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Dear Anne-Maree

New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987

- 1 You have asked us whether investment of the New Zealand Superannuation Fund, into companies such as Northrop Grumman, can amount to a breach of the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987.

Introduction

- 2 As we understand it, the Fund has invested into particular companies, including Northrop Grumman, which may be involved in the manufacture of nuclear weapons or strategic parts for nuclear weapons as a component of the company's business. We understand the investments may have been direct, that is, the investment manager may have deliberately selected a company for investment.
- 3 We consider the only section which deserves attention in relation to investment is section 5(2).
- 4 Our preliminary view is that the investments described above are unlikely to breach section 5(2). Our reasoning is set out below.

Executive Summary

- 5 In so far as is relevant to the Guardians, to establish a breach of section 5(2) the prosecution must prove that, by investing the Fund in the manner described above, it has committed an act "aiding, abetting or procuring" the manufacture of a nuclear explosive device. The prosecution must also prove the intention to aid, abet or procure the action of manufacturing a nuclear explosive device.

- 6 A breach of the section is an indictable offence and as such the standard of proof is "beyond reasonable doubt".
- 7 We also draw your attention to section 15 of the Act. No information shall be laid against any person for an offence against the Act without the consent of the Attorney-General.
- 8 We are not aware of the issue of investment arising in a court under this section or any equivalent section. As no guidance is available to determine whether an investment will be a breach of the section, we consider the question will be answerable on a case by case basis determined on the particular circumstances.
- 9 Having regard to the purpose of the Act as described in Parliament, we have interpreted the section based on interpretation of "aiding, abetting or procuring" as dealt with under the Crimes Act 1961.
- 10 In our view the investment as described cannot constitute an action of aiding, abetting or procuring the manufacture of a nuclear explosive device. We believe in this instance that even if the investment could somehow be interpreted to constitute an action of aiding, abetting or procuring, the requirement of the intention to aid, abet or procure cannot be satisfied beyond reasonable doubt.
- 11 In addition to making out the elements of an offence against the Act, it must also be proven that the any relevant actions of the investment manager can be imputed to the Guardians under agency law.
- 12 For the purpose of this opinion we have not considered section 58 of the New Zealand Superannuation and Retirement Income Act 2001. That section prescribes the manner in which the fund must be invested, including "avoiding prejudice to New Zealand's reputation as a responsible member of the world community".

Issues

- 13 In this opinion we consider the following issues:
- Whether an investment can constitute an action of "aiding, abetting or procuring".
 - Whether the Guardians can be said to have intended an action of "aiding, abetting or procuring".
 - Whether the Guardians is responsible for a criminal action of its agent and to what extent the actions and knowledge of the agent may be attributed to the Guardians.
 - Whether or not the Guardians is a "person" for the purposes of section 5(2).
 - Whether the Guardians is immune to prosecution as a Crown Entity.

The New Zealand Nuclear Free Zone, Disarmament, And Arms Control Act 1987

14 Section 5(2) of the Act provides

No person, who is a New Zealand citizen or a person ordinarily resident in New Zealand, and who is a servant or agent of the Crown, shall, beyond the New Zealand Nuclear Free Zone,—

(a)

Manufacture, acquire, or possess, or have control over, any nuclear explosive device; or

(b)

Aid, abet, or procure any person to manufacture, acquire, possess, or have control over any nuclear explosive device.

15 Section 5(2) is intended to enact the New Zealand Government's obligations under Article 3 of the South Pacific Nuclear Free Zone Treaty. In the context of the section (and the corresponding treaty commitments it relates to) we believe "control" should be interpreted to mean "to have a controlling interest in"¹ (and excludes the physical control over transport and delivery of the device) as this interpretation does not contradict "nuclear explosive device" as defined in the act.

16 Section 2 provides a definition of "nuclear explosive device"

Nuclear explosive device means any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used, whether assembled, partly assembled, or unassembled; *but does not include the means of transport or delivery of such a weapon or device if separable from and not an indivisible part of it.* [emphasis added]

17 The definition is adopted from the South Pacific Nuclear Free Zone Treaty, and reflects the primary purpose of the Act, to honour the New Zealand Government's obligations under that, and other treaties. The origin of the definition is article five of the Treaty for the Prohibition of Nuclear Weapons in Latin America (Tlatelolco, 1968).

18 Under Article 31 of the Vienna Convention on the Law of Treaties, the first rule of treaty interpretation is the ordinary meaning of the terms in their context and consistent with the object and purpose of the treaty. The question of whether the "means of transport or delivery" are separable is therefore more of a technical rather than legal question.

19 We interpret this definition to mean that the delivery system of the nuclear explosive device will be excluded from any "nuclear explosive device" in the Act, if it is separable from and not an indivisible part of the device. In our opinion this excludes all components of delivery (including rocketry and guidance) of the final weapon.

20 Section 14 provides that a contravention to section 5 is an offence:

Offences and penalties

¹ Garner, *Black's Law Dictionary*, 8th Edition, Thompson West.

(1)

Every person commits an offence against this Act who contravenes or fails to comply with any provision of sections 5 to 8 of this Act.

(2)

Every person who commits an offence against this Act is liable on conviction on indictment to imprisonment for a term not exceeding 10 years.

21 Under section 39 of the Sentencing Act 2002 the court may impose a fine rather than a term of imprisonment.

22 As an indictable offence, any case brought under the section would have to be presented to a jury in the High Court.

23 The onus of proof required for an indictment is 'beyond reasonable doubt'.

Investments and section 5(2)(b)

24 Assuming that the Guardians is a person and a servant or agent of the Crown, the crucial question is whether the Guardians did "aid, abet or procure" any person to "manufacture... any nuclear explosive device".

25 The Guardians receives screening reports from Innovest Analytics. According to the controversial activities screening summary for Northrop Grumman, the company is involved in the production of nuclear powered naval vessels. There is no mention in the report of involvement in the manufacture of nuclear explosive device. A nuclear powered vessel is not a nuclear explosive device.

Northrop Grumman has in a letter to Norges Bank confirmed that the company is involved in development, production, assembly, and maintenance of nuclear weapons systems.²

26 Given that Northrop Grumman has admitted it's involvement in the production of nuclear weapons it is arguable that the company might be involved in the "manufacture" of a nuclear explosive device in the language of section 5(2). This will be the case only if Northrop Grumman produces parts of a nuclear weapon other than the means of transport or delivery of such a weapon or device if separable from and not an indivisible part of it.

27 The next issue is whether the investment into Northrop Grumman constitutes an act by the Guardians to "aid, abet, or procure" in the manufacture of any such nuclear explosive device. These terms are not defined in the Act, and no case law has been decided under the Act.

28 In *Black's Law Dictionary*,

² The Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation on exclusion*, Oslo, 19 September 2005.
<http://www.regjeringen.no/en/ministries/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation-on-exclusion.html?id=419589>

- 28.1 "aid" is defined twice in historical use, and once as meaning "legal aid";
- 28.2 "abet" is defined as " 1. To aid, encourage, or assist (someone) especially in the commission of a crime <abet a known felon>. 2. To support (a crime) by active assistance <abet a burglary>;
- 28.3 "aid and abet" is defined as "to assist or facilitate the commission of a crime, or to promote its accomplishment".
- 28.4 "procure" means to get or obtain something.
- 29 To apply the above meaning of "aid" in the context of the section would not provide a meaningful outcome. But applying the meaning given as used in "aid and abet" provides a logical definition which gives effect to the section.
- 30 In defining "aid, abet or procure" it is helpful to review the Hansard regarding the presentation of the Report of the Foreign Affairs and Defence Committee in relation to the Act.
- "The committee... recommended amending clause 5(1)(b) and clause 5(2)(b) so that the provisions therein are identical to the "aid and abet" provisions contained in clause 66 of the Crimes Act. It was pointed out to the committee by Ministry of Foreign Affairs officials that by including in clause 5 a more limited specific provision in a penal clause in the Bill than existed in the Crimes Act serious problems of interpretation might be created for the courts. Therefore the committee opted for the inclusion of provisions that are identical to those contained in the Crimes Act."
- 31 This report suggests that the wording of clause 5(2) is to have the same meaning as the same words in section 66 of the Crimes Act.
- 32 I note that section 5(2)(b) "aid, abet or procure" appears to amalgamate subsections 66(b)(c) and (d) of the Crimes Act 1961. This is in line with the statement of intention found in the Hansard.
- 33 The Crimes Act 1961 section 66 provides:
- 66
- Parties to offences
- (1)
- Every one is a party to and guilty of an offence who—
- (a) Actually commits the offence; or
- (b) Does or omits an act for the purpose of aiding any person to commit the offence; or
- (c) Abets any person in the commission of the offence; or
- (d) Incites, counsels, or procures any person to commit the offence.

Investment – aiding

34 Adams provides commentary summarising the interpretation of this section:³

“Aiding” — s 66(1)(b)

“Aiding” means assisting, helping, or giving support to. Although s 66(1)(b) stipulates only that a person does or omits an act “for the purpose of aiding”, the mere commission of an act intended to have that effect is insufficient. To sustain a conviction for aiding there must be proof of “actual” assistance: *Larkins v Police* [1987] 2 NZLR 282; (1987) 3 CRNZ 49. The reference to “purpose” in s 66(1)(b) is descriptive of the state of mind of the aider and “superimpos[es] a requirement in that respect upon the need for proof that the accused did an act which had the effect of aiding”: *Larkins* (above); *R v M* 4/10/02, Heath J, HC Hamilton T021284; see CA66.19(2).

35 In the *Shorter Oxford Dictionary*, the ordinary meaning given to the word 'assist' is 'an act of helping'. Therefore the question is whether the Guardians is assisting or helping Northrop Grumman produce nuclear weapons by making a direct investment in Northrop Grumman's shares.

36 Whether or not an investment equates to “actual” assistance is a question of fact. The question is whether Northrop Grumman was assisted in the manufacture of a nuclear explosive device because of the Guardians investment in the shares of Northrop Grumman.

37 In this case we believe no assistance has occurred. An argument to establish a nexus between the investment and the manufacture of a nuclear explosive device beyond reasonable doubt would be farfetched. The prosecution would need to establish that the Guardians supplied funds to Northrop Grumman. They would need to establish the funds were used to produce a nuclear explosive device, and that the funds were supplied for that purpose. Finally they would need to show it was the intention of the Guardians to supply the funds for that purpose.

38 We note that an investment has been considered an act of assisting by the English Court of Appeal in *Batts Comb Quarry Ltd. V Ford*⁴.

39 In that case the court dealt with a restraint of trade covenant imposed on the vendors of a quarry. The vendors covenanted that they would not 'assist in carrying on' a competing business. One of the vendors provided capital to his son to purchase a neighbouring quarry. It was held that the father had breached the restraint of trade covenant as he had 'assisted' in carrying on a competing quarrying business.

40 We note that the test in that case is to the degree of civil proof, and would distinguish it on that basis. Furthermore, we think there is a strong argument in this case that purchasing shares on the secondary market does not equate to a provision of capital to the degree of “assistance” in *Batts Comb Quarry*. In that case

³ Adams, *Adams on Criminal Law*, CA66.17

<http://www.brookersonline.co.nz/databases/modus/criminal/adams/ACT-NZL-PUB-Y.1961-43~BDY~PT.4~S.66?si=15>

⁴ [1943] CH. 51.

the "assistor" provided the entire start up capital for the business, advised on the operation of the business, and acted in negotiations for the business.

41 Lord Greene added particular emphasis that the capital provided was

"...the necessary capital to enable the business to be carried on. After all, it is not merely the equipment that is brought about by the provision of the capital, but the whole life of the business."

42 We note that the Guardians holding amounted to approximately 0.036% of the company. It is unclear whether the holding was a result of newly issued shares, or a purchase on the secondary market. As far as this may be relevant, we assume the latter is the case. Where shares are purchased on the secondary market, no additional funding is received by the company, in that case no direct assistance is provided.

43 We believe to complete the act of assisting, the Guardians would need to contribute "necessary capital" to enable the manufacture of a nuclear explosive device. We consider this would only occur on limited circumstances, such as participation in an issue raising capital necessary for a project the purpose of which is the manufacture of a nuclear explosive device. It would also be necessary to show the Guardians were aware of the application of those funds for that particular purpose.

44 In summary of the above, it appears the investment cannot amount to an action of aiding as required by the act. In the unlikely event the opposite were found to be true, the necessary element of intention could not be proven (as discussed at paragraphs 55 to 64 below).

Investment – abetting

45 Having established that the Guardians has not "aided" the manufacture of a nuclear explosive device, the next issue is whether the Guardians has "abetted" the manufacture of a nuclear explosive device.

"Abets", "incites", "counsels" — s 66(1)(c) and (d)

These terms overlap on their ordinary meanings. "Abet" and "incite" both convey the sense of urging on, instigating, or encouraging...

In practice, abetting has been broadly equated with encouragement: *R v Schriek* [1997] 2 NZLR 139; (1996) 14 CRNZ 449; 3 HRNZ 583 (CA); *R v Pene* 1/7/80, CA63/80; *R v Galey* [1985] 1 NZLR 230 (CA); *R v Curtis* [1988] 1 NZLR 734 (CA); *Larkins v Police* [1987] 2 NZLR 282; (1987) 3 CRNZ 49; see also *R v Clarkson* [1979] 1 WLR 1402; *Dunlop v R* (1979) 99 DLR (3d) 301; *R v Giorgi* (1983) 31 SASR 299. Encouragement may be given by words or conduct. Although mere presence at the scene of the offence is not enough to establish liability for either aiding or abetting, deliberate presence intended to signify approval of the acts of the principal will support an inference of encouragement in fact: *Pene* (above); *R v Loper* 22/5/00, CA502/99; *R v Makita* 27/6/05, CA61/05. See also *R v Afa* 7/6/00, Williams J, HC Auckland T000457 and *Joseph v R* 12/12/00, Hammond J, HC Hamilton T002512.

In *R v Thomson* 14/6/05, CA1/05, the Court of Appeal was unable to see how a person could encourage the principal party to commit an offence "without that encouragement being communicated one way or another".⁵

⁵ *Adams*, CA66.17

- 46 In this case the issue is whether the Guardians knew Northrop Grumman produced nuclear weapons, and this was the reason for investment. If so, they might have given encouragement. Note that as well as proving that the action of buying shares in Northrup is a particular encouragement of the manufacture of any explosive nuclear device, the prosecution must also prove that this investment was meant as an encouragement by the Guardians of the manufacture of a nuclear explosive device.
- 47 An investment may imply that the investor believes the company's operations will result in a profit. Other reasons such as the share price is undervalued or the company is a takeover target may also apply. In this case the investment really implies that the Guardians believe the share price will increase (for a number of reasons which can include the company continuing profitably with its business) and the Guardians will eventually make a profit when the shares are sold again. While an investment in shares may be an indication that the investor wants the company to carry on its business, it is not necessarily the case here. In any event the inference that the Guardians invested for the purpose of aiding, abetting or procuring under the Act cannot be drawn.
- 48 It is difficult to equate investment in a company, which may be a signal of encouragement of the business generally, as proof of "abetting" to the degree required by the Act. The encouragement needs to be of the particular action of manufacturing, acquiring, possessing or controlling any nuclear explosive device, rather than the operation of the business generally. For an action under the Act the prosecution must provide evidence that the Guardians encouraged the manufacture of a nuclear device beyond reasonable doubt.
- 49 In this case an accusation of "abetting", regardless of the substance of the action, will not satisfy the requirement of communication. A charge of abetting requires that an encouragement to commit an offence be communicated to the principal party.
- (a) Communication of encouragement
- Although it is not necessary to prove that an act of encouragement caused the principal party to commit the offence, there must be some connection between an abettor and the principal party: *R v Schriek* [1997] 2 NZLR 139; (1996) 14 CRNZ 449; 3 HRNZ 583 (CA). In most cases the encouragement, advice, or persuasion must have been communicated to the principal party before it can be said that there has been actual encouragement etc: *Schriek* (above); *R v Loper* 22/5/00, CA502/99; *R v Briggs* 29/11/01, CA244/01 (abetting); *R v Clarkson* [1979] 1 WLR 1402 (abetting); *R v Calhaem* [1985] QB 808 (counselling); *A-G's Reference (No 1 of 1975)* [1975] QB 773 (abetting and counselling); see also *R v Bryce* [2004] EWCA Crim 1231; [2004] 2 Cr App R 35 (CA). In *R v Thomson* 14/6/05, CA1/05, the Court of Appeal was unable to see how a person could encourage the principal party to commit an offence "without that encouragement being communicated one way or another".⁶
- 50 Unless there is evidence of a specific communication, the only argument is that there is an implied "communication" of encouragement by taking a shareholding in the company.

⁶ Ibid.

- 51 Northrop Grumman listed total shareholder's equity for the 2005 year of \$16.8 billion US dollars. Guardian's investment into Northrop Grumman amounted to \$9 million NZ dollars. This amounts to a 0.036% interest in the company. We are unaware of any direct communication by the Guardians to Northrop Grumman at all, let alone an encouragement to manufacture a nuclear explosive device. By this reasoning there almost certainly cannot be an inference that the Guardians gave encouragement of the manufacture of nuclear explosive devices merely by the existence of it's shareholding. There must be a communication of encouragement by the Guardians of the act to the company.
- 52 In our opinion an action of abetting is not made out for two reasons. First, there has not been an actual encouragement of the manufacture of any nuclear explosive device. Second, there was no communication of any encouragement by the Guardians to Northrop Grumman.

Investment – procuring

- 53 A charge of procuring requires the offender to cause a person to commit an offence. Given that the Guardians has almost no direct or indirect influence over Northrop Grumman's management decisions, they cannot be said to have procured the manufacture of a nuclear explosive device. An exception might be if the Guardians had exercised voting rights to directly cause Northrop Grumman to produce nuclear weapons. It is difficult to imagine this was the case.

"Procures" — s 66(1)(d)

A person "procures" another to commit an offence by deliberately causing that person to commit the offence. "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening": *A-G's Reference (No 1 of 1975)* [1975] QB 773, followed in *Cardin Laurant Ltd v Commerce Commission* [1990] 3 NZLR 563; (1989) 3 TCLR 470; *MOT v Barnett* (1986) 3 DCR 382; and *Blakely v DPP* [1991] RTR 405. See also *R v Broadfoot* [1976] 3 All ER 753; *R v Reed* [1982] Crim LR 819; *R v Beck* [1985] 1 WLR 22.⁷

- 54 Given that procurement requires positive action and exercise of influence which is at least dependent on the percentage of shareholding, it is fairly clear "procure" does not capture the investment in this instance.

Summary – Aiding, abetting or procuring

- 55 Having regard to the arguments above, it is unlikely an action could be brought against the Guardians, or the investment manager. The elements of an action require specific assistance or encouragement of the illegal act. For the reasons given above, we consider it is too remote to equate the investment to the level of assistance or encouragement required under the Act.

Intention

- 56 The most assuring stand point against an action under section 5(2) for the Guardians is the requirement of intention. The issue is whether the Guardians

⁷ Ibid

intended the investment to constitute aiding, abetting, or procuring Northrop Grumman to manufacture a nuclear explosive device.

- 57 It is difficult to imagine how a very minor shareholding in a company listed on a recognised exchange could be construed as an intention beyond reasonable doubt to aid, abet or procure the manufacture of nuclear weapons.

CA66.19

Mens rea of secondary participation — subs (1)

The mens rea required to establish secondary liability under s 66(1)(b)-(d) is usually described as an intention to help or encourage the principal party. This general requirement is well established by a line of authority dealing with liability for aiding or abetting by presence at the scene of an offence: *R v Lewis* [1975] 1 NZLR 222 (CA); *R v Pene* 1/7/80, CA63/80; *R v Genet* 10/4/84, CA146/83; *R v Witika* (1991) 7 CRNZ 621 (CA); *Larkins v Police* [1987] 2 NZLR 282; (1987) 3 CRNZ 49; see also *R v Tomkins* [1985] 2 NZLR 253; (1985) 1 CRNZ 627 (CA); *R v Samuels* [1985] 1 NZLR 350 (CA); *R v Curtis* [1988] 1 NZLR 734 (CA). These cases make it clear that to constitute liability under s 66(1)(b) or (c) there must be proof of both help or encouragement in fact and an intention to help or encourage. More specifically, the general requirement of an intention to aid, abet, etc comprises two distinct mental elements (*R v Singh* 10/12/03, CA53/03; CA67/03; see also *Innes v Police* 24/4/91, Williamson J, HC Invercargill AP17/91).⁸

- 58 The court of appeal addressed the elements of intention in *R v Singh*⁹. Justice Heath said the following¹⁰:

"The requisite intent of a person who is a party to an offence through the operation of s66(1)(b)-(d) of the Act is well settled. The intent has two constituent parts: (a) **knowledge** of the **essential matters** that constitute the offence committed by the principal and (b) an intention or purpose to **help or encourage** the principal **to do the acts that constitute the offence.**"[emphasis added]

- 59 The Guardians must have knowledge of essential matters that constitute the offence. This is a question of fact again to be proved beyond reasonable doubt. The Guardians must be shown to have had knowledge that Northrop Grumman manufactured a nuclear explosive device. They must then be shown to have intended to help or encourage that particular act.

- 60 An investment of the nature found in this case appears much too remote to infer that specific intention. The specific intention behind the investment is to provide a return on investment, i.e. sell the shares at a higher price in the future, and maintain a diversified portfolio, rather than to help or encourage the manufacture of a nuclear explosive device.

- 61 The investment manager is expressly required to use best-practice portfolio management and maximise return without undue risk to the Fund as a whole subject to investment procedures and policies, including the requirement that investment activities be made only in compliance with New Zealand law.

⁸ *Adams*, CA66.19

⁹ 10/12/03, CA53/03; CA6703

¹⁰ *Ibid*, paragraphs 39-41

- 62 Given that the controversial activities screening summary for Northrop Grumman does not include any reference to any nuclear explosive device, it is difficult to prove the Guardians held any knowledge of the level of involvement Northrop Grumman had in the manufacture of nuclear explosive devices.
- 63 Unless the prosecution can provide evidence to the contrary, it is extremely difficult to prove a specific intention by the Guardians (or the investment manager, even a fundamental active investment manager) to aid, abet, or procure the manufacture of a nuclear explosive device, where they have simply met their obligations to invest the Fund.
- 64 Add the fact that the investment decisions are subject to the contract between the Guardians and investment managers. These managers are contracted to make investments subject to restrictions and prohibitions. The investment management agreement requires the manager to comply with all laws. This is an indication of the Guardians intention. If an investment did constitute an act equating to a breach of an Enactment, the evidence suggests this was not the intention. Instead the investment will be made outside the ambit of the manager's authority, and the intention cannot be inferred to be that of the Guardians.

Summary – Intention

- 65 The section requires a person to aid, abet or procure the manufacture of nuclear weapons. The purpose of the shareholding was to provide a return on investment. If an investment of this nature were capable of being interpreted as an action of aiding, abetting or procuring, it must also be shown that the investment was intended for that purpose. We do not think it is reasonable to infer this purpose.

Agency

- 66 It is important to note at the outset that the investment decisions and buying of shares for the portfolio is the responsibility of an investment manager acting as an agent of the Guardians (in the carrying out their contractual obligation to invest the fund owed to the Guardians).
- 67 Before the Guardians can be found responsible for the action of the investment manager, the issue arises as to whether the acts of the investment manager (as agent) can be attributed to the Guardians (as principal) under the laws of agency.
- 68 For the purpose of this opinion we assume the investment manager is not a New Zealand citizen or a person ordinarily resident in New Zealand. A person who is not a citizen or a resident of New Zealand for the purposes of the Act will not be subject to section 5(2). However, a New Zealand resident principal for whom that person is an agent may be liable under the Act.

Agency – Criminal liability of principal

- 69 Criminal liability will only be imposed on a principal who authorises the action of the agent.

133. Principal's criminal liability. As a general rule, no act or default on the part of an agent imposes any **criminal** liability on the principal in respect of that act or default, unless the principal personally takes part in, authorises, or connives at the commission of it.¹¹

70 The crucial question to establish liability of the Guardians as principal is whether the investment manager was authorised to make the investment. The question will be determined having regard to the investment management agreement.

71 For the purposes of this opinion, we have assumed the agreement is similar to the Guardians' standard agreement regarding investment management in global equities, we can confirm our findings according to the specific agreement at your request.

72 Under the investment management agreement the investment manager must make investments:

- in accordance with the Investment Mandate,
- complying with the statement of investment policies, standards and procedures (**SIPSP**),
- complying with all relevant laws.

73 In regard to the SIPSP, clause 6.2.1 requires that any investment into an entity must be made on the basis that the business of the entity is consistent with the laws of New Zealand.

74 The requirement that investments be made "complying with all relevant laws" suggests that if the investment into Northrop Grumman was found to be a breach of section 5(2), the investment would also be in breach of the investment management agreement. That is, the Guardians have not authorised the action, if it is shown to be illegal.

Agency – Ratification of the investment

75 Under agency law, a principal may ratify an unauthorised act of the agent.

An effective ratification places all the parties in the same position that they would have occupied at the material time if the agent had had an actual authority to perform the acts ratified... The illegality of an act will not of itself prevent its ratification.¹²

76 Ratification may be affected by acquiescence.

In certain cases it is sufficient evidence of ratification that the intended principal, knowing all the material steps and that he or she will be regarded as having accepted the position of principal, takes no steps to disown that position within a

¹¹ Cynthia Hawes, *The Laws of New Zealand, Agency*, LexisNexis, <http://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodeId=TAAFAAGAAEAAC&pubTreeWidth=23%>

¹² Cynthia Hawes, *The Laws of New Zealand, Agency*, LexisNexis, <http://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodeId=TAAFAAGAAEAAC&pubTreeWidth=23%>

reasonable time, or adopts no means of asserting his or her rights at the earliest time possible.¹³

- 77 Having become aware of the investment, the Guardians might be considered to have ratified the investment, should the Guardians choose not to take further action. In that case the Guardians will be considered to have authorised the investment, and the act of investing will be imputed upon the Guardians as principal.
- 78 We consider it unlikely that the Guardians could be held to have ratified the investment for the purposes of the act, until all material steps are known to the Guardians. This would include knowing whether the purpose and intention of the investment was that required for a breach of section 5(2).

Criminal liability and status of Crown entities

- 79 To confirm whether the Guardians is subject to section 5(2) it is necessary to consider whether the Guardians is a person under the Act, and whether they may be criminally liable according to the Act.
- 80 The first question is whether the Guardians may be considered a "person" under section 5(2).
- 81 In the Interpretations Act 1999 section 29 provides:
- Person** includes a corporation sole, a body corporate, and an unincorporated body
- 82 The Guardians is a "person" ordinarily resident in New Zealand as a body corporate (under the Crown Entities Act 2004).
- 83 It might be possible to argue that the section intended that "person" be assigned its natural meaning in the context. However, because the Act did not specify a definition to this effect, it is prudent not to argue against the legal definition of person unless it is absolutely necessary.
- 84 The next question is whether the Guardians is immune from prosecution under section 5(2).
- 85 The Guardians is listed as a crown entity under the Crown Entities Act 2004.
- 86 As a "Crown entity" can the Guardians be charged with a criminal offence?
- 87 The determining factor is whether there is a clear indication in the statute that the Crown is intended to be criminally liable.

In *Southland Acclimatisation Society v Anderson*, the Crown was charged with an offence under the Water and Soil Conservation Act which expressly bound the Crown. The Court cited *Cain v Doyle* and held there could be no prosecution because there was no clear indication in the statute that the Crown was intended to be criminally liable. (A further point made in the case was that, as the Crown

¹³ *ibid*

was not bound by the Summary Proceedings Act, there was no machinery to prosecute the Crown.)¹⁴

88 Section 3 provides that the Act shall bind the Crown. Section 5(2) provides a person must be a servant or agent of the Crown. This expressly applies the section to an entity acting on behalf of the Crown. The Guardians are therefore not immune to prosecution under section 5(2) as a crown entity.

89 The final question of application asks whether the Guardians is a servant or agent of the crown.

90 The Guardians is an autonomous Crown entity under the Crown Entities Act 2004.

91 "Servant" and "agent" are not defined in the act. The words must be given their ordinary interpretation.

92 The Guardians was established under enactment to provide a service for the Crown, namely managing the Fund on behalf of the Crown. The Guardians is thus a servant of the Crown.

93 In summary the Guardians is a person and a servant of the crown under s5(2).

Summary

94 Having regard to the above, we consider that there is little or no risk that investment by the Guardians in shares of companies allegedly involved in the manufacture of nuclear weapons breaches section 5(2) of the New Zealand Nuclear Free Zone, Disarmament, And Arms Control Act 1987.

95 It is unlikely investments of the nature described will amount to an act of aiding, abetting or procuring.

96 It is highly unlikely the Guardians could be found to have held the necessary intention required to complete the offence.

97 Finally it is strongly arguable that if a particular investment did amount to a breach, the investment would be made outside the scope of the agent's authority, and as such the act of investing cannot be imputed to the Guardians as principal.

98 Please do not hesitate to contact us if you wish to discuss this matter further.

¹⁴ Ministry of Justice, *REPORT REQUIRED BY SECTION 28 OF THE INTERPRETATION ACT 1999*, June 2001, <http://www.justice.govt.nz/pubs/reports/2001/interpretation/index.html>



Yours sincerely

A handwritten signature in black ink, appearing to read 'Alasdair McBeth'.

Alasdair McBeth

Partner

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