



New Zealand Law Society

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21 July 2004

Ms Bianca Garwood
Regulatory & Competition Policy Branch
Ministry of Economic Development
P O Box 1473
WELLINGTON

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Dear Ms Garwood

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

The Society's Commercial & Business Law Committee (the Committee) appreciates the opportunity to comment on this discussion document. The comments follow the question format set out on P19 of the document.

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

The Committee agrees with the discussion paper that the need to comply with differing regulatory requirements of different jurisdictions increases compliance costs. We are aware this is particularly so in the case of legal 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?***

Yes, subject to the comments below.

3. ***Are there any features of the proposal set out in this 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?***

The discussion paper notes that issuers would be required to comply with entry and ongoing requirements prescribed by the domestic law of the host jurisdiction. The Committee feels that it is important that these requirements be standardized between jurisdictions to ensure true mutuality of access to markets. One jurisdiction should not be able to specify higher or more restrictive entry requirements than the other. Past experience has been that while previous regimes purported to provide access on an equivalent basis, limitations and conditions effectively limited that access. The Committee notes in particular the reference in footnote 8 to exclusion of “excluded securities” as defined in section 9 of the Corporations Act. Care will need to be taken to ensure that such exclusions do not result in an unbalanced application of the proposed regime between jurisdictions.

In addition, as discussed below, at present the proposal potentially allows for duplication of investigations by regulators, and duplication of civil and criminal proceedings. Such matters would increase compliance costs and undermine achievement of these objectives. It would be preferable if each regime was responsible for its own investigation/enforcement.

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

Enforcement

Under “model 2” the regulator of the host jurisdiction would have no involvement in the regulation of the offer. Under the proposed model, the host jurisdiction regulator and courts would have the ability to enforce compliance in the host jurisdiction with the home jurisdiction’s relevant fundraising laws in relation to the making of offers.

The discussion paper acknowledges the proposed model creates complexity in this respect but considers the disadvantages of model 2 are greater. The Committee agrees. However, it considers that more attention is needed to overcoming the disadvantages of the proposed model in this respect.

In particular, a disadvantage of the proposed model is that there would be potential for the regulator in each jurisdiction to take different approaches to the interpretation and application of the home jurisdiction fundraising requirements. This would detract from the goal of having a single set of fundraising requirements applying to an offer of securities in both countries.

In the Committee’s view this is a key issue and should not be left to be worked out in a Memorandum of Understanding between regulators. One way to address this would be to require the host jurisdiction regulator to interpret and apply the home jurisdiction fundraising requirements in a manner consistent with the approach of the home jurisdiction regulator. To facilitate this, the home jurisdiction regulator could issue guidance notes to the host jurisdiction regulator setting out the home jurisdiction regulator’s approach.

Likewise, there would be potential for the host jurisdiction courts to interpret the home jurisdiction fundraising requirements differently to the home jurisdiction courts. The common law relating to the application of foreign law may address this issue (e.g. in applying foreign law, courts may be obliged to follow decisions of the courts of the foreign jurisdiction). However, if this is not the case, provision may be required to ensure the host jurisdiction courts are bound by the decisions of the home jurisdiction courts in respect of the home jurisdiction fundraising requirements.

Consequences of breach

Under the proposed model, the consequences of breach of the home jurisdiction fundraising requirements in the host jurisdiction, both civil and criminal, would be prescribed by the host jurisdiction. The discussion paper says, therefore, that the sanctions that apply in the host country may differ from the sanctions in the home jurisdiction notwithstanding that the applicable substantive requirements in terms of offer documents will be the same.

It is not clear to the Committee why the home jurisdiction sanctions should not apply in the host jurisdiction. It seems to it that making a trans-Tasman offer subject to different remedy and penalty regimes in each jurisdiction adds complexity which detracts from the goal of reducing barriers to cross-border commercial activity.

Potential for double jeopardy

The discussion paper says that issuers would not be exposed to double jeopardy. In particular, footnote 10 says that due to common law principles “[t]here could only be one conviction in respect of the same conduct even if prosecutions were brought in both countries . . .”.

In the Committees view an issuer should never be exposed to the risk of parallel criminal proceedings for the same conduct. It also considers that the meaning of “the same conduct” should be clarified. For example, if an offer in both countries was in breach of one of the substantive requirements in terms of offer documents, would that be one course of conduct giving rise to one offence, or would that be separate conduct in each jurisdiction giving rise to an offence in each jurisdiction (i.e. taking the example of a New Zealand issuer, a breach of New Zealand securities law and a breach of the Australian law requiring compliance with New Zealand securities law in relation to offer documents)?

The appropriate answer is that this should be regarded as only one offence and there should be only one prosecution. The Committee also considers that, for reasons of clarity and certainty, the opportunity should be taken to expressly exclude double jeopardy (including addressing scenarios such as that outlined above) rather than rely on the common law.

Potential for overlapping investigations and duplication of proceedings

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).

Conduct in the host jurisdiction should only be the subject of investigation by one regulator. The default position could be that the host jurisdiction regulator is responsible for investigation of conduct in the host jurisdiction but may pass that responsibility to the home jurisdiction regulator in a particular case.

The discussion paper also notes in footnote 14 that an investor who is unsuccessful with a claim in one jurisdiction would be able to commence the same claim (that is, re-litigate the matter) in the other jurisdiction. Re-litigation should not be permitted. It is contrary to common law principle of issue estoppel (a civil law cousin of the rule against double jeopardy) and detracts from the goal of reducing compliance costs.

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

The proposed exemptions from New Zealand domestic law appear appropriate subject to the following comments:

- While retention of the suspension and cancellation powers contained in sections 38F and 44 of the New Zealand Securities Act are not appropriate, equivalent powers should be conferred on the New Zealand Securities Commission to take immediate action to remove non-compliant Australian offer documents from the New Zealand market, pending further investigation.
- Retention of the criminal sanctions in section 58 of the New Zealand Securities Act poses a risk of double jeopardy that will need to be addressed.

The Committee is not qualified to comment on the appropriateness of the exemptions from Australian domestic law.

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, subject to our earlier comments on double jeopardy and issue estoppel.

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

In conjunction with any proposed regime for Trans Tasman mutual recognition of offers of securities, issues relating to Trans-Tasman listing of offers on the relevant securities exchanges will need to be addressed. It will be important to ensure that issuers are able to publicly list and trade securities that are offered under any regime. Barriers to listing and trading could effectively remove the benefit of a mutual recognition regime. Accordingly it will be necessary to ensure that there is an appropriate mutual listing regime in place between the NZX and ASX, and that that regime does not unreasonably restrict access by New Zealand issuers to listing on the ASX.

We trust these comments are of assistance. If you require clarification or further comment, please do not hesitate to contact the Committee secretary Sarah Barker, phone (04) 472-7837, email sarah.barker@lawyers.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Simon', with a long horizontal flourish extending to the right.

Simon McArley
Convener