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Australia and New Zealand - Mutual Recognition of Securities Offerings

The Corporations (NZ Closer Economic Relations) and other Legislation Amendment Act 2007 (**Amending Act**) is proposed to come into force on 21 December 2007, if not proclaimed sooner. The Amending Act will insert a new Chapter 8 into the Corporations Act 2001 (Cth) dealing with mutual recognition of securities offerings. The following is a summary of the new provisions of the Corporations Act which will become operative once the Amending Act comes into force.

Section 1200F provides that certain existing provisions of the Corporations Act will not apply in relation to a recognised offer. For instance, Chapter 6D [*fundraising*] (other than sections 736 and 738) will not apply to a recognised offer or the offeror of the recognised offer or any offer document for the offer.

A number of conditions must be met before an offer will be considered a “*recognised offer*” for the purposes of the Act. Briefly, the person offering the securities must be:

1. a person incorporated by, or under, the law of a recognised jurisdiction; or
2. a natural person resident in the recognised jurisdiction; or
3. a legal person established by, or under, the law of the recognised jurisdiction; or
4. a person of a kind prescribed by the regulations.

“*Securities*” is defined to include, inter alia, “*shares in a body*”.

“*Recognised jurisdiction*” means a foreign country prescribed by the regulations as a recognised jurisdiction. It is intended that New Zealand will initially be so prescribed. The proposed new provisions have been drafted so that other jurisdictions can also become recognised jurisdictions in the future.

At least 14 days before the [recognised] offer is made in Australia, the person making the offer must lodge a notice with ASIC as well as certain documents and information prescribed by section 1200D. These documents include any offer document required by the law of the recognised jurisdiction, the constitution of the offering company and any details of any relevant exemptions applying to that company in its recognised jurisdiction. The regulations may also require certain statements or details prescribed by the regulations (referred to as a “*warning statement*” in the Amending Act).

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Certain conditions apply in relation to a recognised offer until the recognised offer is closed in Australia. An important condition is that the offer must be made in the recognised jurisdiction as well as in Australia. The offer must also comply with the law of the recognised jurisdiction. If there are any changes to the details of the offer then those changes must also be notified to ASIC.

If the recognised offer is in relation to a managed investment scheme, an offeror must have a dispute resolution process that complies with subsection 1017G(2) of the Corporations Act.

Section 1200K provides that a disclosing entity that has been the offeror of a recognised offer must comply with the continuous disclosure obligations under section 675 of the Corporations Act requiring disclosing entities to lodge material information with ASIC. This applies even if the disclosing entity is not required, by the law of the recognised jurisdiction to which the offer relates, to include that material information in a supplementary or replacement offer document.

The restrictions on pre-prospectus/pre-offer advertising under section 734 and section 1018A (financial products) of the Corporations Act will also apply to recognised offers (section 1200L).

Under section 1200N, ASIC will have the power to make stop orders in relation to documents in connection with a recognised offer – similar to ASIC’s powers in relation to offers by Australian companies. For example, ASIC may make a stop order in relation to a recognised offer if it is satisfied that there is a misleading or deceptive statement in, or a material omission from, an offer document in respect of a recognised offer.

Part 8.3 of the Amending Act contains provisions relating to where a body (e.g. an Australian company) proposes to make an offer of securities in a recognised jurisdiction under a “foreign recognition scheme”. A “foreign recognition scheme” means “*the provisions of a law of a recognised jurisdiction that are prescribed by the regulations as comprising a foreign recognition scheme for the purposes of this Chapter*”.

Section 1200T provides:

“If:

- (a) *a body proposes to make, or is making an offer of securities in a recognised jurisdiction under a foreign recognition scheme; and*
- (b) *under the foreign recognition scheme, the offer is to be regulated by the law of this jurisdiction;*

this Act applies in the recognised jurisdiction in relation to the offer as if it were an offer being made in this jurisdiction.”

In other words, if an Australian company chooses to make an offer of securities in New Zealand pursuant to a foreign recognition scheme, and under that foreign recognition scheme the laws of Australia are applicable to that offer in New Zealand, then the company will be subject to the Corporations Act in respect of its conduct in New Zealand.



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It is intended that corresponding legislation will be enacted in New Zealand.

10 October 2007

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