

16 July 2004

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Ministry of Economic Development  
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Dear Bianca,

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

Thank you for providing us with a copy of the Discussion Paper on Trans-Tasman Mutual Recognition of Offers of Securities and Managed Investment Scheme Interests. New Zealand Exchange Limited (“NZX”) appreciates the opportunity to comment on the matters within the Discussion Paper.

This submission will focus on those issues we wish to comment on however the absence of comment should not be taken as approval of the Discussion Paper.

Our general comment is that it is in the best interest of both New Zealand and Australia to have a regime that facilitates investment between the two countries, enhances competition in capital markets, reduces costs for business and increases choices for investors. To this end we support the model’s aim of allowing securities of issuers from the home jurisdiction to be offered to investors in the host jurisdiction on the basis of compliance with the substantive requirements of the home jurisdiction’s securities laws, subject to the specific comments set out below.

*1. What costs do the current requirements for trans-Tasman offers of securities impose on Australia and New Zealand issuers?*

NZX agrees with the discussion paper that the need to comply with differing regulatory requirements of different jurisdictions increases compliance costs.

*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?*

Although the detailed requirements of Australian and New Zealand securities law differ in a number of respects, the underlying policy goals are the same. While Australian issuers wishing to make offers in New Zealand currently have the benefit of certain exemptions issued by the Securities Commission, an imbalance exists in the absence of similar exemptions for New Zealand issuers looking to make offers in Australia. NZX believes this imbalance would be addressed by the proposed mutual recognition regime to the benefit of both countries. NZX has some reservations as set out below.

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

We understand from the discussion paper that issuers would be required to comply with entry and ongoing requirements prescribed by the domestic law of the host jurisdiction. NZX is concerned that these requirements should be standardized or equivalent across the two jurisdictions. Without this standardization NZX is concerned that true mutuality will not be achieved as one jurisdiction may impose a higher or more restrictive standard. There are examples where mutuality or equal access has been purported to be provided and that equivalent access does not result as a consequence of limitations and conditions being imposed on access on the part of one jurisdiction. An example of where such restrictions could be imposed in this context is via section 9 of the Corporations Act. Footnote 8 to that definition excludes “excluded securities”. It will be important to ensure that exclusions of this nature do not result in an imbalance of the benefits proposed by the regime.

A further area of concern is the potential for the proposal to increase compliance costs for those wishing to take the benefit of it. As presently structured the proposal allows for duplication of investigations by regulators, and duplication of civil and criminal proceedings. The increased compliance costs that ensue from this are against the objectives of the policy behind the proposal.

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

- NZX considers that the identified complexities and disadvantages of the proposed model, with respect to the host regulator/courts potentially taking a different approach to that of the home regulator/courts in respect of the application of the home regulators/courts fundraising requirements need further analysis and consideration with a view to addressing some of these issues. In particular the goal of having a single set of standards could be frustrated were the approaches of the home and host regulators/courts to diverge. NZX questions whether issues of this magnitude should be left for resolution in a Memorandum of Understanding between regulators. A better alternative may be a requirement that the host jurisdiction regulator interpret and apply the home jurisdiction fundraising requirements in a manner consistent with the approach of the home jurisdiction regulator. In respect of issues related to the host jurisdiction courts interpreting the home jurisdiction fundraising requirements differently to the home

jurisdiction courts this might be addressed by a requirement in the legislation that the host jurisdiction courts are bound by the decisions of the home jurisdiction courts in respect of the home jurisdiction fundraising requirements, if the common law relating to the application of foreign law does not otherwise address this issue.

- One aspect of the proposed model that is unclear to NZX from a policy perspective is why the home jurisdictions sanctions, both civil and criminal do not apply in the host jurisdiction notwithstanding that the applicable substantive requirements in terms of offer documents will be the same. That is NZX does not understand why the consequences in terms of remedy and penalty should be different where the substantive requirements are the same. Bearing in mind the goal of removing barriers to making offers in the two jurisdictions it seems inconsistent with this goal that an offeror would be subject to different remedy and penalty regimes in each jurisdiction which in NZX's view adds complexity and uncertainty to the offeror.
- NZX is most concerned that an issuer not be exposed to risk of duplicate or parallel criminal proceedings in the home and host jurisdiction in respect of the same conduct. The discussion paper points to the common law principles on double jeopardy. This matter must be beyond any doubt and NZX considers that the legislation should explicitly deal with this issue; in particular the meaning of "same conduct" requires further clarification so as to ensure the possibility does not arise for an issuer to be subject to two proceedings. Given a breach of the substantive requirements in respect of an offer made by an New Zealand issuer into the two jurisdictions does this amount to one course of conduct or two? The answer to this question raises serious issues in NZX's view as to whether there is in fact a risk of double jeopardy. NZX is of the view that only one prosecution should flow from any conduct that occurs as a result of an offer made in both jurisdictions and that a breach of the substantive requirements should not give rise to a breach of New Zealand securities law and a breach of the Australian law requiring compliance with New Zealand securities law.
- While aggrieved investors should be able to bring proceedings for civil matters in either jurisdiction, NZX is strongly opposed to the idea of re-litigation for failed proceedings as footnote 14 of the discussion paper notes. This is not only contrary to common law principle of issue estoppel but also detracts from the stated goals of the proposal in respect of reducing compliance costs.
- An intergovernmental agreement as suggested in the Discussion Paper should result in regulatory equality between New Zealand and Australia in this area of law and decisions should be binding across jurisdictions. The rationale for allowing aggrieved investors a choice of where to bring proceedings is reduced costs for them.
- It seems from the discussion paper that conduct by the issuer in the host jurisdiction could be the subject of an investigation by both the New Zealand and Australian regulators. The potential for such duplication is inappropriate and detracts from the goal of reducing compliance costs (i.e. issuers could have to deal with two regulators in relation to the same conduct, resulting in greater costs and the risk of inconsistent approaches being taken). NZX is of the view that conduct in the host jurisdiction should only be the subject of investigation by one regulator and submits that the best positioned regulator to undertake this investigations is the host jurisdiction regulator. Procedures could be formalised to facilitate the hand off from host to home in particular cases.

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

Yes

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

The mutual recognition of securities exchanges is an area that should be considered such that an exchange that meets the requirements of the home jurisdiction is taken to have satisfied the requirements of the host jurisdiction (i.e mutual recognition of registered exchanges in New Zealand and Australia such that those exchanges could operate in the other jurisdiction). Similarly issues relating to trans-tasman listing of offers on the relevant securities exchanges should be addressed. Whilst ASX listed companies that comply with the ASX listing rules are recognised by NZX and are not required to meet NZX's rules, provided they remain compliant with the ASX rules, the ASX does not recognise those New Zealand issuers who comply with NZX's requirements, again resulting in New Zealand issuers assuming a greater burden than their Australian counterparts. It will be important to ensure that issuers are able to publicly list and trade securities that are offered under the regime.

Yours sincerely,

Elaine Campbell

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