

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  
SUBMISSION**

**AUSTRALIAN AND NEW ZEALAND COMPETITION AND CONSUMER  
PROTECTION REGIMES**

**PRODUCTIVITY COMMISSION ISSUES PAPER**

Thank you for providing ASIC with the opportunity to meet and comment on the Productivity Commission's Issues Paper on Australian and New Zealand Competition and Consumer Protection Regimes.

**Background – ASIC and Consumer Protection**

In conducting its inquiry, the Productivity Commission is to take into account the consumer protection provisions applying to financial services in the *Australian Securities and Investments Commission Act 2001* ("ASIC Act") and the *Corporations Act 2001* ("Corporations Act") (page 12 of the Issues Paper).

The consumer protection provisions contained in Part 2 of the ASIC Act provide additional enforcement options where consumers have been harmed by "sharp practices" in relation to financial services. The ability for ASIC to take remedial action if a financial service provider has engaged in misleading and deceptive conduct is consistent with ASIC's broader responsibilities regulating financial service providers and disclosure requirements for securities and other financial products.

In addition to the specific provisions addressing unconscionable conduct and consumer protection in relation to financial services in Part 2 of the ASIC Act, ASIC also considers its statutory licensing regime for financial services business and the mandatory disclosure requirements for securities and other financial products are also essential consumer protection tools. ASIC's submission therefore takes into account consumer protection in this broader sense.

**ASIC's Consumer Protection Role and New Zealand**

The close geographical proximity, common cultural heritage and increasing economic integration between Australia and New Zealand, means that there is considerable interaction between ASIC and its regulatory counterparts in New Zealand. The extent of the common interest between ASIC and New Zealand regulators is best demonstrated by the following examples:

- International Cold Calling Scams: ASIC and the New Zealand Securities Commission ("NZSC") have noted that investors in Australia and New Zealand have been targeted by the same international cold calling scams.

These schemes operate on the basis that a "boiler room" usually located in South East Asia "cold calling" (via the telephone) potential investors located in Australia, New Zealand or other developed country. The boiler room may claim to potential investors, that they are located in a major financial centre such as New York or Tokyo and may even have a virtual

office in that location. Investors who wish to invest are instructed to send funds to an offshore bank account located in a third jurisdiction, such as Hong Kong.

The cold callers use high pressure sales techniques to sell investors shares in start up US companies. These shares are sold at an inflated price on claims that they are listed or about to list on NASDAQ or similar exchange. Investors are not told that the shares in the US companies are "restricted shares" and cannot be sold back into the US market until a time restriction has passed and other criteria have been met.

In addition to these initial scams, a number of Australian and New Zealand investors have fallen victim to "secondary scams". Secondary scams are also cold calling scams where investors who have bought shares in the start up US companies are approached with an offer to buy those shares. In order to affect the sale, the investor is required to pay a bond, buy additional shares, or pay a service fee. The sale never eventuates and cold callers misappropriate the bond, service fee or other investor payment.

- **Trans Tasman Investment Scams:** There have been a number of investment scams in either New Zealand or Australia, which have targeted investors in both jurisdictions. For example, Ocean Salvage Investments Ltd a New Zealand company was involved in an illegal fund raising scheme that raised funds from New Zealand and Australian investors. The scheme encouraged investors to invest on the basis that their investment would entitle them to a share of sunken treasure recovered from salvaging a ship wreck.
- **Australian Scams Targeting New Zealand Investors:** There have been examples of Australian scams exclusively targeting New Zealand investors. For example, an unlicensed stock broker, Morgan Price was cold calling New Zealand investors offering investments in shares in US companies.

Given the common interest between ASIC and the NZSC in the above examples, ASIC and the NZSC have sought to assist each other in combating these scams. This action is in addition to the particular enforcement action that each regulator has taken in its own jurisdiction.

In relation to Ocean Salvage Investments Ltd, a joint investor alert was issued by both ASIC and NZSC. Similarly, with international cold calling scams, ASIC has copied the initiative of the NZSC of listing the names of cold calling firms approaching Australian investors on its consumer protection web site FIDO.

After a recent meeting between the Commissioners of ASIC and the NZSC, it was decided to explore additional opportunities for combined consumer education initiative and consumer warnings. The focus of this initiative is to look beyond particular scams to use the expertise and experience of each regulator to "export" successful consumer protection campaigns across the Tasman. Although it is

recognised that such campaigns will need to be modified to take into account local conditions, there will be definite benefits to consumers as regulators will be able to target resources more efficiently.

### **ASIC and Assisting Foreign Regulators**

Another practice that is critical to responding to international and cross Tasman scams is the provision of assistance to overseas regulators. Assistance is provided either through the sharing of information that a regulator has obtained in the course of its investigation or through obtaining evidence at the request of the other regulator. This assistance is critical as cross border scams necessarily involve evidence that is located in a number of jurisdictions and generally a regulator's coercive powers do not operate extra-territorially.

ASIC's ability to share confidential information and information that it has obtained in the course of carrying on its functions is governed by section 127 of the ASIC Act. In relation to foreign law enforcement bodies, the relevant subsection 127(4)(c), provides that the Chairman (or a delegate of the Chairman) can release confidential information or information obtained in the course of carrying on its functions if satisfied that:

- "The release of information would enable or assist a Government or agency of a foreign country to perform a function or exercise a power, conferred on it by a law in force in that foreign country".

ASIC can also use the provisions of section 127(3) of the ASIC Act to release confidential information to a foreign regulator as part of the process of enabling that foreign regulator to assist ASIC with its investigations. Section 127(3) of the ASIC Act enables an ASIC staff member to disclose information for the purposes of performing their function as an ASIC staff member or delegate.

It should be noted that the ability for ASIC to disclose information under section 127 of the ASIC Act is subject to the common law doctrine of procedural fairness or natural justice. This obligation is described in ASIC Policy Statement PS 103 *Confidentiality and the release of information*. This policy statement provides that ASIC is to consider providing procedural fairness where a person would be directly and materially adversely affected by the decision to release information under section 127 of the ASIC Act.

In addition ASIC may only release under s127 information that it has obtained in the course of the exercise of its own functions and powers. It may not use its compulsory powers to collect information purely for the purposes of another regulator, whether Australian or foreign. ASIC may only use its coercive investigative powers, and in particular the power to examine a person on oath, in circumstances where it has reason to suspect:

- Contravention of the corporations legislation;
- Contravention of a law of the Commonwealth, State or Territory in this jurisdiction that concerns management or affairs of a body corporate of managed investment scheme; or

- Contravention of a law of the Commonwealth, State or Territory in this jurisdiction that involves fraud or dishonesty and relates to a body corporate of managed investment scheme (section 13 ASIC Act).

The circumstances in which ASIC can serve a notice requiring the production of documents are slightly broader. Specifically, ASIC is empowered by section 28 of the ASIC Act to serve a notice to produce books and records on certain persons requiring the production of certain books and records, including those relating to the affairs of a corporation (section 30) or a in relation to financial products (section 31). ASIC can only serve a notice to produce:

- For the purposes of performing ASIC's functions under the corporations legislation;
- For the purposes of ensuring compliance with the corporations legislation;
- In relation to a suspected contravention of a law of the Commonwealth, State or Territory in this jurisdiction that concerns management or affairs of a body corporate of managed investment scheme; or Contravention of a law of the Commonwealth, State or Territory in this jurisdiction that involves fraud or dishonesty and relates to a body corporate of managed investment scheme; or
- For the purposes of conducting an investigation under Division 1 of the ASIC Act (section 28 ASIC Act).

ASIC therefore cannot use its investigative powers at the request of a foreign regulator if ASIC does not itself have an independent interest in the matter (eg: if the conduct complained of by the foreign regulator is not also a suspected breach of the Corporations Act). It is not clear whether the suspected breach has also to be a matter that ASIC would otherwise be investigating.

In circumstances where ASIC has not already obtained the required information for its own purposes, a request for assistance by a foreign regulator can be made under the provisions of the *Mutual Assistance in Business Regulation Act* ("MABRA") or the *Mutual Assistance in Criminal Matters Act* ("MACMA"), depending on whether the request for relates to an administrative/civil or a criminal matter.

A foreign regulator can make a request under MABRA to obtain information, documents or evidence for the purposes of the administration or enforcement of a business law (section 6 MABRA). The request is made to ASIC, who makes recommendations to the Attorney General in relation to the request (section 7 MABRA). It is for the Attorney General to make a decision about the request, to authorise ASIC to obtain the information/ evidence or to reject the request (section 8 MABRA). Where the request relates to a criminal investigation or proceeding, the request for assistance is made directly to the Attorney General under the MACMA Act (section 13 MACMA).

Although MABRA and MACMA provide a mechanism by which assistance can be provided to foreign regulators, it can be a very cumbersome process, due to the need to obtain approval from the Attorney-General. This is apparent when compared to the arrangements in place in New Zealand. The NZSC is empowered by section 69F of the Securities Act to conduct investigations on request from foreign regulators where

the conditions in section 69G of the Act are met. These conditions include the Minister having consented to the assistance being provided. In the case of ASIC the Minister has given class order consent, which means that NZSC does not have to refer any ASIC requests for assistance to the Minister for individual approval.

### **Closer Cooperation between Australia and New Zealand**

The interaction between ASIC and NZSC is likely to increase significantly in the event that the proposed mutual recognition regime for offerings of securities and interests in managed investment schemes is implemented.

The proposed regime was outlined in a discussion paper issued by the Australian Department of Treasury and the New Zealand Ministry of Economic Development on 18 May 2003. In essence the regime provides:

- An offer made under the laws of the home jurisdiction can lawfully be made in the host jurisdiction providing that the entry and ongoing requirements of the scheme are met.

The significant point to note about the regime is that the regulators in each jurisdiction retain their ability to take independent action in relation to offers made under the scheme. Although it is contemplated that in the event of a breach of the scheme that the home regulator will be the primary regulator, it will remain open to the host regulator to take unilateral enforcement action. The host regulator for example, will be in a position to issue stop orders in the event that the disclosure in the offer document is inadequate.

ASIC's ability to utilise the consumer protection provisions contained in Part 2 of the ASIC Act, in relation to offers made under the regime will also be preserved. As a consequence, if a offer of securities is made in Australian, using a New Zealand disclosure document and the contents of that document are misleading and deceptive, then ASIC can take action under section 12DA of the ASIC Act.

ASIC is strongly supportive of the retentions of the ability of both ASIC and the NZSC to take enforcement action in respect of offers made under the proposed regime. This ensures that there is sufficient flexibility to ensure that enforcement action is not frustrated by a lack of resources available to the home regulator. In addition, this flexibility enables a regulator to address enforcement outcomes that may be of concern locally but lack the trans-Tasman significant to prompt the home regulator to take action.

### **Other Initiatives to Open Up the Australian Market Internationally**

In addition to the above proposal, there have been a number of initiatives that ASIC has taken to improve access to the Australian market to entities that are regulated overseas. Although, these initiatives do not necessarily apply to New Zealand entities, it is open to New Zealand entities to take advantage of these opportunities.

The most recent initiatives are contained in policy statement PS 176 and policy statement PS 178. Policy statement PS 176 *Licensing Discretionary Powers* –

*wholesale foreign financial service providers*, provides relief from the requirements to hold an Australian Financial Services licence for certain foreign financial services providers who are providing financial services to wholesale clients. As the financial services are being provided to wholesale clients (as opposed to retail clients) it is clearly stated that ASIC is not concerned with consumer protection issues when considering whether or not to grant relief. This is on the basis that wholesale clients have the sophistication and financial resources to protect their own interests when dealing with foreign financial service providers.

It should also be noted, that one of the principles underpinning relief being granted under policy statement PS 176 is a requirement for their to be regulatory equivalence between regulation by ASIC and regulation by the foreign regulator. The discrepancy between the regulatory requirements applying to financial services providers in Australia and New Zealand means that it is very unlikely that any New Zealand regulated entities would meet the requirements of this policy.

The other main initiative policy statement PS 178 *Foreign collective investment schemes* raises important consumer protection issues. This policy statement provides guidance as to when ASIC will grant relief for foreign collective investment schemes (managed investments schemes) from certain requirements ranging from the requirement to register the scheme as a managed investment scheme through to the disclosure requirements applying to offers of interests in the scheme. As the effect of this relief is to enable Australian retail investors to invest in foreign collective investment schemes, consumer protection considerations are very relevant to decisions about whether or not to grant relief.

### **Extra-Territorial operation of ASIC Administered legislation**

As mentioned above, ASIC's investigative powers do not have extra-territorial operation. Subsection 5(4) of the Corporations Act provides that each provision of the Act applies outside this jurisdiction, according to its tenor. The tenor of the investigative powers makes it quite clear that they are to operate only within Australia.

However, there are certain provisions that apply extra-territorially in recognition of the increasing number of cross border regulatory issues. Section 911D of the Corporations Act provides that a financial services business is taken to be carried on in this jurisdiction if the conduct is intended to or likely to have the effect of inducing people in Australia to use the financial service. This means that an international cold calling scam targeting Australian investors is breaching the requirement to hold an Australian Financial Services business, even though the boiler room making the phone calls is located outside Australia.

### **Conclusion**

In summary:

- ASIC considers that there are strong arguments for it to retain the consumer protection powers contained in Part 2 of the ASIC Act, as these powers complement other responsibilities such as licensing of financial

service providers that ASIC administers which are designed create an environment conducive to consumers;

- The increasing prevalence of cross border scams involving securities and other financial products means that more of ASIC's investigations will have an international dimension;
- ASIC has already identified an increasing degree of common interest between ASIC and its New Zealand counterparts as a number of cross border scams are affecting both Australian and New Zealand consumers;
- ASIC in the future will become increasingly reliant on the assistance from overseas regulators for assistance;
- Correspondingly, ASIC will be increasingly called upon to provide assistance to its foreign counterparts;
- The circumstances in which ASIC may use its investigative powers to provide assistance to its NZ counterparts are not as broad as applies to the NZSC (and some other foreign counterparts) and our ability to provide cost-effective consumer protection regulation could be enhanced by broadening those circumstances;
- ASIC and the NZSC are exploring options to improve their already close relationship in response to the increasing prevalence of cross border scams and in anticipation of possible increasing demands arising from the proposed Mutual recognition regime to apply to offers of securities in Australia and New Zealand.