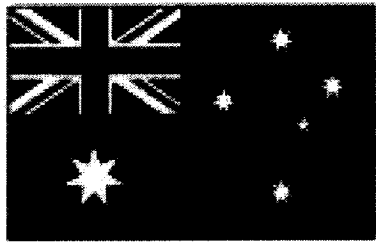


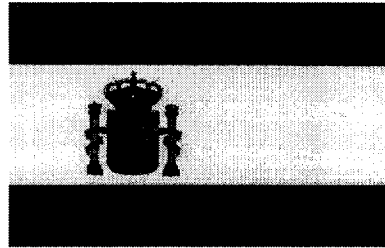
# MEMORANDUM OF UNDERSTANDING

AUSTRALIA



AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION

SPAIN



COMISION NACIONAL DEL  
MERCADO DE VALORES

LISBON  
MAY 1999

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## Memorandum of Understanding

THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION AND THE COMISION NACIONAL DEL MERCADO DE VALORES OF SPAIN,

RECOGNISING, in the light of the increasing international activity in securities markets, the need for mutual co-operation and consultation in order to enhance investor protection, promote the integrity of financial markets, and facilitate the performance of their respective functions and powers;

CONSIDERING the importance of ensuring compliance with, and enforcement of the laws and regulations governing securities, which are applicable in Australia and Spain; and

WILLING therefore to establish the fullest mutual assistance by providing a framework for co-operation, including channels for communication, increased mutual understanding, the exchange of information and investigative assistance permitted by the laws and practices of Australia and Spain;

RESOLVE:

To enter into the following understanding.


### 1. Definitions

For the purpose of this Memorandum of Understanding:

'Authority' means:

- (a) the Australian Securities and Investments Commission; or
- (b) the Comision Nacional Del Mercado De Valores of Spain.

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

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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*.

The Comision Nacional Del Mercado De Valores is the national securities regulator and was established under Section II of the *Securities Markets Act 1988*. The Comision Nacional Del Mercado De Valores is responsible for the enforcement of the Securities Markets Act and its regulatory developments which provides for the regulation of stock markets, intermediaries, collective investment institutions and practices related to the offering of securities to the public and investor protection in relation to financial services. The Comision Nacional Del Mercado De Valores' ability to exercise powers to obtain evidence on behalf of overseas securities commissions or similar bodies is governed by Article 90 of the *Securities Markets Act 1988*.

"investor" means a person who has, holds or places an order to obtain an interest in securities;

"issuer" means a person who issues, proposes to issue or promotes any security;

"laws and regulations" means provisions of the laws and regulations or any rule or policy applicable in Australia and in Spain;

"person" means a natural person, legal entity, partnership or unincorporated association;

"requested Authority" means an Authority to whom a request is made under this Memorandum of Understanding;

"requesting Authority" means an Authority making a request under this Memorandum of Understanding;

"securities" means:

- (i) any share, stock, bond, note, debenture, interest in a collective investment scheme or any instrument similar to shares, stocks, bonds, notes, debentures, interest in a collective investment scheme;
- (ii) any contract or right giving the right to subscribe, buy, sell or acquire by conversion any instrument mentioned in (i) above;

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- (iii) any exchange contract, futures contract, options contract, or any financial instrument based on instruments mentioned in (i) above;
- (iv) any index contract based on instruments mentioned in (i) above; or
- (v) any exchange contract, commodities futures contract or any commodity futures option contract;

"securities professionals" means:

- (a) any person who engages in the business of:
  - (i) purchasing, selling, transferring, clearing or settling securities;
  - (ii) receiving and keeping securities on deposit;
  - (iii) collecting, executing or transmitting orders given by investors concerning the purchase or sale of securities;
  - (iv) engaging on the basis of principal or agent, in the management of individual or collective securities portfolios or accounts;
  - (v) advising on these matters; and
- (b) any person who is associated with another person who performs any functions listed in subparagraph (a) including, without limitation, an employee or authorised representative.

## **2. General Principles**


- 2.1 The purpose of this Memorandum of Understanding is to establish within the limits provided by the law a framework for mutual assistance between the Authorities in order to protect investors, promote the integrity of financial markets, facilitate the performance of the Authorities' functions, and ensure compliance with the laws and regulations governing securities, which are applicable in Australia and Spain.

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- 2.2 To the extent permitted by the laws and practices of Spain and Australia, the Authorities will use reasonable efforts to provide each other with any information, documents or evidence that are discovered which gives rise to a suspicion of a breach, or anticipated breach, of the rules or laws of the other Authority's jurisdiction.
- 2.3 The Authorities intend to ensure that the fullest mutual assistance is provided within the terms of the Memorandum of Understanding.
- 2.4 The Memorandum of Understanding does not:
- (a) modify or supersede any laws or regulations applicable in Australia or Spain;
  - (b) affect the ability of the Authorities to exchange non-confidential information;
  - (c) create a binding obligation under international law;
  - (d) create any enforceable rights;
  - (e) affect any other Memoranda of Understanding entered into by the Authorities.

### **3. Scope of Assistance**

- 3.1 Mutual assistance will be provided in the following areas:
- (a) insider trading, market manipulation and other fraudulent and manipulative practices in relation to securities;
  - (b) enforcement of the laws and regulations relating to securities business;
  - (c) ensuring that participants in securities business promote high standards of fair dealing and integrity in their conduct of that business;
  - (d) rights of investors to obtain timely and accurate information about securities, and disclosure of interests in securities of issuers;

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- (e) the duties of issuers of and offerors for securities to make full and fair disclosure of information material to investors.

3.2 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.

#### **4. Requests for Assistance**

4.1 Requests for assistance must be made in writing and addressed to the requested Authority's contact officer listed in Appendix A.

4.2 To facilitate assistance, the requesting Authority should specify:

- (a) a description in general terms of the subject matter of the request and of the facts of the matter including:
  - (i) the conduct under investigation;
  - (ii) any periods of time to which the request relates; and
  - (iii) the names, and last known addresses, of individuals or companies referred to in the request;
- (b) the assistance sought, such as (where possible) any particulars which will assist the requested Authority in complying with the request, including specific questions to be asked of witnesses, or a list of documents sought;
- (c) the purpose for which assistance is sought;
- (d) a copy of the laws or regulations which may have been violated, and a statement of the way in which the facts give rise to a belief or suspicion that the laws or regulation may have been violated;
- (e) 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;
- (f) the purpose for which the information, evidence or documents is to be used or may at any future time be used;

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- (g) the desired time period and means for the reply and, where appropriate, the urgency of the request;
- (h) any other matters specified by the laws and regulations in the country of the requested Authority.

4.3 Any document or other material provided in response to a request under the Memorandum of Understanding and any copies thereof must be returned on request, to the extent permitted by law.

4.4 The Memorandum of Understanding does not affect the ability of the Authorities to obtain information from persons on a voluntary basis, provided that any procedures in place in the country of each Authority for the provision of such information are observed.

## **5 Execution of Requests**

5.1 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 a request cannot be accepted completely, the requested Authority will consider whether any other assistance can be given (for instance, through channels for mutual assistance in criminal matters).

5.2 In deciding whether to accept or decline a request the requested Authority will take into account whether:

- (a) executing the request would violate legal requirements in the country of the requested Authority;
- (b) the request involves an assertion of jurisdiction not recognised by the requested Authority;
- (c) it would be contrary to the public interest to give the assistance sought; and
- (d) the information or assistance would be more readily obtained through other channels.

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## **6 Permissible Use of Information**

- 6.1 Unless otherwise agreed to by the requested Authority the information supplied will be used solely for the purpose of:
- (a) securing compliance with, or enforcing, the rule or law specified in the request by initiating or assisting in criminal prosecution arising out the breach or suspected breach of such law;
  - (b) conducting or assisting in civil or administrative proceedings, including proceedings which arise out of any actual, suspected or anticipated breach of the rule or law specified in the request, and brought by the Authorities or other law enforcement or regulatory agencies within the jurisdictions of Australia or Spain; or
  - (c) taking regulatory action or imposing regulatory requirements within the areas set out above.

## **7 Confidentiality**

- 7.1 Each Authority shall keep confidential, to the extent permitted by law, requests or communications of information, made within the framework of this Memorandum of Understanding, the contents of such requests, and any other matters arising during the implementation of this Memorandum of Understanding, including consultations between the Authorities.
- 7.2 In all cases, the requesting Authority shall keep confidential, to the extent permitted by law, any information received pursuant to this Memorandum of Understanding to the same extent as such information would be kept confidential in the State of the Authority which has furnished the information.
- 7.3 If a requesting Authority becomes aware that information, statements, evidence or documents provided under the Memorandum of Understanding may be subject to a legally enforceable demand to disclose, the requesting Authority will, to the extent permitted by law, inform the requested Authority of the demand.
- 7.4 Unless the request provides otherwise, the confidentiality provisions of the Memorandum of Understanding shall not prevent the Authorities from informing another law enforcement or regulatory agency within the jurisdictions of Australia

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or Spain of the request or the passing of information or of the information received pursuant to a request to such agencies, provided that:

- (a) the agency is responsible for prosecuting, regulating or enforcing rules or laws falling within the areas set out in clause 3;
- (b) that the purpose of passing that information to the agency falls within the areas set out in clause 6;
- (c) the information is provided on the understanding that it may not be used or disclosed by the agency except for that purpose; and
- (d) the requesting Authority has provided an undertaking in relation to the information requested, if required by the law of the requested Authority's country, in such terms as the law requires.

## **8 Consultation and Disputes**

- 8.1 The Authorities may consult informally, at any time, about a request or proposed request.
- 8.2 The Authorities may consult and review this Memorandum of Understanding with the aim of improving its operation and resolving any disputes which arise.
- 8.3 The Authorities will consult in the event of any dispute over the meaning of any term used in this Memorandum of Understanding.

## **9 Amendments to the Memorandum of Understanding**

- 9.1 The Authorities may consult and may revise the terms of the Memorandum of Understanding upon mutual agreement.

## **10 Termination**

- 10.1 The Memorandum of Understanding shall continue to have effect until terminated by any one of the Authorities by giving 30 days' written notice to the other Authority of its termination.

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10.2 If an Authority gives notice that this Memorandum of Understanding is to be terminated, the Memorandum of Understanding will continue to have effect with respect to any requests for assistance made before the date of notification.

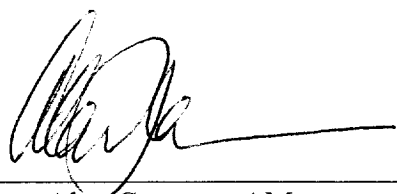
**11 Contact Officers**

11 All communications between the Authorities should be between the contact officers listed in Appendix A, unless otherwise agreed.

**12 Entry into Effect**

12 This Memorandum of Understanding will be effective from the date of its signature by the Australian Securities and Investments Commission and the Comisión Nacional Del Mercado De Valores

Signed at Lisbon, this 24th of May 1999 , in duplicate, in the English and Spanish languages.



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Alan Cameron AM  
Chairman  
Australian Securities and  
Investments Commission



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Juan Fernández-Armesto  
Chairman  
Comision Nacional Del Mercado De  
Valores

## **APPENDIX A**

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

### **Australian Securities and Investments Commission**

Director, Office of International Relations  
National Office Sydney  
Level 18  
135 King Street  
Sydney NSW 2000  
AUSTRALIA

Postal Address:  
GPO Box 4866  
Sydney NSW 1042  
AUSTRALIA

Telephone: 612 911 2075  
Facsimile: 612 911 2634  
Email: [rose.webb@asic.gov.au](mailto:rose.webb@asic.gov.au)

### **Comisión Nacional del Mercado de Valores of Spain**

Director, International Relations  
Comision Nacional Del Mercado De Valores  
Paseo de la Castellana 19  
28046 Madrid  
SPAIN

Telephone: 34 91 585 4115  
Facsimile: 34 91 585 4110  
Email: [rivera@cnmv.es](mailto:rivera@cnmv.es)

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**MEMORANDUM DE ENTENDIMIENTO ENTRE LA AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION DE AUSTRALIA Y LA COMISION NACIONAL DEL  
MERCADO DE VALORES DE ESPAÑA.**

LA AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Y LA COMISIÓN NACIONAL DEL MERCADO DE VALORES DE ESPAÑA,

RECONOCIENDO, a la vista de la creciente actividad internacional en los mercados de valores, la necesidad de cooperación mutua y consultas a fin de realzar la protección del inversor, promover la integridad de los mercados financieros, y facilitar el desempeño de sus funciones y poderes respectivos;

CONSIDERANDO la importancia de asegurar el cumplimiento y la aplicación efectiva de las leyes y los reglamentos que rigen los mercados de valores, aplicables en Australia y España;

ESTANDO DISPUESTAS por lo tanto a establecer el mecanismo de asistencia mutua más completo posible, proporcionando un marco para la cooperación, incluyendo canales de comunicación, un mayor entendimiento mutuo, el intercambio de información y la asistencia en materia de investigación permitida por las leyes y las prácticas de Australia y España;

ACUERDAN:

Formalizar el siguiente acuerdo:

**1. Definiciones**

A efectos de este Acuerdo Bilateral:

"Autoridad" significa:

- (a) la Australian Securities and Investments Commission; o
- (b) la Comisión Nacional del Mercado de Valores de España.

La Australian Securities and Investments Commission es el organismo nacional regulador de sociedades y valores establecido al amparo de la sección 7 de la "Australian Securities and Investments Commission Act" (Ley de la Comisión de Valores e Inversiones de Australia) de 1989.



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La Australian Securities and Investments Commission es responsable de la administración y aplicación de la Ley de Sociedades ("Corporations Law") y la Ley de la Comisión de Valores e Inversiones de Australia ("Australian Securities and Investments Commission Act") de 1989, que establecen la normativa para la regulación de sociedades, mercados de valores y futuros e intermediarios, y protección de los inversores en relación con los servicios y los productos financieros. La facultad de la Australian Securities and Investments Commission para ejercitar poderes coercitivos en nombre de reguladores extranjeros se rige por la Ley de Asistencia Mutua en la Regulación Empresarial ("Mutual Assistance in Business Regulation Act") de 1992.

La Comisión Nacional del Mercado de Valores es el organismo nacional regulador de los valores y se estableció al amparo de la Sección II de la Ley del Mercado de Valores de 1988. La Comisión Nacional del Mercado de Valores es responsable de la aplicación de la Ley del Mercado de Valores y su desarrollo normativo, que establece la regulación de los mercados bursátiles, intermediarios, instituciones de inversión colectiva y prácticas relacionadas con la oferta de valores al público y la protección de los inversores en relación con los servicios financieros. La facultad de la Comisión Nacional del Mercado de Valores para ejercitar poderes a fin de obtener pruebas en nombre de comisiones extranjeras de valores u organismos similares se rige por el Artículo 90 de la Ley del Mercado de Valores de 1988.

"inversor" significa una persona que tenga, posea o sitúe una orden para obtener una participación en valores;

"emisor" significa una persona que emita, se proponga emitir o promueva cualquier valor;

"leyes y reglamentos" significa las estipulaciones de las leyes y los reglamentos o cualquier norma o política aplicable en Australia y España;

"persona" significa una persona física, persona jurídica, sociedad en comandita o asociación no societaria;

"Autoridad receptora" significa la Autoridad que recibe una solicitud al amparo de este Acuerdo Bilateral.

"Autoridad emisora" significa la Autoridad que emite una solicitud al amparo de este Acuerdo Bilateral.

"Valores" significa:

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- (i) cualquier acción, participación de capital, bono, pagaré, obligación, participación en instituciones de inversión colectiva o cualquier instrumento similar a acciones, participaciones de capital, bonos, pagarés, obligaciones, participaciones en instituciones de inversión colectiva;
- (ii) cualquier contrato o derecho que dé derecho a suscribir, comprar, vender o adquirir mediante conversión cualquier instrumento de los mencionados en el punto (i) anterior;
- (iii) cualquier contrato de cambio, contrato de futuros, contrato de opciones, o cualquier instrumento financiero basado en los instrumentos mencionados en el punto (i) anterior;
- (iv) cualquier contrato sobre índices basado en los instrumentos mencionados en el punto (i) anterior; o
- (v) cualquier contrato de cambio, contrato de futuros sobre materias primas o cualquier contrato de opción sobre futuros de materias primas;

"profesionales de valores" significa:


- (a) cualquier persona que se dedique al negocio de:
  - (i) comprar, vender, transferir, compensar o liquidar valores;
  - (ii) recibir y mantener valores en depósito;
  - (iii) recibir, ejecutar o transmitir órdenes dadas por inversores respecto a la compra o la venta de valores;
  - (iv) dedicarse como principal o agente a la gestión de carteras o cuentas individuales o colectivas de valores;
  - (v) asesorar sobre estas materias; y
- (b) cualquier persona que esté asociada a otra persona que desempeñe cualquiera de las funciones relacionadas en el subapartado (a), incluyendo, sin limitación, empleados o representantes autorizados.



## 2. Principios generales

- 2.1 El propósito de este Acuerdo Bilateral es establecer, dentro de los límites fijados por la ley, un marco de asistencia mutua entre las Autoridades a fin de proteger a los inversores, promover la integridad de los mercados financieros, facilitar el cumplimiento de las funciones de las Autoridades, y asegurar el cumplimiento de las leyes y los reglamentos que rigen los valores, que sean aplicables en Australia y España.
- 2.2 En la medida permitida por la ley y las prácticas de Australia y España, las Autoridades harán todo lo razonablemente posible para proporcionarse mutuamente cualquier información, documentos o pruebas que se descubran que den lugar a la sospecha de violación, o violación previsible, de las normas o las leyes de la jurisdicción de la otra Autoridad.
- 2.3 Las Autoridades tienen la intención de asegurar que se presta la asistencia más completa que sea posible al amparo de los términos de este Acuerdo Bilateral.
- 2.4 Este Acuerdo Bilateral:
- (a) no modifica ni anula ninguna ley ni reglamento aplicable en Australia o España;
  - (b) no afecta a la capacidad de las Autoridades para intercambiar información no confidencial;
  - (c) no crea una obligación vinculante a tenor del derecho internacional;
  - (d) no crea ningún derecho ejecutable;
  - (e) no afecta a ningún otro Acuerdo Bilateral suscrito por las Autoridades.

## 3. Ámbito de asistencia

- 3.1 Se prestará asistencia mutua en las siguientes áreas:
- (a) operativa con información privilegiada, manipulación del mercado y otras prácticas fraudulentas y manipuladoras en relación con valores;
  - (b) aplicación de las leyes y reglamentos relativos al negocio de valores;
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- (c) verificación de que los participantes en el negocio de valores promueven elevados niveles de corrección e integridad en la realización de dicho negocio;
- (d) derechos de los inversores a obtener información puntual y exacta sobre valores, y declaración de las participaciones de los emisores en valores;
- (e) deberes de los emisores y oferentes de valores de realizar una declaración plena y justa de la información relevante a los inversores.

3.2 La asistencia disponible al amparo de este Acuerdo Bilateral incluye:

- (a) proporcionar información de los archivos de la Autoridad receptora;
- (b) obtener pruebas y documentos de personas; y
- (c) tomar declaración a personas.

#### 4. **Peticiones de asistencia**

4.1 Las peticiones de asistencia se cursarán por escrito y se dirigirán a la persona de contacto de la Autoridad receptora indicada en el Anexo A.

4.2 Para facilitar la asistencia, la Autoridad emisora deberá especificar:

- (a) una descripción general de la materia objeto de la petición y de los hechos de la misma, incluyendo:
  - (i) la conducta objeto de la investigación;
  - (ii) los períodos de tiempo a los que se refiere la petición; y
  - (iii) los nombres, y las últimas direcciones conocidas, de las personas o empresas mencionadas en la solicitud;
- (b) la asistencia deseada, así como (siempre que sea posible) cualesquiera pormenores que ayuden a la Autoridad receptora a cumplir la petición, incluyendo preguntas específicas que haya que plantear a testigos, o una relación de los documentos solicitados;
- (c) el propósito para el que se pide asistencia;

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- (d) una copia de las leyes o los reglamentos que se puedan haber violado, y una declaración sobre el modo en que los hechos dan lugar a la creencia o sospecha de que las leyes o los reglamentos se pueden haber violado;
- (e) una declaración sobre si la Autoridad emisora ha solicitado, o podría convenientemente solicitar, de otra fuente, la información, las pruebas o los documentos a los que se refiere la solicitud;
- (f) el propósito para el que se usarán o se pueden usar en el futuro la información, las pruebas o los documentos;
- (g) el plazo y los medios de respuesta deseados y, si procede, la urgencia de la petición;
- (h) cualesquiera otras materias especificadas por las leyes y los reglamentos en el país de la Autoridad receptora.

4.3 Cualquier documento u otro material proporcionado en respuesta a una petición al amparo del Acuerdo Bilateral, y cualesquiera copias de los mismos, deben ser devueltos previa petición, en la medida permitida por la ley.

4.4 El Acuerdo Bilateral no afecta a la capacidad de las Autoridades para obtener información de personas de forma voluntaria, siempre que se observen los procedimientos en vigor en el país de cada Autoridad respecto a la provisión de dicha información.

## **5. Cumplimiento de peticiones de asistencia**

5.1 Cada petición será evaluada por la Autoridad receptora para determinar si se puede prestar asistencia al amparo de los términos del Acuerdo Bilateral. Si una petición no se puede aceptar en su totalidad, la Autoridad receptora estudiará cualquier otra asistencia que se pueda prestar (por ejemplo, mediante vías de asistencia mutua en asuntos penales).

5.2 Al decidir si aceptar o rechazar una petición de asistencia, la Autoridad receptora tendrá en cuenta si:

- (a) el ejecutar la petición violaría los requisitos legales en el país de la Autoridad receptora;
- (b) la petición comporta una afirmación de jurisdicción no reconocida por la Autoridad receptora;

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- (c) el dar la asistencia solicitada sería contrario al interés público; y
- (d) la información o la asistencia se podrían obtener más fácilmente por otras vías.

## 6. Usos lícitos de la información

6.1 Salvo que la Autoridad receptora acuerde otra cosa, la información provista se usará exclusivamente a efectos de:

- (a) asegurar el cumplimiento o la aplicación de las leyes o los reglamentos especificados en la petición, incoando o asistiendo en el proceso penal que se derive de la violación o presunta violación de dicha ley;
- (b) tramitar o ayudar en procedimientos civiles o administrativos, incluyendo procedimientos que se deriven de cualquier violación real, presunta o previsible de la norma o ley especificada en la solicitud, e incoados por las Autoridades o por otros organismos encargados de la aplicación de la ley o la regulación dentro de las jurisdicciones de Australia o España; o
- (c) adoptar actuaciones reguladoras o imponer requisitos reguladores en las áreas antes expuestas.

## 7. Confidencialidad

7.1 En la medida permitida por la ley, toda Autoridad mantendrá confidencialmente las peticiones o comunicaciones de información realizadas al amparo de este Acuerdo Bilateral, los contenidos de dichas peticiones, así como cualesquiera otra materias que surjan en el curso de su vigencia, incluyendo las consultas entre las Autoridades.

7.2 En todos los casos, la Autoridad emisora mantendrá confidencialmente, en la medida permitida por la ley, cualquier información recibida al amparo de este Acuerdo Bilateral, en la misma medida en que dicha información se mantendría confidencialmente en el Estado de la Autoridad que ha entregado la información.

7.3 Si la Autoridad emisora deviene consciente de que la información, las declaraciones, las pruebas o los documentos proporcionados a tenor del Acuerdo Bilateral pueden ser objeto de una demanda legalmente ejecutable de divulgación, la Autoridad emisora, en la medida permitida por la ley, informará de la demanda a la Autoridad receptora.



7.4 Salvo que la petición estipule lo contrario, las estipulaciones de confidencialidad del Acuerdo Bilateral no impedirán a las Autoridades informar a otro organismo encargado de la aplicación de las leyes o de la regulación dentro de las jurisdicciones de Australia o España, de la petición o la entrega de información o de la información recibida a tenor de una petición a dichos organismos, siempre que:

- (a) el organismo sea responsable de perseguir, regular o aplicar normas o leyes que entren dentro de las áreas expuestas en la cláusula 3;
- (b) el propósito de pasar dicha información al organismo entre dentro de las áreas expuestas en la cláusula 6;
- (c) la información se proporcione sobre la base de que no puede ser utilizada ni divulgada por el organismo salvo para dicho propósito; y
- (d) la Autoridad emisora haya asumido un compromiso en relación con la información solicitada, si lo requiere la ley del país de la Autoridad receptora en los términos que requiera la ley.

## **8. Consultas y controversias**

8.1 Las Autoridades se pueden consultar informalmente, en cualquier momento, sobre una petición o propuesta de petición.

8.2 Las Autoridades se pueden consultar y revisar este Acuerdo Bilateral con el objetivo de mejorar su funcionamiento y resolver las controversias que surjan.

8.3 Las Autoridades se consultarán en caso de controversia sobre el significado de cualquier término utilizado en este Acuerdo Bilateral.

## **9. Modificaciones del Acuerdo Bilateral**

9.1 Las Autoridades se pueden consultar y revisar los términos del Acuerdo Bilateral de mutuo acuerdo.

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**10. Resolución**

- 10.1 Este Acuerdo Bilateral continuará en vigor hasta que sea resuelto por cualquiera de las Autoridades, dando una notificación por escrito a la otra Autoridad con un preaviso de al menos treinta días.
- 10.2 Si una Autoridad notifica que se va a resolver este Acuerdo Bilateral, el Acuerdo Bilateral seguirá en vigor respecto a cualesquiera peticiones de información comunicadas antes de la fecha de la notificación.

**11. Personas de contacto**

- 11.1 Todas las comunicaciones entre las Autoridades deberán realizarse entre las personas de contacto relacionadas en el Anexo A, salvo que se acuerde otra cosa.

**12. Entrada en vigor**

- 12.1 Este Acuerdo Bilateral será efectivo a partir de su fecha de firma por la Australian Securities and Investments Commission y la Comisión Nacional del Mercado de Valores.

Firmado el día 24 de mayo de 1999, en Lisboa, por duplicado en lengua inglesa y española.



Alan Cameron  
 Presidente  
 Australian Securities and  
 Investments Commission



Juan Fernández-Armesto  
 Presidente  
 Comisión Nacional del  
 Mercado de Valores

**ANEXO A**

Persona de contacto de las Autoridades a efectos de formular peticiones al amparo de este Acuerdo Bilateral

**Australian Securities and Investments Commission**

Director, Office of International Relations  
National Office Sydney  
Level 18  
135 King Street  
Sydney NSW 2000  
AUSTRALIA

Dirección postal:  
GPO Box 4866  
Sydney NSW 1042  
AUSTRALIA

Teléfono: 612 911 2075  
Fax: 612 911 2634  
Correo electrónico: [rose.webb@asic.gov.au](mailto:rose.webb@asic.gov.au)

**Comisión Nacional del Mercado de Valores de España**

Director, Relaciones Internacionales  
Comisión Nacional del Mercado de Valores  
Paseo de la Castellana, 19  
28046 Madrid  
ESPAÑA

Teléfono: 34 91 585 4115  
Fax: 34 91 585 4110  
Correo electrónico: [rivera@cnmv.es](mailto:rivera@cnmv.es)

Handwritten signature and initials in the bottom right corner of the page.

## MEMORANDUM

### **Operation of the Memorandum of Understanding between the Comisión Nacional Del Mercado De Valores and the Australian Securities and Investments Commission**

The purpose of this Memorandum is to discuss the operation of the Memorandum of Understanding ("MoU"), signed on 24 May 1999 between the Comisión Nacional Del Mercado De Valores ("CNMV") and the Australian Securities and Investments Commission ("ASIC"), and to explain how requests for information from the CNMV will be dealt with by ASIC.

#### **A. Requests not requiring the use of ASIC's compulsory powers:**

##### *Public information requests*

ASIC is able to assist the CNMV by providing information contained in the ASCOT public information database. The ASCOT database provides function search facilities including: organisation details; professional register enquiries; person enquiries; and address enquiries. Company extracts can also be requested from the system providing either historical or current company information.

Linked searches of the corporate database can also be conducted using the ASCERTAIN module. This means that information relating to companies and individuals can be accessed more readily and cross-referenced more easily.

ASIC can also request computer-generated images of documents filed with ASIC through the DOCIMAGE system. General subject categories of documents kept filed with ASIC include the following:

- Names
- Registration
- Transfer of Incorporation
- Annual Returns
- Resolutions and minutes of holding companies
- Registrable charges
- Foreign companies or registered Australian bodies
- Deregistered companies
- Takeovers documents
- Fundraising documents
- Managed investment scheme documents



### *Non-public file information requests*

ASIC may obtain certain information without commencing a formal investigation, and this information can be provided to the CNMV under the MoU. ASIC officers may inspect books pursuant to its inspection powers under the Australian Securities and Investments Commission Act 1989 ("ASC Law"). Records which may be inspected by ASIC without charge include:

- (a) books about the affairs of companies and registered schemes as are required to be kept under the Corporations Law;
- (b) records required to be kept under the Corporations Law and the relevant Listing Rules of authorised Exchanges about securities trading;
- (c) records required to be kept under the Corporations Law and the relevant Listing Rules of authorised Exchanges about futures trading.

Types of information available pursuant to a request under the MoU include trading data such as prices, volumes and broker activity concerning securities and futures traded on the exchanges. ASIC may also informally advise the CNMV as to whether it has instituted civil or administrative proceedings against a particular individual or entity, and may provide copies of public documents relating to such proceedings.

ASIC will also provide information extracted from its investigative non-public files pursuant to a formal request made under the MoU. ASIC will request that persons located in Australia provide statements, produce or prepare documents on a voluntary basis for the CNMV.

### **B. Compelling the Production of Information Pursuant to the MoU:**

ASIC can compel the production of information on behalf of the CNMV pursuant to the MoU. The *Mutual Assistance in Business Regulation Act 1992* ("MABR Act") allows ASIC to compel the giving of evidence, provision of information and production of documents to assist foreign regulators. The MABR Act provides for Ministerial approval for such assistance in each case.

Requests from the CNMV for assistance will be made at first instance to ASIC. If ASIC does not oppose the request, it will so advise the Attorney-General, although it may impose conditions or request undertakings. The Attorney-General must then authorise the request before ASIC can provide the assistance to the CNMV. The Attorney-General has the power to vary any conditions or undertakings imposed by ASIC or impose further conditions or undertakings at his or her discretion.



1. *Information sought by ASIC when considering a request for compulsory assistance by the CNMV:*

(A) When considering what action to take in relation to a request, ASIC will take into account various factors including:

- the availability to the CNMV of the information sought in the request from other sources;
- the resource cost to ASIC in meeting the request;
- the likelihood of ASIC successfully obtaining the information sought by the CNMV;
- the extent to which the CNMV has functions corresponding to those of ASIC; and
- whether the CNMV is likely to respond to a similar request made by ASIC.

(B) In order to determine what advice it should give to the Attorney-General, ASIC requires the following information from the CNMV for requests which require the use of compulsory process:

- (a) a description in general terms of the subject matter of the request and of the facts of the matter including:
  - (i) the conduct under investigation;
  - (ii) any periods of time to which the request relates; and
  - (iii) the names, and last known addresses, of individuals or companies referred to in the request;
- (b) the assistance sought, such as (where possible) any particulars which will assist the requested Authority in complying with the request, including specific questions to be asked of witnesses, or a list of documents sought;
- (c) the purpose for which assistance is sought;
- (d) a copy of the laws or regulations which may have been violated, and a statement of the way in which the facts give rise to a belief or suspicion that the laws or regulation may have been violated;
- (e) a description of the functions of the foreign regulator making the request that is sufficient to enable ASIC to consider the extent to which the functions of the foreign regulator correspond with the functions of ASIC;
- (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 purpose for which the information, evidence or documents is to be used or may at any future time be used;
  - (h) the desired time period and means for the reply and, where appropriate, the urgency of the request;
  - (i) details of the confidentiality that the CNMV will accord any information provided in compliance with the request;
  - (j) whether the CNMV desires to receive the information in a single transmission or as and when each item of information becomes available; and
  - (k) the name, telephone number and email address (if available) of an officer of the CNMV who is familiar with the subject matter of the request and who will be available by telephone to answer queries or clarify matters relating to the request if asked to do so by an ASIC officer.
- (C) In considering whether to authorise the provision of assistance, the Attorney-General will, in turn, have regard to the following matters:
- whether it is in Australia's national interest to comply with the request;
  - whether complying with the request is consistent with international law and comity;
  - whether the material provided to the foreign agency is likely to be used for the purpose of punishing a person for an offence of a political nature or punishing or prejudicing a person on account of the person's race, sex, sexual preference, religion, nationality or political opinions; and
  - whether the request would be more suitably dealt with under the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

2. **Gathering Information Pursuant to a request made under the Mutual Assistance in Business Regulation Act**

All administrative and procedural arrangements as to the granting and execution of requests, other than the authorisation, will be carried out by ASIC. Once the Attorney-General authorises the obtaining of the information, documents or evidence, ASIC will gather the requested information pursuant to the provisions of the MABR Act.

An ASIC staff member may serve a written notice on the person (or body corporate as the case may be) to whom the Attorney-General's authorisation relates requiring that person:

- (i) to give to ASIC by instrument signed by the person or competent officer of the body corporate, within the time and manner specified in the notice, information to which the foreign request relates; or
- (ii) to produce documents to ASIC, in accordance with the notice to which the CNMV request relates; or
- (iii) to appear before a specified ASIC staff member at a time and place specified in the notice to give evidence to which the foreign request relates, either orally or in writing, and to produce any such documents.

Where required, ASIC staff member may request the evidence to be given on oath or affirmation. If the person providing the evidence does not comply with the provisions of the notice, and fails to show reasonable excuse, or gives evidence or information knowing it to be false or misleading in a material particular, then that person is guilty of an offence and will be liable to a maximum penalty of 2 years' imprisonment.

The evidence taken under the MABR Act is to be put in writing and ASIC will certify a written version of the evidence. Where documents have been produced to ASIC, certified copies will be sent to the CNMV (although this will also depend upon what is stipulated in the request and any subsequent discussions between ASIC and the CNMV).

A person who appears to give evidence will be able to be represented by an admitted Australian legal practitioner or by any other person (including a foreigner) who by virtue of their expertise could be expected to be of assistance to the person giving the evidence. Other persons who may be present during the taking of evidence include:

- the person taking or giving the evidence;
- a staff member of ASIC;
- a representative of the CNMV;
- a person who is present at the request of the person giving the evidence.
- a person who is entitled to be present under a direction given by the person taking the evidence.

Protection and immunity are given to lawyers and other representatives and persons giving evidence as if they were appearing in a proceeding in the Australian High Court. Therefore persons taking or providing evidence cannot be liable for damages in defamation as a result of the evidence.

A person providing evidence under compulsion will be able to claim the statutory privilege against self incrimination if the information or evidence might tend to incriminate him or her or make him or her liable to the imposition of a penalty. However, the fact that providing the evidence may tend to incriminate the person, is not considered a "reasonable excuse" for failing to provide the evidence. A legal representative is entitled to claim legal professional privilege. Where a privileged

communication is withheld, the lawyer is required to provide details of the identity of the document or the person to whom or by whom the communication was made.

**C. Participation of the Requesting Authority**

ASIC will, through its Office of International Relations, be in close contact with the CNMV in the course of processing requests for information and in conducting investigations to obtain information to provide to the CNMV. In the context of Clause 4.2 of the MoU the CNMV may participate in the investigation by:

- being present during the taking of testimony and prescribing specific questions to be asked of the witness;
- being present at the inspection or examination of books and records and participating in such inspection or examination subject to the approval of ASIC; and
- consulting about strategy and information to be gathered.

**D. Conditions Concerning use and Confidentiality of Information Provided Pursuant to the MoU**

The MABR Act contemplates conditions which may attach to a request made by the CNMV which may be imposed by ASIC and supported, varied or deleted by the Attorney-General. ASIC will specify undertakings to be given by the CNMV to ensure that the conditions are met.

The MoU also contemplates that the Authorities will use their best efforts to maintain confidentiality of requests and protect information exchanged under the MoU from unnecessary public disclosure.

*ASIC duty of confidentiality*

Section 127 of the ASC Law imposes a positive duty on ASIC to take all reasonable steps to protect from unauthorised use or disclosure confidential information it has been given in connection with the performance of its functions or the exercise of its powers. However, disclosure of particular information is permitted:

- where disclosure is required or permitted by a law of the Commonwealth;
- to allow a person to perform his or her functions as a member, staff member or delegate of the Commission or to assist a Commission delegate; and
- where the Chairman is satisfied that the information will enable or assist a government or agency [including a government or agency of a foreign country: paragraph 127(4)(c)] to perform its functions or exercise its powers.



### *Maintenance of confidentiality*

Non-public information received from the CNMV under the MoU, including non-public information contained in requests for assistance from the CNMV to ASIC, would be "confidential" information and thus protected by the positive duty of confidentiality in section 127 of the ASC Law. ASIC will undertake to maintain the confidentiality of such information to the extent permitted by Australian law. In practice, this will mean that ASIC will not offer information obtained from the CNMV to third parties, and will not disclose such information if required by Australian law to do so, without prior reference to the CNMV.

In cases in which ASIC is required by law to disclose information in its possession, ASIC will use its best endeavours to maintain the confidentiality of the information by reference to available privileges and exemptions from production. For example where the production of documents might be required by service of subpoena to produce, ASIC would seek to have such a subpoena put aside on the grounds of public interest immunity. In such cases, ASIC will undertake to inform the CNMV as soon as a demand for disclosure is made.

The following government agencies are permitted by law to obtain from ASIC information provided by the CNMV:

- the Australian Taxation Office
- the National Crime Authority
- the Inspector-General of Intelligence and Security
- the Parliamentary Joint Committee on the Australian Security Intelligence Organisation
- the Commonwealth and Defence Force Ombudsman
- the Privacy Commissioner

Of these organisations, the most frequent recipient of ASIC information is the Australian Taxation Office. In this case, ASIC has negotiated an MoU with the agency and the parties have agreed not to exercise coercive powers against each other. In these instances, the CNMV would be consulted before any of its information was released. In the event of a demand being made by the other agencies ASIC may be able to protect the confidentiality of CNMV information on the basis of statutory provisions which enable persons served to claim that they have a "reasonable excuse" for resisting production. ASIC would argue that the fact the information had been obtained from the CNMV on a confidential basis was a "reasonable excuse" for refusing access. In those circumstances ASIC will ensure that these agencies are advised of the confidential nature of the information and the basis upon which the information was given to ASIC by the CNMV. In any event ASIC will endeavour in every case to ensure the confidentiality of CNMV information to the extent permitted by the law.

ASIC will not be required to produce a document to the Commonwealth and Defence Force Ombudsman if the Attorney-General gives a certificate to the Ombudsman



certifying that disclosure of the information would prejudice the international relations of the Commonwealth (paragraph 9(3)(a) of the *Ombudsman Act*).

ASIC will not be required to produce a document to the Privacy Commissioner if the Attorney-General gives a certificate to the Privacy Commissioner certifying that disclosure of the information would

- prejudice the international relations of the Commonwealth;
- prejudice the conduct of a criminal investigation;
- disclose the existence or identity of a confidential source of information in relation to enforcement of criminal law;
- prejudice the effectiveness of the operational methods or investigative practices or techniques of ASIC (paragraphs 70(1)(a), (e), (f) and (g) of the *Privacy Act*).

#### *Freedom of Information Act*

Persons can seek access to information held by ASIC pursuant to the Commonwealth *Freedom of Information Act* (the FOI Act). Documents received by ASIC from the CNMV would not, in themselves, be exempt from disclosure under the FOI Act.

It is important to note that the FOI Act has several provisions which safeguard against the production of information supplied by an agency such as the CNMV. Documents should be exempt from disclosure under the FOI Act for one or more of the following reasons:

- the disclosure would, or could reasonably be expected to, damage the international relations of the Commonwealth (paragraph 33(1)(a));
- the disclosure would divulge information communicated in confidence by or on behalf of an authority of a foreign government to an authority of the Commonwealth (paragraph 33(1)(b));
- the disclosure would, or could reasonably be expected to, prejudice the conduct of an investigation or disclose the existence or identity of a confidential source of information in relation to the enforcement or administration of the law (paragraphs 37(1)(a) and (b));
- the disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (paragraph 40(1)(d));
- the disclosure would divulge information communicated in confidence by the CNMV (section 45)