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SECURITIES OFFERINGS - EASING THE  
PATH FOR AUSTRALIAN ISSUERS

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**Introduction**

The Australian and New Zealand Governments have introduced a mutual recognition scheme which should make it easier for issuers to extend their securities offerings outside their home jurisdictions to members of the public in their trans-Tasman counterpart country.

On 13 June 2008, Australia and New Zealand exchanged diplomatic notes to bring into effect the trans-Tasman Mutual Recognition of Securities Offerings scheme (*mutual recognition scheme*). The laws implementing the mutual recognition scheme in New Zealand are set out in Part 5 of the New Zealand Securities Act and the Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008 (*New Zealand Regulations*).

The mutual recognition scheme permits an Australian issuer to extend an offer regulated under Australian law into New Zealand using the disclosure document required under Australian law, subject to meeting certain conditions. This means that the Australian issuer will no longer need to prepare an investment statement to wrap around the Australian disclosure document.

**Compliance for Australian issuers**

To make an offer in New Zealand in reliance on the mutual recognition scheme, the offer and the issuer must satisfy the following requirements.

**The offer must be a regulated offer in Australia**

The offer of securities in Australia must require a disclosure document or Product Disclosure Statement under the Australian Corporations Act. That document must have been lodged with the ASIC and any exposure period must have expired before the offer can commence in New Zealand.

**Nature of the issuer and certain prohibitions**

The issuer must be incorporated under the laws of Australia or be a natural person resident in Australia. The issuer or any person concerned in the management of the issuer must not be prohibited from being involved in management of the issuer under Australian or New Zealand law or previously banned by the New Zealand Securities Commission from making a regulated offer.

### **Type of securities**

The mutual recognition scheme applies to offers in New Zealand of equity securities, debt securities, interests in collective investment schemes and any interest in, or option to acquire, such securities.

### **Filing of documents with NZ Registrar of Companies**

Before making the offer in New Zealand, an Australian issuer must provide the New Zealand Registrar of Companies with written notice of its intention to make an offer under the New Zealand Regulations. The notice must contain certain information including:

- a statement that the Australian issuer intends to make an offer in accordance with the mutual recognition scheme;
- a description of the securities to be offered;
- the proposed offer period in New Zealand and Australia;
- details of the person authorised to accept service in New Zealand; and
- a statement that the Australian issuer submits to the New Zealand jurisdiction.

The notice must be accompanied by the Australian disclosure document or PDS, a copy of any exemptions or declarations granted by an Australian regulator which are being relied on by the issuer, and the constituent documents of the Australian issuer.

### **Disclosure document**

The Australian disclosure document must include the relevant warning statements contained in the New Zealand Regulations. These include statements that:

- the offer is being made pursuant to the New Zealand Regulations; and
- the offer is principally regulated under Australian, rather than New Zealand law.

The disclosure document must also highlight potential currency risks and any different tax treatment for New Zealand investors.

### **Ongoing requirements**

While the offer remains open in New Zealand, the Australian issuer must comply with certain conditions. These conditions include ensuring that the offer remains open in Australia, the offer complies with Australian securities laws, and that New Zealand investors can obtain certain documents relating to the offer and the issuer free of charge.

### **Notification requirements**

The Australian issuer must notify the New Zealand Registrar of Companies if certain circumstances arise during the offer period. Those circumstances include:

- when a change is made to the disclosure document or PDS;
- when a supplementary or replacement disclosure document or PDS is required to be issued under Australian law;
- there is a change or revocation of a general exemption relevant to the offer or an offer specific exemption; or
- ASIC begins an enforcement action or exercises a power it has under law in relation to the offer.

### **Failure to comply and its consequences**

If an Australian issuer breaches a term or condition of the New Zealand Regulations then the Australian issuer, the principal officers of the Australian issuer, every promoter of the securities and every director of the issuer may each be liable on summary conviction to a fine not exceeding NZ\$300,000. If the offence is a continuing one, a further fine may be imposed not exceeding NZ\$10,000 for every day or part of a day during which the offence continues.

In these circumstances the New Zealand Securities Commission may also make an order prohibiting the distribution of the Australian disclosure document or banning the Australian issuer from making an offer under the New Zealand Regulations.

### **Liability for misstatements – which law applies**

The mutual recognition scheme exempts a qualifying offer of securities from civil liability for “untrue statements” (i.e., misleading statements or omissions of material particulars) under the New Zealand Securities Act.

However, the New Zealand Securities Act continues to apply to impose criminal liability on an Australian issuer and its directors for distributing an offer document in New Zealand that contains an untrue statement. That criminal liability is subject to a “reasonable grounds to believe” defence.

Although it seems contrary to the intent of the mutual recognition scheme, there remains the possibility that an Australian issuer and its directors could be sued by a New Zealand investor under the New Zealand Fair Trading Act (the New Zealand equivalent of the Australian Trade Practices Act) for losses caused by misleading or

deceptive conduct or statements in relation to an offer of securities. If that liability exists, the “reasonable grounds to believe” defence will again be available.

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