

SUBMISSION

**Trans-Tasman Mutual Recognition of Offers of
Securities and Managed Investment Scheme Interests**



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Introduction

Simpson Grierson Corporate Advisory and Clayton Utz are pleased to present their joint submission on the discussion document entitled "Trans-Tasman Mutual Recognition of Offers of Securities and Managed Investment Scheme Interests" ("Discussion Document") issued by the Department of the Treasury (Commonwealth) in Australia and the Ministry of Economic Development in New Zealand.

Simpson Grierson Corporate Advisory is the specialist mergers, takeovers and securities issuance practice group of Simpson Grierson, one of New Zealand's leading law firms. Members of the practice group have extensive experience in securities law and practice. Simpson Grierson Corporate Advisory has advised on numerous public offers of securities, including offers by Australian issuers into the New Zealand market. For example, Simpson Grierson acted for Promina Group Limited in its 2003 initial public offering in Australia and New Zealand and its dual listing on the Australian Stock Exchange and the New Zealand Exchange. Simpson Grierson also acted for Oceana Gold Limited in its recent trans-Tasman offering and listing.

Clayton Utz maintains a top tier position in the Australian Equity Capital Markets area through extensive work in initial public offerings and ASX listings, rights issues, placements and other forms of equity offering. The leading Equity Capital Markets team at Clayton Utz has played a prominent role in the development of the Australian Capital Markets and, acting for corporations, financiers, sponsors, underwriters and governments, has lead the way in the development and refinement of the supporting legal structures. The depth of experience of the Equity Capital Markets team at Clayton Utz extends to offerings in Australia, international equity markets, or a combination of both, involving a variety of different securities and equity instruments. In these various capacities, Clayton Utz has acted on some of the most significant capital markets transactions in Australia and many "firsts" in this area. This experience includes offers by New Zealand issuers into Australia.

We are pleased to have the opportunity to comment on the Discussion Document. Our submissions follow the questions posed in part 6 of the discussion document.



1. What costs do the current requirements for Trans-Tasman Offer of Securities impose on Australian and New Zealand Issuers?

Australian Issuers

Costs incurred by Australian issuers who wish to extend offers of securities to New Zealand include the costs associated with:

- obtaining legal advice on how to comply with relevant New Zealand requirements;
- preparing a New Zealand investment statement;
- preparing advertisements for offers that comply with New Zealand requirements; and
- compliance with conditions of applicable exemptions.

The costs of obtaining legal advice in this area are not insignificant, and have increased over the years.

The introduction of the general requirement to produce an investment statement for offers made in New Zealand has added to the cost of extending Australian offers to New Zealand. We note that this cost has been removed for those issues that can rely on the Securities Act (Australian Registered Managed Investment Schemes) Exception Notice 2003 ("ARMIS Notice"). The ARMIS Notice allows use of an Australian product disclosure statement in place of an investment statement for the narrow class of issuers it covers – Australian registered managed investment schemes. This begs the policy question of why other Australian offerors should have to go to the lengths of producing an investment statement, although we note that the product disclosure statement is a document of a similar nature to an investment statement.

While certain Australian offers have been exempted from particular requirements of the Securities Act 1978 ("Securities Act") for many years, the detail and the complexity of these exemptions has increased over the years. Although these exemptions provide relief from the cost of producing a prospectus, compliance with the relevant exemption notices brings its own costs, including obtaining advice on whether the exemptions apply, and advice on how to meet the detailed requirements.

In addition, on many occasions an Australian issuer will find that the type of offer they are trying to make "just misses" in terms of compliance with existing exemption notices. Often a specialised exemption will need to be obtained, adding considerably to the compliance costs involved in extending an offer to New Zealand.



Compliance with the conditions of the exemptions can also be problematic, especially where continuous offers are involved. Other unanticipated costs may arise where a condition of an exemption notice is not met. An Australian issuer may be faced with considerable costs in order to remedy a failure to comply with a condition of an exemption, even in cases of unintended non-compliance with a minor requirement, for example, a requirement to lodge an amendment to a trust deed. The consequences of non-compliance with a condition of an exemption notice are usually much more serious than breach of a similar requirement imposed under the Securities Act itself, and the severity of the consequences is often much greater than warranted by the mischief the requirement seeks to avoid. For example, a failure to register a trust deed under the Securities Act in respect of an offer subject to the full requirements of the Act would not render an allotment of securities void. Yet the failure to lodge a copy of a constitution under the ARMIS Notice could render allotments void.

In our experience, while these costs vary from issue to issue, the cost is significant and does act as a deterrent to Australian issuers wishing to extend offers to persons in New Zealand.

New Zealand Issuers

The analysis of costs incurred by New Zealand issuers who propose to make offers of securities in Australia is similar to that described above for Australian issuers extending offers of securities into New Zealand.

Exemptions from particular provisions of the Corporations Act 2001 (Clth) ("Corporations Act") regulating offers of securities in Australia are available in limited circumstances and subject to specified conditions. Such exemptions are described in Appendix 1 to the Discussion Document.

While the exemptions available may relieve a New Zealand issuer of the obligation and associated costs of producing a disclosure document in compliance with the Corporations Act in the limited circumstances to which they apply, significant costs are still incurred under the current regime. Such costs include obtaining legal advice on the regulatory requirements for offers of securities in Australia, including in relation to the availability of any relevant exemptions (or the need to apply for specific relief to vary such an exemption), and costs associated with complying with any conditions on which an exemption may be available. These costs are not insignificant and may, depending upon the particular circumstances of the issuer, deter New Zealand issuers from extending offers of securities into Australia.

If no specific exemption is available, a New Zealand issuer will be required to comply fully with the Corporations Act requirements for offers of securities in Australia, including the preparation



of a disclosure document. Where a prospectus which complies with New Zealand securities law requirements has already been prepared for local offers of securities in New Zealand, the work required to produce a disclosure document in compliance with the Corporations Act may be considerably reduced as the substantive content requirements for the Australian disclosure document are likely to be largely satisfied by the New Zealand prospectus. In practice, this may involve producing what is commonly referred to as a "wrap around" prospectus for offers into Australia. As the name suggests, this document effectively incorporates and supplements the New Zealand prospectus which addresses technical Corporations Act content requirements not satisfied by the New Zealand prospectus.

The costs for a New Zealand issuer in producing a "wrap around" prospectus and obtaining the associated Australian legal advice required are considerable and are likely to deter New Zealand issuers from extending offers into Australia. It is in this scenario, where no Australian exemptions are available, that the cost benefits of a trans-Tasman mutual recognition regime for offers of securities would be most significant.

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

In general, as a first step towards the ultimate goal of a trans-Tasman securities market, we support the establishment of a mutual recognition regime for offers of securities and interests in managed investment schemes along the lines described in the discussion paper.

However, in areas where some relief is already available, to make its introduction worthwhile a new regime would need to impose fewer compliance requirements than the current regime, so that the cost of compliance with the proposed regime will be significantly less.

3. Are there any features of the proposal seen 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 of business, and increasing choice for investors?

In our view the features of the regime which we see as being particularly important are as follows:



- There should be minimal additional host country requirements imposed on an issuer in order to make the offer in the host country.
- The inter-governmental agreement and the domestic legislation implementing the regime in each jurisdiction should cover the principles of the regime. Detailed regulation should be avoided so that the scheme retains its flexibility.
- Exemptions available under the home jurisdiction laws should also be available in respect of an offer made in the host jurisdiction. The securities laws of the home jurisdiction would apply in the host jurisdiction as modified by an exemption granted in the home jurisdiction.

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

In general, and subject to our further comments below, we support the proposal as described in the Discussion Document.

We note the continuing requirement for the offer to be made in both the home and the host jurisdictions. We suggest that this requirement is not necessary. There may be good commercial reasons for an offeror to make an offer only to persons in the host jurisdiction, but following the requirements of the home country. The offeror may have made a similar offer in the home jurisdiction, the documentation for which would require minimal amendment to make a similar offer in the host jurisdiction. In addition, different tax treatment of investments in the home and host jurisdictions may require slight offer restructuring to enable the investment to be attractive to investors in the host jurisdiction. In these circumstances, arguably the issuer should not be required to start its compliance efforts from scratch, but should be able to rely on an ability to make a slightly different offer in compliance with the requirements of its home country.

We understand the policy reasons for the inclusion of this requirement under the current regime. If the current "exemption regime" allowed offers to be made in the host country without a contemporaneous offer being made in the home jurisdiction there is a conflict of laws issue: - whether an offer only made in the host jurisdiction that would, if made in the home country, breach the requirements of the legislation in the home country, would still constitute a breach of the home legislation. The other issue arises in relation to enforcement of the home jurisdiction laws, and whether the regulators in the home jurisdiction have the interest or the jurisdiction to take action in relation to offers only made outside the home jurisdiction.



These two issues will be dealt with under the mutual recognition regime as proposed. The proposal envisages that breaches of the home jurisdiction laws in connection with an offer made to an investor in the host country would expose the offeror to legal action and enforcement action in the home jurisdiction in the same manner as if the breach occurred in the home jurisdiction. The requirement that the offeror have some connection with the home jurisdiction will prevent "jurisdiction hopping".

In relation to exemption powers of the home jurisdiction regulator, we also note the proposal that if the home regulator were to grant an exemption to an issuer that removed the need to use a regulated offer document in the home jurisdiction, the offer would not longer be a "regulated offer", so the mutual recognition regime would not apply. We suggest that provision should be made in the regime for a process whereby such an exemption granted by the home regulator would be recognised in the host jurisdiction. If sufficient policy or practical reasons exist for the home regulator to exempt an issuer from the requirement to make the offer using a regulated offer document, we query why that issuer should not, on the same policy basis, be able to extend such an offer under the mutual recognition regime to investors in the host jurisdiction.

5. Are the proposed exemptions appropriate? Should additional requirements be excluded? Should any of these requirements continue to apply to offers under the mutual recognition requirement?

We submit that the exemptions from New Zealand law and Australian law under the regime should be wide. We agree that provisions having similar effect to sections 35, 38B and 58 of the Securities Act should apply. As is proposed in relation to current Australian prohibitions on hawking, such provisions could also be included in the mutual recognition regime as ongoing requirements.

We query whether any of the provisions of the Securities Act should apply to offers made under the regime where New Zealand is the host jurisdiction and equally whether any of the provisions of the Corporations Act should apply to offers made under the regime where Australia is the host jurisdiction. Penalty and enforcement provisions should be set out in the legislation establishing the regime. To have a mix of requirements that might apply may lead to uncertainty.

We also suggest that the application of other New Zealand and Australian statutes needs to be considered. For example, in New Zealand, the requirements placed on "issuers" in the Financial Reporting Act 1993, the "management bans" currently included in the Companies Act 1993 and the interface with the Takeovers Code for scrip offers should be addressed. In



Australia, the application of various provisions of the Australian Securities and Investments Commission Act 2001 regarding unconscionable conduct in relation to dealing in securities should be covered by the regime. In the case of scrip offers in Australia by a New Zealand bidder, we expect that the general exemption proposed under the regime from the Australian fundraising laws would cover such offers. However, we suggest that it be expressly stated that the principles of the mutual recognition scheme apply equally in this context. That being the case, consideration will also need to be given as to whether the Australian Takeovers Panel would have the jurisdiction to intervene in scrip offers in Australia by a New Zealand bidder which, under the regime, would be regulated by the substantive laws of New Zealand.

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

We agree with the approach outlined in paragraph 5.5.

7. Are there any other aspects of this proposal on which you wish to comment?

Care needs to be taken when drafting the relevant provisions that the effect of non-compliance with the entry or on-going requirements are clearly set out. For example the current issue which arises in relation to exemptions granted under section 5 of the Securities Act should be avoided if possible, namely that failure to comply with a technical or minimal requirement should not be such as to render the whole offer illegal and all allotments void.

As an overall general comment, we believe the proposed mutual recognition regime is a worthwhile first step towards a trans-Tasman securities market. However, whilst we can appreciate the sovereignty issues that militate against a unitary statutory and regulatory regime, we are concerned that the current proposal does not take account of some of the lessons that emerged from the unification of corporate regulation between the Australian States.

One such lesson was the realisation over time that the interests of the investors and consumers of each of the Australian States were best served by a single set of regulations and a single regulator. That process of realisation began with moves to produce uniform rules for companies and other securities issuers in the 1960s. The current mutual recognition proposal arguably starts from considerably further back, by entrenching the differences in the two countries' securities laws. This "one market/two systems" approach may produce some short term



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benefits, but its longer term impact may be to delay what should be the real intermediate aim: a common set of standards in New Zealand and Australia for securities issuers.

Of course, we accept that the political reality is that uniform laws in both countries are not presently a viable proposition. Nevertheless, we would wish the current proposal to be clearly identified as an interim measure, with a commitment to moving towards uniform regulatory standards.

A key lesson from the Australian experience is the importance of having a single regulator. For a significant period, Australia experimented with a single national regulator performing a policy and co-ordination function in tandem with separate State regulators. While this was a considerable advance on the previous system of regulation by separate State regulators, it still suffered from two major defects:

- Confusion about the delineation of roles between the national and State regulators; and
- Lack of uniformity in the application of what were drafted as uniform statutes.

The proposed mutual recognition regime model appears to suffer from similar problems. The suggested enforcement regime that results from the dual-statutory proposal seems unclear and complicated. The Australian experience suggests that this will both impose costs on securities issuers and open opportunities for abuse of the system. Therefore, we would suggest that consideration be given to the establishment of a trans-Tasman regulatory body with specific responsibilities for application and enforcement of the new model. The history of the National Companies and Securities Commission in Australia suggests that such a body should be given significant powers in its own right, rather than being relegated to a co-ordinating or directory function.

If you have any queries in relation to this submission we would be pleased to answer them.

SIMPSON GRIERSON
Don Holborow / Robyn Dey
Partner / Senior Associate

Direct Dial: +64 (0)4 924 3423 / 924 3434
Facsimile: +64 (0)4 472 6986
Email: don.holborow@simpsongrierson.com
robyn.dey@simpsongrierson.com

CLAYTON UTZ
Charles Rosedale / Brendan Groves
Partner / Senior Associate

Direct Dial: +61 (0)3 9286 6181 / 9286 6934
Facsimile: +61 (0)3 9629 8488
Email: croseale@claytonutz.com
bgroves@claytonutz.com