

Financial Markets Conduct (Denarau Villas) Exemption Notice 2016

Pursuant to section 556 of the Financial Markets Conduct Act 2013, the Financial Markets Authority, being satisfied of the matters set out in section 557 of that Act gives the following notice.

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Notice

1 Title

This notice is the Financial Markets Conduct (Denarau Villas) Exemption Notice 2016.

2 Commencement

This notice comes into force on 1 December 2016.

3 Revocation

This notice is revoked on the close of 30 November 2021.

4 Interpretation

(1) In this notice, unless the context otherwise requires,—

Act means the Financial Markets Conduct Act 2013

governing document means the deed of participation between Denarau Villas Limited, Tabua Investments Limited, and Trustees Executors Limited dated 23 July 1997, as amended and restated from time to time

manager means Denarau Villas Limited, a company incorporated in New Zealand and domiciled in Fiji

Regulations means the Financial Markets Conduct Regulations 2014

scheme means the registered scheme established under the governing document.

- (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 from requirement to have a licensed manager

The manager of the scheme is exempted, in respect of the scheme, from—

- (a) section 127(1)(c) of the Act; and
- (b) section 133(a) of the Act to the extent it relates to a requirement referred to in paragraph (a); and
- (c) Section 388(a) of the Act.

6 Conditions of exemptions in clause 5

The exemptions in clause 5 are subject to the conditions that—

- (a) no new managed investment products will be offered or issued in respect of the scheme; and
- (b) scheme participants are the only shareholders of the manager of the scheme.

7 Exemptions from independent custody requirements

- (1) The manager of the scheme is exempted, in respect of the scheme, from—

- (a) section 127(1)(f) of the Act; and
- (b) section 133(a) of the Act to the extent it relates to a requirement referred to in subclause (1)(a).

- (2) The supervisor of the scheme is exempted, in respect of the scheme, from section 156(1) of the Act to the extent that that section requires the supervisor to hold the scheme's property, or, if authorised by the governing document, contract the holding of that scheme property to another person who meets the external custodianship requirements in that section (to the extent that the property is not held directly by scheme participants).

8 Conditions of exemptions in clause 7

The exemptions in clause 7 are subject to the condition that the manager of the scheme continues to hold scheme property to the extent that the property is not held directly by scheme participants.

9 Exemption from daily cash reconciliation requirement

The custodian of scheme property, in respect of the scheme, is exempt from regulation 86(3) of the Regulations.

10 Conditions of exemption in clause 9

- (1) The exemption in clause 9 is subject to the condition that the custodian must reconcile all records of money for the scheme with a frequency that the custodian reasonably determines, in accordance with regulation 86(2) of the Regulations and subclause (2), to be appropriate for the purposes of ensuring that the custodian's records accurately state the scheme's money and all transactions relating to that money.
- (2) For the purposes of determining the appropriate frequency for reconciling records of money

for the scheme, the custodian must—

- (a) consider the frequency, value, and volume of the transactions in respect of the scheme's property; and
- (b) consider, whenever there is a material change in the frequency, value, and volume of cash transactions, whether reconciliations are being carried out with appropriate frequency; and
- (c) consult the supervisor of the scheme; and
- (d) act to the standard of a prudent and professional custodian.

11 Exemption from annual assurance engagement requirement

The custodian of scheme property, in respect of the scheme, is exempt from regulation 87(1) of the Regulations.

12 Exemptions from governing document requirements

The manager of the scheme is exempted, in respect of the scheme's governing document, from—

- (a) section 135(1)(d) of the Act; and
- (b) section 127(1)(b) to the extent that it requires the scheme's governing document to comply with section 135(1)(d) of the Act; and
- (c) section 133(a) of the Act to the extent it relates to a requirement referred to in paragraphs (a) and (b); and
- (d) clause 22(1)(b) of Schedule 4 of the Act to the extent it requires the copy of the governing document lodged with the Registrar to comply with section 135(1)(d) of the Act.

13 Further condition

(1) The exemptions contained in this notice are subject to the further condition that the manager of the scheme must, no later than 3 months after the date this notice comes into force, provide a written notice containing the information in subclause (2) to each scheme participant by delivering it or sending it to the scheme participant's last known address.

(2) The written notice must contain the following information:

- (a) the manager's name and address; and
- (b) a statement in the following form:

"Participatory securities in the Denarau Villas scheme, as well as shares in Denarau Villas Limited, were offered to scheme participants under the Securities Act 1978 in reliance on the Securities Act (Denarau Villas Limited and Others) Exemption Notice 1997 and the Securities Act (Denarau Villas Limited and Others) Exemption Amendment Notice 1999.

After 1 December 2016, the Securities Act will cease to apply and the scheme will instead be subject to the Financial Markets Conduct Act 2013. A new exemption notice called the Financial Markets Conduct (Denarau Villas) Exemption Notice 2016 will apply. The effect of this notice is that Denarau Villas Limited will manage the scheme without the need to be licensed by the Financial Markets Authority. In addition, the supervisor will not be required to hold scheme property. The manager will be the custodian for the

purposes of the scheme but does not, subject to meeting various conditions, need to meet independent custody requirements, carry out daily cash reconciliations, or obtain an annual assurance engagement. Further, the governing document for the scheme does not need to be updated to include a methodology for valuing or pricing scheme assets.

If you would like any further information, please contact [*insert contact details of Denarau Villas Limited*].”

Dated at Wellington this 29th day of November 2016.



Liam Mason
Director of Regulation
Financial Markets Authority

Statement of reasons

This notice comes into force on 1 December 2016 and is revoked on 30 November 2021.

This notice relates to certain participatory securities and accompanying shares that were issued by Denarau Villas Limited in reliance on the Securities Act (Denarau Villas Limited and Others) Exemption Notice 1997 and the Securities Act (Denarau Villas Limited and Others) Exemption Amendment Notice 1999 prior to 1 December 2016.

On and from 1 December 2016, certain ongoing obligations of the Financial Markets Conduct Act 2013 (**Act**) will apply to the securities (subpart 4 of Part 3 of the Act (ongoing disclosure), Part 4 of the Act (governance of financial products), Part 7 of the Act (financial reporting and audit), any regulations made for the purposes of subpart 4 of Part 3, Part 4, or Part 7 of the Act and any other provision of the Act relating to the enforcement, application, or effect of subpart 4 of Part 3, Part 4, or Part 7 of the Act).

This notice exempts the manager, in respect of the scheme established under the deed of participation between Denarau Villas Limited, Tabua Investments Limited, and Trustees Executors Limited dated 23 July 1997 (the **scheme**), from certain governance requirements of the Act. This means that the manager, Denarau Villas Limited, does not need to be licensed and the supervisor does not need to hold the scheme’s property or ensure that property is held by an independent custodian. The exemptions are subject to a number of conditions including that Denarau Villas Limited must hold scheme property and that no new managed investment products will be offered or issued in respect of the scheme. Scheme participants must be informed that the scheme will be subject to the Act and that Denarau Villas Limited will be relying on this notice.

The Financial Markets Authority (**FMA**), after satisfying itself as to the matters set out in section 557 of the Act, considers it appropriate to grant the exemptions because—

- the scheme is closed and participants each have separately identifiable rights in underlying property, being their villa. Together the participants’ villas comprise a resort complex. The manager, Denarau Villas Limited, currently contracts Sheraton International Inc to operate the resort as a hotel. Rental and other income generated by the hotel is paid to participants via the manager:
- Denarau Villas Limited is wholly owned by scheme participants in proportion to each participant’s villa interest. Scheme participants have considerable control, oversight and rights in relation to the manager:

- the scheme is the only scheme managed by Denarau Villas Limited and, aside from some cash held on trust, the manager only has custody of the scheme's communal real property, being resort facilities which include a pool and pool bar and other fittings and fixtures not owned by scheme participants. Day-to-day management and use of the scheme's communal resort facilities is contracted out to Sheraton International Inc in order to operate the hotel:
- without the exemptions, the manager would be required to obtain a licence and the scheme's licensed supervisor or an independent custodian would be required to hold the scheme's property, primarily the communal resort facilities. Given the tangible nature of the majority of the scheme's assets, and the degree of control scheme participants have in relation to the manager, such changes would be unlikely to result in any reduction in governance risks in respect of the scheme:
- in addition, the manager remains subject to the general duties in the Act (including the obligation to act honestly and in the best interests of scheme participants, and to exercise the care, diligence and skill of a prudent person) and the scheme is subject to supervision by an independent licensed supervisor.

As such, the FMA is satisfied that—

- the granting of exemptions is desirable in order to promote the purposes of the Act, specifically to avoid unnecessary compliance costs and promote flexibility in financial markets; and
- as relief is only provided from governance obligations where the particular nature of the scheme means compliance would not serve to reduce risk for scheme participants, the exemptions are not broader than reasonably necessary to address the matters that give rise to them.