Chapter 2

The bill

Provisions of the bill

2.1 This bill will amend the *Corporations Act 2001* to:

- establish a mutual recognition regime for the issue of securities and interests in managed investment schemes (Schedule 1); and
- provide for the mutual recognition of companies (Schedule 2).

2.2 The bill will also amend the *Trade Practices Act 1974* (TPA) and *Radiocommunications Act 1992* to:

- enhance the Australian Competition and Consumer Commission's (ACCC's) ability to share information with others; and
- protect certain information given to, or obtained by, the ACCC from unauthorised use or disclosure (Schedule 3).

2.3 The measures included in the bill are intended to support closer economic relations and reduce duplication in regulatory compliance between Australia and New Zealand. They are consistent with the Australia–New Zealand Closer Economic Relations Trade Agreement and also formalise the work program attached to the Memorandum of Understanding on the Coordination of Business Law between Australia and New Zealand.[1]

2.4 The amendments in relation to the ACCC follow recommendations made by the Productivity Commission in its Research Report, *Australian and New Zealand Competition and Consumer Protection Regimes,* of 16 December 2004.[2]

Schedule 1: Mutual recognition of securities offers

2.5 The mutual recognition regime implements a Treaty signed between Australia and New Zealand on 22 February 2006 titled *Agreement between the Government of Australia and the Government of New Zealand in relation to the Mutual Recognition of Securities Offerings.*[3]

2.6 Under current regulatory requirements, entities from one country wanting to offer securities to investors in the other country must usually comply with two sets of requirements, leading to significant compliance costs. The aim of the mutual

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1 Explanatory Memorandum (EM), p. 1.

2 EM, p. 1.

3 EM, p. 2.

recognition arrangement is to reduce complexity for issuers offering securities across the Tasman, on the basis of compliance with a single substantive regulatory framework.

2.7 Mutual recognition is intended to facilitate investment between the two countries, enhance competition in capital markets, reduce costs for business and increase choice for investors. Issuers from New Zealand will be able to offer securities to investors in Australia on the basis of compliance with New Zealand fundraising requirements. Similarly, Australian issuers will be able to offer securities in New Zealand by complying with Australian requirements.[4]

2.8 The mutual recognition regime applies to offers of securities and interests in managed investment schemes, but does not include financial advice. The EM notes that this is because the requirements under Australian and New Zealand law in relation to the provision of financial advice are not sufficiently similar at present.[5]

2.9 Currently, the regime relates only to New Zealand. However, the bill is drafted in general terms so that it can be extended to other countries if a comparable agreement is reached with them in future, possibly by amending only the regulations.[6]

Schedule 2: Mutual recognition of companies

2.10 Schedule 2 of the bill provides for the mutual recognition of companies. It will exempt companies, incorporated in a country specified in the regulations, from having to lodge information or a document with the Australian Securities and Investments Commission (ASIC) that is already lodged with an equivalent authority in that country. The bill will not remove the requirement for companies to register with ASIC to operate in Australia, but aims to reduce the administration burden of registration and ongoing lodging requirements.[7]

2.11 Initially, the bill will allow companies in New Zealand to do business in Australia without complying with the filing requirements applicable to other foreign companies.

2.12 New Zealand recently enacted reciprocal arrangements to give the New Zealand regulator the power to make similar exemptions in relation to Australian companies operating in New Zealand.[8]

2.13 It is possible that other countries could be prescribed in the Regulations in future.[9]

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4 EM, p. 2.

5 EM, p. 24.

6 EM, p. 29, p. 35 and p. 41.

7 EM, p. 42.

8 Minister's second reading speech.

Schedule 3: Protection of information obtained by the ACCC

2.14 Schedule 3 of the bill contains two initiatives. Firstly, it will enhance the ACCC's ability to share information with governments and other agencies, including the New Zealand Commerce Commission. Secondly, it will provide for the protection of certain information given, or obtained, by the ACCC, including from a foreign government body.

2.15 Treasury officers explained that the schedule is derived from the Productivity Commission's (PC) report of December 2004, *Australian and New Zealand competition and consumer protection regimes.*[10] In its report, the Commission recommended that the TPA and the *Commerce Act 1986* (NZ) should be amended to allow the ACCC and the New Zealand Commerce Commission to exchange information that has been obtained through their information gathering powers. The PC also recommended that safeguards should be built into both Acts to ensure against the unauthorised use and disclosure of confidential or protected information.[11]

2.16 According to the EM, the ACCC's enhanced ability to share information which will follow passage of the schedule will place it in a similar position to ASIC. Section 127 of the ASIC Act 2001 provides for the appropriate disclosure of information by ASIC to Australian, and foreign, governments and agencies, including regulators. Similarly, the ACCC will be able to share certain information with other persons, bodies or agencies, including the New Zealand Commerce Commission. The ACCC is currently limited in its ability to share information with others, including its counterpart regulators.[12]

Treasury consultation process

2.17 A joint Australian and New Zealand discussion paper, *Trans-Tasman Mutual Recognition of Offers of Securities and Managed Investment Scheme Interests,* was issued in May 2004. It outlined three possible models and identified a preferred option. The Treasury and the New Zealand Ministry of Economic Development received a total of 29 submissions on the discussion paper. Subject to certain refinements, nearly all respondents strongly supported the introduction of a mutual recognition regime based on the preferred option.[13]

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9 EM, p. 42.

10 *Proof Committee Hansard,* 23 April 2007, p. 1.

11 Productivity Commission Research Report, *Australian and New Zealand Competition and Consumer Protection Regimes*, 16 December 2004, p. xxvii.

12 EM, p. 2.

13 Commentary on the exposure draft of the Corporations Amendment (NZ Closer Economic Relations) Bill 2006, p. 27. Available at http://www.treasury.gov.au/documents/1155/PDF/Explantory_Material.pdf

2.18 An exposure draft of the bill, covering Schedules 1 and 2, was released for public comment on 11 September 2006. Treasury received five submissions which were broadly supportive of the preferred Option 3.[14]

Committee inquiries

2.19 As mentioned above, the mutual recognition scheme implements a Treaty agreed between Australia and New Zealand. The Joint Standing Committee on Treaties examined the *Agreement between the Government of Australia and the Government of New Zealand in relation to the Mutual Recognition of Securities Offerings* in its Report 75 of 14 August 2006. The committee recommended that binding treaty action be taken.[15]

Evidence received by the committee

2.20 Submissions and correspondence received prior to the public hearing focused on Schedule 1 of the bill. Committee members also sought further information from Treasury officers in relation to Schedule 3.

2.21 ASIC advised the committee that it was consulted by the Treasury in the course of the preparation of the amendments to the *Corporations Act 2001* set out in the bill. ASIC supports these amendments which are generally aimed at enhancing the development of a single Australia/New Zealand economic market.[16]

2.22 In its submission to the committee's inquiry, the Securities and Derivatives Industry Association (SDIA) supported the preferred Option 3 outlined in the Regulatory Impact Statement and contained in the bill:

> …as it offers some regulatory "teeth" to the host jurisdiction with respect to investor protection whilst the primary responsibility remains with the home jurisdiction regulator.[17]

2.23 The SDIA said that it is important that communication between the home and host regulators is of a very high standard for the credibility of their roles to be maintained. In its view, proper analysis of 'relevant exchange of information' is crucial to the protection of investors in both jurisdictions.[18]

2.24 The Law Council of Australia made a brief written submission to the committee, forwarding a submission made by the Corporations Committee of the Business Law section of the Council to the Treasury in November 2006. The Council

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14 See at http://www.treasury.gov.au/contentitem.asp?NavId=062&ContentID=1245

15 Joint Standing Committee on Treaties, *Report 75: Treaties tabled on 11 October 2005 (2) 28 February and 28 March (2)*, pp 51–56.

16 Letter from Mr Steven Yen, PSM, Special Counsel, Policy, ASIC, dated 13 April 2007.

17 Securities and Derivatives Industry Association, *Submission 2*, p. 2.

18 Securities and Derivatives Industry Association, *Submission 2*, p. 2.

advised the committee that this submission 'still continues to represent the views of the [Corporations] Committee'.[19]

2.25 In its submission to the Treasury, the Council supported the enactment of legislation consistent with Option 3 (ie: the option adopted in this bill) for the reasons set out in the EM. It considers this creates a less complex framework than the current regime.

2.26 The Law Council also raised concerns with the Treasury that the mutual recognition regime not lead to regulatory arbitrage between recognised jurisdictions:

> When a decision is being made to proceed with an offering in one of two jurisdictions, it will be open to the promoters of the offering to establish an incorporated entity in either jurisdiction and therefore choose between the regulatory regime in each jurisdiction with which it will comply. This will be particularly so for structured financial products.
>
> For the long term integrity of these regimes to be supported it is important that there be clearly understood symmetry between jurisdictions both in the policy basis for particular structures of regulation and in the enforcement regimes that are created.[20]

2.27 The Law Council expressed concern about whether the underlying work on the Australian and New Zealand regulatory regimes and enforcement mechanisms has been carried out to sustain the long term integrity of the arrangement. In its view, the Australian and New Zealand offering regimes can differ quite fundamentally in their workings and policy. The Law Council points to the work of the European Union in developing mutual recognition principles as a good example of how this should be done.[21]

2.28 The Law Council also raised concerns about the lack of time allowed for industry consultation in relation to this bill.

2.29 Questioned by committee members about the Law Council's concerns about the consultation process, Treasury officers pointed out that there had been six weeks of public consultation in 2006, and there had also been a two month consultation process in 2004 on the principles of the scheme. Officers said that the consultation process had been adequate:

> …we felt that six weeks consultation was adequate with regard to the fact we had already set the principles of the scheme. We had a treaty that was reviewed by a committee and, furthermore, six weeks consultation was considered adequate given the issues that were flagged in the bill.[22]

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19 Law Council of Australia, *Submission 1*, p.1.

20 Law Council of Australia, *Submission 1*, p.1.

21 Law Council of Australia, *Submission 1*, p.2.

22 *Proof Committee Hansard,* 23 April 2007, p. 2.

2.30 Officers also assured the committee that the Law Council's submission had received consideration.[23]

2.31 The committee sought information from the Treasury about how the amendments in schedule 3 would ensure that the ACCC protects company information. Officers told the committee that the proposed amendments in Schedule 3 of the bill ensure that ACCC officials must not disclose any protected information except in the performance of their duties or as required by relevant law. Mr Matthew Bowd, an Analyst in the Competition Policy Framework Unit, said that proposed subsection 15AAA(12) only allows the ACCC to share protected information with other Australian and foreign governments and agencies where the information would enable them to perform one of their functions or powers. In addition, the Chairman of the ACCC can impose conditions on the recipients of restricted information. Mr Bowd noted that these information sharing amendments are consistent with those currently applicable to other regulators, such as ASIC.[24] (see paragraph 2.16)

2.32 Mr Scott Rogers, also an analyst in the Competition Policy Framework Unit, told the committee that under the new provisions, a company claiming that the ACCC has unlawfully disclosed protected information can pursue the matter through the relevant provision of the Crimes Act. Mr Rogers noted that the complainant can, in the first instance, go through the ACCC's general complaints handling mechanism. Thereafter, the complainant may refer the matter to the police or the DPP.[25]

Recommendation

The Committee recommends that the bill be passed.

Senator the Hon Michael Ronaldson
Chair

23 *Proof Committee Hansard*, 23 April 2007, p. 2.

24 Mr Matthew Bowd, The Treasury, *Committee Hansard*, 23 April 2007, p. 1.

25 Mr Scott Rogers, The Treasury, *Committee Hansard*, 23 April 2007, p. 2.