

## **PRODUCT RULING - BR Prd 08/03**

This is a product ruling made under section 91F of the Tax Administration Act 1994.

### **Name of the Person who applied for the Ruling**

This Ruling has been applied for by Capital Market Solutions NZ Limited ("CMS").

### **Taxation Laws**

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

This Ruling applies in respect of sections 8(4B), 11A(1)(j) and 76.

This Ruling does not consider or rule on any "telecommunications services" (as defined in section 2) supplied by CMS.

### **The Arrangement to which this Ruling applies**

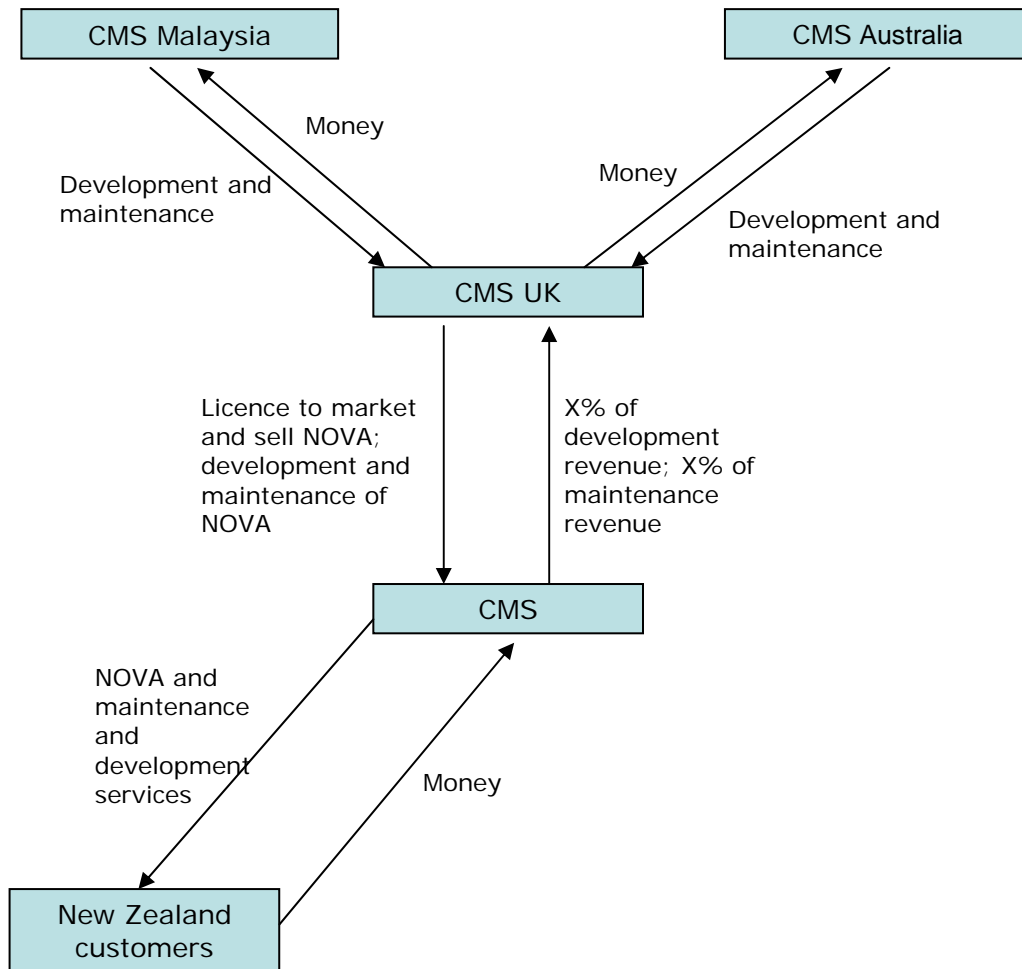
The Arrangement is the supply of services relating to the development and maintenance of NOVA software and provision of network services (some of which include "telecommunications services" (as defined in the Act)) by CMS to its New Zealand customers.

CMS installs NOVA for its New Zealand clients and supplies maintenance and development services. Most New Zealand clients provide financial services (including stock-broking services) to their customers.

Further details of the Arrangement are set out in the paragraphs below.

### ***Details of the Arrangement***

The Arrangement is summarised in the diagram below and discussed in subsequent paragraphs.



### *Description of NOVA*

NOVA is stock-broking computer software that, among other operations, interfaces with stock exchanges and clearing and settlement agencies. It allows for real-time market execution uploads and the automatic settlement and accounting of securities processing. Other functions include client data management, trade booking and allocations, settlements (local and international), margin trading, stock borrow lending, custody, corporate actions and accounting.

### ***Agreement between CMS UK and CMS Licence Agreement***

Capital Market Solutions (UK) Ltd ("CMS UK") has granted to CMS the non-exclusive marketing rights to NOVA in New Zealand. This transaction is governed by the Licence Agreement.

CMS UK supplies NOVA and all related information techniques and procedures to CMS. Clause 3(a) of the Licence Agreement provides that CMS has the right to distribute NOVA in New Zealand.

### **3. GRANT OF RIGHTS**

- (a) The Company hereby confirms that on the Commencement Date the Company granted to the LICENCEE for the consideration hereinafter mentioned a licence to sub-licence the SYSTEM throughout the Territory subject to termination according to the terms of this Agreement set out below provided that the rights of any End User granted and existing during the term of this Agreement shall not be prejudiced or cease on account of the termination or expiration of this Agreement but shall survive

and remain enforceable and provided that nothing in this Agreement shall operate to transfer the Company's rights in the SYSTEM to the LICENCEE.

Clause 5 of the Licence Agreement states that CMS UK undertakes to develop and extend NOVA if CMS so requests, so far as it is commercially reasonable.

#### **5. DEVELOPMENT AND CUSTOMISATION**

- (a) The Company agrees and undertakes to develop and extend or to procure the development and extension of the SYSTEM so far as it is commercially reasonable to do so and so far as it is able to do so using all reasonable endeavours, and to provide new versions and applications of the SYSTEM (if any) as and when they become available. The Company's obligations under this sub-clause do not extend to any modification or customisation of the SYSTEM under sub-clause 5(b).
- (b) In order to assist the LICENCEE to satisfy its obligations under an End User Agreement, the Company agrees and undertakes to modify or customise or procure the modification or customisation of the SYSTEM in accordance with the terms of any request made by the LICENCEE.

Clause 5(b) states that CMS UK will modify or customise NOVA, or arrange to have modification or customisation done, if CMS requests modification or customisation. This will be based on requests made by a customer under any contract between CMS and that customer. No contractual relationship exists between CMS UK or companies that CMS UK engages to modify NOVA ("other CMS companies") and the New Zealand customer. CMS, not the New Zealand customer, conducts all interaction with CMS UK or other CMS companies.

Clause 6(a) of the Licence Agreement states that CMS UK provides maintenance of the NOVA product in accordance with the obligations CMS entered into with its customers. Clause 6(b) of the Licence Agreement states that CMS will provide its customers with support for NOVA.

#### **6. MAINTENANCE**

- (a) In consideration for the payment of the fees specified in clause 7 the Company shall provide or procure the provision of maintenance of the SYSTEM in accordance with the obligations entered into in each End User Agreement for maintenance subject to such agreement having received the prior written approval of the Company.
- (b) The LICENCEE undertakes to provide End Users with support for the SYSTEM such support to include help with problem solving and applications of the SYSTEM and generally to liaise with End Users so as to identify problems such End Users may encounter with the use of the SYSTEM.

Payments are governed by Schedule 1 of the Licence Agreement. Schedule 1 states that CMS retains X% of the maintenance revenue received from its customers and X% of the development revenue. CMS UK receives X% of the maintenance revenue and X% of the development revenue.

#### ***Agreements between CMS and its New Zealand customers***

The contracts and schedules governing the relationship between CMS and its New Zealand customers are the:

- General Terms and Conditions of Business ("General Terms");
- Licence Specific Agreement, including:  
Schedule 1;  
Schedule 2; and  
Schedule 3;

- Software Management Specific Agreement (“SMS Agreement”) (originally entitled the Maintenance and Systems Management Agreement, which is materially the same), including: Schedule 1; and Schedule 2;
- Professional Services Specific Agreement (“PSS Agreement”) (originally entitled the Development Services Specific Agreement, which is materially the same), including the: Schedule of Work (Implementation and Development) (originally entitled the Schedule of Development Work, which is materially the same).

### ***General Terms and Conditions of Business***

CMS and the customer enter into the General Terms, which govern the provision of services and products to CMS’s customers. Separate documents govern the specific requirements that CMS and the customer contract to have performed. The specific terms most relevant for our purposes are contained in the Licence Specific Agreement (discussed in paragraphs 0–21).

The General Terms provide that if a Specific Agreement and the General Terms are inconsistent, the Specific Agreement will prevail.

#### **2. Specific Agreement(s)**

- 2.1 Any Specific Agreement(s) submitted by CMS to the Client is subject to these General Terms. In the event of any inconsistency between a Specific Agreement and these General Terms the terms of the Specific Agreement shall prevail.

The other terms in the General Terms include confidentiality, liability, copyright, risk insurance, termination and other general matters.

### ***Licence Specific Agreement***

CMS enters into the Licence Specific Agreement with its customers. The Licence Specific Agreement has three schedules.

Schedule 1 of the Licence Specific Agreement stipulates which NOVA program modules CMS will provide, the maximum number of concurrent users that may use NOVA, and that CMS will supply NOVA implementation and development services to the customer.

#### **V. SERVICES**

CMS shall supply to the Client the following estimated services in relation to the Computer System:-

##### **1. Implementation**

X man days

##### **2. Development**

The development services under this Agreement are provided under the terms of the Development Services Specific Agreement.

At the commencement of a project, CMS assesses how many days it will need to implement NOVA for the customer. Following commercial negotiation, CMS and the customer agree how much the customer will pay for the

implementation services. NOVA implementation times differ depending on the level of complexity. CMS negotiates payment terms for implementation services with the customer. These terms vary, depending on the circumstances of each deal. Usually, payments are required as the services are performed.

Schedule 2 of the Licence Specific Agreement governs the delivery date and commencement of services.

Schedule 3 of the Licence Specific Agreement details the charges for the NOVA software and charges for implementation.

#### **SERVICES and CLIENT ADDITIONAL PROGRAMS**

Notwithstanding anything contained within the Licence Specific Agreement to the Contrary CMS has agreed to provide the Services listed in Schedule 1 Paragraph V at a fixed price of \$X

This is made up of:

Implementation X days @ NZ\$X per day.

All implementation is physically performed in New Zealand except for very small amounts of implementation which are physically performed outside New Zealand.

#### ***Software Management Specific Agreement***

The SMS Agreement is between CMS and its customer. Under this agreement, CMS undertakes to carry out certain maintenance services. The agreement has two schedules.

Schedule 1 of the SMS Agreement governs the severity level categorisation of any maintenance requested or the type of any enhancement requested. The schedule also governs CMS's target response times to requests.

Schedule 2 of the SMS Agreement states the charges for the monthly maintenance services CMS provides to its customers. These monthly maintenance services can include:

- software maintenance services
- equipment (including maintenance)
- systems and facilities management service
- NOVA network service

With the exception of software maintenance services, some customers may choose to source these services themselves and therefore will not be charged by CMS. Some of the NOVA network services CMS supplies constitute "telecommunications services" (as defined in the Act). Customers who choose to source network services and equipment rental directly handle almost all facilities management requirements themselves. CMS provides only a few basic facilities management services as part of its maintenance services.

#### ***Professional Services Specific Agreement***

CMS and the customer enter into a PSS Agreement, which states the process by which the customer may request development services. The PSS Agreement defines "professional services" as:

"Professional services" means the implementation, installation and/or development services more particularly described in the Schedule of Work

The PSS Agreement includes a Schedule of Work (Implementation and Development).

***Schedule of Work (Implementation and Development)***

The Schedule of Work (Implementation and Development) contains the contract price for the requested man-days of implementation services to the customer. Implementation services relate to implementing and configuring services in respect of the software (NOVA). The Schedule of Work also contains a separate contract price for man-days of development services to the customer. Development services relate to programming and related professional services in respect of the software.

Before CMS agrees to any development work, it undertakes a workshop with the customer to determine the amount of development required to address the customer's particular development requirements. After this workshop, CMS assesses the number of "man-days" required for development. After commercial negotiation, CMS reaches agreement with the customer about how much the customer will pay for development services. When the agreement is reached, CMS delivers the standard NOVA software so the implementation project and development services can start. Customers are likely to require CMS to provide development services after NOVA "goes live", for example, for additional functionality or for further reports to be prepared.

Under clause 2.1 of the Schedule of Work (Implementation and Development), CMS agrees to provide a negotiated number of man-days for implementation services.

**2. DESCRIPTION AND USE OF IMPLEMENTATION SERVICES**

2.1 In consideration of the Contract Price, set forth in clause 4.1 below CMS agrees to provide the following (estimated) number of Man-days of implementation professional services to the Client.-

	Number of Man-days
Project Management	X
Implementation Consultants	X
Technical Consultants	X
Training Consultants	X

These services are hereinafter collectively referred to as the "Implementation Services".

...

2.3 The Implementation Services relate only to implementing and configuration services in respect of the software and/or Programs known as NOVA and associated activities. The Implementation Services are more particularly described in Annex 1 of this Schedule of Work.

CMS also provides a negotiated amount of man-days for development work.

### 3. DESCRIPTION AND USE OF DEVELOPMENT SERVICES

3.1 In consideration of the Contract Price, set forth in clause 4.2 below CMS agrees to provide the following (estimated) number of Man-days of development services to the Client.-

Type	Number of Man-days
Development Services	X

These services are hereinafter collectively referred to as the "Development Services".

The customer agrees to pay CMS for these man-days. CMS negotiates payment terms for development services with the customer. Terms vary, depending on the circumstances of each deal. Usually, payments are required as the services are performed.

### 4. PAYMENT TERMS & PRICE INCREASES

4.1 The Contract Price for the provision of Implementation Services referred to herein is for a fixed price of \$X (plus applicable GST) which shall be payable in accordance with the terms of Annex 3 part A.

4.2 The Contract Price for the provision of Development Services referred to herein is for a fixed price of \$X (plus applicable GST) which shall be payable in accordance with the terms of Annex 3 part B.

In summary, CMS enters into a series of contracts and schedules with a customer. These contracts and schedules provide the implementation, professional and network services that CMS will supply to the customer and the price the customer will pay. Some of these services are carried out in New Zealand, while some are carried out outside New Zealand.

#### ***Services performed in New Zealand***

The services performed in New Zealand are as follows.

<b>Service</b>	<b>Governing Agreement</b>
Almost all Implementation	Licence Specific Agreement
First line support	SMS Agreement
Systems and facilities management	SMS Agreement
Reports development	PSS Agreement; Schedule of Work (Implementation and Development)

### ***Services performed outside New Zealand***

The services performed outside New Zealand are as follows.

<b>Service</b>	<b>Governing Agreement</b>
Some development services	Schedule of Work (Implementation and Development)
Almost all of the software maintenance services	SMS Agreement
Some of the NOVA network services	SMS Agreement

Almost all implementation is carried out in New Zealand. Some development services are carried out overseas, as are almost all the software maintenance services. NOVA is an off-the-shelf product, so needs to be customised to meet additional customer requirements. The customer enters into the above contracts with CMS to supply these services. CMS then contacts CMS UK and details the services required and modifications to be made. CMS UK then contracts other CMS companies to make these modifications and carry out these services. Some NOVA network services (which include “telecommunications services” (as defined in the Act)) are also carried out overseas.

### **Conditions stipulated by the Commissioner**

This Ruling is made subject to the following conditions.

- a) The network services, development services and software maintenance services apportioned at a 0% GST rate are physically performed outside New Zealand.
- b) The network services, development services and software maintenance services physically performed outside New Zealand and charged at a 0% GST rate are indicated on any invoices provided to the New Zealand resident customer.
- c) CMS UK and CMS do not have an agency relationship.
- d) The services physically performed outside New Zealand are priced on an arm’s length, market basis.
- e) The services physically performed in New Zealand are priced on an arm’s length, market basis.
- f) CMS contracts to have some services physically performed outside New Zealand for the following reasons:
  - (i) There are economies of scale in having a centralised development centre outside New Zealand; and
  - (ii) There are lower development costs in having services physically performed outside New Zealand.



## **How the Taxation Laws apply to the Arrangement**

Subject in all respects to any assumption or condition stated above, the Taxation Laws apply to the Arrangement as follows.

- The supply by CMS of network services, development services, and software maintenance services to its New Zealand customers may be charged at a 0% GST rate to the extent that those services are physically performed outside New Zealand, provided those services are not "telecommunications services" (as defined in section 2).
- Section 8(4B) does not apply to the supply of services by CMS to its New Zealand customers.
- Section 76 does not apply to negate or vary any of the above conclusions.

## **The period or income year for which this Ruling applies**

This Ruling will apply for the period beginning on 1 March 2008 and ending on 31 October 2011.

This Ruling is signed by me on the 4<sup>th</sup> day of December 2008.

**Martin Smith**  
Chief Tax Counsel