TAX INFORMATION BULLETIN

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Inland Revenue
Te Tari Taake

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This *Tax Information Bulletin* is also available on the internet in PDF. Our website is at **www.ird.govt.nz**

It has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

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THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

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 items are available for review or comment this month, with a deadline of 27 February 2004.

Ref.	Draft type	Description
PU0034	Public ruling	"Anything occurring upon liquidation" when a company requests removal from the register of companies
PU0081	Public ruling	FBT and motor vehicle multi-leases

Please see page 65 for details on how to obtain a copy.

Ref.	Draft type	Description
DDG0094	General depreciation	Outboard motors

Please see page 55 for the text of this draft.

The following draft items are available for review or comment this month, with a deadline of 16 February 2004.

Ref.	Draft type	Description
ED0049	Operational statement	GST treatment of mortgagee sales
ED0055	Standard practice statement	Promoter penalties—applying promoter penalties to promoters of arrangements involving abusive tax positions

Please see page 65 for details on how to obtain a copy.

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 from our website at **www.ird.govt.nz**

Note (not part of the rulings):

These rulings deal with the ability of a registered person to claim a GST input tax credit on the purchase of fishing quota or a marine farming authorisation from an unregistered person. It was considered appropriate to issue four separate rulings given the different nature of the different marine farming authorisations and fishing quota. However, a single commentary applies to all four of the rulings.

FISHING QUOTA AND SECONDHAND GOODS INPUT TAX CREDITS

PUBLIC RULING – BR PUB 03/07

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 section 20(3) and the definitions of "goods" and "secondhand goods" in section 2, and the definition of "input tax" in section 3A of the Act.

Definitions

For the purposes of this ruling

"Fishing quota" means:

(a) Individual Transferable Quota which has been granted under the Fisheries Act 1983; or

(b) Individual Transferable Quota which has been granted under the Fisheries Act 1996.

The Arrangement to which this Ruling applies

The Arrangement is the supply of fishing quota. The supply of the fishing quota must satisfy the following conditions:

1. The supply by the vendor is a supply made by way of sale.
2. The supply is not a taxable supply.
3. The supply is made to the purchaser, who is a registered person.
4. The fishing quota is situated in New Zealand at the time of supply.
5. The fishing quota is acquired for the principal purpose of making taxable supplies.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- Fishing quota is not "goods" in accordance with the definition of that term in section 2 of the Act. As a result, fishing quota will not constitute "secondhand goods" for the purposes of the Act.
- The purchaser of such fishing quota will not be entitled under section 20(3) to deduct from the amount of output tax payable in a taxable period any amount of input tax in respect of the supply of the fishing quota.

The period for which this Ruling applies

This Ruling applies to a supply of fishing quota where the time of the supply occurs within three years from the date on which this Ruling is signed.

This Ruling is signed by me on the 12th day of November 2002.

Martin Smith
General Manager (Adjudication & Rulings)

MARINE FARMING LEASES AND SECONDHAND GOODS INPUT TAX CREDITS

PUBLIC RULING – BR PUB 03/08

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 section 20(3) and the definitions of "goods" and "secondhand goods" in section 2, the definition of "associated persons" in section 2A of the Act, and the definition of "input tax" in section 3A of the Act.

Definitions

For the purposes of this ruling, **"marine farming lease"** means a marine farming lease granted under the Marine Farming Act 1971.

The Arrangement to which this Ruling applies

The Arrangement is the supply of a marine farming lease. The supply of the marine farming lease must satisfy the following conditions:

1. The supply by the vendor is a supply made by way of sale.
2. The supply is not a taxable supply.
3. The vendor used the marine farming lease to carry on the marine farming activity specified in the marine farming lease.
4. The supply is made to the purchaser, who is a registered person.
5. The marine farming lease is situated in New Zealand at the time of supply.
6. The marine farming lease is acquired for the principal purpose of making taxable supplies.
7. The purchaser maintains sufficient records as required by section 24(7) of the Act.
8. The vendor and the purchaser are not associated persons under the Act.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

1. If the marine farming lease satisfies the following two factors:
    - the marine farming lease defines the area subject to the lease by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan; and
    - the legal effect of the marine farming lease is that the seabed is not excluded from the area leased,

    then:

    - the marine farming lease is "goods" in accordance with the definition of that term in section 2 of the Act.
    - as the vendor has used the marine farming lease for its intrinsic purpose before the sale to the purchaser, the marine farming lease will constitute "secondhand goods" for the purposes of the Act.
    - the purchaser of such a marine farming lease will be entitled under section 20(3) to deduct from the amount of output tax payable in a taxable period the amount of input tax being the tax fraction of the consideration payable for the supply of the marine farming lease to the extent that payment has been made for that supply in that taxable period.
2. If the marine farming lease does not satisfy one or both of the following two factors:
    - the marine farming lease defines the area subject to the lease by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan; and

- the legal effect of the marine farming lease is that the seabed is not excluded from the area leased,

then:

- the marine farming lease is not "goods" in accordance with the definition of that term in section 2 of the Act. As a result, the marine farming lease will not constitute "secondhand goods" for the purposes of the Act.
- the purchaser of the marine farming lease will not be entitled under section 20(3) to deduct from the amount of output tax payable in a taxable period any amount of input tax in respect of the supply of the marine farming lease.

The period for which this Ruling applies

This Ruling applies to a supply of a marine farming lease where the time of the supply occurs within three years from the date on which this Ruling is signed.

This Ruling is signed by me on the 12th day of November 2003.

Martin Smith
General Manager (Adjudication & Rulings)

MARINE FARMING LICENCES AND SECONDHAND GOODS INPUT TAX CREDITS

PUBLIC RULING – BR PUB 03/09

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 section 20(3) and the definitions of "goods" and "secondhand goods" in section 2, the definition of "associated persons" in section 2A of the Act, and the definition of "input tax" in section 3A of the Act.

Definitions

For the purposes of this ruling, **"marine farming licence"** means a marine farming licence granted under the Marine Farming Act 1971.

The Arrangement to which this Ruling applies

The Arrangement is the supply of a marine farming licence. The supply of the marine farming licence must satisfy the following conditions:

1. The supply by the vendor is a supply made by way of sale.
2. The supply is not a taxable supply.
3. The vendor used the marine farming licence to carry on the marine farming activity specified in the marine farming licence.
4. The supply is made to the purchaser, who is a registered person.
5. The marine farming licence is situated in New Zealand at the time of supply.
6. The marine farming licence is acquired for the principal purpose of making taxable supplies.
7. The purchaser maintains sufficient records as required by section 24(7) of the Act.
8. The vendor and the purchaser are not associated persons under the Act.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

1. If the marine farming licence satisfies the following two factors:

    - the marine farming licence defines the area subject to the licence by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan, and
    - the legal effect of the marine farming licence is that the seabed is not excluded from the area licensed,

    then

    - the marine farming licence is "goods" in accordance with the definition of that term in section 2 of the Act.
    - as the vendor has used the marine farming licence for its intrinsic purpose before the sale to the purchaser, the marine farming licence will constitute "secondhand goods" for the purposes of the Act.

- the purchaser of the marine farming licence will be entitled under section 20(3) to deduct from the amount of output tax payable in a taxable period the amount of input tax being the tax fraction of the consideration payable for the supply of the marine farming licence, to the extent that payment has been made for that supply in that taxable period.

2. If the marine farming licence does not satisfy one or both of the following two factors:

   - the marine farming licence defines the area subject to the licence by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan, and
   - the legal effect of the marine farming licence is that the seabed is not excluded from the area licensed,

   then

   - the marine farming licence is not "goods" in accordance with the definition of that term in section 2 of the Act. As a result, the marine farming licence will not constitute "secondhand goods" for the purposes of the Act.
   - the purchaser of the marine farming licence will not be entitled under section 20(3) to deduct from the amount of output tax payable in a taxable period any amount of input tax in respect of the supply of the marine farming licence.

The period for which this Ruling applies

This Ruling applies to a supply of a marine farming licence where the time of the supply occurs within 3 years from the date on which this Ruling is signed.

This Ruling is signed by me on the 12th day of November 2003.

Martin Smith
General Manager (Adjudication & Rulings)

COASTAL PERMITS, CERTIFICATES OF COMPLIANCE, MARINE FARMING PERMITS, AND SECONDHAND GOODS INPUT TAX CREDITS

PUBLIC RULING – BR PUB 03/10

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 section 20(3) and the definitions of "goods" and "secondhand goods" in section 2, and the definition of "input tax" in section 3A of the Act.

Definitions

For the purposes of this ruling:

"Marine farming permit" means a marine farming permit granted under the Fisheries Act 1983.

"Coastal permit" means a resource consent in the form of a coastal permit granted under the Resource Management Act 1991.

"Certificate of compliance" means a certificate of compliance granted under the Resource Management Act 1991.

The Arrangement to which this Ruling applies

The Arrangement is the supply of a marine farming permit in conjunction with either:

- a coastal permit, or
- a certificate of compliance.

The supply of the marine farming permit in conjunction with a coastal permit or a certificate of compliance must satisfy the following conditions:

1. The supply by the vendor is a supply made by way of sale.
2. The supply is not a taxable supply.
3. The supply is made to the purchaser, who is a registered person.
4. The marine farming permit and associated coastal permit or certificate of compliance are situated in New Zealand at the time of supply.

5. The marine farming permit and associated coastal permit or certificate of compliance are acquired for the principal purpose of making taxable supplies.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- A marine farming permit and associated coastal permit or certificate of compliance are not "goods" in accordance with the definition of that term in section 2 of the Act. As a result, the marine farming permit and associated coastal permit or certificate of compliance will not constitute "secondhand goods" for the purposes of the Act.
- The purchaser of a marine farming permit and associated coastal permit or certificate of compliance will not be entitled under section 20(3) to deduct from the amount of output tax payable in a taxable period any amount of input tax in respect of the supply of the marine farming permit and associated coastal permit or certificate of compliance.

The period for which this Ruling applies

This Ruling applies to a supply of a marine farming permit in conjunction with a coastal permit or a certificate of compliance where the time of the supply occurs within three years from the date on which this Ruling is signed.

This Ruling is signed by me on the 12th day of November 2003.

Martin Smith
General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULINGS BR PUB 03/07 TO BR PUB 03/10

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Rulings BR Pub 03/07 to BR Pub 03/10 ("the Rulings").

Background

The question being considered is whether a GST input tax credit is available to registered persons who acquire fishing quota or marine farming authorisations from unregistered persons. While this commentary considers both fishing quota and marine farming authorisations, they need to be dealt with separately as there are different statutory requirements for each of them. Before looking at the relevant GST legislation, the nature of both fishing quota and the various types of marine farming authorisations needs to be considered in more detail.

Fishing quota

The fishing quota being considered is individual transferable quota as defined in section 2 of the Fisheries Act 1996. The Fisheries Act 1996 is almost fully in force. Prior to this, the operative legislation was the Fisheries Act 1983. It seems that the majority of fishing quota was allocated under the 1983 Act. The provisions in the 1996 Act relating to the allocation of quota came into force on 1 October 1997, and the registration provisions under the 1996 Act came into effect on 1 October 2001.

The background to the allocation of fishing quota is that it was initially established and allocated in 1986 pursuant to the Fisheries (Quota Management Areas, Total Allowable Catches, And Catch Histories) Notice 1986, which was made under the Fisheries Act 1983. The fishing quota appears to have been allocated based on a person's commercial fishing history and no charge was made for the quota initially allocated. The quota does not provide a "free" right, however, as an annual levy needs to be paid. These levies are typically significant amounts.

While the majority of the fishing quota is held by large organisations, individual fishermen hold some small parcels of fishing quota. Some of these persons may not make supplies in excess of $40,000 in a 12-month period and thus are not required to register for GST under section 51 of the Goods and Services Tax Act 1985. One of these persons may sell their fishing quota to another person who is registered for GST. The question arises for the purchaser as to whether a GST input tax credit can be claimed.

The nature of fishing quota

There is no definitive statement in any of the fisheries legislation as to the nature of fishing quota. "Individual transferable quota" was not defined in the Fisheries Act 1983. While the term is defined in the Fisheries Act 1996, the definition appears to have been added as a means of ensuring that all of the quota allocated under the different Acts and sections of the Acts is regarded as fishing quota for the purposes of the Fisheries Act 1996.

This change in legislation appears to have affected the characteristics that could be ascribed to fishing quota. Under the Fisheries Act 1983, the fundamental rights acquired by the holder of fishing quota (as determined from the legislation) were that the holder of the fishing quota had the right to catch and take away for their own purposes:

- a specified quantity
- of a particular fish species
- from a particular area (the quota management area), and
- in a specific period (in a year, although the quota is issued in perpetuity).

These rights were able to be dealt with in ordinary commercial dealings in that they could be bought and sold, used as security, and it was possible to register interests against the rights.

The nature of fishing quota granted under the Fisheries Act 1983 has been alluded to in a number of court decisions. The Court of Appeal considered the nature of fishing quota in the case of *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* (unreported, CA 82/97, 22 July 1997, Wellington). The case involved the judicial review of a decision made by the Minister of Fisheries to reduce the total allowable commercial catch (TACC) for snapper in quota management area 1. The Court of Appeal made various comments regarding the nature of fishing quota. At page 16 of the Court's judgment, Justice Tipping stated:

> While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions of the legislation establishing them. That legislation contains the capacity for quota to be reduced. If such reduction is otherwise lawfully made, the fact that quota are a "property right", to use the appellants' expression, cannot save them from reduction. That would be to deny an incident integral to the property concerned.

The Court of Appeal confirmed that fishing quota is property, although it provides little in the way of further guidance on its precise nature except to state that its characteristics must be determined from the legislation. Further clarification was provided by Justice Baragwanath in *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23. In dealing with a contractual dispute, he stated that fishing quota is a statutory chose in action (at paragraph 5 of the judgment):

> The root of title is the issue under the quota management system (the QMS) of individual transferable quota (ITQ) which is a statutory chose in action comprising a fraction of the total of exclusive rights to fish commercially a particular species of fish within one of the ten quota management areas into which the exclusive economic zone is divided. Rights to ITQ are codified by the relevant legislation, especially the Fisheries Amendment Act 1986 and the Fisheries Act 1996.

This dicta, while useful, does not fully explain the rights and obligations that arise in relation to fishing quota, particularly in relation to change in the nature of the entitlement under the Fisheries Act 1996. The position under the Fisheries Act 1996 is different to the previous position under the Fisheries Act 1983. One of the major differences in relation to the rights derived by holding fishing quota is the introduction of the concept of an "annual catch entitlement". Instead of the fishing quota providing a right to catch a specified amount of fish, the fishing quota now "generates" an annual catch entitlement on the first day of the fishing year. Fish are now generally caught under the authority of a fishing permit and an annual catch entitlement (there is also a deemed value payment procedure set out in the legislation). For fishing quota holders, the annual catch entitlement is separately tradable, so that for a particular year a quota owner can sell their annual catch entitlement while retaining the fishing quota that will generate another annual catch entitlement the following year. These developments add a further dimension to the nature of fishing quota.

The lack of any in-depth analysis of the nature of fishing quota means that it is necessary to examine the characteristics and rights granted under the fisheries legislation. These can then be compared to recognised categories of property. If they are sufficiently similar, it may be appropriate to conclude that the fishing quota should be regarded as belonging to that particular category. Alternatively, it may be that the most appropriate conclusion is that fishing quota is not sufficiently similar to anything else and must be regarded as a separate category of property.

There have been a number of suggestions as to the nature of fishing quota. The terms "usufruct right" and "profit à prendre" have been suggested as perhaps describing the fishing quota. A further possibility is that the fishing quota might be regarded as the sale of goods coupled with a licence to retrieve the goods. This commentary will consider these possible classifications in the following order:

- Is fishing quota a "usufruct right"?
- Is fishing quota the sale of goods coupled with a licence to remove the goods?
- Is fishing quota a "profit à prendre"?

Usufruct right

The term "usufruct right" is a civil law rather than common law term. As New Zealand's jurisprudence is based on the common law and doctrine of precedent, the term "usufruct right" is largely unknown to New Zealand law. The basis of this term in the civil law as opposed to common law is confirmed by the definition of the word "usufruct" in the *Concise Oxford Dictionary* (9th ed, Clarendon Press, Oxford, 1995) which provides:

> **usufruct** *n*. (in Roman and Scots law) the right of enjoying the use and advantages of another's property short of the destruction or waste of its substance.

A more expansive definition of the term "usufruct" is found in *Black's Law Dictionary* (6th ed, West Publishing Co, 1990):

> In the civil law, a real right of limited duration on the property of another. The features of the right vary with the nature of the things subject to it as consumables or nonconsumables. … The right of using and enjoying and receiving the profits of property that belongs to another, and a "usufructuary" is a person who has the usufruct or right of enjoying anything in which he has no property interest.
>
> …
>
> There are three types of "usufructs": natural profits produced by the subject of the usufruct, industrial profits produced by cultivation, and civil profits, which are rents, freights, and revenues from annuities and from other effects or rights.

The South African case of *Geldenhuys v CIR* (1947) 14 SATC 419 provided a very full judicial consideration of the nature of a usufruct right. The case concerned the assessability of an amount of income that arose from the sale of a flock of sheep. The taxpayer's husband died leaving the taxpayer with a "life interest" in her husband's estate, with their children as the ultimate beneficiaries. The flock of sheep was valued at £1,451 at the date of the husband's death. The flock declined in number after the husband's death due to drought, and a lesser number of sheep were sold for £4,941 some years later. The taxpayer used the proceeds from the sale to invest, purportedly for her own benefit. The Commissioner sought to include the difference in the taxpayer's assessable income.

The taxpayer argued that she was unable to be assessed on this amount as she was only a usufructuary in relation to the sheep. This meant that she only had a right to use the sheep, with no liability for waste due to circumstances beyond her control. She accepted that this also meant that the investment did not belong to her.

Justice Steyn (with whom Herbstein and Ogilvie Thompson AJJ agreed) delivered the leading judgment. In considering the nature of a usufruct right, Justice Steyn made the following observations at page 424:

> According to some authorities, … movables which are consumed or impaired (*consumuntur et minuuntur*) by use cannot be subject to a full and complete usufruct, but they can be made the subject of an incomplete usufruct, a quasi-usufruct. In this class of movables cattle and animals are, according to the authorities, included.

After referring to further texts and commentaries, Steyn J reached the following conclusions at page 428:

> The passages from *Domat* and *Huber* which I have set out above, however, make it clear in my judgment, that with regard to the cattle and other animals to which they refer these authorities hold that the *dominium* remains with the remainderman; the usufructuary, according to the passage from *Huber* cited above having no right to sell or kill them and being obliged to restore them. … The authorities appear to be agreed that the usufructuary is only entitled to the young or progeny over and above the full complement of the flock. The full number of the flock must be maintained, the young replacing the old as they die, but the flock as an entity must be returned
>
> ….

Application to fishing quota

It seems difficult to apply this concept to fish except perhaps in a fish farming situation. The nature of a usufruct right, even if it did apply in a New Zealand context, does not appear to be consistent with the characteristics of fishing quota identified above. A usufruct right is a right to use property without liability for waste. However, under the fishing quota, a person obtains the right to take the relevant fish from the sea and provide these for consumption. The quota owner is under no obligation in relation to all the other fish in the sea. Further, the quota holder does not have to give a school of fish back at the end of the period, although it will obviously be in the quota holder's best interests to manage the fisheries resources to ensure sustainability in accordance with the principles in the Fisheries Act 1996. It is also noted that a usufruct right is typically granted for a finite period, while the fishing quota is granted in perpetuity.

The effect of this is that the characteristics of a usufruct right are not sufficiently similar to the characteristics of fishing quota for there to be any serious possibility that the fishing quota could be a usufruct right.

Sale of goods with a licence

The concept of a sale of goods with a licence refers to a contract for the sale of goods, where a licence is granted to the purchaser to go onto (typically the vendor's) land to get the goods. For instance, an agreement for the right to take trees from a property could be the sale of goods coupled with a licence to enter onto the land and remove the trees. Alternatively, the agreement might constitute a profit à prendre, which will be discussed in more detail below.

The distinction between an agreement for the sale of goods with a licence and a profit à prendre appears to turn on whether the purchaser is obliged to take the trees, or simply may take the trees. This follows from the definition of "goods" in the Sale of Goods Act 1908. The definition provides that goods "includes emblements, growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale". Thus, unless the agreement between the parties requires that the trees shall be severed, the trees will not be goods under the Sale of Goods Act.

If the purchaser ***is obliged*** to take the trees, then the agreement is more likely a contract for the sale of goods coupled with a licence to retrieve the trees, but if the purchaser ***may*** take the trees, then it is more likely to be a profit à prendre.

This issue was addressed by Justice Young in the Supreme Court of New South Wales in *Ellison v Vukicevic* (1986) 7 NSWLR 104. The case concerned the nature of an agreement between a landowner and a quarrying company where in return for the payment of a royalty, the quarrying company was entitled to quarry for sand and sandstone on the landowner's property. In distinguishing between a profit à prendre and a contract for the sale of goods, Justice Young states at page 116:

> Taking all these factors together it seems to me that the document looks more like a profit à prendre than a licence, but I must also look at the distinction between profits and sale of goods.
>
> After a considerable search, it seems to me that the most accurate statement of the law in this connection is provided by *Hinde McMorland Sim* (op cit at 715), where the authors say:
>
> > "… profits à prendre and contracts for the sale of goods are seen as mutually exclusive, the former consist only of contracts relating to fructus naturales or other parts of the realty where the purchaser has merely a right or option to sever, while the latter consist of:
> >
> > (1) All sales of fructus industriales regardless of who is to sever them
> >
> > (2) All sales of fructus naturales or other parts of the realty which are to be severed by the vendor before property passes to the purchaser, and
> >
> > (3) All sales of fructus naturales or other parts of the realty which the purchaser is under a contractual obligation to sever."
>
> Thus if the document puts on the purchaser an obligation to sever there is a contract for the sale of goods including a licence to go onto the land for the purpose of carrying out the contract, but if the purchaser merely has the option to sever then there is a profit à prendre.

In dealing with this issue, Justice Young referred to a statement in *Hinde McMorland & Sim on Land Law* (1978-79). That statement still represents the view of the authors as it is also included in the latest edition of the book *Land Law in New Zealand*, Hinde McMorland & Sim (1997, Butterworths, Wellington). On the basis of this, the key distinguishing feature between a profit à

prendre and a sale of goods coupled with a licence to retrieve the goods is that a profit à prendre only gives rise to an ***option*** to sever and take the goods, while there will be an obligation to take the goods under a contract for sale.

This is consistent with the New Zealand Supreme Court decision in *Egmont Box Company Limited v Registrar General of Lands* [1920] NZLR 741.

Application to fishing quota

In determining whether fishing quota could be regarded as the sale of goods coupled with a licence to remove the fish, assistance can be derived from the Fisheries Act 1983. The fishing quota itself was originally allocated without cost to fishermen based on prior catch histories. In order to exercise the rights under the fishing quota and associated annual catch entitlement, an annual levy is payable. In determining whether fishing quota is the sale of goods coupled with a licence to remove the fish, the key distinction is whether there is an obligation to take the fish, or whether there is merely an option to take the fish. This question appears to be answered by section 28ZC(3) of the Fisheries Act 1983, and the more recent version contained in regulation 4(3) of the Fisheries (Cost Recovery Levies) Order 2000. It provides that the levy is payable by quota holders irrespective of whether or not the fish, aquatic life, or seaweed to which the quota relates is taken.

Given that the levy is payable regardless of whether the fish are caught in relation to the quota, fishing quota should not be regarded as a sale of the fish as there is no obligation to take the fish. It is also noted that the levy charged is for administering the quota management system rather than necessarily being a "price" payable for the fish. Further, the fish are not "made available" either—the quota owner still has to catch the fish. Thus, situations might exist where the quota owner is unable to catch the amount of the particular species for which they have quota, despite having paid the full levy and desiring to catch the fish. The characteristics of fishing quota are more consistent with the quota holder having only a right to catch the fish. Therefore, the terms of the ownership of the fishing quota are inconsistent with it being an agreement for the sale of goods.

Profit à prendre

It is noted at the outset that the concept of profit à prendre has been referred to in relation to fishing quota in other contexts. The Law Commission in its Preliminary Paper No. 9 "The Treaty of Waitangi and Maori Fisheries" (1989, Wellington) referred to fishing quota as being in the nature of a profit à prendre. At paragraph 4.20 of the Preliminary Paper it states:

> In economic terms the ITQ scheme has created a new limited monopoly akin to those arising from other restrictive licensing schemes, such as liquor licences and taxi licences. In legal terms it has converted a public right to fish commercially (subject, of course, to regulation) into a series of private rights. It has created a new property right in the nature of a profit à prendre – broadly an ongoing right to take something tangible that is present on another person's land – and allocated that right to those who held, or had recently held, commercial fishing licences at the time of its commencement.

What is a profit à prendre?

The nature of a profit à prendre can be gained from the definition in *Halsbury's Laws of England* (4th ed, Butterworths, London, 1980) Vol 14, "Easements and Profits à Prendre" para 240, page 115:

> A profit à prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right.

Profits à prendre are often contrasted with easements or licences. All three items, profits à prendre, easements and licences, confer a right to enter onto land for a particular purpose. However, the distinguishing feature of a profit à prendre is that it confers an additional right to remove something from the land. While this concept has been used in relation to rights to take trees, turf and various minerals, it has also been applied to the taking of fish and other game from land.

One of the earlier cases on point is that of *Wickham v Hawker* [1835-42] All ER 1. The case was concerned with the nature of the right provided to an individual providing the "liberty of hawking, hunting, fishing, and fowling". The issue was whether this was a personal licence in which case it could only be exercised by the individual himself, or whether it was a right in the nature of a profit à prendre that could be exercised by servants. Parke B made the following observation at page 5:

> This being the rule of law on the subject, the point to be decided here is whether the liberty granted is a mere personal licence of pleasure, or a grant of a licence of profit – a profit à prendre. The liberty of fowling has been decided, in one case, to be a profit à prendre, and may be prescribed for as such (*Davies' Case* (1688) 3 Mod Rep 246). The liberty to hawk is one species of ancupium …, the taking of birds by hawks, and seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit: it is common of fishing.

The conclusion of the court was that this grant of the liberty of hawking, hunting, fishing, and fowling was a profit à prendre. This case was followed by the English Court of Appeal decision in *Fitzgerald v Firbank* [1895-9] All ER 445. This case concerned the nature of a grant of exclusive fishing rights in respect of a section of a river. The reason that the nature of the fishing rights was being considered was that the river had been polluted by the defendant discharging waste products from a gravel works into the river which had a significant detrimental effect on the fish in the river. The plaintiff brought an action for an injunction to stop further pollution and for damages for the pollution to date.

The Court of Appeal decided the case in favour of the plaintiff. The comments of the various members of the Court are useful in terms of identifying the nature of the fishing rights. Lindley LJ made the following comments at page 448:

> The right of fishing includes the right to take away fish unless the contrary is expressly stipulated. I have not the slightest doubt about that. Therefore, the plaintiffs have got a right of some sort as distinguished from a mere revocable licence.
>
> What is that? It is a good deal more than an easement; it is what is commonly called a profit à prendre. It is of such a nature that a person who enjoys that right has possessory rights that he can bring an action for trespass at common law for the infringement of those rights.…

Rigby LJ, in agreeing with Lindley LJ, went on to state at page 450:

> I hold that, on the incorporeal hereditament, there is a right of action against any person who disturbs them, either by trespass, or by nuisance, or in any other substantial manner.

This decision was followed by Farwell J in *Nicholls v Ely Beet Sugar Factory Ltd* [1931] All ER 154. That case concerned the ability of the plaintiff to bring an action of nuisance seeking an injunction to stop the defendant polluting a river in which the plaintiff held two fishing rights. The defendant sought to defend the action by arguing that the plaintiff's title was not sufficient title to maintain the action in nuisance. The Court held that the plaintiff's title, which was a profit à prendre, was sufficient to enable the plaintiff to bring an action in trespass or nuisance to protect that right.

The above cases demonstrate that a feature of a profit à prendre is the right to remove something from the land. The cases also show that the courts have applied this concept to fishing rights. Therefore, on the basis that the fishing quota is a "fishing right", it is possible that the fishing quota is a profit à prendre.

An interest in land

So far, the cases have concluded that the grant of fishing rights is generally a profit à prendre as it includes the right not only to catch the fish but also to take them away. Another important feature of a profit à prendre is identified in the *Nicholls* case. This feature is that a profit à prendre is considered to be an interest in land. While not explicitly stated in the *Nicholls* case, the parties necessarily assume it, as the plaintiff was bringing an action of nuisance. A nuisance, according to the definition accepted by Goddard CJ in the English case of *Howard v Walker* [1947] 2 All ER 197 at page 199 is:

> Nuisance is the unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.

That a profit à prendre is an interest in land was addressed more directly in *Webber v Lee* (1882) 9 QBD 315. The case concerned the nature of a right that had been granted over certain land to shoot game and to take it away. The plaintiff was arguing that what had been granted was a mere licence, the defendant that the right was a profit à prendre.

The English Court of Appeal unanimously decided that the interest was a profit à prendre and an interest in land. While all three judges delivered separate judgments, they all made statements similar to that delivered by Jessel MR at page 318:

> The right to shoot game and to take it away when shot has been decided to be an interest in land and a profit à prendre.

One of the consequences of a profit à prendre being an interest in land is that a profit à prendre can only be created or granted by the owner of a sufficient estate or interest in the land. Hinde McMorland & Sim's *Land Law in New Zealand* (1997, Butterworths, Wellington) states at page 655:

> It is also necessary to ensure that the proposed grantor both has title to the product involved and has capacity as grantor if he or she owns an estate less than the fee simple.

Therefore, a profit à prendre is a right to take something off someone else's land. It has been held in a number of cases to describe certain fishing rights. Further, it is an interest in land. As it is an interest in land, the fishing rights if they were to constitute a profit à prendre would need to be granted by a person with a legal estate in the land concerned. However, the cases considered so far have only dealt with fishing rights granted over inland waterways, being lakes, rivers and streams. While some fishing quota is granted in respect of freshwater species, the majority of the fishing quota is granted in respect of species that live in the sea. It needs to be considered whether this makes any difference.

Can a profit à prendre exist in relation to the sea?

The principles identified in the cases considered regarding fishing rights and profits à prendre have been applied to inland waterways. The current situation also involves fishing quota granted over the open seas. There is an issue as to whether the same principles involving profits à prendre can be applied in this instance.

Some assistance on this issue can be found in the Privy Council decision in *Attorney General for the Province of British Columbia v Attorney General for the Dominion of Canada* [1914] AC 153. The case concerned the ability of the Government of British Columbia to grant various fishing rights. The Government of the Dominion had exclusive authority over the sea coast and inland fisheries, but the Government of British Columbia had exclusive authority over property and civil rights in the province. The case concerned an area known as the "railway belt", which included both non-tidal and tidal waters. The question was whether the granting of fishing rights over this area was in the domain of the Government of the Dominion or whether such rights were property rights properly in the domain of the Government of British Columbia.

The Privy Council acknowledged the distinction between tidal and non-tidal waters. Non-tidal waters are those such as lakes, rivers and other inland waterways, excluding those parts of rivers and other waterways that meet the sea and as such are tidal. Tidal waters include these areas where non-tidal waters meet tidal waters, at the mouths of streams and in estuaries, as well as the sea coast. The open seas appear to fall into a separate category.

The Privy Council held that in respect of non-tidal waters, the right to grant fishing rights is a property right and as such exists with the owner of the underlying land. It is a private property right. In the case of rivers this may well exist with private individuals, but in the case of lakes, the title to the underlying land is typically reserved to the Crown. On the facts of the case, this should have meant that the Government of British Columbia had exclusive authority to grant fishing rights. However, the Government of British Columbia had specifically granted ownership of the particular land in question back to the Government of the Dominion.

The railway belt also included tidal waters. The issue was whether the principles that applied to non-tidal waters could have equal application to tidal waters. The Privy Council concluded that the same principles did not apply. In respect of the tidal waters, there was an overriding public right of fishing in tidal waters, which was only subject to regulation by the Government of the Dominion. Viscount Haldane stated at pages 167 and 168:

> The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that title to a fishery arises from the right to the solum. A fishery may of course be severed from the solum, and then it becomes a profit à prendre in alieno solo and an incorporeal hereditament. The severance may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But apart from the existence of such severance by grant or prescription the fishing rights go with the property in the solum.
>
> The authorities treat this broad principle as being of general application. They do not regard it as restricted to inland or non-tidal waters. They recognise it as giving to the owners of land on the foreshore or within an estuary or elsewhere where the tide flows and reflows a title to fish in the waters over such lands, and this is equally the case whether the owner be the Crown or a private individual. But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is prima facie in the public.

From these passages, it can be seen that the Privy Council accepted the general principle that fishing rights attach to the land under the water. These rights can be severed, at which point they become profits à prendre. The Privy Council noted that the authorities have treated this general principle as applying to both inland waterways as well as tidal waters. However, Viscount Haldane noted a further factor that could impact on the application of the principle to tidal waters. The factor is that there is an overriding public right to fish in tidal waters.

The Privy Council noted that the nature of the public right was "not easy to define". However, the public right was regarded as paramount, which led Viscount Haldane to conclude at page 173:

> So far as the waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament.

Therefore, while the general principle is accepted in respect of non-tidal or inland waterways, the Privy Council concluded that it does not apply in respect of tidal waters. The reason for this is that there is an overriding public right to fish in tidal waters. The Privy Council also reached the same conclusion in relation to the open seas. In specifically addressing fishing rights in waters below the mean low water mark and in the open seas, Viscount Haldane stated at page 173:

> Their Lordships have already expressed their opinion that the right of fishing in the sea is a right of the public in general which does not depend on any proprietary title, and that the Dominion has the exclusive right of legislating with regard to it.

The effect of this is that the Privy Council rejected the application of the profit à prendre concept in respect of fishing rights relating to tidal waters and the open seas. The basis for the rejection of the profit à prendre concept in relation to fishing rights in respect of tidal waters and the open seas is the existence of an overriding public right to fish in the sea. According to the Privy Council, this title is "paramount" and subject only to regulation by Parliament.

The existence of the overriding public right to fish in the sea was a sufficient basis for the Privy Council to decide the matter in the *British Columbia* case. However, it is noted that even if the public right had not existed, the Privy Council would not automatically have concluded that the fishing rights were profits à prendre. As a profit à prendre is an interest in land, the person granting the fishing rights needs to have a sufficient interest in the land before the fishing right can be a profit à prendre. Therefore, before the Privy Council could have concluded that the fishing rights were profits à prendre (in absence of the public right to fish), it would need to be established that the Crown owned the land under sea in respect of which the fishing rights were granted. The Privy Council regarded the issue as a difficult one, and one which they considered they did not need to answer. Viscount Haldane stated at page 174:

> But their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark to what is known as the three-mile limit

> because they are of the opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land.

Therefore, the particular issue of whether the Crown owns the seabed appears to be a complex issue in English law. While the Privy Council did not reach a conclusion in respect of this matter, it seems clear that they considered it would have been relevant to a positive finding that the fishing rights were profits à prendre (although the Privy Council concluded that it was not a profit à prendre because of the overriding public right).

Application to fishing quota

In determining whether fishing quota might be in the nature of a profit à prendre, it is necessary to consider the factors established by the cases and then compare these with the fishing quota. The first characteristic of a profit à prendre is that it is a right to take something from land. The cases have held that this extends to taking fish from water that flows over land. Under the Fisheries Act 1983, fishing quota might have been argued to satisfy this requirement as being a right to take fish from water that flows over land. Under the Fisheries Act 1996, the position is less arguable. The introduction of the concept of an annual catch entitlement that is severable from the fishing quota perhaps indicates that the right to fish is one step removed from the fishing quota. However, given that the annual catch entitlement is generated by the fishing quota it is considered that fishing quota can still be regarded as ultimately giving rise to a right to take fish from water that flows over land.

The second point to note is that fishing quota is granted in relation to a number of different species. These include both freshwater species (found in internal waterways) as well as the deep sea species. It is considered that there is no express differentiation in the Fisheries Acts of the rights provided in relation to the different species. Accordingly, it is considered that any determination of the nature of the property rights obtained in relation to fishing quota has to apply equally to all quota across the various species.

Against this background, the Privy Council decision in the *British Columbia* case that an overriding public right to fish in the sea was inconsistent with the existence of a fishing right in the nature of a profit à prendre in relation to the seas poses a potential problem for the characterisation of fishing quota as a profit à prendre. The Privy Council considered that the public right was "paramount" and subject only to regulation by Parliament. The acknowledgement that this public right is subject to regulation by Parliament is important in the New Zealand context. It appears that Parliament in New Zealand has regulated the right to fish in the sea through the Fisheries Acts and associated legislation. While a public right to fish in the sea still appears to exist (with the right being limited as to the size and number of fish that can be caught), it seems clear that this is no longer an overriding public right to fish. The rights created under the quota management system now appear to be the paramount rights. The effect of this is that it is considered that primary concern of the Privy Council in the *British Columbia* case does not appear to be as relevant in a New Zealand context.

The final characteristic of a profit à prendre is that it is an interest in land. This means that the profit à prendre needs to have been created by a person with a legal interest in the land. In this regard, problems may exist for fishing quota granted in respect of freshwater species. In relation to inland waterways, the owner of the adjacent land generally owns the land lying under the waterway where the waterway is contained on the land owned by the person, and to the midpoint where the waterway forms a border of the property. This principle is subject to certain exceptions where the Crown has asserted ownership of the underlying land—as may have occurred in the case of lakes and navigable rivers. Thus, the case for fishing quota being regarded as a profit à prendre encounters some difficulties in relation to fishing quota allocated in respect of freshwater species as it not clear whether the Crown would own all of the underlying land in question, from which it could grant an interest in land in the nature of a profit à prendre.

The situation is fraught with even more uncertainty in relation to the seabed and foreshore. There is some argument that section 7 of the Territorial Sea, Contiguous Zone, And Exclusive Economic Zone Act 1977 provides some assistance as to the ownership of the seabed. However, this only applies in respect of the "territorial sea" which extends 12 nautical miles from the coast of New Zealand. Fishing quota is granted in respect of quota management areas, which extend 200 nautical miles from the mean high water mark along the coast of New Zealand. Further, the effectiveness of this section against customary title was unanimously rejected by the Court of Appeal in *Ngati Apa and Others v Attorney-General and Others* [2003] NZCA 117 (19 June 2003). It is considered that the position is not improved by the "sovereign rights" conferred on New Zealand through Article 56 of the United Nations Convention on the Laws of the Sea. New Zealand did not become a signatory to the Convention until 19 July 1996, meaning that any fishing quota allocated between 1986 and 1996 could not have been granted by the Crown relying on the rights conferred under the Convention.

Accordingly, the issue of whether the Crown owns a sufficient interest in the land from which it could grant an interest in the nature of a profit à prendre is unclear. From this perspective, the approach of the Privy Council in the *British Columbia* case to leave the issue concerning the Crown ownership of the foreshore and seabed as unresolved has considerable merit.

There are further factors from which guidance can be obtained as to whether fishing quota can be regarded as a profit à prendre. When the Fisheries legislation is considered as a whole and in a wider statutory setting, it is considered that there are some other factors that support a conclusion that Parliament did not intend fishing quota to be a profit à prendre. An example is the Forestry Rights Registration Act 1983, where Parliament specifically refers to a forestry right being a profit à prendre. The absence of a similar provision in relation to fishing quota perhaps becomes more significant. A further example is the Personal Property Securities Act 1999 where fishing quota is specifically excluded from the ambit of that Act. While excluding fishing quota from an Act dealing with personal property might tend to support a conclusion that fishing quota is perhaps a profit à prendre, an interest in land, and not personal property, the method of exclusion suggests that Parliament did not exclude fishing quota on this basis. The exclusion provisions in section 23(e) of that Act contain general exclusions for interests in land, and a specific exclusion for fishing quota. If fishing quota was regarded as a profit à prendre and an interest in land, there would have been no need for the specific exclusion.

The end result is that there are a number of difficulties with fishing quota being regarded as a profit à prendre. While there are a number of similarities between the characteristics of fishing quota and the characteristics of a profit à prendre, there are also a number of fundamental inconsistencies in the characteristics that indicate that fishing quota is not a profit à prendre. The effect of these conclusions on the nature of fishing quota leads to the further other possibility that fishing quota is a unique property right, with the rights and obligations in respect of the property determined from the statute creating the right (as alluded to earlier).

A unique property right

The decision in the *British Columbia* case was cited with approval by the Full High Court of Australia in the case of *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314. While the case concerned whether payments made by commercial fishermen for fishing licences were a "tax", the High Court made some useful observations regarding the nature of the Australian fishing licence system. The Court noted the similarities between the rights obtained under a commercial licence and the rights obtained under a profit à prendre. However, the Court ultimately concluded that the fishing rights were not profits à prendre, but instead were statutory rights created under the particular statutory regime. Mason CJ, Deane and Gaudron JJ stated at page 325:

> The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licences. This privilege can be compared to a profit à prendre. In truth, however, it is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all context.

Conclusion on the nature of fishing quota

From the above analysis, it is concluded that fishing quota is not a usufruct right nor is it the sale of goods coupled with a licence. It is noted, however, that the rights granted under the fishing quota are similar to the rights that arise under a profit à prendre. The fishing quota generates an annual catch entitlement which provides the right to take a certain amount of a certain item (being the species of fish) from a certain area. These are the basic characteristics of a profit à prendre. While the rights seem similar, the courts have held that a profit à prendre cannot exist in respect of tidal waters and the open seas, and further that only the owner of an interest in land can create a profit à prendre. As the Crown ownership of the land under the water in respect of which fishing quota is granted is not clear and for the various other reasons considered above, it is concluded that fishing quota is not a profit à prendre.

The effect of this is that it is concluded that fishing quota cannot be categorised as a usufruct right, the sale of goods coupled with a licence, or a profit à prendre. Fishing quota has to be regarded as a unique property right, with its characteristics determined from the provisions of the fishing legislation as set out by Justice Tipping in the *New Zealand Fishing Industry Association* decision referred to above. This is consistent with the Australian decision in *Harper*. It could also be seen to be consistent with the position set out by the Law Commission referred to above, where the rights are "akin" to a profit à prendre, but not entirely the same. It also reflects the statement made by Justice Baragwanath in *Antons Trawling Co Ltd*.

It is noted that the general characteristics of individual transferable quota were set out in section 27 of the Fisheries Act 1996, but that section 27 has since been repealed. It is considered that section 27 was repealed as being redundant, in that it merely summarised the characteristics that are found in other sections of the Fisheries Act 1996.

Marine farming authorisations

There are three different statutory bases on which a marine farming authorisation may have been granted. Prior to 1 October 1991, the relevant legislation was the Marine Farming Act 1971. Under this Act, the Ministry of Fisheries was able to grant marine farm leases and marine farming licences.

On 1 October 1991, the Resource Management Act 1991 came into effect. This Act set out a new procedure for obtaining a marine farming authorisation. The Resource Management Act also repealed the sections of the Marine Farming Act 1971, which enabled marine farm leases and licences to be granted. The new process under the Resource Management Act 1991 involves two stages.

The first stage involves obtaining a resource consent in the form of a coastal permit, or, if the proposed farming activity is already permitted by the relevant Regional Plan, a certificate of compliance. Once one of these documents has been obtained, an application can then be made to the Ministry of Fisheries for a marine farming permit. These are issued under section 67J of the Fisheries Act 1983.

The effect of these different statutory regimes is that there are three different types of statutory approval that might be involved in the sale of a marine farming authorisation. These are:

- a marine farming lease granted under the Marine Farming Act 1971
- a marine farming licence granted under the Marine Farming Act 1971, or
- a marine farming permit granted under the Fisheries Act 1983 in conjunction with a resource consent in the form of a coastal permit or a certificate of compliance granted under the Resource Management Act 1991.

Marine farming leases

The characteristics of marine farming leases are set out in section 11 of the Marine Farming Act. On the basis of section 11(1)(a) of that Act, it appears that a lease granted under this section would constitute a leasehold estate and thus be an interest in land.

However, as the actual terms of any lease as set out in a marine farming lease agreement would govern the nature of the rights acquired under the lease, these terms of the marine farming lease agreement would need to be considered to ensure that they were consistent with the grant of a leasehold estate. For instance, the lease would need to define a particular area of the seabed. Additionally, the terms of the lease would need to be consistent with the lessee obtaining rights in respect of the seabed. While it is likely that most leases would specify a particular area, as it appears that there is no "standard form" lease agreement it is possible that some of the leases granted might exclude rights in respect of the seabed. Such leases may not constitute real property.

In order to ensure that the correct position is provided in the ruling, it only applies to marine farming leases that satisfy the following conditions:

- the marine farming lease defines the area subject to the lease by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan, and
- the legal effect of the marine farming lease is that the seabed is not excluded from the area leased.

Marine farming licences

Similar concerns arise in respect of marine farming licences as with marine farming leases. Section 11(3) refers to a property right that can be passed onto a person's estate and is able to be assigned. While the provision is consistent with a licence being in the nature of a contractual right in accordance with the general law concept of a licence, it is also possible that the terms of a licence granted under this provision might give rise to exclusive rights over a defined area of land and so constitute an interest in land—possibly a leasehold interest. Once again, this appears to be a matter that can only be determined by considering the specific terms of the particular marine farming licence in question.

In order to ensure that the correct position is provided in the ruling, it only applies to marine farming licences that satisfy the following conditions:

- the marine farming licence defines the area subject to the licence by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan, and
- the legal effect of the marine farming licence is that the seabed is not excluded from the area licensed.

Transition to the Resource Management Act

Section 11 of the Marine Farming Act was repealed as from 1 October 1991 by section 362 of the Resource Management Act 1991. However, a savings provision is contained in section 426 of the Resource Management Act. The effect of this provision is to preserve the pre-existing rights relating to both marine farming leases and marine farming licences despite the repeal of section 11 of the Marine Farming Act by the Resource Management Act.

Therefore, both marine farming leases and marine farming licences granted under the Marine Farming Act continue in force under the Resource Management Act with no alteration of the rights and obligations under which they were granted.

New marine farming authorisations

New marine farming authorisations are granted under the Resource Management Act and the Fisheries Act 1983. The first step in the process is to apply for a resource consent from the Local or Regional Council. Section 87 of the Resource Management Act defines a resource consent granted in relation to a coastal marine area to be a "coastal permit". Both these terms are relevant as some provisions of the Resource Management Act relate to coastal permits and some relate to the more general resource consent.

If the Council has already approved the proposed marine farming activity in the area, the applicant will likely only require a Certificate of Compliance rather than a resource consent. Once a person has obtained either a

coastal permit or a certificate of compliance, the person also requires a marine farming permit, which is issued under section 67J of the Fisheries Act 1983.

The treatment for GST purposes

The new marine farming authorisations need to be considered as to how they will be treated under the GST Act because they involve two separate items—a resource consent or certificate of compliance, and a marine farming permit. This matter needs to be considered as it needs to be determined whether there is a single supply of a "marine farming authorisation" or whether there are two separate supplies, one of the resource consent or certificate of compliance and another of the marine farming permit.

This general issue is a difficult one, and has not been fully dealt with by the courts. However, there have been a number of cases both in New Zealand and overseas which have provided some guidance. Some of the New Zealand cases to consider the issue of single versus multiple supplies are the High Court decision in *CIR v Smiths City Group Ltd* (1992) 14 NZTC 9,140; the High Court decision in *Coveney v CIR* (1994) 16 NZTC 11,328; and the Court of Appeal decision in *CIR v Coveney* (1995) 17 NZTC 12,193.

There have been a number of UK decisions on this issue as well, including *British Airways plc v Customs & Excise Commissioners* [1990] STC 643; *Customs and Excise Commissioners v United Biscuits (UK) Ltd* [1992] STC 325; *Virgin Atlantic Airways Limited v Customs & Excise Commissioners* [1995] STC 341; and *Customs & Excise Commissioners v British Telecommunications* [1998] STC 544.

From these cases a number of factors has emerged as being relevant to determining whether there is a single supply or multiple supplies. These factors can be summarised as follows:

- The degree to which the services alleged to constitute a single supply are inter-connected, the extent of the interdependence and intertwining, and whether each is an integral part or component of a composite whole.
- The mere separate itemisation of things in a contract does not make them separable if they are necessary components of the entire transaction.
- Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered, but they are not conclusive.
- If it would not be possible to purchase each of the various elements separately and still end up with a useful article or service, the supply is a compound supply that cannot be split up for tax purposes.

Application to the facts

In determining the degree of interdependence between the resource consent and the marine farming permit, section 67J(2) of the Fisheries Act 1983 provides some assistance. It states that a marine farming permit shall only be issued to a person who holds a coastal permit for the relevant area, or to a person who holds a certificate of compliance in respect of the relevant area.

Therefore, this section illustrates that there is a high level of interdependence between the resource consent and the marine farming permit. This relationship is also reflected in section 67M of the Fisheries Act 1983, the section relating to the transfer of the marine farming permit. This section implies that it is only possible to transfer a marine farming permit in conjunction with the resource consent or certificate of compliance to which it relates. It is understood that as a matter of practice, both the coastal permit and the marine farming permit would be transferred when a marine farm is transferred.

In terms of the case law discussed above, this relationship between the marine farming permit and the resource consent should be sufficient to conclude that they are sufficiently interconnected to be regarded as a single supply rather than as separate supplies. This is on the basis that one of the permits without the other is essentially useless.

Therefore, it appears that most transfers of marine farming activities will involve the supply of both the marine farming permit and the coastal permit or certificate of compliance. It is concluded that when these items are supplied together as part of the same supply, they should be treated as a single supply for GST purposes. The Ruling only applies to supplies of this nature.

Legislation

Having established the nature of both fishing quota and the various types of marine farming authorisations, the next issue involves determining the relevant GST legislation. The section for obtaining an input tax credit is section 20. Section 20(2) outlines the documentary evidence that needs to be held in order to obtain an input tax credit, and section 20(3) provides the circumstances in which a claim will be available depending on the basis of GST registration.

> **20(1)** In respect of each taxable period every registered person shall calculate the amount of tax payable by that registered person in accordance with the provisions of this section.
>
> **20(2)** Notwithstanding any other provision in this Act, no deduction of input tax shall be made in respect of a supply, unless -
>
> (a) A tax invoice or debit note or credit note, in relation to that supply, has been provided in accordance with sections 24 and 25 of this Act and is held by the registered person making that deduction at the time that any return in respect of that supply is furnished; or

(b) A tax invoice is not required to be issued pursuant to section 24(5) or section 24(6) of this Act, or a debit note or credit note is not required to be issued pursuant to section 25 of this Act; or

(c) Sufficient records are maintained as required pursuant to section 24(7) of this Act where the supply is a supply of secondhand goods to which that section relates:

Provided that where a tax invoice or debit note or credit note in relation to that supply has been provided in accordance with this Act, the Commissioner may determine that no deduction for input tax in relation to that supply shall be made unless that tax invoice or debit note or credit note is retained in accordance with the provisions of section 75 of this Act.

20(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 -

(i) In relation to the supply of goods and services (not being a supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies), made to that registered person during that taxable period:

(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:

(ii) Invoiced or paid, whichever is the earlier, pursuant to section 12 of this Act during that taxable period:

(iii) Calculated in accordance with section 25(2)(b) or section 25(5) or section 26 of this Act; and

(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:

(ii) Paid pursuant to section 12 of this Act during that taxable period:

(iii) In relation to the supply of goods and services made during that taxable period to that registered person, not being a supply of goods and services to which subparagraph (i) of this paragraph applies:

(iv) Calculated in accordance with section 25(2)(b) or section 25(5) of this Act, to the extent that a payment has been made in respect of that amount, or section 26 of this Act; and

Under section 20(3), a registered person may deduct from the amount of output tax payable, an amount of "input tax" in accordance with paragraph (a) or (b). "Input tax" is defined in section 3A of the Act. It provides:

3A(1) Input tax, in relation to a registered person, means -

(a) tax charged under section 8(1) on the supply of goods and services made to that person, being goods and services acquired for the principal purpose of making taxable supplies:

(b) tax levied under section 12(1) of this Act on goods entered for home consumption under the Customs and Excise Act 1996 by that person, being goods applied or acquired for the principal purpose of making taxable supplies:

(c) an amount determined under subsection (3) after applying subsection (2).

3A(2) In the case of a supply by way of sale to a registered person of secondhand goods situated in New Zealand, the amount of input tax is determined under subsection (3) if -

(a) the supply is not a taxable supply; and

(b) the goods are not supplied by a supplier who -

(i) is not resident in New Zealand; and

(ii) has previously supplied the goods to a registered person who has entered them for home consumption under the Customs and Excise Act 1996; and

(c) the goods are acquired for the principal purpose of making taxable supplies.

3A(3) The amount of input tax is -

(a) if the supplier and the recipient are associated persons, the lesser of -

(i) the tax included in the original cost of the goods to the supplier; and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(b) if the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(7A), the lesser of -

(i) the tax fraction of the open market value of the deemed supply under section 5(3); and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(c) if the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(8), the lesser of -

(i) the tax fraction of the valuation under section 10(8) of the deemed supply under section 5(3); and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(d) if the supplier and the recipient are not associated persons and the supply is not the only matter to which the consideration relates, the lesser of -

(i) the tax fraction of the purchase price; and

(ii) the tax fraction of the open market value of the supply; or

(e) in all other cases, the tax fraction of the consideration in money for the supply.

3A(4) For the purpose of subsection (1)(b), applied does not include -

(a) the delivery or the arranging of the delivery of the goods to a person in New Zealand; or

(b) the making of the delivery of the goods to a person in New Zealand more easily achieved.

3A(5) For the purpose of subsection (3), tax fraction means the tax fraction that applies at the time of supply.

Section 3A(1)(c) of the definition of "input tax" is the relevant provision. It refers to the calculation of input tax through subsections (2) and (3) when the supply is one of "secondhand goods". "Secondhand goods" is defined in section 2:

"Secondhand goods" does not include -

(a) Secondhand goods consisting of any fine metal; or

(b) Secondhand goods which are, or to the extent to which they are, manufactured or made from gold, silver, platinum, or any other substance which, if it were of the required fineness, would be fine metal: or

(c) Livestock:

Section 2 also provides a definition of the term "goods":

"Goods" means all kinds of personal or real property; but does not include choses in action or money:

Application of the legislation

The starting place in order to determine whether a GST input tax credit is available to a registered person is section 20(3). The section provides different options depending on the method of registration adopted by the registered person. For a person registered on an invoice basis, the relevant paragraph is (a)(ia), and for a person using the payments or hybrid basis of registration the relevant paragraph is (b)(i). However, irrespective of the basis of registration, the Act provides very similar tests for claiming an input tax credit in respect of supplies of secondhand goods. The claim is limited to the amount of "input tax" in relation to a supply of goods or services to that registered person, "to the extent that a payment in respect of that supply has been made during the taxable period".

The relevant definition of "input tax" is contained in section 3A(1)(c) of the Act. In determining the input tax under paragraph (c) it is necessary to consider subsections (2) and (3). Leaving aside the associated persons provisions (which are not relevant to the current rulings), there are a number of requirements that need to be satisfied under the two provisions. These are that:

(i) there be a supply by way of sale

(ii) the supply not be a taxable supply

(iii) the supply be made to a registered person

(iv) the supply be of secondhand goods

(v) the secondhand goods be situated in New Zealand at the time of supply, and

(vi) the secondhand goods are acquired for the principal purpose of making taxable supplies.

Most of these requirements are specified in the rulings to ensure that they will be satisfied in every instance in which the ruling applies. However, requirement 4, that the supply be of secondhand goods, is something that needs to be considered in detail as it cannot be specified in the rulings. Therefore, it is necessary to determine whether or not the fishing quota and mussel licences can be secondhand goods.

"Secondhand goods"

The definition of "secondhand goods" does not attempt to define the term, but instead prescribes a list of things that are not included in the meaning of "secondhand goods". Fishing quota and marine farming authorisations are not excluded under the definition. As the definition gives little indication as to what is included in the term, regard needs to be had to the ordinary meaning of "secondhand goods".

The first observation that can be made is that "secondhand goods" is a composite term. It relates to items that are first of all "goods", and then the subset of those goods that can be described as "secondhand".

"Goods"

In considering the first question as to what is comprised in the term "goods", assistance can be found in section 2. Goods "means all kinds of personal or real property; but does not include choses in action or money". "Goods" is defined very widely in the initial part of the definition,

and then subjected to two specific exclusions. It includes all kinds of real and personal property, but excludes choses in action and money. Therefore, it is necessary to establish whether fishing quota and marine farming authorisations are real or personal property and then secondly, whether they are money or choses in action.

"Property"

Before considering the "real" or "personal" aspects of property, the nature of "property" should first be established. The term "property" is not defined in the Act. *Halsbury's Laws of England* (4th ed, Butterworths, London, 1991) Volume 44, "Stamp Duty", para 1,032, provides the following description of "property":

> Property is that which belongs to a person exclusively of others, and can be the subject of bargain and sale. It includes goodwill, trademarks, licence to use a patent, book debts, options to purchase and other rights under a contract. A revocable licence is not property. An owner of unworked minerals who gives an undertaking to the service owner not to work them does not thereby convey property, and a grant of a purported exclusive right to carry on a certain business in an area when the grantor has no such right is not a conveyance of property.

A similar view is taken in Gray's *Law of Personal Property* (5th ed, Butterworths, 1968) at page 1:

> The term "property" as used in the law of New Zealand and other common-law countries has a dual meaning. It may signify the title to or rights to ownership in goods or other property; and when s. 20 of the Sale of Goods Act 1908 provides by rule 1 that in a contract for the sale of ascertained goods in a deliverable state the "property" in the goods passes at the time the contract is made, "property" here means the title to or ownership of the goods in question. The word "property" may in addition signify the thing owned, that over which title is exercised; in this sense, of course, it includes tangible goods such as a book or a table, but the word covers also incorporeal forms of property such as estates in land (an estate being an aggregate of rights exercisable over or in respect of land) or the contractual rights embodied in a cheque or an insurance policy.

From this it can be seen that the term "property" is used to describe a wide range of things, both tangible and intangible. Its fundamental characteristics seem to be that it is capable of being owned, and that the rights of ownership are capable of being transferred (see, for instance the House of Lords decision in *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472). "Property" needs to be able to be defined and identified, and have a degree of permanence or stability. Further, it needs to able to be transferred.

"Real" and "personal" property

It is a well-established principle of English law that all "property" can be categorised as either real property or personal property. As Gray explains at page 1:

> "The distinction between real property (or realty) and personal property (personalty) is procedural in origin and is derived from the ancient forms of action in English law. In the twelfth century, the possession of freehold land was recoverable by certain actions which were called "real" actions; at this date the remedy for dispossession of all other kinds of property was, effectively, damages only, and actions for damages in these circumstances were called "personal" actions.

The existence of only two classes of property has its origin in these two types of action. The acknowledgement that property is either real or personal is contained in the first sentence of the following quote from Gray (at page 2):

> It is not sufficient, however, to say simply without qualification that land is realty and all other property is personalty. Real property includes, besides the freehold estates and interests in land, things which are said to "savour of the realty".

The effect of there only being two classes of property, one being real and the other personal, is that a finding that something is property necessarily means that it will be either real or personal property. There is no third category. Therefore, in terms of the definition of "goods", if the item is "property", then it will be either real or personal property.

A question arises as to whether it is necessary to determine whether the fishing quota is real or personal property. The section includes both types of property and as long as it is either one or the other there should be no need to make a final determination. While this is true, attempting to classify the property as either real or personal assists in determining whether or not the item is a chose in action. The reason for this is that the chose in action—chose in possession distinction appears to be limited to personal property.

The exclusion for "choses in action"

The term "chose in action" is used to describe various types of personal property. It is not a term that is applied to real property. This observation was made in the English case of *Torkington v Magee* [1900-3] All ER 991 where Channell J defined the term at page 994:

> Chose in action is a known legal expression used to describe all ***personal*** rights of property which can only be claimed or enforced by action, and not by taking physical possession (emphasis added).

Therefore, a finding that an item is real property means that the exclusion for choses in action will not be relevant. However, a finding that the item is personal property means that the exclusion for choses in action could be relevant. In determining the characteristics of a chose in action, the above quote from *Torkington v Magee* is referred to by a number of commentators as providing a useful working definition.

In a New Zealand context, the Court of Appeal considered the issue in the case of *Re Marshall (Deceased), CIR v Public Trustee* [1965] NZLR 851. The case considered a situation involving a right to demand interest on a loan, and whether this was a chose

in action for the purposes of the Death Duties Act 1921. In considering the issue of "chose in action", McCarthy J stated at page 860:

> The right was property, for property in its wider sense includes all things of value. It was personal property and "all personal things are either in possession or in action. The law knows no *tertium quid* between the two". This celebrated statement of Fry LJ in *Colonial Bank v Whinney* (1885) 30 Ch D 261 at p 285, is familiar to every lawyer. It received, I think the express, but certainly the implied approval of the House of Lords on appeal ((1886) 11 AC 426).

Justice McCarthy provides further guidance on the characteristics of choses in action at page 861:

> That is so because if the right to give the notice and the corresponding duty to accept it had been denied, there was no possible method of enforcement other than going to law and thereby **securing not the physical possession of the thing but the advantages of its ownership.** This, says Mr Cyprian Williams in his article in (1895) 11 LQR 223, is the true test, and I agree.
>
> …
>
> The characteristics that **one cannot take the right into physical possession** (even after judgment in one's favour) and that it **can only be vindicated by Court action**, are the qualifying features of a chose in action and have become the bases of most modern definitions (emphasis added).

The fundamental characteristic of a chose in action is the same in both authorities. Both authorities refer to the fact that in respect of a chose in action, one cannot take the right into physical possession. Being able to take the thing into possession is a characteristic of a chose in possession. Even if court action is taken to enforce the chose in action, the result may well be that the advantages of ownership are secured rather than actual physical possession of the thing.

"Secondhand"

There have been few cases on the meaning of the term "secondhand goods" in the GST context. *Case N16* (1991) 13 NZTC 3,142 was a decision of Barber DJ where he had to consider whether deer velvet purchased direct from producers by means of commission agents were secondhand goods when they were purchased by a distributor and exporter of deer velvet.

His Honour concluded that they were not secondhand goods. Judge Barber accepted that the two key concepts underlying whether something is secondhand are previous ownership and previous use. He stated at page 3,148:

> I agree with counsel that the concept of secondhand relates to pre-ownership or pre-use. I agree … that the emphasis is on pre-use. I consider that there is quite some commonsense flexibility in ascertaining whether a good is still new or has become secondhand. I do not regard second ownership as necessarily rendering an item secondhand. Many goods pass from manufacturer to wholesaler or retailer to customer or consumer (with other levels of distributors sometimes also involved), and yet are not regarded as secondhand at the consumer purchaser level, even though the item has been used as stock-in-trade at the various distribution levels. The good is not usually regarded as secondhand until it has been used for its intrinsic purpose.

The TRA felt that previous ownership of goods is not in itself necessarily sufficient to meet the test of secondhand in the Act. Usually a previous owner must have also used the goods for their intrinsic purpose.

Subsequently the Court of Appeal considered the meaning of secondhand in *LR McLean & Co Ltd v CIR* (1994) 16 NZTC 11,211. McKay J expressly referred to and agreed with Judge Barber's comments in *Case N16* as to the ordinary meaning of the term "secondhand". Justice Richardson (as he then was) stated at page 11,213:

> The short point of the appeal is whether wool purchased by registered persons from unregistered persons is secondhand goods for the purposes of the 1985 Act. If the expression secondhand goods is given its ordinary and natural meaning it is common ground that it is not within that description. In ordinary usage the expression refers to goods which have been used, although depending on the context it may apply to goods which are no longer new or even in some contexts goods which have simply been previously owned. Mr Harley for the appellants did not seek to draw any distinction based on "use" of the wool by the sellers. The argument for the appellants is that to accord with the scheme and purpose of the legislation the expression has to be given the meaning of any goods which have been purchased by a registered person.

The judgments of the Court of Appeal state that the term "secondhand" should be given its ordinary or normal meaning. While "secondhand" can mean either pre-owned or pre-used, the Court concluded that it is not sufficient that the goods were previously owned. If an item were "secondhand" simply through being previously owned, the term "secondhand" would be deprived of any practical meaning according to Justice Richardson. Therefore, the Court of Appeal concluded that the more relevant factor is whether the goods have been previously used.

The effect of this is that the courts have not extended the meaning of the term "secondhand goods" to goods that have been previously owned but not previously used for their intrinsic purpose.

Application to fishing quota

Is fishing quota "property"?

When these concepts are applied to fishing quota, it seems that fishing quota would constitute property. Fishing quota is definable and identifiable through being granted under a statutory regime. It is permanent or stable in nature as it is issued in perpetuity. Fishing quota is capable of being owned and there are specific

legislative provisions in the Fisheries Act 1996 dealing with the ability of the fishing quota to be transferred. On this basis, it can be accepted that fishing quota is "property".

Is fishing quota real or personal property?

The next issue is whether fishing quota is real or personal property. The characteristics of fishing quota are determined from considering the legislation under which it is created. Under section 66 of the Fisheries Act 1996 (previously section 28O of the Fisheries Act 1983) the holders of individual transferable quota obtain a right to receive an annual catch entitlement for the species that is the subject of the quota. While the annual catch entitlement is defined by reference to a "quota management area", there is nothing in either of the Fisheries Acts to suggest that it was intended that fishing quota gives rise to an interest in land. Therefore, based on this and the earlier conclusion that fishing quota is not a profit à prendre, it is considered that fishing quota is neither an interest in land nor real property.

As fishing quota is "property" and property is either "real" or "personal", the conclusion that fishing quota is not real property leads also to the conclusion that it must be personal property. As fishing quota is personal property, it will fall within the words "all kinds of real and personal property" in the definition of "goods" in the Act. Therefore, it is considered that this first part of the definition is satisfied. The next question is whether either of the two exclusions to the definition applies.

Is fishing quota a "chose in action"?

On the issue of whether fishing quota is a chose in action, it is established by the cases that the fundamental characteristic of a chose in action is that one cannot take the right into physical possession.

Fishing quota appears to possess this characteristic. The right to catch fish cannot be taken into possession. While an argument could be made that a person could simply catch the fish under the quota, this seems to confuse the fish (which could be taken into possession) with the right to catch those fish (which, it is considered, cannot be taken into possession).

The end result is that it is concluded that fishing quota is a chose in action. While fishing quota is capable of satisfying the first part of the definition of "goods", being a form of personal property, it is then excluded from the definition of "goods" by reason that it is a chose in action. The effect of this is that fishing quota cannot be regarded as being "goods" for the purposes of the GST Act.

Given that it is concluded that fishing quota is not "goods", there is no need to consider the further issue of whether the fishing quota could be regarded as being "secondhand". Therefore, as it is concluded that fishing quota is not "goods", it is also concluded that fishing quota cannot be "secondhand goods".

Application to marine farming authorisations

Are marine farming authorisations "goods"?

This question needs to be addressed in respect of the three types of marine farming authorisations:

- the old marine farming leases
- the old marine farming licences, and
- the new combination resource consent and marine farming permit.

Marine farming leases

It is accepted that marine farming leases are property. The marine farming lease is definable, has a degree of permanence (being the term of the lease) and is capable of being transferred. This means that marine farming leases are property for the first part of the definition.

However, in terms of whether marine farming leases are real or personal property, it is not certain that all marine farming leases would give rise to a leasehold estate. To the extent that a marine farming lease is a leasehold estate, it will be real property. If the particular marine farming lease does not give rise to a leasehold estate, it will then constitute personal property.

An issue exists as to whether marine farming leases might be excluded from being goods on the basis that they are choses in action. As noted above in relation to fishing quota, because choses in action are a subset of personal property, this will only be relevant if it is determined that the particular marine farming lease is not a leasehold estate (and thus not real property). If the marine farming lease is real property, then it will be "goods" for the purposes of the GST Act.

For those marine farming leases that are not real property and are thus personal property, it needs to be determined whether they would be choses in action. The key distinguishing characteristic between choses in action and choses in possession, is the ability of the item to be "taken into possession". Marine farming leases are like fishing quota in this regard in that they do not have a physical aspect to their nature. They encompass a number of rights, but these rights cannot be taken into possession. The only way to enforce these rights is to sue to enforce them. The effect of this is the conclusion that those marine farming leases that are not real property would be choses in action. This means that if a marine farming lease does not give rise to a leasehold estate it will be a chose in action and excluded from the definition of "goods" for the purposes of the GST Act.

For those marine farming leases that constitute real property and are "goods", the further issue of whether they are "secondhand" so as to be "secondhand goods" needs to be considered. The marine farming leases being

considered are interests in land, and it is settled on the basis of the Court of Appeal decision in *Coveney* that land can be secondhand goods. The only other issue to consider is the "use" issue from cases *LR McLean* and *Case N16*.

The intrinsic purpose of a marine farming lease is to farm the particular species specified in the lease. If a farming operation has been carried out pursuant to the lease, then the conclusion appears inescapable that the lease has been used for its intrinsic purpose. However, situations could arise in respect of marine farming leases where a person never actually exercises the rights under the lease and simply sells it without ever having attempted to farm the particular aquatic life in question. In such a case, an issue exists as to whether the lease has been used for its intrinsic purpose. On the basis of the case law, it appears that it has not been used for its intrinsic purpose.

As this is a question of fact to be determined on a case by case basis, the Ruling only applies to marine farming leases that have been used for their intrinsic purposes, namely used to farm the species of fish or marine vegetation specified in the lease.

Marine farming licences

Under section 11(3) of the Marine Farming Act, it seems clear that marine farming licences are property. The licences are defined in that Act, they have a degree of permanence (being the term of the licence) and are capable of being transferred. Therefore, it is concluded that marine farming licences are property.

The next issue is whether marine farming licences are real or personal property. The nature of a marine farming licence is not entirely clear from the Marine Farming Act. Section 11(3) of the Marine Farming Act provides that the right received under a marine farming licence is "the exclusive right during the currency of the licence to farm within the licensed area the species of fish or marine vegetation specified in the licence". It seems possible that the rights created under this provision could constitute an interest in land depending on the particular terms of any given licence. If the licence is defined by reference to a particular area of land and the licence provides the exclusive right to farm this area, it is possible that an interest in land (being a leasehold interest) would have been created despite the use of the term "licence".

On this basis, it is concluded that some marine farming licences may constitute an interest in land and will thus be real property. As it has been concluded that marine farming licences are "property", those licences that are not real property will be personal property.

The next matter to be considered is whether the exclusion for choses in action in the definition of "goods" applies. This issue will only be relevant to those licences that are personal property.

The key characteristic of a chose in action is that it cannot be taken into possession. It is a right that can only be enforced through court action. In respect of those marine farming licences that are personal property, it does not seem possible to take the bundle of rights that constitute the marine farming licences into possession. If the rights are not real property, the licence will not provide an exclusive right to "possess" the particular area. The marine farming licence will provide for the exclusive right of being able to farm in the particular area, but it does not appear to provide the right to exclude others from the area. Therefore, it seems that the only way to enforce the right would be to commence legal proceedings.

On this basis, it appears as if the marine farming licences that are personal property would more properly be regarded as choses in action rather than choses in possession. The result of this is that these marine farming licences are excluded from the definition of "goods" for GST purposes. However, the marine farming licences that are real property are not subject to the exclusion for choses in action, and thus will constitute "goods" for the purposes of the Act.

For those marine farming licences that are real property, the next question is whether these "goods" are "secondhand" so as to qualify for the secondhand goods input tax credit under the GST Act. The marine farming licences being considered are interests in land, and it is settled on the basis of the Court of Appeal decision in *Coveney* that land can be secondhand goods.

In terms of the "use" issue from cases *LR McLean* and *Case N16*, the same conclusion that applied to marine farming leases applies to marine farming licences. Whether the marine farming licence has been used for its intrinsic purpose is a question of fact to be determined on a case by case basis. For this reason, the Ruling only applies to marine farming licences that have been used for their intrinsic purposes, namely used to farm the species of fish or marine vegetation specified in the licence.

Resource consents and marine farming permits

The definition of "goods" requires that the item concerned be either real or personal property. It has been concluded that the GST Act will regard the supply of a resource consent or certificate of compliance in conjunction with a marine farming permit as a single supply. The nature of the property comprised in this supply needs to be considered.

The nature of a resource consent and certificate of compliance

Section 139(6) deems a certificate of compliance to be a resource consent with the result that the provisions of the Resource Management Act are to apply accordingly. Being a "resource consent" means that the rights attaching to the resource consent are governed by section

122 of the Resource Management Act. Section 122 states that "a resource consent is neither real nor personal property".

This statement is interesting. It is well established that all property is either real or personal property. On this basis, the only sensible interpretation which can be placed on this provision is that Parliament did not want all of the common law and other rights which would automatically attach to property of this nature to attach to resource consents. Parliament must have wanted to regulate the rights that attach to a resource consent. This is consistent with the rest of the section, which goes on to deal with the characteristics of resource consents for the purposes of other legislation. Unfortunately, there is no statement regarding the revenue Acts. The issue, therefore, is whether the statement in section 122 of the Resource Management Act applies to the GST Act.

Not real nor personal property

In determining whether or not the statement in the Resource Management Act 1991 impacts on the classification of a resource consent under the GST Act, there are a number of observations which can be made.

The first observation is that the statement in section 122 is not a standard definition. It is not contained in section 2 of the Resource Management Act along with all the other definitions that are prefaced with the words "for the purposes of this Act". Therefore, Parliament may well have intended section 122 to have wider application than simply the Resource Management Act.

A second point can be derived from the wording of section 122 itself. After making the initial statement, the section goes on to address a number of specific Acts and circumstances where the resource consents are to be regarded as having the characteristics of personal property. The GST Act is not one of those situations.

This seems a clear indication from Parliament that the opening statement was intended to apply to the Acts that are dealt with in the section. To take the Personal Property Securities Act 1999 as an example, it seems from the plain wording of the section that Parliament intended that the opening words of the section would have meant that resource consents were not real or personal for the purposes of that Act. This was why Parliament inserted subsection (4) to make it clear that for the purposes of that Act, it was appropriate for a resource consent to be regarded as goods within the meaning of that Act. This does not make a resource consent goods or personal property for other purposes though.

On this basis, it seems that the statement in section 122 would apply for the purposes of the GST Act also. By not making a specific exception for the GST Act, it is only possible to assume that Parliament were content with the initial statement applying to the GST Act.

The third observation, which follows from the second, is the intention of the section that is apparent from the words used. By making the statement that a resource consent is neither real nor personal property, Parliament has created a legal fiction. A resource consent has the general characteristics of property, and the law only knows two categorisations of that property—real and personal. Therefore, in discerning the intention of Parliament in making this statement, the most logical intention is that Parliament did not want the natural common law rights to attach to a resource consent which would attach as a matter of course if the resource consent were either real or personal property.

The consequences of section 122 of the Resource Management Act then need to be applied to the definition of "goods" in the GST Act. "Goods" means "all kinds of personal or real property …". It has been established that resource consents and certificates of compliance are deemed not to be "personal or real property", and that the deeming provision operates for purposes outside the Resource Management Act and so affects the GST Act as well. This means that resource consents and certificates of compliance do not constitute "goods" for the purposes of the GST Act as they are not personal or real property.

Effect of the marine farming permit

There is one further matter to consider, and that is the effect that the marine farming permit might have on any ultimate conclusion regarding the combined property right, being the resource consent or certificate of compliance and a marine farming permit. It has already been concluded that for GST purposes, the supply of these items should be treated as a single supply. It has also been noted that the issuing of a marine farming permit is dependent on having a resource consent or certificate of compliance. Based on these conclusions, it is possible to conclude that the marine farming permit would have no effect on the issue of whether the combined property right is goods.

However, if the marine farming permit were considered in its own right, it seems that the same conclusion would be reached. It appears that a marine farming permit would constitute property. Marine farming permits are capable of being owned, and the rights of ownership are capable of being transferred under section 67M of the Fisheries Act 1983. There is nothing in any of the relevant legislation to suggest that a marine farming permit is real property. While a marine farming permit provides a right to farm within the permit area, it does not typically provide any right to occupy the seabed. It is considered that without such a right, the marine farming permit is unlikely to be an interest in land and thus real property. That a marine farming permit does not provide any right to occupy the seabed seems reflected in section 67L(3), which provides that the marine farming permit does not authorise the permit holder to take any naturally occurring aquatic life in the area subject to the permit.

Thus, it is considered that marine farming permits do not give rise to an interest in land and are accordingly concluded to be personal property.

As the marine farming permits are not "money" the only other exclusion to be considered is that for choses in action. From the earlier analysis, the key characteristic of a chose in action is that it cannot be taken into possession. In respect of marine farming permits, it does not seem possible to take the bundle of rights that comprise a marine farming permit into possession. It seems that the only way to enforce the right would be to commence legal proceedings. On this basis, it appears that marine farming permits would more properly be regarded as choses in action rather than choses in possession. The result of this is that marine farming permits are excluded from the definition of "goods" for GST purposes.

Therefore, it is concluded that the existence of a marine farming permit as part of a supply of a resource consent or certificate of compliance in conjunction with a marine farming permit will not affect the status of the supply for GST purposes. Regardless of whether the resource consent or certificate of compliance and the marine farming permit are considered together or separately, it is concluded that a supply of such items will not be a supply of "goods" as defined in the GST Act.

Summary for marine farming authorisations

Some marine farming leases and some marine farming licences may constitute "goods" for the purposes of the GST Act. These will be leases and licences that are defined with reference to a particular area of land, and that provide for exclusive rights in respect of that land. Such marine farming leases and licences are likely to be interests in land and thus real property. As real property, neither of the exclusions relating to "money" and "choses in action" will apply so that they will not be excluded from the definition of "goods".

The marine farming leases and licences that are not real property and so are personal property will not constitute "goods" for the purposes of the GST Act. The reason for this is that they are choses in action. Because the rights under these marine farming leases and licences cannot be taken into possession, the leases and licences that are personal property will constitute choses in action rather than choses in possession and so will be excluded from the definition of "goods".

In relation to resource consents and marine farming permits, it appears as if the declaration in section 122 of the Resource Management Act that resource consents are neither real nor personal property is intended to apply outside the Resource Management Act. As there is no legislative modification of the statement in respect of the GST Act, the resource consents and marine farming permits will not qualify as being "goods" because they do not satisfy the opening words of the definition of being real or personal property. Therefore, there is no need to consider the further issue of whether they are "secondhand".

One further matter

Before concluding in respect of marine farming authorisations, it needs to be noted that there is presently a Bill before Parliament that, if enacted in its present form, would affect the three different statutory permissions set out above.

The Bill is the Resource Management (Marine Farming and Heritage Provisions) Amendment Bill. This Bill has been reviewed by the Transport and Environment Committee (which reported back on 30 April 1999), and there are a number of useful comments in the Committee's report as to the existing situation and the proposed legislation. The Bill is currently awaiting its second reading.

Under the proposals, marine farming leases and licences will be incorporated into the Resource Management Act and deemed to be resource consents. According to the Committee there will be no diminution of rights for the holders of leases under the Marine Farming Act and the rights of marine farming licence holders may well increase. It certainly appears that the nature of the rights held by marine farmers under the Marine Farming Act will be affected. Instead of a marine farming lease or licence potentially being an interest in land as discussed above, marine farming leases and licences will be deemed to be resource consents.

If the Bill is enacted in this form, this will mean that, based on the previous analysis, the marine farming leases and licences will be neither real nor personal property under section 122(1) of the Resource Management Act. Such a conclusion will mean that all of the various types of "marine farming authorisations" will be treated in the same manner for GST purposes, namely that no secondhand goods input tax credit will be available.

PRODUCT RULING - BR PRD 03/15

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

Name of the Persons who applied for the Ruling

This Ruling has been applied for by:

(a) Perpetual Trust Limited ("Perpetual New Zealand"), in its capacity as trustee of each Asset Trust (as described in the Arrangement).

(b) Perpetual Trustee Company Limited ("Perpetual Australia"), in its capacity as trustee of the Titan NZ Funding Trust (as described in the Arrangement).

Taxation Laws

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

This Ruling applies in respect of sections BG 1, NG 1(2) and the definition of "non-resident withholding income" in section OB 1.

The Arrangement to which this Ruling applies

Parties to the Arrangement

BNZ	Bank of New Zealand
NAB	National Australia Bank Limited
NAML	National Australia Managers Limited
Perpetual New Zealand	Perpetual Trust Limited
Perpetual Australia	Perpetual Trustee Company Limited
Asset Trusts	Special purpose trusts established under Supplemental Trust Deeds to the Titan NZ Master Trust Deed (dated 13 September 2001) with Perpetual New Zealand as trustee
Titan NZ Funding Trust	An Australian trust established under a Supplemental Trust Deed to the Titan Master Trust Deed (dated 16 September 1998) with Perpetual Australia as trustee
NZ Branch	The New Zealand branch of the Titan NZ Funding Trust
NZ Owner	New Zealand owners or issuers of assets to be securitised
TSL	Titan Securitisation Limited or a trust established under the Titan Master Trust Deed dated 16 September 1998 with Perpetual Australia as trustee
QSL	Quasar Securitisation Limited or a trust established under the Quasar Master Trust Deed dated 16 October 2001 with Perpetual Australia as trustee
Contractors	Employees of BNZ/NAB contracted to the NZ Branch to perform securitisation services
Secondee	Full time BNZ staff member seconded by the NZ Branch to perform the day to day tasks of the NZ Branch

1. The Arrangement is the creation of a securitisation trust structure ("Titan NZ trust structure") under which BNZ or NAB can offer NZ Owners access to a pre-established securitisation vehicle, through which they can access a competitive source of funding from a wider and more liquid capital market. Further details of the Arrangement are set out in the paragraphs below.

The structure

2. A number of special purpose Asset Trusts, with Perpetual New Zealand as trustee, either have or will be established under Supplemental Trust Deeds to the Titan NZ Master Trust Deed (dated 13 September 2001). The Supplemental Trust Deeds that establish each Asset Trust will specify provisions that apply to each individual Asset Trust. These provisions may be in addition to, amend or replace provisions of the Titan NZ Master Trust Deed.

3. Each Asset Trust will originate (ie create) or purchase an asset or a portfolio of assets to be securitised from NZ Owners. The Asset Trusts will be New Zealand "qualifying trusts" (as defined in section OB 1) by reason of being settled by a New Zealand resident settlor (BNZ). Perpetual New Zealand is a company incorporated and resident in New Zealand. Perpetual New Zealand and BNZ are not "associated persons" as defined in section OB 1.

4. NZ Owners will generally not be associated with BNZ or NAB. The only two qualifications to this are (i) if BNZ or NAB itself wished to securitise certain of their own assets via this structure or (ii) if a subsidiary of BNZ or NAB wished to securitise certain of its own assets via this structure.

5. Thus in addition to adding to the competitiveness of BNZ in the securitisation market, the establishment of a NZ securitisation trust structure provides the potential for BNZ to securitise its own assets, such

as mortgages or trade debts, in the future. This may have accounting and capital efficiency advantages for BNZ.

6. The structure will primarily be used for NZ Owners, but may also be used to securitise BNZ's own assets.

7. NZ Owners who sell assets to the Asset Trusts or who originate assets directly in the name of Asset Trusts will be bound by the commercial and legal terms of the sale or origination which may include ongoing servicing obligations in respect of the assets. In some instances these NZ Owners will continue to perform certain services in respect of the securitised assets. This will be provided for in the sale and purchase agreement or origination agreement in respect of assets to be sold to, or originated by, the Asset Trust or in a separate services agreement.

8. The first Asset Trust, the Titan NZ No 1 Trust, has already been established for a securitisation transaction.

9. Each Asset Trust will fund the purchase or origination of assets by issuing debt instruments to the Titan NZ Funding Trust or the NZ Branch (depending on aspects discussed below) pursuant to a Titan NZ Trust Note Issuance Facility Agreement. The trustee of Titan NZ Funding Trust is Perpetual Australia, a company incorporated and resident in Australia.

10. The Titan NZ Funding Trust has been established as an Australian Trust under a Supplemental Trust Deed to the Titan Master Trust Deed (dated 16 September 1998). The Titan Master Trust Deed provides for the future establishment of trusts for the purpose of securitising pools of assets that may from time to time be originated or acquired by Perpetual Australia (as trustee). The Supplemental Trust Deed establishing the Titan NZ Funding Trust specifies provisions which relate specifically to the Titan NZ Funding Trust. These add to, amend or replace certain provisions of the Titan Master Trust Deed.

11. Perpetual Australia and NAB are not "associated persons" as defined in section OB 1. NAB wholly owns BNZ. Perpetual Australia and Perpetual New Zealand are also not "associated persons".

12. When obtaining funding within New Zealand, the Asset Trust will contract with the NZ Branch of the Titan NZ Funding Trust. The NZ Branch of the Titan NZ Funding Trust then issues notes to New Zealand investors. When obtaining funding from offshore, the Asset Trust will contract with the Australian office of the Titan NZ Funding Trust to provide funding to it.

13. The Australian office of the Titan NZ Funding Trust will in turn contract with TSL or QSL to provide funding to it. A Titan NZ Funding Trust Fund Note Issuance Facility Agreement will provide for the issue of notes by the Titan NZ Funding Trust to TSL and QSL. TSL and QSL will in turn sell notes to dealers or investors. Those notes will be marketed globally, and dealers and investors will typically be non-New Zealand residents. TSL and QSL are both companies incorporated in Australia (or in the case of a trust, a trust established in Australia).

14. The beneficiaries of each of the Asset Trusts are expected to be either the relevant NZ Owner, TSL or QSL. The beneficiary of the Titan NZ Funding Trust is TSL.

15. TSL and QSL are off balance sheet to the NAB/BNZ Group. They are special purpose companies incorporated in the Australian Capital Territory (or in the case of a trust, a trust established in a State or Territory within Australia). TSL and QSL are not "associated persons" with NAB or any NAB Group company for income tax purposes.

16. Interest will be payable at normal commercial rates on arm's length terms on funding:

    (a) from the Titan NZ Funding Trust

    (b) from NZ Investors

    (c) from TSL and investors in notes issued by TSL, and

    (d) from QSL and investors in notes issued by QSL.

17. Pursuant to a Titan NZ Trust Security Trust Deed, each Asset Trust will grant security over its assets to a Security Trustee which will hold that security for the interests of creditors of the Asset Trust which will include the investors in the notes, ie the Titan NZ Funding Trust and/or the NZ Branch. An independent trustee, which at the time of the ruling application will be Perpetual New Zealand, will act as Security Trustee in relation to each Asset Trust. The Titan NZ Trust Security Trust Deed may change depending on the types of securitised assets, but only to the extent necessary to accommodate the asset type, or to a non-material extent.

18. Pursuant to a Custody Agreement, Perpetual Australia or another independent trustee, in its capacity as Custodian, may provide custodian services in respect of certain assets held by the Asset Trusts, such as holding the assets and documents evidencing title to the assets.

19. The Titan NZ Funding Trust and/or the NZ Branch will grant security over its assets to a Security Trustee representing respectively the interests of

creditors (including TSL or QSL for the Titan NZ Funding Trust, NZ note investors for the NZ Branch). An independent trustee which, at the time of the ruling application, will be P.T. Limited, an Australian resident company (and a related party of Perpetual Australia), will act as Security Trustee in relation to the Titan NZ Funding Trust under a Titan NZ Funding Trust Fund Security Trust Deed. This Security Trust Deed is unlikely to change significantly when the transaction contemplates issuing short term debt instruments through either TSL or QSL. However certain changes will need to be incorporated if a transaction contemplates the issue of medium term notes. If funding is sourced from NZ investors, similar security arrangements will be made by the NZ Branch.

20. A Liquidity Facility is also provided to either the Titan NZ Funding Trust or the Asset Trust by NAB and/or other appropriately rated financial institutions in return for a liquidity fee when the Titan NZ Funding Trust is issuing short term debt instruments. Where liquidity is provided at the Titan NZ Funding Trust level, a Titan NZ Funding Trust Liquidity Facility Agreement will be required.

21. Where the NZ Branch issues short term debt instruments domestically, Liquidity Facilities will also be provided to the Asset Trusts or the Titan NZ Funding Trust by NAB/BNZ and/or other appropriately rated financial institutions in return for a liquidity fee. Where notes are issued to TSL and QSL, it is more likely that the liquidity facility will be provided at the Titan NZ Funding Trust level rather than the Asset Trust level, although this will be dependent on the requirements of the transaction and market conditions at the time.

22. A Titan NZ Funding Trust Clean Up Option Agreement is also likely to be required if the Liquidity Facility Agreement is at the Titan NZ Funding Trust level rather than the Asset Trust level.

23. Further, pursuant to the ISDA Master Agreements, BNZ, NAB and possibly other financial institutions may enter into various derivative agreements with Perpetual New Zealand and Perpetual Australia such as interest rate and currency swaps.

24. In some instances assets to be acquired or originated by an Asset Trust may be funded by BNZ or other financial institutions under a Warehouse Facility pursuant to a Titan NZ Trust Warehouse Facility Agreement. For example, this may occur where the assets supporting the notes to be issued by the Asset Trust have not yet been rating assessed. When notes are issued by the Asset Trust to the Titan NZ Funding Trust or its NZ Branch, the proceeds are used by the Asset Trust to repay the Warehouse Facility.

25. A Payment Directions Agreement may be entered into where assets are funded by a Warehouse Facility.

26. NAML, an Australian resident company, will act as trust manager of the Asset Trusts and the Titan NZ Funding Trust. NAML is a wholly owned subsidiary of NAB.

27. In respect of any internationally-sourced funding the Asset Trusts will have no contact with the NZ Branch. Each Asset Trust is a passive vehicle which, under the management of NAML, implements part of a securitisation solution for the NZ Owner’s funding needs. As discussed in more detail at paragraphs 75 to 92 below, the NZ Branch has entered into contracting arrangements with BNZ or its parent NAB and NAML, pursuant to which employees in certain positions of BNZ/NAB market the use of the Titan NZ trust structure to prospective clients/NZ Owners and seek to implement securitisation transactions through the Titan NZ trust structure. The Contractors will present various securitisation proposals and if mandated will implement the chosen structure. It is generally the NZ Owner that decides which solution is most appropriate in the light of the nature of the assets, its own requirements and funding costs and other attributes inherent in any securitisation structure.

28. NAML as Asset Trust manager will perform the mechanics in terms of contracting for the issue of notes to the Titan NZ Funding Trust (Australian office) (for offshore funding) or the NZ Branch (for NZ funding).

29. In some circumstances the structure of the securitisation will have the funding route as a predetermined element of the structure. In these cases, NAML, as the manager of the Asset Trust, will have no discretion in terms of the funding route used. In other circumstances NAML will have a degree of discretion as to the funding route employed. The most appropriate route will be based on market demand conditions and funding costs. However, the Contractors, in making a securitisation proposal to the NZ Owner in these circumstances will have had regard to the most appropriate funding route at that time.

30. Further, funding obtained from TSL and QSL will not be routed through the NZ Branch or have any relationship with the NZ Branch. Rather, the Australian office of the Titan NZ Funding Trust will contract with TSL and QSL as the Australian office will have direct access to TSL and QSL and will therefore be more easily able to source funds from offshore. TSL and QSL have no presence in New Zealand and do not carry on business in New Zealand.

31. It was estimated at the time of the Ruling application that most transactions that will be put through the Titan NZ trust structure (whether funded through the Titan NZ Funding Trust (Australia), or the NZ Branch) will be in the range of $NZ75 million to $NZ200 million.

Need for securitisation structure and offshore funding

32. One of the essential commercial drivers for setting up an independent securitisation vehicle is to enable banks to offer new and existing customers more competitive funding solutions. The Titan NZ trust structure seeks to improve the securitisation solutions BNZ can offer to NZ Owners by, amongst other things, enabling access to lower cost benefits of broadly based and more flexible offshore funding.

33. Funding cost advantages accrue both through a large securitisation structure being able to access a number of markets and pricing advantages through the market recognition of the securitisation structure's brand. Such structures are used almost universally by securitisation sponsors throughout the world.

34. The Titan NZ Funding Trust is being used in the New Zealand structure because of the expectation that there will be a need for the funding to be predominantly from offshore due to the limits in size and liquidity in the New Zealand market.

35. TSL and QSL structures currently operate in Australia and are utilised by NAB and its customers. TSL has a recognised brand in Australia, and is expected to provide a high level of origination skills and experience. QSL has been recently established and is developing its brand in Australia. The Titan NZ trust structure will have at its disposal the expertise of proven originators, the Contractors who operate in the more developed Australian market. This is complemented by a professional and dedicated New Zealand based servicing function through the NZ Branch. These factors are further discussed below.

36. The decision whether to fund in A$ (or US$) through the Australian office of the Titan NZ Funding Trust or in New Zealand through the NZ Branch will be dependent on the location with the cheapest source of funds or which market is more suitable given the volume and nature of the underlying assets, investor demand in respective markets at the time, and the requirements of the NZ Owner.

37. The Titan NZ trust structure will enable NZ Owners to enjoy the benefit provided by the depth and pricing advantages of the offshore capital markets due to their ability to absorb much larger issue volumes (therefore being more liquid) without being unduly penalised on the yield. As well, while the Titan NZ trust structure allows access to the more liquid offshore markets it also maintains the ability to access the NZ market.

38. The Titan NZ trust structure also offers a back up funding solution if market conditions cause a need for an alternative funding source to be adopted when a transaction is being negotiated.

39. Further, the effectiveness of a securitisation solution depends, inter alia, on its ability to reproduce itself relatively cheaply and to raise funding on beneficial terms. Fixed upfront costs are an impediment and a structure like the Titan NZ trust structure allows a portion of these fixed costs to be defrayed over a number of transactions. It also allows ongoing management to be conducted more effectively. The Titan NZ trust structure is a pre-established structure with well developed documentation and procedures which can be used to allow efficient and cost effective implementation and running of transactions on an ongoing basis.

Further need for funding trust – re overseas funding

40. The Titan NZ Funding Trust is also being used in the New Zealand structure because the "Titan" name will attract investors. The Titan NZ Funding Trust is separate from the Asset Trusts because it is commercially attractive to use Titan's established reputation (and the growing reputation of Quasar) in the market in relation to the raising of funds from offshore investors.

41. In the Australian structure TSL and QSL directly fund the Australian Asset Trusts. The New Zealand position is different for the reasons set out below.

42. Firstly, using the Titan NZ Funding Trust, being an Australian trust with a branch in New Zealand, allows access to a broader pool of liquidity support providers. The reason for this is because there is a much larger number of financial institutions in Australia that will be able to provide liquidity support. This is especially the case where funding is provided by TSL or QSL, in which case liquidity support is required in Australian or US dollars (as opposed to the NZ Branch issuing commercial paper to NZ investors).

43. Further, for structural and documentation reasons it was seen as more expedient and efficient for TSL or QSL to purchase notes from an Australian trust with Perpetual Australia as trustee and NAML as manager.

44. TSL itself was also not considered an appropriate direct funding entity to the Asset Trusts because there is an intention to attract a broader pool of

investors and to use the structure for a broader pool of assets (hence the involvement of QSL). Using a branch of TSL to fund assets through QSL would have created an undesirable brand fusion between QSL and TSL. It is important for BNZ and NAB to maintain a clear distinction between the Titan and Quasar brands from a marketing perspective as TSL and QSL provide two distinct funding solutions for issuers. Using a branch of the Titan NZ Funding Trust, rather than a branch of TSL, eliminates TSL from any transaction which will ultimately be funded by notes issued by QSL (and vice versa). Further it is not considered viable, given the size of the New Zealand securitisation market to set up two branches in New Zealand, one for TSL and one for QSL.

45. The isolation of the NZ assets exposure in the Titan NZ Funding Trust and NZ Branch also makes the credit rating process easier and more flexible than if a branch of TSL is used. The segregation of NZ assets is easily achievable at the Titan NZ Funding Trust via the use of the Titan NZ Funding Trust Supplemental Deed and the Titan NZ Funding Trust Security Trust Deed arrangements. This would also be achievable at the Asset Trust level, but as stated above, that could potentially give rise to liquidity support issues.

46. Further, as TSL is a pre-established entity and is very restricted in what it can do by virtue of the terms of the transaction documents to which it is a party and rating agency requirements, it would have been difficult to obtain approval for a branch of TSL in New Zealand. It was thought cleaner and more expedient to establish the Titan NZ Funding Trust and have it establish a branch in New Zealand to avoid this approval process.

47. As a consequence it was determined that the Titan NZ Funding Trust should be established.

48. TSL is an established entity in the Australian securitisation market and will use its existing reputation and credit rating to attract investors in its notes. QSL has recently been established and is expected to build the same reputation and also use its credit rating to attract investors in its notes. The difference between TSL and QSL and the advantage of the Titan NZ Funding Trust having access to both vehicles is that because of credit rating requirements, QSL has the ability to invest in lower rated notes than TSL and so provides NZ Owners with the ability to securitise a much broader range of assets.

TSL's and QSL's investors:

49. TSL will issue mainly to Australian asset backed commercial paper ("ABCP") investors and TSL (USA) Inc. will issue mainly to US ABCP investors via its US dealer panel.

50. All ABCP investors of TSL, TSL (USA) Inc. (a wholly owned subsidiary of TSL incorporated in the US State of Delaware which issues mainly to US ABCP investors via its US dealer panel) and QSL are non-retail investors, eg funds managers and superannuation funds.

51. In time it is proposed that the NZ Branch of the Titan NZ Funding Trust will issue ABCP to non-retail ABCP NZ investors.

52. It is also possible that the Titan NZ Funding Trust will issue medium term notes to TSL or QSL in order to issue medium term notes to the market.

The NZ Branch

i) Functions

53. The NZ Branch of the Titan NZ Funding Trust will be responsible for marketing the Titan and Quasar brands in New Zealand, obtaining funding from NZ investors and performing other services in respect of the Asset Trusts and for BNZ. The NZ Branch will have the ability to issue debt instruments to New Zealand investors. As discussed below, the NZ Branch will initially employ one full time Secondee and will contract for the services of three Contractors from BNZ/NAB.

54. Part of the commercial rationale for the NZ Branch is to benefit from the power of the Titan brand in Australia, and the need for a physical presence in New Zealand to attract New Zealand investors who are familiar with the New Zealand market. Without the presence of the NZ Branch, the Titan (and Quasar) programme would not function effectively. In particular, the key factors which influenced the decision to establish a branch of Titan in New Zealand were as follows:

(a) the desire to use a number of personnel with a range of securitisation experience and in particular taking advantage of the proven experience and expertise of personnel that work in the more developed Australian market;

(b) the need for a New Zealand based flagship for Titan in New Zealand, especially for NZ Owners who implement transactions through the Titan NZ trust structure;

(c) the need for a physical New Zealand base that origination personnel can use to help market, develop, negotiate and implement Titan NZ transactions;

(d) the advantages provided by having the servicing and administration of Titan NZ transactions done in New Zealand;

(e) the identification of personnel suitable for the servicing and administration tasks required; and

(f) the desire to expand the New Zealand funding market and in doing so increase the flexibility of funding solutions on offer to New Zealand clients.

55. BNZ and its parent NAB expect to benefit in terms of increased banking business and enhanced customer relationships from the use of the Titan and Quasar names and structure. It is hoped that a New Zealand structure will enable BNZ to increase the scope of business it can undertake with any particular NZ Owner and increase the availability of funding to NZ Owners.

Servicing Functions

56. The servicing functions of the NZ Branch will include the following:

- Liasing with auditors;
- Liaising with the registrar and paying agent under commercial paper issues in New Zealand;
- Managing the NZ Branch's cashflows including the receipt and reinvestment of income and payment of interest and expenses;
- Directing the trustee with respect to payments to be made from the bank accounts of the NZ Branch;
- Maintaining accounting records of all transactions and providing copies of these records to NAML;
- Maintaining management information reports and providing such reports to NAML;
- Checking covenants compliance;
- Soliciting bids, receiving and accepting bids from the New Zealand dealer panel at each commercial paper rollover date, including,
  - receiving bids from Dealer Banks on day of Tender
  - selecting bids in order of price and advise successful Dealers
  - making calls on liquidity facilities when bids for commercial paper result in tender shortfall, and
  - writing reports on draw downs, rates, split of subscriptions, etc, in respect of debt draw downs.
- Ensuring compliance with New Zealand law and the trust deed establishing the Titan NZ Funding Trust and NZ Branch; and
- In conjunction with the trustee and NAML, implementation and management of contracting arrangements with BNZ or NAB including negotiation of fee arrangements, negotiation and renewal of Contractors as they expire and liaising with the Contractors on an ongoing basis.

Managing BNZ asset backed transactions

57. The services for BNZ are set out in the Services Agreement and involve management of BNZ's existing asset backed transactions and others agreed from time to time. The details of these transactions are set out in the draft Services Agreement which has an initial period of two years, and automatically extends unless terminated by any party.

58. These are transactions that have been entered into by BNZ and require ongoing management.

59. While servicing/managing BNZ's existing transactions will form part of the Secondee's work initially, this is not the core task of the NZ Branch. The NZ Branch is being established as a key strategic part of the Titan NZ trust structure. As a result of further transactions being implemented through the Titan NZ trust structure, it is expected that the servicing function provided by the NZ Branch will eventually involve predominantly Titan NZ transactions with existing BNZ transactions providing only supplementary business to the NZ Branch.

60. Although it is anticipated that future BNZ originated transactions will be executed through the Titan NZ trust structure, there may be eventualities (eg the credit quality or nature of the underlying assets) where a separate standalone programme is required. In these cases provision is made within the Services Agreement for the NZ Branch to provide management services.

61. As the NZ Branch will have the management skills required for its own activity, including servicing the Asset Trusts, BNZ has an interest in using the NZ Branch's competencies against payment of an arm's length management fee. NAB/BNZ has taken a business decision to structure its securitisation business around the Titan (and Quasar) structure and perceives benefits in having the centralisation of securitisation management in one unit. For example, one such benefit is that the identification of risks or benefits from certain aspects of a transaction can be seamlessly passed over to other transactions to ensure such risks or benefits are dealt with appropriately over all securitisation transactions.

62. Further, BNZ considers there to be advantages in isolating a particular set of transactions, and the risks that are associated with them, in a separate and distinct entity. The NZ Branch provides this and is compensated for the risk it assumes.

63. The servicing of the existing transactions by the Secondee is, in essence, providing ongoing management in normal operational conditions. Where existing asset backed transactions require executive action outside normal management, other BNZ securitisation staff will be involved.

64. The precise tasks that will be performed in respect of each transaction are set out in schedule 2 of the Services Agreement. However, the general nature of the activities that will be performed on behalf of BNZ are as follows:

    - Arranging liquidity facilities and liaising with liquidity facility providers on an ongoing basis
    - Where required, arranging hedge contracts/credit enhancements to be entered into by the Asset Trusts and liaising with hedge/credit enhancement providers on an ongoing basis
    - Arranging the acquisition/sale of any assets
    - Liaising with third party asset servicers
    - Liasing with auditors in conjunction with NAML
    - Liaising with the registrar and paying agent under commercial paper issues in New Zealand
    - Making regular payments of interest and fees
    - Liasing with participating banks
    - Maintaining accounting records of all transactions and providing copies of these records to BNZ and NAML
    - Maintaining management information reports and providing such reports to BNZ and NAML
    - Making calls on credit enhancement providers
    - Checking covenants compliance
    - Checking asset servicer reports and ensuring compliance to rating agencies' requirements (for rated transactions only)
    - Liaising with and instructing the trustee of the Asset Trusts on an ongoing basis, and
    - Soliciting bids, receiving and accepting bids from the New Zealand dealer panel at each commercial paper rollover date, including:
        - receiving bids from Dealer Banks on day of Tender
        - selecting bids in order of price and advising successful Dealers;
        - making calls on liquidity facilities when bids for commercial paper result in tender shortfall;
        - writing reports on draw downs, rates, split of subscriptions, etc, in respect of debt draw downs.

Servicing the Asset Trusts

65. As stated, NAML (an Australian resident company) will act as trust manager of both the Asset Trusts and the Titan NZ Funding Trust. This includes the task of servicing the Asset Trusts. However, because of its lack of presence in New Zealand, NAML will delegate certain servicing functions and some management functions in respect of the Asset Trusts to the NZ Branch pursuant to a Delegation Agreement. In its service role, the NZ Branch will be required to calculate and direct Perpetual New Zealand as trustee of the Asset Trusts in relation to the receipt and payment of interest, principal and fees in respect of the assets and liabilities of each Asset Trust, and perform various services in respect of those assets similar to those set out in respect of existing BNZ asset backed transactions. There is no overlap in NAML's role and the NZ Branch's functions pursuant to the Delegation Agreement other than necessary continued supervision by NAML. The extent of the delegation by NAML is expected to be greater where the source of funding is the domestic market (via the NZ Branch) as opposed to TSL or QSL. The extent of delegation will also vary depending on the asset type and structure.

66. It is intended and expected that the NZ Branch will service every Asset Trust, even where the NZ Owner is an existing client of BNZ, or BNZ itself. However, as stated in paragraph 7 above, certain servicing obligations in respect of the specific assets may remain with the NZ Owner, including a situation where BNZ might securitise some of its own assets through the structure.

67. It is important that the servicing function is carried out from New Zealand because the servicing of a securitisation transaction is much more complex than the servicing of simple debt transactions. This is essentially because of the stringent requirements that the rating agencies impose on the NZ Owner and the servicer of the programme to be able to

achieve a strong credit rating on the securitised debt. It is important that the issuer and the servicer communicate frequently and easily, and the Secondee will be identified as a contact point for clients. It is strongly desirable that the servicing takes place in New Zealand. NAML does not have the New Zealand presence and does not have skills and experience in the New Zealand securitisation market.

68. This is strategically essential for the NZ Branch as servicing of the Asset Trusts is an essential building block for the effective presence of the Titan and Quasar securitisation trust structures in New Zealand and for brand development. The NZ Branch's servicing function, by delivering excellence in service, will contribute to the development of the Titan brand. It also provides convenience and advantages in terms of the contacts and networking a New Zealand based person has with other New Zealand based parties that play important roles in securitisation transactions. For example, if a Titan transaction is funded in New Zealand, the Secondee will have direct contact with the commercial paper dealers in New Zealand and can call or visit them if necessary. The same applies to liquidity providers, hedge providers, standby facility providers, warehouse providers and other liquidity enhancement providers where these are New Zealand based institutions, and the registrar and paying agent for commercial paper programmes. The Secondee will deal with these parties on a regular basis, providing an established networking advantage to the NZ Branch.

69. Because NAB/BNZ believes that the local servicing presence is a very important factor in securitization transactions, the Contractors will promote the local servicing presence to NZ Owners.

70. One element of NAB's strategy for its securitisation business is the centralization, where possible, of the management of its securitisation transactions in specialised off balance sheet entities. This has benefits, not only for prudential reporting purposes, but also enhances the quality of risk management and the centralization of expertise. Virtually all large securitisation arrangers use the services of a management unit with a high degree of separation from the rest of their operation.

71. The Delegation Agreement has been drafted as a master agreement pursuant to which specific tasks to be delegated to each Asset Trust are specified in a schedule each time a new Asset Trust is established. This recognises that the specific tasks to be delegated will depend on the type of assets to be securitised and whether the asset is to be funded via the domestic or offshore market.

72. Whilst the delegated functions in respect of the Asset Trusts could theoretically be carried out by NAML, it does not make commercial sense for NAML to perform such functions if it has the ability to delegate them to someone "on the ground" in New Zealand. In particular, establishment of bank accounts, performing account and cash reconciliations, directing the trustee in relation to payments and any activities required where the facility/swap/other provider is BNZ, should be carried out locally if possible.

73. The extent of delegation will depend on the asset type involved.

74. As Asset Trust manager, NAML will continue to perform its obligations to monitor the financial and contractual performance of each Asset Trust, and prepare and maintain accounts and financial records.

Marketing

75. In addition, the NZ Branch will be required to market the Titan and Quasar brands in New Zealand through Contractors from BNZ/NAB. Contractors are also responsible for the negotiation and execution of transactions. As stated above, the NZ Branch will enter into contracting arrangements with BNZ or its parent NAB and NAML (as Titan NZ Funding Trust manager), pursuant to which employees in certain positions of BNZ/NAB market the use of the Titan NZ trust structure to prospective clients and seek to implement securitisation transactions through the Titan NZ trust structure.

76. Once it is established every transaction put through the Titan NZ trust structure will be arranged by Contractors working for the NZ Branch.

77. Contractually and legally the Contractors act for the NZ Branch when implementing transactions. It is important to clearly differentiate the Titan NZ trust structure from any other securitisation solutions used by BNZ to help develop the Titan brand in New Zealand.

78. As stated, because NAB/BNZ believes that the servicing is a very important factor in securitisation transactions, it is important that the Contractors promote the local servicing presence as a key deal winning aspect of the Titan NZ trust structure. For example, this will be included in presentations to potential NZ Owners. Further, meetings will, if practical for NZ Owners, take place at the NZ Branch premises and NZ Owners will be introduced to the Secondee to put a face to the servicing aspect of the transaction. NAB/BNZ strongly believe that the Contractors must be associated to the local presence, and therefore must be operating for the

NZ Branch. The NZ Branch also provides a base where the Contractors can meet with clients to make presentations and discuss, negotiate and execute transactions. This also helps associate the Contractors with the local presence. As well, having a physical office presence and an identified focal point, which is branded, displays a clear sense of professionalism and commitment to the New Zealand market, which can be important factors in marketing and successfully securing transactions.

79. The Contractors work within the NAB Group's securitisation business. Two Contractors will be NAB personnel based in Australia. The Australian securitisation market is one of the largest in the world and the Contractors need to be based there in order to maintain and develop the required level of expertise. Securitisation transactions are highly varied and require differentiated skills which are specialised in nature. These skills are available within the wider NAB Group.

80. The actual time that will be spent in New Zealand by the Australian based Contractors will vary depending on the opportunities that present themselves.

81. A good proportion of the Contractors' time will also be spent working with other BNZ staff in identifying opportunities and preparing approaches without the need for travel.

82. The role of the Contractors and their physical presence in New Zealand, although periodical, is fundamental to the NZ Branch's strategy.

83. There are three contracting agreements for Contractors covering different areas of expertise.

84. The contracting arrangements between the NZ Branch and BNZ or NAB will be in respect of specific positions within BNZ or NAB for an initial period of two years. Each contract will be in respect of one staff member although the identity of that staff member could change if an individual leaves BNZ or NAB or changes positions during the term of the contract. The personnel contracted by the NZ Branch from BNZ or NAB will be professionals each with specific expertise in the different types of securitisation transactions intended to be put through the Titan NZ trust structure. The Contractors will be responsible for the following:

Marketing

Each Contractor will market the capabilities of the Titan NZ trust structure to prospective securitisation clients in the Contractor's niche area. Their tasks include:

- looking actively for business opportunities to be funded through the Titan NZ Funding Trust or the NZ Branch
- liaising with the Secondee of the NZ Branch in relation to potential transactions
- meeting potential customers and discussing business opportunities for the Titan NZ Funding Trust or the NZ Branch
- making presentations to potential customers
- negotiating the commercial terms of potential transactions
- negotiating securitisation agreements and related documents for the Asset Trusts and the NZ Branch in conjunction with NAML and the trustee of the Asset Trust
- making offers on securitisation transactions on behalf of the Titan NZ Funding Trust and the NZ Branch
- preparing regular marketing and activity status reports, and
- seeking mandates from NZ Owners.

Negotiation and implementation

Tasks include:

- negotiating with NZ Owners and other parties involved in securitisation transactions including credit enhancement providers
- writing term sheets
- writing a transaction report to NAML (as Asset Trust manager) for approval, after a mandate has been obtained from a NZ Owner
- doing modelling work and due diligence on the assets, necessary to obtain credit ratings from the rating agencies
- managing the credit rating process
- structuring and writing information memoranda on the transaction for the benefit of NAML, TSL's and QSL's investors
- structuring and negotiation of the legal documentation of the transaction in conjunction with NAML and the trustees
- managing the structuring and negotiation with the client during the implementation process
- following completion, liaising with the Secondee of the NZ Branch to ensure smooth post implementation phase
- post implementation, managing the relationship with the client and trying to identify opportunities to increase the programme size or extend the programme to new asset types, product features, credit procedures, etc and liaising with the Secondee of the NZ Branch with respect to this

- marketing to the New Zealand originators of assets
- writing a transaction report to NAML (as Asset Trust manager) for approval, after a mandate has been obtained from an issuer
- seeking mandates from NZ Owners
- seeking mandates from existing asset backed issuers wanting to expand their existing programmes offshore.

85. The technology used in structuring a securitisation programme varies according to the underlying assets (ie residential mortgages, motor vehicles, heavy equipment etc). Therefore some originators are specialised in some asset classes. Further, each geographic market is different in terms of investor requirements and credit rating requirements, for example. Thus, it is important that among the Contractors acting for the NZ Branch, some specialise in the NZ market.

86. Contractors will be marketing to both New Zealand investors and NZ Owners. Where the successful execution of transactions involves funding from New Zealand, the Contractors will be involved in assessing and ensuring investor demand for that funding. They will not be involved in selling that funding to New Zealand investors on a day-to-day basis. This is the role of the dealers under the funding programme of the NZ Branch.

87. However, as maintenance of the attractiveness of the Titan (and Quasar) structure is an important element in securing transactions on an ongoing basis, it is in the Contractors' interests to "market" the Titan (and Quasar) structure on a generalised basis to all investors, including New Zealand investors. The Titan and Quasar brand names are considered to have advantages in the market and that is why the structure is being marketed through the NZ Branch. BNZ/NAB see it as important that the use of Titan/Quasar is consistently applied throughout the structure and not just when seeking offshore investors to fund the securitisation transactions.

88. The Contractors will be contracted on an arm's length basis recognizing both the NZ Branch's and BNZ/NAB's benefit from implementing transactions through the NZ Branch. BNZ/NAB will continue to remunerate the contracted staff but will receive a share of the income received by the NZ Branch in respect of any transactions put through the Titan NZ trust structure by the Contractors as consideration for providing the Contractors.

89. Origination income usually takes the form of arrangement fees paid by originators of assets (ie the NZ Owners) in respect of transactions using the Titan (or Quasar) programme and structure.

90. Only estimates of the number of transactions have been given to the Rulings Unit due to the unpredictable nature of the securitisation market, and the length of time it can take to implement transactions. The size of the transactions and the resultant arrangement fee may also vary.

91. The Titan/Quasar programme will be marketed on an ongoing basis, but the number of expected hours will depend on the opportunities that arise and how much effort is needed to exploit any particular opportunity. However, on average, as a broad generalization, Contractors are expected to spend in aggregate approximately 200 to 300 hours per year marketing the services of the Titan NZ Funding Trust or the NZ Branch. Implementation of a transaction would occupy further contractor hours, estimates of which have been provided to the Rulings Unit.

92. The combination of marketing/origination through Contractors, administration, and funding functions through the Secondee should contribute to the NZ Branch being perceived as a standalone entity being able to provide integrated services to its customers. This will facilitate obtaining mandates for the Titan NZ trust structure to manage the Asset Trusts and provide funding for the assets of NZ Owners.

ii) Staff

93. The role of the NZ Branch in the Titan NZ trust structure requires the NZ Branch to have the services of a full time Secondee to perform the day to day tasks of the NZ Branch, as well as the services of the Contractors.

94. The NZ Branch will have at least one full-time staff member seconded from BNZ on an arm's length basis with an arm's length fee being charged pursuant to the Secondment Agreement. The Secondee will be seconded on an exclusive basis to the NZ Branch and will be under the control of the trustee of the Titan NZ Funding Trust. BNZ will continue to do the payroll, and the salary will be re-paid to BNZ by the trustee. BNZ will also receive a fee which will cover the costs of providing the staff member, including the cost of payroll services.

95. The full-time Secondee will be a skilled person possessing the relevant skills to administer and manage the transactions going through the NZ Branch on a day to day basis, administer note issues from the NZ Branch into the New Zealand market where that is considered viable, and to provide servicing functions to the Asset Trusts and BNZ. As stated, the Secondee provides the day to day administration and management of the NZ Branch. The Secondee will also work in conjunction with the Contractors from BNZ or NAB to attract further work to the NZ Branch and to manage and administer the transactions implemented by those Contractors.

96. The nature of the Secondee's tasks will be such that no secretarial services will be required.

97. On a six-monthly basis the Secondee will provide a written report on the NZ Branch's progress to NAML and TSL.

98. The applicant has provided the Rulings Unit with a breakdown of time estimates for the Secondee to perform their function. It is noted that the accuracy of these estimates can be affected by factors such as the performance of the Secondee, the technology available and the market place at the time.

99. It is expected that the number of staff members will increase as the business of the NZ Branch grows. The NZ Branch has the ability to directly employ staff in the future. The applicants expect the NZ Branch operations to expand considerably by the end of 2005.

iii) Premises

100. Subject to paragraph 101 below, the NZ Branch operations will be based at fixed, identifiable premises on Level 13, BNZ Tower, 125 Queen Street, Auckland, licensed from BNZ for an arm's length price pursuant to the Licence and Services Agreement. A plaque bearing the name of the NZ Branch will be displayed in the foyer, and outside the lifts on level 13. These premises will be exclusively occupied by the Secondee of the NZ Branch and Contractors when working for the Branch. The area to be occupied is approximately 10 square metres in a room with direct access from the lobby. Access to meeting rooms, a kitchen, toilets and other common areas will also be provided. Also under the Licence and Services Agreement, the NZ Branch will license certain software as described in the Agreement, and certain equipment listed in schedule 1 to the Agreement. That will include a computer, a dedicated phone line and facsimile lines, a chair, desk and filing cabinet. The NZ Branch will also have an email address, its own stationery and letterhead.

101. While not anticipated, the premises of the NZ Branch could change if, for example, BNZ moved its office premises, or if the NZ Branch outgrows its office space and decides to move to alternative premises. The NZ Branch may also wish to license alternative equipment and software or purchase its own. In these circumstances, at a minimum, the NZ Branch will arrange for alternative premises, equipment and/or software as that detailed above.

102. The initial term of the licence is two years and it is renewable. However, either party can terminate it with 3 months notice. The licence of the office, software and equipment will be provided at an arm's length rate.

103. It is considered that this office space will be sufficient initially. Provision is made in the Licence and Services Agreement for more space to be made available if necessary as the business of the NZ Branch expands.

104. The office will be primarily a work space for the Secondee to fulfil the NZ Branch's activities, and for the Contractors to work from whilst in New Zealand. The Secondee may use the meeting rooms to meet clients post implementation and/or to meet with third parties involved in the servicing and administration of transactions. As stated, the meeting rooms can also be used by the Contractors to meet with clients, BNZ relationship personnel and any other parties involved in marketing and implementing a securitisation transaction. The NZ Branch office space will also be used for storing documentation, market information and marketing material. Copies of documentation relating to the delegated tasks in respect of the Asset Trusts, the management of BNZ's existing asset backed transactions and the issuance of commercial paper in New Zealand will also be maintained in the office.

105. Contractors and the Secondee will typically meet in the common meeting rooms available under the Licence and Services Agreement.

iv) Profit projections

106. The NZ Branch is expected to make a profit each year through performing the functions outlined above. The profits and revenues are expected to grow over the next five years as the awareness of the Titan brand grows and the NZ Branch services more transactions. Projections for the next five years have been provided to the Rulings Unit. The projections are only estimates as the actual revenue will depend on a number of factors including the securitisation opportunities which arise. The profit estimations for the NZ Branch for the first year are as follows:

(in $000)	**Year 1**
Total revenue	280
Total expenses	214
Gross profit	66

107. The set up costs of the Titan NZ trust structure and the NZ Branch are being borne by NAB/BNZ. This is because the Titan (and Quasar) structure is an important strategic business proposition for NAB/BNZ. To enable its viability, NAB/BNZ is absorbing the set up costs as part of its sponsorship of the Titan and Quasar structures, in line with normal commercial practice in this area.

108. Income from servicing BNZ asset backed transactions is not forecast to significantly grow as the primary focus of the Secondee and Contractors will be to originate and service the NZ Branch's own transactions.

109. As the Titan and Quasar brand names are more widely recognised in the New Zealand market, new transactions (therefore new Asset Trusts) will be structured. Thus the servicing of Asset Trusts will be a strategically essential transaction type of the NZ Branch.

110. Income from origination of new business is further explained at paragraphs 88 to 90 above.

111. Estimates of income to the NZ Branch have been provided to the Rulings Unit. Actual amounts and the funding mechanism will be dependent on the factors discussed at paragraph 36 above.

112. There are strong expectations that the ABCP issued by the NZ Branch will be purchased by NZ investors.

113. Where the Australian office of the Titan NZ Funding Trust issues notes to TSL or QSL, the Australian office will derive margin income on the notes issued to it by the Asset Trusts. This income is not paid to or attributed to the NZ Branch.

NAML

114. NAML is an Australian resident company and wholly owned subsidiary of NAB. As stated above, NAML will act as trust manager of the Asset Trusts and the Titan NZ Funding Trust. This includes the task of servicing the Asset Trusts. However, because of its lack of presence in New Zealand, NAML will delegate certain servicing functions and some management functions in respect of the Asset Trusts to the NZ Branch pursuant to a Delegation Agreement. Further details in this respect are set out at paragraphs 65 to 74 above.

115. BNZ currently has no dealings with NAML except as Warehouse Facility Provider to the first Asset Trust established under the Titan NZ trust structure, of which NAML is trust manager.

116. NAML's time involvement will depend on the number of Asset Trusts in operation, the frequency of the asset payment dates (eg monthly versus quarterly) and the complexity of the transactions undertaken. The greater the number of Asset Trusts, the greater the volume of work required to be undertaken. It also depends on the extent of the delegation from NAML to the NZ Branch.

117. NAML's fee at both the Asset Trust level and at the Titan NZ Funding Trust level comprises a base fee and may also include a performance fee. The base fee will be a set predetermined amount.

118. The performance fee (if any) will vary depending on the nature of the transaction, the other costs and whether the NZ Owner is to retain the excess income from the transaction, but will be commercially determined and based on performance.

119. The trustee of the Titan NZ Funding Trust will pay NAML's fee in respect of the Titan NZ Funding Trust and the trustee of the Asset Trust will pay NAML's fee in respect of the Asset Trusts.

120. Under some future transactions a revolving structure may be used so that the NZ Owner can continue to sell receivables to the Asset Trust as they are originated (for example by selling goods on credit). As well, under these transactions the interest rate on the receivables assets may be fixed or floating and so may be different to the interest rate on the notes issued by the relevant Asset Trust. In these circumstances, the Asset Trust will enter into an interest rate swap with BNZ to hedge its interest rate risk exposure.

121. Whether future transactions will be mandated or not will depend on several factors including the ability to use the Titan NZ trust structure and the advantages it offers. If they are mandated, the arrangement fee (if any) will be paid to the entity that arranges the transaction which is expected to be the Contractors acting for the NZ Branch. If these transactions are successfully implemented, they are expected to be funded through the Titan NZ Funding Trust, and serviced by the NZ Branch.

122. While the absence of the NZ Branch and the Contractors contracted to it has not stopped transactions being competed for, it would enhance the chances of securing those transactions. One of the motivations for BNZ in establishing the Titan NZ trust structure as set out in this Arrangement is to provide securitisation solutions it can offer to NZ Owners in a competitive market.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) The office premises licensed to the NZ Branch of the Titan NZ Funding Trust by BNZ pursuant to the Licence and Services Agreement will be exclusively occupied by the staff and Contractors working for the NZ Branch.

(b) Unless the circumstances in paragraph 101 of the Arrangement apply, the Titan NZ Funding Trust will renew the licence pursuant to the Licence and Services Agreement for at least the period of this Ruling, and BNZ or the Titan NZ Funding Trust will not terminate the licence during the period of this Ruling.

(c) If there is any change in the location of the NZ Branch's premises as contemplated by paragraph 101 of the Arrangement, as a minimum the attributes of those premises will be materially the same as those set out in paragraph 100 of the Arrangement for at least the period of the ruling. Further, any change in location of the premises will be for genuine commercial reasons, and the premises will be within office accommodation. If any equipment and/or software is replaced or substituted as contemplated by paragraph 101 of the Arrangement, this will be with equipment and/or software not less substantial or functional than that previously used.

(d) The Titan NZ Funding Trust intends to make a profit from the activities of its NZ Branch.

(e) The profit estimations set out at and referred to in paragraph 106 of the Arrangement, and the breakdown of those estimations as provided to the Rulings Unit, provides what are in good faith believed to be realistic estimates of the revenue and expenditure of the NZ Branch of the Titan NZ Funding Trust, and incorporates what is believed to be all foreseeable expenditure that is likely to be incurred in operating the NZ Branch.

(f) In respect of lending funds to the Titan NZ Funding Trust, each of TSL and QSL:

    (i) are non-residents for New Zealand tax purposes, and

    (ii) do not carry on any business, either wholly or partly, in New Zealand.

(g) Where funds are lent to the Titan NZ Funding Trust by TSL and QSL the loan contracts will not be made or wholly or partly performed in New Zealand.

(h) No funds raised by the Australian office of the Titan NZ Funding Trust from TSL or QSL will be applied towards the activities of the NZ Branch of the Titan NZ Funding Trust.

(i) BNZ reasonably believes that it is important that the Asset Trusts are serviced in New Zealand for the reasons set out at paragraphs 67, 68 and 72 of the Arrangement.

(j) The NZ Branch will undertake a bona fide marketing function as described in the Arrangement. This marketing function is commercially desirable in respect of both new and existing BNZ customers due to the competitiveness in the securitisation market and BNZ reasonably believes that a marketing function is essential if the NZ Branch is going to be successful in securing transactions to be securitised through the Titan NZ trust structure.

(k) BNZ reasonably believes that the Contractors must be associated with the local presence, and therefore must act on behalf of the NZ Branch. Further, BNZ believes that it is important that the Contractors ensure that the local servicing presence is made known as an important element of the Titan NZ trust structure in securing transactions.

(l) It is expected that the servicing function provided by the NZ Branch will eventually involve predominantly Titan NZ transactions following the implementation of further Titan NZ transactions, with servicing of existing BNZ transactions providing only supplementary business to the NZ Branch.

(m) All of the functions to be carried on by the NZ Branch will be discrete functions, which will, except to the extent envisaged by the Arrangement, be carried out without the assistance or intervention of BNZ, NAB or NAML. For the avoidance of doubt, this Condition will not be breached by BNZ or other Parties to the Arrangement undertaking legal and tax compliance checks of the NZ Branch to ensure it is complying with its legal obligations and the Ruling.

(n) Any fees paid pursuant to any Agreement referred to in the Arrangement will be an arm's length quantum on a stand-alone basis.

(o) There will be no connection, association, relationship, arrangement or understanding in any way connected with the Titan NZ trust structure between any of the Parties to the Arrangement or any of their associates other than as described in the Arrangement, except for facilitative and ordinary activities, arrangements or understandings as may be required for the day to day operation of the business activities contemplated by the Titan NZ trust structure (for example, credit enhancement arrangements).

(p) The final form of all documents referred to in the Arrangement will not differ materially to the draft Agreements provided to the Rulings Unit in respect of this Ruling. For the avoidance of doubt, changes to the documents envisaged by the Arrangement or as set out in paragraphs 8 to 21 of the letter of 9 August 2002 to the Rulings Unit accompanying the draft documents are not considered material changes.

(q) Any arrangement entered into under this Ruling will not be materially different from the Arrangement as described in the binding private ruling in relation to the first Asset Trust established under the Titan NZ trust structure (BR Prv 03/48).

How the Taxation Laws apply to the Arrangement

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

- The interest paid by Perpetual New Zealand, in its capacity as trustee of each Asset Trust, to Perpetual Australia, in its capacity as the trustee of the Titan NZ Funding Trust, will not comprise "non-resident withholding income" in terms of sections OB 1 and NG 1(2) of the Act and accordingly that interest will not be subject to non-resident withholding tax or approved issuer levy.
- Interest paid by the Australian office of the Titan NZ Funding Trust to TSL or QSL, in respect of amounts borrowed to fund notes issued by each Asset Trust, will not comprise "non-resident withholding income" in terms of sections OB 1 and NG 1(2) of the Act and accordingly that interest will not be subject to non-resident withholding tax or approved issuer levy.
- Section BG 1 will not apply to negate or vary any of the conclusions reached above.

The period or income year for which this Ruling applies

This Ruling will apply from the date it is signed to 30 May 2008.

This Ruling is signed by me on the 26th day of September 2003.

Martin Smith
General Manager (Adjudication & Rulings)

PRODUCT RULING - BR PRD 03/17

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 Vodafone New Zealand Limited ("Vodafone").

Taxation Laws

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

This Ruling applies in respect of sections CH 2, CH 3, CD 5, EB 1, EH 21, EH 22, EH 23, EH 24, BG 1 and GB 1.

The Arrangement to which this Ruling applies

The Arrangement is the establishment and operation of the Vodafone Pacific Limited ("VPL") Employee Deferred Share Plan ("EDSP") for the benefit of employees in New Zealand and Australia. The Trustee of the EDSP will be a New Zealand resident subsidiary of Vodafone, Vodafone Pacific Limited (New Zealand) Share Plans Limited ("the Trustee").

The Trust Deed, the Plan Rules and the Participation Contract ("PC") provided to the Commissioner of Inland Revenue on 2 March 2001 together form the basis of the Arrangement subject to this Ruling. These documents supersede all previous documents provided to the Commissioner in relation to this Ruling.

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

1. The remuneration package of Vodafone employees is set each year. The Participants will be offered the choice of taking part of the total value of the remuneration package in cash, salary, or benefits in kind, which may include rights to shares under the EDSP. The EDSP may replace some of the current incentives or performance-based reward programs of Vodafone.
2. The EDSP will be a key part of Vodafone's remuneration performance pay regime for its Participants. The purpose is to attract, retain and motivate such employees and to act as a deterrent to theft or misbehaviour and to give Participants a clear identity as shareholders in companies in the Vodafone Group. However, the options provide Participants with a chance to share in growth in share value during the holding period.

3. The EDSP will offer Vodafone employees rights to acquire shares in VPL or Vodafone Group Plc ("VGP") ("shares"). Employees who accept the offer are "Participants" under the EDSP. Participation in the EDSP will be offered to all employees.

4. To meet the entitlements of the Participants, shares will be purchased by the Trustee on the New Zealand or Australian or London Stock Exchanges and held by the Trustee in accordance with the terms of the Trust. Where VPL shares are unavailable or are inappropriate given the remuneration purposes of the plan, VGP shares will be purchased on the London Stock Exchange. Shares will be acquired by the Trustee on market at their prevailing market value.

5. While the Participants will hold rights to shares under the PC, those rights will not be in respect of specific shares and no specific shares will be allocated notionally or beneficially to the Participants. The rights will be operative for up to a maximum period of 10 years or earlier on termination of employment.

6. The rights to receive Allocation Rights from the Trust will be for nil consideration. A Participant may, on the satisfaction of any Relevant Requirements, exercise his or her right to purchase shares from the Trustee for a consideration not exceeding $1.

7. Vodafone will make cash contributions to the Trustee to fund the purchase of shares. Such cash contributions will be used by the Trustee for the following purposes:

   - To purchase shares offered to Participants in recognition of those Participants' reductions in monetary remuneration including bonus and incentive payments ("Salary Sacrifice"). For the purpose of this Ruling such offers shall be known as "Salary Sacrifice Offers".
   - To purchase shares offered to Participants in recognition of Participants' additional services or performance ("Incentive Offers").
   - To purchase shares offered to Participants as supplementary or special offers equal to the amount of any Salary Sacrifice Offers or Incentive Offers accepted by the Participants ("Matching Offers"). The Matching Offers procedure is the usual method of providing discounts and additional benefits in addition to other existing remuneration arrangements for the Participants.
   - To pay for services used by the Trust such as accounting, auditing, consulting, and trust management ("Services").

8. Offers made under the EDSP in relation to any Participant, as a percentage of each Participant employee's total wages, salary or other remuneration, will not exceed:

   - in respect of Salary Sacrifice Offers, up to 25%.
   - in respect of Incentive Offers, up to 30% for Participants who are managers and executive directors, and up to 15% for all other employees.
   - in respect of Matching Offers, up to 5%.

9. Vodafone's contributions to the Trustee's Salary Sacrifice Offers for each Participant will be equal to the employee's Salary Sacrifice. Vodafone will make contributions to fund the purchase of shares for Incentive Offers and Matching Offers out of its own funds and not with reference to Participants' Salary Sacrifice.

10. The minimum vesting or non-exercise period for the Salary Sacrifice Offers and Matching Offers is 24 months after the date of purchase, and this period may be reduced to 12 months in the future. There is no minimum vesting period for Incentive Offers.

11. The Participant's interest in the shares in the Trust cannot be transferred and will be subject to cancellation by the Trustee (eg, in the case of theft, defalcation or misbehaviour, etc).

12. On exercise of the right to receive shares in accordance with Rule 9, shares may be transferred in specie to Participants, or cash distributions made by the Trustee to Participants funded from a sale of shares, or from additional contributions from Vodafone. Exercise may take place at the discretion of the Participant subject to the Relevant Requirements and shall take place on termination of employment or 10 years after the date of purchase of the shares by the Trustee (Refer Rule 9.1).

13. Further details of the Arrangement as contained in the Trust Deed, the Plan Rules and the PC ("the documents") are detailed below.

Trust Deed

14. The Trust Deed provides that VPL wishes to establish a trust for the employees of Vodafone and associated companies.

15. The Trust Deed provides that the Trustee will apply trust funds in accordance with the Plan Rules.

16. The Trust Deed incorporates the Plan Rules as part of the Trust Deed.

Plan rules

17. VPL may from time to time direct the Trustee to offer one or more employees the right to enter into a PC in the form set out in the Schedule to the Plan Rules (Rule 7). Offers will be made to all employees as outlined earlier.

18. The Participant may accept an offer to enter a PC by indicating the Participant's desired reduction in monetary remuneration, signing the PC and returning it to the Trustee before the close of the offer period (Rule 7.3).

19. By entering into a PC the Participant authorises a reduction in that Participant's monetary remuneration including a reduction in any bonus or other incentive payments (ie, Salary Sacrifice). Such reductions are to be apportioned over the term specified in the relevant PC (Rule 8).

20. Vodafone and the Participants will execute an addendum to the employment contract making provision for the Salary Sacrifice, and amending the contract of employment, in the following terms:

    I, ______________ have accepted an offer by the Trustee of the Vodafone Pacific Limited Employee Deferred Share Plan, to participate in the Plan and to acquire the right to purchase shares from the Trustee, on the terms and conditions referred to in the Trust Deed and the Participation Contract.

    I authorise and accept a reduction in my pre-taxation monetary remuneration of an amount equal to the Employee Election (as defined in the Participation Contract), and I authorise and accept a reduction in any future and contingent bonuses or other future and contingent incentive payments of not more than the amount of the Employee Election.

21. If an employee chooses not to accept the offer to participate in the EDSP and consequently there is no Salary Sacrifice, the employee will receive as part of his or her salary, bonus and incentive payments, the amounts that would otherwise be deducted from his or her salary, bonus or incentive payments as Salary Sacrifice. If a Participant chooses not to accept an Incentive Offer, he or she will receive additional remuneration for the additional services or performance which qualified him or her for receiving the Incentive Offer.

22. Allocation Rights (a right granted by the Trustee to a Participant to purchase shares under the EDSP) will be granted in respect of shares, the purchase price of which has been fully satisfied by the reduction in monetary remuneration accepted and authorised by a Participant.

23. A Participant may, subject to the satisfaction of any Relevant Requirements, exercise the employee's right under a PC to purchase all or part of the shares the subject of the PC from the Trustee for a consideration not exceeding $1, or to receive proceeds from the sale of those shares by the Trustee (Rule 9.1(a)).

24. On termination of employment or on the expiry of 10 years from the date the Trustee purchased the shares, the Participant is deemed to have exercised the Participant's right under the PC and is to receive the shares or receive proceeds from the sale by the Trustee of shares the subject of the PC (Rule 9.1(b) and (c)).

25. Where a Participant's employment is terminated and the Participant has not satisfied the Relevant Requirements, the Trustee (at the direction of VPL) may allow a Participant to elect to exercise the right under the PC to purchase shares for consideration not exceeding $1 or at the Participant's election, receive the proceeds from the sale by the Trustee of shares under the PC (Rule 9.2).

26. In respect of a Participant to whom Rule 9.1(b) applies, if the Contract Shares that have been transferred to or sold on behalf of the Participant have not been fully satisfied by the agreed reduction in monetary remuneration, the Employer company shall be entitled to:

    - deduct the outstanding amount from the termination benefits payable to the Participant (if any), and/or
    - direct the Trustee to sell sufficient of the Participant's Contract Shares to fund the outstanding amount and retain the proceeds for its own use (Rule 9.3).

27. VPL may direct the Trustee to apply plan shares by:

    - transferring the shares to any other incentive plan or scheme for the benefit of the employees, or
    - transferring the shares to a superannuation or similar fund for the benefit of employees (Rule 11).

28. Dividends received by the Trustee will be either accumulated or allocated to Participants, at the discretion of the Trustee (Rule 12.2). The circumstances would depend on the factors covered in Rule 12.2 of the Plan Rules. That is, the Trustee would consider in consultation with VPL, how much of the income of the fund would be applied to meet Plan expenses or for any other purpose relevant to the Plan, for example, to purchase additional shares. After these decisions the Trustee could decide at its own discretion to distribute some or all of the remaining income to Participants. The

decision to apply income to Participants would be at the absolute discretion of the Trustee and no criteria would be followed, although if the Trustee decided to apply income to Participants this would be applied predominantly in proportion to the shares subject to PCs held by the Participant.

29. All voting rights in respect of Plan Shares are vested in the Trustee regardless of any Relevant Requirements, and the Trustee will abstain from exercising those rights (Rule 13).

30. Upon termination or winding up of the Trust, each Participant will be deemed to have exercised his or her rights under the PC to purchase shares from the Trustee for a consideration not exceeding $1, or the Participant can elect to receive the proceeds from the sale by the Trustee of shares the subject of the PC in respect of which the Relevant Requirements have been satisfied or at VPL's direction in respect of which the Relevant Requirements have not been satisfied.

Participation Contract (PC)

31. The PC is between the Trustee and the Participant under which the Participant can exercise Allocation Rights and acquire VPL or VGP shares.

32. Under the PC the Trustee grants and the employee accepts a right as a Participant under the Trust Deed to purchase shares from the Trustee (an "Allocation Right"). The employee agrees to a reduction in the Participant's pre taxation monetary remuneration, bonuses, or other incentive payments as detailed in the PC (Clause 2).

33. The Participant may exercise his or her right to purchase shares from the Trustee by giving the Trustee an "Exercise Notice" subject to satisfying the "Relevant Requirements" (Clause 3).

34. The Exercise Notice must specify the number of shares the Participant wishes to purchase and whether the Participant wishes to:

    - purchase the relevant shares from the Trustee, or
    - request the shares be sold by the Trustee on their behalf (Clause 3.1).

35. The Participant is deemed to have given an Exercise Notice in the following circumstances (Clause 3.2):

    - termination of employment (Plan Rule 9.1(b))
    - 10 years have passed from the date of purchase of the shares by the Trustee (Plan Rule 9.1(c))
    - termination of the Trust (Plan Rule 17.2).

36. On the receipt of a valid Exercise Notice, and receipt of consideration of $1, the Trustee shall either transfer the shares to the Participant or sell them on their behalf (Clause 3.7).

37. The number of shares to which an employee is entitled will be adjusted for any bonus or rights issues (Clauses 4.1 and 4.2).

38. This Ruling does not consider or rule on any aspect of the tax consequences (if any) that may arise from any payment, application or appropriation of all or part of the income arising from the Trust Fund to the Participants. This Ruling does not consider or rule on any tax consequences in respect of any Participants who are not "resident in New Zealand" (as defined in section OB 1). This Ruling does not consider or rule on any aspect of the tax treatment of the Matching Offers.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) The executed documents being the Trust Deed, the Plan Rules and the Participation Contract will not differ in any material way to the draft documents provided to the Commissioner of Inland Revenue on 2 March 2001.

b) The EDSP is, and will be for the period of this Ruling, a "qualifying trust" as 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:

- There is no gross income deemed to be derived or expenditure deemed to be incurred by the Participants pursuant to the accrual rules by virtue of sections EH 21 to EH 24 in relation to their participation in the EDSP.
- The benefit received by the Participants under the EDSP is monetary remuneration by virtue of section CH 2. The benefit is included in the gross income of the Participants under section CH 3.
- Under section CH 2(6), the Participants derive the gross income in respect of the shares obtained under the EDSP, when the Participants exercise their right to acquire the shares from the Trustee.
- The taxable value of the benefit received by the Participants under section CH 2 is the difference between the amount paid for the shares, being $1

(one dollar), and the market value of the shares on the day the right is exercised by the employee. If the shares acquired by the Participants are listed on either the London or the Australian Stock Exchange, the value of the shares is the market value of the shares on the day the right is exercised converted into New Zealand dollars using the relevant foreign exchange rate on that day.

- The amount of the Salary Sacrifice agreed to by the Participants to satisfy the requirements of the EDSP does not constitute gross income of the Participants under sections CD 5, CH 3, or EB 1.
- The amount of any contribution made by Vodafone to the Trustee does not constitute gross income derived by the Participants under sections CD 5, CH 3, or EB 1.
- Sections BG 1 and GB 1 will not apply to negate or vary the conclusions above.

The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 April 2001 to 31 March 2006.

This Ruling is signed by me on the 15th day of October 2003.

Martin Smith
General Manager (Adjudication & Rulings)

PRODUCT RULING - BR PRD 03/20

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 Platinum Asset Management Limited ("PAML").

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)(a), CF 8(b), CG 15(2)(b) and the definition of "non-taxable bonus issue" in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the investment by New Zealand resident Unit Holders in the Platinum Asia Fund (the "Fund"), an Australian resident unit trust, and the operation of two classes of units, namely Class D and Class E. This is pursuant to the Platinum Trust Consolidated Constitution (the "Constitution"), an Investment Statement dated 30 May 2003 (the "Investment Statement"), and a Product Disclosure Statement dated 23 April 2003 (the "Disclosure Statement"), together with a copy of an Administration Agreement between PAML (as Trustee of the Platinum Trust) and a New Zealand investor. These documents were supplied to the Rulings Unit on 24 June 2003. Apart from these documents, there is no other agreement, arrangement or understanding between PAML and any Unit Holder. Further details of the Arrangement are set out in the paragraphs below.

1. PAML is the Responsible Entity performing both the role of Trustee and Manager of the Fund. The operation of the Fund is governed by the Constitution. The Fund is managed and controlled in Australia by PAML. New Zealand residents will be invited to purchase units in the Fund.

2. The objective of the Fund is to provide investors with capital growth over the long term (five or more years) by investing predominantly in listed companies in the Asian region with a view to benefiting from the growth that the economies of China and India bring to the region. The portfolio consists of around 30–60 stocks.

3. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund is an Australian tax resident unit trust and is not resident in New Zealand.

4. The Fund will be liable to tax in Australia by reason of the Fund being resident in Australia and its central management and control being in Australia. The Fund is governed by the laws of New South Wales and PAML is an Australian based company which operates from its offices in Sydney, Australia.

5. The Manager holds the assets of the Fund on trust. Unit Holders have a beneficial interest in the Fund, which is divided into units of one or more classes as designated by the Manager. Every unit will be of equal value to each other unit in the Fund and will confer an equal interest in the Fund and its distributable income. A unit in the Fund will not confer any interest in any particular part of the Fund nor in any particular asset forming part of the Fund.

6. According to the Constitution, the distributable income of the Fund will be determined by the Manager at the end of each Financial Year and the income shall be distributed as soon as reasonably practicable after the end of the relevant Financial Year (Clauses 16.1, 16.4, 16.5 and 16.6).

7. The Constitution further provides that the Manager may at any time create and issue units of a particular class in the Fund with special terms of issues, rights, or liabilities (Clause 6.2).

8. Under the memoranda of unit classes establishing the Class D and Class E units ("the Memoranda"), the Manager will automatically reinvest the distributable income which a Unit Holder of Class D and Class E would otherwise receive as a distribution by way of the issue of additional units in the Fund (Clause 5). New Zealand resident Unit Holders provide no consideration to the Fund for the issue of the additional units.

9. The Fund is predominantly held by Australian Unit Holders. Pursuant to clause 6.4 of the Constitution of the Fund, the New Zealand Unit Holders do not have the power to control the exercise of decision-making rights with respect to the Fund.

10. The Manager retains the discretion to pay income distributions in cash under the terms of the Memoranda.

11. This Ruling is in relation to Class D and Class E units which are subject to non-discretionary reinvestment in additional units.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) An investment in the Fund will not be an investment in a controlled foreign company as defined in section CG 4.

(b) All distributable income from Class D and Class E units will be automatically reinvested in Class D and Class E units in accordance with the Constitution.

(c) PAML will not exercise its discretion to pay cash distributions to Unit Holders in accordance with Clause 5(b) of the Memoranda.

(d) PAML will not make an election under section CF 8 that the issue of additional units will be a "taxable bonus issue".

(e) New Zealand Unit Holders will not use the branch equivalent method of accounting for income under the foreign investment fund regime.

(f) The Fund is not resident in New Zealand.

(g) The Trustee of the Fund is resident in Australia for Australian tax purposes.

(h) The central management and control of the Fund is in Australia.

(i) At the date of issue of this Ruling, the Fund is subject to the provisions of Division 6 of the Income Tax Assessment Act 1936.

(j) At the date of issue of this Ruling, the Trustee is liable to pay tax under Division 6 of the Income Tax Assessment Act 1936 on the worldwide income of the Fund to which the beneficiaries of the Fund are not presently entitled.

(k) There will be no material changes to the way the Fund is taxed in Australia for the period of this Ruling.

(l) The Fund will not be a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.

(m) Any Administration Agreements entered into with PAML in respect of the Fund, are not materially different to the Administration Agreement provided to the Rulings Unit on 24 June 2003.

(n) There is nothing permitted by law that enables New Zealand Unit Holders to control the exercise of decision-making rights with respect to the Fund.

How the Taxation Laws apply to the Arrangement

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

- Where Class D and Class E units are issued on the terms that PAML has the power to reinvest the income entitlements in additional units, the issue of additional units to Unit Holders will constitute a "non-taxable bonus issue" (under section CF 8(b) and the definition of "non-taxable bonus issue" in section OB 1).
- These units will be excluded from the definition of a dividend in terms of section CF 3(1)(a).
- Interests held by New Zealand investors in the Fund will be excluded from the definition of "foreign investment fund" by virtue of section CG 15(2)(b).

The period or income year for which this Ruling applies

This Ruling will apply for the period 21 November 2003 to 20 November 2008.

This Ruling is signed by me on the 21st day of November 2003.

Max Carr
National Manager, Corporates

NEW LEGISLATION

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

The prescribed rate of interest used to calculate fringe benefit tax on low-interest, employment-related loans has decreased from 7.33% to 7.08% for the quarter beginning 1 October 2003.

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 July 2003.

The new rate was approved by Order in Council on 17 November 2003.

Income Tax (Fringe Benefit Tax, Interest on Loans) Amendment Regulations (No 3) 2003 2003/324

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.

DISCRETIONARY REMEDY NOT AWARDED BY HIGH COURT

Case:	M & J Wetherill Company Ltd & Ors v TRA & CIR
Decision date:	4 November 2003
Act:	Taxation Review Authorities Act 1994
Keywords:	Judicial review, discretion

Summary

The High Court held that the plaintiffs were entitled to appeal the TRA's decision in *Case U35*, but refused to exercise its discretion to order the TRA to sign the case on appeal. There was real doubt as to whether there is a right of appeal in respect of interlocutory decisions of the TRA.

Facts

This case has a very long history. In 1996 the Commissioner received a number of requests for cases stated on the objectors' objections (relating to the J G Russell tax avoidance template). The objectors requested that the cases stated be filed in the Taxation Review Authority ("the TRA"), but the Commissioner filed them in the High Court.

The High Court (Baragwanath J) determined that it would more appropriate for the cases stated to be heard in the TRA and told the Commissioner to file them there. In *Case U35* (2000) 19 NZTC 9,330 the TRA (Judge Barber) accepted the Commissioner's application to file the cases stated out of time and rejected the objectors' application that their objections be allowed. In *Case U41* (2000) 19 NZTC 9,380 the TRA refused to allow an appeal of *Case U35* and struck the purported appeal out.

In *M & J Wetherill & Co Ltd v TRA & CIR* (2001) 20 NZTC 17,166 the objectors judicially reviewed the TRA's decisions in *Case U35* and *Case U41*. The High Court (O'Regan J) largely found for the objectors and sent the case back to the TRA for re-determination. His Honour held, in relation to *Case U41*, that interlocutory decisions of the TRA could be appealed. However, despite their success in the High Court, the objectors appealed to the Court of Appeal. The Commissioner cross-appealed. The Court of Appeal rejected the objectors' appeal and allowed the Commissioner's cross-appeal: *M & J Wetherill & Co Ltd v TRA* (2002) 20 NZTC 17,624. The Court of Appeal also refused an application by the objectors for leave to appeal to the Privy Council: *M & J Wetherill & Co Ltd v TRA* (2002) 20 NZTC 17,681. The Privy Council refused an application for special leave to appeal.

In *Case W7* (2003) 21 NZTC 11,049 the objectors attempted to appeal, as opposed to review, the TRA's decision in *Case U35*.

The objectors argued that as O'Regan J had held that there was a right of appeal in relation to *Case U35* and that since the Commissioner had not cross-appealed that finding, the TRA was bound to follow the ruling of the High Court. They submitted that O'Regan J's decision was res judicata and the TRA was therefore obliged to state a case on appeal in respect of *Case U35*.

The TRA refused to state a case on appeal and the objectors reviewed Judge Barber's decision. The review was again heard by O'Regan J.

The objectors sought an order requiring the TRA to state a case on appeal. The Commissioner argued that the points that would be raised on appeal had already been dealt with by the High Court and the Court of Appeal. The Commissioner also argued that the Court of Appeal had indicated that there was no right of appeal of interlocutory decisions of the TRA.

Decision

O'Regan J set out the history of the litigation in detail. In particular, O'Regan J noted the comments made by the Court of Appeal that there could probably not be appeals of interlocutory decisions of the TRA. The

Court of Appeal had commented:

> In the light of the conclusions and reasoning in relation to O'Regan J's judgment on review of *Case U35*, there could be no basis for a separate appeal to the High Court in respect of those matters. However, we are not to be taken as accepting that there is jurisdiction to appeal from a decision of that kind except as relating to "the determination on the objection" (Taxation Review Authorities Act 1994, section 26) which, arguably, is confined to the ultimate substantive determination of an objection.

O'Regan J also noted the Court of Appeal's comments in the leave application where Richardson P stated:

> Mr Judd submitted that a rejection of an administrative law challenge to a decision under reg 6(4) and reg 8 could not determine a general appeal on the merits under section 26. The tests, he said, are different. They are. But in some circumstances the two inquiries in the factual area may so overlap that the same decision would have to be given whichever route is chosen.

In their petition for special leave to appeal to the Privy Council the objectors foreshadowed an application for review of the TRA if it did not allow an appeal of *Case U35*.

The central issue for O'Regan J was the law of res judicata. A matter is "res judicata" if it has already been decided by the courts. It therefore cannot (generally) be revisited. O'Regan J stated (at paragraph [27]):

> It could therefore be argued that, having previously sought such relief and the Court having determined not to grant it, the plaintiffs are estopped from pursuing the same cause of action, and seeking the same relief.

O'Regan J held that this was not a case of attempted relitigation of a failed argument. The plaintiffs were entitled to pursue their claim even though the relief sought was the same as that sought in the first judicial review proceeding. O'Regan J held that, strictly speaking, the Commissioner could be estopped from arguing that there was no right of appeal from *Case U35* as the Commissioner had not cross-appealed that part of O'Regan J's first judgment. However, the judge also noted the Court of Appeal's comments disagreeing with his conclusions and that the Court of Appeal had expressed clear views that the review appeal had effectively disposed of any points that could be raised on appeal.

O'Regan J held that on a strict interpretation issue estoppel would not apply to an appeal against *Case U35* and that there were still some issues that could yet be determined. His Honour also held that though any appeal would involve a direct attack on the observations of the Court of Appeal, the present proceedings could not be said to be an abuse of process.

O'Regan J concluded that based on his finding in the first judicial review case, the objectors were entitled to appeal against the TRA's finding in *Case U35*. However, O'Regan J did not consider that it was appropriate for him to exercise his discretion to order the TRA to sign the case on appeal. His Honour considered that the observations of the Court of Appeal in the earlier appeal and leave applications as to the correctness of his earlier findings (and the correctness of *Case U35*) meant that his discretion should not be exercised. O'Regan J also noted that many of the issues had already been dealt with and that the objectors would be able to appeal the substantive decisions of the TRA.

The objectors have indicated that they intend to appeal this decision.

TAX AGENT'S JUDICIAL REVIEW OF DISTRICT COURT FAILS

Case: Russell v District Court & CIR

Decision date: 12 November 2003

Act: Tax Administration Act, Judicature Amendment Act

Keywords: Judicial review, interlocutory decisions, prosecutions.

Summary

The tax agent's judicial review of various interlocutory decisions by the district court was unsuccessful.

Facts

This was a judicial review application by Mr J G Russell of various interlocutory decisions by the District Court in prosecutions against Mr Russell for failure to comply with section 17 TAA 1994 requests. An interlocutory decision is one made prior to the substantive hearing is largely to deal with managing the hearing (eg evidence, witness statements)

The CIR laid 226 informations against Mr Russell (but later withdrew some 91) in respect of his failure to comply with section 17 requests. Mr Russell's defence is that the Commissioner has abused his powers and this is part of the vendetta against him by the CIR.

In managing the case(s) the District Court made several orders with which the CIR complied but not to the satisfaction of Mr Russell. In an interlocutory hearing the District Court judge was satisfied the Commissioner had complied with the orders. Mr Russell first sought to appeal this decision but had no right of appeal to interlocutory matters in summary proceedings (section 107 Summary Proceedings Act), he then sought recall of the judgment which was declined and then sought that a case be stated to the High Court for its opinion but this was not available as the case stated can only be on law alone (section 78 Summary proceedings Act) and the issues raised by Mr Russell were mixed fact and law.

Mr Russell then commenced judicial review proceedings. The Commissioner's application to strike this out was unsuccessful and this was the substantive hearing.

Decision

The High Court declined to grant any judicial review remedies in this case. Justice O'Regan reviewed interlocutory decisions of the District Court judge and accepted these were decision properly open to the District Court Judge: "In my view, her decisions in that regard are not amenable to judicial review, and even if they were, I can see no basis on which intervention by this Court would be justified." [Para 43].

It was considered that Mr Russell's request for unedited documents which the District Court declined to accede to could not succeed as the trial judge had reviewed the documents and ruled on their relevance-which is part of the function of the judge. [Para 28]

It was also noted that the method of claiming legal privilege for in-house lawyers outlined in *Miller* (1997) 18 NZTC 13,00—that in house counsel file affidavits with the basis of the privilege claim) was not required where the documents spoke for themselves [Para 32—also *Downey v Wright & Dickson* (HC Auckland M275/95, 29 June 1995)]. Mr Russell has repeatedly argued failure to do so means the privilege had not been effectively claimed.

It was also accepted that if there was sufficient nexus between an interlocutory decision and the final outcome, then that interlocutory decision could be subject to appeal as part of appealing the final decision [Para 45]. This trended to suggest granting judicial review remedies was inappropriate.

JOINT VENTURE SCHEME FOUND TO BE TAX AVOIDANCE

Case: Erris Promotions Limited & Ors v CIR

Decision date: 14 November 2003

Act: Income Tax Act 1994; Tax Administration Act 1994

Keywords: Depreciable intangible property, sham, tax avoidance, abusive tax position

Summary

Investors in the Actonz Joint Venture ("AJV") claimed losses passed onto them from the depreciation of software purportedly purchased by the AJV. The Commissioner disallowed these claims for several reasons including tax avoidance and sham. He also imposed 100% shortfall penalties on the investors for taking an abusive tax position. The High Court found for the Commissioner.

Facts

Background

1. This case concerned the validity of losses claimed by investors of the Actonz Investment Joint venture ("the AJV"). Those losses were disallowed by the Commissioner ("the CIR") who considered they were not deductible for a number of reasons.

2. The challenge related to the tax treatment of six pieces of computer software which the AJV purportedly purchased in October 1996 for a total of $685 million. The CIR considered all the software was purchased at grossly inflated prices in order to secure a large GST refund and depreciation deductions.

3. The manager of the AJV, Actonz Management Limited ("AML") initially claimed a large GST input credit of approximately $60 million based on the purchase price of five of the six pieces of software on December 1996 (another piece of the software was conceded later by AML). The CIR disallowed this claim and the dispute continued through to the Adjudication Unit ("Adjudication"). A challenge was commenced by AML in December 2000 after Adjudication found for the CIR in October 2000. However, it was agreed between the parties that the GST dispute would be set aside until the depreciation dispute was decided.

Income tax dispute

4. The AJV depreciated all six software packages from the 1997 income tax year (despite conceding two of the packages in the GST dispute) and the resulting losses were allocated to investors who had purchased units in the AJV. The investors initially claimed these losses in their income tax returns. Further AJV losses were allocated to investors in the 1998 and 1999 income tax years which were claimed either in tax returns or by way of NOPA. The total amount of income tax in dispute, assuming a marginal tax rate of 33% for each investor, is approximately $226 million.

5. The CIR disallowed the losses as he considered the deductions were derived from a tax avoidance scheme and that a number of the sale and purchase agreements were shams. He also considered the software could not be depreciated as there was no entitlement to do so under the tax depreciation rules.

6. The internal disputes resolution procedure continued through to Adjudication. In March 2002 Adjudication found for the CIR on the grounds that the statutory criteria for claiming depreciation under EG1 of the Income Tax Act 1994 ("the ITA") were not met; the documents under which the software was purchased by the AJV were shams and that the deprecation claims of the investors were the result of a tax avoidance arrangement.

7. Erris Promotions Ltd and five other investors ("the Erris cases") filed challenges in the Taxation Review Authority ("the TRA") in May 2002. They were transferred to the High Court upon application by the CIR. The Erris cases were agreed upon by the parties to be representative of all investors in the joint venture. An order was also made by the Court that the Erris cases would be representative under Rule 78 of the High Court rules. Approximately 200 AJV investors will have their case decided by this proceeding.

Decision

8. Ronald Young J, finding for the CIR, held that the price paid for the source code was not depreciable and that the scheme amounted to tax avoidance. The taxpayers were liable for a 100% abusive tax interpretation penalty.

9. Ronald Young J held that most of the purchase price of the software purchase agreements could not be depreciated. In each software purchase agreement the source code had virtually all of the purchase price allocated to it and intellectual property, including the copyright(s) had $1 allocated and the other property, essentially the physical representations of the software, also $1. Ronald Young J held that the copyright portion of the purchase price ($1) could be depreciated because it was depreciable intangible property for the purposes of the ITA 1994. The status of the source code had to be judged using the ordinary meanings

of tangible and intangible property, because there were no statutory definitions of the terms in the New Zealand tax legislation. Tangible was defined as being able to be touched. Intangible with not being able to be touched. In so defining the terms Ronald Young J rejected the approach adopted in the US authority of South Central Bell Telephone Coy v Barthelemy, 643 So 2nd 1240 (1994), preferring instead the approach of the English Court of Appeal in St Albans City and District Council v International Computers Ltd [1996] 4 All ER 481. The source code was a set of instructions separate from any physical manifestation; source code as described could not be touched and did not therefore come within the Oxford Dictionary definition of tangible; a set of instructions was no more than ideas expressed in logical form. The source code was intellectual property and intangible. Since the source code did not come within the definition of depreciable intangible property in the ITA 1994 it could not be depreciated.

10. Ronald Young J held that the depreciable loss able to be claimed could only be claimed for the months of the year (whole or part months) the asset was actually owned: section EG 2 ITA 1994.

11. It was held that the agreements for the purchase of the E-Direct, Linx and Packet Plus software were shams. In the case of the E-Direct software, at the purported time of purchase no such software existed and therefore none could be bought or sold. Nothing was transferred other than an idea which was in itself not depreciable. The purported vendors of the Linx and Packet Plus software did not own the software at the time of sale and therefore could not sell it to Actonz. The agreements for the sale and purchase of the software were therefore shams.

12. Ronald Young J held that the scheme was a tax avoidance arrangement. In seeking to apply CIR v BNZ Investments Ltd [2002] 1 NZLR 450 (CA) the taxpayers had confused proof of the arrangement and the necessity of a meeting of minds by the two or more persons who constitute an "arrangement" with tax adjustment for taxpayers who invest in a "void" scheme. Section GB 1 ITA 1994 provided that the tax of any person affected by a void arrangement could be adjusted. This was a logical recognition of the proposition that even if a taxpayer did not know the scheme they were investing in was a tax avoidance scheme (and void) they should not be able to alter their tax liability to their advantage: CIR v Peterson [2003] 2 NZLR 77. At best, the investors shut their eyes to what they must have known was a scheme that was too good to be true. In deciding whether the arrangement entered into was tax avoidance it was appropriate to consider the commerciality of the purchase of the software packages. Ronald Young J held it was clear that the dominant purpose of the joint venture was tax avoidance, importantly:

    (1) the software purchases involved no financial, technical or legal due diligence

    (2) the purchase prices were grossly inflated

    (3) much of the software either did not exist or did not work as claimed

    (4) the investment was significantly sold as a way of avoiding income tax

    (5) there was little or nor commercial aspect to the scheme

    (6) the terms of the purchase of the software contained no risk to the purchasers and involved 100% vendor finance

    (7) the information memoranda on which the scheme was sold provided for an investment with a several hundred percent return solely from tax advantages, without any sales of software licenses. While the technology boom was important background to the negotiations and purchase of the software it did not change the fact that the transactions had no commercial base and were essentially a means of creating a tax advantage.

13. The taxpayers were liable for a 100% abusive tax interpretation penalty. Ronald Young J held that the CIR had to establish an unacceptable interpretation of tax law and (viewed objectively) the tax position the taxpayers took was a consequence of an arrangement that was predominantly for the purpose of avoiding tax. Ronald Young J rejected the taxpayers' reliance on the third party tax opinions and valuations, because that in itself did not constitute reasonable care. The fact that a taxpayer had requested, received and followed the advice of an agent on the interpretation of a tax law, or its application, meant that the taxpayer had taken an "interpretation" as required under section 141B TAA 1994 in line with that taken by the agent in terms of the general principles of agency law: Case U47 [2000] 19 NZTC 9410. Ronald Young J concluded that no one aware of all the facts surrounding the various software purchases could consider the prices paid for the software anything other than hugely and falsely inflated. The surrounding circumstances pointed clearly to tax avoidance. The interpretations adopted by the taxpayers were not about as likely as not to be correct. An unacceptable interpretation on behalf of all taxpayers was therefore taken.

14. As both LAQC's and individual taxpayers took "tax positions", both were liable for penalty.

CHURCH SUPERANNUATION SCHEME NOT CHARITABLE

Case: Jarod Peter Hester & Ors v CIR

Decision date: 25 November 2003

Act: Income Tax Act 1994

Keywords: Superannuation scheme, charity

Summary

The superannuation scheme for employees of the Church of Jesus Christ of Latter-day Saints was held not to be charitable. The activities of the employees could not be said to be essential to the operation of the Church and there was not the same level of lifelong commitment as in the *Presbyterian Church* case.

Facts

Introduction

The plaintiffs were the trustees of the Church of Jesus Christ of Latter-day Saints ("the Church") Deseret Benefit Plan ("the Plan"). The Plan is a defined benefit and contributory superannuation scheme providing retirement income to employees of the Church. The plaintiffs claimed that the Plan was exempt from income tax pursuant to section CB 4(1)(c) of the Income Tax Act 1994 (which exempts income derived by trustees for charitable purposes).

The plaintiffs also relied on section CB 4(1)(e) and further claimed that the Commissioner had acted in a discriminatory manner by refusing to grant the Plan charitable status.

The Plan

The Plan is for employees of the Church. The Church does not have paid ministers, but has a system of "callings" whereby Church members perform ecclesiastical functions. The Church itself has charitable status. The salaries received by the members of the Plan related to their temporal job, not their calling.

There were two Church related entities that employ members (and potential members) of the Plan: the Church Trust Board and the Church College. Members employed by the Church Trust Board work at either the Church's Administration Centre in Takapuna or the Church Temple in Hamilton. The Church College is also in Hamilton.

The Administration Centre

During the relevant period the Administration Centre was responsible for the overall administration of the Church's operations in New Zealand, including property management, maintaining financial records, and other support for Church programmes. Members of the Plan at the Administration Centre included managers, human resources staff, IT staff, secretarial and clerical staff, and accounting staff.

Church College

Church College is a private secondary school which is run and financed by the Church. It teaches the national curriculum as well as providing religious education to students. All staff members (apart from one) belong to the Church. Members of the Plan at the College include teachers, secretarial and administrative staff, and catering and security staff.

Church Temple

The Temple is the most sacred place the Church has in New Zealand. Members of the Plan at the Temple include managers, gardeners, security guards, clerical workers, and clothing and cafeteria workers.

The Arguments

The plaintiffs' argument was based on two cases where superannuation funds connected to religious organisations were found to be charitable: *Presbyterian Church of New Zealand Beneficiary Fund v CIR* [1994] 3 NZLR 363 ("*Presbyterian Church*") and *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* (1945) 26 TC 335 ("*Baptist Union*"). The Commissioner considered that the Plan's situation could be distinguished from those cases.

Decision

O'Regan J set out background facts about the Plan and its membership. His Honour then summarised the *Presbyterian Church* and *Baptist Union* cases. In the *Presbyterian Church* case, Heron J emphasised the lifelong commitment of Presbyterian ministers, and found that there was a nexus between the financial benefit provided to the retired Presbyterian ministers and the advancement of religion by the Presbyterian Church itself. In the *Baptist Union* case, MacDermott J had held that the purpose of that fund was prima facie charitable, as it promoted the advancement of religion by allowing ministers to devote their whole time to the work of the Baptist Church.

O'Regan J held that "[i]t is clear that the present case is not on all fours with the *Presbyterian Church Fund* case, because the members of the Plan are not clergy." The Church does not have paid clergy, though all Church employees (and therefore all members of the Plan) were required to obtain a "Temple Recommend", which included the obligation to undertake a calling if requested, and were also required to be "Temple worthy" (to adhere to a Church-wide standard of behaviour).

The plaintiffs argued that its employees were integral to the Church's operation and that the work that they did could not be done by non-members of the Church. The Commissioner submitted that in many cases the tasks performed by the employees could be performed by independent contractors or employees who were not Temple worthy, and therefore it could not be said that without the employees the Church could not operate. O'Regan J accepted this submission.

O'Regan J also accepted the Commissioner's submission that there was not the aspect of lifelong commitment that was present in the *Presbyterian Church* and *Baptist Union* cases. The judge also noted that there was a significant level of voluntary contributions to the scheme (the Commissioner argued that the Plan's provisions for voluntary contributions had no charitable element). His Honour also noted that many of the Church's employees had skills that could be transported to a non-Church environment, a distinguishing factor from the other cases.

O'Regan J rejected an argument by the plaintiffs that he should take into account the potential effect of his judgment on the Church, a charitable organisation. O'Regan J stated (at paragraph [64]):

> The question before the Court is the correctness of the assessment of a particular taxpayer (the plaintiff), and that must be decided on the basis of the tax status of that taxpayer. That can only be determined by reference to the rules applying to that taxpayer.

O'Regan J also rejected the plaintiffs' arguments that the assessment was discriminatory against the Plan. His Honour stated (at paragraph [66]):

> The fact that the Commissioner has determined that the characteristics of another taxpayer lead him to a different conclusion in respect of that taxpayer does not mean that he is behaving in a discriminatory way. Rather, it means he is recognising what he perceives to be differences between the taxpayer that lead to a different outcome in respect of each of them.

O'Regan J concluded that there were a number of differences between the Plan and the *Presbyterian Church* case. That case was exceptional and should not be seen as authority that any superannuation scheme for the employees of a church should be charitable. O'Regan declined to follow the *Presbyterian Church* case to the extent that it could be said to extend to church employees who are not ministers but have an ecclesiastical role in their employment. The purpose of the Plan was to benefit the employees of the Church, which was a private benefit not consistent with the charitable purpose claimed by the plaintiffs.

LEGISLATION AND DETERMINATIONS

OUTBOARD MOTORS – DRAFT GENERAL DEPRECIATION DETERMINATION

Please quote reference: DDG0094

The Commissioner proposes to issue a General Depreciation Determination that will insert the asset class "Outboard motors" into the "Leisure" industry category and the "Transportation" asset category of General Depreciation Determination DEP1. The proposed depreciation rates are 33 % DV and 24 % SL, based on an estimated useful life of five years.

There is currently an asset class "Outboard motors" in the industry category "Undersea maintenance (where equipment used under salt water or on maintenance barge on salt water)", with the same depreciation rates. The new asset classes are merely intended to make these depreciation rates more easily accessible to users of General Depreciation Determination DEP1.

EXPOSURE DRAFT – GENERAL DEPRECIATION DETERMINATION DEPXX

This determination may be cited as "Determination DEPXX: Tax Depreciation Rates General Determination Number XX".

1. Application

This determination applies to taxpayers who own the asset classes listed below.

This determination applies to "depreciable property" other than "excluded depreciable property", no matter when the property in question was acquired or used.

2. Determination

Pursuant to section EG 4 of the Income Tax Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by inserting into the "Leisure" industry category and the "Transportation" asset category, in the appropriate alphabetical order, the general asset class, estimated useful life, diminishing value depreciation rate and straight-line depreciation rate listed in the next column:

General asset class	Estimated useful life years	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Outboard motors	5	33	24

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 1994.

If you wish to make a submission on the proposed changes, please write to:

Manager Field Liaison & Communication
Adjudication & Rulings
Inland Revenue Department
National Office
PO Box 2198
WELLINGTON

We need to receive your submission by 27 February 2004 if we are to take it into account in finalising the determination.

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.

TAX PAYMENTS – WHEN RECEIVED IN TIME IR-SPS PRC-101

Introduction

1. This Standard Practice Statement (SPS) sets out the Commissioner's practice for accepting tax payments as having been made in time.

Application

2. This SPS replaces SPS PRC-100 *Tax payments — when received in time* and will apply from 19 December 2003.

Background

3. SPS PRC-100 *Tax payments—when received in time* (*Tax Information Bulletin* Vol 10, No 4 (April 1998)) set out when the Commissioner would accept payments as having been made in time. Since that publication there have been changes in the way taxpayers make payments to Inland Revenue. The purpose of this SPS is to reflect those changes and inform taxpayers when a payment will be accepted as having been made in time.

4. This SPS refers to:
    - Payments by post
    - Electronic payments
    - Physical delivery
    - Post-dated cheques
    - Weekends and public holidays
    - Tax pooling, and
    - Tax transfers.

Standard Practice

5. This standard practice applies to all tax types, including Goods and services tax (GST) and child support payments.

Payments by post

6. Payments will be accepted as being received in time if mailed and postmarked on or by the due date.

7. For Rural Delivery taxpayers, the date of payment is when it is received by New Zealand Post or similar provider. It is not when the payment is placed in the taxpayer's personal mail box for collection.

Overseas payments

8. An overseas postmark cannot be used to determine the date a payment was received by Inland Revenue from a taxpayer living or working overseas. Accordingly, normally the time of actual receipt by Inland Revenue will be used.

Electronic payments

9. Taxpayers may make payments electronically, including internet banking. A payment will be received in time when it has been electronically paid or direct credited into an Inland Revenue account either on or before the due date. Internet payments must be completed prior to the end of the banks' online business hours to be recorded as received on that specific day. Internet payments after these online business hours will be processed on the next business day.

10. In the context of electronic payments, "business hours" means the hours a bank makes available to customers to initiate electronic payments on any given day. Payments made after these hours will be processed by the bank as at the next business day.

Overseas payments

11. A payment will be received in time when it has been electronically paid or direct credited into an Inland Revenue account either on or before the New Zealand due date.

Physical delivery

12. A payment will be accepted as being received in time if it is deposited into an Inland Revenue drop box by the close of business on the due date.

Westpac payments

13. Taxpayers may also make payments at most branches of Westpac. Payments can be made over the counter or via drop boxes. The payment is received in time if it is physically handed into a Westpac branch by the close of business on the due date.

Post-dated cheques

14. Inland Revenue will not bank post-dated cheques until the specified date. A cheque that is post-dated after the due date, even though it is received on or before the due date, will be treated as late. This applies to payments that are posted or physically delivered.

Weekends and public holidays

15. If a due date falls on a weekend or a public holiday (including a provincial anniversary day), Inland Revenue will accept a payment without charging a penalty when it is handed in or posted on the next working day.

Electronic payments

16. If a due date falls on a weekend or a public holiday (including a provincial anniversary day), then an electronic payment will be accepted as in time when it is credited into an Inland Revenue account on the next working day.

GST payments

17. Payments will be accepted as being received in time if mailed and postmarked on or by the due date. GST payments are due on the last working day of the month. There is one exception to the GST rule. GST payments, which would normally be due on the last working day of December, are due on 15 January.

Tax pooling

18. In cases of tax pooling, the date of payment is when the intermediary makes the tax payment to Inland Revenue. For more information on the implications of tax pooling please refer to *Tax Information Bulletin* Vol 15, No 5 (May 2003).

Tax transfers

19. For the rules regarding the transfers of overpaid taxes please refer to *Tax Information Bulletin* Vol 14, No 11 (November 2002).

This Standard Practice Statement was signed by me on 10 December 2003

Margaret Cotton
National Manager (Technical Standards)

RETENTION OF BUSINESS RECORDS BY ELECTRONIC MEANS IR-SPS GNL-430

Introduction

1. This Standard Practice Statement (SPS) provides guidelines on the retention of business records where those records are stored in electronic form, on microfiche or on microfilm. The SPS also provides guidelines on the information and assistance required when Inland Revenue requests information and requires access to business records and supporting background materials.

Application

2. This SPS applies from 21 November 2003 which is the date the Electronic Transactions Act 2002 (ETA) and the Electronic Transactions Regulations 2003 (No. 288) generally came into force.

3. The SPS replaces the previous Inland Revenue publications issued on record retention in *Tax Information Bulletins* Vol 1, No 6 (issued December 1989), Vol 3, No 1 (issued July 1991) and Vol 3, No 9 (issued July 1992).

Summary

4. Business records may be kept in either paper-based or electronic form. Where records are held in electronic form, it is important they are kept in a manner that allows Inland Revenue to readily ascertain the amount of tax payable.

5. If information is transferred from source-paper and other non-electronic records into electronic form or microfilm for record retention purposes, the electronic or microfilm record, when reproduced in printed form must be identical in format and in all other respects to the original record. The addition of information such as index referencing is acceptable. The additional information must not obscure the image of the original record and must be distinguishable as additions to the original record.

6. If business records are originally in electronic form, persons should be able to demonstrate that their electronic records systems are secure from both unauthorised access and data alterations. Electronic copies must be readily accessible and capable of being retrieved and produced as a legible hard copy or supplied to Inland Revenue in electronic form upon request.

Background

7. The Tax Administration Act 1994 (TAA) requires persons who carry on business or other income earning activities to keep in New Zealand sufficient records in English to enable the Commissioner to readily ascertain the amounts of tax payable by that person.

8. Previously, the majority of business records were kept in paper form and the Commissioner allowed such records to be transferred to microfiche or microfilm in limited circumstances.

9. Technological advances have seen records now being transferred to electronic form or in some cases originating in electronic form. The ETA provides a framework to support those persons who want to conduct their businesses electronically. These persons will also have the option to use technology to store information from source-paper documents or other non-electronic records. The ETA also removes the requirement to retain the source-paper or non-electronic records where persons who use technology to store business records can ensure the integrity of the information transferred from source-paper or other non-electronic records.

10. It is an offence against the TAA if a person does not keep books or records required to be kept by a tax law or does not provide information when requested by an authorised Inland Revenue officer.

Legislation

Electronic Transactions Act 2002

25. LEGAL REQUIREMENT TO RETAIN DOCUMENT OR INFORMATION THAT IS IN PAPER OR OTHER NON-ELECTRONIC FORM

(1) A legal requirement to retain information that is in paper or other non-electronic form is met by retaining an electronic form of the information if –

(a) the electronic form provides a reliable means of assuring the maintenance of the integrity of the information; and

(b) the information is readily accessible so as to be usable for subsequent reference.

(2) Subsection (1) applies to information that is a public record within the meaning of the Archives Act 1957 only if the Chief Archivist has approved the retention of that information in electronic form.

(3) To avoid doubt, if information is retained in electronic form in accordance with subsection (1), the paper or other non-electronic form of that information need not be retained.

26. LEGAL REQUIREMENT TO RETAIN INFORMATION THAT IS IN ELECTRONIC FORM

Subject to section 27, a legal requirement to retain information that is in electronic form is met by retaining the information—

(a) in paper or other non-electronic form if the form provides a reliable means of assuring the maintenance of the integrity of the information; or

(b) in electronic form if—

(i) the electronic form provides a reliable means of assuring the maintenance of the integrity of the information; and

(ii) the information is readily accessible so as to be usable for subsequent reference.

27. EXTRA CONDITIONS FOR ELECTRONIC COMMUNICATIONS—

In addition to the conditions specified in section 26, if a person is required to retain information that is contained in an electronic communication,—

(a) the person must also retain such information obtained by that person as enables the identification of—

(i) the origin of the electronic communication; and

(ii) the destination of the electronic communication; and

(iii) the time when the electronic communication was sent and the time when it was received; and

(b) the information referred to in paragraph (a) must be readily accessible so as to be usable for subsequent reference.

Tax Administration Act 1994

22. KEEPING OF BUSINESS RECORDS

(1) Without limiting the generality of subsection (7), the records required to be kept and retained under subsection (2) in respect of any business carried on during any income year by any person, shall contain—

…

(b) A record of all entries from day to day of all sums of money received and expended by the person (in relation to that business) and the matters in respect of which the receipt and expenditure takes place; and

(c) Where that business involves dealing in goods—

(i) A record of all goods purchased, and of all goods sold in the carrying on of that business (except those sold in the course of cash retail trading customarily conducted in a business of the kind of which that

business is one) showing the goods, and the sellers and buyers or, as the case may be, the agents of the sellers and buyers in sufficient detail to enable the goods, and the sellers and buyers, and those agents, to be readily identified by the Commissioner; and all invoices relating to the goods; and…

(d) Where that business involves the provision of services, records of the services provided and all invoices relating to them; and…

(e) The charts and codes of accounts, the accounting instruction manuals, and the system and programme documentation which describes the accounting system used in each income year in the carrying on of that business.

(2) (f) ... shall keep in New Zealand sufficient records in the English language to enable the ascertainment readily by the Commissioner, or any officer authorised by the Commissioner in that behalf, …

(l) … shall retain in New Zealand all such records for a period of at least 7 years after the end of the income year to which they relate…

(5) The Commissioner may, by notice in writing given before the expiry of the 7-year retention period specified in subsection (2), require a taxpayer to retain all or any of the records specified in that subsection for a further period not exceeding 3 years following the expiry of the 7-year period…

(7) In this section, records includes—

(a) Books of account (whether contained in a manual, mechanical, or electronic format) recording receipts or payments or income or expenditure:

(b) Vouchers, bank statements, invoices, receipts, and such other documents as are necessary to verify the entries in the books of account referred to in paragraph (a):

Goods and Services Tax Act 1985

Section 75 of the GST Act has similar requirements to section 22 of the TAA.

Electronic Transactions Regulations 2003

SCHEDULE 1, CLAUSE 4

Conditions for legal requirements to retain records under Inland Revenue Acts—

(1) A legal requirement under the Inland Revenue Acts to retain a record that is initially in paper or other non-electronic form may be met by retaining an electronic form of the record, only if—

(a) the record is readily able to be produced in paper form; and

(b) that paper form is a duplicate image of the original paper or other non-electronic form.

(2) For the purposes of subclause (1), it does not matter that annotations, indexing references, or other additional information are included in the record retained in electronic form, provided that they—

(a) do not obscure any of the original information contained in the record; and

(b) are distinguishable as additions to the original record.

(3) A legal requirement under the Inland Revenue Acts to retain a record that is generated in electronic form and is provided to another person in paper or other non-electronic form (for example, an invoice generated electronically and printed for sending to a customer) may be met by retaining the record in its electronic form only.

(4) Despite subclause (1), if a record is received from a person in both paper or other non-electronic form and in electronic form (for example, a bank statement sent by a bank in paper form, and also provided in electronic form), a legal requirement to retain the record may be met by retaining the record in its electronic form only.

(5) In this clause, Inland Revenue Acts has the same meaning as in section 3(1) of the Tax Administration Act 1994.

Standard Practice

11. Regardless of how business records are retained there must be sufficient detail to ensure a complete audit trail that allows tracing the retained records to and from accounting records and to tax returns.

12. Section 25 of the ETA provides the option of using technology to store source paper documents by electronic means. Section 26 of the ETA sets the standard for retaining information in electronic form. The Commissioner considers that the information will be readily ascertainable and meet the requirements of the ETA if the following practice is followed:

Retention of records on microfilm/microfiche

13. Paper records microfilmed must be copied completely and accurately.

14. The microfilmed records, when reproduced in printed form, must be identical in format and in all other respects to the original records. The addition of information such as indexing references is acceptable. The additional information must not obscure the view of the original record information and must be distinguishable as additions to the original record.

15. The quality of the microfilmed records must be sufficient to ensure they are readily accessible and capable of being retrieved on legible hard copies (printouts) if required.

16. Paper records microfilmed in accordance with the requirements detailed below may be destroyed after transfer to microfilm.

Retention of records in electronic form – originally in paper form.

17. Paper records transferred to electronic form must be copied completely and accurately—for example, the use of imaging to provide information in a format identical in all respects to the source-paper document. The addition of information such as index referencing is acceptable. The additional information must not obscure the view of the original record information and must be distinguishable as additions to the original record.

18. The electronic copy must be readily accessible and capable of being retrieved on legible hard copy (printouts) or supplied in electronic form (on electronic media and unencrypted in a form able to be read by Inland Revenue staff) if required.

19. Source-paper documents or other non-electronic records from which the complete information is transferred and stored in electronic form, in accordance with the requirements of the ETA and the Electronic Transactions Regulations 2003 (No. 288), may be destroyed after transfer to the electronic form.

Retention of records in electronic form – originally in electronic form.

20. Internal controls must be adequate to ensure that all business transactions executed electronically, including those executed through the internet, are completely and accurately captured.

21. Persons should be able to demonstrate that their electronic records systems are secure from both unauthorised access and data alterations. This usually involves developing and documenting a security program that establishes:

    - controls to ensure that only authorised personnel have access to electronic records;
    - provide for backup and recovery of records;
    - ensure that personnel are trained to safeguard sensitive or classified electronic records; and
    - minimise the risk of unauthorised alteration, addition or erasure.

22. The charts and codes of accounts, the accounting instruction manuals, and the system and programme documentation which describes the accounting system used must be retained and produced if required, to an Inland Revenue officer.

Encryption

23. The electronic copy must be readily accessible and capable of being retrieved and produced as legible hard copy (printouts) or supplied in electronic form (on electronic media and unencrypted in a form able to be read by Inland Revenue officers) if required.

24. The Commissioner may approve the use of symbols and abbreviations to facilitate the electronic transfer of tax invoices, credit notes or debit notes. Requests for approval should be made in writing to Inland Revenue.

25. Those who engage in the electronic transfer of tax invoices, credit notes or debit notes must retain electronic records that in combination with any other records, eg the underlying contracts, price lists, price changes, product code descriptions, have an adequate level of detail to meet the requirements of the Goods and Services Tax Act 1985 (GST Act). For example, if a hard copy invoice is requested, the printout must contain all information as required under section 24 of the GST Act.

Internet

26. Persons who do business via the internet are required to keep business records of all internet transactions for tax purposes.

Emails

27. Some emails may be classified as business records required to be kept for tax purposes. Where emails are business records, section 27 of the ETA requires the origin, destination and time of electronic communications to be retained and accessible so as to be usable for subsequent references.

Additional requirements

28. The following additional requirements are also necessary where business records are retained in electronic form.

Backup

29. Backup and recovery procedures must be sufficient to guarantee the availability of electronic records for the required record retention period.

Hardware/software changes

30. In the event of hardware/software changes:

    - facilities for retrieving electronic records that have been stored on the former system must be retained, or
    - the electronic records must be converted to a compatible system and both sets of files retained complete with documentation showing the method of transfer and controls in place to ensure the transfer was complete and accurate.

Storage offshore

31. The Commissioner may approve the storage of records offshore. Approval is subject to the records being readily available in New Zealand on request, in English, and at no cost to Inland Revenue in obtaining the information. Each case will be considered on individual merit, having regard to the person's compliance history and whether storage overseas is likely to impede Inland Revenue compliance activities.

Providing accounting information in electronic format to Inland Revenue

32. Inland Revenue's Computer Tax Audit Unit and electronic data coordinators specialise in downloading electronically stored information. The preferred media for receiving electronic information is on CD, DVD or floppy disk. However, other media may be accepted such as 8mm tape cartridge, Zip drives, 4mm DAT tapes. An alternative method is transfer of data between personal computers. Other mutually agreeable transfer methods may be negotiated as required.

33. When possible, electronic information supplied to Inland Revenue should be in a fixed record length format, in EBCDIC or ASCII or delimited. Tapes should be created without software compression. The electronic information should be copied to media, not a proprietary back up. Documentation should be supplied with the media showing the record layout, record length, (block size if supplied on tape) and number of records.

Assistance to Inland Revenue officers

34. Adequate viewing and printing facilities should be made available free of charge to Inland Revenue officers. If requested, persons must locate selected records that have been stored and print any items selected, free of charge to Inland Revenue officers.

35. Persons must be available to explain the operation of their computer system to Inland Revenue officers. This is the case whether the system is owned and operated by the person or out-sourced to a third party.

36. There must be sufficient detail to ensure a complete audit trail that allows tracing the retained records to and from accounting records through to tax returns.

Retention period

37. The electronic or microfilmed records must be retained for the full retention period required by the TAA and the GST Act, currently seven years unless extended to 10 years by Inland Revenue for specific case situations.

This Standard Practice Statement is signed by me on 10 December 2003.

Margaret Cotton
National Manager (Technical Standards)

QUESTIONS WE'VE BEEN ASKED

This section of the *TIB* sets out answers to some inquiries we've received. We publish these as they may be of general interest to readers. A general similarity to items published here will not necessarily lead to the same tax result. Each case should be considered on its own facts.

MANAGING COMMUNICATIONS ASSOCIATED WITH A DISPUTE REFERRED TO THE ADJUDICATION UNIT

This item outlines how the Adjudication & Rulings group deals with communications it receives that are associated with a dispute that has been referred to the Adjudication Unit.

Introduction

Under the disputes resolution process, a tax dispute between Inland Revenue and a taxpayer is generally referred to the Adjudication Unit to review. The Adjudication Unit is independent of Inland Revenue's audit function, so as to facilitate impartiality, and is intended to take a **fresh look** at the application of the law to the facts of the disputed case. As such, the actual and perceived **independence** of the Unit is a matter that is taken very seriously.

As noted in *Tax Information Bulletin (TIB)*, Vol 8, No 3, August 1996, it is intended that communications to the Adjudication Unit about a dispute being considered by an Adjudication team would be very rare and, in most instances, would be initiated by the Unit itself. This would generally be in circumstances where the Adjudication team required clarification of some matter concerning the dispute. In all such cases, such contact will be in writing and a copy of the letter is also sent to the other party to the dispute. This is to ensure **openness and transparency** of the Adjudication process, and also to prevent compromising some aspects of the tax disputes process, including the role of the Statement of Position and the operation of the evidence exclusion rule.

The *TIB* implies that the disputants cannot initiate any communications with the Adjudication team. However, in practice, taxpayers, agents and Inland Revenue staff, from time to time, do attempt to contact the Adjudication Unit for various reasons. These communications are managed by Adjudication & Rulings' Field Liaison & Communication Unit ("FLAC") in a manner that endeavours to ensure that the impartiality and independence of the adjudication process is not compromised.

The principles

There are two principles that guide the Adjudication Unit and FLAC in managing inward communications that are associated with a dispute that has been referred to the Unit.

- The first principle is one of **openness and transparency**. This ensures that the adjudication process is consistent with the dispute resolution procedures and is based on an "all cards on the table" approach. This includes every communication subsequent to the dispute being referred to the Adjudication Unit which FLAC passes on to the Adjudication team working on the particular case being copied to all parties concerned. This principle is also reflected in the final Adjudication Report which is intended to be comprehensive and address all relevant arguments raised by either party to the dispute. As such, final decisions of the Commissioner are clearly explained in the report.
- The second principle is one of **maintaining the independence of the Adjudication Unit so that the impartiality of the team considering a disputed matter is not compromised**. This is to ensure that the Adjudication team cannot be inappropriately influenced by matters beyond the scope of **the dispute as embodied in the documentation** referred to the Adjudication Unit. As noted in the *TIB*, the role of the Adjudication Unit is not to carry out further investigations but to form a view based primarily on the information provided in the Statements of Position of the respective parties, including any additions to such statements under section 89 M(13) of the Tax Administration Act 1994.

These two principles generally overlap so as to effectively require that the parties are aware both of the reasons for the decision and what has influenced the Adjudication team in the course of their deliberations. An example of this can be seen in the final Adjudication Report issued by the Unit, which is comprehensive as to the reasons for the decision(s). If an aspect is not in the report, then it did not influence the Adjudication team and does not form part of the reasoning or decision of the Adjudication team in that matter.

Applying the principles in practice

There are two categories of communications:

- Those generated by the Adjudication Unit itself because they need to know something in order to progress their consideration of the case.
- Those that are generated by the disputants—generally enquiring as to the state of progress of their particular case, or wanting to contribute further by referring additional material or arguments, suggestions, etc.

The first category

The first category is straightforward and is of the type referred to in the *TIB*. FLAC signs such letters and ensures that copies are referred to both parties. The reason for FLAC signing these letters is to ensure that the Adjudication team does not become the contact point for matters arising from such communications, and so is not open to direct contact for debating matters that potentially impact on their impartiality and perceptions of such impartiality. FLAC also ensures that all correspondence received in response is copied to both parties.

The types of communications that fit into this category include letters enquiring whether a single report can be prepared in cases which concern more than one taxpayer, and (in rare situations) letters requesting clarification of something in a Statement of Position or requesting evidential material referred to in a Statement of Position but not included in the material provided.

The second category

As already noted, the second category involves communications received from a taxpayer or their agent, or from the Service Delivery area of Inland Revenue. The nature of these communications can range from enquiries about the state of progress of their particular case to wishing to refer additional material for consideration.

Any inward communications are received by FLAC in the first instance and would be answered by FLAC if the matter is of a general or procedural nature. Some entirely administrative or system-related communications which are dealt with solely by FLAC or the systems area in Adjudication & Rulings and are not seen by the Adjudication team working on the case would not generally be copied to both parties. All communications which are passed on to the Adjudication team working on the particular case will be copied to both parties to the dispute. If the sender of the communication claims that it is the subject of legal professional privilege, the applicability of the privilege will be considered and determined by the Adjudication team before any copy is sent to the other party.

APPLICATION OF THE ANONYMOUS VERSION OF DETERMINATION S13

Question

We have received a query concerning the anonymous version of Determination S13 (as published in the *Gazette* on 20 July 1999) and whether it applies to a particular taxpayer. The correspondent also queried whether the methodology specified in the Determination was correct for all situations to which it applied.

Conclusion

The anonymous version of the Determination does not apply to anyone as such. As stated in the published version:

> The following is an anonymous version of a determination made for a particular applicant who is, or intends to be, a party to the relevant financial arrangement. It is not the determination nor a determination, merely an anonymous version of the actual determination.

Accordingly, the anonymous version does not itself apply to any taxpayers. During the course of dealing with the query, we have contacted the agent of the taxpayers that applied for the actual Determination. The agent advised that the taxpayers did not proceed with the arrangement as described in the Determination. Accordingly, Determination S13 does not apply to anyone either.

It is also noted that on reviewing the methodology in the Determination S13 as a result of the query, the Commissioner no longer considers that the methodology in the Determination S13 is correct in all respects.

REGULAR FEATURES

DUE DATES REMINDER

January 2004

15 **GST return and payment due**

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

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

FBT return and payment due

30 **GST return and payment due**

February 2004

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

9 **End-of-year income tax**

- 7 April 2003, 2002 end-of-year income tax due for clients of agents with a March balance date
- 7 February 2004, 2003 end-of-year income tax due for people and organisations with a March balance date and who do not have an agent

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

27 **GST return and payment due**

These dates are taken from Inland Revenue's Smart business tax due date calendar 2003 – 2004

YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft 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.**
On the homepage, click on "The Rulings Unit welcomes your comment on drafts of public rulings/interpretation statements before they are finalised . . ." Below the heading "Think about the issues", click on the drafts that interest you. You can return your comments by internet.

Name ________________________________

Address ________________________________

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	Draft public ruling	*Comment deadline*
☐	PU0034: "Anything occurring upon liquidation"when a company requests removal from the register of companies	27 February 2004
	Draft public ruling	*Comment deadline*
☐	PU0081: FBT and motor vehicle multi-leases	27 February 2004
	Draft operational statement	*Comment deadline*
☐	ED0049: GST treatment of mortgagee sales	16 February 2004
	Draft standard practice statement	*Comment deadline*
☐	ED0055: Promoter penalties	16 February 2004

Items are not generally available once the comment deadline has passed

No envelope needed—simply fold, tape shut, stamp and post.

Affix
Stamp
Here

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