



16 July 2004

Ms Ruth Smith
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Department of Treasury
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PARKES ACT 2600

By email

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Dear Ms Smith,

Mutual Recognition of Offers of Securities and Managed Investment Scheme Interests

ASX welcomes the opportunity to comment on the discussion document prepared by the Department of the Treasury and the Ministry of Economic Development dated May 2004.

ASX supports the continuing co-ordination of business law between New Zealand and Australia and believes that a framework to facilitate trans-Tasman mutual recognition of offers of securities and managed investment schemes will be of particular benefit to both the Australian and New Zealand markets. For the following reasons:

- regulatory benefits flow from having two regimes based on similar principles, particularly in terms of compliance costs and alignment of market policy; and
- increased co-ordination reduces the barriers to participation in markets in more than one country, benefits in terms of allocative efficiency, productive efficiency and dynamic efficiency that increased competition brings.

In October last year ASX released an Exposure Draft of proposed listing rule amendments designed to facilitate flexibility in the structuring of capital raising mechanisms to better accommodate the capital raising needs of the diverse range of ASX listed companies. In that document ASX noted (paras 3 & 4):

Cross-border flows of equity capital have increased exponentially in recent years. At the same time there is increasing investment overseas by Australian investors in foreign equities. The impact of technological developments has been significant. Investors and capital are less constrained by international borders.

If our market is to continue to grow and remain relevant, it needs to be able to respond quickly to change, domestically and internationally. Our regulatory framework is a key element in our market's capacity to compete effectively. We need to be sure that the level of financial markets regulation promotes market confidence and equips our financial market participants to compete internationally and to raise capital at a reasonable cost.

The proposal outlined in the discussion paper will serve to strengthen the dual markets and provide a broader capital base at a reasonable cost for listed companies on both markets. This is essential if the two markets are to remain relevant in global terms. In response to the specific issues raised in the discussion paper, ASX's comments are outlined below.

What costs do the current requirements for trans-Tasman offers of securities impose on Australian and New Zealand Issuers?

ASX cannot comment in detail on the costs associated with compliance with multiple regulatory regimes other than a general comment that reducing costs of raising capital is beneficial to the company raising capital, investors and the capital market as a whole.

In its Capital Raising Mechanisms Exposure Draft released in October 2003, ASX proposed amendments to listing rule 7.7 which deals with offers to shareholders outside the jurisdiction. The listing rule currently distinguishes between New Zealand and other overseas shareholders of ASX listed companies. The rule requires a company to send offer documents for a pro rata offer to shareholders in New Zealand. ASX had always assumed that the cost of producing and sending offer documents for New Zealand shareholders was negligible. However, a number of listed companies advised ASX that the cost for providing offer documents to New Zealand holders may range from \$10,000 to \$30,000 on average, which encompassed circumstances where there may be only 10 or 20 shareholders in the jurisdiction. It is ASX's understanding that costs for larger companies could total approximately \$50,000 although in such cases the shareholder base would likely be substantially larger. I note that these figures are not authoritative and are based on indications given by ASX listed companies to ASX.

It was therefore proposed to remove the special New Zealand directive and allow a company to determine whether to send offer documents to New Zealand in light of factors which influence such a decision relative to other jurisdictions, including the number of shareholders in that jurisdiction.

ASX received a number of useful submissions from New Zealand stakeholders in response to the proposal. The submissions highlighted that the NZ Securities Act (Overseas Companies) Exemption Notice 2002 provides an exemption from the requirement to provide and register offer documents in New Zealand in circumstances where the (overseas) company making the offer is listed on ASX, and the offer is being made pro rata to existing shareholders. The result of this exemption is that there is therefore little or no cost in preparing documents and should be only a modest legal cost involved in obtaining legal advice regarding the Exemption Notice. This is noted in the Discussion Paper.

ASX accepted that the New Zealand legislation has the effect that the cost of offering securities in both jurisdictions should be relatively low and determined to withdraw the proposed rule amendment. However, ASX believes that the concerns expressed by listed companies were genuine as they related to cost being a concern in considering capital raising alternatives and reflected the importance of measures that assist in lowering regulatory barriers where regulatory frameworks are substantively similar. Importantly, the proposals outlined in the discussion paper will have the effect of lowering costs in both jurisdictions while achieving the same regulatory outcome.

Should Australia and New Zealand put in place a mutual recognition regime for offers of securities and interests in managed investment schemes broadly along the lines discussed in the paper?

ASX considers that the approach as detailed in the discussion paper is the appropriate framework and supports the basic principle that underpins the proposed regime that although the detailed requirements of Australian and New Zealand securities law may differ in a number of respects, the underlying policy goals are the same. ASX believes that the primary regulatory considerations of disclosure, investor protection and equality of access to opportunity for investors underlie the capital raising frameworks of both jurisdictions.

ASX agrees that the relevant goals of regulation of capital raising and investor protection can be achieved by allowing issuers to use their home jurisdiction offer documents when offering securities in the other jurisdiction, with limited additional requirements designed to draw offerees' attention to the fact that the offer is required to comply with the requirements of the other jurisdiction's regulatory regime, rather than with the requirements of the host jurisdiction's laws that apply to domestic offers.

ASX prefers that regulation should occur based on transparent principles contained in legislation rather than by way of specific exemptions contained in sub-ordinate legislation and class orders. This approach is both flexible and provides a higher degree of certainty to those subject to the regulatory framework. However, we suggest that to provide optimum flexibility and to take account of the likelihood of changes in policy as the market evolves, it may be preferable to consider enshrining the principle of a mutual recognition regime in legislation, but also providing for modification by the relevant regulators should they agree that modification is necessary and/or desirable.

Are there any features of the proposal set out in the paper which you see as particularly important in order to ensure that the regime achieves the objectives of facilitating investment between the two countries, enhancing competition in capital markets, reducing compliance costs for business, and increasing choice for investors?

We agree that it is important that ASIC and the New Zealand Securities Commission establish regimes for communication and co-ordination of regulatory action in connection with relevant offers.

We note the comments in the discussion paper in relation to enforcement issues, and in particular that the host jurisdiction regulator would have primary responsibility for action against issuers for failure to comply with the ongoing requirements, and that the home jurisdiction would have responsibility for action in respect of breaches of the substantive requirements of the home jurisdiction securities laws. It is essential that whichever regulator takes action, in the case of dual listings, that such action is carefully managed in order that it is communicated to both exchanges at the earliest opportunity. For example, if an Australian issuer were the subject of stop order action by ASIC, it would be vital for market integrity reasons that both the New Zealand and Australian exchanges were notified of the action at the earliest opportunity, and that notification occur simultaneously.

Are there any features of the proposal that you see as inappropriate or undesirable, and that you consider should be changed? How should they be changed?

ASX is supportive of the proposed model and does not have any substantive concerns about the features of the proposal.

Are the proposed exemptions for the standard domestic requirements of each country's fund-raising laws for offers made under the mutual recognition regime, as set out in Appendix 2 to the paper, appropriate? Should additional requirements be excluded? Should any of these requirements continue to apply to offers under the mutual recognition regime?

ASX does not have any comment at this stage on further requirements that should be subject to further exemptions. We believe that it is important that the governments and regulatory bodies consult with a broad cross-section of companies listed on both ASX and New Zealand Stock Exchange, as those companies are best placed to advise in this regard.

Is it appropriate to provide for special arrangements for enforcement of civil and/or criminal penalties for breach of the host jurisdiction's ongoing requirements, along the lines described in section 5.5 of the paper?

We support provisions that would enable the enforcement of civil and criminal penalties. In this regard ASX notes that a submission has been made to the Attorney General's department in relation to the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement.

Are there any other aspects of the proposal on which you wish to comment?

It may be appropriate to consider an on-going requirement that where an issuer wishes to utilise the mutual recognition regime it may be necessary to review arrangements to ensure that the disclosure of price sensitive announcements and other relevant market information is co-ordinated across both jurisdictions. ASX works closely with listed companies in relation to the application of listing rule 15.7 that deals with the requirement that information must be released to ASX first. In the case of dual listed entities, it is recognised that provided the substance of the rule is satisfied where disclosure is made to both exchanges almost simultaneously, market integrity concerns do not arise and the rule is taken to be satisfied.

We also note that the Australian law definitions of "security" and "managed investment schemes" is reflected in the New Zealand concept of "security" under the NZ Securities Act. For the purposes of that Act a unit trust (equivalent to Australian concept of a managed investment scheme) is a security. Any proposed changes to the relevant legislative frameworks in this regard should be monitored to ensure consistency across the two regimes.

ASX would be happy to provide any additional information or explanations that the Department would find helpful as it finalises its proposals.

Yours sincerely,

Catherine Officer
Legal Counsel & Manager, Issuers & Quoted Products