

# TAX INFORMATION BULLETIN

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*This TIB has no appendix*

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Inland Revenue  
*Te Tari Taake*

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## THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

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Inland Revenue produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents.

Because we are keen to produce items that accurately and fairly reflect taxation legislation, and are useful in practical situations, your input into the process—as perhaps a user of that legislation—is highly valued.

The following draft item is available for review/comment this month, having a deadline of 1 October 2001. Please see page 6 of *TIB*, Vol 13, No 8 (August 2001) for the text of this item.

<b>Ref.</b>	<b>Draft type</b>	<b>Description</b>
DDG00014	Depreciation determination	Dairy farm milking shed building, plant and machinery

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The following draft items are available for review/comment this month, having a deadline of 1 November 2001. Please see page 103 for details on how to obtain copies.

<b>Ref.</b>	<b>Draft type</b>	<b>Description</b>
ED0022	Draft standard practice statement	Timeliness in resolving tax disputes
ED0024	Draft standard practice statement	Six-monthly GST return threshold

## BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates tax liability based on it.

For full details of how binding rulings work, see our information booklet *Adjudication & Rulings, a guide to Binding Rulings (IR 715)* or the article on page 1 of *Tax Information Bulletin* Vol 6, No 12 (May 1995) or Vol 7, No 2 (August 1995).

You can download these publications free of charge from our website at [www.ird.govt.nz](http://www.ird.govt.nz)

This issue of the *TIB* contains binding product rulings for the Tortis-International Fund (BR Prd 01/20) and the Tortis-NZ Fund (BR Prd 01/21). Shortly after those rulings were made, it was found that the Arrangement was incorrectly stated with regard to the process followed by unitholders wishing to dispose of their units. Consequently, the Commissioner agreed that those rulings should be withdrawn, on 13 September 2001, and new product rulings made. Those new product rulings for the Tortis-International Fund (BR Prd 01/26) and the Tortis-NZ Fund (BR Prd 01/27) are also published in this issue of the *TIB*. As the new product rulings are in respect of a different arrangement from the rulings that have been withdrawn, they are able to apply for the same period as the product rulings that have now been withdrawn.

## PRODUCT RULING – BR PRD 01/20

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 Tortis-International Fund.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3(1)(b) and CF 3(1)(c).

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of a unit trust known as Tortis-International Fund (“Tortis-INTL” or the “Fund” or the “Trust”) pursuant to a Deed of Trust dated 16 December 1996 and amended on 18 February 1997, 31 July 2000 and as amended by an Amending Trust Deed which will be the same as, or not materially different from the draft deed provided to Inland Revenue on 29 June 2001 (the “Trust Deed”), and the Prospectus for the Fund (the “Prospectus”).

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

1. The Fund invests in the securities of those companies that make up the Tower Global Index (the “Global Index” or the “Index”). The Global Index is a customised version of the Morgan Stanley Capital International World Index (the “MSCI World Index”). The Fund has been designed to provide investors with comprehensive coverage of global equities.
2. Tortis-INTL is a unit trust in terms of the Unit Trusts Act 1960 and meets the definition of a “unit trust” contained in section OB 1.
3. Tortis-INTL is a New Zealand tax resident. The trustee of Tortis-INTL is the Public Trustee (the “Trustee”). The manager of Tortis-INTL is Tower Managed Funds Investments Limited (previously known under the name “Tower Trust Services Limited”) (the “Manager”). The investment manager of the Fund is State Street Global Advisors, Australia, Limited (the “Investment Manager” or “State Street”).
4. The investment policy of the Fund is set out in clause 82.1 of the Trust Deed. It states:
  82. The investment policy of the Trust shall be:
  - 82.1 to only invest the Fund (other than the Cash Pool and Unmarketable Accumulations) in Index Shares in a manner that replicates the Adjusted MSCI and to only enter into transactions that are necessary to give effect to that policy;

- 82.2 to invest the Cash Pool in deposits with banks registered under the Reserve Bank Act 1989 or other debt obligations or in the Tower First Rate Account upon terms that will allow the Manager to pay the anticipated Liabilities of the Fund and to manage the redemption of Units and the liquidity of the Trust;
- 82.3 to invest Unmarketable Accumulations in Derivatives until the total value of investment in Derivatives reaches a Marketable Amount whereupon the Derivatives will be realised and the proceeds invested in accordance with clause 82.1 or 82.2; and
- 82.4 to not take any action to hedge or manage foreign exchange risks or exposures that arise from the Investments being held in non New Zealand currencies.
5. The investment objectives of the Fund are as follows:
- To track the adjusted MSCI Index, called the TOWER Global Index, to provide broad international coverage of approximately 1,000 companies;
  - The Global Index includes only “grey listed” countries to New Zealand, so that double taxation issues do not occur. These include companies resident in the United States, United Kingdom, Germany, Canada, Japan, and Australia. These companies provide coverage of 80% of all international companies contained within the total MSCI Index;
  - The Investment Manager cannot diversify investments of the Fund, or take prudent steps in respect of the mix of the Fund’s investments.
6. The Trust Deed states that:
- It is not the Fund or the Trustee’s intention to profit from holding, acquiring or selling constituent company securities.
7. Tortis-INTL is an open fund and new investors are able to subscribe for units from time to time. The beneficial interest in Tortis-INTL is divided into units. Each unit confers an equal interest in Tortis-INTL (other than a fractional unit which will confer a proportionate interest) but does not confer any interest in any particular part of the fund or any particular investment of the fund.
8. The Applicant has confirmed that all aspects of the previous rulings (BR Prv 96/135, BR Prv 96/136, and BR Prv 01/15), relating to the Fund, have been complied with. There has been no change to the Trust Deed of the Fund (except for the changes noted above), nor any change to the management or operation of the Fund since its establishment.
10. The tracking of the Global Index is undertaken by the Investment Manager.
11. The fundamental objective of the MSCI World Index is as follows (taken from the *MSCI Methodology and Index Policy* document, published by MSCI in March 1998, at page 3):
- MSCI Indices are constructed to provide benchmarks that accurately represent the opportunities available to the institutional investor. While an all-share-index (all listed companies at their full market cap weight) represents the theoretical opportunity set available to the global investor, this is not a fair performance benchmark in practice, since it cannot be fully replicated due to illiquidity of either shares or volume. Thus, MSCI creates indices which capture the spirit of an all-share index, but are actually subsets of shares which are truly replicable.
12. The rules for determining which companies will be included in the MSCI World Index are set out below (taken from the *MSCI Methodology and Index Policy* document):
- MSCI produces a world index which currently (31 May 2000) comprises 22 countries and over 1,300 stocks. Each country included in the MSCI World Index is represented by a separate index which forms part of the larger Index. The index for each country is referred to as a MSCI Country Index.
- In constructing the MSCI Country Indices MSCI uses a five-step process.
- MSCI Country Index Selection Criteria:
1. Define the total market.
  2. Sort the market by industry groups and target 60% for inclusion.
  3. Select stocks with good liquidity and free float.
  4. Avoid cross-ownership.
  5. Apply the full market capitalization weight to each stock.
- 1. Define the total market:** The initial research for the MSCI Indices covers the full breadth of each equity market in the universe. Country specialists track the evolution of both listed and unlisted shares of domestically listed companies in 51 markets that, combined, account for over 90% of the world’s total market capitalization. Based in Geneva, these teams of country specialists collect data on shares, pricing, ownership, float and liquidity for effectively all companies worldwide. Sources for this information include local stock exchanges and brokerage firms, newspapers and company contacts. All of the companies within this research coverage are eligible for inclusion in the MSCI Indices except non-domiciled companies, investment trusts and mutual funds.

### ***The MSCI World Index***

9. The Tower Global Index is a customised version of the MSCI World Index.

**2. Sort the total market by industry groups and target 60% for inclusion:** Once information on the total country market capitalization is analyzed, 60% of the capitalization of each industry group, and thus 60% of the entire market, is targeted for inclusion in each MSCI country index. This process ensures that the index reflects the industry characteristics of the overall market, and permits the construction of accurate regional and composite industry indices.

With the uniform target of capturing 60% of each country's total market capitalization, each country carries its proportional weight in the regional and composite indices. A 60% target has been found sufficient to maintain a high level of tracking while still providing for an investable universe across all countries (the "highest common denominator" which can be captured, while still having an investable index in each country).

**3. Select stocks with good liquidity and free float:** A goal of the MSCI index construction process is to select the most liquid stocks within each industry group, all other things being equal, since liquidity is necessary but not the sole determinant for inclusion in the index. Liquidity is monitored by monthly average trading value over time in order to determine normal levels of volume, excluding temporary peaks and troughs. A stock's liquidity is significant not only in absolute terms, but also relative to its market capitalization and to average liquidity for the country and the industry as a whole. Liquidity is not used as an absolute measure to select constituents because: An absolute minimum level of liquidity would be arbitrary and would have different meanings in different markets.

Liquidity is partly a function of the cyclical nature of markets and industries. Limiting index constituents to only the most liquid stocks would introduce a bias against those stocks and sectors that are temporarily out of favor with investors. An inflexible rule might also dictate a pattern of constituent additions and deletions that would introduce unnecessary turnover in the index.

The free float (percentage of shares freely tradable) of every security in the market is monitored and an estimate is calculated, and low float may exclude a stock from consideration in the index. In the developed markets and some emerging markets, "low" float is considered under approximately 25%, as estimated by the country specialists at CIPSA in Geneva. However, in many emerging market countries, the average float is below 25%, so float is measured relative to the stock's own industry and country.

But float can be a difficult number to determine. In some markets, reliable data sources are generally not available; in other markets, information on smaller and less prominent issues can be subject to error and time lags. Additionally, government ownership and corporate share crossholdings can change over time and are not always made public. The precise definition of "float" also tends to differ depending on the data source. Thus, evaluations of float run the risk of penalizing those markets that have higher standards for company disclosure, regardless of the actual degree of availability of shares. As with liquidity, sufficient float is an important consideration, not an inflexible rule.

**4. Avoid cross-ownership:** Cross-ownership occurs when one company has a significant ownership stake in another company, and both are included in the index. Substantial cross-ownership can skew industry weights, distort country-level valuations (such as Price/Earnings and Price/Book Value) and overstate a country's true market size.

An integral part of the index construction process is to identify corporate share crossholdings in order to avoid or minimize cross-ownership in the MSCI Indices. Country analysts in Geneva separate cross-ownership stakes into two categories. The first consists of stakes which are considered immaterial. In these cases, such cross-ownership does not represent something significant in terms of having distortionary effects on the index even if both companies are included. The second category is stakes which could materially distort an industry- or country-level index by significantly overstating the index's market capitalization if both companies are included. Other ownership stakes (such as government, family, other institutional holdings) are also included in the estimated free float.

**5. Apply the full market capitalization weight to each stock:** All standard MSCI indices are weighted by each company's full market capitalization (both listed and unlisted shares). This approach has the advantage of objectivity—the number of shares outstanding is consistently defined for companies around the world and is a readily obtainable figure. This approach also minimizes turnover. MSCI does not adjust share weights for either free float or cross-holdings. The most serious consequence of float limitations is illiquidity, which can be monitored objectively. Full market capitalization weighting is favored to float-weighting schemes for both theoretical and practical reasons:

- It is impossible to judge whether a position which is currently in firm hands might be available in the future.
- The quality and timeliness of information on float varies from market to market. Adjustments penalize those markets with the highest standards of company information disclosure.
- Float adjustments incur index turnover as the float of a company changes. However, the precision of a float-adjusted index may not yield a more "investable" index. For instance, when the float of a stock increases from 55% to 60%, it may not be necessarily 5% more investable on a practical basis. In fact, it was probably fully replicable at a full market cap weight and the increase in turnover did not result in a "better" index, only an increase in transaction costs.
- Float adjustments on a country level may not result in materially different country weights from market capitalization weights.

[Weighting stocks at their full market capitalisation, as described above in the fifth selection criterion, is slowly being phased out by MSCI: first by its extension of the partial inclusion policy to all new additions to its indices (as of 31 July 2000) and second, by the change in its index construction methodology to a free float-adjustment methodology.

However, currently stocks which were already part of the Index as at 31 July 2000 are included at their full market capitalisation.]

**Partial Inclusion Policy**

Since the normal MSCI index policy is to include index constituents at 100% of market capitalization, large issues with low float—a characteristic of many privatizations—pose a dilemma for index construction. Including such companies at full market cap weight can overwhelm an index and overstate the true size of market opportunities; yet excluding them also results in an incomplete picture of the market. A company is included or excluded on a case-by-case basis, where the contributing factors include the expected change in float (especially for first-time government privatizations), stability of the liquidity and importance of the company in its local economy.

A growing number of very sizable companies have been or will be brought to market with modest tranches initially made available to the public. By virtue of their size and visibility, these companies are obvious candidates for inclusion in a portfolio. To reflect this new market trend, MSCI index construction rules do allow for the possibility of including a company at a portion of its total market capitalization. This occurs only in exceptional cases when very large companies come to market with very modest initial float.

In July 31 2000 the policy on partial inclusions was amended. MSCI has extended the application of its policy on partial inclusion of companies to all new additions to the MSCI indices. This amendment will simplify the partial inclusion policy, providing consistent treatment for all new index additions. Previously, the policy was targeted only at new constituents with very large market capitalizations. This amendment does not affect existing constituents in the MSCI indices.

Following this amendment, all companies with a float below 40%, that are to be added to the MSCI Standard or Extended indices, regardless of size, will be included at a fraction of their total market capitalization using a Market Cap Factor (MCF). The MCF will be determined using MSCI's current schedule as shown below:

% Float equal to or exceeding*	10	15	20	25	30	35	40
% Market Cap Factor (MCF)	20	30	40	50	60	80	100

\* Over-allotment option is not included in the case of IPOs, privatizations and similar public offerings.

**Structural Changes (“Structural Changes”)**

In changing the constituents of the MSCI Indices, accurate representation is balanced with minimizing turnover. An index must represent the current state of an evolving marketplace while at the same time minimizing turnover, which is costly as well as inconvenient for investment managers. Restructuring an index involves a balancing of constituent additions and deletions. The primary concern when considering additions and deletions is the continuity of the indices. Of secondary concern are the turnover costs associated with these changes.

There are two broad categories of changes to the MSCI Indices: structural changes and market-driven changes.

Structural changes reflect the evolution of a market due, for example, to a change in industry composition or regulations. Industry restructurings generally take place every 18 to 24 months for any given country. However, the structural change to the country index may occur on only four dates throughout the year: as of the close of the last business day of February, May, August and November. MSCI index additions and deletions are announced two weeks in advance. There are absolute firewalls on any price-sensitive decision until there is a public announcement. These changes are communicated to subscribers both electronically and by fax. They are simultaneously posted on public Reuters pages (starting on MSCIA) and public Bloomberg pages (MSCN). The Reuters and Bloomberg MSCI pages are updated by Capital International Perspective, S.A. in Geneva. The pages include the security names, the action to be taken and, when necessary, the context of the change.

A more detailed announcement service is available for a fee (and provides the weightings, shares outstanding, security identifiers and industry classification).

During the examination of each country index, the market cap and business function coverage of each industry group is measured against the underlying market. The investability (free float, cross-ownership, long- and short-term trading volume and turnover) of each constituent is also monitored. In the event that an industry is over- or under-covered, or that there are stocks in the index which are no longer investable (here both long-term and short-term liquidity is examined), or a large privatization has altered the capitalization of the market, a structural change may be necessary.

The MSCI indices reflect the opportunity set to the global investor on an ongoing basis—and should thus mirror the fundamental changes in the market's structure, and correspond to the situation of the average institutional investor. These structural changes are designed and timed to minimize turnover to the indices. If possible, several unrelated changes to a country index are grouped together, minimizing disruption.

**Structural Change Additions:** As markets grow because of privatizations, investor interest, or the relaxation of regulations, index additions (with or without corresponding deletions) may be needed to bring industry representations up to the 60% target. Companies are considered not only with respect to their broad industry, but also with respect to their sub-sector, in order to represent if possible a broader range of economic activity.

**Structural Change Deletions:** The indices must represent the full-investment cycle, including bear as well as bull markets. Out-of-favor stocks may exhibit declining price, market capitalization, and/or liquidity, and yet continue to be good representatives of their industry. Deleting constituents because their liquidity has declined introduces a bias against out-of-favor companies or industries, especially those in the trough of a business cycle. For this reason, low liquidity is never an automatic trigger for deleting a company from the index.

Companies may be deleted because they have diversified away from their industry classification, because the industry has evolved in a different direction from the company's thrust, or because a better industry representative exists (either a new issue or an existing company). In addition, in order not to exceed the 60% target coverage of industries and countries, adding new index companies may entail corresponding deletions.

#### **Market-driven Changes ("Market Driven Changes")**

Market-driven changes consist of new issues, mergers, acquisitions, bankruptcies, and other similar corporate events. These changes are announced and implemented as they occur.

**Additions - New Issues:** New issues may not be automatically eligible for immediate inclusion in the MSCI Indices. Many factors must be considered, such as market capitalization, float and liquidity. Some new issues undergo a seasoning period of six to twelve months between index restructurings until a trading pattern and volume are established. After that time, they are eligible for inclusion, subject to the standard selection criteria discussed.

However, sometimes a new issue, usually a privatization, comes to market and substantially changes the country's industry profile. In this case, where even temporarily excluding it would distort the characteristics of the market, it may be immediately included in the MSCI Indices. An example is YPF, Argentina's privatized oil company, which at USD 3.04 billion is Latin America's largest privatization to date. In these cases, however, an announcement is made in the first few days of official trading for the security, since the country specialists do not want to influence the primary placement of the issue.

In other cases, a large new issue may not be included even in the normal process of restructuring, despite substantial size and liquidity. The primary reasons for non-inclusion of a large new issue are as follows:

- A large stock, if it has low float and is also illiquid, can overwhelm an index and over-represent the true opportunities in the market.
- The index may be at the limit of industry representation—including the new issue would seriously over-weight an industry in the index.
- In some cases, it is necessary to defer inclusion of a new issue until the next opportunity for index restructuring.

**Deletions - Suspended Companies:** In the case of suspension for bankruptcy or near bankruptcy, the suspended company is deleted at the smallest price (unit or fraction of the currency) at which a security could have traded in a given market.

More complex are the cases where the suspension is due to a major restructuring, which results in the company being ineligible (at least for an important period of time) for normal listing and trading on the stock exchange. The MSCI policy is to remove these companies from the index only after there is little likelihood the company will return to normal trading.

In this situation, the key issue is determining the price at which the company can be removed from the index. Unofficial market prices may be used as a base to determine that exit price. In exceptional circumstances, average indicative prices from reliable sources may be used.

**Mergers & Acquisitions:** Any case of mergers and acquisitions, or capital restructuring, which can affect a company within the MSCI universe is monitored. Depending on whether the active companies are, or are not, constituents of the MSCI Indices, a number of factors must be considered. If either the acquiring or the acquired firm is a constituent of the index, the first consideration is the impact of the acquisition on the index. The second consideration involves structural changes to the index. When a non-constituent company acquires a constituent company, either the acquiring company can replace the constituent company in the index, or another company altogether may be chosen as a better representative of the industry. If two medium-sized, non-constituent companies merge, the merged company may also be considered for inclusion in the indices. However, this change would occur only through a structural review.

**Spin-Offs:** A spin-off is the distribution to existing shareholders of a part of the company's business through the issuance of shares in the newly-established company. The decision to include the newly-established company in the index is based on several factors including estimated market value, market capitalization, and float. The market value of the spin-off is estimated through a consensus of industry analysts, grey market prices, and statistics on revenues and earnings.

#### **Performance of stocks**

The methodology for determining which stocks are to be included in the relevant country indices does not involve any exercise of predicting whether a company is likely to be particularly profitable or unprofitable or whether the company's securities are likely to increase in value or decrease in value. Performance is not an issue. MSCI is solely focused on ensuring that a consistent methodology is used in preparing the indices, which maximises the utility of the indices as a recognised world-wide benchmark of stock market movement and avoids unnecessary turnover of index stocks.

#### ***Changes to the MSCI World Index***

13. In partial replacement of the process stated above, there are also forthcoming changes which alter the way in which the MSCI World Index will select its constituent company securities. The MSCI will adjust all its equity indices for free float and increase the target market representation of its Standard Index series from 60% to 85%. The combined changes will be implemented in two separate phases. The first phase will be implemented as of the close of 30 November 2001 and the second phase will be implemented as of the close of 31 May 2002.

14. The change in index construction methodology to a “free float-adjustment” methodology is described in the *MSCI Announcement*, dated 10 December 2000 (“the *Announcement*”), as follows:

MSCI calculates the free float of an equity security as its total number of shares outstanding less shareholdings classified as strategic and shares otherwise restricted from trading by international investors. Examples of shares excluded from free float are stakes held by governments, corporations, controlling shareholders and their families, the company’s management, and shares subject to foreign ownership restrictions.

Under this enhanced index construction methodology, MSCI will free float-adjust constituent weights using an adjustment factor, which will be referred to as the Inclusion Factor. This Inclusion Factor is equal to a constituent’s estimated free float rounded-up to the closest 5%. For example, a constituent with an estimated free float of 23.2% will be included in the index at 25% of its total market capitalization, while a constituent with an estimated free float of 78.6%, will be included in the index with an Inclusion Factor of 0.80. Where the foreign ownership limit is more restrictive than the free float, and if there are no foreign strategic investors, a constituent’s Inclusion Factor will be equal to its exact foreign ownership limit, rounded to the nearest percentage point.

Securities with a free float below 15% will not typically be eligible for inclusion in the MSCI equity indices. However, in exceptional cases where including such a security would significantly improve the index’s ability to accurately represent the investment opportunities in that country or industry, the security may be included in the MSCI indices with an Inclusion Factor equal to its estimated free float rounded to the closest percentage point. For example, a very large company with an estimated free float of 11.4%, if included in the index, would be included with an Inclusion Factor of 0.11.

In order to account for other types of restrictions on foreign equity investment, such as the investor qualification and quota approval system prevailing today in Taiwan, the enhanced MSCI methodology provides for an additional investability factor, referred to as the Limited Investability Factor. The application of this Limited Investability Factor would permit a more accurate comparison of markets with more complex and subtle restrictions to the investment process with markets where investment limitations can be appropriately reflected in security specific Inclusion Factors.

MSCI will review constituents’ Inclusion Factors at the time of regular country index rebalancings. In addition, MSCI will allow for changes in a security’s Inclusion Factor in response to significant market-driven corporate events, as the events become effective.

15. To determine whether a shareholding is strategic or non-strategic, the *Announcement* states the following guidelines:

#### Shareholding classification guidelines

MSCI primarily classifies shareholdings as strategic or non-strategic based on a categorization of investor types.

- **Strategic shareholders:** The following investor types are generally considered as strategic and their shareholdings in a company are not included in that company’s equity capital to determine its free float:
- **Governments:** Shares owned by governments and affiliated entities. Please refer to the specific guidelines described below for government agencies and government-related investment funds.
- **Corporations:** Shares owned by corporations, including treasury shares owned by the company itself, except when the treasury shares are excluded from the number of shares outstanding. Please refer to specific guidelines for banks.
- **Management and Board Members:** Shares owned by members of the company’s management or Board of Directors, including shares owned by individuals or families that are related to or closely affiliated with members of the company’s management, Board of Directors, or founding members deemed to be insiders.
- **Employee Stock Ownership Plans (ESOPs):** Shares owned in ESOPs during the lockup period.

**Non-Strategic shareholders:** The following investor types are generally considered as non-strategic and their shareholdings in a company are included in that company’s equity capital to determine its free float:

- **Individuals:** Shares owned by individuals, excluding shares owned by individuals or families that are related to or closely affiliated with members of the company’s management, Board of Directors or founding members deemed to be insiders, and, excluding those shareholdings held by individuals whose significant size suggests that they are strategic in nature.
- **Investment funds, mutual funds or unit trusts:** Shares owned in investment funds, mutual funds and unit trusts, including shares owned in passively managed funds.
- **Pension funds:** Shares owned in employee pension funds, excluding shares of the employing company, its subsidiaries or affiliates.
- **Insurance companies:** In principle, the investment objective of portfolio holdings of insurance companies is non-strategic. When there are reasons to believe that an insurance company’s shareholding is strategic, it will not be included in free float.
- **Social security funds:** Shares owned in social security funds, unless the fund’s management is deemed to exert influence over the management of the company.
- **Venture capital funds:** Shares owned in venture capital funds, unless a specific investment is deemed to be strategic in nature.

16. If the above guidelines are not sufficient, the *Announcement* also states the following additional guidelines:

In the event that the above categories should not appropriately capture the nature of a specific shareholding, its classification as strategic or non-strategic will be determined based on a more extensive analysis. In particular, the following guidelines will be followed:

- **Banks.** Shareholdings by banks are considered as strategic, excluding, when identifiable, specific shareholdings that are deemed to be non-strategic.
- **Nominees or trustees:** Shareholdings registered in the name of a nominee or trustee are classified as strategic or non-strategic based on an analysis of who is the ultimate beneficial owner of the shares, according to the above definitions.
- **Government agencies and government-related investment funds:** Shareholdings of government agencies and government-related investment funds are classified based on an analysis of the objective of the investment.
- **Shares placed in IPOs with special incentives:** Shares that are placed in an IPO and that include meaningful incentives to hold the shares for a specific period of time, are classified as strategic until those incentives expire.
- **ADRs and GDRs:** Shares that are deposited to back the issuance of ADRs and GDRs are classified as non-strategic, unless it is established that a specific stake held in ADRs or GDRs is strategic in nature.

17. Other shares (other than those which are classified as “strategic”) may also be excluded from the free float. These shares, described above as “shares otherwise restricted” from the free float, are described as follows:

- **Limits on share ownership for foreigners:** Limits on the proportion of a security’s share capital that is authorized for purchase by non-domestic investors. Where they exist, these foreign share-ownership limits are generally set by law, government regulations, or company by-laws.
- **Other foreign investment restrictions:** Investment restrictions, other than those described above, which materially limit the ability of international investors to freely invest in a particular equity market. There is typically no simple way to account for these limitations in a benchmark, as these restrictions tend to be more subtle and complex, and may affect different market participants in different ways.

18. The MSCI calculates the free float-adjustment construction methodology in the following manner:

**Calculation of a security’s free float-adjusted market capitalization**

As a general rule, MSCI calculates the free float of a security as its total number of shares outstanding less shareholdings classified as strategic and shares otherwise restricted from trading by international investors. However, the determination of the corresponding free float-adjusted market capitalization is dependent on the nature of the limitations on free float.

In all cases, the calculation is based solely on publicly available shareholding information obtained from multiple information sources. For each security, all available shareholdings are considered where public data is available, regardless of size.

• **Calculation in the case of a security which is not subject to a foreign ownership limit or other foreign investment restrictions**

- Strategic shareholding (%) =  $\frac{\text{Number of shares classified as strategic}}{\text{Total number of shares outstanding}}$
- Free float (%) = 100% - Strategic shareholding (%)
- For constituents with free float greater than or equal to 15%, the security’s Inclusion Factor is equal to its estimated free float, rounded-up to the closest 5%.
- Securities with free float less than 15% are typically not eligible for inclusion in the indices. However, in exceptional cases, where including such a security would significantly improve the index’s ability to accurately represent the investment opportunities in that country or industry, the security may be included in the indices with an Inclusion Factor equal to its estimated free float rounded to the closest 1%.
- Free float-adjusted market capitalization = Inclusion Factor \* total market capitalization
- **Calculation in the case of a security which is subject to a foreign ownership limit**
- Foreign strategic shareholding (%) =  $\frac{\text{Number of shares held by foreign strategic investors}}{\text{Total number of shares outstanding}}$
- Free float available to foreign investors (%) is equal to the lesser of
  - the free float, calculated as: 100% - strategic shareholding (including both foreign and domestic strategic shareholders) (%)
  - the foreign ownership limit less the foreign strategic shareholding (%)
- For constituents whose free float available to foreign investors is greater than or equal to 15%, the security’s Inclusion Factor is equal to the lesser of:
  - the estimated free float available to foreign investors rounded-up to the closest 5%;
  - the foreign ownership limit rounded to the closest 1%.

- Securities with a free float available to foreign investors of less than 15% are typically not eligible for inclusion in the indices. However, in exceptional cases, where including such a security would significantly improve the index's ability to accurately represent the investment opportunities in that country or industry the security may be included in the indices with an Inclusion Factor equal to its estimated free float available to foreign investors rounded to the closest 1%.
- Free float-adjusted market capitalization = Inclusion Factor \* total market capitalization
- **In the case of a security which is subject to other foreign investment restrictions**

In the case where other foreign investment restrictions exist, which materially limit the ability of international investors to freely invest in equity markets, an additional Limited Investability Factor may be applied. There is typically no simple way to account for these types of investability limitations in a benchmark as they tend to be subtle and complex, and may affect different market participants in different ways. Therefore, where warranted, the Limited Investability Factor will be determined based on an extensive case-by-case analysis.

19. The change in target representation, as described in the *Announcement*, will occur as follows:

In conjunction with the free float-adjustment of its indices, MSCI will increase the target market representation in the MSCI Standard Index series from 60% of total market capitalization to 85% of free float-adjusted market capitalization within each industry group within each country. Given trends such as increased market concentration, the increase in coverage will provide greater diversification and representation of investment opportunities in the indices. Broader coverage is also expected to decrease ongoing turnover in the MSCI indices.

MSCI research shows that the increase to a target market representation of 85% can be achieved with the addition of a reasonable number of relatively liquid and sizeable constituents in most countries. In the countries where this is not possible, the country index will remain below the target market representation of 85%.

20. The "phase in" periods, also detailed in the December 2000 *Announcement*, for the changes were detailed as follows:

**Publication of Constituent Data and Implementation**

In order to assist market participants in understanding and preparing for these changes, MSCI plans to publish, on or before June 30 2001, the list of index constituents and their Inclusion Factors under the enhanced methodology for each of the MSCI Standard country indices. In addition, shortly thereafter, MSCI will begin publishing a provisional index series to measure the performance of the MSCI countries and main regions based on the enhanced methodology.

The provisional series, together with the constituents and their Inclusion Factors, also may be used by clients who wish to measure their performance against such an index, ahead of MSCI's official implementation schedule.

In order to best transition the indices to the enhanced methodology, the combined changes will be implemented in two separate phases: as of the close of 30 November 2001, and as of the close of 31 May 2002. The changes in each phase will simultaneously affect all MSCI Standard country indices and will include changes resulting from both the free float-adjustment and the increase in coverage. In the first phase, approximately half of the total change resulting from the free float-adjustment will be implemented for all existing index constituents and, simultaneously, all the new constituents resulting from the increase in coverage to 85% will be added at approximately half of their free float-adjusted market capitalization.

More specifically, in the first phase, the market capitalization of all existing index constituents will be adjusted by an interim Inclusion Factor equal to the simple average of the current proportion of market capitalization included in the index prior to the change and their final Inclusion Factor. This average will be rounded up to the closest 5% (or closest 1% if below 15%). For example, in the first phase, two constituents with free floats of 23.2% and 78.6%, respectively, currently included in the index at their full market capitalization weights, will have their market capitalization adjusted by interim Inclusion Factors of 0.65 and 0.90, respectively. These interim Inclusion Factors are calculated as  $(25\%+100\%)/2 = 62.5\%$ , rounded-up to 65%, and  $(80\%+100\%)/2 = 90\%$ , respectively.

Simultaneously, all the new constituents resulting from the increase in coverage to 85% will be added to the indices in the first phase with interim Inclusion Factors equal to half of their final Inclusion Factors rounded-up to the closest 5% (or 1% if below 15%). For example, in the first phase, two new constituents with free floats of 23.2% and 78.6%, respectively, will be included in the indices with their market capitalization adjusted by Inclusion Factors of 0.13 ( $25\%/2 = 12.5\%$ , rounded-up to 13%) and 0.40 ( $80\%/2 = 40\%$ ), respectively.

In the second and final phase, the remaining adjustment to market capitalization of all constituent securities will be implemented.

**Index Rebalancings and Market Events during the Transition Period**

During the transition period, from 11 December 2000 through 31 May 2002, MSCI will maintain its schedule of regular quarterly index rebalancings for its Standard Index series. To minimize changes not related to the transition, MSCI will seek to coordinate all changes in the Standard indices with the target index under the enhanced methodology (i.e., the provisional series when available.) In addition, MSCI will only consider very significant changes in the equity markets when performing its quarterly index reviews.

All new additions of companies resulting from IPO's and regular quarterly rebalancings will be included with their final Inclusion Factors.

Also, during the transition period, important new market capitalization additions resulting from mergers, acquisitions and similar corporate events, in principle will be made in proportion to the free float of the additional market capitalization entering the index. For example, when a company - with a current inclusion factor of 40% - issues new shares for the acquisition of assets entirely in firm hands for the equivalent of 25% of its current share capital, the resulting inclusion factor will be derived from the following calculation:  $[(100 \times 40\%) + (25 \times 0\%)] / 125 = 32\%$ , which will be rounded up to 35%.

21. As of 31 May 2001, MSCI have been calculating and publishing the MSCI Provisional Index Series, which is based upon the MSCI Enhanced Methodology for free float adjusting constituents' index weights, and targeting for Index inclusion 85% of free float-adjusted market capitalisation in each industry group with each country.

### ***The Adjusted MSCI World Index: the Tower Global Index***

22. The Global Index is a customised version of the MSCI World Index. The Global Index replicates the MSCI World Index, with one qualification: it only contains grey list countries, which comprise at least 2% of the MSCI World Index. The Global Index does not alter the MSCI World Index in any other way.
23. If any of the countries included in the Global Index leave the grey list then securities held in companies resident in that country will be immediately divested. If any company in which Tortis INTL holds securities ceases to be resident in a grey list country, then securities held in that company will be immediately divested.

### ***Trust Deed and Prospectus***

#### *Two classes of units*

24. The Fund offers two classes of units: Class A and Class B. Class A units are standard retail units. Class B units are issued on exactly the same terms as Class A units, however holders of Class B units, due to the size of their investment, are able to negotiate reduced management and trustee fees.

#### *Date of Adjustments*

25. The Fund is re-balanced in the following circumstances:
- If any security, any country index, or the entire Index has a deviation of greater than +/- 0.5% of the total Fund; and
  - Due to the Structural Changes in the MSCI, currently quarterly; and

- If there is a Market Driven Change such as a merger, takeover, new listing or reduction or increase in capital affecting any Index company on the Global Index.

26. Such re-balancing will occur as soon as possible after the above events have occurred and in any event within 2 business days.

#### *Rights Issues*

27. The Global Index may be adjusted from time to time because of rights issues.
28. In the event of any rights issue by an Index Company, the Manager will hold the entitlement if the entitlement is included in the Index. If the entitlement is not included in the Index, but the securities the subject of the entitlement will be immediately included in the Index, the Manager will retain the entitlement and take up the securities. If the Manager does not know whether the securities the subject of the entitlement will be included in the Index the Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index Companies to track the Index.

#### *Mergers, Takeovers and Share Buy-backs*

29. The Global Index may be adjusted from time to time because of mergers, takeovers or share buy-backs.
30. With the exception of any situation where shares in an Index company are compulsorily acquired pursuant to any companies legislation, listing rules or takeover code requirements, in the event of a merger or takeover of an Index Company, the Manager will adjust the Fund portfolio at a time as close as practicably possible to the time the Index is adjusted. The Fund will not accept an offer unless as a consequence of not accepting the offer the Fund would track the Index less accurately than if it had accepted the offer.
31. The Manager will not elect to participate in a share buy-back scheme of a Index Company.

#### *Cash investments held by the Fund*

32. Although it is not an objective of the Fund to hold cash, the Manager and the Investment Manager (on behalf of the Fund) may hold cash to facilitate the easier administration of the Fund. The cash held by the Manager and the Investment Manager is on "call". Wherever possible, the Manager will enter into futures contracts to cover the cash held by the Fund. This is known as "equitised cash".

33. The Investment Manager (on behalf of the Fund) will hold cash in the following circumstances:
- Following the sale of securities in the course of tracking the Index, pending the reinvestment of that cash;
  - Following a contribution to the Fund, pending the investment of that contribution;
  - Following the sale of securities to meet a request for withdrawal by a Manager on behalf of a unitholder;
  - To accumulate the minimum amount of cash required to allow for minimum trade sizes and to obtain a reasonable representation of the number of securities on the Index, which is presently \$NZ5 million (“the minimum investment level”). The minimum investment level will increase to \$US3 million as at 31 May 2002 to take account of the changes to the MSCI described in paragraphs 13 to 21 above.
34. The Investment Manager may hold up to an amount equivalent to the minimum investment level in cash (including both free and equitised cash). This threshold may be exceeded in the following circumstances:
- for up to 10 working days preceding a MSCI structural change;
  - for up to 3 working days after a MSCI structural change; or
  - for up to 10 working days prior to a pending withdrawal in respect of which it has received a withdrawal request.
35. In addition to any funds held by the Investment Manager, the Manager may hold cash. The amount of cash held by the Manager will not be greater than what strictly arises out of the circumstances described below, and in any event will not exceed 2% of the total assets of the Fund. Those circumstances are:
- Following a contribution to the Fund, pending the investment of that contribution;
  - Following the sale of securities to meet a request to redeem units in cash; and
  - To fund the expenses, fees and taxation for the Fund;
36. The 2% threshold of cash held by the Manager may be exceeded in the following circumstances:
- For up to one business day if there is rapid inflow to the Fund, or the Fund has notice of a substantial pending withdrawal ;
  - For up to one calendar month if the Manager receives a formal notice of a forthcoming obligation of subsequent performance (ie, payment due on partly paid shares) affecting the constituent securities in the Index; or
  - For up to one calendar month if the Manager is aware of a forthcoming distribution to unitholders at the scheduled date of distribution.
37. However, in any event, if the 2% threshold of cash held by the Manager is exceeded, the Fund will take immediate action to remedy the situation within the shortest practicable time.
38. At all times, there is a limit on the total cash (including cash held by the Manager and free and equitised cash held by the Investment Manager) which is the greater of 5% of the total value of the Fund and the sum of 2% of the total value of the Fund and the minimum investment level (except if there is a significant withdrawal or investment).
39. The Investment Manager will use best endeavours to equitise all cash, subject to futures contract size constraints.
40. The following futures contracts are currently used:
- | Country        | Contract   |
|----------------|------------|
| Australia      | SPI200     |
| Canada         | S&P/TSE60  |
| Japan          | Nikkei 225 |
| Germany        | DAX        |
| United Kingdom | FTSE100    |
| United States  | S&P500     |
41. In the event that alternative futures contracts in one or more markets enable improved tracking of the Global Index, or that one or more of the above contracts ceases to exist, the Investment Manager will use such alternative contract or contracts.
- Hedging*
42. The Fund does not take any action to hedge or remove foreign currency risks or exposures that arise from the investments of the Fund in non-New Zealand currencies.

*Foreign Currencies*

43. The Investment Manager may enter into spot foreign exchange contracts where these are necessary in order to purchase or divest the foreign currencies necessary to purchase or dispose of Index securities. These contracts are not speculative and are settled within 2 business days.

*Borrowing*

44. The Fund may only borrow in the following circumstances:

- To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days;
- Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary;
- To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary; or
- For advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.

*Events that trigger acquisitions or realisations*

45. The Fund will only sell or otherwise dispose of securities in the following circumstances:

- If the Fund is voluntarily or involuntarily wound up;
- If there is a change in the Index composition due to either Structural Changes or Market Driven Changes so that the composition of the Fund no longer tracks the Index, or when the Fund is otherwise required to buy and sell securities to rebalance the Fund in order to maintain tracking;
- Funding redemptions to the extent that these cannot be met out of cash held by the Fund;

- Transferring securities to a unitholder if the unitholder redeems units for securities;
- If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

*Issue and redemption of Units*

46. Investors wishing to subscribe for units may do so for cash or, alternatively, above a certain prescribed level, investors may subscribe for units by transferring to Tortis-INTL an appropriately weighted basket of securities, and will receive units in Tortis-INTL in exchange.

47. Tortis-INTL permits investors to exit by redeeming units or by repurchase of units by the Manager. These are the only methods of exit offered by Tortis-INTL as it is not listed on a stock exchange. Units in the Fund may be redeemed by a unitholder for cash or an equivalent basket of securities (clause 35 of the Trust Deed).

48. A unitholder may redeem units subject to the conditions in Article C of the Trust Deed. Article C gives the Manager a discretion to refuse to redeem units where the amount to be redeemed is less than the minimum number acceptable by the Manager at that time. Currently the Manager has set a minimum withdrawal at \$500.

49. Unit prices may be published in newspapers. Tortis-INTL has an Internet site which will be used principally to publish prices at which the Manager will repurchase or redeem units, and as a means for transferring units only by purchase from the Manager, and redemption or repurchase by the Manager.

*Same day unit redemption policy*

50. On being repurchased the Manager is required to pay the aggregate value of the units to the investor within 21 business days of the relevant time (as described in the Trust Deed). However when possible the Fund operates a same day unit redemption policy. The Fund will endeavour to redeem the units requested by any unitholder and redeem and pay for those units on the same day as the unitholder's request is made.

51. If the Fund has insufficient cash in the cash pool, the Fund will always in the first instance attempt to borrow (on suitable commercial terms) sufficient funds in order to meet the redemption request. In situations where the Fund is not able to borrow such sufficient funds, the Fund may suspend the withdrawal of

units in the Fund. The only exception to the Fund always attempting to borrow in the first instance where a redemption request is made and there is insufficient cash in the cash pool, is where a redemption request is made by a unitholder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unitholders. In such a case the Fund will always suspend the withdrawal of units.

*Suspension of issuing and redeeming units*

52. The Fund has not previously suspended the issuing or redeeming of units. A suspension from issuing or redeeming units (including any deferral notice with regard to Class B units) may be necessary in exceptional circumstances, being the following situations:

- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed;
- (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Shares from the Stock Exchanges on which those Index Shares are listed;
- (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests; or
- (4) in the case of any deferral notice in respect of class B units, the Trustee reasonably forms the opinion that to fund redemptions may prejudice the Fund's obligations to Class A unitholders.

If a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event. However in the case of a deferral notice, with regard to Class B units, the period of the deferral notice may be extended until the Trustee reasonably forms the opinion that to fund redemptions is no longer prejudicial to the Fund's obligations to Class A unitholders.

## Conditions stipulated by the Commissioner

This Ruling is subject to the following conditions:

- (a) The predetermined rules used by the Investment Manager to ascertain the Global Index constituents (set out above), and the predetermined rules used by MSCI to calculate the MSCI World Index (set out above), will not be made with or influenced by any intention of seeking higher rates of return or capital growth.
- (b) No material changes will be made to the way in which the Global Index tracks the MSCI World Index.
- (c) Apart from as described above at paragraphs 13 to 21, no material changes will be made to the way in which MSCI constructs the MSCI World Index.
- (d) The proportion of the Applicant's assets to be held as cash (including all "free" cash and "equitised" cash) will not exceed what is strictly necessary in order to fulfil the purposes stated in paragraph 32 of this ruling, and will not in any event exceed the greater of 5% of the value of the Fund and the sum of 2% of the value of the Fund and the minimum investment level.  
  
This condition will not be regarded as being breached if, pending investment of contributions or disbursement of withdrawal proceeds, the Fund is forced to hold cash in excess of the greater of 5% of the value of the Fund and the sum of 2% of the value of the Fund and the minimum investment level. The Fund will immediately invest or disburse such cash, except where immediate investment to track the Index is not possible due to the unavailability of appropriate equities, in which case the excess cash may be held for only so long as is strictly necessary and in any event no longer than two business days.
- (e) When the cash held by the Investment Manager reaches the minimum investment level (presently \$NZ5 million, but to be \$US3 million as from 31 May 2002), it will be immediately applied to track the Index.
- (f) The Investment Manager will rebalance the Fund in the following circumstances:
  - If any security, any country index, or the entire Index has a deviation of greater than +/- 0.5% of the total Fund; and
  - Due to Structural Changes in the MSCI, currently quarterly; and

- If there is a Market Driven Change such as a merger, takeover, new listing or reduction or increase in capital affecting any Index company on the Global Index.

Such re-balancing will occur as soon as possible after the above events have occurred and in any event within 2 business days.

- (g) When rebalancing the Fund the Investment Manager will use its best endeavours to track the Index as exactly as possible. Any re-balancing of the Fund that does not achieve an exact match of the Index will only occur where it is not possible to obtain or sell the securities necessary to exactly replicate the Index. In any case the tracking deviation will not exceed 1% of the value of the Fund.
- (h) In the event of any rights issue by an Index Company, the Manager will hold the entitlement if the entitlement is included in the Index. If the entitlement is not included in the Index, but the securities the subject of the entitlement will be immediately included in the Index, the Manager will retain the entitlement and take up the securities. If the Manager does not know whether the securities the subject of the entitlement will be included in the Index the Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index Companies to track the Index.
- (i) With the exception of any situation where shares in an Index company are compulsorily acquired pursuant to any companies legislation, listing rules or takeover code requirements, in the event of a merger or takeover of an Index Company, the Manager will adjust the Fund portfolio at a time as close as practicably possible to the time the Index is adjusted (but in any event within 2 business days). The Fund will not accept an offer unless as a consequence of not accepting the offer the Fund would track the Index less accurately than if it had accepted the offer.
- (j) The Fund Manager will not elect to participate in a share buy-back scheme of any Index Company.
- (k) When the Fund is given the option of re-investing its dividends into any Index Company, the Fund invariably accepts the cash dividend.

- (l) The Fund can only borrow in the following circumstances:
  - To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days;
  - Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary;
  - To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary; or
  - For advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.
- (m) The Fund will not take any action to hedge or remove foreign currency risks or exposures that arise from the investments of the Fund in non-New Zealand currencies.
- (n) The Fund will only sell or otherwise dispose of securities in the following circumstances:
  - If the Fund is voluntarily or involuntarily wound up;
  - If there is a change in the Index composition due to either Structural Changes or Market Driven Changes so that the composition of the Fund no longer tracks the Index, or when the Fund is otherwise required to buy and sell securities to rebalance the Fund in order to maintain tracking;
  - Funding redemptions to the extent that these cannot be met out of cash held by the Fund;
  - Transferring securities to a unitholder if the unitholder redeems units for securities;
  - If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

- (o) This Ruling shall cease to apply if at any time:
- (i) there is a unitholder, or two or more unitholders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund; and
  - (ii) if that unitholder, or one or more of such unitholders, ordinarily hold securities on revenue account or the disposal of securities by that unitholder, or one or more of such unitholders, would ordinarily give rise to gross income for income tax purposes.
- For the purposes of this condition unitholders are associated with each other if they are “associated persons” within the meaning of section OD 7 or OD 8(3).
- (p) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.
- (q) Apart from the Trust Deed and the Prospectus of the Fund that have been supplied to Inland Revenue as part of the application for this Ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unitholder (or any person associated with or acting on behalf of any unitholder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.
- This condition shall not be regarded as breached by virtue only of:
- (a) the fact that a unitholder has the ability to invest, or withdraw at any time; and/or
  - (b) the entry into of any agreement, arrangement or understanding contemplated by the Trust Deed for the purpose of enabling investment or withdrawal; and/or
  - (c) the appointment by the Trustee of the Manager; and/or
  - (d) any agreement, arrangement or understanding entered into by the Trustee in a capacity other than as trustee of the Fund, or the Manager in a capacity other than as manager of the Fund, in the ordinary course of the Trustee or the Manager conducting an independent investment advisory or investment portfolio management business.
- (r) The Fund will not exercise any voting rights associated with the holding of Index Company securities.
- (s) If the Fund is resettled this Ruling shall not apply from the date of resettlement.
- (t) The Fund will not be involved in any securities lending.
- (u) The Fund will not utilise the power to suspend the issuing or redeeming of units (including any deferral notice with regard to Class B units) except in exceptional circumstances, being the following situations:
- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed;
  - (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Shares from the Stock Exchanges on which those Index Shares are listed;
  - (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests;
  - (4) where there is insufficient cash in the cash pool and a redemption request is made by a unitholder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unitholders; or
  - (5) in the case of any deferral notice in respect of class B units, the Trustee reasonably forms the opinion that to fund redemptions may prejudice the Fund’s obligations to Class A unitholders.
- If a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event. However in the case of a deferral notice, with regard to Class B units, the period of the deferral notice may be extended until the Trustee reasonably forms the opinion that to fund redemptions is no longer prejudicial to the Fund’s obligations to Class A unitholders.
- (v) The Manager will not redeem units as a means of correcting tracking errors.

- (w) The Trustee will not exercise its power under clause 87.7 of the Trust Deed to promote or carry on any scheme or undertaking in any country upon such terms and conditions as the Trustee deems fit.
- (x) The Fund will not invest in derivatives, with the exception of futures contracts entered into for the purposes of tracking the Index and spot foreign exchange contracts (which have a settlement period of no longer than two business days) to acquire or dispose of the necessary foreign currency so as to purchase or dispose of Index securities.
- (y) The Manager has the power to purchase units from unitholders when unitholders wish to redeem their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool, when the Fund cannot borrow the funds required, and when the Fund is unable to sell sufficient securities in order to redeem the units requested. The Manager will not use this power to enhance the profit of the Fund.
- (z) The Global Index will only include countries that are listed in Schedule 3, Part A.
- (aa) The foreign companies included in the Global Index are resident and liable for tax in a country listed in Schedule 3, Part A.
- (bb) For the purposes of section CG 15(2)(b)(iii), in case of an interest, in relation to a foreign entity, of a kind specified in section CG 15(1)(a), the foreign entity is not a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.
- (cc) The Fund will not acquire or hold any income interest or any control interest in any company that is a "controlled foreign company" under section CG 4.
- (dd) There is no arrangement between the Trustee and any unitholders to effect the redemption of units in substitution for dividends.
- (ee) Any cancellation of units will not be part of a pro rata cancellation as that term is defined in section CF 3(14).
- (ff) The Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- (gg) The Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- (hh) All distributions received by the Fund will be paid out to investors net of any expenses incurred by the Fund.
- (ii) In relation to amounts paid as consideration for a cancellation upon liquidation, the recipient will not be a person that is related to Tortis-INTL within the meaning of section CF 3(12).

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

Subject in all respects to any conditions stated above, the Taxation Laws apply to the Applicant and the Arrangement as follows.

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unitholders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3 (1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled. The Commissioner is satisfied that, in terms of section CF 3 (1)(b)(iii), the distribution is not in lieu of the payment of dividends. The procedure of publicising buy-back and redemption prices on the Internet does not constitute a "recognised exchange" in terms of the definition of that phrase in section OB 1.
- If the Fund is liquidated, section CF 3 (1)(c) will apply. The amount distributed to unit holders will not be a dividend to the extent that it does not exceed the aggregate of the "available subscribed capital per share cancelled" and the "excess return amount", as those terms apply to the Fund. The excess return amount will include gains on any securities sold by the Fund.

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

This Ruling will apply for the period from 1 July 2001 until 30 June 2004.

This Ruling is signed by me on the 29<sup>th</sup> day of June 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/21

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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 Tortis New Zealand Fund.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3 (1)(b) and CF 3 (1)(c).

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of a unit trust known as Tortis-NZ Fund (“Tortis-NZ” or the “Fund” or the “Trust”) pursuant to the Deed of Trust dated 1 November 1996 and as amended by an Amending Trust Deed which will be the same as, or not materially different from the draft deed provided to Inland Revenue on 29 June 2001 (the “Trust Deed”) and the Prospectus for the Fund (the “Prospectus”).

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

1. The Fund invests in a portfolio of shares that match the composition and weighting of the NZSE30 Selection Capital Index (“the Index”). The Fund has been designed to provide investors with an index which reflects as nearly as practical the stocks available to investors in the New Zealand Stock Exchange (the “NZSE”). The Applicant advises that the Index was selected because it allows for accurate tracking.
2. Tortis-NZ is a unit trust in terms of the Unit Trusts Act 1960 and meets the definition of a “unit trust” contained in section OB 1.
3. The trustee of the Fund is the Public Trustee (“the Trustee”). The manager of the Fund is Tower Managed Funds Investments Limited (previously known under the name “Tower Trust Services Limited”) (“the Manager”).

4. The investment policy of the Fund is set out in clause 82.1 of the Trust Deed. It states:

82. The investment policy of the Trust shall be:

82.1 to only invest the Fund (other than the Cash Pool) in Index Companies in a manner that replicates the NZSE30 Index and to only enter into transactions that are necessary to give effect to that policy; and

82.2 to invest the Cash Pool in deposits with banks registered under the Reserve Bank Act 1989 or other debt obligations or in the Tower First Rate Account, upon terms that will allow the Manager to pay the anticipated Liabilities and to manage the redemption of Units and the liquidity of the Trust.

5. According to the Prospectus, the investment objectives of the Fund are as follows:

- To track the performance of the NZSE30 Index, which represents approximately 97% of all shares listed on the New Zealand Stock Exchange;
- To invest only in shares and securities that replicate the NZSE30, apart from the liquidity pool of approximately 5% of the Fund’s assets;
- The Investment Manager cannot diversify investments of the Fund, or take steps to diversify the mix of the Fund’s investments outside the above objectives.

6. The Trust Deed states that:

It is not the Fund or the Trustee’s intention to profit from holding, acquiring or selling constituent company securities.

7. Tortis-NZ is an open fund and new investors are able to subscribe for units from time to time. The beneficial interest in the Fund is divided into units. Each unit (other than a fractional unit which will confer a proportionate interest) confers an equal interest in the Fund but does not confer any interest in any particular part of the Fund or any investment in the Fund.
8. The Applicant has confirmed that all aspects and conditions of the previous rulings (BR Prv 96/135, BR Prv 96/136 and BR Prv 01/14), relating to the Fund, have been complied with. There has been no change to the Trust Deed of the Fund, (except for the changes noted above), nor any change to the management or operation of the Fund since its establishment.

### The Index Rules

9. The NZSE describes the NZSE30 Index in general terms as follows:

#### NZSE30 Selection Gross And Capital Indices

The NZSE30 Selection Index covers the 30 largest and most liquid issuers with equity securities quoted on the New Zealand Stock Exchange. The float capital of each company is established by removing all known blocks of shares held, or more-or-less controlled, by one person or a group of related persons and amounting to 30% or more of the share capital. This reflects as nearly as is practical, the stock normally available to investors. The NZSE30 Selection Index is weighted by float (available) capital and membership is reviewed quarterly. The Index has been recalculated back to 01 January 1991.

The...NZSE30 [is] available in both gross and capital form, that is with and without the reinvestment of dividends. The day-to-day methods of index calculation and adjustment for issues and dividends are identical to the NZSE Gross and Capital Indices.

10. The Construction and Maintenance Rules for the NZSE30 Index explain how the Index operates. The Construction and Maintenance Rules contain 20 Rules, which outline how the Index is constructed and how it adjusts over time. These rules are as follows:

The major rules governing the construction and maintenance of the base of companies making up the indices are as follows:-

1. Companies considered for inclusion in the index must be registered in New Zealand or have a sufficient proportion of shareholding on a New Zealand register to qualify for inclusion based on that proportion of the company's market capitalisation.
2. All classes of quoted equity security of a company are eligible for inclusion in the index bases. For index calculation purposes an equity security is defined in the Listing Rules. It includes all securities representing a residual equity claim on the earnings of the company and all securities which derive a substantial portion of their value from their ordinary share characteristics or conversion privileges. This includes convertible notes, specified preference shares, partly-paid shares and warrants (company-issued options).
3. Shares issued through pro rata bonus and rights issues will be recognised on the ex date, according to the issue ratio. Application of changes will be governed by Rule 4.
4. Any adjustments to the capitalisation of Index constituents which do not accumulate to a relative Index impact of more than 0.03% will be held and applied at each quarterly revision. Adjustments with a greater impact will be applied as soon as practicable.

5. With respect to new issues that have a slightly different dividend entitlement to the ordinary shares, the treatment for index calculation purposes is to aggregate the reported outstanding number of both classes of share to the sum at the price of the ordinary share.

6. Newly quoted securities will be included in the indices at the end of the month, not less than five business days following its initial listing if the company meets all inclusion criteria.

Overseas FASTER constituent securities will be assigned a weighting that reflects the percentage holdings on the New Zealand Register in order to determine eligibility and weighting in the NZSE40 and NZSE30 Indices. The weighting assigned to overseas constituents will be the most recent three month moving average. If a weighting is not available at the time of quotation, then when the weighting is available post quotation, the market price will be used to determine eligibility. If a reasonable indication of the percentage holding on the New Zealand Register is available prior to listing, then this will be used in conjunction with its issue price.

7. The Exchange will review the composition of the indices each quarter according to the following rules 8 - 17. The revised bases of the indices, will be communicated to the market at least three weeks before they are to take effect.
8. At each revision, companies will be ranked according to their daily average market capitalisation and float capitalisation for the preceding six months. The top 50 stocks will form the eligible pool for inclusion in either the NZSE40 or NZSE30 respectively.
9. Any index stock that has dropped out of the index pool will be removed from any index or indices in which it currently features.
10. Rule 10 refers only to NZSE40 Index.
11. Rule 11 refers only to NZSE40 Index.
12. Rule 12 refers only to NZSE40 Index.
13. The float capital of each company in the NZSE30 is calculated by excluding parcels of shares deemed to be not freely available in the market. As a general rule, the Exchange will exclude all holdings comprising a 30% or greater "relevant interest", as disclosed in the Substantial Security Holders Notices issued pursuant to the Securities Amendment Act 1988.
14. Any NZSE30 stock that has dropped to a float capital rank of 36 or below will be removed from the NZSE30.
15. Any stock which is not in the NZSE30 and is ranked 25 or higher by float capital will automatically be introduced into the NZSE30 unless it would replace a more liquid stock (determined by trading value over the previous six months). New listings ranked 25 or higher by float capital in the index pool will be automatically included in the NZSE30 in accordance with rule 6.

16. Any required additions to or deletions from the NZSE30 as a result of the operation of rules 14 and 15 will be made with reference to the liquidity of the stocks ranked 26 to 35.
17. Any additions or deletions required between quarterly revisions due to a merger, takeover or new listing will be carried out in accordance with rules 10, 11, 16 & 19.
18. Movements in float capital will be monitored continuously, and the number of securities excluded will generally be updated as and when Substantial Security Holder Notices are received by the Exchange subject to the application of rule 4. In the case of pro-rata cash or bonus issues, it would be assumed, until advice was received otherwise, that the substantial security holders received or accepted their pro rata entitlement, and the number of excluded shares would be increased accordingly on the ex date. If the change in the amount of stock excluded represents 5% or more of the quoted capital of the company, the market would be advised of the impending change at least two weeks in advance.
19. In the event of a merger or takeover in respect of 100% of a constituent company's issued securities, such constituent company's securities will be removed from the Index five Business Days after the date the Offeror becomes entitled and announces that it will proceed with compulsory acquisition.  
  
Where a takeover offer proceeds at less than 100% acceptance, the constituent company's securities will continue to be included in the Index unless there is a failure to satisfy the Index rules. In such cases the constituent company's securities will be removed from the Index five Business Days after the Index Committee determines that such failure to satisfy the Index rules is not likely to be rectified in the near future.
20. Notwithstanding any of the foregoing rules, the New Zealand Stock Exchange reserves the right to, at any time, include any stock in the base of either index and attribute to it such weight as it may in its sole discretion determine.

### ***Trust Deed and Prospectus***

#### *Date of Adjustments*

11. The Fund re-balances in the following circumstances:
  - (i) monthly, when the NZSE adjusts the weighting of Index Companies to allow for cancellation/allotment of shares on issue of the Index Companies;
  - (ii) quarterly, when the NZSE reviews the Index Companies in the Index; and
  - (iii) when the NZSE makes any other announcement that affects the NZSE30 Index.

12. Such re-balancing will occur as soon as possible after the above events have occurred and in any event within one business day.

#### *Rights Issues*

13. The Index may be adjusted from time to time because of rights issues.
14. In the event of any rights issue by an Index Company, the Manager will only take up the rights if the rights are to be included in the Index. If the rights are not included in the Index, the Manager will sell the rights and reinvest in the Index at the earliest possible time.

#### *Mergers, Takeovers and Share Buy-backs*

15. The Index may be adjusted from time to time because of mergers, takeovers or share buy-backs.
16. With the exception of any situation where shares in an Index Company are compulsorily acquired pursuant to the NZSE Listing Rules or the Takeover Code requirements, in the event of a merger or takeover of an Index Company the Manager will adjust the Fund portfolio at the time the Index is adjusted and not participate in the event in any other way.
17. The Manager will not elect to participate in a share buy-back scheme of any Index Company.

#### *Cash investments held by the Fund*

18. Although it is not an objective of the Fund to invest in cash securities, the Fund may hold cash to facilitate the easier administration of the Fund. The Fund will hold cash in the following instances:
  - Following a contribution to the Fund, pending the investment of that contribution;
  - Following the sale of securities to meet a request to redeem units in cash; and
  - To fund expenses, and any fee and taxation obligations of the Fund.
19. Cash is held in on-call deposits with banks registered under the Reserve Bank Act 1989.

#### *Borrowing*

20. The Fund may only borrow in the following circumstances:
  - To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days;

- Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary;
- To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary or
- For advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.

*Events that trigger acquisitions or realisations*

21. The Fund will only sell or otherwise dispose of securities in the following circumstances:
- If the Fund is voluntarily or involuntarily wound up;
  - If there is a change in the Index composition so that the composition of the Fund no longer tracks the Index or when the Fund is otherwise required to buy and sell securities to maintain tracking;
  - Funding redemptions to the extent that these cannot be met out of cash held by the Fund;
  - Transferring securities to a unitholder if the unitholder redeems units for securities;
  - If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

*Issues and redemptions of Units*

22. Investors wishing to subscribe for units may do so for cash or, alternatively, above a certain prescribed level, investors may subscribe for units by transferring to Tortis-NZ an appropriately weighted basket of securities, and will receive units in Tortis-NZ in exchange.
23. Tortis-NZ permits investors to exit by redeeming units or by repurchase of units by the Manager. These are the only methods of exit offered by Tortis-NZ as it is not listed on a stock exchange. Units in the Fund may be redeemed by a unitholder for cash or an equivalent basket of securities (clause 35 of the Trust Deed).

24. A unitholder may redeem units subject to the conditions in Article C of the Trust Deed. Article C gives the Manager a discretion to refuse to redeem units where the amount to be redeemed is less than the minimum number acceptable by the Manager at that time. Currently the Manager has set a minimum withdrawal at \$500.

*Same day unit redemption policy*

25. On being repurchased the Manager is required to pay the aggregate value of the units to the investor within 21 business days of the relevant time (as described in the Trust Deed). However when possible the Fund operates a same day unit redemption policy. The Fund will endeavor to redeem the units requested by any unitholder and redeem and pay for those units on the same day as the unitholder's request is made.
26. If the Fund has insufficient cash in the cash pool, the Fund will always in the first instance attempt to borrow (on suitable commercial terms) sufficient funds in order to meet the redemption request. In situations where the Fund is not able to borrow such sufficient funds, the Fund may suspend the withdrawal of units in the Fund. The only exception to the Fund always attempting to borrow in the first instance where a redemption request is made and there is insufficient cash in the cash pool, is where a redemption request is made by a unitholder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unitholders. In such a case the Fund will always suspend the withdrawal of units.

*Suspension of issuing and redeeming units*

27. The Fund has not previously suspended the issuing or redeeming of units. A suspension from issuing or redeeming units may be necessary in exceptional circumstances, being the following situations:
- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed; or
  - (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Company securities from the NZSE; or
  - (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests.

If a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event.

## Conditions stipulated by the Commissioner

This Ruling is subject to the following conditions:

- (a) The predetermined rules used by the Manager and the NZSE to ascertain the Index constituents (set out above) will not be made with or influenced by any intention of seeking higher rates of return or capital growth.
- (b) No material changes will be made to the way in which the Fund will track the Index.
- (c) No material changes will be made to the way in which the NZSE constructs the Index.
- (d) The Fund will re-balance in the following circumstances:
  - (i) monthly, when the NZSE adjusts the weighting of Index Companies to allow for cancellation/allotment of shares on issue of the Index Companies;
  - (ii) quarterly, when the NZSE reviews the Index Companies in the Index;
  - (iii) when the NZSE make any other announcement that affects the NZSE30 Index; and
  - (iv) If any security or the entire Index has a deviation of greater than 0.2%.

Such re-balancing will occur as soon as possible after the above events have occurred and in any event within one business day.
- (e) When rebalancing the Fund the Manager will use its best endeavours to track the Index as exactly as possible. Any re-balancing of the Fund that does not achieve an exact match of the Index will only occur where it is not possible to obtain or sell the securities necessary to exactly replicate the Index. In any case the tracking deviation will not exceed 0.2% of the value of the Fund.
- (f) In the event of any rights issue by an Index Company of the Index, the Fund Manager will only take up the rights if the rights are to be included in the Index. If the rights are not included in the Index, the Fund Manager will sell the rights and reinvest in the Index at the earliest possible time.

- (g) With the exception of any situation where shares in an Index Company are compulsorily acquired pursuant to the NZSE Listing Rules or the Takeover Code requirements, in the event of a merger or takeover of an Index Company the Manager will adjust the Fund portfolio at the time the Index is adjusted and not participate in the event in any other way.
- (h) The Manager will not elect to participate in a share buy-back scheme of any Index Company.
- (i) When the Fund is given the option of re-investing its dividends into any Index Company, the Fund invariably accepts the cash dividend.
- (j) The cash pool is held in on-call deposits with banks registered under the Reserve Bank Act 1989. The holding of such cash will arise only from the following circumstances:
  - Following a contribution to the Fund, pending the investment of that contribution;
  - Following the sale of securities to meet a request to redeem units in cash; and
  - To fund any expenses, and fee or taxation obligations of the Fund.

The proportion of the Fund's assets to be held as cash will not be greater than what strictly arises out of the above described circumstances, and in any event will not exceed 5% of the total assets of the Fund.
- (k) Condition (j) shall not be considered breached if the 5% limit is exceeded when this occurs due to the following reasons:
  - For up to one business day if there is rapid inflow to the Fund, or the Fund has notice of a substantial pending withdrawal ;
  - For up to one calendar month if the Manager receives a formal notice of a forthcoming obligation of subsequent performance (ie, payment due on partly paid shares) affecting the constituent securities in the index; or
  - For up to one calendar month if the Manager is aware of a forthcoming distribution to unitholders at the scheduled date of distribution.

In any event when the 5% limit is exceeded for any of the reasons above, the Fund takes immediate action to remedy this within the shortest practicable time.

- (l) The Fund can borrow only in the following circumstances:
- To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event the borrowing will be repaid within three business days;
  - Where the Fund is required to fund purchases of shares due to changes in the Index Companies in the Index where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn; this borrowing must be repaid as soon as possible;
  - When, due to a merger situation affecting the composition of the Index, payment due to the Fund is delayed (such delay is beyond the control of the Fund) creating a situation where the Fund will need to rebalance the Index; this borrowing must be repaid as soon as possible; or
  - For advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.
- (m) The Fund will only sell or otherwise dispose of securities in the following circumstances:
- If the Fund is voluntarily or involuntarily wound up;
  - If there is a change in the Index composition so that the composition of the Fund no longer tracks the Index or when the Fund is otherwise required to buy and sell securities to maintain tracking;
  - Funding redemptions to the extent that these cannot be met out of cash held by the Fund;
  - Transferring securities to a unitholder if the unitholder redeems units for securities;
  - If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.
- (n) This Ruling shall cease to apply if at any time:
- (i) there is a unitholder, or two or more unitholders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund; and
- (ii) if that unitholder, or one or more of such unitholders, ordinarily hold securities on revenue account or the disposal of securities by that unitholder, or one or more of such unitholders, would ordinarily give rise to gross income for income tax purposes.
- For the purposes of this condition unitholders are associated with each other if they are "associated persons" within the meaning of section OD 7 or OD 8(3).
- (o) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.
- (p) Apart from the Trust Deed and the Prospectus of the Fund that have been supplied to Inland Revenue as part of the application for this Ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unitholder (or any person associated with or acting on behalf of any unitholder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.
- This condition shall not be regarded as breached by virtue only of:
- (a) the fact that a unitholder has the ability to invest, or withdraw at any time; and/or
- (b) the entry into of any agreement, arrangement or understanding contemplated by the Trust Deed for the purpose of enabling investment or withdrawal; and/or
- (c) the appointment by the Trustee of the Manager; and/or
- (d) any agreement, arrangement or understanding entered into by the Trustee in a capacity other than as trustee of the Fund, or the Manager in a capacity other than as manager of the Fund, in the ordinary course of the Trustee or the Manager conducting an independent investment advisory or investment portfolio management business.
- (q) The Fund will not exercise any voting rights associated with the holding of Index Company shares.
- (r) If the Fund is resettled this Ruling shall not apply from the date of resettlement.
- (s) The Fund will not be involved in any securities lending.

- (t) A suspension from issuing or redeeming units may be necessary in exceptional circumstances, being the following situations:
- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed; or
  - (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Company securities from the NZSE;
  - (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests; or
  - (4) where there is insufficient cash in the cash pool and a redemption request is made by a unitholder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unitholders; or

If a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event.

- (u) The Manager will not redeem units as a means of correcting tracking errors.
- (v) The Trustee will not exercise its power under clause 87.7 of the Trust Deed to promote or carry on any scheme or undertaking in any country upon such terms and conditions as the Trustee deems fit.
- (w) The Trustee will not exercise its power under clause 87.10 of the Trust Deed to agree to enter into and perform any contract option or other right relating to any investment including any derivative.
- (x) The Manager has the power to purchase units from unitholders when unitholders wish to redeem their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool, when the Fund cannot borrow the funds required, and when the Fund is unable to sell sufficient securities in order to redeem the units requested. The Manager will not use this power to enhance the profit of the Fund.
- (y) There is no arrangement between the Trustee and any unitholders to effect the redemption of units in substitution for dividends.
- (z) Any cancellation of units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).
- (aa) The Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- (bb) The Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- (cc) All distributions received by the Fund will be paid out to investors net of any expenses incurred by the Fund.
- (dd) In relation to amounts paid as consideration for a cancellation upon liquidation, the recipient will not be a person that is related to Tortis-NZ within the meaning of section CF 3(12).

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

Subject in all respects to any conditions stated above, the Taxation Laws apply to the Applicant and the Arrangement as follows:

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unitholders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3 (1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled. The Commissioner is satisfied that, in terms of section CF 3 (1)(b)(iii), the distribution is not in lieu of the payment of dividends.
- If the Fund is liquidated, section CF 3 (1)(c) will apply. The amount distributed to unit holders will not be a dividend to the extent that it does not exceed the aggregate of the “available subscribed capital per share cancelled” and the “excess return amount”, as those terms apply to the Fund. The excess return amount will include gains on any securities sold by the Fund.

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

This Ruling will apply for the period from 1 July 2001 until 30 June 2004.

This Ruling is signed by me on the 29<sup>th</sup> day of June 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/26

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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 Tortis-International Fund.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3(1)(b) and CF 3(1)(c).

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of a unit trust known as Tortis-International Fund (“Tortis-INTL” or the “Fund” or the “Trust”) pursuant to a Deed of Trust dated 16 December 1996 and amended on 18 February 1997, 31 July 2000 and as amended by an Amending Trust Deed which will be the same as, or not materially different from the draft deed provided to Inland Revenue on 29 June 2001 (the “Trust Deed”), and the Prospectus for the Fund (the “Prospectus”).

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

1. The Fund invests in the securities of those companies that make up the Tower Global Index (the “Global Index” or the “Index”). The Global Index is a customised version of the Morgan Stanley Capital International World Index (the “MSCI World Index”). The Fund has been designed to provide investors with comprehensive coverage of global equities.
2. Tortis-INTL is a unit trust in terms of the Unit Trusts Act 1960 and meets the definition of a “unit trust” contained in section OB 1.
3. Tortis-INTL is a New Zealand tax resident. The trustee of Tortis-INTL is the Public Trustee (the “Trustee”). The manager of Tortis-INTL is Tower Managed Funds Investments Limited (previously known under the name “Tower Trust Services Limited”) (the “Manager”). The investment manager of the Fund is State Street Global Advisors, Australia, Limited (the “Investment Manager” or “State Street”).

4. The investment policy of the Fund is set out in clause 82.1 of the Trust Deed. It states:

82. The investment policy of the Trust shall be:

82.1 to only invest the Fund (other than the Cash Pool and Unmarketable Accumulations) in Index Shares in a manner that replicates the Adjusted MSCI and to only enter into transactions that are necessary to give effect to that policy;

82.2 to invest the Cash Pool in deposits with banks registered under the Reserve Bank Act 1989 or other debt obligations or in the Tower First Rate Account upon terms that will allow the Manager to pay the anticipated Liabilities of the Fund and to manage the redemption of Units and the liquidity of the Trust;

82.3 to invest Unmarketable Accumulations in Derivatives until the total value of investment in Derivatives reaches a Marketable Amount whereupon the Derivatives will be realised and the proceeds invested in accordance with clause 82.1 or 82.2; and

82.4 to not take any action to hedge or manage foreign exchange risks or exposures that arise from the Investments being held in non New Zealand currencies.

5. The investment objectives of the Fund are as follows:
  - To track the adjusted MSCI Index, called the TOWER Global Index, to provide broad international coverage of approximately 1,000 companies;
  - The Global Index includes only “grey listed” countries to New Zealand, so that double taxation issues do not occur. These include companies resident in the United States, United Kingdom, Germany, Canada, Japan, and Australia. These companies provide coverage of 80% of all international companies contained within the total MSCI Index;
  - The Investment Manager cannot diversify investments of the Fund, or take prudent steps in respect of the mix of the Fund’s investments.
6. The Trust Deed states that:

It is not the Fund or the Trustee’s intention to profit from holding, acquiring or selling constituent company securities.
7. Tortis-INTL is an open fund and new investors are able to subscribe for units from time to time. The beneficial interest in Tortis-INTL is divided into units. Each unit confers an equal interest in Tortis-INTL (other than a fractional unit which will confer a proportionate interest) but does not confer any interest in any particular part of the fund or any particular investment of the fund.

8. The Applicant has confirmed that all aspects of the previous rulings (BR Prv 96/135, BR Prv 96/136, and BR Prv 01/15), relating to the Fund, have been complied with. There has been no change to the Trust Deed of the Fund (except for the changes noted above), nor any change to the management or operation of the Fund since its establishment.

### **The MSCI World Index**

9. The Tower Global Index is a customised version of the MSCI World Index.
10. The tracking of the Global Index is undertaken by the Investment Manager.
11. The fundamental objective of the MSCI World Index is as follows (taken from the *MSCI Methodology and Index Policy* document, published by MSCI in March 1998, at page 3):

MSCI Indices are constructed to provide benchmarks that accurately represent the opportunities available to the institutional investor. While an all-share-index (all listed companies at their full market cap weight) represents the theoretical opportunity set available to the global investor, this is not a fair performance benchmark in practice, since it cannot be fully replicated due to illiquidity of either shares or volume. Thus, MSCI creates indices which capture the spirit of an all-share index, but are actually subsets of shares which are truly replicable.
12. The rules for determining which companies will be included in the MSCI World Index are set out below (taken from the *MSCI Methodology and Index Policy* document):

MSCI produces a world index which currently (31 May 2000) comprises 22 countries and over 1,300 stocks. Each country included in the MSCI World Index is represented by a separate index which forms part of the larger Index. The index for each country is referred to as a MSCI Country Index.

In constructing the MSCI Country Indices MSCI uses a five-step process.

#### **MSCI Country Index Selection Criteria:**

1. Define the total market.
2. Sort the market by industry groups and target 60% for inclusion.
3. Select stocks with good liquidity and free float.
4. Avoid cross-ownership.
5. Apply the full market capitalization weight to each stock.

**1. Define the total market:** The initial research for the MSCI Indices covers the full breadth of each equity market in the universe. Country specialists track the evolution of both listed and unlisted shares of domestically listed companies in 51 markets that, combined, account for over 90% of the world's total market capitalization. Based in Geneva, these teams of country specialists collect data on shares, pricing, ownership, float and liquidity for

effectively all companies worldwide. Sources for this information include local stock exchanges and brokerage firms, newspapers and company contacts. All of the companies within this research coverage are eligible for inclusion in the MSCI Indices except non-domiciled companies, investment trusts and mutual funds.

**2. Sort the total market by industry groups and target 60% for inclusion:** Once information on the total country market capitalization is analyzed, 60% of the capitalization of each industry group, and thus 60% of the entire market, is targeted for inclusion in each MSCI country index. This process ensures that the index reflects the industry characteristics of the overall market, and permits the construction of accurate regional and composite industry indices.

With the uniform target of capturing 60% of each country's total market capitalization, each country carries its proportional weight in the regional and composite indices. A 60% target has been found sufficient to maintain a high level of tracking while still providing for an investable universe across all countries (the "highest common denominator" which can be captured, while still having an investable index in each country).

**3. Select stocks with good liquidity and free float:** A goal of the MSCI index construction process is to select the most liquid stocks within each industry group, all other things being equal, since liquidity is necessary but not the sole determinant for inclusion in the index. Liquidity is monitored by monthly average trading value over time in order to determine normal levels of volume, excluding temporary peaks and troughs. A stock's liquidity is significant not only in absolute terms, but also relative to its market capitalization and to average liquidity for the country and the industry as a whole. Liquidity is not used as an absolute measure to select constituents because: An absolute minimum level of liquidity would be arbitrary and would have different meanings in different markets.

Liquidity is partly a function of the cyclical nature of markets and industries. Limiting index constituents to only the most liquid stocks would introduce a bias against those stocks and sectors that are temporarily out of favor with investors. An inflexible rule might also dictate a pattern of constituent additions and deletions that would introduce unnecessary turnover in the index.

The free float (percentage of shares freely tradable) of every security in the market is monitored and an estimate is calculated, and low float may exclude a stock from consideration in the index. In the developed markets and some emerging markets, "low" float is considered under approximately 25%, as estimated by the country specialists at CIPSA in Geneva. However, in many emerging market countries, the average float is below 25%, so float is measured relative to the stock's own industry and country.

But float can be a difficult number to determine. In some markets, reliable data sources are generally not available; in other markets, information on smaller and less prominent issues can be subject to error and time lags. Additionally, government ownership and

corporate share crossholdings can change over time and are not always made public. The precise definition of “float” also tends to differ depending on the data source. Thus, evaluations of float run the risk of penalizing those markets that have higher standards for company disclosure, regardless of the actual degree of availability of shares. As with liquidity, sufficient float is an important consideration, not an inflexible rule.

**4. Avoid cross-ownership:** Cross-ownership occurs when one company has a significant ownership stake in another company, and both are included in the index. Substantial cross-ownership can skew industry weights, distort country-level valuations (such as Price/Earnings and Price/Book Value) and overstate a country’s true market size.

An integral part of the index construction process is to identify corporate share crossholdings in order to avoid or minimize cross-ownership in the MSCI Indices. Country analysts in Geneva separate cross-ownership stakes into two categories. The first consists of stakes which are considered immaterial. In these cases, such cross-ownership does not represent something significant in terms of having distortionary effects on the index even if both companies are included. The second category is stakes which could materially distort an industry- or country-level index by significantly overstating the index’s market capitalization if both companies are included. Other ownership stakes (such as government, family, other institutional holdings) are also included in the estimated free float.

**5. Apply the full market capitalization weight to each stock:** All standard MSCI indices are weighted by each company’s full market capitalization (both listed and unlisted shares). This approach has the advantage of objectivity—the number of shares outstanding is consistently defined for companies around the world and is a readily obtainable figure. This approach also minimizes turnover. MSCI does not adjust share weights for either free float or cross-holdings. The most serious consequence of float limitations is illiquidity, which can be monitored objectively. Full market capitalization weighting is favored to float-weighting schemes for both theoretical and practical reasons:

- It is impossible to judge whether a position which is currently in firm hands might be available in the future.
- The quality and timeliness of information on float varies from market to market. Adjustments penalize those markets with the highest standards of company information disclosure.
- Float adjustments incur index turnover as the float of a company changes. However, the precision of a float-adjusted index may not yield a more “investable” index. For instance, when the float of a stock increases from 55% to 60%, it may not be necessarily 5% more investable on a practical basis. In fact, it was probably fully replicable at a full market cap weight and the increase in turnover did not result in a “better” index, only an increase in transaction costs.

- Float adjustments on a country level may not result in materially different country weights from market capitalization weights.

[Weighting stocks at their full market capitalisation, as described above in the fifth selection criterion, is slowly being phased out by MSCI: first by its extension of the partial inclusion policy to all new additions to its indices (as of 31 July 2000) and second, by the change in its index construction methodology to a free float-adjustment methodology. However, currently stocks which were already part of the Index as at 31 July 2000 are included at their full market capitalisation.]

**Partial Inclusion Policy**

Since the normal MSCI index policy is to include index constituents at 100% of market capitalization, large issues with low float—a characteristic of many privatizations—pose a dilemma for index construction. Including such companies at full market cap weight can overwhelm an index and overstate the true size of market opportunities; yet excluding them also results in an incomplete picture of the market. A company is included or excluded on a case-by-case basis, where the contributing factors include the expected change in float (especially for first-time government privatizations), stability of the liquidity and importance of the company in its local economy.

A growing number of very sizable companies have been or will be brought to market with modest tranches initially made available to the public. By virtue of their size and visibility, these companies are obvious candidates for inclusion in a portfolio. To reflect this new market trend, MSCI index construction rules do allow for the possibility of including a company at a portion of its total market capitalization. This occurs only in exceptional cases when very large companies come to market with very modest initial float.

In July 31 2000 the policy on partial inclusions was amended. MSCI has extended the application of its policy on partial inclusion of companies to all new additions to the MSCI indices. This amendment will simplify the partial inclusion policy, providing consistent treatment for all new index additions. Previously, the policy was targeted only at new constituents with very large market capitalizations. This amendment does not affect existing constituents in the MSCI indices.

Following this amendment, all companies with a float below 40%, that are to be added to the MSCI Standard or Extended indices, regardless of size, will be included at a fraction of their total market capitalization using a Market Cap Factor (MCF). The MCF will be determined using MSCI’s current schedule as shown below:

% Float equal	10	15	20	25	30	35	40
or exceeding*							
% Market Cap	20	30	40	50	60	80	100
Factor (MCF)							

\* Over-allotment option is not included in the case of IPOs, privatizations and similar public offerings.

### **Structural Changes (“Structural Changes”)**

In changing the constituents of the MSCI Indices, accurate representation is balanced with minimizing turnover. An index must represent the current state of an evolving marketplace while at the same time minimizing turnover, which is costly as well as inconvenient for investment managers. Restructuring an index involves a balancing of constituent additions and deletions. The primary concern when considering additions and deletions is the continuity of the indices. Of secondary concern are the turnover costs associated with these changes.

There are two broad categories of changes to the MSCI Indices: structural changes and market-driven changes.

Structural changes reflect the evolution of a market due, for example, to a change in industry composition or regulations. Industry restructurings generally take place every 18 to 24 months for any given country. However, the structural change to the country index may occur on only four dates throughout the year: as of the close of the last business day of February, May, August and November. MSCI index additions and deletions are announced two weeks in advance. There are absolute firewalls on any price-sensitive decision until there is a public announcement. These changes are communicated to subscribers both electronically and by fax. They are simultaneously posted on public Reuters pages (starting on MSCIA) and public Bloomberg pages (MSCN). The Reuters and Bloomberg MSCI pages are updated by Capital International Perspective, S.A. in Geneva. The pages include the security names, the action to be taken and, when necessary, the context of the change.

A more detailed announcement service is available for a fee (and provides the weightings, shares outstanding, security identifiers and industry classification).

During the examination of each country index, the market cap and business function coverage of each industry group is measured against the underlying market. The investability (free float, cross-ownership, long- and short-term trading volume and turnover) of each constituent is also monitored. In the event that an industry is over- or under-covered, or that there are stocks in the index which are no longer investable (here both long-term and short-term liquidity is examined), or a large privatization has altered the capitalization of the market, a structural change may be necessary.

The MSCI indices reflect the opportunity set to the global investor on an ongoing basis—and should thus mirror the fundamental changes in the market’s structure, and correspond to the situation of the average institutional investor. These structural changes are designed and timed to minimize turnover to the indices. If possible, several unrelated changes to a country index are grouped together, minimizing disruption.

**Structural Change Additions:** As markets grow because of privatizations, investor interest, or the relaxation of regulations, index additions (with or without corresponding deletions) may be needed to bring industry representations up to the 60% target.

Companies are considered not only with respect to their broad industry, but also with respect to their sub-sector, in order to represent if possible a broader range of economic activity.

**Structural Change Deletions:** The indices must represent the full-investment cycle, including bear as well as bull markets. Out-of-favor stocks may exhibit declining price, market capitalization, and/or liquidity, and yet continue to be good representatives of their industry. Deleting constituents because their liquidity has declined introduces a bias against out-of-favor companies or industries, especially those in the trough of a business cycle. For this reason, low liquidity is never an automatic trigger for deleting a company from the index.

Companies may be deleted because they have diversified away from their industry classification, because the industry has evolved in a different direction from the company’s thrust, or because a better industry representative exists (either a new issue or an existing company). In addition, in order not to exceed the 60% target coverage of industries and countries, adding new index companies may entail corresponding deletions.

### **Market-driven Changes (“Market Driven Changes”)**

Market-driven changes consist of new issues, mergers, acquisitions, bankruptcies, and other similar corporate events. These changes are announced and implemented as they occur.

**Additions - New Issues:** New issues may not be automatically eligible for immediate inclusion in the MSCI Indices. Many factors must be considered, such as market capitalization, float and liquidity. Some new issues undergo a seasoning period of six to twelve months between index restructurings until a trading pattern and volume are established. After that time, they are eligible for inclusion, subject to the standard selection criteria discussed.

However, sometimes a new issue, usually a privatization, comes to market and substantially changes the country’s industry profile. In this case, where even temporarily excluding it would distort the characteristics of the market, it may be immediately included in the MSCI Indices. An example is YPF, Argentina’s privatized oil company, which at USD 3.04 billion is Latin America’s largest privatization to date. In these cases, however, an announcement is made in the first few days of official trading for the security, since the country specialists do not want to influence the primary placement of the issue.

In other cases, a large new issue may not be included even in the normal process of restructuring, despite substantial size and liquidity. The primary reasons for non-inclusion of a large new issue are as follows:

- A large stock, if it has low float and is also illiquid, can overwhelm an index and over-represent the true opportunities in the market.
- The index may be at the limit of industry representation—including the new issue would seriously over-weight an industry in the index.

- In some cases, it is necessary to defer inclusion of a new issue until the next opportunity for index restructuring.

**Deletions - Suspended Companies:** In the case of suspension for bankruptcy or near bankruptcy, the suspended company is deleted at the smallest price (unit or fraction of the currency) at which a security could have traded in a given market.

More complex are the cases where the suspension is due to a major restructuring, which results in the company being ineligible (at least for an important period of time) for normal listing and trading on the stock exchange. The MSCI policy is to remove these companies from the index only after there is little likelihood the company will return to normal trading. In this situation, the key issue is determining the price at which the company can be removed from the index. Unofficial market prices may be used as a base to determine that exit price. In exceptional circumstances, average indicative prices from reliable sources may be used.

**Mergers & Acquisitions:** Any case of mergers and acquisitions, or capital restructuring, which can affect a company within the MSCI universe is monitored. Depending on whether the active companies are, or are not, constituents of the MSCI Indices, a number of factors must be considered. If either the acquiring or the acquired firm is a constituent of the index, the first consideration is the impact of the acquisition on the index. The second consideration involves structural changes to the index. When a non-constituent company acquires a constituent company, either the acquiring company can replace the constituent company in the index, or another company altogether may be chosen as a better representative of the industry. If two medium-sized, non-constituent companies merge, the merged company may also be considered for inclusion in the indices. However, this change would occur only through a structural review.

**Spin-Offs:** A spin-off is the distribution to existing shareholders of a part of the company's business through the issuance of shares in the newly-established company. The decision to include the newly-established company in the index is based on several factors including estimated market value, market capitalization, and float. The market value of the spin-off is estimated through a consensus of industry analysts, grey market prices, and statistics on revenues and earnings.

#### **Performance of stocks**

The methodology for determining which stocks are to be included in the relevant country indices does not involve any exercise of predicting whether a company is likely to be particularly profitable or unprofitable or whether the company's securities are likely to increase in value or decrease in value. Performance is not an issue. MSCI is solely focused on ensuring that a consistent methodology is used in preparing the indices, which maximises the utility of the indices as a recognised world-wide benchmark of stock market movement and avoids unnecessary turnover of index stocks.

#### **Changes to the MSCI World Index**

13. In partial replacement of the process stated above, there are also forthcoming changes which alter the way in which the MSCI World Index will select its constituent company securities. The MSCI will adjust all its equity indices for free float and increase the target market representation of its Standard Index series from 60% to 85%. The combined changes will be implemented in two separate phases. The first phase will be implemented as of the close of 30 November 2001 and the second phase will be implemented as of the close of 31 May 2002.
14. The change in index construction methodology to a "free float-adjustment" methodology is described in the *MSCI Announcement*, dated 10 December 2000 ("the *Announcement*"), as follows:

MSCI calculates the free float of an equity security as its total number of shares outstanding less shareholdings classified as strategic and shares otherwise restricted from trading by international investors. Examples of shares excluded from free float are stakes held by governments, corporations, controlling shareholders and their families, the company's management, and shares subject to foreign ownership restrictions.

Under this enhanced index construction methodology, MSCI will free float-adjust constituent weights using an adjustment factor, which will be referred to as the Inclusion Factor. This Inclusion Factor is equal to a constituent's estimated free float rounded-up to the closest 5%. For example, a constituent with an estimated free float of 23.2% will be included in the index at 25% of its total market capitalization, while a constituent with an estimated free float of 78.6%, will be included in the index with an Inclusion Factor of 0.80. Where the foreign ownership limit is more restrictive than the free float, and if there are no foreign strategic investors, a constituent's Inclusion Factor will be equal to its exact foreign ownership limit, rounded to the nearest percentage point.

Securities with a free float below 15% will not typically be eligible for inclusion in the MSCI equity indices. However, in exceptional cases where including such a security would significantly improve the index's ability to accurately represent the investment opportunities in that country or industry, the security may be included in the MSCI indices with an Inclusion Factor equal to its estimated free float rounded to the closest percentage point. For example, a very large company with an estimated free float of 11.4%, if included in the index, would be included with an Inclusion Factor of 0.11.

In order to account for other types of restrictions on foreign equity investment, such as the investor qualification and quota approval system prevailing today in Taiwan, the enhanced MSCI methodology provides for an additional investability factor, referred to as the Limited Investability Factor.

The application of this Limited Investability Factor would permit a more accurate comparison of markets with more complex and subtle restrictions to the investment process with markets where investment limitations can be appropriately reflected in security specific Inclusion Factors.

MSCI will review constituents' Inclusion Factors at the time of regular country index rebalancings. In addition, MSCI will allow for changes in a security's Inclusion Factor in response to significant market-driven corporate events, as the events become effective.

15. To determine whether a shareholding is strategic or non-strategic, the *Announcement* states the following guidelines:

**Shareholding classification guidelines**

MSCI primarily classifies shareholdings as strategic or non-strategic based on a categorization of investor types.

- **Strategic shareholders:** The following investor types are generally considered as strategic and their shareholdings in a company are not included in that company's equity capital to determine its free float:
- **Governments:** Shares owned by governments and affiliated entities. Please refer to the specific guidelines described below for government agencies and government-related investment funds.
- **Corporations:** Shares owned by corporations, including treasury shares owned by the company itself, except when the treasury shares are excluded from the number of shares outstanding. Please refer to specific guidelines for banks.
- **Management and Board Members:** Shares owned by members of the company's management or Board of Directors, including shares owned by individuals or families that are related to or closely affiliated with members of the company's management, Board of Directors, or founding members deemed to be insiders.
- **Employee Stock Ownership Plans (ESOPs):** Shares owned in ESOPs during the lockup period.

**Non-Strategic shareholders:** The following investor types are generally considered as non-strategic and their shareholdings in a company are included in that company's equity capital to determine its free float:

- **Individuals:** Shares owned by individuals, excluding shares owned by individuals or families that are related to or closely affiliated with members of the company's management, Board of Directors or founding members deemed to be insiders, and, excluding those shareholdings held by individuals whose significant size suggests that they are strategic in nature.
- **Investment funds, mutual funds or unit trusts:** Shares owned in investment funds, mutual funds and unit trusts, including shares owned in passively managed funds.

- **Pension funds:** Shares owned in employee pension funds, excluding shares of the employing company, its subsidiaries or affiliates.
- **Insurance companies:** In principle, the investment objective of portfolio holdings of insurance companies is non-strategic. When there are reasons to believe that an insurance company's shareholding is strategic, it will not be included in free float.
- **Social security funds:** Shares owned in social security funds, unless the fund's management is deemed to exert influence over the management of the company.
- **Venture capital funds:** Shares owned in venture capital funds, unless a specific investment is deemed to be strategic in nature.

16. If the above guidelines are not sufficient, the *Announcement* also states the following additional guidelines:

In the event that the above categories should not appropriately capture the nature of a specific shareholding, its classification as strategic or non-strategic will be determined based on a more extensive analysis. In particular, the following guidelines will be followed:

- **Banks.** Shareholdings by banks are considered as strategic, excluding, when identifiable, specific shareholdings that are deemed to be non-strategic.
- **Nominees or trustees:** Shareholdings registered in the name of a nominee or trustee are classified as strategic or non-strategic based on an analysis of who is the ultimate beneficial owner of the shares, according to the above definitions.
- **Government agencies and government-related investment funds:** Shareholdings of government agencies and government-related investment funds are classified based on an analysis of the objective of the investment.
- **Shares placed in IPOs with special incentives:** Shares that are placed in an IPO and that include meaningful incentives to hold the shares for a specific period of time, are classified as strategic until those incentives expire.
- **ADRs and GDRs:** Shares that are deposited to back the issuance of ADRs and GDRs are classified as non-strategic, unless it is established that a specific stake held in ADRs or GDRs is strategic in nature.

17. Other shares (other than those which are classified as "strategic") may also be excluded from the free float. These shares, described above as "shares otherwise restricted" from the free float, are described as follows:

- **Limits on share ownership for foreigners:** Limits on the proportion of a security's share capital that is authorized for purchase by non-domestic investors. Where they exist, these foreign share-ownership limits are generally set by law, government regulations, or company by-laws.

- **Other foreign investment restrictions:**  
Investment restrictions, other than those described above, which materially limit the ability of international investors to freely invest in a particular equity market. There is typically no simple way to account for these limitations in a benchmark, as these restrictions tend to be more subtle and complex, and may affect different market participants in different ways.
18. The MSCI calculates the free float-adjustment construction methodology in the following manner:
- Calculation of a security's free float-adjusted market capitalization**
- As a general rule, MSCI calculates the free float of a security as its total number of shares outstanding less shareholdings classified as strategic and shares otherwise restricted from trading by international investors. However, the determination of the corresponding free float-adjusted market capitalization is dependent on the nature of the limitations on free float.
- In all cases, the calculation is based solely on publicly available shareholding information obtained from multiple information sources. For each security, all available shareholdings are considered where public data is available, regardless of size.
- **Calculation in the case of a security which is not subject to a foreign ownership limit or other foreign investment restrictions**
  - Strategic shareholding (%) =  

$$\frac{\text{Number of shares classified as strategic}}{\text{Total number of shares outstanding}}$$
  - Free float (%) = 100% - Strategic shareholding (%)
  - For constituents with free float greater than or equal to 15%, the security's Inclusion Factor is equal to its estimated free float, rounded-up to the closest 5%.
  - Securities with free float less than 15% are typically not eligible for inclusion in the indices. However, in exceptional cases, where including such a security would significantly improve the index's ability to accurately represent the investment opportunities in that country or industry, the security may be included in the indices with an Inclusion Factor equal to its estimated free float rounded to the closest 1%.
  - Free float-adjusted market capitalization =  

$$\text{Inclusion Factor} * \text{total market capitalization}$$
  - **Calculation in the case of a security which is subject to a foreign ownership limit**
  - Foreign strategic shareholding (%) =  

$$\frac{\text{Number of shares held by foreign strategic investors}}{\text{Total number of shares outstanding}}$$
  - Free float available to foreign investors (%) is equal to the lesser of
    - the free float, calculated as: 100% - strategic shareholding (including both foreign and domestic strategic shareholders) (%)
    - the foreign ownership limit less the foreign strategic shareholding (%)
  - For constituents whose free float available to foreign investors is greater than or equal to 15%, the security's Inclusion Factor is equal to the lesser of:
    - the estimated free float available to foreign investors rounded-up to the closest 5%;
    - the foreign ownership limit rounded to the closest 1%.
  - Securities with a free float available to foreign investors of less than 15% are typically not eligible for inclusion in the indices. However, in exceptional cases, where including such a security would significantly improve the index's ability to accurately represent the investment opportunities in that country or industry the security may be included in the indices with an Inclusion Factor equal to its estimated free float available to foreign investors rounded to the closest 1%.
  - Free float-adjusted market capitalization =  

$$\text{Inclusion Factor} * \text{total market capitalization}$$
  - **In the case of a security which is subject to other foreign investment restrictions**
- In the case where other foreign investment restrictions exist, which materially limit the ability of international investors to freely invest in equity markets, an additional Limited Investability Factor may be applied. There is typically no simple way to account for these types of investability limitations in a benchmark as they tend to be subtle and complex, and may affect different market participants in different ways. Therefore, where warranted, the Limited Investability Factor will be determined based on an extensive case-by-case analysis.
19. The change in target representation, as described in the *Announcement*, will occur as follows:
- In conjunction with the free float-adjustment of its indices, MSCI will increase the target market representation in the MSCI Standard Index series from 60% of total market capitalization to 85% of free float-adjusted market capitalization within each industry group within each country. Given trends such as increased market concentration, the increase in coverage will provide greater diversification and representation of investment opportunities in the indices. Broader coverage is also expected to decrease ongoing turnover in the MSCI indices.
- MSCI research shows that the increase to a target market representation of 85% can be achieved with the addition of a reasonable number of relatively liquid and sizeable constituents in most countries. In the countries where this is not possible, the country index will remain below the target market representation of 85%.

20. The “phase in” periods, also detailed in the December 2000 *Announcement*, for the changes were detailed as follows:

**Publication of Constituent Data and Implementation**

In order to assist market participants in understanding and preparing for these changes, MSCI plans to publish, on or before June 30 2001, the list of index constituents and their Inclusion Factors under the enhanced methodology for each of the MSCI Standard country indices. In addition, shortly thereafter, MSCI will begin publishing a provisional index series to measure the performance of the MSCI countries and main regions based on the enhanced methodology. The provisional series, together with the constituents and their Inclusion Factors, also may be used by clients who wish to measure their performance against such an index, ahead of MSCI’s official implementation schedule.

In order to best transition the indices to the enhanced methodology, the combined changes will be implemented in two separate phases: as of the close of 30 November 2001, and as of the close of 31 May 2002. The changes in each phase will simultaneously affect all MSCI Standard country indices and will include changes resulting from both the free float-adjustment and the increase in coverage. In the first phase, approximately half of the total change resulting from the free float-adjustment will be implemented for all existing index constituents and, simultaneously, all the new constituents resulting from the increase in coverage to 85% will be added at approximately half of their free float-adjusted market capitalization.

More specifically, in the first phase, the market capitalization of all existing index constituents will be adjusted by an interim Inclusion Factor equal to the simple average of the current proportion of market capitalization included in the index prior to the change and their final Inclusion Factor. This average will be rounded up to the closest 5% (or closest 1% if below 15%). For example, in the first phase, two constituents with free floats of 23.2% and 78.6%, respectively, currently included in the index at their full market capitalization weights, will have their market capitalization adjusted by interim Inclusion Factors of 0.65 and 0.90, respectively. These interim Inclusion Factors are calculated as  $(25\%+100\%)/2 = 62.5\%$ , rounded-up to 65%, and  $(80\%+100\%)/2 = 90\%$ , respectively.

Simultaneously, all the new constituents resulting from the increase in coverage to 85% will be added to the indices in the first phase with interim Inclusion Factors equal to half of their final Inclusion Factors rounded-up to the closest 5% (or 1% if below 15%). For example, in the first phase, two new constituents with free floats of 23.2% and 78.6%, respectively, will be included in the indices with their market capitalization adjusted by Inclusion Factors of 0.13 ( $25\%/2 = 12.5\%$ , rounded-up to 13%) and 0.40 ( $80\%/2 = 40\%$ ), respectively.

In the second and final phase, the remaining adjustment to market capitalization of all constituent securities will be implemented.

**Index Rebalancings and Market Events during the Transition Period**

During the transition period, from 11 December 2000 through 31 May 2002, MSCI will maintain its schedule of regular quarterly index rebalancings for its Standard Index series. To minimize changes not related to the transition, MSCI will seek to coordinate all changes in the Standard indices with the target index under the enhanced methodology (i.e., the provisional series when available.) In addition, MSCI will only consider very significant changes in the equity markets when performing its quarterly index reviews.

All new additions of companies resulting from IPO’s and regular quarterly rebalancings will be included with their final Inclusion Factors.

Also, during the transition period, important new market capitalization additions resulting from mergers, acquisitions and similar corporate events, in principle will be made in proportion to the free float of the additional market capitalization entering the index. For example, when a company - with a current inclusion factor of 40% - issues new shares for the acquisition of assets entirely in firm hands for the equivalent of 25% of its current share capital, the resulting inclusion factor will be derived from the following calculation:  $[(100 \times 40\%) + (25 \times 0\%)] / 125 = 32\%$ , which will be rounded up to 35%.

21. As of 31 May 2001, MSCI have been calculating and publishing the MSCI Provisional Index Series, which is based upon the MSCI Enhanced Methodology for free float adjusting constituents’ index weights, and targeting for Index inclusion 85% of free float-adjusted market capitalisation in each industry group with each country.

**The Adjusted MSCI World Index: the Tower Global Index**

22. The Global Index is a customised version of the MSCI World Index. The Global Index replicates the MSCI World Index, with one qualification: it only contains grey list countries, which comprise at least 2% of the MSCI World Index. The Global Index does not alter the MSCI World Index in any other way.
23. If any of the countries included in the Global Index leave the grey list then securities held in companies resident in that country will be immediately divested. If any company in which Tortis INTL holds securities ceases to be resident in a grey list country, then securities held in that company will be immediately divested.

### **Trust Deed and Prospectus**

#### *Two classes of units*

24. The Fund offers two classes of units: Class A and Class B. Class A units are standard retail units. Class B units are issued on exactly the same terms as Class A units, however holders of Class B units, due to the size of their investment, are able to negotiate reduced management and trustee fees.

#### *Date of Adjustments*

25. The Fund is rebalanced in the following circumstances:
- If any security, any country index, or the entire Index has a deviation of greater than +/- 0.5% of the total Fund; and
  - Due to the Structural Changes in the MSCI, currently quarterly; and
  - If there is a Market Driven Change such as a merger, takeover, new listing or reduction or increase in capital affecting any Index company on the Global Index.
26. Such rebalancing will occur as soon as possible after the above events have occurred and in any event within 2 business days.

#### *Rights Issues*

27. The Global Index may be adjusted from time to time because of rights issues.
28. In the event of any rights issue by an Index Company, the Manager will hold the entitlement if the entitlement is included in the Index. If the entitlement is not included in the Index, but the securities the subject of the entitlement will be immediately included in the Index, the Manager will retain the entitlement and take up the securities. If the Manager does not know whether the securities the subject of the entitlement will be included in the Index the Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index Companies to track the Index.

#### *Mergers, Takeovers and Share Buy-backs*

29. The Global Index may be adjusted from time to time because of mergers, takeovers or share buy-backs.
30. With the exception of any situation where shares in an Index company are compulsorily acquired pursuant to any companies legislation, listing rules or takeover code requirements, in the event of a merger or takeover of an Index Company, the Manager will adjust the Fund portfolio at a time as close as practicably possible to the time the Index is adjusted.

The Fund will not accept an offer unless as a consequence of not accepting the offer the Fund would track the Index less accurately than if it had accepted the offer.

31. The Manager will not elect to participate in a share buy-back scheme of a Index Company.

#### *Cash investments held by the Fund*

32. Although it is not an objective of the Fund to hold cash, the Manager and the Investment Manager (on behalf of the Fund) may hold cash to facilitate the easier administration of the Fund. The cash held by the Manager and the Investment Manager is on "call". Wherever possible, the Manager will enter into futures contracts to cover the cash held by the Fund. This is known as "equitised cash".

33. The Investment Manager (on behalf of the Fund) will hold cash in the following circumstances:
- Following the sale of securities in the course of tracking the Index, pending the reinvestment of that cash;
  - Following a contribution to the Fund, pending the investment of that contribution;
  - Following the sale of securities to meet a request for withdrawal by a Manager on behalf of a unitholder;
  - To accumulate the minimum amount of cash required to allow for minimum trade sizes and to obtain a reasonable representation of the number of securities on the Index, which is presently \$NZ5 million ("the minimum investment level"). The minimum investment level will increase to \$US3 million as at 31 May 2002 to take account of the changes to the MSCI described in paragraphs 13 to 21 above.
34. The Investment Manager may hold up to an amount equivalent to the minimum investment level in cash (including both free and equitised cash). This threshold may be exceeded in the following circumstances:
- for up to 10 working days preceding a MSCI structural change;
  - for up to 3 working days after a MSCI structural change; or
  - for up to 10 working days prior to a pending withdrawal in respect of which it has received a withdrawal request.

35. In addition to any funds held by the Investment Manager, the Manager may hold cash. The amount of cash held by the Manager will not be greater than what strictly arises out of the circumstances described below, and in any event will not exceed 2% of the total assets of the Fund. Those circumstances are:

- Following a contribution to the Fund, pending the investment of that contribution;
- Following the sale of securities to meet a request to redeem units in cash; and
- To fund the expenses, fees and taxation for the Fund;

36. The 2% threshold of cash held by the Manager may be exceeded in the following circumstances:

- For up to one business day if there is rapid inflow to the Fund, or the Fund has notice of a substantial pending withdrawal ;
- For up to one calendar month if the Manager receives a formal notice of a forthcoming obligation of subsequent performance (ie, payment due on partly paid shares) affecting the constituent securities in the Index; or
- For up to one calendar month if the Manager is aware of a forthcoming distribution to unitholders at the scheduled date of distribution.

37. However, in any event, if the 2% threshold of cash held by the Manager is exceeded, the Fund will take immediate action to remedy the situation within the shortest practicable time.

38. At all times, there is a limit on the total cash (including cash held by the Manager and free and equitised cash held by the Investment Manager) which is the greater of 5% of the total value of the Fund and the sum of 2% of the total value of the Fund and the minimum investment level (except if there is a significant withdrawal or investment).

39. The Investment Manager will use best endeavours to equitise all cash, subject to futures contract size constraints.

40. The following futures contracts are currently used:

Country	Contract
Australia	SPI200
Canada	S&P/TSE60
Japan	Nikkei 225
Germany	DAX
United Kingdom	FTSE100
United States	S&P500

41. In the event that alternative futures contracts in one or more markets enable improved tracking of the Global Index, or that one or more of the above contracts ceases to exist, the Investment Manager will use such alternative contract or contracts.

#### *Hedging*

42. The Fund does not take any action to hedge or remove foreign currency risks or exposures that arise from the investments of the Fund in non-New Zealand currencies.

#### *Foreign Currencies*

43. The Investment Manager may enter into spot foreign exchange contracts where these are necessary in order to purchase or divest the foreign currencies necessary to purchase or dispose of Index securities. These contracts are not speculative and are settled within 2 business days.

#### *Borrowing*

44. The Fund may only borrow in the following circumstances:

- To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days;
- Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary;
- To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary; or

- For advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.

*Events that trigger acquisitions or realisations*

45. The Fund will only sell or otherwise dispose of securities in the following circumstances:
- If the Fund is voluntarily or involuntarily wound up;
  - If there is a change in the Index composition due to either Structural Changes or Market Driven Changes so that the composition of the Fund no longer tracks the Index, or when the Fund is otherwise required to buy and sell securities to rebalance the Fund in order to maintain tracking;
  - Funding redemptions to the extent that these cannot be met out of cash held by the Fund;
  - Transferring securities to a unitholder if the unitholder redeems units for securities;
  - If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

*Issue and redemption of Units*

46. Investors wishing to subscribe for units may do so for cash or, alternatively, above a certain prescribed level, investors may subscribe for units by transferring to Tortis-INTL an appropriately weighted basket of securities, and will receive units in Tortis-INTL in exchange.

47. When a unitholder wishes to dispose of an investment in the Fund, the unitholder is able to elect that the units be either redeemed by the Trustee, or repurchased by the Manager.

Notwithstanding any provision in the Prospectus or the Deed of Trust, it is the invariable practice of the Fund that where such an election is made by the unitholder, the units will be either redeemed by the Trustee, or repurchased by the Manager, in strict accordance with that election.

In the absence of an election by the unitholder, the units will in all instances be repurchased by the Manager.

Where units are repurchased by the Manager, the price paid to the unitholder by the Manager will be the same amount as would be received by the unitholder if the unitholder had elected

the direct redemption method. In all instances where units are repurchased by the Manager, whether pursuant to an election by a unitholder or not, the Manager will redeem those units with the Trustee for the same price as paid to the unitholder.

48. A unitholder may redeem units subject to the conditions in Article C of the Trust Deed. Article C gives the Manager a discretion to refuse to redeem units where the amount to be redeemed is less than the minimum number acceptable by the Manager at that time. Currently the Manager has set a minimum withdrawal at \$500.

49. Unit prices may be published in newspapers. Tortis-INTL has an Internet site which will be used principally to publish prices at which the Manager will repurchase or redeem units, and as a means for transferring units only by purchase from the Manager, and redemption or repurchase by the Manager.

*Same day unit redemption policy*

50. On being repurchased the Manager is required to pay the aggregate value of the units to the investor within 21 business days of the relevant time (as described in the Trust Deed). However when possible the Fund operates a same day unit redemption policy. The Fund will endeavour to redeem the units requested by any unitholder and redeem and pay for those units on the same day as the unitholder's request is made.

51. If the Fund has insufficient cash in the cash pool, the Fund will always in the first instance attempt to borrow (on suitable commercial terms) sufficient funds in order to meet the redemption request. In situations where the Fund is not able to borrow such sufficient funds, the Fund may suspend the withdrawal of units in the Fund. The only exception to the Fund always attempting to borrow in the first instance where a redemption request is made and there is insufficient cash in the cash pool, is where a redemption request is made by a unitholder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unitholders. In such a case the Fund will always suspend the withdrawal of units.

*Suspension of issuing and redeeming units*

52. The Fund has not previously suspended the issuing or redeeming of units. A suspension from issuing or redeeming units (including any deferral notice with regard to Class B units) may be necessary in exceptional circumstances, being the following situations:

- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed;
- (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Shares from the Stock Exchanges on which those Index Shares are listed;
- (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests; or
- (4) in the case of any deferral notice in respect of class B units, the Trustee reasonably forms the opinion that to fund redemptions may prejudice the Fund's obligations to Class A unitholders.

If a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event. However in the case of a deferral notice, with regard to Class B units, the period of the deferral notice may be extended until the Trustee reasonably forms the opinion that to fund redemptions is no longer prejudicial to the Fund's obligations to Class A unitholders.

## Conditions stipulated by the Commissioner

This Ruling is subject to the following conditions:

- (a) The predetermined rules used by the Investment Manager to ascertain the Global Index constituents (set out above), and the predetermined rules used by MSCI to calculate the MSCI World Index (set out above), will not be made with or influenced by any intention of seeking higher rates of return or capital growth.
- (b) No material changes will be made to the way in which the Global Index tracks the MSCI World Index.

(c) Apart from as described above at paragraphs 13 to 21, no material changes will be made to the way in which MSCI constructs the MSCI World Index.

(d) The proportion of the Applicant's assets to be held as cash (including all "free" cash and "equitised" cash) will not exceed what is strictly necessary in order to fulfil the purposes stated in paragraph 32 of this ruling, and will not in any event exceed the greater of 5% of the value of the Fund and the sum of 2% of the value of the Fund and the minimum investment level.

This condition will not be regarded as being breached if, pending investment of contributions or disbursement of withdrawal proceeds, the Fund is forced to hold cash in excess of the greater of 5% of the value of the Fund and the sum of 2% of the value of the Fund and the minimum investment level. The Fund will immediately invest or disburse such cash, except where immediate investment to track the Index is not possible due to the unavailability of appropriate equities, in which case the excess cash may be held for only so long as is strictly necessary and in any event no longer than two business days.

(e) When the cash held by the Investment Manager reaches the minimum investment level (presently \$NZ5 million, but to be \$US3 million as from 31 May 2002), it will be immediately applied to track the Index.

(f) The Investment Manager will rebalance the Fund in the following circumstances:

- If any security, any country index, or the entire Index has a deviation of greater than +/- 0.5% of the total Fund; and
- Due to Structural Changes in the MSCI, currently quarterly; and
- If there is a Market Driven Change such as a merger, takeover, new listing or reduction or increase in capital affecting any Index company on the Global Index.

Such rebalancing will occur as soon as possible after the above events have occurred and in any event within 2 business days.

(g) When rebalancing the Fund the Investment Manager will use its best endeavours to track the Index as exactly as possible. Any rebalancing of the Fund that does not achieve an exact match of the Index will only occur where it is not possible to obtain or sell the securities necessary to exactly replicate the Index. In any case the tracking deviation will not exceed 1% of the value of the Fund.

- (h) In the event of any rights issue by an Index Company, the Manager will hold the entitlement if the entitlement is included in the Index. If the entitlement is not included in the Index, but the securities the subject of the entitlement will be immediately included in the Index, the Manager will retain the entitlement and take up the securities. If the Manager does not know whether the securities the subject of the entitlement will be included in the Index the Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index Companies to track the Index.
- (i) With the exception of any situation where shares in an Index company are compulsorily acquired pursuant to any companies legislation, listing rules or takeover code requirements, in the event of a merger or takeover of an Index Company, the Manager will adjust the Fund portfolio at a time as close as practicably possible to the time the Index is adjusted (but in any event within 2 business days). The Fund will not accept an offer unless as a consequence of not accepting the offer the Fund would track the Index less accurately than if it had accepted the offer.
- (j) The Fund Manager will not elect to participate in a share buy-back scheme of any Index Company.
- (k) When the Fund is given the option of re-investing its dividends into any Index Company, the Fund invariably accepts the cash dividend.
- (l) The Fund can only borrow in the following circumstances:
- To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days;
  - Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary;
  - To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary; or
  - For advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.
- (m) The Fund will not take any action to hedge or remove foreign currency risks or exposures that arise from the investments of the Fund in non-New Zealand currencies.
- (n) The Fund will only sell or otherwise dispose of securities in the following circumstances:
- If the Fund is voluntarily or involuntarily wound up;
  - If there is a change in the Index composition due to either Structural Changes or Market Driven Changes so that the composition of the Fund no longer tracks the Index, or when the Fund is otherwise required to buy and sell securities to rebalance the Fund in order to maintain tracking;
  - Funding redemptions to the extent that these cannot be met out of cash held by the Fund;
  - Transferring securities to a unitholder if the unitholder redeems units for securities;
  - If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.
- (o) This Ruling shall cease to apply if at any time:
- (i) there is a unitholder, or two or more unitholders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund; and
  - (ii) if that unitholder, or one or more of such unitholders, ordinarily hold securities on revenue account or the disposal of securities by that unitholder, or one or more of such unitholders, would ordinarily give rise to gross income for income tax purposes.
- For the purposes of this condition unitholders are associated with each other if they are "associated persons" within the meaning of section OD 7 or OD 8(3).
- (p) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.

- (q) Apart from the Trust Deed and the Prospectus of the Fund that have been supplied to Inland Revenue as part of the application for this Ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unitholder (or any person associated with or acting on behalf of any unitholder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds. This condition shall not be regarded as breached by virtue only of:
- (a) the fact that a unitholder has the ability to invest, or withdraw at any time; and/or
  - (b) the entry into of any agreement, arrangement or understanding contemplated by the Trust Deed for the purpose of enabling investment or withdrawal; and/or
  - (c) the appointment by the Trustee of the Manager; and/or
  - (d) any agreement, arrangement or understanding entered into by the Trustee in a capacity other than as trustee of the Fund, or the Manager in a capacity other than as manager of the Fund, in the ordinary course of the Trustee or the Manager conducting an independent investment advisory or investment portfolio management business.
- (r) The Fund will not exercise any voting rights associated with the holding of Index Company securities.
- (s) If the Fund is resettled this Ruling shall not apply from the date of resettlement.
- (t) The Fund will not be involved in any securities lending.
- (u) The Fund will not utilise the power to suspend the issuing or redeeming of units (including any deferral notice with regard to Class B units) except in exceptional circumstances, being the following situations:
- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed;
  - (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Shares from the Stock Exchanges on which those Index Shares are listed;
- (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests;
- (4) where there is insufficient cash in the cash pool and a redemption request is made by a unitholder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unitholders; or
- (5) in the case of any deferral notice in respect of class B units, the Trustee reasonably forms the opinion that to fund redemptions may prejudice the Fund's obligations to Class A unitholders.
- If a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event. However in the case of a deferral notice, with regard to Class B units, the period of the deferral notice may be extended until the Trustee reasonably forms the opinion that to fund redemptions is no longer prejudicial to the Fund's obligations to Class A unitholders.
- (v) The Manager will not redeem units as a means of correcting tracking errors.
  - (w) The Trustee will not exercise its power under clause 87.7 of the Trust Deed to promote or carry on any scheme or undertaking in any country upon such terms and conditions as the Trustee deems fit.
  - (x) The Fund will not invest in derivatives, with the exception of futures contracts entered into for the purposes of tracking the Index and spot foreign exchange contracts (which have a settlement period of no longer than two business days) to acquire or dispose of the necessary foreign currency so as to purchase or dispose of Index securities.

- (y) The Manager has the power to purchase units from unitholders when unitholders wish to redeem their units. The Manager will always use this power when the unitholder specifically requests that the Manager purchase the units and in any instance where the unitholder does not specifically request that the Trustee redeem the units. The Manager will not purchase units from any unitholder, where to do so would be inconsistent with the unitholder's election to redeem their units with the Trustee. The Manager will not use this power to enhance the profit of the Fund.
- (z) The Global Index will only include countries that are listed in Schedule 3, Part A.
- (aa) The foreign companies included in the Global Index are resident and liable for tax in a country listed in Schedule 3, Part A.
- (bb) For the purposes of section CG 15(2)(b)(iii), in case of an interest, in relation to a foreign entity, of a kind specified in section CG 15(1)(a), the foreign entity is not a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.
- (cc) The Fund will not acquire or hold any income interest or any control interest in any company that is a "controlled foreign company" under section CG 4.
- (dd) There is no arrangement between the Trustee and any unitholders to effect the redemption of units in substitution for dividends.
- (ee) Any cancellation of units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).
- (ff) The Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- (gg) The Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- (hh) All distributions received by the Fund will be paid out to investors net of any expenses incurred by the Fund.
- (ii) In relation to amounts paid as consideration for a cancellation upon liquidation, the recipient will not be a person that is related to Tortis-INTL within the meaning of section CF 3(12).

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

Subject in all respects to any conditions stated above, the Taxation Laws apply to the Applicant and the Arrangement as follows.

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unitholders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3 (1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled. The Commissioner is satisfied that, in terms of section CF 3 (1)(b)(iii), the distribution is not in lieu of the payment of dividends. The procedure of publicising buy-back and redemption prices on the Internet does not constitute a "recognised exchange" in terms of the definition of that phrase in section OB 1.
- If the Fund is liquidated, section CF 3 (1)(c) will apply. The amount distributed to unit holders will not be a dividend to the extent that it does not exceed the aggregate of the "available subscribed capital per share cancelled" and the "excess return amount", as those terms apply to the Fund. The excess return amount will include gains on any securities sold by the Fund.

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

This Ruling will apply for the period from 1 July 2001 until 30 June 2004.

This Ruling is signed by me on the 8<sup>th</sup> day of August 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/27

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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 Tortis New Zealand Fund.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3 (1)(b) and CF 3 (1)(c).

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of a unit trust known as Tortis-NZ Fund (“Tortis-NZ” or the “Fund” or the “Trust”) pursuant to the Deed of Trust dated 1 November 1996 and as amended by an Amending Trust Deed which will be the same as, or not materially different from the draft deed provided to Inland Revenue on 29 June 2001 (the “Trust Deed”) and the Prospectus for the Fund (the “Prospectus”).

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

1. The Fund invests in a portfolio of shares that match the composition and weighting of the NZSE30 Selection Capital Index (“the Index”). The Fund has been designed to provide investors with an index which reflects as nearly as practical the stocks available to investors in the New Zealand Stock Exchange (the “NZSE”). The Applicant advises that the Index was selected because it allows for accurate tracking.
2. Tortis-NZ is a unit trust in terms of the Unit Trusts Act 1960 and meets the definition of a “unit trust” contained in section OB 1.
3. The trustee of the Fund is the Public Trustee (“the Trustee”). The manager of the Fund is Tower Managed Funds Investments Limited (previously known under the name “Tower Trust Services Limited”) (“the Manager”).
4. The investment policy of the Fund is set out in clause 82.1 of the Trust Deed. It states:
  82. The investment policy of the Trust shall be:

- 82.1 to only invest the Fund (other than the Cash Pool) in Index Companies in a manner that replicates the NZSE30 Index and to only enter into transactions that are necessary to give effect to that policy; and

- 82.2 to invest the Cash Pool in deposits with banks registered under the Reserve Bank Act 1989 or other debt obligations or in the Tower First Rate Account, upon terms that will allow the Manager to pay the anticipated Liabilities and to manage the redemption of Units and the liquidity of the Trust.

5. According to the Prospectus, the investment objectives of the Fund are as follows:
  - To track the performance of the NZSE30 Index, which represents approximately 97% of all shares listed on the New Zealand Stock Exchange;
  - To invest only in shares and securities that replicate the NZSE30, apart from the liquidity pool of approximately 5% of the Fund’s assets;
  - The Investment Manager cannot diversify investments of the Fund, or take steps to diversify the mix of the Fund’s investments outside the above objectives.
6. The Trust Deed states that:

It is not the Fund or the Trustee’s intention to profit from holding, acquiring or selling constituent company securities.
7. Tortis-NZ is an open fund and new investors are able to subscribe for units from time to time. The beneficial interest in the Fund is divided into units. Each unit (other than a fractional unit which will confer a proportionate interest) confers an equal interest in the Fund but does not confer any interest in any particular part of the Fund or any investment in the Fund.
8. The Applicant has confirmed that all aspects and conditions of the previous rulings (BR Prv 96/135, BR Prv 96/136 and BR Prv 01/14), relating to the Fund, have been complied with. There has been no change to the Trust Deed of the Fund, (except for the changes noted above), nor any change to the management or operation of the Fund since its establishment.

#### *The Index Rules*

9. The NZSE describes the NZSE30 Index in general terms as follows:

##### **NZSE30 Selection Gross And Capital Indices**

The NZSE30 Selection Index covers the 30 largest and most liquid issuers with equity securities quoted on the New Zealand Stock Exchange. The float capital of each company is established by removing all known blocks of shares held, or more-or-less controlled, by

one person or a group of related persons and amounting to 30% or more of the share capital. This reflects as nearly as is practical, the stock normally available to investors. The NZSE30 Selection Index is weighted by float (available) capital and membership is reviewed quarterly. The Index has been recalculated back to 01 January 1991.

The...NZSE30 [is] available in both gross and capital form, that is with and without the reinvestment of dividends. The day-to-day methods of index calculation and adjustment for issues and dividends are identical to the NZSE Gross and Capital Indices.

10. The Construction and Maintenance Rules for the NZSE30 Index explain how the Index operates. The Construction and Maintenance Rules contain 20 Rules, which outline how the Index is constructed and how it adjusts over time. These rules are as follows:

The major rules governing the construction and maintenance of the base of companies making up the indices are as follows:-

1. Companies considered for inclusion in the index must be registered in New Zealand or have a sufficient proportion of shareholding on a New Zealand register to qualify for inclusion based on that proportion of the company's market capitalisation.
  2. All classes of quoted equity security of a company are eligible for inclusion in the index bases. For index calculation purposes an equity security is defined in the Listing Rules. It includes all securities representing a residual equity claim on the earnings of the company and all securities which derive a substantial portion of their value from their ordinary share characteristics or conversion privileges. This includes convertible notes, specified preference shares, partly-paid shares and warrants (company-issued options).
  3. Shares issued through pro rata bonus and rights issues will be recognised on the ex date, according to the issue ratio. Application of changes will be governed by Rule 4.
  4. Any adjustments to the capitalisation of Index constituents which do not accumulate to a relative Index impact of more than 0.03% will be held and applied at each quarterly revision. Adjustments with a greater impact will be applied as soon as practicable.
  5. With respect to new issues that have a slightly different dividend entitlement to the ordinary shares, the treatment for index calculation purposes is to aggregate the reported outstanding number of both classes of share to the sum at the price of the ordinary share.
  6. Newly quoted securities will be included in the indices at the end of the month, not less than five business days following its initial listing if the company meets all inclusion criteria.
- Overseas FASTER constituent securities will be assigned a weighting that reflects the percentage holdings on the New Zealand Register in order to determine eligibility and weighting in the NZSE40 and NZSE30 Indices. The weighting assigned to overseas constituents will be the most recent three month moving average. If a weighting is not available at the time of quotation, then when the weighting is available post quotation, the market price will be used to determine eligibility. If a reasonable indication of the percentage holding on the New Zealand Register is available prior to listing, then this will be used in conjunction with its issue price.
7. The Exchange will review the composition of the indices each quarter according to the following rules 8 - 17. The revised bases of the indices, will be communicated to the market at least three weeks before they are to take effect.
  8. At each revision, companies will be ranked according to their daily average market capitalisation and float capitalisation for the preceding six months. The top 50 stocks will form the eligible pool for inclusion in either the NZSE40 or NZSE30 respectively.
  9. Any index stock that has dropped out of the index pool will be removed from any index or indices in which it currently features.
  10. Rule 10 refers only to NZSE40 Index.
  11. Rule 11 refers only to NZSE40 Index.
  12. Rule 12 refers only to NZSE40 Index.
  13. The float capital of each company in the NZSE30 is calculated by excluding parcels of shares deemed to be not freely available in the market. As a general rule, the Exchange will exclude all holdings comprising a 30% or greater "relevant interest", as disclosed in the Substantial Security Holders Notices issued pursuant to the Securities Amendment Act 1988.
  14. Any NZSE30 stock that has dropped to a float capital rank of 36 or below will be removed from the NZSE30.
  15. Any stock which is not in the NZSE30 and is ranked 25 or higher by float capital will automatically be introduced into the NZSE30 unless it would replace a more liquid stock (determined by trading value over the previous six months). New listings ranked 25 or higher by float capital in the index pool will be automatically included in the NZSE30 in accordance with rule 6.
  16. Any required additions to or deletions from the NZSE30 as a result of the operation of rules 14 and 15 will be made with reference to the liquidity of the stocks ranked 26 to 35.
  17. Any additions or deletions required between quarterly revisions due to a merger, takeover or new listing will be carried out in accordance with rules 10, 11, 16 & 19.

18. Movements in float capital will be monitored continuously, and the number of securities excluded will generally be updated as and when Substantial Security Holder Notices are received by the Exchange subject to the application of rule 4. In the case of pro-rata cash or bonus issues, it would be assumed, until advice was received otherwise, that the substantial security holders received or accepted their pro rata entitlement, and the number of excluded shares would be increased accordingly on the ex date. If the change in the amount of stock excluded represents 5% or more of the quoted capital of the company, the market would be advised of the impending change at least two weeks in advance.
19. In the event of a merger or takeover in respect of 100% of a constituent company's issued securities, such constituent company's securities will be removed from the Index five Business Days after the date the Offeror becomes entitled and announces that it will proceed with compulsory acquisition.
- Where a takeover offer proceeds at less than 100% acceptance, the constituent company's securities will continue to be included in the Index unless there is a failure to satisfy the Index rules. In such cases the constituent company's securities will be removed from the Index five Business Days after the Index Committee determines that such failure to satisfy the Index rules is not likely to be rectified in the near future.
20. Notwithstanding any of the foregoing rules, the New Zealand Stock Exchange reserves the right to, at any time, include any stock in the base of either index and attribute to it such weight as it may in its sole discretion determine.

### ***Trust Deed and Prospectus***

#### *Date of Adjustments*

11. The Fund re-balances in the following circumstances:
- (i) monthly, when the NZSE adjusts the weighting of Index Companies to allow for cancellation/allotment of shares on issue of the Index Companies;
  - (ii) quarterly, when the NZSE reviews the Index Companies in the Index; and
  - (iii) when the NZSE makes any other announcement that affects the NZSE30 Index.
12. Such re-balancing will occur as soon as possible after the above events have occurred and in any event within one business day.

#### *Rights Issues*

13. The Index may be adjusted from time to time because of rights issues.
14. In the event of any rights issue by an Index Company, the Manager will only take up the rights if the rights are to be included in the Index. If the rights are not included in the

Index, the Manager will sell the rights and reinvest in the Index at the earliest possible time.

#### *Mergers, Takeovers and Share Buy-backs*

15. The Index may be adjusted from time to time because of mergers, takeovers or share buy-backs.
16. With the exception of any situation where shares in an Index Company are compulsorily acquired pursuant to the NZSE Listing Rules or the Takeover Code requirements, in the event of a merger or takeover of an Index Company the Manager will adjust the Fund portfolio at the time the Index is adjusted and not participate in the event in any other way.
17. The Manager will not elect to participate in a share buy-back scheme of any Index Company.

#### *Cash investments held by the Fund*

18. Although it is not an objective of the Fund to invest in cash securities, the Fund may hold cash to facilitate the easier administration of the Fund. The Fund will hold cash in the following instances:
- Following a contribution to the Fund, pending the investment of that contribution;
  - Following the sale of securities to meet a request to redeem units in cash; and
  - To fund expenses, and any fee and taxation obligations of the Fund.
19. Cash is held in on-call deposits with banks registered under the Reserve Bank Act 1989.

#### *Borrowing*

20. The Fund may only borrow in the following circumstances:
- To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days;
  - Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary;
  - To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary or

- For advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.

*Events that trigger acquisitions or realisations*

21. The Fund will only sell or otherwise dispose of securities in the following circumstances:
- If the Fund is voluntarily or involuntarily wound up;
  - If there is a change in the Index composition so that the composition of the Fund no longer tracks the Index or when the Fund is otherwise required to buy and sell securities to maintain tracking;
  - Funding redemptions to the extent that these cannot be met out of cash held by the Fund;
  - Transferring securities to a unitholder if the unitholder redeems units for securities;
  - If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

*Issues and redemptions of Units*

22. Investors wishing to subscribe for units may do so for cash or, alternatively, above a certain prescribed level, investors may subscribe for units by transferring to Tortis-NZ an appropriately weighted basket of securities, and will receive units in Tortis-NZ in exchange.
23. When a unitholder wishes to dispose of an investment in the Fund, the unitholder is able to elect that the units be either redeemed by the Trustee, or repurchased by the Manager.

Notwithstanding any provision in the Prospectus or the Deed of Trust, it is the invariable practice of the Fund that where such an election is made by the unitholder, the units will be either redeemed by the Trustee, or repurchased by the Manager, in strict accordance with that election.

In the absence of an election by the unitholder, the units will in all instances be repurchased by the Manager.

Where units are repurchased by the Manager, the price paid to the unitholder by the Manager will be the same amount as would be received by the unitholder if the unitholder had elected the direct redemption method. In all instances where units are repurchased by the Manager,

whether pursuant to an election by a unitholder or not, the Manager will redeem those units with the Trustee for the same price as paid to the unitholder.

24. A unitholder may redeem units subject to the conditions in Article C of the Trust Deed. Article C gives the Manager a discretion to refuse to redeem units where the amount to be redeemed is less than the minimum number acceptable by the Manager at that time. Currently the Manager has set a minimum withdrawal at \$500.

*Same day unit redemption policy*

25. On being repurchased the Manager is required to pay the aggregate value of the units to the investor within 21 business days of the relevant time (as described in the Trust Deed). However when possible the Fund operates a same day unit redemption policy. The Fund will endeavor to redeem the units requested by any unitholder and redeem and pay for those units on the same day as the unitholder's request is made.
26. If the Fund has insufficient cash in the cash pool, the Fund will always in the first instance attempt to borrow (on suitable commercial terms) sufficient funds in order to meet the redemption request. In situations where the Fund is not able to borrow such sufficient funds, the Fund may suspend the withdrawal of units in the Fund. The only exception to the Fund always attempting to borrow in the first instance where a redemption request is made and there is insufficient cash in the cash pool, is where a redemption request is made by a unitholder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unitholders. In such a case the Fund will always suspend the withdrawal of units.

*Suspension of issuing and redeeming units*

27. The Fund has not previously suspended the issuing or redeeming of units. A suspension from issuing or redeeming units may be necessary in exceptional circumstances, being the following situations:
- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed; or
  - (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Company securities from the NZSE; or

- (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests.

If a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event.

## Conditions stipulated by the Commissioner

This Ruling is subject to the following conditions:

- (a) The predetermined rules used by the Manager and the NZSE to ascertain the Index constituents (set out above) will not be made with or influenced by any intention of seeking higher rates of return or capital growth.
- (b) No material changes will be made to the way in which the Fund will track the Index.
- (c) No material changes will be made to the way in which the NZSE constructs the Index.
- (d) The Fund will re-balance in the following circumstances:
- (i) monthly, when the NZSE adjusts the weighting of Index Companies to allow for cancellation/allotment of shares on issue of the Index Companies;
  - (ii) quarterly, when the NZSE reviews the Index Companies in the Index;
  - (iii) when the NZSE make any other announcement that affects the NZSE30 Index; and
  - (iv) If any security or the entire Index has a deviation of greater than 0.2%.

Such re-balancing will occur as soon as possible after the above events have occurred and in any event within one business day.

- (e) When rebalancing the Fund the Manager will use its best endeavours to track the Index as exactly as possible. Any re-balancing of the Fund that does not achieve an exact match of the Index will only occur where it is not possible to obtain or sell the securities necessary to exactly replicate the Index. In any case the tracking deviation will not exceed 0.2% of the value of the Fund.

- (f) In the event of any rights issue by an Index Company of the Index, the Fund Manager will only take up the rights if the rights are to be included in the Index. If the rights are not included in the Index, the Fund Manager will sell the rights and reinvest in the Index at the earliest possible time.

- (g) With the exception of any situation where shares in an Index Company are compulsorily acquired pursuant to the NZSE Listing Rules or the Takeover Code requirements, in the event of a merger or takeover of an Index Company the Manager will adjust the Fund portfolio at the time the Index is adjusted and not participate in the event in any other way.

- (h) The Manager will not elect to participate in a share buy-back scheme of any Index Company.

- (i) When the Fund is given the option of re-investing its dividends into any Index Company, the Fund invariably accepts the cash dividend.

- (j) The cash pool is held in on-call deposits with banks registered under the Reserve Bank Act 1989. The holding of such cash will arise only from the following circumstances:

- Following a contribution to the Fund, pending the investment of that contribution;
- Following the sale of securities to meet a request to redeem units in cash; and
- To fund any expenses, and fee or taxation obligations of the Fund.

The proportion of the Fund's assets to be held as cash will not be greater than what strictly arises out of the above described circumstances, and in any event will not exceed 5% of the total assets of the Fund.

- (k) Condition (j) shall not be considered breached if the 5% limit is exceeded when this occurs due to the following reasons:

- For up to one business day if there is rapid inflow to the Fund, or the Fund has notice of a substantial pending withdrawal ;
- For up to one calendar month if the Manager receives a formal notice of a forthcoming obligation of subsequent performance (ie, payment due on partly paid shares) affecting the constituent securities in the index; or
- For up to one calendar month if the Manager is aware of a forthcoming distribution to unitholders at the scheduled date of distribution.

In any event when the 5% limit is exceeded for any of the reasons above, the Fund takes immediate action to remedy this within the shortest practicable time.

- (l) The Fund can borrow only in the following circumstances:
- To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event the borrowing will be repaid within three business days;
  - Where the Fund is required to fund purchases of shares due to changes in the Index Companies in the Index where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn; this borrowing must be repaid as soon as possible;
  - When, due to a merger situation affecting the composition of the Index, payment due to the Fund is delayed (such delay is beyond the control of the Fund) creating a situation where the Fund will need to rebalance the Index; this borrowing must be repaid as soon as possible; or
  - For advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.
- (m) The Fund will only sell or otherwise dispose of securities in the following circumstances:
- If the Fund is voluntarily or involuntarily wound up;
  - If there is a change in the Index composition so that the composition of the Fund no longer tracks the Index or when the Fund is otherwise required to buy and sell securities to maintain tracking;
  - Funding redemptions to the extent that these cannot be met out of cash held by the Fund;
  - Transferring securities to a unitholder if the unitholder redeems units for securities;
  - If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

- (n) This Ruling shall cease to apply if at any time:
- (i) there is a unitholder, or two or more unitholders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund; and
  - (ii) if that unitholder, or one or more of such unitholders, ordinarily hold securities on revenue account or the disposal of securities by that unitholder, or one or more of such unitholders, would ordinarily give rise to gross income for income tax purposes.

For the purposes of this condition unitholders are associated with each other if they are "associated persons" within the meaning of section OD 7 or OD 8(3).

- (o) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.
- (p) Apart from the Trust Deed and the Prospectus of the Fund that have been supplied to Inland Revenue as part of the application for this Ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unitholder (or any person associated with or acting on behalf of any unitholder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.
- This condition shall not be regarded as breached by virtue only of:
- (a) the fact that a unitholder has the ability to invest, or withdraw at any time; and/or
  - (b) the entry into of any agreement, arrangement or understanding contemplated by the Trust Deed for the purpose of enabling investment or withdrawal; and/or
  - (c) the appointment by the Trustee of the Manager; and/or
  - (d) any agreement, arrangement or understanding entered into by the Trustee in a capacity other than as trustee of the Fund, or the Manager in a capacity other than as manager of the Fund, in the ordinary course of the Trustee or the Manager conducting an independent investment advisory or investment portfolio management business.

- (q) The Fund will not exercise any voting rights associated with the holding of Index Company shares.
- (r) If the Fund is resettled this Ruling shall not apply from the date of resettlement.
- (s) The Fund will not be involved in any securities lending.
- (t) A suspension from issuing or redeeming units may be necessary in exceptional circumstances, being the following situations:
- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed; or
  - (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Company securities from the NZSE;
  - (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests; or
  - (4) where there is insufficient cash in the cash pool and a redemption request is made by a unitholder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unitholders; or
- If a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event.
- (u) The Manager will not redeem units as a means of correcting tracking errors.
- (v) The Trustee will not exercise its power under clause 87.7 of the Trust Deed to promote or carry on any scheme or undertaking in any country upon such terms and conditions as the Trustee deems fit.
- (w) The Trustee will not exercise its power under clause 87.10 of the Trust Deed to agree to enter into and perform any contract option or other right relating to any investment including any derivative.
- (x) The Manager has the power to purchase units from unitholders when unitholders wish to redeem their units. The Manager will always use this power when the unitholder specifically requests that the Manager purchase the units and in any instance where the unitholder does not specifically request that the Trustee redeem the units. The Manager will not purchase units from any unitholder, where to do so would be inconsistent with the unitholder's election to redeem their units with the Trustee. The Manager will not use this power to enhance the profit of the Fund.
- (y) There is no arrangement between the Trustee and any unitholders to effect the redemption of units in substitution for dividends.
- (z) Any cancellation of units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).
- (aa) The Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- (bb) The Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- (cc) All distributions received by the Fund will be paid out to investors net of any expenses incurred by the Fund.
- (dd) In relation to amounts paid as consideration for a cancellation upon liquidation, the recipient will not be a person that is related to Tortis-NZ within the meaning of section CF 3(12).

## How the Taxation Laws apply to the Arrangement

Subject in all respects to any conditions stated above, the Taxation Laws apply to the Applicant and the Arrangement as follows:

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unitholders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3 (1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled. The Commissioner is satisfied that, in terms of section CF 3 (1)(b)(iii), the distribution is not in lieu of the payment of dividends.

- If the Fund is liquidated, section CF 3 (1)(c) will apply. The amount distributed to unit holders will not be a dividend to the extent that it does not exceed the aggregate of the “available subscribed capital per share cancelled” and the “excess return amount”, as those terms apply to the Fund. The excess return amount will include gains on any securities sold by the Fund.

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

This Ruling will apply for the period from 1 July 2001 until 30 June 2004.

This Ruling is signed by me on the 8<sup>th</sup> day of August 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/17

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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 The New Zealand Guardian Trust Company Limited as Trustee for the NZGT 30 Fund (“the Fund”).

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of:

- Section CF 2(3);
- Section CF 2(3A);
- Subpart LE;
- Section CF 3(1)(b);
- Section HH 3;
- Section GB 1(3); and
- Section BG 1.

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of the Fund, pursuant to the Deed of Trust dated 5 September 1996 and Deed of Amendment dated 15 September 2000, which acts as a specialist investment fund to hold a portfolio of shares and other securities that match the composition and weighting of the NZSE 30 Capital Share Price Index (“the Index”).

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

1. The Trustee and Manager of the Fund is The New Zealand Guardian Trust Company Limited (“the Trustee” and “the Fund Manager”). It is registered as a trustee company under the Trustee Companies Act 1967. The Fund has been established under the Trustee Companies Act 1967 and meets the definition of “group investment fund” contained in section OB 1.
2. The Investment Manager of the Fund is New Zealand Guardian Trust Funds Management Limited (“the Investment Manager”). The Investment Manager was appointed to invest and manage various funds, including the NZGT 30 Fund, by an Investment Management Agreement dated 16 August 2000.
3. The Fund invests in securities of those companies that make up the NZSE30 Capital Share Price Index (“the Index”). The Index provides a measure of price trends of New Zealand’s top thirty listed companies and was chosen for its ability to best reflect the shares that are able to be purchased by members of the public on the New Zealand Stock Exchange (“NZSE”).
4. The beneficial interest in the Fund is divided into units. Each unit confers an undivided part or share in the beneficial interest of the Fund. Income of the Fund is distributed to unitholders twice a year.
5. The Fund has both “category A units” and “category B units”. Category B units are those units which are acquired with funds from “designated sources” as defined in section HE 2(3). As the majority of the investments in the Fund are not from “designated sources”, most of the units in the Fund are category A units. All of the units in the Fund are subject to the same rules regarding income distribution and redemption of units.
6. The Trustee receives subscriptions from each investor, with a minimum value of \$1000, with further investments being in multiples of \$100. The Trustee also receives redemption requests, of a minimum number of 100 units per investor. On a valuation day subscriptions and redemptions of units are netted off. The Trustee will then purchase securities and issue new units, if the subscriptions exceed the redemptions, or sell securities and cancel units, if the redemptions exceed the subscriptions. The valuation day is defined in clause 1 of the Trust Deed as the close of business on Thursday of each week, or, if any such date is not a Business Day, the immediately preceding Business Day.
7. The Fund Manager may also purchase units from unitholders, when unitholders wish to redeem their units. The Fund Manager may use this power only when the Fund does not have enough funds in the cash pool, and is unable to sell sufficient securities in order to redeem the units requested. To date, the Fund Manager has not utilised this power.

8. Clause 6.9 of the Trust Deed enables the Fund to suspend unit redemptions. The power to suspend unit redemptions is used in exceptional circumstances, being:

- where a material adverse change in the financial markets occurs namely, a breakdown in liquidity caused by an act of God, or a system failure; or
- if there is a fundamental breakdown in the functioning of financial markets namely, closure of the NZSE or a collapse of the market resulting in a lack of liquidity in the Fund's securities.

Where it is necessary to suspend redemption of units, the suspension will be for a maximum period of 3 business days, unless the exceptional circumstances giving rise to the need to suspend are beyond the control of the Trustee and the Investment Manager, in which case the suspension shall only be for such a period as is strictly necessary for the Fund and or the Investment Manager to recover from the event.

9. This Ruling does not apply where the disposal of units by any particular unitholder is assessable under sections CD 3 or CD 4.

## Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

- a) All units redeemed by the Fund will be redeemed in whole and not in part.
- b) The units are not non-participating redeemable shares as that term is defined in section CF 3(14).
- c) Any redemption of units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).
- d) The units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- e) The units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- f) All distributions received by the Fund will be paid out to unitholders net of any expenses incurred by the Fund.

- g) The Fund Manager has the power to purchase units from unitholders, when unitholders wish to redeem their units. The Fund Manager may use this power only when the Fund does not have enough funds in the cash pool, and is unable to sell sufficient securities in order to redeem the units requested.
- h) There is no agreement, arrangement, or understanding between the Fund, the Trustee, the Fund Manager, or the Investment Manager and any unitholder (or any person associated with any unitholder) which directly or indirectly has a purpose or effect of the redemption or disposition of any of a unitholder's units occurring in substitution for or instead of one or more distributions from the Fund.
- i) The Fund is a qualifying trust as that term is defined in section OB 1.

## 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 distribution of category A income to category A unitholders will be treated as a "dividend" pursuant to section CF 2(3).
- In respect of payments made to category A unitholders, section CF 2(3A) will treat the Fund as if it were a company for the purposes of subpart LE of the Act.
- The amount paid to category A unitholders on the redemption of their units will be excluded from the definition of dividend by section CF 3(1)(b) to the extent that the amount does not exceed the available subscribed capital per share cancelled.
- Section GB 1(3) does not apply to the sale of category A units to the Fund Manager by category A unitholders.
- In the absence of other factors relating to the circumstances of any particular category A unitholder, any gain on the sale of the category A units to the Fund Manager does not of itself give rise to the application of section BG 1.
- Any distribution of category B income to category B unitholders is included within the definition of "beneficiary income" as defined in section OB 1, and is included in the assessable income of the unitholder under section HH 3(1).

- Under section HH 3(2) the Fund is liable, as agent for the unitholder, to deduct tax from distributions of category B income made to unitholders at the unitholders' marginal tax rate.
- The amount paid to category B unitholders on the redemption of units is not assessable to the unitholders under section HH 3(5), to the extent that it does not include any "beneficiary income".
- In the absence of other factors relating to the circumstances of any particular category B unitholder, any gain on the sale of the category B units to the Fund Manager does not of itself give rise to the application of section BG 1.

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

This Ruling will apply for the period 1 July 2001 to 30 June 2004.

This Ruling is signed by me on the 28<sup>th</sup> day of June 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/18

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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 ASB World Shares Trust.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 2(1)(i), CF 3(1)(b) and GB 1(3).

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of the ASB World Shares Trust (the “ASB World Trust” or the “Trust” or the “Fund”) pursuant to a master deed dated 17 October 1997 (the “Master Deed”), an establishment deed also dated 17 October 1997 (the “Establishment Deed”), a “Variation of Master Deed Dated 17 October 1997” (executed on 27 April 1999) and a Deed of Amendment to ASB World Shares Trust Establishment Deed (dated 18 June 2001).

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

1. The ASB World Trust is a unit trust pursuant to the Unit Trusts Act 1960 and is a “unit trust” for the purposes of the definition of that term in section OB 1.
2. The trustee of the ASB World Trust is the Trustees Executors and Agency Company of New Zealand Limited (the “Trustee”). It is registered as a trustee company under the Trustee Companies Act 1967. The manager of the Trust is ASB Investments Limited (formerly ASB Investment Services Limited) (the “Manager”), which is a wholly-owned subsidiary of ASB Bank Limited. The beneficial interests in the Trust are divided into units. Each unit confers an equal interest in the Trust, but units do not confer any interest in any particular investment of the Trust.

#### **Investment**

3. The ASB World Trust acts as a special purpose vehicle, which holds units in the AMP Investments’ World Index Fund (the “AMP WiNZ Fund”). Ownership of units in the AMP

WiNZ Fund enable the ASB World Trust to obtain the same financial results through one investment as would be achieved by direct investment in the securities which make up the MSCI World Index (the “Index”) tracked by the AMP WiNZ Fund.

4. ASB selected the AMP WiNZ Fund for its underlying investment for the following reasons:
  - The corporate strength and stability of AMP Limited (“AMP”), and the strong likelihood that AMP would be able to support an index-tracking fund well into the foreseeable future;
  - AMP’s technical expertise, particularly the investment management skill and capability of AMP Investments Limited in being able to construct and efficiently manage an index-tracking fund;
  - The high standard of service provided by AMP eg, regular statements and reporting on the AMP WiNZ Fund; good working relationship; and
  - AMP’s competitive investment management fees resulting in a lower cost to ASB World Trust Fund investors in having their funds invested in the AMP WiNZ Fund through the ASB World Trust.
5. Clauses 3.1 and 3.2 of the ASB World Trust’s Establishment Deed state the “investment objectives” of the ASB World Trust and identify the “authorised investments” as follows:
  - 3 Investment Policy
  - 3.1 Objectives: The objectives of the Trust are to:
    - (a) invest in the AMP Investments’ World Index Fund subject to the need for the Trust to hold some cash for liquidity and administrative purposes; and
    - (b) provide after tax foreign currency hedges in respect of 50% of the foreign currency securities indirectly invested in through the Trust’s investment in the AMP Investment’s World Index Fund.

The funds of the Trust that are available for investment shall be invested in the AMP Investments’ World Index Fund or in foreign currency contracts as soon as practicable after receipt by the Trustee. The Trust and the Trustee do not have an intention to profit from holding, acquiring or selling AMP Investments’ World Fund units.
  - 3.2 Authorised Investments: For the purposes of this Trust “Authorised

Investments” means:

- (a) the AMP Investments’ World Index Fund;
  - (b) cash balances with banks, brokers, agents, funds, including, without limitation, the ASB Money Market Trust, or custodians held for the liquidity and administrative purposes of the Trust referred to at Clause 3.1; and
  - (c) foreign exchange contracts for the foreign currencies of the securities making up the AMP World Index entered into to provide the hedges referred to in clause 3.1
6. Pursuant to the Establishment Deed, the ASB World Trust is only authorised to invest contributions from Members in: (a) the AMP WiNZ Fund, (b) a fixed 50% after tax foreign currency hedge and (c) cash investments. The Fund may hold cash investments to facilitate the easier administration of the Fund. The cash investments are held as cash in the ASB Bank Call Account. The Fund will hold cash in the following instances:
- Following a contribution to the Fund, pending the investment of that contribution;
  - Following the sale of AMP WiNZ Fund units to meet a request to redeem units in cash;
  - To make income distributions to unitholders;
  - To meet obligations under the fixed 50% after tax foreign currency hedge; and
  - To met administration expenses of the Fund.
7. It is the intention of the ASB World Trust that investment in AMP WiNZ Fund units (including the appropriate level of hedge, or distribution of excess cash, whichever is intended) will be completed as soon as practicable after receipt by the Trustee. The funds received from unitholders are invested on a weekly basis. Funds passed to the Manager are invested in the underlying pool within 24 hours.
8. The currencies to be hedged are the US dollar, Japanese yen, Euro, British pound, Australian dollar and Canadian dollar. The weighting of these currencies in the hedge will be determined exactly, based on the Trust’s underlying exposure, on each rollover date, based on the latest country weightings (included in the Index) which are made available by AMP Investments Limited.
9. The ASB World Trust is required to place an order for a 74.6% hedge (or an equivalent residual figure should the applicable income tax rate change from 33%) and accept the closest to this figure that is obtainable within the set limits. Further, realignment of the hedge level will occur monthly at the rollover of forward contracts to a new forward date. All hedge contracts will mature on or about the fifteenth business day of the month following entry. The level of the hedge is to be maintained at between 71.6% and 77.6% of the non-New Zealand dollar amount invested offshore. This variance is required to take account of redemptions and subscriptions arising during a month. It is also required to take account of the fact that foreign currency hedges can generally only be obtained in round amounts. Where the hedge moves outside the plus or minus 3% (pre-tax) band the hedge will be adjusted back to 74.6%, on the day that this occurs, based on the country weightings made available by AMP Investments Limited on the last roll-over date.
10. Under clause 11.3(h) of schedule 1 to the Master Deed the unitholders can sanction any variation of the “authorised investments” of the Trust by extraordinary resolution. However, the Fund intends to maintain its current investment strategy.
- AMP WiNZ Fund**
11. The AMP WiNZ Fund is a “group investment fund” within the meaning of section OB 1. The AMP WiNZ Fund is required to buy and sell shares as required to ensure that it continues to track the Index. The AMP WiNZ Fund has two current binding rulings (BR Prv 01/31, regarding BD 1(1), CD 3, CD 4, and CD 5 and BR Prv 01/32, regarding OZ1 and CG 1) which state that such buying and selling is not motivated by any intention to derive a profit or gain from such sales. The AMP WiNZ Fund is listed on the New Zealand Stock Exchange.
12. The AMP WiNZ Fund will make taxable distributions to the Trust from any income received by the AMP WiNZ Fund semi-annually within 20 days from the end of June and December.
13. The Trust will generally distribute such part, as is determined by the Manager, of its net income 6-monthly to unitholders and that net income will be calculated taking into account all costs, charges and expenses due.

14. The Establishment Deed also provides for special distributions to occur at other times determined by the Manager. However, in the period between receipt of income from the AMP WiNZ Fund and any distribution, the ASB World Trust is required to invest amounts not held for administrative or liquidity purposes in units in the AMP WiNZ Fund and maintain the fixed 50% after tax foreign currency hedge.

#### **Suspensions**

15. The Fund has not previously suspended redemptions. A suspension from issuing or redeeming units will only occur in exceptional circumstances, being the following situations:
- (1) If a material adverse change in the financial markets occurs, namely, a breakdown in liquidity caused by an act of God or a system failure;
  - (2) If there is a fundamental breakdown in the functioning of financial markets, namely, the failure of pricemaking software; or
  - (3) If it is required so as to avoid a breach of any applicable law.

Any such suspension will be for a maximum period of 3 business days, unless the exceptional circumstance giving rise to the need to suspend is beyond the control of the Trustee and Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund and/or the Manager to recover from that event.

#### **Redemption of ASB World Fund units**

16. The Manager has the power to purchase units from unitholders, when unitholders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unitholders' requests. To date, the Manager has not utilised this power.

#### **Redemption of AMP WiNZ Fund units**

17. When the ASB World Trust is required to redeem units in the AMP WiNZ Fund, the ASB World Trust can sell its units to a third party, or it can redeem its units to the AMP WiNZ Fund. Upon redemption, the ASB World Trust will receive a parcel of securities equal to the value of the units at that time. The AMP WiNZ Fund manager may sell those securities on behalf of (as agent for) the ASB World Trust, and then give the ASB World Trust cash for those units. The ASB World Trust also has the option (as opposed to redeeming its units to the AMP WiNZ Fund) to sell its units through the AMP WiNZ Fund manager.

18. Redemption requests for AMP WiNZ Fund units must be for a minimum of 1,000,000 WiNZ units. When the ASB World Trust makes a redemption request to the AMP WiNZ Fund, the AMP WiNZ Fund manager makes a choice as to how to effect that redemption request. The AMP WiNZ Fund manager may effect redemption by either: (1) cancellation of the units or (2) purchasing those units on its own behalf. In either situation, when the AMP WiNZ Fund manager effects a redemption request, the unitholder (ie, the ASB World Trust) will receive the same redemption amount for its AMP WiNZ Fund units.
19. Requests to dispose of parcels of less than 1,000,000 AMP WiNZ Fund units will be facilitated by the AMP WiNZ Fund manager in parcels of 100,000 AMP WiNZ Fund units. The ASB World Trust will only dispose of its AMP WiNZ Fund units by making a redemption request to the AMP WiNZ Fund manager. The ASB World Trust will not dispose of AMP WiNZ Fund units in any other manner.

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

This Ruling is made subject to the following conditions:

- a) There is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager and any unitholder (or any person associated with any unitholder) which directly or indirectly has a purpose or effect of the redemption or disposition of any of a unitholder's units occurring in substitution for or instead of one or more distributions from the Fund.
- b) The Trust will be a widely-held trust, as that term is defined in section CF 3(14).
- c) Any cancellation of ASB World Trust units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).
- d) The ASB World Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- e) The ASB World Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- f) The income of the Fund, net of any expenses incurred by the Fund, will be paid out to unitholders either as cash or additional units in the Fund. However, the Manager may use its discretion, and decide not to make such a

payment if the amount to be paid is so minimal that the administrative costs of making the payment would exceed the amount to be distributed. The payment of income to unitholders on this basis is consistent with the Fund's normal dividend policy and Trust Deed. Not necessarily paying out the full value of the WiNZ Fund units received as income reflects the Trustee's normal prudence in only distributing the "profits" of the Fund and does not occur for tax purposes;

- g) The Manager has the power to purchase units from unitholders, when unitholders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unitholders' requests.
- h) Where unitholders elect to receive distributions as additional Fund units instead of cash, these constitute a "taxable bonus issue" as that term is defined in section OB 1.
- i) The AMP WiNZ Fund was chosen to provide a cost effective means for simulating an investment that matches the composition and weighting of the Index. The AMP WiNZ Fund was not selected in order to maximise returns.
- j) The Fund has not taken into account historical returns in deciding to maintain its current investment strategy.
- k) The investment objectives and authorised investments of the Trust will not be amended.
- l) The cash pool is held in cash deposits which are held on call in the ASB Bank Call Account. The holding of such cash will arise only from the following circumstances:
  - Pending investment in AMP WiNZ Fund units;
  - To meet a withdrawal from the Trust;
  - To make income distributions to unitholders;
  - Pursuant to the fixed 50% after tax foreign currency hedge; and
  - To meet administration expenses of the Fund.

The proportion of the Fund's assets to be held as cash will not be greater than what strictly arises out of the above described circumstances, and in any event will not exceed the greater of \$200,000 or 4% of the total assets of the Fund.

- m) Condition (l) shall not be breached if the limit referred to in condition (l) is exceeded when this occurs due to the following reasons:
  - Where a large cash subscription has been paid into the cash pool; or
  - Receipt of dividends from the AMP WiNZ Fund; or
  - From proceeds or settlement of maturing currency hedge contracts; and

the Fund takes immediate action to remedy this within the shortest practicable time, and in any event, no longer than 5 business days.
- n) The Fund may borrow temporarily in order to meet the following obligations where it is unable to meet such demands out of its current cash reserves:
  - (1) to redeem units;
  - (2) to meet hedging contract obligations.

Any such borrowing will only be to the extent that is strictly necessary and in the case of borrowing to redeem units will not exceed 2% of the value of the Fund and in the case of borrowing to meet hedging obligations will not exceed 10% of the value of the Fund. All such borrowing will be repaid within five business days.
- o) The Fund will only sell or otherwise dispose of AMP WiNZ Fund units in the following circumstances:
  - To meet administration expenses of the Fund that cannot be met out of the cash pool; or
  - Where the Manager must purchase or redeem AMP WiNZ Fund units in order to meet the needs of the Fund's unitholders; or
  - In order to wind up the Trust; or
  - To meet hedging contract obligations that cannot be met out of the cash pool.
- p) When the Fund is given the option of re-investing its dividends for additional units in the AMP WiNZ Fund, the Fund will always accept the reinvestment option. In any such case, the value of the units received is equivalent to the value of the cash dividend, (net of tax, fees and expenses).
- q) This ruling shall cease to apply if at any time:
  - (i) there is a unitholder, or two or more unitholders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund; and

- (ii) if that unitholder, or one or more of such unitholders, ordinarily hold securities on revenue account or the disposal of securities by that unitholder, or one or more of such unitholders, would ordinarily give rise to gross income for income tax purposes.

For the purposes of this condition unitholders are associated with each other if they are “associated persons” within the meaning of section OD 7 or OD 8(3).

- r) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.
- s) Apart from the Trust Deed and/or Prospectus and/or any Rules of the Fund that have been supplied to Inland Revenue as part of the application for this ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unitholder (or any person associated with or acting on behalf of any unitholder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.  
For the avoidance of doubt, (i) the fact that a unitholder has the ability to invest, or withdraw at any time and/or (ii) the entry into of agreements, arrangements or understandings contemplated by the Trust Deed for the purpose of enabling investment or withdrawal, will not alone constitute an agreement, arrangement or understanding to which the preceding sentence applies.
- t) The Fund will not exercise any voting rights associated with the holding of AMP WiNZ Fund units.
- u) If the Fund is resettled this Ruling shall not apply from the date of resettlement.
- v) A suspension from issuing or redeeming units will only occur in exceptional circumstances, being:
  - (1) If a material adverse change in the financial markets occurs namely, a breakdown in liquidity caused by an act of God, or a system failure; or
  - (2) If there is a fundamental breakdown in the functioning of financial markets namely, the failure of pricemaking software; or
  - (3) If it is required so as to avoid a breach of any applicable law.

Any such suspension will be for a maximum period of 3 business days, unless the exceptional circumstance giving rise to the need to suspend is beyond the control of the Trustee and Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund and/or the Manager to recover from that event.

- w) The distribution period of the Fund will only be altered for administrative reasons and shall not be altered to enhance the performance of the Fund in any way.
- x) The Manager has the power to purchase units from unitholders, when unitholders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unitholders’ requests.
- y) There is no agreement, arrangement or understanding between the AMP WiNZ Fund or its trustee or its manager and the ASB World Trust (or any person associated with the ASB World Trust) which directly or indirectly has a purpose or effect of the redemption or disposition of any of the ASB World Trust’s units occurring in substitution for or instead of one or more distributions from the AMP WiNZ Fund.
- z) The Trust will only dispose of its AMP WiNZ Fund units by making a redemption request to the AMP WiNZ Fund manager or by selling to a third party. The Fund will only sell to a third party in the exceptional circumstance where the request to the AMP WiNZ Fund Manager cannot be actioned within 7 business days.
- aa) Any powers exercised by the Trustee under the Master Deed and Establishment Deed are for the purposes of either buying units in the AMP WiNZ Fund, matched by a 50% after tax hedge, to reflect the level of funds invested in the Trust, or selling units in the AMP WiNZ Fund to fund redemption of units in the Trust, or in order to meet its payment obligations under the hedging arrangement or to meet administration expenses of the Fund.
- bb) The existing binding rulings for the AMP WiNZ Fund (BR Prv 01/31 and BR Prv 01/32) or any such replacement ruling or rulings in respect of the same taxation laws remain current and in force.

## **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:

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unitholders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3 (1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled.
- Section GB 1(3) does not apply to the arrangement.

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

This Ruling will apply for the period 1 July 2001 until 30 June 2004.

This Ruling is signed by me on the 2<sup>nd</sup> day of July 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/19

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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 ASB New Zealand Shares Trust.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 2(1)(i), CF 3(1)(b) and GB 1(3).

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of the ASB NZ Shares Trust (the “ASB NZ Trust” or the “Trust” or the “Fund”) pursuant to the Master Deed (which is dated 17 October 1997) (the “Master Deed”), the Establishment Deed (which is also dated 17 October 1997) (the “Establishment Deed”), a “Variation of Master Unit Trust Deed Dated 17 October 1997” (dated 27 April 1999) and a Deed of Amendment to ASB NZ Shares Trust Establishment Deed (dated 18 June 2001).

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

1. The ASB NZ Trust is a unit trust pursuant to the Unit Trusts Act 1960 and is a “unit trust” for the purposes of the definition of that term in section OB 1.
2. The trustee of the ASB NZ Trust is The Trustees Executors and Agency Company of New Zealand Limited (the “Trustee”). It is registered as a trustee company under the Trustee Companies Act 1967. The manager of the Trust is ASB Investments Limited (formerly ASB Investment Services Limited) (the “Manager”), which is a wholly-owned subsidiary of ASB Bank Limited. The beneficial interests in the Trust are divided into units. Each unit confers an equal interest in the Trust, but units do not confer any interest in any particular investment of the Trust.

#### *Investment*

3. The ASB NZ Trust acts as a special purpose vehicle, which holds units in the AMP Investments’ Tracker Fund (the “AMP Tracker Fund”). Ownership of units in the AMP Tracker

Fund enable the ASB NZ Trust to obtain the same financial results through one investment as would be achieved by direct investment in the securities which make up the Russell Ord Minnett Tradeable Index (“the Index”) tracked by the Tracker Fund.

4. ASB selected the AMP Tracker Fund as its underlying investment for the following reasons:
  - The corporate strength and stability of AMP Limited (“AMP”), and the strong likelihood that AMP would be able to support an index-tracking fund well into the foreseeable future;
  - AMP’s technical expertise, particularly the investment management skill and capability of AMP Investments Limited in being able to construct and efficiently manage an index-tracking fund;
  - The high standard of service provided by AMP eg, regular statements and reporting on the AMP Tracker Fund; good working relationship; and
  - AMP’s competitive investment management fees resulting in a lower cost to ASB NZ Trust Fund investors in having their funds invested in the AMP Tracker Fund through the ASB NZ Trust.
5. Clauses 3.1 and 3.2 of the ASB NZ Trust’s Establishment Deed state the “investment objectives” of the ASB NZ Trust and identify the “authorised investments” as follows:
  - 3 Investment Policy
    - 3.1 Objectives: The objective of the Trust is to invest in the AMP Investments Tracker Fund, subject to the need for the Trust to hold some cash for liquidity and administrative purposes. The funds of the Trust that are available for investment shall be invested in the AMP Investment Tracker Fund as soon as practicable after receipt by the Trustee. The Trust and the Trustee do not have an intention to profit from holding, acquiring or selling AMP Investments’ Tracker Fund units. The Trust and the Trustee do not have an intention to profit from holding, acquiring or selling AMP Investments’ Tracker Fund units.
    - 3.2 Authorised Investments: For the purposes of this Trust “Authorised Investments” means:
      - (a) the AMP Investments’ Tracker Fund;
      - (b) cash balances with banks, brokers, agents, funds, including, without limitation, the ASB Money Market Trust, or custodians held for the liquidity and administrative purposes of the Trust referred to at Clause 3.1;

6. Pursuant to the Establishment Deed, the ASB NZ Trust is only authorised to invest contributions from members in: (a) the AMP Tracker Fund and (b) cash investments. The Fund may hold cash investments to facilitate the easier administration of the Fund. The cash investments are held as cash in the ASB Bank Call Account. The Fund will hold cash in the following instances:
  - Following a contribution to the Fund, pending the investment of that contribution;
  - Following the sale of AMP Tracker Fund units to meet a request to redeem Trust units in cash;
  - To make income distributions to unitholders; and
  - To meet administration expenses of the Fund.
7. It is the intention of the ASB NZ Trust that investment in AMP Tracker Fund units, including the appropriate distribution of excess cash, will be completed as soon as practicable after receipt by the Trustee. The funds received from unitholders are invested on a weekly basis. Funds passed to the Manager are invested in the underlying pool within 24 hours.
8. Under clause 11.3(h) of schedule 1 to the Master Deed the unitholders can sanction any variation of the “authorised investments” of the Trust by extraordinary resolution. However, the Fund intends to maintain its current investment strategy.

**AMP Tracker Fund**
9. The AMP Tracker Fund is a “group investment fund” within the meaning of section OB 1. The AMP Tracker Fund is required to buy and sell shares as required to ensure that it continues to track the Index. The AMP Tracker Fund has two current binding rulings (BR Prv 96/157, regarding CD 3, CD 4, and CE 1(1) and BR Prv 97/114, regarding CD 5) which state that such buying and selling is not motivated by any intention to derive a profit or gain from such sales.
10. The AMP Tracker Fund makes taxable distributions to the ASB NZ Trust. The taxable distributions from the AMP Tracker Fund to the ASB NZ Trust are from any dividends received by the AMP Tracker Fund, according to the Prospectus, either on receipt or quarterly, depending on the size of the ASB NZ Trust’s investment. However, in practice, the dividends are received on a monthly basis.
11. The ASB NZ Trust will generally distribute to its unitholders part of the distributions it receives from the AMP Tracker Fund six-monthly. To determine the amount of the distribution, the Manager of the ASB NZ Trust will determine the Trust’s “net income” by taking into account, not only the distributions received by the AMP Tracker Fund, but also all costs, charges and expenses due by or to the ASB NZ Trust.
12. The Establishment Deed also provides for special distributions to occur at other times determined by the Manager. However, in the period between receipt of income from the AMP Tracker Fund and any distribution the ASB NZ Trust is required to invest amounts not held for administrative or liquidity purposes in units in the AMP Tracker Fund.
13. The AMP Tracker Fund units will be issued subject to the reverse ordering rule (subparagraph CF 3(1)(b)(iv)(B)) and may only be redeemed in whole, and not in part. Units in the AMP Tracker Fund are not quoted on any exchange.

**Suspensions**
14. The Fund has not previously suspended redemptions. A suspension from issuing or redeeming units will only occur in exceptional circumstances, being:
  - (1) If a material adverse change in the financial markets occurs, namely, a breakdown in liquidity caused by an act of God or a system failure; or
  - (2) if there is a fundamental breakdown in the functioning of financial markets, namely, the failure of pricemaking software.
  - (3) If it is required so as to avoid a breach of any applicable law.Any such suspension will be for a maximum period of 3 business days, unless the exceptional circumstance giving rise to the need to suspend is beyond the control of the Trustee and Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund and/or the Manager to recover from that event.

**Redemption of ASB NZ Trust Units**
15. The Manager has the power to purchase units from unitholders, when unitholders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unitholders’ requests. To date, the Manager has not utilised this power.

**Redemption of AMP Tracker Fund Units**

16. When the ASB NZ Trust is required to redeem units in the AMP Tracker Fund, the parcel of securities held by the AMP Tracker Fund attributable to the ASB NZ Trust's investment can be returned to the ASB NZ Trust. Alternatively, the redemption parcel of securities can be delivered to the AMP Tracker Fund manager as agent for the unitholder (ie, the ASB NZ Trust). In this alternative situation, the AMP Tracker Fund manager will sell the basket of securities comprising the redemption parcel as agent for the ASB NZ Trust, and the AMP Tracker Fund manager will pay the proceeds to the ASB NZ Trust (or in certain circumstances, the AMP Tracker Fund manager will hold the securities and transfer to the ASB NZ Trust the equivalent dollar value of the redeemed securities).
17. The ASB NZ Trust always requests the AMP Tracker Fund manager to redeem the basket of securities for cash, instead of receiving the basket of securities. Therefore, the ASB NZ Trust, upon redemption of units in the AMP Tracker Fund, will receive a transfer of securities followed by an immediate sale of those securities by the AMP Tracker Fund manager as agent for the ASB NZ Trust.
18. Although the AMP Tracker Fund's prospectus refers to a threshold of 100,000 units being the minimum redemption amount (in order to redeem the units to the AMP Tracker Fund), ASB Bank have agreed with the AMP Tracker Fund manager that the treatment of redemptions for parcels of 100,000 units or greater will also apply to parcels of 50,000 or greater in respect of redemptions for the ASB NZ Trust.

- c) Any cancellation of ASB NZ Trust units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).
- d) The ASB NZ Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- e) The ASB NZ Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- f) The income of the Fund, net of any expenses incurred by the Fund, will be paid out to unitholders either as cash or additional units in the Fund. However, the Manager may use its discretion, and decide not to make such a payment if the amount to be paid is so minimal that the administrative costs of making the payment would exceed the amount to be distributed. The payment of income to unitholders on this basis is consistent with the Fund's normal dividend policy and Trust Deed. Not necessarily paying out the full value of the Tracker Fund units received as income reflects the Trustee's normal prudence in only distributing the "profits" of the Fund and does not occur for tax purposes;
- g) The Manager has the power to purchase units from unitholders, when unitholders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unitholders' requests.
- h) Where unitholders elect to receive distributions as additional Fund units instead of cash, these constitute a "taxable bonus issue" as that term is defined in section OB 1.
- i) The AMP Tracker Fund was chosen to provide a cost effective means for simulating an investment that matches the composition and weighting of the Index. The AMP Tracker Fund was not selected in order to maximise returns.
- j) The Fund has not taken into account historical returns in deciding to maintain its current investment strategy.
- k) The investment objectives and authorised investments of the Trust will not be amended.
- l) The cash pool is held in cash deposits which are held on call in the ASB Bank Call Account. The holding of such cash will arise only from the following circumstances:
  - To meet the administration expenses of the Fund;
  - Pending investment in AMP Tracker Fund units;

**Conditions stipulated by the Commissioner**

This Ruling is made subject to the following conditions:

- a) There is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager and any unitholder (or any person associated with any unitholder) which directly or indirectly has a purpose or effect of the redemption or disposition of any of a unitholder's units occurring in substitution for or instead of one or more distributions from the Fund.
- b) The Trust will be a widely-held trust, as that term is defined in section CF 3(14).

- To meet a withdrawal from the Trust; or
- To make income distributions to unitholders.

The proportion of the Fund's assets to be held as cash will not be greater than what strictly arises out of the above described circumstances, and in any event will not exceed the greater of \$200,000 or 4% of the total assets of the Fund.

m) Condition (l) shall not be breached if the limit referred to in condition (l) is exceeded when this occurs due to the following reasons:

- Where a large cash subscription has been paid into the cash pool; or
- Receipt of dividends from the AMP Tracker Fund, and

the Fund takes immediate action to remedy this within the shortest practicable time, and in any event, no longer than five business days.

n) In the event that the Fund has insufficient cash available to meet redemptions, the Fund may temporarily borrow in order to redeem units.

Any borrowing that occurs will be: (i) only to the extent that is strictly necessary and will not in any event exceed 2% of the value of the Fund; and (ii) repaid as soon as possible and in any event within five business days.

o) The Fund will only sell or otherwise dispose of AMP Tracker Fund units in the following circumstances:

- To meet the administration expenses of the Fund;
- The Manager must purchase or redeem AMP Tracker Fund units in order to meet the needs of the Fund's unitholders; or
- In order to wind up the Trust.

p) When the Fund is given the option of re-investing its dividends for additional units in the AMP Tracker Fund, the Fund will always accept the reinvestment option. In any such case, the value of the units received is equivalent to the value of the cash dividend (net of tax, fees and expenses) and the distribution of cash or units constitutes a "dividend" as that term is defined in section CF 2.

q) This ruling shall cease to apply if at any time:

- (i) there is a unitholder, or two or more unitholders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund; and

- (ii) if that unitholder, or one or more of such unitholders, ordinarily hold securities on revenue account or the disposal of securities by that unitholder, or one or more of such unitholders, would ordinarily give rise to gross income for income tax purposes.

For the purposes of this condition unitholders are associated with each other if they are "associated persons" within the meaning of section OD 7 or OD 8(3).

r) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.

s) Apart from the Trust Deed and/or Prospectus and/or any Rules of the Fund that have been supplied to Inland Revenue as part of the application for this ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unitholder (or any person associated with or acting on behalf of any unitholder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.

For the avoidance of doubt, (i) the fact that a unitholder has the ability to invest, or withdraw at any time and/or (ii) the entry into of agreements, arrangements or understandings contemplated by the Trust Deed for the purpose of enabling investment or withdrawal, will not alone constitute an agreement, arrangement or understanding to which the preceding sentence applies.

t) The Fund will not exercise any voting rights associated with the holding of AMP Tracker Fund units.

u) If the Fund is resettled this Ruling shall not apply from the date of resettlement.

v) A suspension from issuing or redeeming units will only occur in exceptional circumstances, being:

- (1) If a material adverse change in the financial markets occurs namely, a breakdown in liquidity caused by an act of God, or a system failure;
- (2) If there is a fundamental breakdown in the functioning of financial markets namely, the failure of pricemaking software; or
- (3) If it is required so as to avoid a breach of any applicable law.

Any such suspension will be for a maximum period of 3 business days, unless the exceptional circumstance giving rise to the need to suspend is beyond the control of the Trustee and Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund and/or the Manager to recover from that event.

- w) The distribution period of the Fund will only be altered for administrative reasons and shall not be altered to enhance the performance of the Fund in any way.
- x) The Manager has the power to purchase units from unitholders, when unitholders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unitholders' requests.
- y) The AMP Tracker Fund is an "unlisted trust" in terms of the definition of that term in section CF 3(14).
- z) Cancellation of AMP Tracker Fund units will not be made as part of a pro rata cancellation of units.
- aa) AMP Tracker Fund units will not be quoted on the official list of a recognised exchange.
- bb) The AMP Tracker Fund units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- cc) There is no agreement, arrangement or understanding between the AMP Tracker Fund or its trustee or its manager and the ASB NZ Trust (or any person associated with the ASB NZ Trust) which directly or indirectly has a purpose or effect of the redemption or disposition of any of the ASB NZ Trust's units occurring in substitution for or instead of one or more distributions from the AMP Tracker Fund.
- dd) The Trust will either: (1) redeem its AMP Tracker Fund units to the AMP Tracker Fund or (2) sell its units to the AMP Tracker Fund manager. The Trust will not dispose of its units in any other manner.
- ee) All distributions received by the AMP Tracker Fund will be paid out, (either as cash or AMP Tracker Fund units) to investors in the AMP Tracker Fund net of any expenses incurred by the AMP Tracker Fund.

- ff) Any powers exercised by the Trustee under the Master Deed and Establishment Deed are for the purposes of either buying units in the AMP Tracker Fund to reflect the level of funds invested in the Trust or, selling or redeeming units in the AMP Tracker Fund to fund redemptions of units in the Trust.
- gg) The existing binding rulings for the AMP Tracker Fund (BR Prv 96/157 and BR Prv 97/114) or any such replacement ruling or rulings in respect of the same taxation laws remain current and in force.

## **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:

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unitholders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3 (1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled.
- Section GB 1(3) does not apply to the arrangement.

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

This Ruling will apply for the period 1 July 2001 until 30 June 2004.

This Ruling is signed by me on the 2<sup>nd</sup> day of July 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/22

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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 Treaty of Waitangi Fisheries Commission/Te Ohu Kai Moana (“TOKM”).

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CD 3 and CD 5.

### The Arrangement to which this Ruling applies

The Arrangement is the distribution by TOKM of its assets to Maori as full and final settlement to compensate for historical grievances of Maori in relation to commercial fishing pursuant to the Deed of Settlement between the Crown and Maori dated 23 September 1992. Further details of the Arrangement are set out in the paragraphs below.

1. TOKM is a statutory body established by the Maori Fisheries Act 1989, as amended by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. TOKM’s functions are set out in section 5 and section 6 of The Maori Fisheries Act 1989.
2. The Crown vested significant assets in TOKM (in the form of cash and fishing quota) in settlement of all claims by Maori in respect of commercial fishing. This settlement was carried out pursuant to the Maori Fisheries Act 1989, the Deed of Settlement dated 23 September 1992 (“the Settlement Deed”) and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (“the Settlement Act”).
3. Paragraph M of the preamble to the Settlement Deed indicates that the settlement was made to settle past wrongs or grievances. It states:  

The Crown and Maori wish to express their mutual and solemn acknowledgment that the settlement evidenced by this Settlement Deed marks the resolution of an historical grievance.
4. Section 9 of the Settlement Act declares that the effect of the settlement is to settle all claims by Maori in respect of commercial fishing.

5. Clause 4.5.7 of the Settlement Deed indicates that TOKM holds the assets for the benefit of Maori. It states:

All parties acknowledge the Treaty of Waitangi Fisheries Commission receives and holds the settlement benefits on behalf of Maori and for their benefit.

6. Clause 4.5.1 of the Settlement Deed, in combination with clause 4.5.7 above also indicates that TOKM is holding the settlement benefits ultimately for the benefit of all Maori. Clause 4.5.1 states:

Maori agrees that the settlement evidenced by this Settlement Deed of all the commercial fishing rights and interests of Maori is ultimately for the benefit of all Maori.

7. “Pre-settlement assets” are the assets vested in TOKM pursuant to the Maori Fisheries Act 1989 when originally enacted and up until the time of settlement on 6 January 1993 (“settlement date”) and the acquisition of Sealord Products Limited. “Post settlement assets” are assets vested post settlement date and pursuant to the Settlement Deed. Clauses 4.5.2 and 4.5.6 of the Settlement Deed indicate that the pre-settlement assets are considered part of the settlement under the Settlement Deed and thus both the pre and post settlement assets can be viewed as vested in TOKM for the settlement of historical grievances.

8. Clause 4.5.2 of the Settlement Deed states in relation to pre-settlement assets that:

The Treaty of Waitangi Fisheries Commission is to consider how best to give effect to the resolutions taken at the annual general meeting of the Maori Fisheries Commission in July 1992 and will be empowered to allocate assets held by the Maori Fisheries Commission at the day before the Settlement Date.

9. The authority to allocate pre-settlement assets is contained in section 6(e)(i) of the Maori Fisheries Act 1989. Section 6(e)(iv) of the Maori Fisheries Act requires a report to be prepared for the Minister of Fisheries setting out the allocation process.

10. In relation to post-settlement assets clauses 4.5.3 and 4.5.4.2 of the Settlement Deed require TOKM to develop procedures for identifying beneficiaries and distributing settlement benefits. In particular clause 4.5.4.2 provides:

[a] procedure for identification of beneficiaries and their interests in accordance with the Treaty of Waitangi and a procedure for allocation of benefits of this Settlement Deed to them in accordance with the

principles of the Treaty of Waitangi. Such proposals for distribution of settlement benefits will address the questions set out in Annexure A and will include a procedure for Maori affected, to be heard on benefit issues.

Annexure A outlines the issues which need to be considered in determining the method of allocation of benefits from post settlement assets. These issues include:

- What will be distributed
- Who will manage the distribution system
- Who will receive the settlement benefits
- How will different levels of interest be identified and accommodated
- How will disputes be resolved.

This is consistent with the provision of the Maori Fisheries Act dealing with the allocation of post-settlement asset benefits. In particular section 6(e)(ii)(A)-(B) provides for the development of a method of allocation of the benefits from the deed of settlement.

11. TOKM acquired quota and cash from the Crown. It leased the quota and used the proceeds to acquire further assets such as quota and shares. TOKM also used the cash received from the Crown to acquire assets such as quota and shares. Further acquisitions of quota and shares by TOKM may also occur which will be funded from TOKM earnings on its assets, or proceeds from asset realisations. However, any transactions which involve TOKM transferring (whether by way of sale or other dispositions) any asset to any company in return for shares in that company, will not constitute a distribution that is subject to this Ruling. Therefore, when TOKM distributes its assets, Maori will receive a mixture of some or all of:
  - Fishing quota,
  - Shares in companies,
  - Cash.
12. The amounts distributed to Maori will therefore comprise of assets received from the Crown by TOKM, assets subsequently acquired by TOKM (using either cash received from the Crown, earnings from assets, or proceeds from asset sales), and the accumulated income derived by TOKM from the assets.

## Assumption made by the Commissioner

This Ruling is made subject to the following assumption:

- The distributions under this Arrangement will be made by TOKM in the course of its termination pursuant to section HI 1(2).

## Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

- a) TOKM is a "Maori authority" as defined in section OB 1.
- b) The settlement between the Crown and Maori pursuant to the Settlement Deed dated 23 September 1992 has no direct and identifiable connection with lost profits to Maori.

## 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 distribution by TOKM to Maori made under this Arrangement will not constitute amounts derived from any business of Maori under section CD 3.
- The distribution by TOKM to Maori made under this Arrangement will not constitute gross income under ordinary concepts to Maori under section CD 5.

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

This Ruling will apply from the date this Ruling is signed until the 16<sup>th</sup> day of July 2006.

This Ruling is signed by me on the 16<sup>th</sup> day of July 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/23

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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 Assure New Zealand Ltd in respect of Assure Select Global Value Equities Portfolio.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of:

- Section CF 2(1)(f)
- Section CF 3(1)(a)
- Section CF 8
- Section CG 1(b)
- Sections CG 5(1) and (2)
- Sections CG 15(1) and (2)
- Section HE 1

The following definitions in section OB 1:

- “bonus issue”
- “bonus issue in lieu”
- “company”
- “foreign company”
- “foreign entity”
- “international tax rules”
- “non-taxable bonus issue”
- “taxable bonus issue”

Section OE 2

The definitions of “FIF rules” and “international tax rules” in section OZ 1(1)

Schedule 3

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and operation of Assure Select Global Value Equities Portfolio (“the Fund”). Further details of the Arrangement are set out in the paragraphs below.

1. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund will be managed and controlled in Australia by

Assure Services & Technology Ltd (“the Manager”) which was incorporated in Australia and which carries on business in Sydney, Australia. The Manager has no offices or employees outside Australia. The Manager is the responsible entity and trustee of the Fund.

2. The objective of the Fund is to outperform the benchmark of the MSCI World Index in AUD by investing in a diversified portfolio of international shares. The MSCI World Index is the Morgan Stanley Capital International World Index which includes the stocks of 1,575 companies representing the stock markets of 22 countries.
3. A prospectus has been registered in Australia and with the Registrar of Companies in New Zealand. An investment statement has been issued for Class B units which are to be offered to New Zealand investors. All New Zealand investors will invest directly into the Funds either personally or through a nominee. Wrap account and master trust services referred to in the prospectus represent separate entities in Australia and will not be used in New Zealand. Class B units differ from Class A units in regard to the Responsible Entity’s fees and charges, repurchase policy and distribution policy. In all other respects the classes of units are equivalent.
4. Applications for the allotment of units are to be made to the Manager: Clause 19.1 of the Constitution. The application form for the allotment of units provides that the signature of the investor confirms acceptance of the terms and conditions set out in the investment statement relating to the particular investment.
5. The Investment Statement says that the operation of the Fund is governed by its Constitution, the Corporations Law and the general law of Australia. The Constitution sets out the conditions under which the Fund operates, the rights and obligations of the unitholders and the rights, responsibilities and duties of the Manager.
6. The Manager may accept or refuse any application for units in total or in part and is not required to give any reason for the refusal of an application: Clauses 19.3 and 19.4. The Manager also has discretion to refuse to register a transfer without giving any reason for the refusal: Clause 17.4.

- The Manager intends to apply the discretion given under the Constitution to ensure that:
- No New Zealand resident will have a control interest in the Fund greater than 40 percent; and
  - There will not be a group of less than 5 or fewer New Zealand residents with a controlling interest in the Fund.
7. The Manager has discretion to invest the assets of the Fund in any Authorised Investment. Authorised Investments include:
- shares, stocks, debentures, bonds, notes, convertible notes, or any unit or option over these;
  - derivative contracts (including swaps, futures, forward rate agreements and options and any form of agreement creating a contingent liability);
  - Unit Trust investments (being any units, rights to participate or interest in an undertaking, enterprise or scheme, whether unquoted or quoted on any stock or other securities exchange, including any interest in a managed investment scheme and any prescribed interest, which the Manager and the Fund is not prohibited by the Corporations Law from investing in);
  - Any deposit with or any negotiable instrument accepted endorsed or issued by, an Australian ADI, as defined in section 9 of the Corporations Law;
  - Deposits or loans to any financial institution other than Unit Trust Investments;
  - bills of exchange, promissory notes, commercial bills or other negotiable instruments issued by any financial institution;
  - the taking, granting, buying or selling of options in relation to any of the above;
  - any other investment determined by the Manager to be an authorised investment.
8. The Manager may appoint an investment manager for the Fund to act in relation to the investments of the Fund or any part of the Fund: clause 42.1(1). An investment manager has the powers in relation to the investments of the Fund determined by the manager, which may include the power to delegate all or any of the powers granted to the investment manager of the Manager: clause 42.1(2). Lazard Asset Management Pacific, whose headquarters are in New York, USA, has been appointed as the first investment manager of the Fund.
9. The Manager has discretion as to the investment policy of the Fund but the investment policy must be specified in the first prospectus of the Fund: clauses 29.1 and 29.2. The prospectus (which relates to both the Fund and the Assure Select Global Core Equities Portfolio) explains the difference in the investment policy of the two funds as follows:
- Assure initially established two Portfolios, Assure Select Global Core Equities Portfolio and Assure Select Global Value Equities Portfolio, in October 2000, and subsequently established Assure Select Global Active Equities Portfolio....
- Assure Select is the umbrella name under which the Portfolios are being offered. A single investment manager is responsible for managing the investments of a Portfolio. Assure has appointed Putnam as the investment manager for the Global Core Equities Portfolio and Lazard as the investment manager for the Global Value Equities Portfolio. Putnam's investment philosophy is based on the belief that all companies, no matter what they do or make, have an underlying long term business worth and that share prices fluctuate significantly around this long term worth. Lazard's investment philosophy is based on bottom-up value stock selection. Lazard focuses on companies that are financially productive yet inexpensively priced. Assure has appointed National as the investment manager for the Global Active Equities Portfolio, with an investment mandate that requires National to invest the Portfolio wholly in funds managed by Capital. Capital's investment philosophy is based on a bottom-up research approach to stock selection emphasising a company's stock price relative to the underlying value and expected earnings growth of that company....
- The currency hedging policy of the Fund is as follows:
- International equity investments may be partially hedged back to the Australian dollar. The hedging level will generally be set at 35% of the four major currencies: USD, GBP, Euro and Yen. Other currencies will generally not be hedged. The level of hedging can fluctuate around the central point to allow for asset and currency movements.
- Additionally, hedging may be used selectively for defensive purposes. Cross hedging is also permitted. After agreement with Lazard, hedging policy may be changed from time to time by Assure.
10. The Manager holds the assets of the Fund on trust for the members: clause 5.2 Constitution. The Manager must clearly identify the assets of the Fund as the property of the Fund and hold the assets separately from any other property held by the Manager: clause 5.3. However, the Manager may engage a custodian to hold the assets in accordance with the Australian Corporations Law: clause 5.4. The Manager has appointed State Street Australia Ltd ("State") as the custodian to hold the assets of the Funds and to perform some administrative functions for the Funds.

- State was incorporated in Australia and carries on business in, Sydney, Australia. State has no offices in New Zealand.
11. The Manager has entered into a Custodian Agreement with State. Clause 3.13 of the Custodian Agreement permits State to appoint subcustodians to carry out any of the provisions of the Custodian Agreement. State's duties under the Custodian Agreement are as follows:
- State must segregate in its books for the account of the Manager all securities and other non cash property of each Fund, other than securities which are held in a securities system.
  - State is to release and deliver securities of a Fund held by State or its subcustodians only upon receipt of proper instructions.
  - State will pay interest on credit balances in cash accounts.
  - Upon receipt of proper instructions State or its subcustodians may enter into all types of contracts for foreign exchange on behalf of the Manager.
  - State or its subcustodians may make margin payments on derivatives contracts on behalf of the Manager.
  - State or its subcustodians may deliver money of the Manager to a third party to be held on deposit for the Manager pursuant to proper instructions.
  - State or its subcustodians are to use their commercially reasonable efforts to collect on a timely basis all income and other payments with respect to each Fund to which the Manager is entitled. Income that is collected is to be credited to the relevant accounts held for the Manager.
  - Upon receipt of proper instructions State is to pay out (or direct its subcustodians to pay out) moneys of the Fund for the purchase of securities, the conversion, exchange or surrender of securities of the Fund, the payment of expenses incurred by the Manager, the purchase or sale of foreign exchange or foreign exchange agreements, in connection with trading in derivatives contracts or securities borrowings by the Manager. State may also pay out money of the Fund for any other purpose upon receipt of proper instructions.
- Refer clauses 3.1, 3.5, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12. State also has general obligations in respect of recordkeeping, procurement of registration of securities, execution of documents required to perform its obligations under the Custodian Agreement. State must also segregate its settlement staff from its accounting staff. Refer clause 3.4.
12. The expression "proper instructions" is defined in the Custodian Agreement as follows:
- Proper Instructions means instructions (which may be standing instructions) received by the Custodian from the [Manager] (or a person duly authorised by the [Manager]), the Investment Manager, or any person duly authorised by either of them, in any of the following forms:
- (a) in writing signed or initialled by the authorised person (subject to the telephone verification callback procedures adopted by the Custodian and advised to the [Manager] from time to time); or
  - (b) in a tested communication; or
  - (c) in a communication utilising access codes effected between electro mechanical or electronic devices; or
  - (d) by such other means as may be agreed in writing from time to time by the Custodian and the party giving such instructions including without limitation oral instructions.
13. State may without express authority from the Manager or the Investment Manager:
- Make payments to itself or others for minor expenses of handling securities or other similar items relating to its duties under the Custodian Agreement.
  - Surrender securities in temporary form for securities in definitive form;
  - Endorse for collection cheques, drafts and other negotiable instruments; and
  - Attend to all non-discretionary details in connection with the sale, exchange, substitution, purchase, transfer and other dealings with the securities and other assets of the Funds.
- See Clause 3.19.
14. State's duties under the Administrative Services Agreement are to provide accountancy services, registry services and taxation services.
15. The beneficial interest in the fund is divided into units: Clause 6.1. A member is a person who is registered as the holder of a unit: definition of "member", Clause 1.1(39). Unitholders do not have a right to any particular assets or any part of the assets of the Funds.

Clauses 7.1 and 7.2 of the Constitution provide:

**7.1 General Entitlement to Assets**

Each Unit confers on the holder of that Unit an undivided interest in the Assets in the proportion that the Unit bears to the total number of Units on Issue at that time.

**7.2 No Entitlement to any part of Assets**

A unit does not entitle the holder of that Unit to any particular Asset comprised in the Assets or to any particular part of the Assets.

16. Clause 11.1 provides that a unit confers on the member the following:
- The right to attend and vote at meetings of members;
  - The right for the member as at midnight on the last day of a Distribution Period to receive a share of the Distributable Income (if any) for the Distribution Period on a pro rata basis with all other such units;
  - The right to participate in the division of any surplus assets or profits of the fund on the winding up of the fund on a pro rata basis with all other units; and
  - Rights on redemption of the units.

Members may not interfere with the rights or powers of the Manager in its dealings with the assets of the Fund and the Fund, nor do members have the right to exercise any rights, power or privileges in respect of any part of the assets or investments of the Fund: Clause 12.1.

17. The Manager is required to collect and receive all money, rights and property paid, receivable or arising from the assets of the Fund and must pay the liabilities of the Fund, including tax liabilities: clause 31. The Manager must determine the net taxable income of the Fund for each distribution period: clause 32.2. The distributable income of the Fund for a period is to be determined by applying the following formula which is set out in Clause 32.3 of the Constitution:

$$DI = NTI + I - NCI + C - D$$

Where:

- DI = the amount of Distributable Income
- NTI = the amount of Net Taxable Income
- I = so much of the amount by which Income exceeds the Net Taxable Income that the Manager has determined is to be distributed to Members
- NCI = Non-Cash Income
- C = the amount of capital the Manager has determined is to be distributed
- D = Accumulation Account

18. "Distribution period" is defined in Clause 1.1(25) as follows:
- (a) for the first Distribution Period, the period from the Commencement Date to the next Distribution Calculation Date;
  - (b) thereafter, the period beginning on the day after the preceding Distribution Calculation Date to the next Distribution Calculation Date until the last Distribution Calculation Date immediately preceding the Termination Date; and
  - (c) for the last Distribution Period, the period from the last Distribution Calculation Date immediately preceding the Termination Date until the Termination Date;

The distribution calculation dates are 31 March, 30 June, 30 September and 31 December in each year "or any other date the Manager determines from time to time": Clause 1.1(22).

19. Clause 32.4 provides that each member's income entitlement in the Fund is to be determined by applying the following formula:

$$IE = \frac{DI \times UH}{NU}$$

Where:

- IE = the Income Entitlement of the Member
- DI = the amount of Distributable Income
- UH = the Unit Holding of the Member at the close of business on the Distribution Calculation Date
- NU = the number of Units on Issue at the close of business on the Distribution Calculation Date

The distributable income of the Fund is the net taxable income of the Fund (calculated under the rules in the Australian Act or in accordance with generally accepted accounting principles) with adjustments for distributions of income for any period, non-cash income, capital amounts distributed and accumulation amounts.

20. Clause 32.5 provides:

**32.5 Distribution Accounts**

- (1) The Manager may:
- (a) keep separate accounts of different categories or sources of income or capital, or deductions or credits for taxation purposes; and
  - (b) allocate income, capital, deductions or credits from a particular category or source to particular Members.
- (2) Nothing in this clause 32 or any provision of this Constitution requires the Manager to establish any separate bank for:
- (a) any distribution to any Member or the Members; or
  - (b) in respect of the accounts referred to in clause 32.5(1).

21. The Manager must calculate and distribute each Member's Income Entitlement: clause 32.6. Clauses 32.6, 32.7 and 33.1 provide:

**32.6 Determination Member's Income Entitlement**

Subject to clause 34.1 and to the terms of any issue, for each Distribution Period, the Manager must calculate and distribute each Member's Income Entitlement.

**32.7 Member's Entitlement Vested and Present**

For each Accounting Period:

- (1) the Manager holds the Distributable Income which has not been distributed by the end of the Accounting Period for the Members; and
- (2) each Member will be presently entitled to Distributable Income of the Fund in proportion to the amounts which are distributed pursuant to clauses 32.3 and 32.4

in proportion to their respective entitlements under this Constitution.

**33.1 Distribution Date**

Subject to the Security Interest Rules and subject to clause 34.1 and the terms of any issue, the Manager must distribute the Distributable Income to which the Member is presently entitled within 2 months after the end of the relevant Distribution Period.

22. Clause 33.6 provides:

The Manager has power to retain and accumulate in respect of an Accounting Period any part of what would otherwise be income for that Accounting Period, and no Member has any interest in the amount accumulated. If the Manager decides to distribute the Accumulation Amount or any part of it in a later Accounting Period, that amount must be treated as a distribution of Distributable Income of that later Accounting Period.

However, the Prospectus indicates that the Manager does not intend to exercise the power to retain and accumulate income for the duration of the Prospectus.

23. Clauses 34.1 and 34.4 provide:

**34.1 Power to Reinvest**

The Manager may, in relation to a particular class of Units, except in relation to holders of Units of a particular class to which clause 34.4 applies, decide whether, and on what terms, to permit the Members to reinvest some or all of any distribution to acquire additional Units.

....

**34.4 Non-Discretionary Reinvestment**

Under the terms of issue of any Units of a particular class, the Manager may reinvest the whole or any part of an amount which a Member would otherwise receive as a distribution under clause 33.1 by way of issuing additional Units in the Fund. Clause 19 does not apply to the issue of Units under this clause 34.4. Subject to the terms of the issue, Units issued under this clause 34.4 will be priced in accordance with clause 20.1.

(Clause 19 relates to the procedures for applications for units.)

24. The Investment Statement says:

Investors in each Portfolio receive the benefit of all investment returns generated by the underlying assets of each Portfolio, less taxes, expenses and the fees set out above.

Returns from Class B units take the form of distributions (both cash and increases in the number of units owned) and any increases in the value of units. You will receive the return from any increases in the value of units you hold when the relevant units are sold or redeemed and the proceeds paid to you. Distributions are made at the times discussed below.

....

In general terms, distributions for Class B units comprise your share of a Portfolio's net income and realised capital gains after Assure has deducted authorised fees and expenses related to that class. Assure will normally make distributions to you within two months of the end of each distribution period, so within two months after 30 September, 31 December, 31 March and 30 June in each year at present. Assure may vary the frequency and duration of distribution periods from time to time, but intends there will be at least one distribution of income each financial year. Some or all of the Class B unitholders' income entitlements in a Portfolio will be automatically reinvested in additional Class B units in that Portfolio. The Manager has the right to determine the proportion of the income entitlements that will be reinvested. At present it is intended for Class B unitholders of each Portfolio, that 90% of income entitlements will be automatically reinvested.

25. The Prospectus says:

**Distributions**

Distributions are made in accordance with the constitution. In general terms, distributions comprise your share of a Portfolio's net income and realised capital gains after the Responsible Entity has deducted authorised fees and expenses. The Responsible Entity has the right to retain and accumulate income however it does not intend to exercise that right for the duration of this Prospectus. Assure will normally make distributions to investors within 2 months of the end of each distribution period, so within two months after 30 September, 31 December, 31 March and 30 June in each year at present. The Responsible Entity may vary the duration of distribution periods from time to time, and therefore the frequency of distributions, in relation to Class A units or Class B units or both. However, the Responsible Entity intends there will be at least one distribution of income each financial year for each class of units in each Portfolio. Again, remember that if your investment is held through a master trust or wrap account service your account operator may pay you income at times which are different to this.

At present it is intended that Portfolios will pay all distributions wholly in cash except in relation to Class B unitholders, 90% of whose income entitlements will be subject to mandatory reinvestment in additional Class B units. The Responsible Entity has the power to revoke mandatory reinvestment, and to increase or decrease the percentage of income entitlement that is subject to mandatory reinvestment, at its sole discretion. (p. 10)

26. Clause 51.1 of the Constitution provides that the Fund must be wound up and terminated on the first to occur of the following dates:
- If the members by extraordinary resolution so determine, the date the extraordinary resolution is passed;
  - If the manager considers it to be in the interest of the members, the date the manager so determines;
  - The vesting date (being the day that is 80 years less one day after the commencement date);
  - If the fund is wound up pursuant to an order of the court, the date of the order or such other date as the court determines.
27. Clause 52 sets out the procedure that is to be followed on termination. Clause 52.1 says:
- The Manager must, as soon as practicable after the Termination Date:
- (1) convert the Assets into money;
  - (2) pay the liabilities of the Fund and provide for any contingent liabilities or liabilities not yet accrued; and
  - (3) pay the balance of the Assets to the Members in accordance with the provisions of this Constitution.

## Assumptions made by the Commissioner

This Ruling is made subject to the following assumptions:

- i) The Manager is the trustee of the Fund under the general law and for Australian tax purposes.
- ii) The Fund is not resident in New Zealand.
- iii) The Fund is not a controlled foreign company as defined in section CG 4.
- iv) New Zealand members of the Fund will not use the branch equivalent method of calculating income of the Fund.
- v) All New Zealand investors will invest directly into the Fund either personally or through a nominee.

## Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

- a) The Manager does not make an election that the issue of additional units to New Zealand investors shall be treated as a taxable bonus issue.
- b) The Manager of the Fund was incorporated in Australia, carries on business there, or has its central management or control in Australia. Accordingly, the Fund is a resident trust estate for Australian tax purposes.

## 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:

- Where units are issued on the terms that the Manager is not obliged to distribute income entitlements relating to the units and has the power to reinvest the whole or part of the income entitlements in additional units, the issue of additional units to the persons holding such units will constitute a non-taxable bonus issue and, accordingly will be excluded from the definition of a dividend in terms of section CF 3(1)(a) of the Act.
- The interest of New Zealand investors in the Fund will not constitute an interest in a foreign investment fund by virtue of the exemption in section CG 15(2)(b).

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

This Ruling will apply for the period 1 January 2001 to 31 March 2004.

This Ruling is signed by me on the 24<sup>th</sup> day of July 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/24

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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 Assure New Zealand Ltd in respect of Assure Select Global Core Equities Portfolio.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of:

- Section CF 2(1)
- Section CF 3(1)(a)
- Section CF 8
- Section CG 1(b)
- Sections CG 5(1) and (2)
- Sections CG 15(1) and (2)
- Section HE 1

The following definitions in section OB 1:

- “bonus issue”
- “bonus issue in lieu”
- “company”
- “foreign company”
- “foreign entity”
- “international tax rules”
- “non-taxable bonus issue”
- “taxable bonus issue”

Section OE 2

The definitions of “FIF rules” and “international tax rules” in section OZ 1(1)

Schedule 3

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and operation of Assure Select Global Core Equities Portfolio (“the Fund”). Further details of the Arrangement are set out in the paragraphs below.

1. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund will be managed and controlled in Australia by Assure Services & Technology Ltd (“the Manager”), which was incorporated in Australia and which carries on business in Sydney, Australia. The Manager has no offices or employees outside Australia. The Manager is the responsible entity and trustee of the Fund.
2. The objective of the Fund is to outperform the benchmark of the MSCI World Index in AUD by investing in a diversified portfolio of international shares. The MSCI World Index is the Morgan Stanley Capital International World Index which includes the stocks of 1,575 companies representing the stock markets of 22 countries.
3. A prospectus has been registered in Australia and with the Registrar of Companies in New Zealand. An investment statement has been issued for Class B units which are to be offered to New Zealand investors. All New Zealand investors will invest directly into the Funds either personally or through a nominee. Wrap account and master trust services referred to in the prospectus represent separate entities in Australia and will not be used in New Zealand. Class B units differ from Class A units in regard to the Responsible Entity’s fees and charges, repurchase policy and distribution policy. In all other respects the classes of units are equivalent.
4. Applications for the allotment of units are to be made to the Manager: Clause 19.1 of the Constitution. The application form for the allotment of units provides that the signature of the investor confirms acceptance of the terms and conditions set out in the investment statement relating to the particular investment.
5. The Investment Statement says that the operation of the Fund is governed by its Constitution, the Corporations Law and the general law of Australia. The Constitution sets out the conditions under which the Fund operates, the rights and obligations of the unitholders and the rights, responsibilities and duties of the Manager.

6. The Manager may accept or refuse any application for units in total or in part and is not required to give any reason for the refusal of an application: Clauses 19.3 and 19.4. The Manager also has discretion to refuse to register a transfer without giving any reason for the refusal: Clause 17.4. The Manager intends to apply the discretion given under the Constitution to ensure that:
- No New Zealand resident will have a control interest in the Fund greater than 40 percent; and
  - There will not be a group of less than 5 or fewer New Zealand residents with a controlling interest in the Fund.
7. The Manager has discretion to invest the assets of the Fund in any Authorised Investment. Authorised Investments include:
- shares, stocks, debentures, bonds, notes, convertible notes, or any unit or option over these;
  - derivative contracts (including swaps, futures, forward rate agreements and options and any form of agreement creating a contingent liability);
  - Unit Trust investments (being any units, rights to participate or interest in an undertaking, enterprise or scheme, whether unquoted or quoted on any stock or other securities exchange, including any interest in a managed investment scheme and any prescribed interest, which the Manager and the Fund is not prohibited by the Corporations Law from investing in);
  - Any deposit with or any negotiable instrument accepted endorsed or issued by, an Australian ADI, as defined in section 9 of the Corporations Law.
  - Deposits or loans to any financial institution other than Unit Trust Investments;
  - bills of exchange, promissory notes, commercial bills or other negotiable instruments issued by any financial institution;
  - the taking, granting, buying or selling of options in relation to any of the above;
  - any other investment determined by the Manager to be an authorised investment.
8. The Manager may appoint an investment manager for the Fund to act in relation to the investments of the Fund or any part of the Fund: clause 42.1(1). An investment manager has the powers in relation to the investments of the Fund determined by the manager, which may include the power to delegate all or any of the powers granted to the investment manager of the Manager: clause 42.1(2). Putnam Advisory Company Inc, whose headquarters are in Boston, USA, has been appointed as the first investment manager of the Fund.
9. The Manager has discretion as to the investment policy of the Fund but the investment policy must be specified in the first prospectus of the Fund: clauses 29.1 and 29.2. The prospectus (which relates to all Funds established by the Manager) explains the differences in the investment policies of the Funds as follows:
- Assure initially established two Portfolios, Assure Select Global Core Equities Portfolio and Assure Select Global Value Equities Portfolio, in October 2000, and subsequently established Assure Select Global Active Equities Portfolio....
- Assure Select is the umbrella name under which the Portfolios are being offered. A single investment manager is responsible for managing the investments of a Portfolio. Assure has appointed Putnam as the investment manager for the Global Core Equities Portfolio and Lazard as the investment manager for the Global Value Equities Portfolio. Putnam's investment philosophy is based on the belief that all companies, no matter what they do or make, have an underlying long -term business worth and that share prices fluctuate significantly around this long term worth. Lazard's investment philosophy is based on bottom-up value stock selection. Lazard focuses on companies that are financially productive yet inexpensively priced. Assure has appointed National as the investment manager for the Global Active Equities Portfolio, with an investment mandate that requires National to invest the Portfolio wholly in funds managed by Capital. Capital's investment philosophy is based on a bottom-up research approach to stock selection emphasising a company's stock price relative to the underlying value and expected earnings growth of that company....
- The Policy of the Fund in respect of currency hedging is as follows:
- International equity investments may be partially hedged back to the Australian dollar. The hedging level will generally be set at 35% of the four major currencies: USD, GBP, Euro and Yen. Other currencies will generally not be hedged. The level of hedging can fluctuate around the central point to allow for asset and currency movements.
- Additionally, hedging may be used selectively for defensive purposes. Cross hedging is also permitted. After agreement with Putnam, hedging policy may be changed from time to time by Assure.

10. The Manager holds the assets of the Fund on trust for the members: clause 5.2 Constitution. The Manager must clearly identify the assets of the Fund as the property of the Fund and hold the assets separately from any other property held by the Manager: clause 5.3. However, the Manager may engage a custodian to hold the assets in accordance with the Australian Corporations Law: clause 5.4. The Manager has appointed State Street Australia Ltd (“State”) as the custodian to hold the assets of the Funds and to perform some administrative functions for the Funds. State was incorporated in Australia and carries on business in Sydney, Australia. State has no offices in New Zealand.
11. The Manager has entered into a Custodian Agreement with State. Clause 3.13 of the Custodian Agreement permits State to appoint subcustodians to carry out any of the provisions of the Custodian Agreement. State’s duties under the Custodian Agreement are as follows:
- State must segregate in its books for the account of the Manager all securities and other non cash property of each Fund, other than securities which are held in a securities system.
  - State is to release and deliver securities of a Fund held by State or its subcustodians only upon receipt of proper instructions.
  - State will pay interest on credit balances in cash accounts.
  - Upon receipt of proper instructions State or its subcustodians may enter into all types of contracts for foreign exchange on behalf of the Manager.
  - State or its subcustodians may make margin payments on derivatives contracts on behalf of the Manager.
  - State or its subcustodians may deliver money of the Manager to a third party to be held on deposit for the Manager pursuant to proper instructions.
  - State or its subcustodians are to use their commercially reasonable efforts to collect on a timely basis all income and other payments with respect to each Fund to which the Manager is entitled. Income that is collected is to be credited to the relevant accounts held for the Manager.
  - Upon receipt of proper instructions State is to pay out (or direct its subcustodians to pay out) moneys of the Fund for the purchase of securities, the conversion, exchange or surrender of securities of the Fund, the payment of expenses incurred by the Manager, the purchase or sale of foreign exchange or foreign exchange agreements, in connection with trading in derivatives contracts or securities borrowings by the Manager. State may also pay out money of the Fund for any other purpose upon receipt of proper instructions.
12. The expression “proper instructions” is defined in the Custodian Agreement as follows:
- Proper Instructions means instructions (which may be standing instructions) received by the Custodian from the [Manager] (or a person duly authorised by the [Manager]), the Investment Manager, or any person duly authorised by either of them, in any of the following forms:
- (a) in writing signed or initialled by the authorised person (subject to the telephone verification callback procedures adopted by the Custodian and advised to the [Manager] from time to time); or
  - (b) in a tested communication; or
  - (c) in a communication utilising access codes effected between electro mechanical or electronic devices; or
  - (d) by such other means as may be agreed in writing from time to time by the Custodian and the party giving such instructions including without limitation oral instructions.
13. State may without express authority from the Manager or the Investment Manager:
- Make payments to itself or others for minor expenses of handling securities or other similar items relating to its duties under the Custodian Agreement.
  - Surrender securities in temporary form for securities in definitive form;
  - Endorse for collection cheques, drafts and other negotiable instruments; and
  - Attend to all non-discretionary details in connection with the sale, exchange, substitution, purchase, transfer and other dealings with the securities and other assets of the Funds.
- Refer clauses 3.1, 3.5, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12. State also has general obligations in respect of recordkeeping, procurement of documents required to perform its obligations under the Custodian Agreement. State must also segregate its settlement staff from its accounting staff. Refer clause 3.4.
- See Clause 3.19.

14. State's duties under the Administrative Services Agreement are to provide accountancy services, registry services and taxation services.
15. The beneficial interest in the fund is divided into units: Clause 6.1. A member is a person who is registered as the holder of a unit: definition of "member", Clause 1.1(39). Unitholders do not have a right to any particular assets or any part of the assets of the Funds. Clauses 7.1 and 7.2 of the Constitution provide:

**7.1 General Entitlement to Assets**

Each Unit confers on the holder of that Unit an undivided interest in the Assets in the proportion that the Unit bears to the total number of Units on Issue at that time.

**7.2 No Entitlement to any part of Assets**

A Unit does not entitle the holder of that Unit to any particular Asset comprised in the Assets or to any particular part of the Assets.

16. Clause 11.1 provides that a unit confers on the member the following:
- The right to attend and vote at meetings of members;
  - The right for the member as at midnight on the last day of a Distribution Period to receive a share of the Distributable Income (if any) for the Distribution Period on a pro rata basis with all other such units;
  - The right to participate in the division of any surplus assets or profits of the fund on the winding up of the fund on a pro rata basis with all other units; and
  - Rights on redemption of the units.

Members may not interfere with the rights or powers of the Manager in its dealings with the assets of the Fund and the Fund, nor do members have the right to exercise any rights, power or privileges in respect of any part of the assets or investments of the Fund: Clause 12.1.

17. The Manager is required to collect and receive all money, rights and property paid, receivable or arising from the assets of the Fund and must pay the liabilities of the Fund, including tax liabilities: clause 31. The Manager must determine the net taxable income of the Fund for each distribution period: clause 32.2. The distributable income of the Fund for a period is to be determined by applying the following formula which is set out in Clause 32.3 of the Constitution:

$$DI = NTI + I - NCI + C - D$$

Where:

- DI = the amount of Distributable Income  
 NTI = the amount of Net Taxable Income  
 I = so much of the amount by which Income exceeds the Net Taxable Income that the Manager has determined is to be distributed to Members  
 NCI = Non-Cash Income  
 C = the amount of capital the Manager has determined is to be distributed  
 D = Accumulation Account

18. "Distribution period" is defined in Clause 1.1(25) as follows:

- (a) for the first Distribution Period, the period from the Commencement Date to the next Distribution Calculation Date;
- (b) thereafter, the period beginning on the day after the preceding Distribution Calculation Date to the next Distribution Calculation Date until the last Distribution Calculation Date immediately preceding the Termination Date; and
- (c) for the last Distribution Period, the period from the last Distribution Calculation Date immediately preceding the Termination Date until the Termination Date;

The distribution calculation dates are 31 March, 30 June, 30 September and 31 December in each year "or any other date the Manager determines from time to time": Clause 1.1(22).

19. Clause 32.4 provides that each member's income entitlement in the Fund is to be determined by applying the following formula:

$$IE = \frac{DI \times UH}{NU}$$

Where:

- IE = the Income Entitlement of the Member  
 DI = the amount of Distributable Income  
 UH = the Unit Holding of the Member at the close of business on the Distribution Calculation Date  
 NU = the number of Units on Issue at the close of business on the Distribution Calculation Date

The distributable income of the Fund is the net taxable income of the Fund (calculated under the rules in the Australian Act or in accordance with generally accepted accounting principles) with adjustments for distributions of income for any period, non-cash income, capital amounts distributed and accumulation amounts.

20. Clause 32.5 provides:
- 5.5 Distribution Accounts**
- (1) The Manager may:
- (a) keep separate accounts of different categories or sources of income or capital, or deductions or credits for taxation purposes; and
  - (b) allocate income, capital, deductions or credits from a particular category or source to particular Members.
- (2) Nothing in this clause 32 or any provision of this Constitution requires the Manager to establish any separate bank for:
- (a) any distribution to any Member or the Members; or
  - (b) in respect of the accounts referred to in clause 32.5(1).
21. The Manager must calculate and distribute each Member's Income Entitlement: clause 32.6. Clauses 32.6, 32.7 and 33.1 provide:
- 32.6 Determination Member's Income Entitlement**
- Subject to clause 34.1 and to the terms of any issue, for each Distribution Period, the Manager must calculate and distribute each Member's Income Entitlement.
- 32.7 Member's Entitlement Vested and Present**
- For each Accounting Period:
- (1) the Manager holds the Distributable Income which has not been distributed by the end of the Accounting Period for the Members; and
  - (2) each Member will be presently entitled to Distributable Income of the Fund in proportion to the amounts which are distributed pursuant to clauses 32.3 and 32.4
- in proportion to their respective entitlements under this Constitution.
- 33.1 Distribution Date**
- Subject to the Security Interest Rules and subject to clause 34.1 and the terms of any issue, the Manager must distribute the Distributable Income to which the Member is presently entitled within 2 months after the end of the relevant Distribution Period.
22. Clause 33.6 provides:
- The Manager has power to retain and accumulate in respect of an Accounting Period any part of what would otherwise be income for that Accounting Period, and no Member has any interest in the amount accumulated. If the Manager decides to distribute the Accumulation Amount or any part of it in a later Accounting Period, that amount must be treated as a distribution of Distributable Income of that later Accounting Period.
- However, the Prospectus indicates that the Manager does not intend to exercise the power to retain and accumulate income for the duration of the Prospectus.
23. Clauses 34.1 and 34.4 provide:
- 34.1 Power to Reinvest**
- The Manager may, in relation to a particular class of Units, except in relation to holders of Units of a particular class to which clause 34.4 applies, decide whether, and on what terms, to permit the Members to reinvest some or all of any distribution to acquire additional Units.
- ....
- 34.4 Non-Discretionary Reinvestment**
- Under the terms of issue of any Units of a particular class, the Manager may reinvest the whole or any part of an amount which a Member would otherwise receive as a distribution under clause 33.1 by way of issuing additional Units in the Fund. Clause 19 does not apply to the issue of Units under this clause 34.4. Subject to the terms of the issue, Units issued under this clause 34.4 will be priced in accordance with clause 20.1.
- (Clause 19 relates to the procedures for applications for units.)
24. The Investment Statement says:
- Investors in each Portfolio receive the benefit of all investment returns generated by the underlying assets of each Portfolio, less taxes, expenses and the fees set out above.
- Returns from Class B units take the form of distributions (both cash and increases in the number of units owned) and any increases in the value of units. You will receive the return from any increases in the value of units you hold when the relevant units are sold or redeemed and the proceeds paid to you. Distributions are made at the times discussed below.
- ....
- In general terms, distributions for Class B units comprise your share of a Portfolio's net income and realised capital gains after Assure has deducted authorised fees and expenses related to that class. Assure will normally make distributions to you within two months of the end of each distribution period, so within two months after 30 September, 31 December, 31 March and 30 June in each year at present. Assure may vary the frequency and duration of distribution periods from time to time, but intends there will be at least one distribution of income each financial year. Some or all of the Class B unitholders' income entitlements in a Portfolio will be automatically reinvested in additional Class B units in that Portfolio. The Manager has the right to determine the proportion of the income entitlements that will be reinvested. At present it is intended for Class B unitholders of each Portfolio, that 90% of income entitlements will be automatically reinvested.
25. The Prospectus says:
- Distributions**
- Distributions are made in accordance with the constitution. In general terms, distributions comprise your share of a Portfolio's net income and realised capital gains after the Responsible Entity has deducted authorised fees and expenses. The Responsible Entity has the right to retain and accumulate income however

it does not intend to exercise that right for the duration of this Prospectus. Assure will normally make distributions to investors within 2 months of the end of each distribution period, so within two months after 30 September, 31 December, 31 March and 30 June in each year at present. The Responsible Entity may vary the duration of distribution periods from time to time, and therefore the frequency of distributions, in relation to Class A units or Class B units or both. However, the Responsible Entity intends there will be at least one distribution of income each financial year for each class of units in each Portfolio. Again, remember that if your investment is held through a master trust or wrap account service your account operator may pay you income at times which are different to this.

At present it is intended that Portfolios will pay all distributions wholly in cash except in relation to Class B unitholders, 90% of whose income entitlements will be subject to mandatory reinvestment in additional Class B units. The Responsible Entity has the power to revoke mandatory reinvestment, and to increase or decrease the percentage of income entitlement that is subject to mandatory reinvestment, at its sole discretion (p.10)

26. Clause 51.1 of the Constitution provides that the Fund must be wound up and terminated on the first to occur of the following dates:
- If the members by extraordinary resolution so determine, the date the extraordinary resolution is passed;
  - If the manager considers it to be in the interest of the members, the date the manager so determines;
  - The vesting date (being the day that is 80 years less one day after the commencement date);
  - If the Fund is wound up pursuant to an order of the court, the date of the order or such other date as the court determines.

27. Clause 52 sets out the procedure that is to be followed on termination. Clause 52.1 says:

The Manager must, as soon as practicable after the Termination Date:

- (1) convert the Assets into money;
- (2) pay the liabilities of the Fund and provide for any contingent liabilities or liabilities not yet accrued; and
- (3) pay the balance of the Assets to the Members in accordance with the provisions of this Constitution.

## Assumptions made by the Commissioner

This Ruling is made subject to the following assumptions:

- i) The Manager is the trustee of the Fund under the general law and for Australian tax purposes.
- ii) The Fund is not resident in New Zealand.
- iii) The Fund is not a controlled foreign company as defined in section CG 4.
- iv) New Zealand members of the Fund will not use the branch equivalent method of calculating income of the Fund.
- v) All New Zealand investors will invest directly into the Fund either personally or through a nominee.

## Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

- a) The Manager does not make an election that the issue of additional units to New Zealand investors shall be treated as a taxable bonus issue.
- b) The Manager of the Fund was incorporated in Australia, carries on business there, or has its central management or control in Australia. Accordingly, the Fund is a resident trust estate for Australian tax purposes.

## 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:

- Where units are issued on the terms that the Manager is not obliged to distribute income entitlements relating to the units and has the power to reinvest the whole or part of the income entitlements in additional units, the issue of additional units to the persons holding such units will constitute a non-taxable bonus issue and, accordingly will be excluded from the definition of a dividend in terms of section CF 3(1)(a) of the Act.
- The interest of New Zealand investors in the Fund will not constitute an interest in a foreign investment fund by virtue of the exemption in section CG 15(2)(b).

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

This Ruling will apply for the period 1 January 2001 to 31 March 2004.

This Ruling is signed by me on the 24<sup>th</sup> day of July 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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## PRODUCT RULING – BR PRD 01/25

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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 Assure New Zealand Ltd in respect of Assure Select Global Active Equities Portfolio.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of:

- Section CF 2(1)(f)
- Section CF 3(1)(a)
- Section CF 8
- Section CG 1(b)
- Sections CG 5(1) and (2)
- Sections CG 15(1) and (2)
- Section HE 1

The following definitions in section OB 1:

- “bonus issue”
- “bonus issue in lieu”
- “company”
- “foreign company”
- “foreign entity”
- “international tax rules”
- “non-taxable bonus issue”
- “taxable bonus issue”

Section OE 2

The definitions of “FIF rules” and “international tax rules” in section OZ 1(1)

Schedule 3

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and operation of Assure Select Global Active Equities Portfolio (“the Fund”). Further details of the Arrangement are set out in the paragraphs below.

1. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund will be managed and controlled in Australia by

Assure Services & Technology Ltd (“the Manager”) which was incorporated in Australia and which carries on business in Sydney, Australia. The Manager has no offices or employees outside Australia. The Manager is the responsible entity and trustee of the Fund.

2. The objective of the Fund is to outperform the benchmark of the MSCI World Index in AUD by investing in a diversified portfolio of international shares. The MSCI World Index is the Morgan Stanley Capital International World Index which includes the stocks of 1,575 companies representing the stock markets of 22 countries.
3. A prospectus has been registered in Australia and with the Registrar of Companies in New Zealand. An investment statement has been issued for Class B units which are to be offered to New Zealand investors. All New Zealand investors will invest directly into the Funds either personally or through a nominee. Wrap account and master trust services referred to in the prospectus represent separate entities in Australia and will not be used in New Zealand. Class B units differ from Class A units in regard to the Responsible Entity’s fees and charges, repurchase policy and distribution policy. In all other respects the classes of units are equivalent.
4. Applications for the allotment of units are to be made to the Manager: Clause 19.1 of the Constitution. The application form for the allotment of units provides that the signature of the investor confirms acceptance of the terms and conditions set out in the investment statement relating to the particular investment.
5. The Investment Statement says that the operation of the Fund is governed by its Constitution, the Corporations Law and the general law of Australia. The Constitution sets out the conditions under which the Fund operates, the rights and obligations of the unitholders and the rights, responsibilities and duties of the Manager.
6. The Manager may accept or refuse any application for units in total or in part and is not required to give any reason for the refusal of an application: Clauses 19.3 and 19.4. The Manager also has discretion to refuse to register a transfer without giving any reason for the refusal: Clause 17.4.

The Manager intends to apply the discretion given under the Constitution to ensure that:

- No New Zealand resident will have a control interest in the Fund greater than 40 percent; and
- There will not be a group of less than 5 or fewer New Zealand residents with a controlling interest in the Fund.

7. The Manager has discretion to invest the assets of the Fund in any Authorised Investment. Authorised Investments include:
- shares, stocks, debentures, bonds, notes, convertible notes, or any unit or option over these;
  - derivative contracts (including swaps, futures, forward rate agreements and options and any form of agreement creating a contingent liability);
  - Unit Trust investments (being any units, rights to participate or interest in an undertaking, enterprise or scheme, whether unquoted or quoted on any stock or other securities exchange, including any interest in a managed investment scheme and any prescribed interest, which the Manager and the Fund is not prohibited by the Corporations Law from investing in);
  - Any deposit with or any negotiable instrument accepted endorsed or issued by, an Australian ADI, as defined in section 9 of the Corporations Law;
  - Deposits or loans to any financial institution other than Unit Trust Investments;
  - bills of exchange, promissory notes, commercial bills or other negotiable instruments issued by any financial institution;
  - the taking, granting, buying or selling of options in relation to any of the above;
  - any other investment determined by the Manager to be an authorised investment.
8. The Manager may appoint an investment manager for the Fund to act in relation to the investments of the Fund or any part of the Fund: clause 42.1(1). An investment manager has the powers in relation to the investments of the Fund determined by the manager, which may include the power to delegate all or any of the powers granted to the investment manager of the Manager: clause 42.1(2). National Corporate Investment Services Ltd (“National:”), whose headquarters are in

Sydney, Australia has been appointed as the first investment manager of the Fund: Clause 42.2 of Constitution. The underlying investment manager is Capital International Inc, a US company whose headquarters are in Los Angeles. National is required to invest in funds managed solely by Capital International.

9. The Manager has discretion as to the investment policy of the Fund but the investment policy must be specified in the first prospectus of the Fund: clauses 29.1 and 29.2. The prospectus (which relates to all Funds established by the Manager) explains the difference in the investment policy of the Funds as follows:

Assure initially established two Portfolios, Assure Select Global Core Equities Portfolio and Assure Select Global Value Equities Portfolio, in October 2000, and subsequently established Assure Select Global Active Equities Portfolio....

Assure Select is the umbrella name under which the Portfolios are being offered. A single investment manager is responsible for managing the investments of a Portfolio. Assure has appointed Putnam as the investment manager for the Global Core Equities Portfolio and Lazard as the investment manager for the Global Value Equities Portfolio. Putnam’s investment philosophy is based on the belief that all companies, no matter what they do or make, have an underlying long term business worth and that share prices fluctuate significantly around this long-term worth. Lazard’s investment philosophy is based on bottom-up value stock selection. Lazard focuses on companies that are financially productive yet inexpensively priced. Assure has appointed National as the investment manager for the Global Active Equities Portfolio, with an investment mandate that requires National to invest the Portfolio wholly in funds managed by Capital. Capital’s investment philosophy is based on a bottom-up research approach to stock selection emphasising a company’s stock price relative to the underlying value and expected earnings growth of that company....

The policy of the Fund in respect of currency hedging is as follows:

International equity investments are made on an unhedged currency basis.

Additionally, hedging may be used selectively for defensive purposes. Cross hedging is also permitted. After agreement with the investment manager, hedging policy may be changed from time to time by Assure.

10. The Manager holds the assets of the Fund on trust for the members: clause 5.2 Constitution. The Manager must clearly identify the assets of the Fund as the property of the Fund and hold the assets separately from any other property held by the Manager: clause 5.3. However, the Manager may engage a custodian to hold the assets in accordance with the Australian Corporations Law: clause 5.4. The Manager

has appointed State Street Australia Ltd (“State”) as the custodian to hold the assets of the Funds and to perform some administrative functions for the Funds. State was incorporated in Australia and carries on business in, Sydney, Australia. State has no offices in New Zealand.

11. The Manager has entered into a Custodian Agreement with State. Clause 3.13 of the Custodian Agreement permits State to appoint subcustodians to carry out any of the provisions of the Custodian Agreement. State’s duties under the Custodian Agreement are as follows:
- State must segregate in its books for the account of the Manager all securities and other non cash property of each Fund, other than securities which are held in a securities system.
  - State is to release and deliver securities of a Fund held by State or its subcustodians only upon receipt of proper instructions.
  - State will pay interest on credit balances in cash accounts.
  - Upon receipt of proper instructions State or its subcustodians may enter into all types of contracts for foreign exchange on behalf of the Manager.
  - State or its subcustodians may make margin payments on derivatives contracts on behalf of the Manager.
  - State or its subcustodians may deliver money of the Manager to a third party to be held on deposit for the Manager pursuant to proper instructions.
  - State or its subcustodians are to use their commercially reasonable efforts to collect on a timely basis all income and other payments with respect to each Fund to which the Manager is entitled. Income that is collected is to be credited to the relevant accounts held for the Manager.
  - Upon receipt of proper instructions State is to pay out (or direct its subcustodians to pay out) moneys of the Fund for the purchase of securities, the conversion, exchange or surrender of securities of the Fund, the payment of expenses incurred by the Manager, the purchase or sale of foreign exchange or foreign exchange agreements, in connection with trading in derivatives contracts or securities borrowings by the Manager. State may also pay out money of the Fund for any other purpose upon receipt of proper instructions.
12. The expression “proper instructions” is defined in the Custodian Agreement as follows:
- Proper Instructions means instructions (which may be standing instructions) received by the Custodian from the [Manager] (or a person duly authorised by the [Manager]), the Investment Manager, or any person duly authorised by either of them, in any of the following forms:
- (a) in writing signed or initialled by the authorised person (subject to the telephone verification callback procedures adopted by the Custodian and advised to the [Manager] from time to time); or
  - (b) in a tested communication; or
  - (c) in a communication utilising access codes effected between electro mechanical or electronic devices; or
  - (d) by such other means as may be agreed in writing from time to time by the Custodian and the party giving such instructions including without limitation oral instructions.
13. State may without express authority from the Manager or the Investment Manager:
- Make payments to itself or others for minor expenses of handling securities or other similar items relating to its duties under the Custodian Agreement.
  - Surrender securities in temporary form for securities in definitive form;
  - Endorse for collection cheques, drafts and other negotiable instruments; and
  - Attend to all non-discretionary details in connection with the sale, exchange, substitution, purchase, transfer and other dealings with the securities and other assets of the Funds.
- See Clause 3.19.
14. State’s duties under the Administrative Services Agreement are to provide accountancy services, registry services and taxation services.
15. The beneficial interest in the fund is divided into units: Clause 6.1. A member is a person who is registered as the holder of a unit: definition of “member”, Clause 1.1(39). Unitholders do not have a right to any particular assets or any part of the assets of the

Funds. Clauses 7.1 and 7.2 of the Constitution provide:

**7.1 General Entitlement to Assets**

Each Unit confers on the holder of that Unit an undivided interest in the Assets in the proportion that the Unit bears to the total number of Units on Issue at that time.

**7.2 No Entitlement to any part of Assets**

A Unit does not entitle the holder of that Unit to any particular Asset comprised in the Assets or to any particular part of the Assets.

16. Clause 11.1 provides that a unit confers on the member the following:
- The right to attend and vote at meetings of members;
  - The right for the member as at midnight on the last day of a Distribution Period to receive a share of the Distributable Income (if any) for the Distribution Period on a pro rata basis with all other such units;
  - The right to participate in the division of any surplus assets or profits of the fund on the winding up of the fund on a pro rata basis with all other units; and
  - Rights on redemption of the units.

Members may not interfere with the rights or powers of the Manager in its dealings with the assets of the Fund and the Fund, nor do members have the right to exercise any rights, power or privileges in respect of any part of the assets or investments of the Fund: Clause 12.1.

17. The Manager is required to collect and receive all money, rights and property paid, receivable or arising from the assets of the Fund and must pay the liabilities of the Fund, including tax liabilities: clause 31. The Manager must determine the net taxable income of the Fund for each distribution period: clause 32.2. The distributable income of the Fund for a period is to be determined by applying the following formula which is set out in Clause 32.3 of the Constitution:

$$DI = NTI + I - NCI + C - D$$

Where:

- DI = the amount of Distributable Income
- NTI = the amount of Net Taxable Income
- I = so much of the amount by which Income exceeds the Net Taxable Income that the Manager has determined is to be distributed to Members
- NCI = Non-Cash Income
- C = the amount of capital the Manager has

determined is to be distributed

$$D = \text{Accumulation Account}$$

18. “Distribution period” is defined in Clause 1.1(25) as follows:

- (a) for the first Distribution Period, the period from the Commencement Date to the next Distribution Calculation Date;
- (b) thereafter, the period beginning on the day after the preceding Distribution Calculation Date to the next Distribution Calculation Date until the last Distribution Calculation Date immediately preceding the Termination Date; and
- (c) for the last Distribution Period, the period from the last Distribution Calculation Date immediately preceding the Termination Date until the Termination Date;

The distribution calculation dates are 31 March, 30 June, 30 September and 31 December in each year “or any other date the Manager determines from time to time”: Clause 1.1(22).

19. Clause 32.4 provides that each member’s income entitlement in the Fund is to be determined by applying the following formula:

$$IE = \frac{DI \times UH}{NU}$$

Where:

- IE = the Income Entitlement of the Member
- DI = the amount of Distributable Income
- UH = the Unit Holding of the Member at the close of business on the Distribution Calculation Date
- NU = the number of Units on Issue at the close of business on the Distribution Calculation Date

The distributable income of the Fund is the net taxable income of the Fund (calculated under the rules in the Australian Act or in accordance with generally accepted accounting principles) with adjustments for distributions of income for any period, non-cash income, capital amounts distributed and accumulation amounts.

20. Clause 32.5 provides:

**32.5 Distribution Accounts**

- (1) The Manager may:
  - (a) keep separate accounts of different categories or sources of income or capital, or deductions or credits for taxation purposes; and
  - (b) allocate income, capital, deductions or credits from a particular category or source to particular Members.
- (2) Nothing in this clause 32 or any provision of this Constitution requires the Manager to establish any separate bank for:

- (a) any distribution to any Member or the Members; or
- (b) in respect of the accounts referred to in clause 32.5(1).

21. The Manager must calculate and distribute each Member's Income Entitlement: clause 32.6. Clauses 32.6, 32.7 and 33.1 provide:

**32.6 Determination Member's Income Entitlement**

Subject to clause 34.1 and to the terms of any issue, for each Distribution Period, the Manager must calculate and distribute each Member's Income Entitlement.

**32.7 Member's Entitlement Vested and Present**

For each Accounting Period:

- (1) the Manager holds the Distributable Income which has not been distributed by the end of the Accounting Period for the Members; and
- (2) each Member will be presently entitled to Distributable Income of the Fund in proportion to the amounts which are distributed pursuant to clauses 32.3 and 32.4

in proportion to their respective entitlements under this Constitution.

**33.1 Distribution Date**

Subject to the Security Interest Rules and subject to clause 34.1 and the terms of any issue, the Manager must distribute the Distributable Income to which the Member is presently entitled within 2 months after the end of the relevant Distribution Period.

22. Clause 33.6 provides:

The Manager has power to retain and accumulate in respect of an Accounting Period any part of what would otherwise be income for that Accounting Period, and no Member has any interest in the amount accumulated. If the Manager decides to distribute the Accumulation Amount or any part of it in a later Accounting Period, that amount must be treated as a distribution of Distributable Income of that later Accounting Period.

However, the Prospectus indicates that the Manager does not intend to exercise the power to retain and accumulate income for the duration of the Prospectus.

23. Clauses 34.1 and 34.4 provide:

**34.1 Power to Reinvest**

The Manager may, in relation to a particular class of Units, except in relation to holders of Units of a particular class to which clause 34.4 applies, decide whether, and on what terms, to permit the Members to reinvest some or all of any distribution to acquire

additional Units.

....

**34.4 Non-Discretionary Reinvestment**

Under the terms of issue of any Units of a particular class, the Manager may reinvest the whole or any part of an amount which a Member would otherwise receive as a distribution under clause 33.1 by way of issuing additional Units in the Fund. Clause 19 does not apply to the issue of Units under this clause 34.4. Subject to the terms of the issue, Units issued under this clause 34.4 will be priced in accordance with clause 20.1.

(Clause 19 relates to the procedures for applications for units.)

24. The Investment Statement says:

Investors in each Portfolio receive the benefit of all investment returns generated by the underlying assets of each Portfolio, less taxes, expenses and the fees set out above.

Returns from Class B units take the form of distributions (both cash and increases in the number of units owned) and any increases in the value of units. You will receive the return from any increases in the value of units you hold when the relevant units are sold or redeemed and the proceeds paid to you. Distributions are made at the times discussed below.

....

In general terms, distributions for Class B units comprise your share of a Portfolio's net income and realised capital gains after Assure has deducted authorised fees and expenses related to that class. Assure will normally make distributions to you within two months of the end of each distribution period, so within two months after 30 September, 31 December, 31 March and 30 June in each year at present. Assure may vary the frequency and duration of distribution periods from time to time, but intends there will be at least one distribution of income each financial year. Some or all of the Class B unitholders' income entitlements in a Portfolio will be automatically reinvested in additional Class B units in that Portfolio. The Manager has the right to determine the proportion of the income entitlements that will be reinvested. At present it is intended for Class B unitholders of each Portfolio, that 90% of income entitlements will be automatically reinvested.

25. The Prospectus says:

**Distributions**

Distributions are made in accordance with the constitution. In general terms, distributions comprise your share of a Portfolio's net income and realised capital gains after the Responsible Entity has deducted authorised fees and expenses. The Responsible Entity has the right to retain and accumulate income however it does not intend to exercise that right for the duration of this Prospectus. Assure will normally make distributions to investors within 2 months of the end of each distribution period, so within two months after 30 September, 31 December, 31 March and 30 June in each year at present. The Responsible Entity may vary

the duration of distribution periods from time to time, and therefore the frequency of distributions, in relation to Class A units or Class B units or both. However, the Responsible Entity intends there will be at least one distribution of income each financial year for each class of units in each Portfolio. Again, remember that if your investment is held through a master trust or wrap account service your account operator may pay you income at times which are different to this.

At present it is intended that Portfolios will pay all distributions wholly in cash except in relation to Class B unitholders, 90% of whose income entitlements will be subject to mandatory reinvestment in additional Class B units. The Responsible Entity has the power to revoke mandatory reinvestment, and to increase or decrease the percentage of income entitlement that is subject to mandatory reinvestment, at its sole discretion. (p. 10)

26. Clause 51.1 of the Constitution provides that the Fund must be wound up and terminated on the first to occur of the following dates:

- If the members by extraordinary resolution so determine, the date the extraordinary resolution is passed;
- If the manager considers it to be in the interest of the members, the date the manager so determines;
- The vesting date (being the day that is 80 years less one day after the commencement date);
- If the fund is wound up pursuant to an order of the court, the date of the order or such other date as the court determines.

27. Clause 52 sets out the procedure that is to be followed on termination. Clause 52.1 says:

The Manager must, as soon as practicable after the Termination Date:

- (1) convert the Assets into money;
- (2) pay the liabilities of the Fund and provide for any contingent liabilities or liabilities not yet accrued; and
- (3) pay the balance of the Assets to the Members in accordance with the provisions of this Constitution.

## Assumptions made by the Commissioner

This Ruling is made subject to the following assumptions:

- i) The Manager is the trustee of the Fund under the general law and for Australian tax purposes.
- ii) The Fund is not resident in New Zealand.
- iii) The Fund is not a controlled foreign company as defined in section CG 4.

iv) New Zealand members of the Fund will not use the branch equivalent method of calculating income of the Fund.

v) All New Zealand investors will invest directly into the Fund either personally or through a nominee.

## Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

- a) The Manager does not make an election that the issue of additional units to New Zealand investors shall be treated as a taxable bonus issue.
- b) The Manager of the Fund was incorporated in Australia, carries on business there, or has its central management or control in Australia. Accordingly, the Fund is a resident trust estate for Australian tax purposes.

## 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:

- Where units are issued on the terms that the Manager is not obliged to distribute income entitlements relating to the units and has the power to reinvest the whole or part of the income entitlements in additional units, the issue of additional units to the persons holding such units will constitute a non-taxable bonus issue and, accordingly will be excluded from the definition of a dividend in terms of section CF 3(1)(a) of the Act.
- The interest of New Zealand investors in the Fund will not constitute an interest in a foreign investment fund by virtue of the exemption in section CG 15(2)(b).

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

This Ruling will apply for the period 1 January 2001 to 31 March 2004.

This Ruling is signed by me on the 24<sup>th</sup> day of July 2001.

**Martin Smith**

General Manager (Adjudication & Rulings)

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# FORESTRY RIGHTS – SECONDHAND GOODS GST INPUT TAX DEDUCTION

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## PUBLIC RULING – BR Pub 01/08

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**Note** (not part of ruling): This ruling is essentially the same as public ruling BR Pub 98/5 which was published in *TIB* Vol 10, No 12 (December 1998). BR Pub 98/5 applies up until 30 September 2001. This new ruling takes into account minor changes to the legislation since BR Pub 98/5 was issued, and the commentary has been expanded. Its period of application is from 1 October 2001 to 30 September 2006.

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This is a public ruling made under section 91D of the Tax Administration Act 1994.

### Taxation Laws

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

This Ruling applies in respect of the section 2(1) definition of “secondhand goods”, section 3A(1)(c) definition of “input tax”, and section 20(3).

### The Arrangement to which this Ruling applies

The Arrangement is the supply to a GST registered person of a “forestry right” (as defined in the Forestry Rights Registration Act 1983) by way of sale in the following circumstances:

- The sale is not a taxable supply; and
- The right is situated in New Zealand at the time of supply; and
- The right is acquired by the registered person for the principal purpose of making taxable supplies; and
- The right has been used by at least one prior owner for its intrinsic purpose.

### How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- A forestry right is a secondhand good for which an input tax deduction is available within the section 2(1) definition of “secondhand goods”, section 3A(1)(c) definition of “input tax”, and section 20(3).

### The period for which this Ruling applies

This Ruling will apply for the period 1 October 2001 to 30 September 2006.

This Ruling is signed by me on the 3<sup>rd</sup> day of September 2001.

**Martin Smith**

General Manager (Adjudication and Rulings)

## COMMENTARY ON PUBLIC RULING BR PUB 01/08

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusion reached in public ruling BR Pub 01/08 (“the Ruling”).

The subject matter covered in the Ruling was previously dealt with in public ruling BR Pub 98/5 (*Tax Information Bulletin* Vol 10, No 12 (December 1998) at page 43, under the heading “Forestry Rights – secondhand goods GST input tax deduction”). This Ruling extends that coverage to 30 September 2006.

### Background

We had been asked to clarify whether a GST registered person who buys a forestry right by way of a non-taxable supply may make a secondhand goods input tax deduction. It had been unclear whether a forestry right can be a secondhand good.

### Legislation

Section 2 of the Forestry Rights Registration Act 1983 (“FRRA”) defines “forestry right” (for the purposes of that Act):

Forestry right means a right created in accordance with this Act:

Section 2A of the FRRA deals with the creation of forestry rights. It states:

#### 2A Creation of forestry rights

- (1) A forestry right may be created by the proprietor of land—
  - (a) By creating in accordance with subsection (3); or
  - (b) By granting to any other person; or
  - (c) By reserving to the proprietor on the sale of the land,—
 

the right to—
  - (d) Establish, maintain, and harvest; or
  - (e) Maintain and harvest,—
 

a crop of trees on that land.
- (2) The forestry right may also—
  - (a) Grant or reserve rights of access and rights of construction and use of tracks, culverts, bridges, buildings, and other works and facilities if those rights are ancillary to and necessary for the purposes of subsection (1);
  - (b) Provide for charges, payments, royalties, or division of the crop or the proceeds of the crop,—

whether or not such rights or provisions are coupled with an obligation.

- (3) Despite any enactment or rule of law, the proprietor may, in accordance with this section, create a forestry right for the proprietor.

- (4) No right created under this section is capable of conferring a right of exclusive possession of the land.

Section 3(1) of the FRRA states:

Notwithstanding any rule of law or equity to the contrary, every forestry right shall be deemed to be a *profit à prendre*.

Section 2(1) of the Goods and Services Tax Act 1985 defines “goods”:

“Goods” means all kinds of personal or real property; but does not include choses in action or money.

Section 3A(1)(c) defines “input tax” in relation to secondhand goods:

- (1) Input tax, in relation to a registered person, means—
  - ....
  - (c) an amount determined under subsection (3) after applying subsection (2).

Section 20(3) allows deductions from output tax, and states:

- (3) Subject to this section, in calculating the amount of tax payable in respect of each taxable period, there shall be deducted from the amount of output tax of a registered person attributable to the taxable period—
  - (a) In the case of a registered person who is required to account for tax payable on an invoice basis pursuant to section 19 of this Act, the amount of input tax—
 

...
  - (ia) In relation to the supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies, to the extent that a payment in respect of that supply has been made during that taxable period:
 

...
  - (b) In the case of a registered person who is required to account for tax payable on a payments basis or a hybrid basis pursuant to section 19 of this Act, the amount of input tax—
    - (i) In relation to the supply of goods and services made to that registered person, being a supply of goods and services which is deemed to take place pursuant to section 9(1) or section 9(3)(a) or section 9(3)(aa) or section 9(6) of this Act, to the extent that a payment in respect of that supply has been made during the taxable period:

## Application of the Legislation

Under sections 2(1), 3A, and 20(3), seven conditions must be met before the purchase of a forestry right by a GST registered person will permit a secondhand goods input tax deduction:

- Forestry rights must be “goods” as defined in section 2(1).
- The supply of a forestry right must be by way of sale.
- The supply of the forestry right must be a non-taxable supply.
- The sale must involve payment in the taxable period for which an input tax deduction is sought.
- The forestry right must be secondhand.
- The forestry right must be acquired for the principal purpose of making taxable supplies.
- The forestry right must be situated in New Zealand at the time of sale.

The following paragraphs consider some of these requirements.

### “Goods”

The Commissioner considers that a forestry right (as defined in section 2 of the Forestry Rights Registration Act 1983) is a “good” for GST purposes. “Goods” means all real and personal property but does not include choses in action. Section 3(1) of the Forestry Rights Registration Act 1983 deems forestry rights to be *profits à prendre*. A *profit à prendre* is a right to take something off another person’s land. A *profit à prendre* is an interest in land. It is not a chose in action because the rights under a *profit à prendre* are of a possessory nature, whereas a chose in action can only be enforced by action. An example of a “chose in action” is the granting of a licence at a boat marina. The benefits arising from the licence cannot be obtained by taking possession of the licence, but by action against a licensor who refuses to honour the licence. On the other hand, a forestry right, which can be enforced by taking possession, is real property and a “good” for GST purposes.

### “Sale”

A secondhand goods input tax deduction is only available if there is a supply by way of sale. Forestry rights are a form of transferable property right, like other *profits à prendre*, and may be sold. It will be a question of fact whether there has been a sale rather than a lease or sub-grant of a forestry right. Because of the definition of “input tax” in section 3A, a secondhand goods input tax deduction is available only where there is a sale (section 3A(2)).

The sale must be by way of a non-taxable supply for an input tax deduction to be available.

### “Payment”

An input tax deduction is only available to the extent that there has been payment for the goods in the relevant taxable period. Therefore, if there is a sale by instalments, input tax deductions are available only in the taxable period in which each instalment is paid.

### “Secondhand”

The forestry right must be “secondhand” before an input tax deduction is available. The Commissioner considers that land is a secondhand good. This is supported by case law, e.g. *Case N13* (1991) 13 NZTC 3,105. The Court of Appeal decision in *Coveney v CIR* (1995) 17 NZTC 12,193 appears to have confirmed this view, notwithstanding earlier obiter dicta that land may not be a secondhand good in *L R McLean v CIR* (1994) 16 NZTC 11,211 (CA) and *King v Bennetts* (1994) 16 NZTC 11,370.

However, when a specific interest in land, like a forestry right, is newly created, it is a unique mix of rights distinct from the original land over which it was created. Accordingly, the original creation of a forestry right cannot be a sale of secondhand goods. The forestry right is a new item of property. Before a forestry right can be a secondhand good, at least one prior owner must have made use of the right for its intrinsic purpose, *L R McLean v CIR* (CA), being some exercise of the rights conferred by the forestry right. A forestry right is a bundle of rights giving its owner the right to either:

- establish, maintain and harvest; or
- maintain and harvest,

a crop of trees on that land.

The forestry right will be considered a secondhand good so long as the prior owner has used the forestry right for its intrinsic purpose, namely has exercised some of the rights provided under that forestry right (for example the prior owner has established, maintained and/or harvested a crop of trees).

## **Examples**

### **Example 1**

Purchaser is a GST registered person who intends to enter the forestry industry in a small way. On 1 July 2000 she buys a forestry right from Supplier, who is not registered for GST. Supplier had bought the right 18 months earlier from a farmer who had decided not to diversify into forestry. Supplier had used the right on a small scale to remove a small amount of timber. The purchase price is \$20,000 payable in four quarterly instalments. The first payment is made on 1 August 2000. Purchaser is entitled to a secondhand goods input tax deduction because the forestry right was disposed of by sale, the seller was unregistered (non-taxable supply), the forestry right was secondhand, and Purchaser acquired the right for the principal purpose of making taxable supplies. In Purchaser's next GST return (for the two months ending 31 August 2000) she should deduct as input tax the tax fraction of the amount of the first instalment (\$5,000). Accordingly, she may deduct \$555.55.

### **Example 2**

The same facts as example 1 above, but neither the Supplier nor any other previous owner has harvested any trees but the Supplier has used the existing forestry right to plant a crop of trees on the land. Once again a secondhand goods credit would be available as the Supplier has used the forestry right for one of its intrinsic purposes, being the right to establish a crop of trees.

## **NEW LEGISLATION**

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### **FRINGE BENEFIT TAX – PRESCRIBED RATE OF INTEREST ON LOW-INTEREST, EMPLOYMENT-RELATED LOANS**

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The prescribed rate of interest used to calculate fringe benefit tax for low-interest, employment-related loans has decreased from 7.95% to 7.69% for the quarter beginning 1 July 2001.

The new rate was approved by means of an Order in Council signed on 27 August 2001 and applies from the quarter beginning 1 July 2001.

The rate is reviewed regularly to ensure it is in line with the Reserve Bank's survey of first mortgage interest rates. It was last changed with effect from the quarter beginning 1 April 2001.

*Income Tax (Fringe Benefit Tax, Interest on Loans)  
Amendment Regulations (No 2) 2001 (2001/219)*

## QUESTIONS WE'VE BEEN ASKED

This section of the TIB sets out the answers to some day-to-day questions that people have asked. We have published these as they may be of general interest to readers.

These items are based on letters we've received. A general similarity to items in this package will not necessarily lead to the same tax result. Each case will depend on its own facts.

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## SHORTFALL PENALTIES IN RESPECT OF AGREED ADJUSTMENTS

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### QB 2104

We have been asked whether shortfall penalties should be determined at the same time as an agreed adjustment and included on the agreed adjustment form.

### Background

During an audit, Inland Revenue may identify discrepancies in respect of taxpayers' returns, the effect of which will be an alteration to the amount of a taxpayer's liability to tax as stated in the return.

In most instances, both the taxpayer and Inland Revenue will come to an agreement as to what adjustments are to be made to the return, thus avoiding the necessity to enter the disputes process.

As a result of this agreement, both the taxpayer and Inland Revenue sign an "agreed adjustment" form which lists the item and amounts that have been agreed upon as requiring adjustment.

However, where the agreed adjustment will result in an increased tax liability for the taxpayer, the taxpayer may also incur shortfall penalties as provided for in section 141 Tax Administration Act 1994 (TAA).

Section 94A(3) TAA allows the Commissioner to make the shortfall penalty assessment either before or after unpaid tax has been assessed, or has become assessable or payable, or has been paid.

The legislation does not prevent the Commissioner from assessing the shortfall penalty at the same time as the adjustments are being determined or finalised.

*Tax Information Bulletin*, Vol 6, No 3 (August 1996), states (at page 16):

One of the objectives of the new disputes resolution process is the prompt and efficient resolution of disputes. To be consistent with this objective, the Commissioner will raise the issue of penal tax or shortfall penalties as soon as is practicable, which in most cases will be at the same time the substantive issues are being discussed.

### Practice

The Commissioner's practice is to reach agreement with the taxpayer on any shortfall penalties at the same time as other tax adjustments and to include these shortfall penalties on the agreed adjustment form unless the taxpayer advises otherwise, or circumstances exist where it is inappropriate to do so, eg prosecution.

Where the shortfall penalty is not included in an agreed adjustment, Inland Revenue will inform the taxpayer that shortfall penalties may still apply. This will allow the taxpayer to know "up front" his or her potential total liability at the time agreement is reached in respect of the adjustments.

The Commissioner considers it is desirable, from the view of both the taxpayer and Inland Revenue, that there is a swift resolution to taxation matters in dispute. A swift resolution also provides certainty to the taxpayer that all matters have been dealt with.

## STANDARD PRACTICE STATEMENTS

These statements describe how the Commissioner will, in practice, exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

## RELEASE OF INFORMATION – IR-SPS GNL 170

### Introduction

This standard practice statement provides guidelines for responding to requests for information made under the Official Information Act 1982 (Official Information Act) and the Privacy Act 1993 (Privacy Act). This statement also explains the relationship of these Acts with the Tax Administration Act 1994 (Tax Administration Act) and how the secrecy provisions in the Tax Administration Act and Child Support Act 1991 (Child Support Act) will be applied.

### Application

This Standard Practice Statement applies from 11 September 2001.

### Summary

Requests for information can be made orally or in writing.

Inland Revenue is required to make a decision on a request as soon as reasonably practicable and in any case no later than 20 working days after the receipt of the request. Where Inland Revenue is unable to do so, it will write to the requester extending the timeframe. Charging for the provision of information is permissible under the Official Information Act where considerable departmental resources will be required to satisfy the request.

All information held by Inland Revenue is “official information”. Requests by natural persons for information about themselves are governed by the Privacy Act. Under that Act, individuals have a right of access to information about themselves, subject only to the reasons for refusing access stipulated in the Act.

All other requests for information are required to be determined under the Official Information Act.

Part II of the Official Information Act covers requests for information, including personal information by natural persons about natural persons other than themselves.

Part III of the Official Information Act covers requests for internal rules (section 22) or reasons for decisions (section 23).

Part IV of the Official Information Act relates to requests by bodies corporate for information about themselves (section 24).

Under the Official Information Act, there are different reasons for refusing information requests depending on whether Part II, Part III or Part IV applies.

Neither the Privacy Act nor the Official Information Act restricts the effect of the secrecy obligations imposed on Inland Revenue staff by the Tax Administration Act. When a request is to be considered under the Tax Administration Act, Inland Revenue will consider the intent of the Official Information Act and/or the Privacy Act.

For example, there are times when personal information about a requester would not be given to the requester:

- once Inland Revenue has advised that a tax investigation is to commence and disclosure would prejudice the effective conduct of the investigation;
- when the information requested would disclose the identity of a person who has supplied information to Inland Revenue thereby breaching an obligation of confidentiality;
- when the information requested would disclose particular targeting or investigation techniques and selection criteria which, if disclosed, would prejudice Inland Revenue’s ability to investigate in the future.

In these cases a request may be refused as the release of this information would be likely to prejudice the maintenance of the law.

### Legislation

#### **Official Information Act 1982**

The purpose of the Official Information Act is to increase the availability of official information.

Section 5 provides that information shall be made available unless there is good reason for withholding it.

The reasons for refusal to supply official information are contained in sections 6, 7, 9 and 18 of the Official Information Act. For Inland Revenue, the following reasons to withhold information are particularly relevant.

### **Section 6**

Disclosure of the information requested would:

- prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand;
- prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by an international organisation or another government or any agency of such Government;
- prejudice the maintenance of the law including the prevention, investigation and detection of offences;
- endanger the safety of any person;
- damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies relating to, inter alia, taxation.

### **Section 9**

Withholding of the information requested is necessary to:

- protect the privacy of natural persons;
- avoid unreasonable prejudice to the commercial position of the person who supplied or is the subject of the information;
- protect information which is subject to an obligation of confidence, where disclosure would be likely to prejudice the supply of similar information, which supply is in the public interest;
- avoid prejudice to the substantial economic interests of New Zealand;
- maintain the constitutional conventions which protect, for example, collective and individual ministerial responsibility, the political neutrality of officials and the confidentiality of advice tendered by Ministers and officials;
- maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers, or employees of any department in the course of their duty;
- maintain legal professional privilege;
- enable a Minister or any department to carry on, without prejudice or disadvantage, negotiation.

The reasons for refusal contained in section 9 are subject to the public interest. They will not provide good reason to withhold information, where the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

### **Section 18**

The information requested may be withheld if:

- the making available of the information requested would be contrary to the provisions of a specified enactment;
- the information requested is or will soon be publicly available;
- the information requested cannot be made available without substantial collection or research;
- the information requested is not held by the department;
- the request is frivolous or vexatious or that the information requested is trivial;

### **Section 27**

(Reasons for refusal of requests for personal information by bodies corporate)

- disclosure would prejudice the interests protected by section 6(a) to (d), section 7 or section 9(2)(b);
- disclosure would involve the unwarranted disclosure of the affairs of another person or of a deceased person;
- disclosure would breach legal professional privilege;
- the request is frivolous or vexatious or the information requested is trivial.

Section 52 of the Official Information Act states that the Official Information Act does not override a provision in another Act that imposes a prohibition or restriction in relation to the availability of information.

### **Privacy Act 1993**

The purpose of the Privacy Act 1993 is to promote and protect individual privacy.

The Information Privacy Principles contained in section 6 set out the rules for the collection, use, access to and disclosure of information relating to individuals by public and private sector agencies.

Inland Revenue is subject to those Information Privacy Principles. Principle 6 provides that where an agency holds personal information in a form that is readily retrievable, individuals are entitled to have access to information relating to them.

An agency may refuse to disclose information requested in certain circumstances. Reasons for refusal to supply information are contained in sections 27, 28 and 29. The following reasons to withhold information are particularly relevant to Inland Revenue.

#### **Section 27**

- disclosure would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;
- disclosure would endanger the safety of any individual;

#### **Section 29**

- disclosure would involve the unwarranted disclosure of the affairs of another individual or a deceased individual;
- disclosure would breach legal professional privilege;
- the request is frivolous or vexatious, or the information requested is trivial;
- the information requested is not readily retrievable;
- the information requested is not held by the department and the person responding to the request has no grounds for believing that the information is either held by another agency or connected more closely with the functions or activities of another agency.

Section 7 of the Privacy Act states that Information Privacy Principles 6 and 11 do not override a provision in another Act that imposes a prohibition of restriction in relation to the availability of information.

#### **Tax Administration Act 1994**

Section 81(1) requires all officers of Inland Revenue to maintain secrecy in respect of all matters relating to the Inland Revenue Acts. It also provides that officers of Inland Revenue shall not communicate any such matters to any person during or after their employment except *“for the purpose of carrying into effect”* the Inland Revenue Acts or the other Acts listed in this subsection. This exception is referred to as the general exception.

Section 81(4) lists a number of specific instances where the Commissioner may disclose information.

Under section 81(4)(l) the Commissioner may provide information to a person from whom or in relation to whom such information is held or was obtained. The information must be readily available and the Commissioner must consider it reasonable and practicable to release the information.

#### **Child Support Act 1991**

Section 240 of the Child Support Act deals with secrecy of child support and other revenue matters. The Child Support Act is an Inland Revenue Act and as such, section 240 needs to be read in conjunction with the secrecy provisions in the Tax Administration Act.

Section 240(2) contains communications, which are deemed to be communications of matters made for the purpose of carrying into effect the provisions of the Child Support Act. Under certain circumstances communication of information is allowed to the police, the qualifying custodian, the recipient of spousal maintenance, the chief executive of the department for the time being responsible for the administration of the Social Security Act 1964 and the chief executive of the Department for Courts.

#### **Discussion**

Information held by Inland Revenue may be requested orally or in writing by any of the following:

- a New Zealand citizen;
- a permanent resident in New Zealand;
- a person who is in New Zealand;
- a body corporate incorporated in New Zealand;
- a body corporate incorporated outside New Zealand which has a place of business in New Zealand.

The nature of the information being requested and the identity of the requester will determine the Act under which the request is to be considered. The request need not refer to the Act.

If the request is made by or on behalf of a natural person for information about that person it will be considered under the Privacy Act. All other requests, including requests for information relating to another person or requests from bodies corporate for information about themselves, will be considered under the Official Information Act.

The provisions in the Official Information Act and Privacy Act do not derogate from the secrecy provisions contained in the Tax Administration Act. If the Tax Administration Act precludes the disclosure, the reason for the refusal must be one of the reasons stipulated in sections 6, 7, 9, 18 or 27 of the Official Information Act or sections 27, 28 or 29 of the Privacy Act.

The Tax Administration Act contains exceptions to the obligation of secrecy. In particular sections 81(1) and 81(4).

### **Section 81(1)**

This exception provides for disclosure where this is considered necessary to carry into effect the Acts referred to in this section. This exception will apply whether it is officers of the department or third parties carrying into effect the Acts. The Court of Appeal in *Knight v CIR* [1991] 2 NZLR 30 has held that the carrying into effect of the Inland Revenue Acts must include their proper implementation or administration. It is not confined to the collection of revenue and therefore careful consideration, on a case by case basis, must be given to all duties and responsibilities of officers under the Inland Revenue Acts.

Section 81 requires a restrictive approach by the Commissioner to releasing taxpayer information to other persons. In practice this will mean the stringent application of the secrecy provision when a request is made for information about another taxpayer's affairs. Section 6 of the Tax Administration Act reinforces the right of taxpayers to have their individual affairs kept confidential.

### **Section 81(4)**

This subsection lists a number of instances where the Commissioner may release information. Most importantly, under paragraph (l) the Commissioner is permitted to provide information in the Commissioner's possession to a person from or on behalf of or in relation to whom that information is held or was obtained, provided that the person making the request is either the person concerned, their legal representative, or their agent authorised in writing (or authorised in such other manner as the Commissioner prescribes).

Section 81(4)(l) also stipulates that the information must be readily available and that the Commissioner must consider it reasonable and practicable to release the information.

If, in order to comply with the request, a substantial amount of work would be involved in locating, extracting and collating the requested information, it may be that the information is not readily available and can be refused in terms of section 18(c)(i) of the Official Information Act or s27(1)(c) of the Privacy Act.

Pursuant to section 81(4)(l), information about a person will be released upon request to that person unless there are good reasons to withhold that information under either the Official Information Act (for bodies corporate) or the Privacy Act (for individuals). The facts and the surrounding circumstances of each case must be carefully considered.

There are times when personal information would not be given to a taxpayer or an agent. These include the following examples:

- once Inland Revenue has advised that a tax investigation is to commence and disclosure would prejudice the effective conduct of the investigation;
- when the information requested would disclose the identity of a person who has supplied information to Inland Revenue on the basis of confidentiality;
- when the information requested would disclose particular targeting or investigation techniques and selection criteria which, if disclosed, would prejudice Inland Revenue's ability to investigate in the future.

In these cases a request may be refused in terms of section 27(1)(c) of the Privacy Act (for individuals) or section 27(1)(a) of the Official Information Act (for bodies corporate).

### **Providing reasons for decisions and access to internal rules affecting decisions**

Sections 22 and 23 of the Official Information Act provide a right of access to internal rules affecting decisions and to reasons for decisions affecting a person in their personal capacity. Together these sections identify that where persons are affected in their personal capacity by a decision or recommendation of Inland Revenue, they are entitled to know about the applicable rules and policies. They are also entitled to receive adequate information about why the decision or recommendation came to be made.

Compliance with these sections will promote the accountability of Inland Revenue by enabling decision-making processes to be more transparent and understandable to the people they affect.

Where section 81 of the Tax Administration Act applies and secrecy is required, access to information can be refused under section 6(c) of the Official Information Act because disclosure would prejudice the maintenance of the law, namely the proper operation of section 81 of the Tax Administration Act.

## Standard Practice

### ***Receiving a request***

Requests can be received orally or in writing. However, it may be appropriate for Inland Revenue to ask the requester to submit their request in writing to reduce any opportunity for misunderstandings.

Requests for official information are required to be "specified with due particularity". This means that Inland Revenue must be able to identify the information being sought. If a request is so general in nature that it is impossible to identify the nature of the information sought, it is reasonable for Inland Revenue to ask the requester to be more specific.

The fact that a request is for a large amount of information does not in itself mean that the request lacks due particularity.

In respect of requests for all personal information held about the requester, it is reasonable for Inland Revenue to seek clarification as to whether the requester wishes to be supplied with copies of material that has already passed between the requester and Inland Revenue.

Inland Revenue is required to provide reasonable assistance to persons requesting information. Where the requested information is not held by Inland Revenue but believed to be held by another Government agency or Minister, Inland Revenue is required to transfer the request within 10 working days.

### ***Responding to the request***

In all cases information will be released upon request unless there are good reasons to withhold that information under either the Official Information Act or the Privacy Act.

#### ***Timeframe***

Both the Official Information Act and the Privacy Act place an obligation on Inland Revenue to make a decision as to whether the information requested will be released as soon as practicable, and in any case within 20 working days after the day on which the request is received. Therefore, any request for the release of information will be dealt with as a matter of urgency.

#### ***Extension of time***

Inland Revenue will write to the requester extending the timeframe if the request involves a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of Inland Revenue or where consultation is necessary in order to make a decision on the request. If the requester is dissatisfied with the extension of time, they can seek a review by the Ombudsman or Privacy Commissioner.

A response to a request made under the Official Information Act or Privacy Act will include:

- a repeat of the original request;
- a reference to the Act the request has been considered under;
- Inland Revenue's decision on the request;
- the reason for refusal where Inland Revenue has refused the request in whole or in part;
- the requester's right to seek an investigation and review by the Ombudsmen, or Privacy Commissioner of the decision, or have the decision reviewed by a review officer who reports directly to the Commissioner of Inland Revenue in case of a refusal.

### ***Charging***

The Official Information Act permits charging for the supply of official information. Inland Revenue will consider charging when considerable departmental resources will be required to satisfy the request.

If Inland Revenue intends to charge for providing the information, an interim letter will be issued detailing the proposed charge and whether whole or part payment is required before the information will be released.

In line with State Services Commission guidelines and practice by other government departments, Inland Revenue's policy is not to impose charges on Members of Parliament and parliamentary research units.

Inland Revenue will not charge a natural person for the supply of personal information about that person.

### ***Deletion of information from documents***

Where the information requested is contained in a document and there is good reason for withholding some of the information contained in that document, the other information in that document will be made available by making a copy of the document with the necessary deletions clearly identified in the document.

This Standard Practice Statement was signed by me on 11 September 2001.

**Margaret Cotton**

National Manager  
Technical Standards

## LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, the Court of Appeal and the Privy Council.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision. Where possible, we have indicated if an appeal will be forthcoming.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

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## WHETHER TRUST'S PURPOSES WERE CHARITABLE

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**Case:** *(Latimer & Ors for the) Crown Forestry Rental Trust v CIR*  
**Decision date:** 7 August 2001  
**Act:** Income Tax Act 1976  
**Keywords:** *Charitable status*

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### Decision

O'Regan J held that the Trust had two purposes, only one of which was charitable (assisting Maori claimants) so that it was not entitled to tax exemption under section 61(25).

He accepted the Commissioner's submission that the Trust's stakeholder role of retaining and investing capital funds was different from the "receive and hold" obligation of other trusts, that therefore it was a purpose and not just an administrative power, that it was not a purpose ancillary only to its other purpose, and that it was non-charitable.

### Summary

O'Regan J found in favour of the Commissioner.

### Facts

On 20 July 1989 the Crown, the New Zealand Maori Council, and the Federation of Maori Authorities Inc executed an agreement to provide for the terms and conditions upon which the Crown would sell existing tree crops on Crown forestry land to commercial purchasers together with a licence to use the land on an ongoing basis. The rent payable by each purchaser was to be put in a fund administered by a rental trust. The interest earned by the investment of the rent was to be made available to assist Maori making claims involving land before the Waitangi Tribunal.

The Crown Forestry Rental Trust ("the Trust") was established in 1989. Under clause 2.1 of its Trust Deed it is stated as being established to:

- (a) Receive the Rental Proceeds from the Licences;
- (b) Make the interest, earned from investment of those Rental Proceeds, available to assist Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, Licensed Land.

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# SALE OF BUSINESS PACKAGES – WHETHER DISPUTANTS ENTITLED TO GST INPUT CREDIT ON SECONDHAND GOODS; WHETHER COMMISSIONER ESTOPPED FROM REASSESSMENT

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**Case:** TRA Number 003/00, 016/00 and 017/00. Decision Number 007/01

**Decision date:** 9 August 2001

**Act:** Goods and Services Tax Act 1985, Income Tax Act 1994

**Keywords:** *Legitimate expectation; secondhand goods; deemed dividends*

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An investigating officer was assigned to review the case in late 1996, and after discussing several unrelated matters with ABC's accountant, was alerted to the business package sales. A decision was made to expand the review to cover the GST input credit refund, and after further consideration the matter was referred to the Adjudication Unit which concluded that the input tax credit was not available and a reassessment was issued.

## Summary

The Taxation Review Authority found for the Commissioner on the GST issue and for the disputants on the deemed dividend issue.

The consideration paid by ABC was by way of credit to the shareholder-vendors' current accounts. As part of the above review, the value of the business packages was also considered, and an expert valuation was undertaken. As a result of this valuation, it was determined that Mr A and Mr B were liable to tax on a deemed dividend under section 4(1)(a) and/or (d) of the Income Tax Act 1976 (ITA), in respect of the amount by which the payment exceeded the value of the package supplied.

## Facts

There are three disputants in this case—ABC Limited ("ABC"), Mr A, and Mr B. Both Mr A and Mr B are directors and shareholders of ABC.

## Decision

### *Legitimate Expectation*

Mr A and Mr B wished to develop ideas through ABC. The ideas were a low cost housing scheme and a group and corporate travel scheme respectively. In order to safeguard against the proprietor of the idea leaving ABC and taking the idea to another entity, ABC's accountant suggested that each of the shareholders enter formal agreements between themselves and ABC regarding their ideas. The object of the agreement was to make it clear, and legally binding, that ABC owned the intellectual property that it was setting out to develop, rather than the original proprietor.

Apart from the questions relating to the GST refund and the deemed dividend, there was also a dispute as to whether the Commissioner was in some way estopped from issuing his reassessment of the GST refund because ABC had a legitimate expectation that it could rely upon the earlier assessment allowing the refund. The Commissioner contended that ABC was prevented from raising that matter in argument because the question was not raised in ABC's Statement of Position.

In connection with this, the "business packages" were sold by the vendor owners to ABC. The same basic contract was used with necessary modifications for each package; the basic contract drafting was done by Mr B. The low-cost housing package was sold for \$750,000, and the group and corporate travel plan for \$275,000.

Judge Willy noted that there was no express mention of the matter anywhere in ABC's Statement of Position, and its only option then was to rely upon an inference which it sought to have drawn from a particular passage in an attachment to its Statement of Position. His Honour was satisfied that such an inference could not be drawn.

It was in respect of these sales that ABC made a second-hand goods GST input claim, based on the amount of the contract price. The Inland Revenue was invited to review the transactions, and an officer of the Department went to ABC's premises. The transactions were approved, and the input claims allowed on 28 February 1996.

He then went on to consider whether the Authority should exercise its jurisdiction under section 138G(2) of the Tax Administration Act 1994 (TAA) and allow ABC to argue the new material. This discretion is expressly limited by two cumulative requirements, and, after noting that the matter could easily have been raised in ABC's Statement of Position had it exercised due diligence in preparing it, His Honour declined to allow the matters to be raised.

Judge Willy did, however, go on to record his findings in respect of this issue, in case he was wrong in exercising his discretion that way. After traversing Counsels' submissions on the point, along with the leading cases, His Honour observed that the Commissioner "cannot be precluded from carrying out his statutory function of correctly assessing the GST liability of a given taxpayer" and was accordingly satisfied on the facts that ABC's arguments as to legitimate expectation and estoppel must fail.

### **GST Input Claim**

In determining whether the packages sold to ABC were second-hand goods such as to give rise to an input credit, His Honour considered in some detail the term "second-hand goods". It was accepted by Counsel for the Commissioner that the packages were not within any of the exceptions to the definition of second-hand goods, but beyond that recourse needed to be had to the ordinary meaning of the words. His Honour noted that the term was a composite one, of which both aspects must be satisfied by ABC.

His Honour turned first to "goods", and, after considering the definition in section 2 of the GST Act 1985 ("...all kinds of personal or real property..."), went on to consider the meaning of the word "property". He accepted that the definition of property did not include "mere information, confidential or otherwise".

It was submitted for the Commissioner that, to the extent that the business packages comprised "information", the supply of that information would not constitute the supply of property and thus would not be the supply of goods.

After considering the entry in Garrow and Fentons *Law of Personal Property in New Zealand*, along with Salmond's work on jurisprudence, Judge Willy concluded that:

"both the content of the documents evidencing the two concepts and the rights to exploit the concepts themselves, are capable of being described as property and therefore satisfy the definition of what constitutes goods in section 2"

His Honour distinguished *FCT v United Aircraft Corporation* to find that what was transferred in both instances was not merely knowledge, but the right to use the knowledge exclusively for the term of the agreement (for the low-cost housing scheme), as well as an obligation to provide physical assistance and copyright entitlements (for group and corporate travel). His Honour then went on to find that this property was not a chose in action but was "the right to physical possession of the bundle of rights contained in the contracts evidencing the transactions".

As regards whether the goods were second-hand, His Honour discussed various judgments on this point (including *T28* and *McLean v CIR*) and concluded that in applying ordinary English usage it could not be said that the property was second-hand, "there being no evidence that the property ... was used in any way by either of the vendors prior to the sale to the company." The issue was thus disposed of in favour of the Commissioner.

### **Deemed Dividends**

In the relevant part, section 4(1)(a) and (d) of the ITA states that the term "dividends", in relation to any company and any payment made by the company to any person having regard to that person's or any other person's capacity as shareholder in that company, includes credits to a shareholder's current account, and in respect of property acquired from a shareholder of the company, the extent to which consideration provided by the company exceeds the market value of the property.

Judge Willy relied on previous observations made in *Q49* and *Q6* and held that the act of ABC in crediting the vendors with the amount of the purchase price constituted a payment to the shareholder-vendors.

The next question which arose was whether those payments were made "having regard to that person's or any other person's capacity as shareholder in that company". The test for this is contained in section 4(1)(a) of the ITA, which requires a disputed payment to be tested against similar payments made to persons unconnected with the company.

Having already made findings of fact at some length relating to the bona fides of the transactions, and having held that the transactions were conducted truly at arm's length, His Honour was satisfied that "an honest commercial evaluation was made of the value of each of the concepts to the company and therefore indirectly its contributors." Judge Willy found it of some importance that the purchase price in each case differed significantly and was, therefore, "not satisfied that ... the transactions were on terms which were different from those which would have [been] obtained in the case of persons who were 'neither shareholders in the company nor connected with shareholders in the company'."

The matter was disposed of in favour of Mr A and Mr B, and His Honour did not go on to consider the questions of market price or true value.

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## WHETHER COMMISSIONER'S REASSESSMENT OF GST RETURN WAS PROCEDURALLY VALID

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**Case:** *PLM Software Limited v CIR*  
**Decision date:** 10 August 2001  
**Act:** Judicature Amendment Act 1972  
**Keywords:** *Judicial Review*

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### Summary

The Plaintiff was unsuccessful in its challenge to the Commissioner's procedure.

### Facts

The Plaintiff company filed a GST return for the period ending 30 April 1996. After reviewing the return, the Commissioner accepted that a GST refund was due and issued a cheque for the refund. On 30 January 1998 the Commissioner decided to review the return, and issued a NOPA in which he proposed to cancel the refund.

On 29 February 2000 the Commissioner issued a second NOPA raising one further issue (sham), and on 28 April 2000 the plaintiff filed a response. Also on 28 April 2000 the Commissioner advised the taxpayer of his intention to reassess on five of the nine grounds contained in the February NOPA. The remaining four grounds, including sham, were abandoned. As the statute bar was to take effect from 1 May 2000, the challenged assessment was also issued.

The Plaintiff sought judicial review, alleging that the Commissioner's action in purporting to reassess the plaintiff for GST for this period was invalid for failure to comply with the statutory disputes procedure as provided by Part IVA of the Tax Administration Act 1994 (TAA). In short, the Plaintiff's case was that the Commissioner must, prior to making an assessment, have issued a NOPA, received a NOR, held a conference, issued a disclosure notice and SOP, and then referred the matter to adjudication.

The Commissioner submitted that the only mandatory step under the legislation was to issue a NOPA, and that had been done.

### Decision

In deciding the matter, Heron J felt that it should be approached "on a basis which does not confine itself to the words of the various sections which go to make up [Part] IVA, but as a matter of broad taxation principle".

His Honour noted that section 114 of the TAA, which states that the validity of an assessment shall not be affected by reason that any of the provisions of the Inland Revenue Acts have not been complied with, seemed to "cut the ground completely from under the Plaintiffs".

Putting that aside, he then went on to observe that the disputes procedures were somewhat flexible, and that failure to arrange a conference, for example, would not seem to be the sort of procedural error that would give rise to invalidity. The conference stage, although required under the procedures set out in a chart published in the Commissioner's *TIB*, was not a statutory requirement.

After considering a further example of this nature, His Honour observed that while there was some weight in the plaintiff's complaint that proceeding straight to the assessment meant neither of the parties has clarified the facts, evidence, issues or propositions of law up to that point:

"the decision not to follow the procedure was to protect the limitation point and it would seem that by agreement or in any event the Part IVA procedure could be revived and continue. Obviously it would need agreement on both sides but I do not see that as impossible in the circumstances."

Heron J also relied on *Abbatis Properties Ltd*, which he found supplied the key to this case—for the protection of time limitation an assessment may be issued notwithstanding that other dispute procedures are in place. In most cases the Commissioner would act in accordance with the dispute procedures, and assessing in the face of a time limitation "does not in a real sense prevent the taxpayer from getting a fair hearing or favourable decision".

As far as the legislative history to Part IVA was concerned, His Honour did not find anything in it to support disturbing the power of assessment conferred on the Commissioner, and noted that the reforms were "remedial in nature but not such as to challenge validity in my mind".

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## WHETHER THERE WAS SALE OF A GOING CONCERN FOR THE PURPOSES OF THE GOODS AND SERVICES TAX ACT; WHETHER COMMISSIONER ENTITLED TO AN EXTENSION OF TIME FOR FILING APPEAL

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**Case:** *CIR v Fatac Limited (in Liquidation)*  
**Decision date:** 22 August 2001  
**Act:** Goods and Services Tax Act 1985  
**Keywords:** *Going concern; Extension of time; Proof of debt*

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The Commissioner filed a Notice of Appeal. The appeal was filed by way of case stated. A subsequent judgment (*CIR v Dick and Anor* [2000] 19 NZTC 15,849) held that to be the wrong procedure for appeals. The Commissioner filed a fresh notice of appeal and an application to extend the time for filing the appeal.

### Summary

The Commissioner was successful. Heron J found that there was a sale of a going concern but there was no written agreement for the purpose of section 11(1)(c)(ii) of the Goods and Services Tax Act 1985.

On the basis of the Taxation Review Authority's decision the liquidator rejected the Commissioner's proof of debt for the GST. The liquidators' notice advising the Commissioner was not challenged until some months later. The Commissioner then applied for orders to review the liquidators' decision and for an extension of time within which to make the application.

### Facts

On 1 July 1996 the Disputant entered into an agreement for the sale of a property. The property was sold subject to a licence to a third party, evidenced by an agreement dated 30 April 1991, permitting it to operate a quarry on the land. The agreement was conditional upon the purchaser reaching an agreement with the third party over some of the quarrying conditions. Following settlement a new licence agreement was entered into.

Both vendor and purchaser were registered for GST. The agreement provided that the purchase price was "inclusive of GST (if any)". The words "plus GST (if any)" were deleted, and the agreement provided that only if both possibilities were deleted then "the purchase price includes GST (if any)".

The purchasers claimed a GST refund, which was accepted by the Commissioner, and the Commissioner then sought the disputant for output tax. The liquidator of the company disputed this assessment and the Taxation Review Authority found in the Disputants' favour.

The Taxation Review Authority found that the relevant taxable activity was quarrying and that the goods and services necessary for the continued operation of that activity had been supplied. The Authority also found that the agreement contained the required agreement in writing for the supply of a going concern.

### Decision

The relevant taxable activity was the licensing of land and not quarrying as found by the Taxation Review Authority.

The licence between the vendor and the third party had not been transferred on settlement.

Hansen J held that there was a licence and not a lease. Had a lease been assigned to the purchaser, the goods and services necessary for the continued operation of the taxable activity would have been supplied. It also has relevance to the issue of whether the parties agreed that there had been a supply of a going concern.

Three things are required for the supply of a going concern:

- (i) There be a supply of the whole or part of a taxable activity which is capable of separate operation; and
- (ii) All goods and services necessary for the continued operation of the activity are supplied; and
- (iii) The supplier has carried on the activity up until time of transfer.

It was held that all three requirements were satisfied. Hansen J stated that the cases confirm that the critical issue is not whether the purchaser carries on the activity transferred but whether it is capable of being carried on at the time of transfer. He held that there was a supply of the taxable activity and of the goods and services necessary for its continued operation.

The agreement between the vendor and the purchaser made possible the continuation of the taxable activity. The fact it would be operated on somewhat different terms following settlement did not affect this position.

Hansen J stated that the supplier and recipient must agree that the supply is of a going concern and this must be evidenced expressly. He held that the Taxation Review Authority was wrong to find that the vendor and purchaser had agreed in writing that there had been supply of a going concern. Accordingly, there was a sale of a going concern, namely the taxable activity of supplying land for the purpose of quarrying, but that it was not agreed by the parties for the purpose of section 11(1)(c)(ii).

Justice Hansen held that there could be no real opposition to the application for an extension of time as there was no prejudice to the disputant caused by the delay and the merits of the appeal favoured the grant of the extension.

It was stated that the Commissioner's application for an order to review the liquidators' decision to refuse his proof of debt for the GST was premature. Section 304(3) of the Companies Act 1993 provides that if a liquidator subsequently considers that a claim has been wrongly admitted or rejected in whole or in part, he may revoke or amend that decision. Accordingly the Commissioner can invite the liquidator to reconsider his decision to reject the claim in the light of the outcome of the substantive appeal.

It was further held that there was a limit of time prescribed to make an application for an order to review and no rights to extend could be read into it.

## REGULAR FEATURES

### DUE DATES REMINDER

#### October 2001

5 **Employer deductions and Employer monthly schedule**

Large employers (\$100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

23 **Employer deductions**

Large employers (\$100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*

**Employer deductions and Employer monthly schedule**

Small employers (less than \$100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

**FBT return and payment due**

31 **GST return and payment due**

#### November 2001

5 **Employer deductions and Employer monthly schedule**

Large employers (\$100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

7 **Provisional tax instalments due for people and organisations with a March balance date**

20 **Employer deductions**

Large employers (\$100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*

**Employer deductions and Employer monthly schedule**

Small employers (less than \$100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

30 **GST return and payment due**

*These dates are taken from Inland Revenue's Smart business tax due date calendar 2001–2002*



## YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft public binding rulings, interpretation statements, standard practice statements, and other items that we now have available for your review. You can get a copy and give us your comments in these ways:

**By post:** Tick the drafts you want below, fill in your name and address, and return this page to the address below. We'll send you the drafts by return post. Please send any comments *in writing, to the address below*. We don't have facilities to deal with your comments by phone or at our other offices.

**By internet:** Visit [www.ird.govt.nz/promotion/draftitems.html](http://www.ird.govt.nz/promotion/draftitems.html) and click on the drafts that interest you under the "Think about the issues" heading. You can return your comments by the internet.

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### **Draft Standard Practice Statements**

### **Comment deadline**

- |                          |   |                 |
|--------------------------|---|-----------------|
| <input type="checkbox"/> | <b>ED0022:</b> Timeliness in resolving tax disputes | 1 November 2001 |
| <input type="checkbox"/> | <b>ED0024:</b> Six-monthly GST return threshold     | 1 November 2001 |

*Items are not generally available once the comment deadline has passed*

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