



Securities Act (Orakei Marina) Exemption Notice 2004

Pursuant to the Securities Act 1978, the Securities Commission gives the following notice (to which is appended a statement of reasons of the Securities Commission).

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Notice

- 1 **Title**
This notice is the Securities Act (Orakei Marina) Exemption Notice 2004.

- 2 **Commencement**
This notice comes into force on the day after the date of its notification in the *Gazette*.

- 3 **Expiry**
This notice expires on the close of 31 March 2007.

- 4 **Interpretation**
 - (1) In this notice, unless the context otherwise requires,—
Act means the Securities Act 1978
company means Orakei Marina Limited

Regulations means the Securities Regulations 1983

reporting date, in relation to a financial year, means the date that is 3 months after the end of that financial year

scheme means the scheme for ownership of rights and interests in the marina situated at Tamaki Drive, Auckland, and known as the Orakei Marina

specified participatory securities means participatory securities issued by the company in respect of the scheme

trust means Orakei Marina Management Trust.

- (2) Any term or expression that is defined in the Act or the Regulations and used, but not defined, in this notice has the same meaning as in the Act or the Regulations.

5 Exemptions

The company and the trust, and every person acting on behalf of either or both of them, are exempted, in the case of specified participatory securities, from—

- (a) section 33(3) of the Act; and
- (b) section 37(2) of the Act; and
- (c) section 37A(1)(c) of the Act; and
- (d) clauses 7(2) to (6), 8, and 38 of the Third Schedule of the Regulations.

6 Conditions of exemption from section 33(3) of Act relating to trust

The exemption in clause 5(a) is subject to the conditions that,—

- (a) as soon as reasonably practicable after the end of each financial year of the scheme, the trust must prepare, or cause to be prepared, financial statements for the scheme; and
- (b) the trust must ensure that the financial statements are audited; and
- (c) as soon as reasonably practicable after the beginning of each financial year of the scheme, the trust must send, or cause to be sent, to the holders of specified participatory securities a written statement containing reasonable details of the actual and budgeted contributions required to be made by those holders to the operating

and other expenses of the scheme during that financial year.

7 Conditions of exemptions relating to registered prospectus

The exemptions in clause 5 are also subject to the conditions that every registered prospectus that contains or accompanies an offer of specified participatory securities—

- (a) contains prominent statements to the effect that, if information or a statement in the prospectus or in any attachment to the prospectus becomes false or misleading in a material particular, the prospectus will be immediately withdrawn or amended; and
- (b) contains prominent statements to the effect that, in respect of each financial year of the scheme,—
 - (i) audited financial statements that comply with the Financial Reporting Act 1993 will be prepared for the scheme not later than the reporting date; and
 - (ii) copies of the most recent audited financial statements for the scheme may be obtained by holders of the specified participatory securities, free of charge, on request at the place or places specified in the prospectus; and
 - (iii) every registered prospectus will be accompanied by, or have annexed to it, a copy of the most recent financial statements for the scheme; and
- (c) specifies the fixed annual fees payable by holders of the specified participatory securities for the first financial year of the scheme following the first date of issue of specified participatory securities; and
- (d) specifies the minimum gross value of sales of specified participatory securities required to enable the scheme to commence; and
- (e) explains the effect of the condition in clause 8; and
- (f) specifies that, if specified participatory securities cannot be allotted as provided in clause 8, then the company, or all the directors of the company, will repay the subscriptions, together with interest at the prescribed rate, within 2 months of the expiry of the time period referred to in clause 8; and

- (g) is accompanied by a copy of the most recent financial statements for the scheme; and
- (h) is accompanied by a copy of the most recent statement of the actual and budgeted contributions to the operating and other expenses of the scheme referred to in clause 6(c); and
- (i) contains, or has annexed to it, or is accompanied by, a copy of the licence for marina berths granted in respect of the scheme.

8 Condition of exemption from section 37(2) of Act that applies if minimum gross value of sales not reached

- (1) The exemption in clause 5(b) is also subject to the condition that no allotment may be made of a specified participatory security unless, within 6 months after the date of the registered prospectus,—
 - (a) subscribers for the specified participatory securities have become legally bound to pay to the company the amount stated in the registered prospectus as the minimum gross value of sales in accordance with clause 7(d); and
 - (b) each subscriber for specified participatory securities has paid, and the company has received, at least 20% of the amount that the subscriber has become legally bound to pay in respect of those securities.
- (2) For the purpose of this clause,—
 - (a) a sum is deemed to have been paid to, and received by, the company if a cheque for that sum is received in good faith by the company and the directors of the company have no reason to suspect that the cheque will not be paid;
 - (b) the amount so stated in the registered prospectus must be reckoned exclusively of any amount payable otherwise than in cash.

9 Condition of exemption from section 37A(1)(c) of Act requiring certificates to be lodged with Registrar

The exemption in clause 5(c) is also subject to the condition that the company, during the period that the offer of the specified participatory securities remains open for subscription, lodges with the Registrar certificates that—

- (a) relate to the registered prospectus for the specified participatory securities; and
- (b) refer to the company's most recent audited financial statements, being financial statements that comply with the Financial Reporting Act 1993; and
- (c) are signed on behalf of the directors by at least 2 directors of the company; and
- (d) are dated not later than 3 months after the date of the financial statements referred to in paragraph (b); and
- (e) state that, in the opinion of the company's directors after due enquiry by them, the registered prospectus is not, at the date of the certificate, false or misleading in a material particular by reason of failing to refer or give proper emphasis to adverse circumstances; and
- (f) state that, except to the extent permitted by this notice, the information contained in the registered prospectus complies with the Third Schedule of the Regulations.

Dated at Wellington this 16th day of November 2004.

The Common Seal of the Securities Commission was affixed in the presence of:

[L.s.]

J. Diplock,
Chairperson.

Statement of reasons

This notice comes into force on the day after the date of its notification in the *Gazette* and expires on 31 March 2007.

The notice exempts Orakei Marina Limited and the Orakei Marina Management Trust, subject to conditions, from certain provisions of the Securities Act 1978 and of the Securities Regulations 1983 in the case of offers of participatory securities in a scheme relating to marina berths at Orakei Marina, Tamaki Drive, Auckland.

The exemption would, subject to conditions, enable Orakei Marina Limited and that trust to—

- offer participatory securities without the appointment of a statutory supervisor in respect of the participatory securities; and
- extend the life of the prospectus in respect of the participatory securities so that allotments made during the extended period continue to be valid; and
- extend the time within which subscriptions are required to be refunded; and
- enable the prospectus to be issued without inclusion of prospective financial information or an auditor's report.

The Securities Commission considers that it is appropriate to grant the exemption for the following reasons:

- the participatory securities on offer are not in the nature of an ongoing scheme or business operation whereby investors will expect an income stream, and as such some of the provisions of the law applying to those investments do not provide material benefit for investors, but impose costs on the issuer; and
- the role of a statutory supervisor in monitoring ongoing cash-flows and production of income for the scheme would not provide significant advantage for security holders in respect of this scheme, as the principal purpose of the investment will be to provide use of facilities. Given the nature of the scheme, the requirement to appoint a statutory supervisor may create a cost that is unlikely to be equalled by any benefit to marina berth licence holders; and
- the marketing requirements of schemes such as marina promotions are longer term than for most offers of securities. This is accommodated by allowing the use of an "evergreen" prospectus; and
- the condition of exemption requiring the directors to certify periodically that the prospectus is accurate and up to date, and to withdraw it immediately if it is misleading, provides protection for prospective investors by requiring that the prospectus can be relied upon as being accurate and current; and
- the scheme is not a traditional investment scheme whereby investors will receive a financial return by way of interest, dividends, or any other form of participation in the profits of the issuer. As such, prospective financial information about

- the scheme would be of limited use to investors. The condition requiring disclosure of fees payable will provide more useful information for prospective investors; and
- as the registered prospectus will not contain financial information, there is no need for an auditor's report.
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Issued under the authority of the Acts and Regulations Publication Act 1989.

Date of notification in *Gazette*: 18 November 2004.

This notice is administered by the Securities Commission.
