



Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Bill 2007

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Law and Bills Digest Section

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Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Bill 2007

Date introduced: 29 March 2007

House: House of Representatives

Portfolio: Treasury

Commencement: The substantive parts of Schedules 1 & 2 commence on a date to be fixed by Proclamation, or 6 months after the day the Act receives Royal Assent, whichever is the sooner. Schedule 3 commences on the 28th day after the Act receives Royal Assent.

Purpose

The purpose of the Bill is to give effect to Australia's obligations under the *Agreement between the Government of Australia and the Government of New Zealand in relation to the Mutual Recognition of Securities Offerings*, and to amend the *Trade Practices Act 1974* to include a scheme for the disclosure of information gathered by the Australian Competition and Consumer Commission (ACCC).

Background

Schedules 1 & 2

In October 2001, the Australian Minister for Financial Services and Regulation wrote to his counterpart in New Zealand suggesting that the two countries consider formal processes for mutual recognition in financial services regulation.¹ This led to the *Agreement between the Government of Australia and the Government of New Zealand in relation to the Mutual Recognition of Securities Offerings*. This Bill essentially gives effect to Australia's obligations under that agreement, to implement a mutual recognition scheme in relation to securities offerings. It should be noted that, although initially applying only to relations with New Zealand, the scheme of the Bill is such that it can be extended to offers originating in other foreign jurisdictions if a similar agreement is reached with them.² In deciding upon an appropriate option for the implementation of a mutual recognition regime, the Government has considered three options: disapplication of foreign law, incorporation of foreign law and compliance with substantive requirements of domestic law. The third of those options – compliance with substantive requirements of domestic law – is the option favoured by the Government, and the option implemented by this Bill. The same option was favoured by the Government of New Zealand.³ Details of

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this option are outlined in the main provisions section. Details of the other options can be found in the Explanatory Memorandum to the Bill.

Schedule 3

Schedule 3 is titled 'Protection of information obtained by the ACCC'. It is, however, as much about disclosure of information as it is about protecting it. The schedule comes about due to a recommendation of the Productivity Commission in its 2004 Research Report '[Australian and New Zealand Competition and Consumer Protection Regimes](#)'. That report included:

RECOMMENDATION 6.4

The Trade Practices Act 1974 (Cwlth) and the Commerce Act 1986 (NZ) should be amended to allow the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to exchange information that has been obtained through their information gathering powers.⁴

The Bill implements new provisions in the Trade Practices Act that will allow the ACCC to disclose information collected by it to a wide range of agencies including any foreign government body. The new provision will give the ACCC powers similar to those given to ASIC under section 127 of the *Australian Securities and Investments Commission Act 2001*.

Political Party and Stakeholder views

The Bill was referred to the Senate Standing Committee on Economics. The Committee, comprising representatives from the Liberal, National, Labor and Democrat parties, recommended, without dissent, that the Bill be passed.⁵ The Bill subsequently passed the House of Representatives on 10 May without opposition. The ALP position on the Bill was described this way during debate:

Labor supports initiatives to enhance economic relationships between Australian and New Zealand. This bill achieves this objective by allowing for the mutual recognition of the issue of securities offerings and companies to reduce costs associated with doing business. Labor also believes that provisions amending the role of the ACCC in terms of disclosure and protection of certain information are important in terms of building the capacity to cooperate across the Tasman.⁶

The issue of consultation was raised during the Senate Committee's inquiry, the Law Council of Australia having expressed concern at what it saw as the short time available in which to make submissions on the Bill. Treasury representatives explained that:

We had six weeks public consultation. Furthermore, in 2004 this scheme had a two-month public consultation period about the principles of the scheme.⁷

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There were only two submissions to the Senate Committee's inquiry into the Bill. One from the Law Council, the other from the Security & Derivatives Industry Association (SDIA). Apart from its complaint about the time allowed for submissions, the Law Council generally supported the Bill, but emphasised the need for symmetry between regulatory regimes in the two jurisdictions, in order to avoid forum shopping by prospective offerors. The SDIA submission was broadly supportive of the provisions in the Bill.

Main provisions

Schedule 1 – Mutual recognition of securities offers

Items 6, 8 & 9 of Schedule 1 amend the definition of 'ED securities' in various sections of the Corporations Act. The effect is that foreign offerors will be subject to the continuous disclosure provisions in Chapter 6CA of the Corporations Act where 100 or more people hold securities, or interests in managed investment schemes, from the time of issue.

Item 18 of Schedule 1 inserts into the Corporations Act **proposed Chapter 8**, relating to the mutual recognition of securities offers. **Part 8.1** provides definitions of various terms used throughout the chapter. **Part 8.2** regulates foreign offers that are to be recognised in the Australian jurisdiction. **Proposed section 1200B** provides that an offer becomes a recognised offer on the first day it is made, provided that it meets the conditions specified in section **1200C**. The conditions include:

- that the person making the offer must be either a natural person resident in the recognised jurisdiction or an incorporated entity under the law of the recognised jurisdiction
- the person has not been banned by ASIC from making offers, and
- various formal requirements including the lodging of the documents described in proposed section **proposed 1200D**.

Proposed section 1200F provides for the effect of a recognised offer's status as such. The section includes a table listing various provisions of the Corporations Act that do not apply to recognised offers. Recognised offers will, instead, be required to comply with proposed Division 3, which contains the requirement for compliance with the laws of the foreign jurisdiction (s1200G)

Proposed section 1200G provides for further conditions with which an offeror must comply including that the offer must comply with the law of the recognised jurisdiction.

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Proposed section 1200H requires a foreign offeror to lodge with ASIC details of an address for service within this jurisdiction (Australia).

Proposed section 1200J provides that a foreign offeror, in respect of a managed investment scheme, must have a dispute resolution scheme that complies with subsection 1017G(2) of the Corporations Act, unless exempted by ASIC.

Proposed Division 5 of Chapter 8 provides for ASIC's powers in relation to recognised offers. Proposed section **1200N** provides a table that describes various circumstances and the orders that ASIC is entitled to make in response. **Proposed section 1200P** empowers ASIC to declare that a person be banned for up to 5 years from making a recognised offer, where that person has committed wrongdoing in relation to a recognised offer. **Proposed section 1200P** includes a process that allows for a person to make submissions to ASIC before such a declaration is made. The person may be legally represented.

Proposed section 1200S requires that, where a body proposes to make an offer in a recognised foreign jurisdiction, and the offer is, under the mutual recognition scheme, to be regulated by the law of Australia, the body must lodge written notice of the fact with ASIC.

Proposed section 1200U empowers ASIC to order that offers not be advertised in a recognised jurisdiction where there is a breach of Corporations Act provisions relating to product disclosure statements.

Schedule 2 – Recognition of companies

Item 1 inserts **proposed section 601CDA** into the Corporations Act. This section exempts companies from lodging, with ASIC, information or documents where the company has lodged similar documents with a foreign regulator. Foreign companies will still be required to register as such with ASIC before they operate in Australia.

Schedule 3 – Protection of information obtained by the Australian Competition and Consumer Commission

Item 1 inserts into the Trade Practices Act **proposed new section 155AAA**. The section provides for a regime of disclosure and protection of information obtained by the ACCC in the exercise of its functions. The ACCC may, in specified circumstances, release information to the Minister, the Secretary of the relevant Department, a Royal Commission, and a host of regulatory bodies listed under subsection (12), including a foreign government body.

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Financial implications

The Financial Impact Statement notes that:

Schedule 1 and 2 of the Bill will require Commonwealth expenditure.

There will be minor implementation costs for the regulator, ASIC, from the measures in the Bill.

Concluding comments

This Bill is directed at improving regulatory co-operation and integration between Australia and New Zealand (and possibly between Australia and other jurisdictions) in relation to securities offerings. The Bill has generally been supported by stakeholders and has met with bipartisan support in the Senate Standing Committee on Economics, as well as in the House of Representatives.

Endnotes

1. Joint Standing Committee on Treaties, 'Report 75: Review of Treaties tabled on 11 October 2005 (2), 28 February and 28 March 2006 (2)', par. 8.5.
2. *Explanatory Memorandum*, Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Bill 2007, p. 41.
3. *ibid.*, p. 25.
4. Productivity Commission, Research Report, December 2004, p. xxvii.
5. Senate Standing Committee on Economics, 'Corporations (NZ Closer Relations) and Other Legislation Amendment Bill 2007 [Provisions]', Canberra, May 2007.
6. Catherine King MP, 'Second reading speech: Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Bill 2007', House of Representatives, *Debates*, 10 May 2007, p. 43.
7. Ms Cherie Rebecca Parker, Senior Analyst, Market Integrity Unit, Corporations and Financial Services Division, Markets Group, Treasury, Senate Standing Committee on Economics, Transcript, 23 April 2007, p. E2.

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