

Level 7
52 Martin Place
Sydney NSW 1155GPO Box 2719
Sydney NSW 1155
DX 1020 SydneyTelephone (02) 8705 7581
Facsimile (02) 8705 7580
Email stuart.grimshaw@cba.com.au**Stuart Grimshaw**
Group Executive
Investment and Insurance Services

23 July 2004

MS
Ms Ruth Smith
Manager
Market Integrity Unit
Department of the Treasury
Langton Crescent
PARKES ACT 2600

Dear Ms Smith

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

With a strong presence in both the Australian and New Zealand financial services sectors, the Commonwealth Bank of Australia (the Bank) is a keen supporter of the proposal for a trans-Tasman mutual recognition regime for offers of securities and interests in managed investment schemes. The current requirements can be administratively complex, with serious consequences and costs for non-compliance. (See attached for details.)

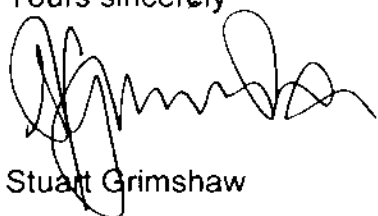
For the most part, the Bank believes that the scheme outlined in the Discussion Paper released in May this year would achieve the objectives of increased investment between Australia and New Zealand; enhanced competition in capital markets; reduced costs for business; and increased choice for investors.

The attachment to this letter addresses a number of matters that the Bank considers need further thought. The key issue is the need to extend application of the mutual recognition regime to offers which are exempt from disclosure in the home country as well as "regulated offers". The inconsistencies between the general exemptions available in Australia and New Zealand need to be addressed. Otherwise, the mutual recognition regime will not meet its full potential for enhancing trans-Tasman economic integration.

The Bank appreciates the opportunity to comment at this early stage of the mutual recognition regime's development. It would welcome continued close consultation between Government and the private sector as the regime is finalised and translated into legislation.

If you wish to discuss any of the material provided by the Bank, please contact Ms Emma Curtis, Senior Manager Legal, Colonial First State Investments, tel: 02 8224 6018.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stuart Grimshaw', written over the printed name below it.

Stuart Grimshaw

Information On The Costs Imposed By Current Requirements

Under the New Zealand ARMIS 1999 Exemption Notice, and, for some documents, the ARMIS 2003 Exemption Notice, late or non-lodgement of specified documents with the New Zealand Securities Commission can give rise to serious consequences.

Section 37 of the Securities Act 1978 (NZ) renders allotments made during the period of non-compliance void, and imposes an obligation to pay 10% per annum on those allotments. This is the case regardless of the circumstances giving rise to, or the extent of, the breach. The practical effect of late or non-lodgement on investors is also not a relevant consideration (other than in Court action to remediate the situation where a breach has occurred).

These requirements therefore impose substantial compliance burdens on Australian issuers offering in New Zealand. Depending on the type of document, lodgement is required to be done on the date the document is effective in Australia, or within 5 days. This can be an onerous requirement for which robust compliance systems are required to ensure breaches do not occur.

There can be practical difficulties in co-ordinating lodgements between the Australian Securities and Investments Commission ("ASIC") and the New Zealand Securities Commission. For instance, an amendment to a managed investment scheme constitution (which is required to be lodged with the New Zealand regulator) is effective on the date it is lodged with ASIC. It then needs to be lodged in New Zealand, i.e. it cannot be lodged in both jurisdictions simultaneously as it must first be lodged with ASIC in order to have effect.

The potential consequence of offerings being void where a breach has occurred leads to uncertainty about the legal position of fund offerings. This has led to the need for Australian issuers which have had void transactions in the past to apply to the New Zealand High Court to validate relevant allotments where there has been no material prejudice to investors. This entails high costs of preparing for and carrying out the necessary Court applications, including detailed forensic work about the specific investments which have been affected.

Features Of The Proposed Scheme Which Need Expansion

The mutual recognition proposals will apply only to "regulated offers" i.e. where offers of the security are regulated by the laws of Australia and New Zealand and a regulated offer document is required in both countries (page 9, Discussion Paper). The proposals should be extended to apply to offers which are exempt from disclosure in the home country. There are similar, but not identical, general exemptions available in each country, for wholesale offerings and in other cases as set out below.

The entry requirements (page 10) require the offer document to be lodged with the host jurisdiction regulator, but in the case of at least some exempt offerings, there may not in fact be an offer document to lodge.

To overcome inconsistencies and promote efficient capital raisings between the countries, the Bank submits that the proposals should explicitly recognise wholesale offerings and other exemptions, such as employee share acquisition plans, along with "regulated offers". This would allow offers which are exempted in the home country to be also exempted from disclosure in the host country.

In Australia, offers to wholesale clients are exempt from requiring a prospectus or PDS (s 708 & 1012A-1012C, Corporations Act). In broad terms, wholesale clients are professional and sophisticated investors, so that the following offers are exempt from disclosure:

- where the minimum subscription is at least \$AUD500,000;
- where the client is a "professional investor" eg an Australian financial services licensee, an APRA regulated body, a person who controls at least \$10million, a listed entity, an exempt public authority or an investment company; and
- where the client is a "sophisticated investor" ie who has provided an accountant's certificate not more than 6 months old stating that the person has net assets of at least \$2.5 million or gross income in the last two financial years of at least \$250,000.

In New Zealand, it is understood that the following offers are exempt from disclosure under section 3(2) of the Securities Act:

- an offer to relatives or close business associates of the issuer;
- offers made to persons whose principal business is the investment of money or who in the course of their business, habitually invest money; and
- where the minimum subscription is at least \$NZD500,000.

Further general exemptions from disclosure are set out in sections 708, 1012D and 1012E of the Australian Corporations Act (such as dividend reinvestment schemes, bonus issues, offers made in a takeover and small scale offerings) which should also be included in the mutual recognition proposals. Some of these are already covered by specific conditional exemption notices issued by the New Zealand Securities Commission.

Employee share acquisition schemes may either be exempt from disclosure under s 708 (where no consideration is payable) or conditionally exempted from disclosure in Australia pursuant to ASIC Class Order 03/184. It is understood that limited exemptions only are available for employee purchase plans in New Zealand (Securities Commission exemption notice 2002/320). The proposals should explicitly recognise offers under employee share schemes, which are exempted under Australian law.

It is evident that there are inconsistencies between the two countries in these areas, but the broad thrust of the exemptions is similar. Without explicit recognition of the general exemptions, an offer of securities which is exempt

from prospectus or PDS disclosure in Australia may not necessarily be exempt from disclosure in New Zealand, with the result that a prospectus and investment statement are required.

Proposed Exemptions

Appendix 2 of the Discussion Paper sets out the various statutory provisions which will be exempted in each country.

In New Zealand, it is proposed to exempt offers from all of Part II of the Securities Act 1978, apart from section 35 (prohibition on door to door sales), section 38B (allows the Securities Commission to prohibit misleading or non-compliance advertisements) and section 58 (criminal liability for misstatement in an advertisement or registered prospectus). This appears to give the appropriate exemptions.

In Australia, the proposed exemptions for shares and debentures appear appropriate. For managed investment schemes, the proposed exemptions appear to go too far. Part 7.7 of the Corporations Act deals with financial services disclosure, i.e. providing Financial Services Guides and Statements of Advice. If the proposed regime is not to cover financial advice, there does not seem to be justification to exclude Part 7.7.

Recommendation For Consequences Of Breach Of Entry Requirements

It is submitted that a breach of the entry requirements under the Mutual Recognition Proposal should be proportionate to the nature of the breach, taking into consideration the policy behind each specific entry requirement, in particular the relevant detriment (if any) to investors. Where a breach is technical in nature and unlikely to reduce investor protection or proper disclosure, a fine may be appropriate. In lieu of voiding allotments, civil liability may be appropriate, where there is loss flowing as a result of the non-compliance.

Clarification Of The Requirement For "Opt-In" Notices

Currently, it is unclear whether, under a mutual recognition regime, a new "opt-in" notice would need to be lodged with the New Zealand regulator every time a PDS is replaced. The Bank believes that, taking the following considerations into account, an opt-in notice should only be required to be lodged once:

- Australian registered managed investment schemes are generally offered under a continuous offer. For this type of offer it seems appropriate to lodge an opt-in notice once only.
- It does not seem necessary to lodge a further opt-in notice each time the offer document is replaced, updated or supplemented. To do so would add to the filing and compliance requirements.
- To require otherwise appears to result in unnecessary compliance obligations on issuers with no increase in consumer protection.
- If an opt-in notice is required on an ongoing basis, it is submitted that the consequence of late filing of an opt-in notice should not be to render void allotments issued prior to the lodgement of the opt-in notice.

Lodgement Of Exemptions

The Discussion Paper provides that it is an entry requirement that "a copy of any exemption granted by the home jurisdiction regulator that is specific to the Offer or the Offeror" must be lodged with the relevant securities regulator. It is submitted that this should be amended to provide that exemptions specific to the offeror need only be lodged if that exemption is material to an investment decision about the offer. To require otherwise would increase the compliance requirements and result in many more exemptions being required to be lodged, not all of which may be relevant to the offer. This in turn increases the potential to inadvertently breach the conditions of the regime.

Similarly, the discussion paper provides that particulars of any "general exemption" granted by the home jurisdiction regulator that are relevant to the offer must be lodged. It is submitted that this should be clarified to provide that it does not include ASIC Class Orders. There are numerous ASIC Class Orders which are potentially relevant and these are continuously being reviewed and supplemented as circumstances in the legislative regime change. Further, each Australian issuer would potentially lodge the same Class Orders, resulting in duplication and excessive administrative requirements for no perceivable consumer gain. It is also unworkable for an offeror to particularise at a given point in time which Class Orders they are relying upon, as they may choose to do so at any time, without specifying that they are doing so.

Application Of The Securities Act (NZ) To Marketing And Distribution

The Bank would appreciate confirmation that, in light of the proposed exclusion from the mutual recognition regime of financial advice beyond offer documents, that the parts of the New Zealand Securities Act relating to marketing and distribution will continue to apply to offers in New Zealand.