

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION
AND THE
FINANCIAL SERVICES BOARD
OF THE REPUBLIC OF SOUTH AFRICA
ON THE EXCHANGE OF INFORMATION
FOR CO-OPERATION AND CONSULTATION

[LISBON, PORTUGAL]
[MAY 1999]

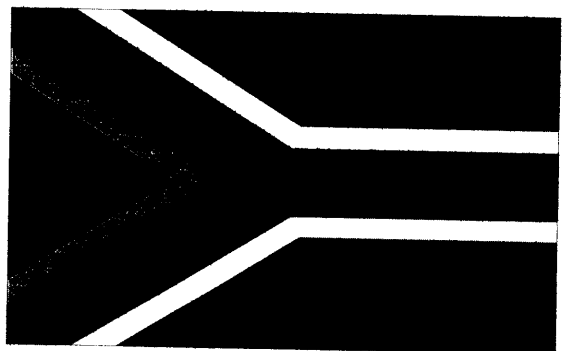
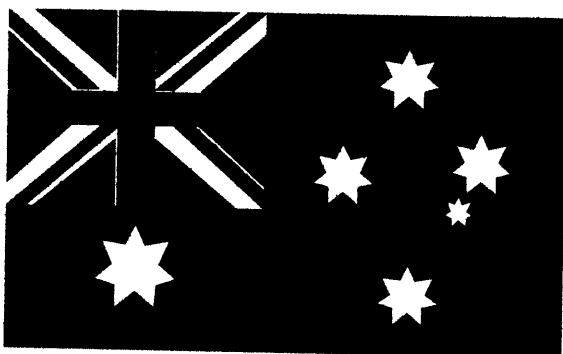


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1. INTRODUCTION

- 1.1 The Financial Services Board of South Africa was established under section 2 of the Financial Services Board Act, 1990, to supervise the exercise of control, in terms of any law, over the activities of financial institutions (excluding banks) and over financial services in South Africa and to advise the Minister of Finance on matters concerning financial institutions and financial services. The functions of the Financial Services Board include the regulation and supervision of the activities of South African licensed exchanges, clearing houses, independent intermediaries investing on behalf of clients (excluding advisers), central securities depositories, collective investment schemes and provident institutions (which include all types of insurance and retirement fund activities) in order to protect investors and to maintain the integrity, efficiency and financial soundness of the financial markets and provident institutions. The Financial Services Board strives to ensure that the financial markets and provident institutions discharge / fulfil their regulatory responsibilities / obligations in relation to all trading and member-related matters in a professional and impartial manner.
- 1.2 The Australian Securities and Investments Commission is the national corporate and securities regulator established under section 7 of the *Australian Securities and Investments Commission Act 1989*. The Australian Securities and Investments Commission is responsible for the administration and enforcement of the *Corporations Law* and the *Australian Securities and Investments Commission Act 1989*, which provide for the regulation of corporations, securities and futures markets and intermediaries, and investor protection in relation to financial services and products. The Australian Securities and Investments Commission's ability to exercise coercive powers on behalf of foreign regulators is governed by the *Mutual Assistance in Business Regulation Act 1992*.
- 1.3 The Financial Services Board of South Africa and the Australian Securities and Investments Commission recognise:
- The importance of international co-operation and consultation to the development and maintenance of open, fair, ordered and sound domestic financial services industry in South Africa and Australia and to the facilitation of their respective functions and powers;
- The increasing international activity in financial markets and supply of financial services;
- The corresponding need for mutual co-operation, the sharing of information and investigative assistance - to the extent permitted by the laws and practices of South Africa and Australia - in the administration and enforcement of laws and regulations concerning the financial services industry in South Africa and Australia respectively; and
- have reached the following understanding.

2. DEFINITIONS

“Authority” means the Financial Services Board of South Africa or the Australian Securities and Investments Commission;

“Authorities” mean the Financial Services Board of South Africa and the Australian Securities and Investments Commission;

“financial institutions” mean the institutions and persons regulated and supervised by the Authorities respectively; and

“financial product” means:

- (a) a facility for taking money on deposit (otherwise than as part-payment for identified services) made available in the course of conducting a banking business;
- (b) securities being shares, units of such shares, debentures, stocks or bonds, interests in a managed investment scheme, an options contract, and any contract or right giving the right to subscribe, buy, sell or acquire by conversion any such instrument;
- (c) any futures contract traded on an exchange;
- (d) an life insurance contract;
- (e) a retirement savings account; and
- (f) an interest in a superannuation fund;

but does not include a foreign exchange contract.

“investor” means a person who has, holds or places an order to obtain an interest in a financial product.

“issuer” means a person who issues, proposes to issue or promotes any security or other financial product.

“jurisdiction” means the country, state or other territory, as the case may be, in which an Authority has legal authority, power and/or jurisdiction by law.

“laws and regulations” means provisions of the laws and regulations or any rules or policy applicable in South Africa and in Australia.

“person” means a natural person, body corporate, partnership, unincorporated association, government or political subdivision, agency or instrumentality of a government;

“Requested Authority” means the Authority to whom a request is made pursuant to clause 5 of this Memorandum of Understanding;

“Requesting Authority” means the Authority making a request pursuant to clause 5 of this Memorandum of Understanding;

3. INTENTION

- 3.1 The Authorities intend to establish a framework for mutual assistance and to facilitate the exchange of information and provision of assistance between the Authorities to enable the effective performance of their duties and to enforce or secure compliance with any laws and regulations of their respective jurisdictions.
- 3.2 The Authorities intend to provide one another with assistance under this Memorandum of Understanding to the full extent permitted by the laws and regulations of their respective jurisdictions.
- 3.3 This Memorandum of Understanding will serve to promote the integrity, efficiency and financial soundness of financial institutions and financial markets and protect investors by improving effective regulation, enhancing the supervision of cross-border transactions, and preventing fraudulent and other prohibited practices in Australia and South Africa.
- 3.4 The Memorandum of Understanding does not:
 - (a) create any binding legal obligations upon the Authorities;
 - (b) modify or supersede any laws or regulations applicable in South Africa or Australia;
 - (c) affect the ability of the Authorities to exchange non-confidential information;
 - (d) create any enforceable rights;
 - (e) affect any other Memoranda of Understanding entered into by the Authorities;
 - (f) lead to the right of any person, directly or indirectly, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance under this Memorandum of Understanding
- 3.5 The Authorities intend, where legal authorisation is lacking, to actively pursue all avenues towards obtaining, by law, all the necessary powers for the effective achievement of the objectives of the Memorandum of Understanding, and to keep the other Authority informed of developments in connection therewith.

- 3.6 To the extent permitted by the laws and regulations of South Africa and Australia, the Authorities will use reasonable efforts to provide each other with any information, documents or evidence that they discover which leads to a suspicion of a breach or anticipated breach of laws and regulations in the jurisdictions of the Authorities.

4. SCOPE

4.1 Mutual assistance will be provided in the following areas:

- (a) assisting in the discovery of and taking of action against insider trading, market manipulation and other fraudulent and manipulative practices in relation to financial products and activities regulated by the Authorities;
- (b) enforcement of the laws and regulations relating to dealing, arranging deals and managing investments on financial markets or by provident institutions or other financial institutions;
- (c) the disclosure of timely, accurate and material information to investors by issuers of financial products;
- (d) regulation and supervision of financial institutions and clearing and settlement activities;
- (e) promoting and securing the fit and proper qualities of registered persons and the promotion of high standards of fair dealing and integrity in their conduct of business;
- (f) breaches of companies legislation; and
- (g) any matters agreed upon between the Authorities from time to time.

4.2 Assistance available under this Memorandum of Understanding includes:

- (a) providing information from files of the Requested Authority;
- (b) obtaining evidence and documents from persons; and
- (c) taking statements from persons.

5. REQUESTS FOR ASSISTANCE OR INFORMATION

- 5.1 This Memorandum of Understanding does not affect the ability of the Authorities to obtain information from persons on a voluntary basis, provided that the Authorities observe procedures in the jurisdiction of each Authority for the obtaining of such information.
- 5.2 To facilitate communication and ensure continuity in the co-operation between the Authorities, each Authority designates the contact persons set forth in Appendix A for communications under this Memorandum of Understanding.
- 5.3 A Requesting Authority will make requests for assistance in writing addressed to the contact officer of the Requested Authority.
- 5.4 Any document or other material provided in response to a request under the Memorandum of understanding and any copies thereof must be returned to the Requested Authority upon request, to the extent permitted by law.
- 5.5 The request will include -
- (a) a general description of the subject matter of the request;
 - (b) the purpose for which the Requesting Authority seeks the assistance or information and for which any information, documents or evidence provided will be used or may at any future time be used;
 - (c) a description of the assistance, documents or information sought by the Requesting Authority including (where possible) any specific questions to be asked of witnesses or list of documents sought which would assist the Requested Authority to comply with the request;
 - (d) any information in the possession of the Requesting Authority that might assist the Requested Authority in identifying the persons, bodies or entities believed by the Requesting Authority to possess the information sought, or the places where the Requested Authority may obtain such information;
 - (e) the laws and regulations concerning the matter that is the subject matter of the request;
 - (f) a statement as to whether the Requesting Authority has sought, or could conveniently seek, from another source, the information, evidence or documents to which the request relates;
 - (g) the desired period of time for the reply; and
 - (h) whether any other authorities, governmental or non-governmental, are co-operating with the Requesting Authority or seeking information from the confidential files of

the Requesting Authority and to whom onward disclosure of information is likely to be necessary;

- (i) any other matters specified by the laws and regulations in the country of the Requested Authority.

5.6 In urgent circumstances, the Requested Authority will accept a request for assistance and will expedite to the extent possible a reply thereto by summary procedures or by means of communication other than the exchange of letters. Such urgent communications must be confirmed in writing as prescribed above by the contact person set out in Appendix A within five business days.

6. EXECUTION OF REQUESTS

- 6.1 Each request will be assessed by the Requested Authority to determine whether assistance can be provided under the terms of the Memorandum of Understanding. If the request cannot be accepted completely, the Requested Authority will consider whether other assistance may be provided.
- 6.2 The Requested Authority may deny requests for assistance under the Memorandum of Understanding:
- (a) where the request would require the Requested Authority to act in a way that would violate the laws of the jurisdiction of the Requested Authority;
 - (b) where the request is not in accordance with the provisions of this Memorandum of Understanding;
 - (c) on grounds of public interest; or
 - (d) where the information or assistance would more readily be obtained through other channels.
- 6.3 Where the Requested Authority denies or opposes a request for assistance, or where assistance is not available under the law of the jurisdiction of the Requested Authority, the Requested Authority will provide the reasons why it is not granting the assistance. The Authorities will then consult pursuant to clause 10.
- 6.4 The Authorities recognise that they intend nothing in the Memorandum of Understanding to either limit or enhance the powers of the Authorities under the laws and regulations of their respective jurisdictions to investigate or gather information or to take measures otherwise than as provided in the Memorandum of Understanding to obtain information, whether or not concerning a request under the Memorandum of Understanding.

7. UNSOLICITED INFORMATION

Where one Authority has information that will assist the other Authority in the performance of its regulatory functions, the former may provide such information, or arrange for such information to be provided, on a voluntary basis even though the other Authority has made no request. The terms and conditions of this Memorandum of Understanding will apply if the providing Authority specifies that it is passing the information under this Memorandum of Understanding.

8. PERMISSIBLE USES OF INFORMATION

- 8.1 Any assistance or information provided under the Memorandum of Understanding should only be used by the Requesting Authority for the purpose of performing its regulatory and supervisory functions whether by initiating or assisting in criminal or civil proceedings, other regulatory action or the imposition of regulatory requirements.
- 8.2 The Requesting Authority may not use information furnished for any purpose other than that identified in terms of paragraph 5.5(b).
- 8.3 If the Requesting Authority wants to use the information obtained for any purpose other than that stated in terms of paragraph 5.5(b), the Requesting Authority must notify the Requested Authority of its intention and provide the Requested Authority with an opportunity to oppose such use.
- 8.4 Where the Requesting Authority believes that sharing confidential information with a third party is necessary, it must inform the Requested Authority of the other authority's interest in this information and it must provide the Requested Authority with the opportunity to oppose such use.
- 8.5 The Requesting Authority may consult with the Requested Authority concerning the reasons for the objection if the Requested Authority opposes such use.

9. CONFIDENTIALITY

- 9.1 The Authorities will, to the full extent permitted by the laws and regulations of their respective jurisdictions, keep confidential:
 - (a) any request for assistance or information pursuant to this Memorandum of Understanding;
 - (b) any information received pursuant to this Memorandum of Understanding; and

- (c) any matter arising during the operation of this Memorandum of Understanding, including consultations and unsolicited assistance.
- 9.2 The Requesting Authority shall not disclose the assistance or information obtained pursuant to this Memorandum of Understanding to third parties without the prior consent of the Requested Authority.
- 9.3 Notwithstanding the provisions of paragraphs 8.1, 8.2, 8.3 and 9.2, the confidentiality provisions of this Memorandum of Understanding shall not prevent the Authorities from informing the law enforcement or regulatory bodies in its jurisdiction of the request or from passing information received pursuant to a request provided that:
 - (a) such agencies or bodies have responsibility for prosecuting, regulating or enforcing laws and regulations falling within the scope of this Memorandum of Understanding;
 - (b) the purpose of passing on such information to such an agency or body falls within the scope of this Memorandum of Understanding; and
 - (c) an undertaking has been obtained from the recipient by the providing Authority, that the recipient will maintain the confidentiality of the information, except when disclosure is required pursuant to a legally enforceable demand.
- 9.4 If an Authority becomes aware that information passed under this Memorandum of Understanding may be subject to a legally enforceable demand to disclose, it will to the extent permitted by laws and regulations of its jurisdiction, inform the other Authority of that demand. The Authorities will then consult on the appropriate course of action.
- 9.5 The Authorities' confidential treatment of assistance and information will continue when either Authority gives notice of its intent to cease co-operation under this Memorandum of Understanding. The Authorities understand that the laws and regulations of their respective jurisdictions place limitations on use and disclosure of non-public information obtained pursuant to this Memorandum of Understanding.

10. CONSULTATION

- 10.1 The Authorities may consult informally, at any time, about a request or proposed request.
- 10.2 The Authorities will consult with each other to improve the operation of the Memorandum of Understanding and resolve any matters that may arise including but not limited to:
 - (a) matters of mutual interest to enhance co-operation and to protect investors by ensuring the stability, efficiency, and integrity of the financial services industry in their respective jurisdictions;

- (b) the co-ordination of the supervision of financial institutions; and
 - (c) the administration of the laws and regulations of their respective jurisdictions.
- 10.3 The purpose of such consultations is to assist in the development of mutually agreeable approaches for strengthening the financial services industry of their respective jurisdictions while avoiding, whenever possible, conflicts that may arise from the application of differing regulatory practices.
- 10.4 The Authorities will consider the need for additional measures for the exchange of investigation, enforcement, supervisory and surveillance information in the administration and enforcement of the laws and regulations concerning financial institutions and products in their respective jurisdictions, on an ongoing basis. To this end, the Authorities will inform one another of the adoption of domestic measures that may affect their abilities to provide assistance under this Memorandum of Understanding.
- 10.5 The Authorities may take practical measures to facilitate the implementation of the Memorandum of Understanding. As such, the Authorities may consult and amend, relax or waive any of the terms of the Memorandum of Understanding upon mutual agreement.
- 10.6 The Authorities will consult in the event of any dispute over the meaning of any term used in the Memorandum of Understanding.

11. COSTS OF INVESTIGATION

If it appears that the Requested Authority will incur substantial costs in responding to a request for assistance under this Memorandum of Understanding, the Authorities will establish a cost-sharing arrangement before the Requested Authority continues to respond to the request for assistance.

12. TERMINATION OF MEMORANDUM OF UNDERSTANDING

- 12.1 This Memorandum of Understanding will continue in effect until the expiration of 30 days after either Authority gives written notice to the other Authority of its intention to terminate the Memorandum of Understanding.
- 12.2 If either Authority gives such notice, this Memorandum of Understanding will continue to have effect with respect to all requests for assistance that the Authorities made before the effective date of notification until the Requesting Authority terminates the matter for which it requested assistance.

13. EFFECTIVE DATE

This Memorandum of Understanding will be effective from the date of its signing by the Authorities.

SIGNED at Lisbon, Portugal this 2^d day of May 1999.

FOR THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION



.....
Alan Cameron AM
Chairman

FOR THE FINANCIAL SERVICES BOARD OF SOUTH AFRICA:



.....
Mr. Rick Cottrell
Executive Officer

APPENDIX A**DESIGNATED CONTACT OFFICERS****Australian Securities and Investments Commission**

The Requested Authority's contact officer for the purposes of making requests under this Memorandum of Understanding

For all purposes:

Director, Office of International Relations	Tel	:	(61 2) 9911 2075
National Office Sydney	Fax	:	(61 2) 9911 2634
Level 18	E-mail	:	rose.webb@asic.gov.au
135 King Street			
Sydney NSW 2000			
AUSTRALIA			

Postal Address:

GPO Box 4866
Sydney NSW 1042
AUSTRALIA

Financial Services Board of South Africa

P.O. Box 35655
Menlopark
Pretoria 0102
SOUTH AFRICA

For investigation and enforcement information:

Head, Legal and Policy	Tel:	(27 12) 428-8095
	Fax:	(27 12) 347-0221
	E-mail:	francoij@fsb.co.za.

For supervisory and market surveillance information:

Mr Gerry Anderson	Tel:	(27 12) 428-8114
Head, Financial Markets	Fax:	(27 12) 347-1379
	E-mail:	gerrya@fsb.co.za

Mr Gordon Rennie	Tel:	(27 12) 428-8066
Specialist, Financial Markets	Fax:	(27 12) 347-1379
	E-mail:	gordonr@fsb.co.za

