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Financial Markets Conduct (Bay Energy Limited) 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 (Bay Energy Limited) Exemption Notice 2016.

2 Commencement

This notice comes into force on 12 September 2016.

3 Revocation

This notice is revoked on the close of 31 December 2016.

4 Interpretation

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

Act means the Financial Markets Conduct Act 2013

Court means the High Court of New Zealand

demerger means the demerger of Trustpower into New Trustpower and Tilt Renewables Limited pursuant to a Court approved scheme of arrangement under Part 15 of the Companies Act 1993

demerger guaranteeing group, in relation to offer of senior debt securities, means the group comprising—

(a) New Trustpower; and

(b) any guarantor of the senior debt securities from time to time being, as at the issue date of the specified debt securities, GSP Energy

demerger issuing group, in relation to the offer of specified debt securities, means New Trustpower and all intended subsidiaries of New Trustpower following completion of the demerger

demerger specified period means the period starting on 1 April 2013 and ending on the date of the PDSs

exchange offer, in relation to the senior debt securities, means the offer to holders of certain existing Trustpower debt securities to exchange those Trustpower debt securities for senior debt securities

general offer, in relation to the offer of senior debt securities, means the offer of senior debt securities to all New Zealand resident investors

generation assets means the assets of the demerger issuing group used directly in the generation of electricity

GSP Energy means GSP Energy Pty Limited

New Trustpower means Bay Energy Limited to be renamed Trustpower Limited on or about the implementation date for the demerger

PDSs means the senior PDS and the subordinated PDS

register entries mean the senior register entry and the subordinated register entry

Regulations means the Financial Markets Conduct Regulations 2014

senior debt securities means the three series of unsecured unsubordinated fixed rate notes to be issued by New Trustpower

senior PDS, in relation to the offer of senior debt securities, means the product disclosure statement for the offer of senior debt securities to be dated on or about 14 September 2016

senior register entry, in relation to the offer of senior debt securities, means the entry for the offer of senior debt securities in the register of offers of financial products

specified debt securities means the senior debt securities and the subordinated debt securities

subordinated debt securities means the unsecured subordinated fixed rate notes to be issued by New Trustpower

subordinated PDS, in relation to the offer of subordinated debt securities, means the product disclosure statement for the offer of subordinated debt securities to be dated on or about 14 September 2016

subordinated register entry, in relation to the offer of subordinated debt securities, means the entry for the offer of subordinated debt securities in the register of offers of financial products

Trustpower means Trustpower Limited.

(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 Exemption in respect of KIS

New Trustpower is exempted from regulation 29(1)(c) of the Regulations to the extent that it does not permit information about the exchange offer and the general offer being included in the KIS contained in the Senior PDS.

6 Condition of exemption in clause 5

The exemption in clause 5 is subject to the condition that the senior PDS must not include any information relating to the exchange offer or general offer in the KIS, other than a statement in the following form in section 1 under the heading 'What is this':

"This offer comprises a **General Offer** which is open to all New Zealand resident investors of fixed rate bonds maturing 15 December 2022 to be issued by New Trustpower. The General Offer includes a priority pool for New Zealand resident holders of Trustpower's 2016 bonds.

The offer also includes an **Exchange Offer**, which is an offer to certain New Zealand resident holders of bonds issued by Trustpower to exchange those Trustpower bonds for new bonds issued by New Trustpower which have the same ranking, interest rate and maturity date as the Trustpower bonds held."

7 Exemption in respect of certain information in PDS

New Trustpower is exempted from clauses 7, 10, 25, 30(5), 33(1), 65(1)(c) and 65(3)(b) of Schedule 2 of the Regulations with respect to the offer of specified debt securities.

8 Conditions of exemptions in clause 7

(1) The exemptions in clause 7 are subject to the condition that the PDSs must contain all the information and statements specified in the following that are applicable:

- (a) clause 7 of Schedule 2 of the Regulations but applied as if the reference to the issuing group's business was a reference to the demerger issuing group's business:
- (b) clause 10 of Schedule 2 of the Regulations but applied as if the references to the issuing group were references to the demerger issuing group:
- (c) clause 25 of Schedule 2 of the Regulations but applied as if references to—
  - (i) the issuing group were references to the demerger issuing group; and
  - (ii) the specified period was a reference to the demerger specified period and applied as if the demerger issuing group had been in business for that period; and
  - (iii) debt securities in clause 25(f)(i) to (iii) of Schedule 2 of the Regulations were references to any debt securities issued by Trustpower or New Trustpower:
- (d) clause 30(5) of Schedule 2 of the Regulations but applied as if references to the issuing group were references to the demerger issuing group:
- (e) clause 33(1) of Schedule 2 of the Regulations but applied as if references to the issuing group were references to the demerger issuing group:
- (f) clauses 65(1)(c) and 65(3)(b) of Schedule 2 of the Regulations but applied as if references to the issuing group were references to the demerger issuing group.

(2) The exemptions in clause 7 are subject to the further condition that New Trustpower must not issue the specified debt securities until the demerger has been approved by the Court and the implementation of the demerger has been completed.

(3) The exemptions in clause 7 are subject to the further condition that the PDSs contain—

(a) in section 1 under the heading "About the New Trustpower Group",—

(i) a statement to the effect that the information and statements that are contained or referred to in the PDSs under subclause (1) relate to the demerger issuing group rather than the usually required New Trustpower and all subsidiaries of New Trustpower as at the date of the PDS; and

(ii) a brief description of the demerger; and

(b) a statement in section 2 to the effect that New Trustpower must not issue the specified debt securities unless the condition referred to in subclause (2) is satisfied.

9 Exemption in respect of the diagram showing ranking of debt securities

New Trustpower is exempted from clause 31(1)(d) of Schedule 2 of the Regulations with respect to the offer of specified debt securities to the extent that it requires the amounts included in the diagram prepared under clause 30(2)(b) of Schedule 2 of the Regulations to be indicative amounts based on the financial position of New Trustpower at its most recent balance date or any more recent stated date.

10 Condition of exemption in clause 9

The exemption in clause 9 is subject to the condition that the amounts included in the diagram contained in the PDSs prepared under clause 30(2)(b) of Schedule 2 of the Regulations are indicative amounts based on the financial position of New Trustpower as if the demerger had been completed and extracted from the pro forma consolidated statement of financial position referred to in clause 12(6)(b).

11 Exemption in respect of financial information

New Trustpower is exempted from clauses 36, 37 and 38 of Schedule 2 of the Regulations with respect to the offer of specified debt securities.

12 Conditions of exemptions in clause 11

(1) The exemptions in clause 11 are subject to the conditions that—

(a) the PDSs include a statement in section 7 in the following form:

"This table provides selected financial information about New Trustpower Group. Full pro forma consolidated financial statements are available on the offer register at www.business.govt.nz/disclose. New Trustpower Group's financial performance and position is critical to New Trustpower's ability to meet its obligations, including those owed to you. If you do not understand this sort of financial information, you can seek professional advice."

(b) the senior PDS includes in section 7—

(i) a statement to the effect that only some of the members of the demerger issuing group (other than New Trustpower) are guarantors of the senior debt securities; and

(ii) a brief description of how the demerger issuing group's financial position and performance is relevant to the repayment of the senior debt securities.

(c) the subordinated PDS includes in section 7—

(i) a statement to the effect that no members of the demerger issuing group (other than New Trustpower) are guarantors of the subordinated debt securities; and

(ii) a brief description of how the demerger issuing group's financial position and performance is relevant to the repayment of the subordinated debt securities.

(2) The exemptions in clause 11 are subject to the further conditions that section 7 of the PDSs include the following information and statements:

(a) a table headed "Selected financial information and ratios" that contains the following information for the demerger issuing group extracted from the pro forma consolidated financial statements referred to in subclause (6):

(i) revenues for each accounting period ending 31 March 2014, 31 March 2015 and 31 March 2016:

(ii) net profit after tax plus interest, tax, depreciation, amortisation, and fair value movements in financial instruments (EBITDAF) for each accounting period ending 31 March 2014, 31 March 2015 and 31 March 2016:

(iii) net profit after tax for the accounting period ending 31 March 2016:

(iv) net cash flows from operating activities (before tax) for each accounting period ending 31 March 2014, 31 March 2015 and 31 March 2016:

(v) cash and cash equivalents for the accounting period ending 31 March 2016:

(vi) total assets for the accounting period ending 31 March 2016:

(vii) value of generation assets for each accounting period ending 31 March 2014, 31 March 2015 and 31 March 2016:

(viii) total debt for the accounting period ending 31 March 2016:

(ix) total liabilities for the accounting period ending 31 March 2016:

(x) equity for the accounting period ending 31 March 2016:

(xi) debt/EBITDAF, where debt is determined in accordance with paragraph (viii) for the accounting period ending 31 March 2016:

(xii) interest expense for the accounting period ending 31 March 2016:

(xiii) EBITDAF/interest expense for the accounting period ending 31 March 2016:

(b) under the row for debt/EBITDAF in the table referred to in subclause (2)(a), a statement in the following form:

"Debt/EBITDAF is an indicator of the degree to which an entity has borrowed against earnings. The higher the number, the greater the risk that the entity will not be able to pay off its debts.":

(c) under the row for EBITDAF/interest expense in the table referred to in subclause (2)(a), a statement in the following form:

"EBITDAF/interest expense is a measure of the ability of an entity to pay interest on borrowings. The lower the number, the greater the risk that the entity will not be able to pay interest.":

(d) a statement to the effect that the information that is contained in the table referred to in subclause (2)(a) relates to the demerger issuing group rather than the usually required New Trustpower and all of its subsidiaries as at the date of the PDS:

(e) a statement identifying the information usually required under clauses 37 and 38 of Schedule 2 of the Regulations which has not been provided in the PDSs in reliance on the exemptions contained in clause 11:

(f) a statement as to why the information referred to in subclause 2(e) has not been provided:

(g) a statement by the directors of New Trustpower setting out the reasons why New Trustpower considers it appropriate to provide the alternative financial information set out in section 7 of the PDSs, including why New Trustpower considers the information will be more useful to prospective investors in assessing the merits of the offer of specified debt securities:

(h) a summary of the differences between the information that would usually be required to be contained in the PDSs under the Regulations and the information that is provided in the PDSs.

(3) The exemptions in clause 11 are subject to the further conditions that section 7 of the senior PDS includes the following information and statement:

(a) a table that contains the following financial information for both New Trustpower and for the demerger guaranteeing group stated as at 31 March 2016 extracted from pro forma consolidated financial statements referred to in subclause (6):

(i) total assets:

(ii) total tangible assets (being total assets less total intangible assets and goodwill):

(iii) total liabilities:

(iv) total net tangible assets (being total tangible assets under paragraph (ii) less total liabilities under paragraph (iii)):

(b) above the table referred to in subclause (3)(a), a statement to the effect that the table shows the financial position of New Trustpower and the demerger guaranteeing group.

(4) The exemptions in clause 11 are subject to the further conditions that section 7 of the subordinated PDS includes the following information and statement:

(a) a table that contains the following financial information for New Trustpower stated as at 31 March 2016 extracted from pro forma consolidated financial statements referred to in subclause (6):

(i) total assets:

(ii) total tangible assets (being total assets less total intangible assets and goodwill):

(iii) total liabilities:

(iv) total net tangible assets (being total tangible assets under paragraph (ii) less total liabilities under paragraph (iii)):

(b) above the table referred to in subclause (4)(a), a statement to the effect that the table shows the financial position of New Trustpower.

(5) The exemptions in clause 11 are subject to the further conditions that section 7 of the PDSs contains,—

(a) a statement identifying the information extracted from pro forma consolidated financial statements referred to in subclause (6) or other information that have not been prepared in accordance with GAAP; and

(b) a brief description of the basis on which the pro forma information has been prepared; and

(c) a reference to where information on the principal assumptions on which the pro forma financial information is based can be obtained on the offer register; and

(d) a reference to where reconciliations to the audited financial statements for Trustpower that have been prepared in accordance with GAAP can be obtained on the offer register; and

(e) a reference to where a copy of the investigating accountants report by PricewaterhouseCoopers on the pro forma consolidated financial statements referred to in subclause (6) can be obtained on the offer register.

(6) The exemptions in clause 11 are subject to the further conditions that the register entries contain—

(a) an unaudited pro forma consolidated statement of financial performance for the demerger issuing group for the accounting periods ending 31 March 2014, 31 March 2015 and 31 March 2016, such statements of financial performance to be prepared—

(i) as if the demerger had occurred on 31 March 2013 and the demerger issuing group had commenced business on 1 April 2013; and

(ii) by extracting the financial information of the demerger issuing group from the audited financial statements for Trustpower for the accounting periods ending 31 March 2014, 31 March 2015 and 31 March 2016; and

(b) an unaudited pro forma consolidated statement of financial position for the demerger group for the accounting period ending 31 March 2016, such statement of financial position to be prepared—

(i) as if the demerger had occurred on 31 March 2016; and

(ii) by extracting the financial information of the demerger issuing group from the audited financial statements for Trustpower for the accounting periods ending 31 March 2016; and

(c) a statement to the effect that the pro forma financial statements referred to in subclause (6) have not been prepared in accordance with GAAP; and

(d) a statement explaining why the pro forma financial statements referred to in subclause (6) have not been prepared in accordance with GAAP; and

(e) a description of the principal assumptions on which the pro forma financial information contained in the PDSs and on the offer register is based; and

(f) a reconciliation of the pro forma information contained in the PDSs and on the offer register to the audited financial statements for Trustpower, such reconciliation must—

(i) be a tabular reconciliation to GAAP; and

(ii) disclose each material adjustment; and

(iii) include explanatory notes about those adjustments if those notes are necessary or desirable in order to explain the tabular information; and

(g) a copy of the investigating accountants report by PricewaterhouseCoopers on the pro forma consolidated financial statements referred to in subclause (6).

(7) The exemptions in clause 11 are subject to the further conditions that the register entries contain the following information and statements immediately after the information required by subclause (6):

(a) a statement that the register entry does not contain the usually required—

(i) group financial statements for New Trustpower and all subsidiaries of New Trustpower as at the date of the PDSs for the accounting periods ending

31 March 2014 and 31 March 2015 prepared in accordance with GAAP together with any auditors report on those statements; and

(ii) group financial statements for New Trustpower and all subsidiaries of New Trustpower as at the date of the PDSs for the accounting period ending 31 March 2016 prepared in accordance with GAAP and audited by a qualified auditor; and

(iii) a copy of the auditor's report on the financial statements referred to in subclause (7)(a)(ii):

(b) a statement as to why the information referred to in subclause (7)(a) has not been provided:

(c) a statement by the directors of New Trustpower setting out the reasons why New Trustpower considers it appropriate to provide the alternative financial information set out in the register entries, including why New Trustpower considers the information will be more useful to prospective investors in assessing the merits of the offer of specified debt securities:

(d) a summary of the differences between the information that would usually be required to be contained in the register entries under the Regulations and the information that is provided in the register entries.

Dated at Auckland this 9th day of September 2016

Garth Stanish
Director of Capital Markets
Financial Markets Authority

Statement of Reasons

This notice comes into force on 12 September 2016, and is revoked on 31 December 2016.

The notice exempts Bay Energy Limited (**New Trustpower**), subject to conditions, from certain provisions of the Financial Markets Conduct Regulations 2014 (**Regulations**), in relation to its regulated offers of unsubordinated fixed rate notes (**senior debt securities**) and subordinated fixed rate notes (**subordinated debt securities**).

Trustpower Limited (**Trustpower**) is proposing to demerge into two separate companies: New Trustpower and Tilt Renewables Limited (**demerger**). The demerger is to be implemented by way of a court approved scheme of arrangement under part 15 of the Companies Act 1993 (**scheme**). It is proposed that New Trustpower will make the offers of senior debt securities and subordinated debt securities prior to the scheme becoming effective. However, the senior debt securities and subordinated debt securities will not be issued by New Trustpower until after the scheme becomes effective. As a result, the offers of the senior debt securities and subordinated debt securities will be undertaken at a time when New Trustpower is a wholly owned subsidiary of Trustpower and prior to the time at which New Trustpower will acquire the assets and liabilities of Trustpower which it will hold when the demerger is completed.

New Trustpower is exempt from the requirements—

- under regulation 29(1)(c) of the Regulations to the extent that it does not permit information about the exchange offer and the general offer being included in the KIS contained in the product disclosure statement for the offer of senior debt securities (**senior PDS**); and
- under clauses 7, 10, 25, 30(5), 33(1), 65(1)(c) and 65(3)(b) of Schedule 2 of the Regulations to include information about the 'issuing group' in the senior PDS and in the product disclosure statement for the offer of subordinated debt securities (**subordinated PDS**); and
- under clause 31(1)(d) of Schedule 2 of the Regulations that the amounts in the diagram showing the ranking of debt securities on liquidation (**ranking diagram**) in the PDSs to be indicative amounts based on the financial position of New Trustpower at its most recent balance date or any more recent date; and
- under clauses 36, 37 and clause 38 of Schedule 2 of the Regulations to include certain statements and selected financial information in the senior PDS and in the subordinated PDS (**PDSs**).

The Financial Markets Authority (**FMA**), after satisfying itself as to the matters set out in section 557 of the Financial Markets Conduct Act 2013 (**Act**), considers it appropriate to grant these exemptions because—

- the offer of senior debt securities is made up of an exchange offer and a general offer. The exchange offer is made to holders of existing notes issued by Trustpower to exchange those Trustpower notes for senior debt securities. The general offer is made to all New Zealand resident investors. Due to the structure of the offer, it is considered desirable to include information relating to the exchange offer and general offer in the KIS contained in the senior PDS because that information is important to prospective investors' understanding of the proposed offer of senior debt securities. It is a condition of the exemption that no other information relating to the exchange offer or general offer, other than the prescribed statement, may be included in the KIS:
- the Regulations require the PDSs to contain information on the 'issuing group', being New Trustpower and all subsidiaries of New Trustpower as at the date of the PDSs (**current issuing group**). However, the financial position and composition of the 'issuing group' will change materially between the date of the PDSs and the date on which the senior debt securities and subordinated debt securities are issued. Requiring New Trustpower to provide information about the current issuing group will not, in the context of the demerger, provide prospective investors with meaningful information:
- it is the post-demerger position of the 'issuing group' that is material to prospective investors. The conditions of the exemption require the PDSs to include all the information and statements required by the Regulations, but applied as if references to the 'issuing group' were references to New Trustpower and all intended subsidiaries of New Trustpower following completion of the demerger (**demerger issuing group**). Further, no senior debt securities or subordinated debt securities can be issued by New Trustpower if the scheme is not implemented:
- the conditions of the exemption with respect to the ranking diagram require the amounts in that diagram to instead be indicative amounts based on the financial position of New Trustpower as if the demerger had been completed, in order to provide investors with more relevant and accurate information:
- clauses 36, 37 and 38 of Schedule 2 of the Regulations would have required the PDSs to include statements and selected financial information for the current issuing group and for New Trustpower as at New Trustpower's most recent balance date. The senior PDS would also need to include selected financial information about the guarantors of the senior debt

securities. At its most recent balance date, New Trustpower was a wholly-owned subsidiary of Trustpower Limited and did not prepare individual financial statements. Instead, prospective investors need to understand the financial position of the demerger issuing group and of New Trustpower after the demerger has been completed, as it is the post-demerger position of the New Trustpower business that will be relevant to an investor's decision whether or not invest in the senior debt securities or subordinated debt securities:

- the conditions of the exemption require the PDSs to contain alternative information, including selected financial information for the demerger issuing group, New Trustpower and the guarantors of the senior debt securities, to enable prospective investors to make informed decisions about their investments. The selected financial information has been extracted from unaudited pro forma consolidated financial statements for the demerger issuing group that are included in the register entries for the offers of senior debt securities and subordinated debt securities (**register entries**), instead of the usually required group financial statements for the current issuing group:
- the conditions of the exemption also require New Trustpower to make various statements in the PDSs and register entries, including identifying the historical information usually required by the Regulations, why that information has not been provided and why the directors of New Trustpower consider it appropriate to provide the alternative financial information, including why they consider the information is more useful to prospective investors in assessing the merits of the offers of senior debt securities and subordinated debt securities:
- as such, the FMA is satisfied that the exemptions are desirable in order to promote the purposes of the Act, specifically to promote the confident and informed participation of businesses, investors, and consumers in the financial markets and to provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products:
- the exemptions only provide relief from the requirements to provide information, including historical financial information, with respect to the current issuing group and New Trustpower that is not meaningful for prospective investors in the context of the demerger. Instead, the conditions of the exemption require the PDSs and register entries to include information, including alternative financial information, with respect to the demerger issuing group and New Trustpower that is more relevant to investors when making informed investment decisions regarding the offers of senior debt securities and subordinated debt securities. In these circumstances, the FMA is satisfied that the exemptions are not broader than reasonably necessary to address the matters that gave rise to the exemptions.