

Ms Claire LaBouchadiere
Senior Manager, Corporations
Australian Securities and Investments Commission
Level 5, 100 Market Street
SYDNEY NSW 2000

24 July 2014

Dear Ms LaBouchadiere,

Consultation Paper 220 - Fundraising: Facilitating offers of CHESS Depository Interests

The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Law Council**) welcomes the opportunity to make submissions on ASIC Consultation Paper 220 (**CP 220**).

The Law Council generally supports ASIC's proposals in CP 220, but wishes to make the following comments.

1 Chapter 6D

We have reviewed the proposed class order against individual relief recently granted in respect of Chapter 6D, and note that the class order operates more broadly in that it covers Chapter 6D as a whole whereas relief instruments have addressed certain aspects (eg. cleansing notices). However, we support ASIC's broad approach regarding Chapter 6D.

2 Licensing

ASIC notes that there are differing views as to whether a foreign company issuer of CDIs and/or the CDI depository nominee is required to hold an AFSL for a financial service that consists of dealing in CDIs (CP 220.19). To address this, ASIC proposes to issue class order relief exempting a foreign company issuer (other than a foreign investment company) from the requirement to hold an AFSL for a financial services that constitutes 'arranging' for a dealing in CDIs (CP 220.22). ASIC proposes limited relief as it considers the AFSL requirements to otherwise be covered by the self-dealing exemption in s766C(4) and by a CDI depository nominee's AFSL authorising the provision of custodial or depository services (CP 220.20 and 220.21).

However, given the uncertainty, we submit that the class order should provide comprehensive, general relief from the AFSL requirements for:

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- all foreign entity issuers (not just in relation to arranging and irrespective of whether the issuer is a foreign company, foreign investment company or foreign managed investment scheme); and
- all CDI depositary nominees (except in relation to the provision of custodial and depositary services).

In relation to the first point above, it is not clear why a foreign investment company that does not benefit from the self-dealing exemption in s766C(4) (because the company comes within s766C(5)) should not benefit from the relief.¹ The wording of the proposed class order appears to be more limited than the objective of ensuring that the relief will apply to 'a foreign company described as an ETF' (CP 220.15(a)) (as such an ETF we expect normally would come within s766C(5)).

3 CDIs and s713 prospectuses

We note ASIC's intention is that secondary offers of CDIs can be undertaken via a short-form prospectus under s713 where the underlying foreign share is a 'continuously quoted security' (draft Regulatory Guide at para 43(b)). In other words, in respect of a foreign company listed on ASX, s713 will be available where (among other things) the underlying shares have been quoted on ASX at all times in the 3 months prior to the prospectus date (per s9 definition of 'continuously quoted securities'). We suggest that relief should be conditional on the issuer providing information equivalent to that specified in s713(5), perhaps by incorporating that condition in the proposed s703B(c).

We are aware that many foreign issuers listed on ASX have received waivers from the requirement in ASX Listing Rule 2.4 to quote all of their underlying shares on ASX, and to instead quote only their CDIs. We understand ASX has granted these waivers as the quotation of only CDIs, and not the underlying shares, enables investors to be better informed about the free float, depth and liquidity of ASX's market in the relevant foreign issuer's securities.

Based on the proposed wording of the class order, foreign issuers subject to these arrangements could not rely on s713 as their underlying foreign shares are not quoted on ASX and therefore cannot be 'continuously quoted securities'. We submit this should be addressed in the class order so that, for the purposes of s713, CDIs can qualify as 'continuously quoted securities'.

4 CDIs as consideration in a takeover bid

We submit that ASIC should, as part of a separate review, consider possible modifications to Chapter 6 to accommodate situations where CDIs are offered as consideration under a takeover bid. For example, CDIs should constitute 'quoted securities' in the context of the minimum bid price rule (s621 as modified by Class Order 00/2338) and the requirement to disclose certain pre-bid acquisitions (s636(1)(h)).

¹ We assume this is because of the stated intent in CP 220.9 to replicate how the Corporations Act would otherwise apply. But if this is the case it creates additional complexities for applicants who must already have complied with stringent requirements imposed by their home jurisdiction and ASX.

Should you have any questions, please contact the Committee Chairman, Bruce Cowley, on 07 3119 6213, email: bruce.cowley@minterellison.com or Richard Kriedemann on 02 9230 4326, email: Richard.Kriedemann@allens.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal stroke extending to the right.

John Keeves
Chairman, Business Law Section