au/penalties. It is therefore possible that the penalties will be revisited.

Civil and criminal proceedings for the same conduct?

4.92 Submissions in response to the discussion paper suggested that the implementing provisions should ensure that there could be no 'double jeopardy'. The concern related to both criminal and civil penalty proceedings. This segment of the commentary therefore outlines the current provisions and the circumstances in which it is thought necessary to address this issue in the draft provisions.

Mutual recognition of securities offerings

In Australia

4.93 Currently under the Corporations Act:

- There can be no pecuniary penalty order after a conviction for an offence constituted by the conduct which is substantially the same (section 1317M);
- Civil penalty proceedings are stayed if criminal proceedings are started or have already been started and the offence is constituted by conduct that is substantially the same as alleged in the civil penalty proceedings (section 1317N); and
- With one exception, criminal proceedings may be started even though the person has, for example, had a pecuniary penalty order made against them (section 1317P).

Between Australia and another jurisdiction

Civil and criminal proceedings

4.94 Draft section 1200S extends the ambit of sections 1317M and 1317N, outlined above, to cross-jurisdictional situations.

Civil and civil proceedings

4.95 In relation to civil proceedings, we are advised that Australian courts are likely to take the view that an argument of issue estoppel can be based on a foreign judgment.⁵

Criminal and criminal proceedings

4.96 We understand that the common law is settled in relation to criminal proceedings for the same offence in different jurisdictions - 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.⁶

5 In *Kuligowski v Metrobus* [2004] HCA 34, the full bench of the High Court restated (at para 21) the principles applicable in relation to issue estoppel as follows: 'In his speech in *Carl Zeiss Stiftung*..., Lord Guest, after noting that the doctrine of issue estoppel had been accepted by Australian courts for a number of years, indicated that, for the doctrine to apply in the second set of proceedings, the requirements were: (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.'

6 For example, *R v Lipohar* [1999] HCA 65; *R v Treacy* [1971] AC 537 at 562.

Void allotments

4.97 Several submissions received in response to the discussion paper sought to ensure that the problem of void allotments, encountered in recent years in New Zealand, not occur under the proposed regime. The problem occurred when offerors making allotments had not complied with a condition on an exemption which facilitated the offering.

4.98 The basic principle that underpins the draft 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 the entry requirements for the regime are satisfied; and the offeror complies with the ongoing requirements of the regime.

4.99 An offer that does 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. Minor or technical failures to meet the entry requirements may be fixed by an ASIC declaration (draft subsections 1200F(3) and (4)).

4.100 The consequences of a breach of the ongoing requirements in the host jurisdiction are prescribed by the law of the host jurisdiction. In Australia, a breach of ongoing conditions listed in sections 1200J-1200L may result in criminal penalties; however (despite the use of the word 'condition') this does not render any allotment under the recognised offer void.

Encouraging consistent interpretation

4.101 Some submissions suggested the inclusion of a provision directing or encouraging courts to interpret the law of a foreign jurisdiction consistent with that of the foreign jurisdiction courts themselves.

4.102 This is considered inappropriate. However, it is obviously desirable that the courts of the host jurisdiction have regard to the interpretation of the relevant foreign law by home jurisdiction courts, when host jurisdiction courts are required to make rulings which involve that law. This situation is likely to occur, given that compliance with the home jurisdiction law is an ongoing requirement of the host jurisdiction.

Application of regime to some services regulated in Australia as managed investment schemes

4.103 The mutual recognition provisions will only apply to offers that are regulated by existing fundraising legislation in both jurisdictions.

Mutual recognition of securities offerings

4.104 It is therefore possible that some services regulated as managed investment schemes in Australia are not regulated by the fundraising legislation of some foreign countries and therefore will not fit within the mutual recognition regime.

Electronic lodgement

4.105 We are exploring with ASIC the possibility of electronic lodgement of those documents required by the draft provisions to be lodged.

Consultation process for amendments to domestic legislation

4.106 The approach that has been adopted in the draft provisions 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. This risk is managed by provisions in the Treaty, specifically:

- The parties cannot impose additional requirements in relation to the entry and ongoing requirements for the scheme in the implementing legislation unless the Australian and New Zealand Ministers mutually determine them in writing (Articles 4 and 5);
- The parties are required to consult in relation to the implementing legislation and in relation to any amendments to that legislation to ensure that it is consistent with and gives effect to the Agreement. There is also a requirement for consultation in relation to proposals for material changes to the scope or requirements of each party's securities legislation (Article 8);
- The parties are required to enter into consultations at the written request of either if the party that requested the consultation considers (a) an obligation under the Agreement has not been, is not being or may not be fulfilled or (b) the achievement of any of the objectives of the Agreement is being or may be frustrated (Article 9);
- Either party may request consultations with the other party with a view to amending the Agreement. Unless the parties agree otherwise, the consultations must begin promptly. Any agreed amendments enter into force when they have been confirmed by an exchange of diplomatic notes (Article 11); and
- Either party may terminate the mutual recognition arrangement, in the unlikely event that serious concerns arise and cannot be resolved (Article 13).

Mutual recognition of securities offerings

4.107 The Commonwealth is already under an obligation to consult the States and Territories before any such amendment.

4.108 If:

- the relevant law of a foreign country covered by the mutual recognition provisions were amended significantly so that the outcomes were no longer comparable to the outcome of Australian fundraising legislation; and
- consultation in accordance with the relevant treaty had been undertaken but had not been successful

the relevant regulations bringing that jurisdiction into the mutual recognition regime could be repealed.

Cooperation between exchanges

4.109 There are several entities which are listed on both the New Zealand Stock Exchange and the Australian Stock Exchange. Various submissions responding to the Treasury's Trans-Tasman Mutual Recognition of Securities Offerings Discussion Paper suggested greater cooperation between the New Zealand and Australian stock exchanges was required, particularly with regards to Listing Rules. We understand that the two Exchanges are discussing issues of coordination.

Stamp duty implications

4.110 Transfers of securities that are quoted on an Australian Stock Exchange are exempt from stamp duty. However, in some jurisdictions stamp duty may be payable on unquoted securities by the buyer of the shares and is based on the amount of consideration.

4.111 The stamp duty implications for subscribers for securities offered under the proposed scheme were raised in several submissions in response to the discussion paper. We have raised this issue with State and Territory officers.

Current exemptions

4.112 The proposed trans-Tasman mutual recognition regime for offers of securities and interests in managed investment schemes will replace existing exemptions already in place between the two countries. Principally, these exceptions are:

- Australian offers in New Zealand:

Mutual recognition of securities offerings

- Securities Act (Australian Issuers) Exemption Notice 2002 — relief from the prospectus requirements
 - Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 2003 (‘ARMIS’) — Product Disclosure Statement requirements for Managed Investment Schemes
 - The Securities Commission has also issued a number of issuer-specific exemption notices.
- New Zealand offers in Australia:
 - ASIC Class Orders and Policy Statements that specifically make reference to exempting NZ entities. Amongst others, these include the following:
 1. CO 00/177 — Fundraising exemption: NZ prospectuses;
 2. CO 00/180 — Foreign securities: publishing of reports and notices;
 3. CO 00/181 — Foreign securities: publishing of reports and notices;
 4. CO 00/183 — Foreign rights issue;
 5. PS 178 — Foreign collective investment schemes.
 - ASIC Class Orders that make reference to foreign companies in general. These include the following:
 6. CO 00/238 — Dividend reinvestment plans;
 7. CO 02/311 — CHESS Depositary Interests; and
 8. CO 02/316 — Foreign Depositary Interests.

4.113 To the extent that these exemptions apply to offers made by New Zealand offerors, they would be superseded by the draft provisions.

Misleading and deceptive conduct

4.114 To the extent that liability for misleading and deceptive conduct in connection with an offer is concerned, each host jurisdiction is permitted (but not required) by the treaty with New Zealand 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 will continue to apply the corresponding provisions of the

Mutual recognition of securities offerings

Australian Securities and Investments Commission Act 2001 (Cth) (in Part 2, Division 2) to offers made to Australian investors under the mutual recognition regime.

Address for service; submission to jurisdiction

4.115 The draft provisions will require that the offeror lodge with ASIC an address for service in Australia (see draft paragraphs 1200B(6)(b) and 1200C(1)(g)).

4.116 Draft section 1200T provides for the manner in which documents may be served on a person. Notwithstanding existing provisions in the Corporations Act, including sections 109X and 601CX, a document may also be served on a person at the address lodged under paragraph 1200C(1)(g).

4.117 The reason for this is to accommodate offerors which are not companies, as defined in the Corporations Act for the purpose of section 109X, or registered bodies.

4.118 We understand that because the person is required to give an address for service in Australia, and that their participation in the scheme would be voluntary, an Australian court is likely to view this as submission to its jurisdiction.

Continuous issuers

4.119 The writers of several submissions sought to ensure that the provisions would not impede the operations of continuous issuers.

4.120 In this regard, we note that an offer under the regime will continue as long as it meets the requirements of the home jurisdiction's laws (see draft section 1200F). Therefore, expiry dates under Australian laws will determine how the regime applies to Australian offers, and expiry dates under New Zealand law will determine how the regime applies to New Zealand offers.

4.121 We welcome your views as to how these draft provisions fit with current practice.

Warning statements

4.122 Under draft paragraph 1200C(1)(b) a warning statement, that is to be included with an offer document in this jurisdiction, must be lodged with ASIC at least 14 days before the day on which the offer is first made in Australia. Further, draft section 1200D states that the regulations may prescribe the necessary statements to be included in any such document. The statement is

Mutual recognition of securities offerings

intended to act as a warning for potential subscribers that the offer is subject to a different regime.

4.123 It is anticipated that the regulations will require that the statement refer to the law governing the offer documents, and the possibility of tax differences and currency risks. While draft regulations will be issued for public exposure in due course, we welcome any views you may have on the issues the statement should address.

5

Reduced filing requirements for foreign companies

Background

5.1 Schedule 2 to the draft bill contains proposed amendments to the Corporations Act to exempt foreign companies from countries prescribed in the regulations that are operating or wishing to operate in Australia from lodging information with ASIC that the companies have already lodged with foreign authorities, in certain circumstances. It is proposed that New Zealand will be prescribed in the regulations.

5.2 The revised Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law (MOU) calls for the closer integration of company laws, in particular managing cross-recognition of company registrations, whereby companies in Australia and New Zealand can do business in the other jurisdiction without complying with the filing requirements applicable to other foreign companies.

5.3 Currently, New Zealand companies wishing to operate in Australia must comply with the filing requirements applicable to foreign companies. These filing requirements can result in companies submitting the same documents in each jurisdiction, plus additional information not necessarily required by their home jurisdiction.

5.4 At this time, the legal and administrative differences between the Australian and New Zealand company law regimes prevent the full cross-recognition of companies. This measure is intended to reduce the administrative and transaction costs for New Zealand companies operating in Australia and further demonstrates the Government's commitment to closer economic relations (CER).

Key changes

5.5 Schedule 2 to the draft bill contains amendments to Divisions 2 and 3 of Part 5B.2 of the Corporations Act to exempt those companies, incorporated in a country that is prescribed in regulations (prescribed foreign country companies), from the requirement to lodge information or a copy of a document with ASIC that is already lodged with an authority of the prescribed foreign country whose functions include functions equivalent to any of those of ASIC.

5.6 The proposed exemptions will not remove the requirement for prescribed foreign country companies to register with ASIC if they wish to operate in Australia. However, they are intended to reduce the administrative burden of registration and the ongoing filing requirements by decreasing the information or copies of documents required to be lodged with ASIC.

5.7 The proposed exemptions apply to information or copies of documents that are required to be lodged pursuant to a provision in Divisions 2 and 3 of Part 5B.2 and only where this information or these copies of documents are the same as the information or copies of documents required by an authority of the prescribed foreign country.

5.8 This amendment maintains the requirement for prescribed foreign country companies to lodge with ASIC information that is not required to be submitted to an authority of the prescribed foreign country but is required due to an Australian law, except for those affected provisions in Divisions 2 and 3 of Part 5B.2.

5.9 This approach to prescribe affected countries in regulations has precedent in subsection 12A(8) of the *Foreign Acquisitions and Takeovers Act 1975*, which allows an exemption from certain sections of that Act once a country is prescribed in regulations.

5.10 One effect of this exemption to lodging certain information or copies of documents is that interested consumers, investors and creditors will no longer be able to rely on ASIC collecting all of the information which they may require to make informed investment decisions. An amendment in Part 9.1 deems any information provided to ASIC by an authority from the prescribed foreign country as a result of this Schedule to be lodged with ASIC.

5.11 Both the *Australian Securities and Investments Commission Act 2001* and agreements between ASIC and the New Zealand Registrar of Companies already allow ASIC to share information on New Zealand companies operating in Australia and Australian companies operating in New Zealand.

Reduced filing requirements of foreign companies

5.12 The following table contains a brief summary of how the amendments are intended to operate in relation to prescribed foreign country companies.

Current filing obligations	What requirements will change	What requirements will not change
Registration of a foreign company Section 601CE and Form 402	The prescribed foreign company will no longer have to lodge details of: the directors, a copy of the certificate of incorporation, a certified copy of the constitution, and notification of details of a charge.	The company will still be required to register with ASIC and as such lodge the details of: the incorporation, the local agent/s, a charge in Australia, a memorandum of appointment or a power of attorney, list of Australian resident directors and any Australian board, and the name registration.
Balance sheet and annual report Section 601CK and Forms 405 and 406	The company will no longer have to submit financial information already submitted to the foreign authority.	The company will still be required to lodge a balance sheet, profit and loss statement, and cash flow statement (prepared in accordance with Australian accounting standards), as well as any information ASIC requires in accordance with subsection 601CK(3).
Notice of certain changes Section 601CV and Forms 484 and 409	The company will no longer have to lodge changes to its constitution or directors not resident in Australia.	The company will still be required to lodge changes to its Australian resident directors, local agent details and any changes to the place of incorporation of the company.

Notes on Items

5.13 Item 1 in Schedule 2 to the draft bill inserts an amendment to Division 2 of Part 5B.2 of the Corporations Act to exempt foreign companies, whose place of origin is prescribed, from lodging with ASIC information or copies of documents required pursuant to the Division that they have already lodged with a foreign authority whose functions include functions equivalent to any of those of ASIC.

5.14 The functions of the foreign authority do not have to align with all of ASIC's functions; however, the functions of the foreign authority must be equivalent to any of those that ASIC perform. This provision is inserted to

Reduced filing requirements of foreign companies

allow circumstances where foreign countries arrange their regulation of corporations and financial services differently to Australia. This amendment is intended to capture foreign authorities that perform regulation, compliance and enforcement functions as well as those authorities that collect information and maintain company registers.

5.15 Item 2 in Schedule 2 to the draft bill inserts an amendment to Division 3 of Part 5B.2 of the Corporations Act to extend the amendment in Item 1 to foreign bodies registered with ASIC.

5.16 Item 3 in Schedule 2 to the draft bill inserts an amendment to Part 9.1 of the Corporations Act. This amendment deems information or a copy of a document lodged with the foreign authority to be lodged with ASIC if the foreign authority has given the information or the document to ASIC. This amendment will cover both electronic transfers of information and copies of documents, as well as paper transfers of information and copies of documents. In effect, where the foreign authority has given only information to ASIC (as opposed to information contained in a copy of a document), this information is also deemed to be a document for the purposes of Part 9.1.