



## Emerging Trends in the Trans-Tasman Financial and Capital Markets: Harmonisation or Assimilation?

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### Introduction

Today I would like to offer my perspectives on the trends affecting the trans-Tasman financial and capital markets. In addition to looking at the specific groundbreaking steps proposed for the harmonisation of Australian and New Zealand securities laws, I believe that it is important to place current trans-Tasman events in the wider context of developments in the global markets.

The subtitle to my paper today is "*harmonisation or assimilation?*" This title is intended to be provocative. Whenever trends are identified, there are also challenges and opportunities. My paper is not intended as a pure legal analysis of what has happened historically, what the draft law says and what is likely to occur in the future. The steps taken towards harmonisation of securities laws deal with extending a local capital raising offer from one (home) market to the other (host) market. The bigger issue arises when each country seeks to establish its own laws in relation to securities offers within its market to govern any offer originating in that market and in turn, by virtue of harmonisation, offers extended beyond that market. The question becomes should New Zealand differentiate itself as a home market for capital raising, and if so, how?

### What trends are discernible from the markets?

I believe it is important to place the trans-Tasman developments in the context of what I see as the current global trends. In short, the name of the game is access to and the freedom of transfer of capital. In one word, the focus is on "*liquidity*":

- vigorous capital markets competition by acquisition highlighting market convergence and the emergence of a global marketplace for capital;
- increasing emphasis on trading or economic associations and alliances, and focus on trade liberalisation with developing and emerging economies;
- continuing heavy demand for valuable, limited resources and commodities (oil, minerals and water) fuelled particularly by high growth economies such as China;
- historically high levels of the supply of capital and debt as developing countries grow and developed countries populations age and save for retirement;
- the re-emergence and astonishing growth of both private equity funds and hedge funds presenting a challenge to regulated equity markets and global implications arising from high levels of leverage;
- concentration of rule making power in the hands of frontline government agencies and the shifting of that power to regulated stock exchanges and unregulated sectors.

## **A global market**

We are currently witnessing the emergence of a true global market. This is occurring almost in spite of what the governments and regulators are doing. As we open our daily newspapers and web pages, we read that stock exchanges (that is, regulated capital markets) are seeking to buy other exchanges, whether in the United States, Europe, Asia or Australasia, and seeking global alliances. NZX is establishing an electronic communications network in Australia to process Australian share trades. NZX is creating this share trading platform with the help of five brokers. While this is occurring, a group of international investment banks is setting up a global trading platform. Exchanges are competing for revenue by competing for capital –IPOs and listings – by offering greater liquidity and lower fees.

What is occurring is a move towards a financial world without borders. The relative ease of transfer and movement of capital is driving these changes to stock exchanges that not so long ago were focused on their own geographic markets. In turn, stock exchanges are competing for capital with private equity funds. There are two important points here. First, that the attraction of capital and the freedom of its movement as exemplified by the stock exchanges, private equity and hedge funds are transforming how money is raised and where it is raised. Secondly, that these changes raise serious questions about what is the place of regulation and specifically what is the role of government?

## **The role of law**

New regulation is considered while existing regulation is questioned. We read that regulators are concerned about private equity and hedge funds and that there are calls for greater regulatory scrutiny. We read that the top European Union Court is proposing to rule against a German law containing Volkswagen's 20% cap on voting rights on the grounds that it violates the principle of the free movement of capital. There is a balance to be struck between an adequate level of core regulation on the one hand that is sufficient to engender local and international confidence in the market (fraud, insider trading, market manipulation, corporate governance) and having a level of regulation that does not impede but allows the attraction and freedom of movement of capital. There are three levels at which lawmakers and regulators may have a role:

- the first is to establish a core or base level of regulation; 12 & 13 March 2007 M & A Summit
- secondly, to remove existing regulatory barriers, either systematically or on a wider basis, to encourage greater economic activity with other markets;
- thirdly, to introduce fundamental laws for the free movement of capital that take precedence over all regulation.

A significant and emerging trend that governments and indeed the Australian and New Zealand governments appear to be alive to is that merely tinkering at the edges and attempting harmonisation of laws on a piecemeal basis is time consuming, costly and ultimately ineffective. Above all, businesses demand certainty and clarity.

A market is a convergence of mutually self-interested parties seeking to interact using a universally accepted set of rules. Those rules may not be statutory, but there must be rules. Contrary to a view that is held by some commentators, the role of law is to facilitate commercial transactions. How do we determine the appropriate level of intervention by the introduction of rules? It is commonly accepted that a good law or rule is one which is universally understood, accepted and enforced. Historically, rules in the form of laws are latecomers to the market. Laws are typically reactive and by definition are not timely. While changing laws reflect social, political and economic change, the pace of legislative processes often delay the introduction of an urgently needed set of laws by months and even years.

Given the pace of change in the commercial world, lawmakers have recognised that in order to match that pace of change, laws must be made on the run and put in place as quickly as possible. Increasingly, lawmakers are recognising that in terms of industry specific regulation, subject to some qualifications, specialised industry bodies or government agencies with a direct interface with the industry are better placed to regulate than elected representatives advised by bureaucratic officials. Both the US and New Zealand reflect this approach.

Historically, New Zealand laws have been enacted in response to three forces:

- first, where there is pressure from overseas to introduce new laws to ensure consistency with international practice;
- secondly, in response to a New Zealand specific situation, usually a calamitous event;
- thirdly, where New Zealand adopts specific reform intended to differentiate New Zealand or to gain an economic advantage.

There is a growing trend towards regulation to ensure consistency with international laws. There are some commentators who advocate that New Zealand simply follows the international lead because as a small market we have no choice. In contrast, New Zealand has had its very unique legislation that required explanation to the world. The prime example that comes to mind is the Corporations (Investigation and Management) Act. Some of you will recall the international reaction to this very New Zealand specific legislation. At the time it was regarded outside New Zealand as being outside international norms and effectively added a significant risk premium for New Zealand borrowers. It did not enhance New Zealand's ability to raise debt.

One view is that unless New Zealand can point to a rationale for a New Zealand specific law, there is a good case for following the leaders. But, ultimately this means assimilation – New Zealand will no longer be unique, and our market becomes a small outpost. Instead, New Zealand should focus on enhancing its competitiveness, such as the relatively low cost of establishing a business, raising capital and share trading, and the time zone relative to other major markets.

While we are seeing more legislation that is reactive to international pressure, for example the rules relating to corporate governance in the wake of the Sarbanes- Oxley Act, we are also seeing push back by market participants. As corporates and ultimately investors rail against onerous and costly compliance with regulations flowing from the Sarbanes-Oxley Act, regulators are coming

under fire. The higher costs imposed on corporates and in turn IPOs in the United States is said to have a downward effect on capital raising in the United States.

Both New Zealand and Australia regulators are increasing sensitive to the cost benefit analysis of any new legislation. The corollary to this is that less regulation may be better and that sometimes existing legislation is no longer justifiable. We are seeing fewer laws made in New Zealand that set us apart and give New Zealand an advantage. Having said that, the recent debacle over the revision of the taxation of investments legislation is an example that illustrates that tax legislation can signal and be directly responsible for attracting capital and in this case, capital flight. Laws also lack the flexibility to deal with modern capital markets as transactions evolve and become more diverse. We are therefore seeing an increasing focus by regulators on regulating behaviour, and particularly ethical practices, such as conflicts of interest.

### **Key legal rules for markets**

Ultimately, where capital is raised is made on the basis of a cost versus benefit analysis, with the financial equation taking into account a discount factor for risk. Legal risk is an important component. The other equally important component is political risk that is a reflection of political stability including whether there is any perceived or actual corruption involving government agencies and the ability of those government agencies to effectively carry out their roles in an objective way. The key components that establish the framework on which a local market will be founded are:

- first, the ease of entry of foreign investment and cost of registration;
- secondly, the existence of basic laws around the sanctity of contract, creditors' rights, intellectual property rights, labour laws and environmental liability laws and the enforcement of obligations;
- thirdly, laws relating to the taxation of income and any capital gains tax;
- fourthly, laws governing the ease of transfer of capital and repatriation of profits, and currency controls or regulations;
- fifthly, laws relating to capital raising, and basic market conduct, disclosure and trading.

Increasingly, the ability of parties in different countries to agree on the applicable (international) rules and practices relating to matters such as accounting standards and dispute resolution, mediation and arbitration are examples of how local laws and rules become redundant in a global marketplace. If the place of incorporation is neutral, then the focus becomes the actual places of business. If the market for capital raising is a global one, every market must stand on its individual merits and comparative advantages.

A further trend we are seeing is that each individual country's laws and rules are in some cases not as important and will play an equal secondary role to industry or market regulation. The recent calls for regulation of the largely unregulated burgeoning private equity and hedge funds illustrates that regulated markets do not have a monopoly for capital raising.

As governments face an ever changing marketplace, detailed rules around market regulation is being handed down to government agencies to prescribe. More and more we are seeing regulation developed and enforced by specific frontline government agencies. Self-regulating organisations and industry entities in a coregulatory environment have a significant regulatory role. Another trend we are now seeing is that market regulation, as opposed to laws, is playing a larger role. For example, the City Code is a code of relatively simple rules that are abided by the participants who understand that they enforced by exclusion. This set of market rules on behaviour has become the de facto written rules regarding market behaviour. These operate over and above the basic laws and market regulations.

### **The New Zealand market**

If we accept the hypothesis that laws are increasingly playing a minor role, then what is the role of law in today's financial markets? In my view, the law should have one sole policy focus; that is, to encourage capital raising. Ultimately, the law should focus on the freedom of movement of capital. Since the liberalisation of New Zealand's financial markets from 1984 onwards, we have seen large capital inflows into New Zealand into the regulated or listed, as well as the non-listed sectors. We only need to observe the current NZX statistics relating to the proportion of foreign ownership of the New Zealand listed equities market as well as the listed debt market to appreciate this. However, New Zealand's main problem has been the absence of liquid equities or debt due to low volume and thin trading. There is no easy answer to this.

However, the attraction of capital is not something which can be seen in isolation. It is useful to look at a number of examples of financial markets that are geographically closer to New Zealand and Australia to understand the forces at work. How are those markets competing for capital?

### **Examples of other markets**

The first example is Dubai. I use this example merely to illustrate that the attraction of capital also requires an educated and experienced labour force. In the absence of a skilled labour force, it is difficult to harvest increasingly large sums of capital.

My second example is India. India is regarded as having sound foundations for a growing financial market. It has certainty regarding the rule of law and its legal system. However, there are still concerns concerning some currency trading controls and the enforcement of market manipulation rules. India still has restrictions concerning the opening of foreign offices and there are still issues around capital convertibility. India also has high local tax rates. However, it enjoys regional proximity to the large and emerging Asian and South East Asian markets and has a large pool of skilled labour. India's infrastructure has been developed at a rapid rate and it has a growing technological base.

My third example is Hong Kong, which has a strong equities trading and IPO focus. Hong Kong enjoys the certainty of the rule of law and has considerable financial markets expertise and experience. Hong Kong is renowned for its strong corporate governance regulation. Its 6 million people are well-educated and widely speak both English and Mandarin as well as Cantonese. It has the advantage of close ties to global markets and is geographically well positioned in relation to China and surrounding Asian markets. In the past year, Hong Kong has rated number one in

terms of the greatest volume of IPOs worldwide (although more money overall was raised in London).

My final example is Shanghai. Shanghai is regarded as the centre of Chinese and Asian business, with most multinationals in the region having their regional offices in Shanghai. The currency is still the Chinese currency. It is positioned well in terms of its time zone compared with Hong Kong and Tokyo. It has strong foundations in terms of commodities trading and is seen as an ideal base for debt issuance. However, it has been recently marred by corruption scandals and there is still an overall lack of international confidence in its political stability. However, with increasing amounts being spent on infrastructure and a well educated bi-lingual workforce, it is positioned well for the future of China and the region.

Each of these markets is characterised by at least one distinct comparative advantage predicated on one or more historical or developed strengths, nurtured over time. New Zealand as a market cannot compete in terms of size alone, it must seek to follow examples so that it can sustain a long term competitive advantage. If not, New Zealand risks isolation and eventual assimilation.

### **Trans-Tasman Harmonisation**

Until very recent events, the history of trans-Tasman securities regulation has been characterised by limited recognition of certain financial products on a reciprocal basis. An example of this was the limited liberalisation of requirements in New Zealand and in Australia for unit trusts. There had not been a concerted, coordinated effort to recognise securities offerings from each other's jurisdiction principally for two reasons:

- first, the underlying disclosure regimes are quite different when considered in detail on a pure disclosure basis;
- secondly, and more importantly, there has been from a New Zealand perspective a policy stance taken that the New Zealand investment statement that became the primary offer document in 1997 did not have at that time an Australian equivalent. Permitting an Australian offer in New Zealand without an investment statement ran counter to the importance being accorded to the investment statements at that time.

There has been the further development of the introduction in Australia of the registered managed investment scheme and the introduction of an associated product disclosure statement. New Zealand responded with an exemption specifically for this product class. This approach has characterised the New Zealand approach to recognition of Australian offers. The approach has been reactionary and focused on specific products, with each jurisdiction jealously guarding its local laws.

With the recent commitment by the Australian and New Zealand governments to move towards harmonisation of securities offerings, we are poised to enter into an entirely different trans-Tasman capital raising environment. It will be a groundbreaking event when the regimes come into force. There will be reciprocity for contemporaneous trans-Tasman capital raisings. This is a clear recognition that when raising capital, geographical issues are not material. Whether funds are raised by a New Zealand or Australian issuer, so long as you have met the basic filing

requirements and your offer is not misleading, harmonisation allows you to raise capital in both markets.

### **What has happened to date?**

The framework for the co-ordination of business law between New Zealand and Australia is found in the Memorandum of Understanding between the Government of Australia and the Government of New Zealand on the Co-ordination of Business Law, signed on 22 February 2006. Earlier memoranda were signed in 2000 and 1988. The 1988 memorandum was part of a review of the 1 January 1983 Australian New Zealand Closer Economic Relations Trade Agreement.

On 4 October 2001, the Australian Minister for Financial Services and Regulation proposed to the New Zealand Minister of Commerce that the countries consider formal processes of mutual recognition in financial services regulation.

On 18 May 2004, the Australian Treasury and the New Zealand Ministry of Economic Development jointly wrote a discussion paper on Trans-Tasman Mutual Recognition for Offers of Securities and Management Investment Scheme Interests. After a period of consultation, the Australian Treasury discussed the options available with ASIC and New Zealand officials.

The Agreement between the Government of Australia and the Government of New Zealand in Relation to Mutual Recognition of Securities Offerings ("*the Treaty*") was signed on 22 February 2006. It specifies the scope of the trans-Tasman mutual recognition regime to be implemented by domestic legislation in both countries. Implementing law has been drafted and this has resulted in the Australian Exposure Draft of the Corporations Amendment (New Zealand Closer Economic Relations) Bill 2006 and the New Zealand Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2006.

### **Status and timing**

The respective draft legislation on both sides of the Tasman reflect groundbreaking steps towards not only the harmonisation of securities laws in both countries, but ultimately a single capital market. The opening up of the Australian market to New Zealand offers is a significant step for New Zealand issuers and vice versa. It is analogous to New Zealand a producer of goods having open access to the Australian market. At the time of writing this paper, with the consultation process completed for both pieces of legislation, the Ministry of Economic Development has indicated that the timing of the introduction of the New Zealand regulations is intended to be contemporaneous with the Australian effective date. New Zealand is waiting for Australia to introduce its Bill and approve the related regulations, probably in March 2007. This means that the new regimes are not likely to come into force before the middle of 2007.

The key characteristics of the draft legislation are that, from a New Zealand perspective, a New Zealand registered issuer (whether listed or not) may extend an offer that has been lawfully made in New Zealand to investors in Australia without being required to comply with most of the substantive requirements of Australian laws that would apply to domestic offers. New Zealand issuers need not lodge information with ASIC that has already been lodged with the New Zealand Registrar of Companies. However, there are some ASIC filing requirements in Australia, but these

are relatively minor and straightforward in nature. The Australian draft legislation also removes certain other filing requirements for New Zealand companies operating in Australia but this is not discussed in any further detail in this paper. Interestingly, while this paper discusses New Zealand offers in Australia, the Australian legislation is generic and is therefore able to be extended to offers from other countries, whether in South East Asia or elsewhere.

### **Current position in New Zealand**

Under the current regime, offers by Australian offerors in New Zealand are governed by the Securities Act 1978, which requires a registered prospectus and the offer to be accompanied by an investment statement. Australian issuers are subject to the requirements of the Act unless an exemption notice applies. Two Australian specific exemption notices which have been highlighted are the Securities Act (Australian Issuers) Exemption Notice 2002, which relates to offers by Australian issuers in New Zealand and the Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 2003, which relates to the offer of interests in those schemes in New Zealand. An Australian issuer under the first notice is still required to prepare an investment statement. An issuer under the second notice need not prepare an investment statement if the offer is made using a product disclosure statement.

### **Current position in Australia**

Offers by New Zealand offerors in Australia are governed by the Corporations Act 2001, which requires an offer of securities to be accompanied by the relevant disclosure document. Typically, this will mean that a product disclosure statement is required. Under the Corporations Act, ASIC has the power to grant specific exemptions and class orders. However, from a New Zealand issuer's perspective, there has not been any significant relief for New Zealand issuers.

### **Existing regulatory framework**

The principal problem from a New Zealand issuer's perspective is that when raising capital from the issue of new securities, that issuer cannot use its New Zealand home jurisdiction offer documents when making a trans-Tasman offer of securities in Australia. Rather, it must comply with the laws of the Australian host jurisdiction unless there is an applicable exemption. This has resulted in significant costs being imposed on New Zealand issuers, as well as on Australian issuers making offers here, or offers not being made at all. Significant costs are imposed such as advisory fees on the Australian requirements and for preparing the necessary additional disclosure documents.

The mutual recognition arrangements have the aim of overcoming mutually inconsistent requirements between Australia and New Zealand and also to reduce compliance costs associated with complying with the different regulatory requirements of the other jurisdiction. The starting point is that if an issuer complies with the regulations of its home jurisdiction, this should permit that issuer to raise funds in the other host jurisdiction. Three possible approaches were considered to achieve this for offers of securities:

- the first option is to have the host jurisdiction in effect allowing the offer to be regulated solely by the home jurisdiction. This is given effect by the host jurisdiction disapplying parts of its regulation. This is the model adopted in the European Union;
- the second option is that in addition to disapplying parts of its regulations, the host jurisdiction takes the additional step of incorporating the laws of the home jurisdiction within its domestic regulatory framework. The host jurisdiction then takes responsibility for regulating the issuer. This requires host jurisdiction's regulator to take on a greater role, including regulating overseas issuers under a different regulatory framework;
- the third option is essentially a middle ground between the first two options. This is the option chosen by Australia and New Zealand in relation to the proposed regulations. This approach is based on a principle that an offer of securities regulated in its home country can be lawfully made in the host country provided that certain entry requirements are satisfied and the offer or complies with certain ongoing requirements in the host and home jurisdictions.

Entry requirements are typically relating to "*opting in*" to the mutual recognition regime by filing a notice with the host regulator and providing an address for service in the host country and submitting to the jurisdiction of the courts of that country. Ongoing requirements include conditions that the offer must comply with the home jurisdiction's ongoing regulatory requirements and that the offer document is accompanied by warnings in relation to governing law, taxation and currency risk (also known as health warnings). Under this option, the home jurisdiction has primary responsibility for supervising the offer. The host country regulator has the power to suspend or stop an offer and to prohibit advertisements in that country if entry requirements are not satisfied or if any ongoing requirements are not complied with.

#### **Proposed Australian regime: New Zealand offers in Australia**

Briefly by way of outline, in order to extend an offer that has been made in New Zealand to Australia, where the offeror meets the offeror criteria, for example, that it is incorporated in New Zealand, and the offer is of a kind prescribed by the regulations, then provided that the offeror has lodged the required documents and information with ASIC, the offer is eligible to be a recognised offer in Australia. The securities that may be offered are shares, debentures and interests in managed investment schemes (this appears to include unit trusts and participatory securities with a statutory supervisor). The regime does not extend to offers of superannuation products, life insurance or derivatives.

There are continuing obligations on the offeror relating to supplementary lodgment conditions, for example, notifying any change in the offer document, notifying any change of address for service and complying with the law of New Zealand. It should be noted that ASIC has powers to use stop orders if there is any contravention of the relevant provisions.

Other important aspects to note are that the person offering securities in Australia must be incorporated in New Zealand, or a natural person residing in New Zealand or a legal person who is established by or under the laws of New Zealand.

Interestingly, this means that companies incorporated in third countries will not be able to use this regime to issue securities in Australia when they have complied with New Zealand law. The New Zealand regulations allow such offerors, and this appears to have been an accepted difference between the two sets of proposed regulations. The definition of an "offeror" is also sufficiently wide to catch trustees in relation to New Zealand collective investment vehicles.

The principal notice requirements for the New Zealand offeror are fairly straightforward and relate to:

- the offer documents;
- the company's constitution in the case of shares and for other issuers the relevant scheme constitution or trust deed;
- a copy of the health warning statement;
- details of any New Zealand exemption; and
- the address for service in Australia.

In addition, certain ongoing requirements will apply, including in particular that:

- the New Zealand offeror must comply with the law of New Zealand;
- there must be a contemporaneous offer in both jurisdictions;
- there are information filing requirements with ASIC in relation to changes to the offer;
- notice must be given to ASIC where there is a change of address for service and any exercise of statutory power by, in New Zealand, the Securities Commission.

Careful attention has been paid to avoiding the problem encountered in the recent past in relation to void allotments that has been experienced by a number of Australian issuers in New Zealand. As you will be aware, a number of Australian issuers failed to comply with what were regarded to be minor requirements in relation to particular exemption notices. However, these infractions were not dealt with under the then Securities Act and resulted in significant amendments to the Act to enable those offers to be validated. Under the proposed new regime, minor technical failures to meet entry requirements may be fixed by an ASIC declaration. In Australia, breach of ongoing conditions may result in criminal penalties, however, this does not render any allotment void under the offer.

### **Proposed New Zealand regime: Australian offers in New Zealand**

Under the proposed New Zealand regulations, an offer may be made by an Australian offeror of equity or debt securities, interests in collective investment schemes (registered managed investment schemes), or any interest in or option to acquire any of those securities. The offer must be in respect of which a disclosure document or product disclosure statement or similar offer document is required under Australian securities legislation.

As noted previously, it is interesting that Australian offerors are defined to mean an offeror incorporated under the laws of Australia, a natural person resident in Australia, a legal person established under the laws of Australia, or any offeror registered as an overseas company under the laws of Australia. This last category does not appear in the Australian draft. In terms of offerors, the scope of the New Zealand draft regulations is wider than that of the Australian equivalent. An Australian offeror in New Zealand can be an overseas company, but a New Zealand offeror in Australia must be incorporated in New Zealand.

Essentially, securities under this regime offered in New Zealand by an Australian offeror are exempt from the Securities Act 1978 and its regulations except for the provisions relating to door to door sales, prohibition of advertisements, and criminal liability for misstatements in advertisements. The New Zealand draft regulations permit Australian offerors to make certain pre-offer statements of a limited nature. The conditions for the offer being recognised in New Zealand are that the offer must continue to be a valid offer under the Corporations Act, and have complied with ASIC filing requirements and any waiting period must have expired. The regime does not impose any additional requirements for listed issuers in relation to their home exchange, apart from any requirements implied by compliance with the Corporations Law.

There are certain requirements in relation to giving notice to the Registrar of Companies to "*opt in*" to the regime. The notice must:

- state that the offeror intends to make an offer in accordance with the regulations;
- include the name of the offeror and the securities to be offered; • state the proposed offer period;
- state the name and address in New Zealand of the person who is authorised to accept service in New Zealand;
- include a statement that the offeror submits to the jurisdiction of the courts of New Zealand;
- the notice must be signed by a person of authority; and
- must be accompanied by certain documents.

The accompanying documents are:

- the offer documents filed with ASIC or where there is no filing requirement the actual offer documents;
  - a copy of any applicable ASIC exemption;
  - particulars of any general ASIC exemption relevant to the offer;
  - the relevant constitutional document in relation to the offer or securities; and
  - a copy of the required health warning.

The health warning is notable in the sense that it highlights that the offer is made in both Australia and New Zealand and is regulated under the securities legislation of Australia. It warns that apart

from the exceptions noted earlier, the securities legislation of New Zealand does not generally apply to the offer. The health warning goes on to state that under the Treaty, the Securities Commission and ASIC have enforcement responsibilities and any complaint should in the first instance be directed to the Securities Commission who will pass on the complaint to ASIC if necessary. There is the standard warning in relation to tax implications and currency exchange risks.

The offeror must also comply with certain ongoing requirements, including:

- providing offerees on request with copies of the relevant constitutional documents in relation to the offer or the offeror;
- that certain prohibited persons must not be involved in management with the offeror; and
- that there are certain ongoing filing requirements upon certain events, including where there is a change in certain details in relation to the offer or the offeror and any applicable exemptions.

As with offers in Australia, the New Zealand regulations stipulate that failure to meet any entry requirements is only fatal where the offeror does not obtain a declaration in writing from the Securities Commission that the failure is technical and minor only and that it is a non-material breach. Failure to comply with any ongoing requirements may adversely affect an offer because the regulations do not apply to securities offered by an Australian offeror if that offeror or associated person has breached those ongoing requirements and the Commission has given notice that the offeror must not make any further offers. Again, this is an attempt to deal with the situation where, in particular, ongoing requirements may not be complied with and may lead to the offer being rendered void under New Zealand law.

For any Australian offer, there are one or two issues to be aware of, particularly ensuring that the offer document is able to be read by both New Zealand and Australian offerees and important matters such as the returns and fees are not misleading for both sets of offerees.

### **The future?**

In summary, there are potentially greater benefits under the proposed two new regimes for New Zealand issuers seeking to raise funds by being able to access the much larger Australian market at a lower cost than before. Australian issuers will have direct access to what would otherwise be an expensive and limited class of potential New Zealand investors. Existing and potential new New Zealand issuers may choose to base their capital raising in New Zealand because a New Zealand offer can potentially become a trans-Tasman offer at a relatively low additional cost.

The stark reality for the New Zealand market is that the potentially greater volume of Australian offers becoming available to New Zealand investors may result in a net outflow of funds from New Zealand. These funds might otherwise have been available for New Zealand based issuers. Smaller Australian offers that previously were uneconomic to offer to the smaller pool of investors in New Zealand will compete with New Zealand offers for capital.

The challenge for New Zealand issuers, the New Zealand government and regulators, and NZX is to attract a net inflow of funds into New Zealand. Issuers must be encouraged to be based in New Zealand and ultimately to either to list in New Zealand or to invest that capital in New Zealand. The danger of harmonisation is that it may distract everyone from what ought to be the continuing long term focus – the attraction to the New Zealand market of issuers and their capital by positive action. New Zealand has a great opportunity to realign its legal framework to take advantage of the new global market. Whether that is achieved by becoming more like other markets, or establishing New Zealand as a cost-effective place to raise funds, presents our next and biggest challenge.

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