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Advance by email to Bianca.garwood@med.govt.nz

Dear Bianca,

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

Thank you for the opportunity to comment on this discussion paper.

General comments

The Commission supports the policy intention of the proposed mutual recognition regime, also the preferred model set out in the discussion paper.

In particular we agree with the comment on page 5 of the discussion paper that although there are a number of differences in the detail of New Zealand and Australian securities law, the policy goals are the same, and that these goals can be achieved by allowing issuers to use their home jurisdiction offer documents when offering securities in the other jurisdiction, with the limited additional requirements noted in the paper. This Commission has a well established policy of using its exemption power under section 5(5) of the Securities Act 1978 to enable overseas issuers to offer securities in New Zealand using overseas offer documents where the Commission is of the view that the offer is one that is regulated under the law of a recognised jurisdiction. There are in place a number of exemptions for Australian issuers. In our view these have generally worked well, and have allowed New Zealanders access to a greater range of investment products.

The Commission is also of the view, however, that while exemptions are useful tools for the development of a policy that might ultimately be recognised in law, they are not the preferred tool to use in the longer term to establish changes that bear on the policy of our securities law. The limitations by which the Commission is bound in this respect mean that its exemptions are unlikely to lower compliance costs to the extent that this could be done by a legislative mutual recognition regime. An example arises regarding the use of investment statements, as indicated in the discussion paper.

The Commission also recognises that there are practical limitations to its exemption regime. An example is the lack of flexible penalties, which can mean that breaches of conditions of exemption are severe even for minor matters. Related to this is the inability of any exemption to require compliance with any ongoing conditions (conditions subsequent to allotment of the security concerned).

For these reasons we agree that a formal agreement between New Zealand and Australia is necessary to achieve a comprehensive mutual recognition regime. If a mutual recognition regime is to be formally established between the Governments of Australia and New Zealand, it is preferable that this is implemented by legislative rather than administrative means.

Discussion paper questions

Costs imposed by current requirements

The Commission does not have any figures to offer on the costs that are imposed by the current requirements. We have, however, received feedback from Australian issuers and their advisers that gives us some indication of the areas in which costs are imposed.

At present, as noted in the discussion paper, there are relatively extensive exemptions available for Australian issuers who wish to offer equity or debt securities, or interests in managed investment schemes, to investors in New Zealand. During its 2002 review of exemption notices the Commission received a number of submissions in support of continuing such exemptions, which included comment that the exemptions lower costs for overseas issuers.

However, in respect of equity and debt securities these exemptions do not extend to providing relief from the requirement to have an investment statement. The Commission has been asked on several occasions to grant such an exemption. In considering these applications the Commission has been required to consider the purpose of the investment statement under New Zealand law, which is to provide a plain-English, short form disclosure document that gives the prudent but non-expert investor key information about the investment.

Where such a document is required under overseas law, such as the Product Disclosure Statement for Australian Managed Investment Schemes, the Commission has granted an exemption from the requirement to have an investment statement. In the absence of an equivalent document the Commission has felt unable to grant such an exemption. The Commission has received comment from overseas issuers and other bodies, including the Australian Stock Exchange, that this requirement appears to affect the willingness of some Australian issuers to extend offers to New Zealand investors.

In addition to the costs of preparing specific offer documents, most offers made from Australia into New Zealand are likely to require issuers to obtain New Zealand legal advice. Offers can be made under a number of Commission exemptions, depending on the nature of the offer. For some types of offer, for instance rights offers by listed companies, there are essentially no conditions of exemption that require additional disclosure or compliance obligations. For most, however, the exemptions require limited additional disclosure for New Zealand investors, and in some cases ongoing obligations to file documents on a public register in New Zealand.

We do not consider that the obligations on issuers under Commission exemptions are onerous. However, we think that savings could be achieved if there were a single regime for trans-Tasman offers, and in particular if any additional conditions to be met by an overseas issuer in New Zealand and Australia were broadly similar. While it is likely that most issuers would nonetheless seek the comfort of legal advice from lawyers in the host jurisdiction, the costs associated with this could be minimised by uniform and easily accessible obligations for cross-border offerings.

On the subject of costs we would mention also that investors can incur costs in cross-border offers where there is no simple mechanism for pursuing any claim against an overseas issuer. To some extent this is a risk of investing overseas, but it is one that we consider could be significantly reduced by an efficient cross-border enforcement model. We comment on this further below.

Should Australia and New Zealand put in place a mutual recognition regime broadly along the lines described in the paper?

For the reasons noted in our general comments, we consider that a mutual recognition regime is desirable.

We agree that the proposed model presents the preferable way to achieve this. The incorporation model would, in our view, lead to unnecessary effort on the part of each country whenever there is a change to the law in the other. While a requirement for each jurisdiction to study any change in the applicable law prior to it having effect in the jurisdiction is in principle a sound discipline, we think that in practice this can lead to the delays and unneeded resource commitment mentioned in the paper. The proposed model avoids this. However, a result of the proposed model will be that changes in each country's domestic disclosure laws will affect the disclosure that is permissible for an offer of securities in the other country. In order to secure long term confidence in such a model it will be important for officials in each country to consult with their counterparts in the other jurisdiction ahead of changes to the law. For this reason we support the inclusion in the Agreement of the advance notice and consultation provisions mentioned at paragraph 4.1 of the discussion paper.

We also prefer the proposed model to the "disapplication" model. It can never be assured that a regulator will be immediately aware of, or able to deal with, every instance of non-compliance. In the context of a cross-border offering it is possible that certain disclosures can have a misleading effect in one country to a greater degree than in another (for example, if an offering were to associate itself in a misleading manner with a well known but unrelated company or institution in the host country). We agree that the "disapplication" model makes enforcement more difficult both for investors and public authorities. The Commission does not support a model that removes the ability of the host regulator to exercise its powers, where necessary, in the performance of its statutory functions.

Important features

The discussion paper proposes that essentially none of the substantive disclosure, trustee and statutory supervisor, and issuer registration provisions of the law of the host jurisdiction will apply to an offer made under this regime. This recognises, in our view, the policy stated in the paper of examining policy goals rather than legislative detail in considering whether each regime offers broadly equivalent information or protection for investors. We see this approach as essential. The experience of the CER or TTMR agreements, when contrasted with the former NAFTA agreement, underscores the importance of proceeding with the aim that all matters are within the scope of the agreement unless specifically exempted. While securities regulation is conduct, rather than product regulation, and cannot in terms of its scope be approached in quite the same manner as a product or services agreement, we think the presumption that all is included should apply equally to the disclosure and conduct regulation of cross-border offerings.

We agree it is likely to be appropriate to include some warning statements for investors in host jurisdictions, explaining significant differences that should be brought to the attention of investors. However, the benefits of the regime will be reduced if these warnings begin to extend into substantive disclosure matters. This is not to say that there is no situation in which this may be necessary, but the question should be approached with the understanding that the costs of additional disclosure may significantly reduce the benefits of the regime.

Another matter that will be important to the success of the regime is cooperation between regulators. The discussion paper mentions that both home and host regulators will have authority to act against misleading documents, and other breaches of the law. We agree in general with the suggestion that the home regulator would normally have responsibility for taking action against failure to comply with breaches of the substantive law of the home jurisdiction, even though this would also constitute a breach of the host jurisdiction's ongoing requirements. We also agree, though, as noted above, that each regulator must be able to act as required in the interests of investors.

We think it will be important that the Securities Commission and the Australian Securities and Investments Commission continue to further enhance our working relationship, including developing systems for further information sharing and cooperation regarding cross-border offerings. In June this year the ASIC and the Securities Commission formally met to discuss their relationship and areas of common interest. Following the meeting the commissions wrote jointly to their respective Ministers to report on this. This letter noted that the mutual recognition regime proposed in the discussion paper, if adopted, will require a co-ordinated regulatory approach between ASIC and the Securities Commission, particularly in the areas of compliance and enforcement. The letter expressed the support of both commissions to the proposal of a mutual recognition regime, and noted that we will be taking active steps to facilitate its objectives if it is adopted. From the meeting it was agreed that staff of the commissions would begin preparatory work for possible future joint work in administering the proposed mutual recognition regime. If the model proposed in the discussion paper is to be adopted we see such cooperation as vital in order to provide certainty of operation to issuers and adequate protection for investors.

Undesirable features

The Commission does not oppose any aspects of the proposed model. If implemented, we look forward to commenting in more detail on proposed regulations.

Proposed exemptions

As noted above, we agree with the proposed approach to exemptions.

Enforcement

At present the costs of enforcement can represent key risks of investing in overseas products. We have seen recently, in relation to overseas collective investment schemes, that conflicts of laws can leave investors and issuers uncertain about the legal effects of non-compliance. These issues can make private enforcement next to impossible. We strongly support an effective enforcement regime that allows investors and regulators in each jurisdiction to bring proceedings or take other action without encountering jurisdictional barriers. We support the suggested approaches to both civil and criminal proceedings.

We recognise that the question of trans-Tasman enforcement of fines and penalties raises more significant legal questions, going beyond the scope of securities law. However, consistent with our view expressed above we think this is a matter that should be given serious consideration. In principle we support measures to increase the efficiency of enforcement of breaches of securities law.

Other matters

As noted, the Commission is of the view that effective compliance and enforcement measures will be important to the success of this regime. This will require close cooperation between the ASIC and the Securities Commission. In addition, we think it may be useful to examine the relevant powers of the commissions in respect of information sharing, cooperation, and enforcement to make such efforts as effective as possible. A particular example is the ability of each regulator to acquire information in the other jurisdiction. In the context of a mutual recognition agreement there should be, to the extent possible, no impediments to the acquisition and use of information by one regulator for the enforcement of any breach of the host jurisdiction requirements of a cross-border offer. This may, in our view, require an examination of the undertakings the New Zealand Commission must obtain under section 69I of the Securities Act before providing information to the ASIC, and also of the procedure in Australia whereby the ASIC must use the Mutual Assistance in Business Regulation Act to obtain information in certain circumstances, and the undertakings that must be received prior to passing on information obtained under that law.

We would support a broader examination of the measures that could enhance both the acquisition of information and the enforcement of requests. We suggest this include consideration of measures similar to those in the Commerce Act 1986 and Trade Practices Act 1974 that permit cross-border delivery and enforcement of evidence notices by the Commerce Commission and the Australian Competition and Consumer Commission (sections 98H of the Commerce Act and 155A of the Trade Practices Act).

We trust the above is of assistance. We note the Commission has been consulted during the policy development and drafting of Part 5 of the Securities Act 1978, and in the course of the drafting of the discussion document. We would be happy to contribute further, and to meet with officials to discuss any aspect of this submission or the proposed mutual recognition regime.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Liam Mason', with a stylized flourish at the end.

Liam Mason
General Counsel

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