AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF NEW ZEALAND IN RELATION TO MUTUAL RECOGNITION OF SECURITIES OFFERINGS

Regulation Impact Statement

1. BACKGROUND

The proposed trans-Tasman mutual recognition regime for offers of securities and interests in managed investment schemes is being developed as part of a general initiative for greater coordination of business law between Australia and New Zealand. The framework for the coordination of business law between Australia and New Zealand is set out in the Memorandum of Understanding between the Government of Australia and the Government of New Zealand on the Coordination of Business Law, of which the most recent version was signed in August 2000.

The August 2000 memorandum replaced the Memorandum of Understanding on the Harmonisation of Business Laws, which was signed in July 1988 and which formed part of the 1988 review of the Australian New Zealand Closer Economic Relations Trade Agreement (which came into effect on 1 January 1983).

On 4 October 2001, the then Australian Minister for Financial Services and Regulation, Hon Joe Hockey, wrote to the then New Zealand Minister of Commerce, the Hon Paul Swain, proposing that Australia and New Zealand consider formal processes of mutual recognition in financial services regulation.

Under the current regulatory regime, issuers from one country (the home jurisdiction) who wish to offer securities to investors in the other country (the host jurisdiction) need to comply with two substantive regimes (subject to some exceptions).

Offers by Australian offerors in New Zealand

Under the *Securities Act 1978* (NZ) (the Securities Act), a security may not be offered to the public unless there is a registered prospectus and the offer is accompanied by an investment statement relating to the security.

Australian issuers making an offer in New Zealand must comply with the disclosure requirements of the Securities Act, unless they fall within an exemption notice issued by the New Zealand Securities Commission (Securities Commission). Two relevant exemption notices are the Securities Act (Australian Issuers) Exemption Notice 2002 (‘Australian Issuers Notice’) and the Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 2003 (‘ARMIS’).

The Australian Issuers Notice provides relief from the prospectus requirements by allowing Australian issuers to use an Australian prospectus for an offer of equity or debt securities in New Zealand (subject to certain conditions). The exemption also allows Australian issuers to use an Australian trustee and trust deed for offers of debt securities in New Zealand.

Similarly, ARMIS allows investment products in Australian registered managed investment schemes to be offered to the public in New Zealand without a New Zealand registered prospectus, as long as the conditions of ARMIS are complied with.

An issuer operating under the Australian Issuers Notice is still required to prepare an investment statement to accompany offers in New Zealand that meets the requirements of the Securities Act and the Securities Regulations 1983 (NZ). An issuer operating under ARMIS does not need to prepare an investment statement if the offer is made using a Product Disclosure Statement (PDS).

The Securities Commission has also issued a number of issuer-specific exemption notices.

Offers by New Zealand offerors in Australia

Under Chapter 6D of the *Corporations Act 2001* (Cth) (the Corporations Act), an offer of securities must be accompanied by the relevant disclosure document. The type of document that is required depends upon the specific nature of the offer, for example, an 'offer information statement' may be used instead of the standard prospectus if the amount raised by the offeror is $5,000,000 or less. Under Part 7.9 of the Corporations Act, offers relating to the issue of other types of financial products (including interests in managed investment schemes) are generally accompanied by a product disclosure statement.

The Corporations Act defines a managed investment scheme as an arrangement where investors' contributions are pooled and managed on an arms-length basis. The investor acquires rights to share in the benefits of the scheme. Such schemes require registration and are therefore regulated by the Australian Securities and Investments Commission (ASIC). A product disclosure statement is required for a particular scheme, subject to any exemptions, if the investors in that scheme are classified as 'retail investors' (for example, they invest amounts of $500,000 or less, or there are more than 20 investors in the scheme, subject to a $2,000,000 ceiling).

Under the Corporations Act, ASIC has the power to exempt a person, or class of persons, from any of the provisions of Chapter 6D and Part 7.9. For example, ASIC Class Order (CO 00/177) provides relief from section 711(6) of the Corporations Act to offerors whose prospectuses are registered in New Zealand. Section 711(6) relates to the issue of securities beyond the expiry date specified in the prospectus. These do not significantly reduce the cost of complying with the two regimes.

2. PROBLEM IDENTIFICATION

The need to regulate offers of securities

The aim of regulating the primary market for securities, the market in which capital is raised by the issue of new securities, is to ensure, as far as possible, that intending investors are supplied with adequate information so that they can make informed judgments.

The intangible nature of investment opportunities means that their merits cannot be assessed by inspection as in the case of, for example, land or goods. There is a need, therefore, for disclosure to the general public by the persons extending the offer.

Two regulatory regimes

As indicated above, Australian and New Zealand issuers cannot use their home jurisdiction offer documents when making a trans-Tasman offer of securities or managed investment scheme interests. Instead, issuers must comply with the relevant requirements in the host jurisdiction unless the issuer is operating under an exemption in the host jurisdiction.

Issuers of securities report that the current regulatory arrangements impose significant costs on both sides of the Tasman.

Costs borne by Australian offerors, which have increased over time, include: fees for legal advice and corporate advisory services for New Zealand requirements; preparing, filing and disseminating New Zealand investment statements (although the costs are reduced for issues relying on exemption notices); preparing New Zealand compliant advertisements; and compliance with conditions of exemption notices.

Costs borne by New Zealand issuers are similar to those of Australian issuers in relation to advisory fees for Australian requirements and preparing and disseminating Australian disclosure documents. If no specific exemptions are available, New Zealand issuers also need to comply fully with the Corporations Act requirements.

The effect of the current regulatory regime

The effect of such costs is that, in some cases, the offer will be made in both countries, but the additional compliance costs will increase the offeror's cost of raising funds. In other cases, the additional costs will mean that the offer is not extended to the other country. This reduces the offeror's access to potential investors, and reduces investment options for investors in the other country.

A study has not been undertaken quantifying the aggregate costs to issuers of offering securities in the host jurisdiction. According to the Australian Stock Exchange (ASX), however, a number of companies listed on the ASX have advised the ASX that the cost of providing offer documents to New Zealand investors may range from $10,000 to $30,000 on average. These figures encompass circumstances where there may be only ten to twenty New Zealand investors. The ASX also understands that costs for larger companies could total approximately $50,000 although in such cases the shareholder base would likely be substantially larger.

However, a number of submissions on the discussion paper noted that the option identified in the discussion paper (that is option three) would involve a significant reduction in costs for companies who were issuing securities both in Australia and New Zealand.

A study in relation to the number of trans-Tasman offers that have not proceeded due to the additional costs of compliance with the host jurisdiction has not been conducted. This is due partly to ASIC not keeping records of New Zealand offers into Australia. It can be said, however, that there is an opportunity cost involved in not accessing a potential overseas investment market. While such an opportunity cost would appear to be greater for New Zealand offerors (because of Australia's relatively larger investment market), the cost to Australian offerors cannot be discounted.

While the electronic provision of disclosure documents may marginally reduce the costs to some extent, a significant element of the cost of such documents is the advice and checks needed to produce the offer documents. There is no way of quantifying the level of electronic provision of offer documents or quantifying the difference in costs between electronic and hard copy provision of offer documents. This is in part due to the number of variables that impact on costs, including the type of offer, the size of the offer (and the size of the offeror) and the location of the offeror. Nevertheless, anecdotal evidence from business suggests that many companies make offer documents available both electronically and in hard copy form, and that the cost of printing such material is minimal. In other words, the vast majority of costs arise from the advice and checks needed when making an offer and there is a minimal cost difference in relation to issuing prospectuses and product disclosure statements electronically or by hard copy.

The problem

The problem to be addressed, therefore, is the regulatory barriers currently facing issuers wishing to offer securities in the host jurisdiction of complying with the relevant requirements in relation to the structure of the investment scheme in that jurisdiction, unless the issuer is operating under an exemption in the host jurisdiction.

3. OBJECTIVES

The fundamental objective is to address the problem of trans-Tasman regulatory barriers currently facing issuers of securities and managed investment scheme interests, and to thereby facilitate investment between Australia and New Zealand, enhance competition in capital markets, reduce costs for business, and increase choice for investors.

4. DESCRIPTION OF OPTIONS

Mutual recognition arrangements aim both to overcome mutually inconsistent requirements that may exist between national regulatory frameworks and to reduce compliance costs associated with the need to comply with the different regulatory requirements of different jurisdictions.

Mutual recognition arrangements achieve these aims by enabling an issuer in the home jurisdiction to operate in the host jurisdiction on the basis of compliance with a single substantive regulatory framework (that of the home jurisdiction). Compliance with the regulatory framework of the home jurisdiction operates as a “passport” that allows an entity to carry on business in the host jurisdiction under the same regulatory framework.

There are three alternative options available for a trans-Tasman mutual recognition arrangement for offers of securities and managed investment scheme interests. The three regimes are outlined below.

Option one – disapplication of domestic law

Option one is the simplest model of mutual recognition. It involves, for home jurisdiction issuers that satisfy the host jurisdiction's domestic access regime, the host jurisdiction disapplying parts of its own regulatory framework (in relation to certain conduct by the home jurisdiction issuer) in favour of the applicable law of the home jurisdiction. There are no ongoing requirements under the law of the host jurisdiction (other than, for example, that the home jurisdiction issuer remain regulated in its home jurisdiction) – the offer is regulated solely by the law of the home jurisdiction. The securities regulator of the host jurisdiction has no involvement in the regulation of the offer, and has no supervisory or enforcement powers.

Disapplication by the host jurisdiction of aspects of its domestic regulatory framework in relation to conduct by home jurisdiction issuers may be subject to additional specific requirements, such as to appoint a local agent.

This option appears to be the basis of the model of mutual recognition adopted in the European Union (EU). Under the EU arrangements, EU countries have agreed to disapply their domestic licensing requirements in relation to entities that are subject to regulation in other EU jurisdictions. A licence granted in one EU jurisdiction operates as a regulatory "passport" across the EU. However, EU countries have not disapplied their respective 'conduct of business' rules. These rules continue to apply and differ significantly across EU jurisdictions.

This approach can also be adopted by a host jurisdiction in the absence of any agreement from other jurisdictions that are to be recognised under the arrangement (although in these circumstances the approach should be more accurately characterised as unilateral, rather than mutual, recognition).

Option two – incorporation of foreign law

Under option two, the host jurisdiction, in common with option one, disapplies aspects of its domestic regulatory framework in favour of the applicable law of the home jurisdiction. Unlike option one, however, the host jurisdiction incorporates the laws of the home jurisdiction within its domestic regulatory framework, which applies in relation to conduct within its boundaries by entities from the home jurisdiction. The host jurisdiction incorporates home jurisdiction law either 'word for word' or by reference to the home jurisdiction law as at a particular date.

Option two differs from option one in that the host jurisdiction is responsible for regulating the conduct of the home country issuer, which will satisfy the requirements of the host jurisdiction by complying with the requirements of the home jurisdiction. (Home country issuers will also need to satisfy the entry requirements of the mutual recognition arrangement.)

A mutual recognition arrangement based on option two provides a greater role for regulators in the host jurisdiction than an arrangement based on option one. Offerors would still be able to issue securities in the host jurisdiction under a single substantive regulatory framework. However, they would be required to deal with more regulators (and would be subject to multiple court systems). Each domestic regulator would have responsibility for regulating the conduct of all issuers within its respective jurisdiction. Regulators would regulate overseas-based issuers under different regulatory frameworks to those that apply to domestically-based issuers.

Option three – compliance with substantive requirements of domestic law

Option three seeks to provide a 'middle ground' between option one and option two. It is based on applying the substantive fundraising laws of the home jurisdiction to offers made in the host jurisdiction. The basic principle that underpins this option is that an offer of securities that is a regulated offer in the home country and can lawfully be made in that country, can lawfully be made in the host country in the same manner and with the same offer documents, provided that: (i) the entry requirements are satisfied; and (ii) the offeror complies with the ongoing requirements.

Entry requirements include, for example, requirements to:

- opt into the mutual recognition regime in respect of a particular offer, by filing with the host country regulator a notice that contains prescribed information in relation to the offeror and the offer; and
- provide an address for service of legal documents in the host country and submit to the jurisdiction of the courts of that country.

An offer that does not meet the entry requirements falls outside the mutual recognition regime. It is treated as an ordinary, domestic offer under the host jurisdiction's law and needs to meet the standard requirements under the laws of that jurisdiction.

Ongoing requirements are imposed by domestic legislation in the host jurisdiction and include, among others, conditions that:

- the offer must remain a regulated offer in the home jurisdiction;
- the offeror must comply with the home jurisdiction's relevant fundraising laws in relation to the making of such offers as they apply from time to time; and
- the principal offer document be accompanied by specified warnings in relation to, for example, the governing law, tax differences and currency risk.

Failure to meet the ongoing requirements results in a breach of the host country's laws (that specify ongoing requirements).

Under option three, the home jurisdiction regulator has primary responsibility for supervising a cross-border offer and can exercise powers of its own motion, at the request of the host country regulator, or at the request of a person in the host country. The host country regulator has the power to suspend or stop an offer, to prohibit advertisements in the host country if entry requirements are not satisfied or if the ongoing requirements are not complied with and to investigate suspected breaches of the law, including breaches of entry requirements or ongoing requirements (including the home jurisdiction compliance requirement).

Under any option, ASIC will not send officers to New Zealand to undertake investigations or enforcement activity there. ASIC's powers do not extend to New Zealand and it would be inappropriate to amend the law to purport to provide for this. Instead, ASIC and the New Zealand Securities Commission may exchange relevant information under their respective governing laws. Their co-ordination is facilitated by a Memorandum of Understanding between the two regulators.

5. IMPACT ANALYSIS

The groups currently most affected by the regulation of trans-Tasman securities offerings and likely to be most affected by the options include:

- issuers of securities in Australia and New Zealand (particularly public companies);
- investors in Australia and New Zealand; and
- ASIC, the New Zealand Securities Commission and the New Zealand Registrar of Companies (the New Zealand Regulators).

The costs and benefits of the identified options, which this impact analysis compares against the current regulatory environment (and against each other), can be evaluated under four headings:

- The benefits of overcoming mutually exclusive regulatory requirements and the costs for offerors and regulators.
- Consistency with providing appropriate regulatory outcomes in host jurisdictions (especially in relation to foreign issuers operating under mutual recognition).
- Impact on national and parliamentary sovereignty.
- The extent of associated complexity.

The first two of these headings are probably the most significant. They are also closely related to one another. The extent to which host jurisdictions realise the benefits associated with them disapplying their domestic regulatory frameworks under mutual recognition arrangements is likely to depend on the capacity of these arrangements to ensure the maintenance of appropriate regulatory outcomes within each host jurisdiction.

Benefits from overcoming mutually exclusive regulatory requirements

The most immediate benefit derived from overcoming the need to comply with different regulatory requirements in Australian and New Zealand that pursue the same policy objectives is removing/reducing the compliance costs associated with multiple market participation currently borne by Australian and New Zealand issuers. Other, derivative benefits include:

- Facilitating cross-border fundraising (and investment) activity by Australian and NZ entities.
- Enhancing competition in domestic capital markets by facilitating market entry.
- Providing significant potential to reduce the cost of capital to issuers by enabling them to access wider capital markets at lower cost than is currently available.
- Providing investors with more opportunities to manage risk through geographical diversification of their investments by increasing the range of investment choices.

These benefits derive in large part from the disapplication of aspects of the host jurisdiction’s regulatory framework. From this perspective, each option has the potential to yield these benefits. The extent to which these benefits will be realised under each of the options, however, depends on two, related, factors:

- The extent to which the host jurisdiction disapplies its domestic regulatory framework.
- The particular parts of its regulatory framework that the host jurisdiction disapplies.

The second factor is particularly important, as some regulatory requirements are likely to be more burdensome and generate higher compliance costs that others. As discussed above, fundraising regulation, which the host jurisdiction would disapply under each identified option, in both Australia and New Zealand, is relatively onerous and generates significant compliance costs for issuers.

Under all three options, potential issuers are likely to face initial familiarisation costs, with these being greater the more complex the option.

Option one

It can be argued that option one may involve lower compliance costs than options two and three because an issuer may not be required to interact with host regulators (or courts) under option one. ASIC advises that option one is likely to have the lowest costs for regulators, though they note that in the event of difficulties, to the extent that the home regulator is expected to ensure compliance with the home jurisdiction requirements in the host jurisdiction, option one potentially involves complexities and costs that may not arise under the other options.

Options two and three

Options two and three may involve slightly higher compliance costs and pose a slightly higher regulatory risk for offerors issuing securities in the host jurisdiction. This is because issuers would be required to interact with the host jurisdiction regulator and would be subject to multiple liability frameworks (albeit under the same substantive law).

Under option two, the host country regulator would also be likely to face greater costs associated with understanding, and supervising and enforcing the home jurisdiction's securities laws, with the potential for inconsistent administration of the provisions.

Compliance costs would potentially be marginally higher under option three than option two because of the existence of ongoing requirements – features not present in option two. However, these costs are expected to be small.

From this perspective, option three may be less attractive to potential trans-Tasman issuers than options one and two. However, if option three is better able to ensure the maintenance of appropriate regulatory outcomes in the host jurisdiction, these potential costs may be offset by their potential to facilitate the more extensive disapplication of host jurisdiction legislation.

ASIC has advised that between options two and three, all other things being equal, option two is likely to involve greater costs for regulators than option three. This is essentially because option three assumes that the home regulator will be playing a "lead regulator" role in relation to an offering, while option two does not envisage the host regulator being able to rely on the home regulator in dealing with matters arising under the locally adopted foreign law.

ASIC, however, notes that the costs for offerors and regulators under either options two or three would probably not be high in absolute terms.

It is envisaged that the compliance costs associated with option three will be minimised in the implementing legislation by:

- addressing the overlap between lodgement requirements in Australia and New Zealand;
- addressing the concerns of those involved in continuous (or open-ended) offers to ensure that the entry requirements will not apply inappropriately; and

providing for simplified procedures for lodging documents as part of the ongoing requirements.

There would not be any significant costs for investors under any of these three options, beyond the initial familiarisation costs.

Maintenance of appropriate domestic regulatory outcomes

Mutual recognition arrangements aim to overcome regulatory barriers facing offerors issuing securities in multiple jurisdictions while maintaining appropriate regulatory outcomes in host jurisdictions. The key issue in this regard concerns the adequacy of the protection available to investors dealing with home jurisdiction issuers operating in the host jurisdiction (although market integrity and financial stability are also important considerations). The protection available to investors in these circumstances should be similar in its effectiveness to the protection available to investors acquiring domestically-issued securities.

This requires that home and host jurisdictions have equivalent regulatory frameworks and that the enforcement provisions and remedies available under these frameworks should apply to issuers when they operate outside their respective home jurisdictions.

Option one

Under option one, host jurisdictions do not impose their own regulatory frameworks. Rather, they rely on the cross-border effects of regulation in the home jurisdiction. A benefit associated with this approach is that the financial burden of the host regulator's supervisory, investigative and enforcement roles is removed entirely.

This means that there is total reliance on the home jurisdiction's fundraising requirements and regulator – there is no capacity for the host regulator to issue a stop order on the issue where there is a contravention of a disapplied provision. In addition, as indicated above, the home jurisdiction regulators would not be entitled to exercise their own investigation and examination powers in the host jurisdiction.

This approach may be appropriate in relation to parts of the regulatory framework that have the indivisibility and non-excludability characteristics of a public good – for example, investors in both home and host jurisdictions may all benefit from a prohibition in the home jurisdiction on offer documents containing false or misleading statements. It may be less appropriate where regulation does not have strong public good characteristics. In these circumstances, a home country regulator may be able to choose not to regulate a domestic issuer in relation to conduct by that issuer beyond its territorial boundaries or provisions in the home jurisdiction may not apply to conduct in a host jurisdiction that has disapplied its domestic legislation. Further, disapplication is inappropriate where there is the possibility of the issuer undertaking separate conduct , such as advertising, in the host jurisdiction, which is not also being undertaken in the home jurisdiction.

While option one may reduce the marginal costs of extending an offer into the host jurisdiction, the host jurisdiction is likely to limit the application of such a regime when it has no means of regulation or responsibility over securities' offers made inside its jurisdiction.

Option one also raises issues relating to the ease with which investors in the host jurisdiction may access remedies that may be available to them under the home jurisdiction's regulatory framework. Most importantly, such investors may be required to incur the additional expense of pursuing remedies through the court system of a foreign jurisdiction. This aspect of the model may even dissuade host jurisdiction investors from taking up the securities being offered by home jurisdiction issuers.

Option one has the least capacity to ensure the maintenance of appropriate regulatory outcomes and may decrease investor confidence.

Options two and three

Options two and three have a number of potential advantages over option one in terms of their capacity to ensure the maintenance of appropriate regulatory outcomes in the host jurisdiction.

Firstly, an issuer offering securities across the Tasman would be subject to oversight by the host jurisdiction regulator, who retains responsibility for regulating conduct within their respective jurisdictions. Host jurisdiction regulators are more likely than home jurisdiction regulators to have both the capacity and willingness to exercise effective regulatory oversight in relation to issuers operating in the host jurisdiction.

Secondly, host jurisdiction investors can pursue statutory and other remedies in their domestic court system (and would not be required to pursue these remedies in the court system of the home jurisdiction). This would reduce the difficulty and expense of pursuing legal remedies in comparison with option one.

Option three also enables host jurisdiction investors to pursue civil proceedings against a foreign issuer for a contravention of the home jurisdiction regulatory framework in the courts of the host jurisdiction.

This is because the foreign issuer will have an address for service in the host jurisdiction, and will have submitted to the jurisdiction of its courts. However, the investor may still need to enforce his or her judgment in the home jurisdiction. Investors will be given notice of such practical difficulties by the 'health warnings' associated with these offers.

The arrangements for enforcing in the home jurisdiction fines and penalties imposed in the host jurisdiction for breaches of the ongoing requirements are currently being examined by the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement. The Working Group is reviewing legal co-operation in such areas as service of process, the taking of evidence, the recognition of judgments in civil and regulatory matters and regulatory enforcement, and is preparing a discussion paper for public consultation.

National/parliamentary sovereignty

All of the options have implications for national/parliamentary sovereignty because host countries must disapply parts of their domestic regulatory frameworks and, therefore, surrender (at least while the mutual recognition arrangement is operational) to various extents their capacity to directly regulate certain conduct within their jurisdictions. Each option would also presumably require Australia and New Zealand to consult with one another before amending their domestic regulatory frameworks because this may have implications for regulating conduct in each other's jurisdictions.

Reductions in national sovereignty may be inevitable, however, in order to address problems that result from the existence of national regulatory frameworks.

Option one

Under option one, the host jurisdiction surrenders the capacity to influence the development and implementation of regulation and, instead, relies on the cross-border effects of regulation within an issuer's home jurisdiction to ensure appropriate conduct when it operates across borders. The disadvantage of this approach is that the host jurisdiction must accept any adverse consequences of the regulation adopted by the home jurisdiction or end the arrangement by introducing its own regulatory framework.

Option two

A significant difficulty with option two is the parliamentary sovereignty issues it raises. The host jurisdiction would have to amend its law or regulations to reflect changes in the home jurisdiction's law. Not only would national parliaments not have control over certain aspects of the content of the laws of their jurisdiction, such a process would be likely to be resource intensive and could lead to gaps in the mutual recognition regime where there is a lag between changes in the laws of the respective jurisdictions. Such lags could delay proposed or existing trans-Tasman securities offerings and could constitute a disincentive for issuers contemplating entering the regime.

This is a key weakness that option three does not share.

Option three

Because compliance with the host jurisdiction's laws can be achieved through complying with the current requirements of the home jurisdiction, a change in the laws of the home jurisdiction has the effect of altering the substantive compliance requirements in the host jurisdiction, even though the laws of the host country do not change. This approach creates the theoretical risk that the laws of one country will change in a manner that affects the equivalence of the regulatory regimes, giving rise to concerns about the appropriateness of continuing to operate the mutual recognition regime. This risk will be addressed by including in the treaty provisions:

- requiring consultation in relation to the implementing legislation (and proposed amendments to it) and material changes to the scope of a jurisdiction's securities legislation; and

- enabling each jurisdiction to terminate the treaty for any reason (in the unlikely event that serious concerns arise and cannot be resolved).

The treaty will also provide the capacity to add to the prescribed list of entry and ongoing requirements if there is agreement between Ministers.

The provision requiring consultation is likely to reduce only marginally the flexibility with which Australia may amend its regulatory framework. This is because the Commonwealth is already under an obligation to consult the States and Territories before any such amendment. Consultation with New Zealand will take place at this time and the views expressed taken into account.

Complexity

The aim of the proposed mutual recognition arrangement is to reduce complexity for issuers offering securities across the Tasman by enabling them to carry on business under a single substantive regulatory framework (that of their home jurisdiction). Each of the identified options has the potential to reduce complexity for companies wanting to offer securities in Australia and in New Zealand.

All three options increase complexity for investors in the sense that the offer documents will not be in compliance with the usual Australian fundraising requirements (although they are functionally equivalent). It may therefore prove harder to compare the offer with the usual Australian offer.

Option one

Option one is the least complex option since the host jurisdiction simply disapplies particular aspects of its regulatory framework. This would marginally reduce ASIC's costs, however it would increase the complexity for investors (and hence their costs) as they would be required to familiarise themselves with the issuer's home system of regulation, make a judgement regarding its appropriateness and (potentially) seek relief in the home issuer's judicial system.

Options two and three

Options two and three may involve greater complexity for issuers since they would be required to interact more closely with regulators in two jurisdictions and would be exposed to multiple liability frameworks. This complexity is illustrated particularly with respect to option three by the existence of entry requirements and ongoing requirements.

Understanding the entry and ongoing requirements also increases the complexity for investors. However, options two and three may also result in less complexity for investors seeking to pursue statutory remedies against issuers since they could be pursued within an investor's home jurisdiction rather than the issuer's home jurisdiction. Furthermore, under option three, investors only need to be familiar with one system of regulation (that is their own country's system of regulation and the treaty).

Options two and three are likely to increase complexity for host jurisdiction regulators (and courts) as they would be required to monitor and enforce compliance with the laws of different substantive requirements within their respective jurisdictions.

However, complexity may be less evident under option three than option two since the host regulator performs a role secondary to that of the home regulator. ASIC indicate that the impact on regulators in relation to complexity is likely to be minimal.

Options two and three are less complex than the current regime.

Summary

The following table summarises the likely impacts of each option.

	Option one	Option two	Option three
Benefits from overcoming mutually exclusive regulatory requirements	• Removing or reducing compliance costs associated with multiple market participation (plus derivative benefits).	• Same as option one.	• Same as option one.
Compliance costs	• Lower than the current system. Arguably lower than options two and three.	• Lower than the current system. Higher than option 1 and marginally lower than option 3.	• Lower than the current system. Higher than option 1 and marginally higher than option 2.
Maintenance of appropriate regulatory outcomes	• Not capable.	• Capable.	• Most capable.
National/ parliamentary sovereignty	• Raises significant issues	• Raises significant issues and is unlikely to be acceptable to the Parliament.	• Best addresses the significant issues.
Complexity	• Least complex.	• Complex (though less complex than the current system).	• Marginally more complex than option 2 (though less complex than the current system).
Impact on administration / Government	• Some reduction in administration. Some reduction in the Government's ability to legislate in this area.	• No significant increase or decrease in administration. Significant reduction in the Government's ability to legislate in this area.	• No significant increase or decrease in administration. Minimal reduction in the Government's ability to legislate in this area.
Impact on	• Improved	• Improved	• Improved choice,

investors	choice, most reduction in regulatory protection.	choice, some reduction in regulatory protection.	with an appropriate level of regulatory protection.
Impact on issuers of securities	• Reduction in costs.	• Reduction in costs.	• Reduction in costs.

In conclusion, while options one and two may involve smaller overall compliance costs, option three provides for a reduction in compliance costs compared to the current system, while maintaining appropriate regulatory outcomes, a point recognised in many of the submissions. As the Australian Stock Exchange noted in their submission: "Importantly, the proposals outlined in the discussion paper [option three] will have the effect of lowering costs in both jurisdictions [over the current requirements] while achieving the same regulatory outcome."

6. CONSULTATION

The main parties affected by the regulation of trans-Tasman securities offerings are: issuers of securities in Australia and New Zealand; investors in Australia and New Zealand; and ASIC and the New Zealand Regulators.

The Australian Treasury and New Zealand Ministry of Economic Development jointly wrote a discussion paper relating to the establishment of trans-Tasman mutual recognition arrangement for offerings of securities and managed investment scheme interests. The discussion paper was released on 18 May 2004 for two months' public consultation. A total of 29 submissions on the discussion paper were received from Australian and New Zealand respondents, including from regulators, corporations, industry bodies and groups representing investors.

Treasury has discussed the options with ASIC, which expressed considerable concerns with option two (and will continue to do so). Treasury has also liaised with the New Zealand officials extensively in relation to the terms of the arrangement and will continue to do so for the purposes of the implementing legislation. New Zealand officials favour adopting option three.

Subject to various comments, nearly all respondents strongly support putting in place a mutual recognition regime along the lines of option three, which was described in the paper together with options one and two.

Respondents to the paper raised various issues, including:

- the scope of the mutual recognition arrangement;
  - whether the regime should apply to issuers registered in the home jurisdiction as foreign companies (as this may lead to the regime's abuse);
- entry and ongoing requirements;

  - the standardisation between Australia and New Zealand of entry and ongoing requirements (so that application of the arrangement is not unbalanced);

  - the consistent interpretation of the requirements by courts and regulators;

  - the content of, and guidance on, warning statements;

- consequences of breach of entry and ongoing requirements;

  - proportionality between the penalty for non-compliance with particular requirements and the nature of the breach (and whether particular breaches should result in an offer being voided);

- regulatory enforcement

  - whether existing arrangements are the most efficient way of fostering regulatory cooperation;

  - the potential for respective regulators/courts to take different approaches to the interpretation and application of home jurisdiction laws.

Since respondents to the paper are parties that have a familiarity with, and an appreciation of, the mechanics and subtleties involved in trans-Tasman offerings of securities and managed investment scheme interests, their submissions are potentially significant in shaping the scope and terms of the final arrangement and its implementation.

The majority of issues raised by respondents were technical issues that are best addressed by the implementing, domestic legislation (see below).

Broader issues that were raised and that have been assessed and incorporated into option three include that the:

- mutual recognition regime should not encompass financial advice that extends beyond offer documents and investment statements;

  - since the requirements under Australian and New Zealand law in respect of the provision of financial advice are not sufficiently similar at present, mutual recognition in this regard would not be readily achieved;

- the home jurisdiction regulator should issue guidance notes to the host jurisdiction regulator setting out their approach to interpreting and applying home jurisdiction laws;

  - since there is potential for Australian and New Zealand regulators to take different approaches to interpreting and applying their domestic laws, co-operation of this nature is desirable.

7. CONCLUSION AND RECOMMENDED OPTION

Treasury considers that option three (based on compliance with the substantive requirements of domestic law) provides a better basis for a mutual recognition arrangement than option one (based on the disapplication of domestic law) or option two (based on the incorporation of foreign law). Treasury recommends, therefore, that the Government adopt option three as the arrangement for establishing a trans-Tasman mutual recognition framework for offers of securities and managed investment scheme interests.

This conclusion is based on a weighted assessment of the following criteria, where the first two are probably the most significant:

- The benefits of overcoming mutually exclusive regulatory requirements.
- Consistency with providing appropriate regulatory outcomes in host jurisdictions (especially in relation to foreign issuers operating under mutual recognition).
- Impact on national and parliamentary sovereignty.
- The extent of regulatory complexity.

Treasury acknowledges that option three, compared to options one and two, is perhaps more complex and may contain marginally higher compliance costs for issuers (as they would have to interact more extensively with the overseas regulator) as well as for the host jurisdiction regulator and courts (as they would be required to enforce compliance with different frameworks within their respective jurisdictions). Nevertheless, option three will still lower costs for issuers compared to the current system, a point that was made in many of the submissions.

Further, the advantage of option three (compared to option one) is that it is more likely to ensure the maintenance of appropriate regulatory outcomes in relation to the conduct of overseas-based issuers in the host jurisdiction. Under option one, the conduct of overseas-based issuers is essentially unregulated under the law of the host jurisdiction (depending on the degree of disapplication of host jurisdiction law).

While option two would probably also ensure the maintenance of appropriate regulatory outcomes in the host jurisdiction, Treasury considers that it is unrealistic for Australia to formally incorporate relevant parts of New Zealand’s laws as part of its own framework.

Finally, the vast majority of respondents to the discussion paper strongly supported putting in place a mutual recognition arrangement based on option three. New Zealand also strongly supports option three.

8. IMPLEMENTATION & REVIEW

A treaty will specify the scope of the trans-Tasman mutual recognition regime and domestic legislation will implement the arrangement in Australia and New Zealand.

Account has been taken of the submissions received on the discussion paper in framing the treaty and will be taken in framing the domestic legislation.

The treaty will provide for:

- Consultation if, for example, a party considers that the achievement of any of the objectives of the treaty are being or may be frustrated.

- Review of the effectiveness of the mutual recognition regime no later than five years after the entry into force of the treaty.

- Termination of the treaty by either Australia or New Zealand at any time.

The following paragraphs indicate the steps involved in signing the treaty, implementing it via domestic legislation and reviewing the effectiveness of the mutual recognition regime.

Once the New Zealand and Australian Governments have agreed to the final text of the treaty, the treaty is signed by both Australia and New Zealand and tabled in both Australian Houses of Parliament. It is then examined by the Joint Standing Committee on Treaties (JSCOT) which will issue a report, to which the Government must respond (and table its response in Parliament). The treaty then goes to the Executive Council (ExCo) for authorisation of ratification and is then ratified by the Minister for Foreign Affairs.

Concurrently with this process, policy authority for the implementing legislation is sought, the implementing legislation drafted and exposed for public consultation. The Ministerial Council for Corporations will also be consulted, in accordance with the Corporations Agreement 2002, before the Bill is introduced into the Parliament.

The treaty will come into effect after an exchange of diplomatic notes with New Zealand, confirming the completion of the respective domestic procedures for the entry into force of the treaty. In Australia's case, this means that the treaty can only enter into force after all the legislative changes have been put in place.

The exact timing is still unclear, however we are aiming to have the scheme commence some time in 2006.

A review will be conducted no later than five years after the date of entry into force of the treaty. This process will review the effectiveness of the scheme, with a view to agreeing to and implementing any necessary improvements.

In terms of ongoing implementation, the Australian Treasury and the New Zealand Ministry of Economic Development will continue to liaise in order to coordinate details of the implementing legislation. ASIC and the New Zealand regulators will also liaise in order to ensure that offers made under the mutual recognition scheme are regulated appropriately. This is not expected to significantly increase the work load of these or other Government agencies.

Any problems that may arise in the context of the mutual recognition scheme will be dealt with through mutual understanding and dialogue between the relevant parties.