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Sydney

Level 41, Aurora Place
88 Phillip Street
Sydney NSW 2000 Australia
www.challenger.com.au

telephone 02 9994 7000
facsimile 02 9994 7777

Ms Bianca Garwood
Analyst
Regulatory & Competition Policy Branch
Ministry of Economic Development (NZ)
BY EMAIL: bianca.garwood@med.govt.nz
BY FAX: 0011 64 4 4712 658

Ms Ruth Smith
Manager
Market Integrity Unit
The Department of Treasury (Aust)
BY EMAIL: rsmith@treasury.gov.au
BY FAX: 02 6263 2882

Dear Ms Garwood & Ms Smith

Trans-Tasman Mutual Recognition of Offers of Securities and Managed Investment Scheme Interests – Discussion Paper (May 2004) (the “Discussion Paper”)

1. Background

We refer to the Discussion Paper.

Challenger Managed Investments Limited (“**Challenger**”) currently offers a small number of Australian managed investment schemes in New Zealand under the relevant New Zealand (“**NZ**”) law exemption notice. Challenger is a member of the Challenger Financial Services Group, which is listed on the Australian Stock Exchange.

Challenger welcomes the proposed Trans-Tasman Mutual Recognition Regime (the “**Mutual Recognition Regime**”) and we welcome the opportunity to comment.

This submission focuses on the perspective of an Australian issuer (such as Challenger) seeking to offer in New Zealand under the Mutual Recognition Regime. Hence, relevant Australian law and NZ law requirements are referred to from that perspective. Analogous comments to those in this submission may well be applicable to a NZ issuer offering in Australia under the Mutual Recognition Regime but by reference to the (differing) relevant NZ and Australian domestic law requirements for offers by NZ issuers into Australia. While this submission does not focus on NZ issuers offering in Australia under a Mutual Recognition Regime, clearly reciprocity is appropriate whether the offer is by an Australian issuer into NZ or by an NZ issuer into Australia (subject to differences in NZ and Australian domestic law).

Melbourne

Level 41, 101 Collins Street
Melbourne VIC 3000
telephone 03 8616 1000
facsimile 03 8616 1111

Brisbane

Level 9
175 Eagle Street
Brisbane QLD 4000
telephone 07 3218 8000
facsimile 07 3220 3132

Perth

Level 3, 55 St Georges Terrace
Perth WA 6000
telephone 08 9223 7800
facsimile 08 9221 2499

Adelaide

Level 9, T & G Building
82 King William Street
Adelaide SA 5000
telephone 08 8211 7777
facsimile 08 8212 1661



2. Mutual Recognition Regime in addition to Domestic Regime

While it is quite clear in the Discussion Paper, we suggest that it be abundantly clear that reliance on the Mutual Recognition Regime is an alternative to otherwise complying with the host country's domestic laws. That is, in relation to an offer by an Australian issuer of Australian products in New Zealand, we submit that it should be made clear that the Australian issuer may lawfully offer into New Zealand:

1. via the Mutual Recognition Regime; or
2. by satisfying New Zealand domestic law on securities (and participatory securities) offers; or
3. by satisfying any New Zealand domestic law exemption (under exemption notices) from various New Zealand domestic legal requirements (for example, the ARMIS Exemption Notice 2003).

3. Mutual Recognition Entry Requirements

3.1. Mutual Recognition Opt-in Notice

Page 6 of the Discussion Paper states:

*“Entry requirements will include... a condition that an offeror opt into the mutual recognition regime **in respect of a particular offer**, by filing a notice with the host jurisdiction regulator...”*

The Discussion Paper refers to an Opt-in Notice being required to be lodged “**in respect of a particular offer**”. Under a continuous offer (which is the norm for offers of Australian registered managed investment schemes in New Zealand), it is not clear when a “particular offer” starts and ends.

We submit that in relation to continuous offers (or schemes which are “open ended” as is almost always the case with unlisted schemes), the entry requirement should be to lodge the mutual recognition opt-in notice **once only** and that **this be required by** the later to occur of:

- when the offeror first commences offering the relevant type of security (for example, units in a particular Australian registered managed investment scheme) in the host jurisdiction; or
- the proposed commencement of the Mutual Recognition Regime.

It should **not** be necessary to lodge further mutual recognition Opt-in Notices each time, for example, the relevant home jurisdiction law offer document (a product disclosure statement (“**PDS**”) in the case of Australian registered managed investment schemes) is “rolled”, replaced, updated or supplemented. To require more than one initial mutual recognition



Opt-in notice for a continuous (or “open ended”) offer, results in unnecessary compliance obligations on issuers *with no consumer protection enhancements*.

Further, given that (in the context of an Australian issuer offering in NZ under the Mutual Recognition Regime) the consequence of a breach of the *entry* requirements may well be as for offering securities in New Zealand without a New Zealand prospectus, namely void allotments under section 37 of the *Securities Act 1978* (NZ), it is fundamentally important that entry requirement lodgements under the Mutual Recognition Regime be kept to those required from a consumer protection perspective.

If the Ministry of Economic Development (NZ) and Commonwealth Treasury (Australia) consider it necessary to require multiple Opt-in Notices, then the consequence of non-instantaneous or late filing of an entry requirement Opt-in Notice should not, of itself, give rise to the same consequences as offering in New Zealand without a New Zealand prospectus (ie void allotments).

3.2. Consequences of Breach of Entry Requirements

As you may well be aware, under the New Zealand ARMIS 1999 Exemption Notice and, for some documents, the ARMIS 2003 Exemption Notice, non-instantaneous lodgement (for continuous offers), late lodgement or non-lodgement of documents may give rise to serious consequences (namely void allotments under section 37 *Securities Act 1978* (NZ) and an obligation to pay 10% per annum on those allotments), *irrespective* of the circumstances giving rise to, or the extent of, the non-instantaneous (for continuous offers), late or non-lodgement. To some extent, recent New Zealand law changes have addressed this issue, but require an issuer to make an application to New Zealand courts.

The Discussion Paper notes that a breach of the entry requirements would “be treated as an ordinary domestic offer in the host jurisdiction, and therefore will be unlawful if domestic regulatory requirements are not met, *with the consequences prescribed by domestic law*”. We submit that the penalty or sanction for non-compliance with an entry requirement should be proportionate to the nature of the breach, rather than (unlike the ARMIS 1999 Exemption Notice) giving rise to the “death penalty” (void allotments) irrespective of the surrounding circumstances (such as whether various offer documents such as an Australian prospectus and New Zealand investment statement were otherwise available to New Zealand investors).

Perhaps MED and Treasury may decide to review each entry requirement and consider which should give rise to (under NZ law) a per se void allotment under section 37 and which should instead solely expose issuers to fines and civil liability (if loss is proven to flow from the non-compliance).

An alternative solution may be similar to the recent amendments to the *Securities Act 1978* in New Zealand where court relief is available provided investors are not materially prejudiced. Alternatively, an approach similar to ARMIS 2003 might be adopted, where the lodgement requirements non-compliance of which still (potentially) exposes issuers to void



allotments (subject to court relief) were limited to the most “important” documents (such as the product disclosure statement).

3.3. Specific Entry Requirements – Paragraph 5.2 of the Discussion Paper

As mentioned above, the mutual recognition Opt-in Notice should only have to be lodged once for continuous (or open ended) offers.

The entry requirement to lodge relevant constitutional documents should be clarified that the lodgement requirement is to lodge the relevant constitutional document current as at the date of lodging the Mutual Recognition Opt-in Notice. This is particularly important if void allotments result from non-compliance with any entry requirement (irrespective of whether all other Mutual Recognition requirements have been complied with).

3.4. Requirement to Lodge any Exemption Granted by the Home Jurisdiction that is Specific to the Offer or Offeror

The Discussion Paper (page 11) states that the following must be lodged as an entry requirement:

*“A copy of any exemption granted by the home jurisdiction regulator that is specific to the Offer **or the Offeror.**”*

It should be made clear that this entry requirement does not require lodgement of ASIC class orders. ASIC class orders are not specific to the Offer or Offeror as they apply generally to the “class” falling within the terms of the ASIC class order.

In relation to specific exemptions (that is, not class order exemptions), we submit that specific exemptions should not be required to be lodged as an entry requirement because home jurisdiction *disclosure* laws will adequately require disclosure of the substance of specific exemptions where appropriate (that is, where the specific exemptions are material to an investment decision). On this basis, we submit that no specific exemptions should be required to be lodged as an entry requirement and that it is simply a matter for disclosure in the home jurisdiction offer document (see section 3.5) where home jurisdiction law requires. If the home jurisdiction’s *disclosure* laws require reference to the substance of the specific exemption then it will be included in the home jurisdiction offer document.

As an alternative, the entry requirement should be amended so that it only applies in respect of any exemption granted *specifically* in respect of the *offer*, which is materially relevant to an investment decision. Currently, as worded, any exemption specific to the *offeror* is required to be lodged irrespective of whether it is materially relevant to the *offer*. This may capture many *offeror* reliefs which have no direct material application to the *offer*. For example, exemptions in relation to an Australian issuer’s licence obligations may be caught. The requirement to lodge such *offeror* exemptions, involves substantial compliance requirements, bearing in mind that breach potentially gives rise to the “death penalty” (void allotment). If an exemption has been granted to the *offeror*, which is not specifically



obtained for the *offer*, and the matter is material to an investment decision, Australian law would require the matter to be disclosed in the (Australian law) product disclosure statement. For this reason, if exemptions are required to be lodged, they should be limited to exemptions specific to the *offer* and which are materially relevant to an investment decision.

3.5. Lodgement of any General Exemption Granted by the Home Jurisdiction Regulator that is Relevant to the Offer

The Discussion Paper (page 11) states the mutual recognition opt-in notice must provide:

*“particulars of any **general exemption** granted by the home jurisdiction regulator that is relevant to the offer.”.*

It is not clear what “general exemption” means. This requirement should **not** require ASIC Class Orders to be lodged as an entry requirement. This is because there are numerous potentially relevant ASIC Class Orders. This requirement involves substantial compliance requirements for no apparent consumer benefit. Some of the ASIC Class Orders relied on regularly by issuers in the context of Australian PDSs are: CO 03/217 (Differential Fees), CO 03/237 (Updating non-material information outside of the PDS), and CO 02/262 (Switching Relief). Each of these Class Orders requires a matter relating to the Class Order to be “flagged” in the PDS. That is, investors are aware of the nature of the exemption by way of disclosure in the PDS.

Some Class Orders however may not require specific reference to them in the PDS. Class orders are regularly issued. It may be that an issuer may decide after issuing a PDS to rely on a class order. The issuer may legally rely on the class order (under Australian law) without amending its PDS (to refer to the subject matter of the class order) if the class order does not prescribe PDS disclosure and provided that reliance on that class order is not something a retail investor would expect to find disclosed in a PDS (in terms of the general PDS disclosure tests).

It is strongly submitted that it is unnecessary for investors of the host jurisdiction (NZ in this context), to require lodgement of ASIC Class Orders. These matters should be left to the home jurisdiction offer document. That is, if the class order does not require reference to it (or its subject matter) in the offer document (Australian PDS), there is no policy for requiring lodgement in the host jurisdiction. If the class order requires reference to the subject matter of the class order in the PDS, then the ongoing requirements (which includes that the offer/PDS meets home jurisdiction law) are sufficient from an investor protection perspective without requiring lodgement of the class order in the host jurisdiction.

Further, this matter is particularly important if any breach of the entry requirements gives rise to potentially void allotments (for offers into New Zealand).



4. Mutual Recognition Ongoing Requirements

4.1. Home Jurisdiction exemptions relevant to the offeror

The Discussion Paper (page 11) states that:

*“Any amendment to... an exemption **relevant to the Offer** granted by the home jurisdiction regulator that is specific to the **Offer or the Offeror** must be filed...”*

For the reasons stated in paragraphs 3.4 and 3.5, we submit this should not be required. Alternatively we submit that exemptions relating to the **Offeror** should not be required and that specific exemptions relating to the **Offer** should only be required if the specific exemption is materially relevant to an investment decision. This is particularly so bearing in mind that breach of this (albeit unnecessary) ongoing requirement gives rise to substantial fines. If “relevant to the Offer” is intended to limit the exemptions relevant to the **Offeror** that are required to be lodged, that may assist. However, clarification is required as the limiter “relevant to the Offer” (in relation to exemptions specific to the **Offeror** does not appear in the similar entry requirement (see paragraph 3.4).

4.2. Lodging Constitutional Amendments

Under Australian law constitutional amendments for registered managed investment schemes are not effective until they are lodged with ASIC. The ongoing requirements therefore should be clarified, at least in relation to registered managed investment schemes, that the filing must be done within the later of five business days after lodgement with ASIC or the date the constitution amendment is (under the constitution) effective. This is to accommodate constitution amendments which are stated to be effective after lodgement with ASIC.

4.3. Consequences of breaching an Ongoing requirement

We welcome the development in the Mutual Recognition Regime that non-instantaneous (for continuous offers), late, or non-compliance with an *ongoing* lodgement requirement does not, of itself, give rise to void allotments. Clearly civil liability (if loss can be proven) is still (and should be) applicable. Given the history of the ARMIS 1999 Exemption Notice where non-instantaneous, late or non-filing of various documents automatically gave rise to New Zealand securities law's most severe sanction (void allotments), the Mutual Recognition Regime should make it abundantly clear that in relation to *ongoing* (and *entry*) requirements, breaches may give rise to fines, potential civil penalties and civil liability, but do not (of itself) give rise to void allotments under Section 37 of the *Securities Act* (NZ). In this regard, the recent amendments to the Securities Act in relation to section 37, and the ARMIS 2003 Exemption Notice may be useful precedents. However, even under ARMIS 2003, some non-instantaneous (for continuous offers), late or non-lodgements still give rise to void allotments subject to court relief.

Please feel free to contact Stephen Judge if you would like to discuss any aspect of this submission.

Yours sincerely

Stephen Judge

Senior Legal Counsel

Challenger Financial Services Group

T (02) 9994 7338

F (02) 9994 7777

E sjudge@challenger.com.au