Problems Flowing from the Nil Depreciation of Buildings

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In its 2010-11 Budget, the New Zealand Government implemented the Tax Working Group's recommendation to deny depreciation deductions for buildings that do not actually depreciate in value. The Government's amending legislation prohibits a depreciation deduction in respect of commercial and residential buildings with an estimated useful life of 50 years or more. Although there has been little opposition to this measure, from a practical perspective, there are significant consequences for black-hole expenditure and manipulation of the characterisation of expenditure on buildings. This article examines those consequences, the rationale behind the new legislation, and Inland Revenue's position. The author concludes that further judicial testing of the capital-revenue expenditure boundary in relation to expenditure on buildings is most likely, and that the Government should be cautious about relying on gathering the estimated $685 million additional tax revenue that it expects from this change.

1.0 Introduction

As recommended by the Victoria University of Wellington Tax Working Group, and widely anticipated, the tax reforms implemented in the 2010 Budget included a nil rate of depreciation for all buildings. The new rate applies to both commercial and residential buildings, and to rental and owner-occupied properties. The nil depreciation rate becomes effective from 1 April 2011 for all buildings, regardless of when they were purchased or constructed. As a result, existing buildings will cease to accrue depreciation, yet remain liable for the recovery of previously accumulated depreciation upon their future sale.

[(2010) Vol 16:3 NZJTLP 307, 308] The statutory amendments necessary to implement this nil rate of depreciation were simple, involving changes to only a few sections, to override the current regulatory depreciation determinations applicable to buildings with an estimated useful life of 50 years or more. The nil rate is intended to apply exhaustively as taxpayers may no longer seek special depreciation rates for individual buildings, even when they can establish that it has a shorter-than-usual useful life.

The Government calculated that the denial of depreciation deductions for buildings will raise an additional $685 million in revenue. Surprisingly, there has been little opposition to this change, with most taxpayers seemingly resigned to the removal of depreciation deductions.

From a practical perspective, the denial of depreciation is a simple measure, easily understood and implemented, that is estimated to raise substantial additional revenue. On the surface, it seems like a political masterstroke. But given the complex inter-relationship between different regimes and allowances in the Income Tax Act 2007 (ITA 2007), no change can take place completely in isolation, and a change of this magnitude is bound to have unexpected flow-on effects. Most significantly, the denial of depreciation deductions for buildings creates a massive new category of black-hole expenditure, with all the problems that it presents.

To limit the adverse tax effect from this change, taxpayers will undoubtedly seek to recharacterise the nature of their expenditure on buildings, or challenge the very definition of "building", in order to mitigate the tax effect of disallowing all depreciation. Accordingly, this apparently simple change may instead result in increased disputes for taxpayers and less revenue than expected for the Government.

2.0 The rationale of denying all depreciation on buildings

The rationale for allowing a deduction for depreciation is that capital assets used in the production of income decrease in value over time and, in line with accounting practice, for tax purposes the cost of such capital assets is set off against income over the life of the assets. This view has been generally accepted as almost a truism. Yet it appears that, at least for buildings, that statement is no longer correct.

When making the announcement of the new nil rate of depreciation for buildings, the Minister of Revenue, the Hon Peter Dunne explained:

> "Ending depreciation tax breaks on buildings makes sense. On average, New Zealand buildings actually increase, rather than decrease, in value over time."

[(2010) Vol 16:3 NZJTLP 307, 309] The Special Report from the Policy Advice Division of Inland Revenue explaining the new rate justified it on the basis that:

> "Currently, buildings with an estimated useful life of 50 years can be depreciated for tax purposes. However, [an] analysis of New Zealand building price data between 1993 and 2009 shows that, on average, buildings have actually been increasing in value. This suggests that the current depreciation rate of 2% is not appropriate."To address this concern, the [Taxation (Budget Measures) Bill 2010] sets a 0% depreciation rate for buildings with an estimated useful life of 50 years or more. This new rate will apply to all such buildings regardless of when they were purchased."

The rationale for the new policy was explained as follows:

> "The proposed changes are intended to make New Zealand's tax rules more neutral and non-distortionary. Allowing depreciation on long-lived buildings and the application of depreciation loading on certain assets provides tax depreciation rates in excess of [the] true economic depreciation rates. When this occurs, the tax rules can make an investment profitable when this would not be so in the absence of taxes."

In practice, the total denial of depreciation on all buildings was acknowledged by the Tax Working Group as chiefly a measure to raise additional revenue to compensate for the reduction in personal tax rates:

> "As these options are changes to the existing system, they are likely to be relatively easy to implement and involve relatively low compliance or administration costs. By far the largest in revenue-generating terms is the withdrawal of depreciation on buildings. Some evidence suggests that many buildings do not in fact depreciate, raising questions over the merits of effectively subsidising investment in those buildings. The TWG therefore considers that this base broadening option deserves consideration as a means of funding corporate and personal income tax rate reductions."

In his 2010 Budget announcement, the Minister of Revenue confirmed that this change will raise $685 million in its first year, increasing to over $690 million in future years. But this additional revenue will only arise if taxpayers continue to capitalise their expenditure to what are now non-depreciable buildings. As explained below, the author suggests that taxpayers will immediately modify their behaviour in an attempt to mitigate the effects of this blanket denial of depreciation.

3.0 Inland revenue's previous view on depreciation of buildings

The appropriateness of permitting depreciation of buildings has been considered previously by Inland Revenue. In July 2004, an Officials' Issues Paper entitled *Repairs and Maintenance to the Tax Depreciation Rules* **[(2010) Vol 16:3 NZJTLP 307, 310]** reviewed the economic justification for allowing depreciation of commercial and residential buildings. That Issues Paper acknowledged the economic inconsistency of permitting depreciation of assets that are likely to be appreciating in value:

> "there may be an element of tax advantage for investment in residential rental property and buildings more generally. Our analysis also suggests that investment in rental property may be providing a tax shelter for income from other sources."

However, on closer examination, the Issues Paper concludes that:

> "Some have argued that the absence of a capital gains tax may lead to excessive investment in residential rental properties. This is because depreciation deductions are being given for an appreciating asset, while any gains in the value of the property are untaxed. However, this analysis is somewhat misleading. Real estate consists of both land, which typically appreciates in both real and nominal terms, and buildings, which typically depreciate in real terms but may appreciate in nominal terms."

While almost certainly correct from an economic point of view, it must be remembered that the New Zealand tax regime adopts nominal values, with no concession or allowance for the inflationary impact on the price of property. Items purchased as a "hedge against inflation" may still give rise to taxable income calculated on a nominal basis, as confirmed by the Court of Appeal in *National Distributors Ltd*. Citing the Privy Council decision in *Lowe v CIR*, Doogue J explained:

> "I accept the law, as it stands, is clear that inflation cannot be taken into account when calculating profits on property transactions."

Attempts to manipulate or exploit nominal prices for depreciation assets lay at the heart of a number of tax avoidance arrangements, which attempted to immediately deduct or depreciate amounts that would not become payable until future years, if at all.

Similarly, while a building may depreciate against inflation, it generally appreciates in nominal terms and, therefore, for income tax purposes. Nevertheless, Inland Revenue's previous conclusion was that buildings in New Zealand do, in fact, depreciate in nominal terms over their useful life. Based on that conclusion:

> "Officials do not support the option of denying depreciation deductions for rental housing altogether, as such a measure raises a number of concerns. Property prices are typically made up of land and **[(2010) Vol 16:3 NZJTLP 307, 311]** improvements (the asset – house – on that land and any improvements to that asset or the land itself). Denying depreciation deductions entirely might be suggested because properties often appreciate rather than depreciate, although depreciation deductions are aimed at reflecting changes in the value of improvements over time. If the overall value of a property does not change but improvements depreciate while land appreciates, failure to allow for depreciation deductions will discourage economically efficient investment in new improvements. Buildings are scrapped on occasion, and it is clear that at least these buildings have fully depreciated. The evidence presented in chapter 5 provides a rationale for some reduction to building depreciation rates but not for denying depreciation deductions altogether."

Accordingly, the complete denial of depreciation on buildings contradicts Inland Revenue's previously considered view. Nevertheless, presumably for both political and financial reasons, the Government adopted the recommendation of the Tax Working Group on this point.

4.0 Investment and improvement on buildings becomes black-hole expenditure

The tax effect of imposing a nil rate of depreciation on all buildings is that investment in commercial or residential buildings, and all improvements to them, instantly become a new category of "black hole" expenditure. "Black hole" expenditure is neither immediately deductible, nor deductible over the economic life of the asset to which it relates. The "black hole" problem arises where expenditure is on capital account and, therefore, cannot be deducted immediately, yet does not give rise to an asset that can be depreciated for tax purposes. Henceforth, all expenditure on the purchase or improvement of commercial or residential buildings with an estimated useful life of 50 years or more will come within this definition.

The problems posed by black-hole expenditure were amply demonstrated in *Milburn New Zealand Ltd*, in which the costs of feasibility studies of potential business projects that did not proceed were held to be neither deductible nor depreciable. Another example was the *Simkin Trust* case, in which a deduction for the purchase price of a trademark was not permitted to the owner, yet the income derived from the license of that trademark was taxable as a royalty. Those cases highlight the strained interpretations taxpayers will adopt to avoid the "disappearance" of expenditure that cannot be deducted nor capitalised to an asset for depreciation. Taxpayers are incentivised to adopt aggressive or questionable interpretations in an attempt to have that expenditure recharacterised as another class of deductible or depreciable expenditure.

Interestingly, since this problem was highlighted in the *Milburn* case, recent tax policy developments have moved towards reducing instances of black-hole expenditure. For example, in late 2002 the then Government set up the Private Sector Liaison Group on Research and Development to monitor the implementation of the 2001 reforms in relation to research and development expenditure. Under those changes, an immediate deduction was allowed for expenditure on most types of research and **[(2010) Vol 16:3 NZJTLP 307, 312]** development, except to the extent an asset was created that had to be capitalised for accounting purposes, which was then generally depreciable.

But those changes did not resolve all black-hole expenditure problems, such as costs incurred in applying for a patent when that patent was not granted or expenditure in developing “know how”. In those cases, either there was no depreciable asset to which that expenditure could be capitalised or the asset was not a depreciable property. Recognising the disadvantage to taxpayers from the unavailability of depreciation in those instances, in 2005 a number of specific provisions were introduced to allow for the immediate deductibility of such expenses. These included s DJ 6(1A) ITA 2007, which allows an immediate deduction for:

- Costs associated with patent applications when the application is either withdrawn or not granted, and
- Costs of applications for certain consents under the Resource Management Act 1991 when the application is withdrawn or is refused.

At the time, Inland Revenue advised:

> “In relation to the recommendations to allow deductions for various ‘black hole’ development expenditures more generally, the government has asked officials to work with the group to identify situations of particular concern, and consider possible solutions.”

After reviewing the problems faced by high-tech start-up enterprises, one commentator noted:

> “The issue of black hole expenditure is slowly being resolved through changes to the tax legislation. However, it is still an issue in practice.”

In particular, that commentator concluded:

> “As outlined above, the tax treatment of different types of R&D expenditure can be complex. For innovators involved in different types of development it can be onerous keeping track of different projects, patentable and non-patentable expenditure and other costs. As a result of this complexity, taxpayers may not be wholly scrupulous in tracking costs and identifying black hole expenditure, and therefore claiming tax deductions to which they may not be entitled. It is to be hoped that reforms in this area will continue and that these issues will be addressed.”

The tax treatment of the remaining few categories of black-hole expenditure remains on Inland Revenue’s work programme, although many issues are yet to be resolved. Proposals to permit deduction of current black-hole expenditure on capital raising and new projects were raised at the Government Job Summit in early 2009 and were then formally put to Inland Revenue for further consideration.

Yet, while Inland Revenue has attempted to minimise black-hole expenditure in other areas, the denial of depreciation for buildings has created a vast new category. Unfortunately, this treatment will only encourage taxpayers to attempt to find ways to escape this adverse tax effect.

[(2010) Vol 16:3 NZJTLP 307, 313] Interestingly, the Government’s *Fact Sheet – Building Depreciation* accompanying the 2010 Budget announcement identifies two of the possible areas in which the denial of building depreciation may be mitigated:

> "Building owners will still be able to claim deductions for repairs and maintenance, to maintain the condition and value of their properties. They will also still be able to claim depreciation deductions for 'fit outs' not considered part of the building."

As discussed below, the boundary between repairs and maintenance and capital improvements remains unsettled, yet will now become crucial to the tax treatment of all renovations of or improvements to buildings. Likewise, the precise scope of what constitutes a non-depreciable "building" is uncertain, so items that would previously have been included in the generic building category might now be depreciated as separate assets.

5.0 Repairs and maintenance

The deduction of repairs and maintenance expenditure is currently determined under the general deduction provision in s DA 1 ITA 2007. Deductions of a capital nature are limited under s DA 2(1). Obviously, the understanding of the distinction between capital and revenue expenditure is one of the fundamentals of tax law, yet there is no concrete definition given in the Income Tax Act. In distinguishing between capital expenditure and revenue expenditure, the Courts have developed a series of complex, indicative tests.

The distinction between repairs and maintenance and capital improvements has already been the subject of significant case law. The traditional New Zealand authority is the Court of Appeal decision in *Auckland Trotting Club*. That decision clarified that repairs and maintenance involved the replacement or renewal of a worn-out or dilapidated part of an asset but not the renovation or reconstruction of the whole asset. It permits the correction of part of an existing asset that has become worn-out or dilapidated but does not permit the significant improvement or alteration of that asset or the creation of a new asset.

The test established in *Auckland Trotting Club* was two-fold:

(a) Identify the relevant asset. Is the item being repaired/replaced part of a larger asset (for example, the roof of a house), or is it a single asset (for example, a television)?

(b) Ascertain the nature, extent and cost of the work undertaken. This will involve determining whether the work remedied wear and tear (the cost of which is generally deductible), or whether **[(2010) Vol 16:3 NZJTLP 307, 314]** the asset has been improved or otherwise substantially changed (the cost of which is generally non-deductible).

This test has been applied in subsequent cases, including the most recent decisions (now almost a decade old) in *Auckland Gas* and *Poverty Bay Electric Power Board*.

With regard to work completed on buildings in particular, the leading Australian case of *WG Thomas & Co Pty Ltd* advised that the relevant question was not:

> "whether the roof or the floor or some other part of the building, looked at by itself, was repaired as distinct from being reconstructed or replaced. It is whether what was done to the roof or the floor or some other part was a repair of the building."

Under that logic, Courts have generally viewed all work in light of its effect on the building as a whole. The effect of this has been that "a series of restorations of the property could be undertaken over a period of time that progressively restores subsidiary parts of the whole. [This] progressive restoration would involve a series of deductible repair expenses."

Accordingly, the tax treatment of repairs and maintenance on buildings has generally been quite generous, except in obvious cases of substantial renovation or significant improvement. The only relatively hard-and-fast rule relates to the non-deductibility of repairs for newly-acquired assets where that property was not immediately in a workable state and the purchase price reflected that disrepair. It has been concluded that the cost of putting the asset in a working order is properly part of the acquisition cost of the asset and not its maintenance.

In Australia, the law permits taxpayers to distinguish and deduct genuine repairs even when they are undertaken as part of a larger capital project. As acknowledged in the Australian Taxation Office's (ATO's) Taxation Ruling TR 97/23:

> "The character of a repair does not necessarily change because it is carried out at the same time as an improvement. If, for

> example, a shopping centre is extensively renovated or restored (the project combining repairs and improvements) and if some parts of the project can be effectively separated and considered in isolation from the rest of the project, they may still be repairs. It is necessary to examine separately the individual parts of the total project to determine whether any part, if considered in isolation, is a repair. It is not appropriate to have regard only to the result of the entire work done. It is inappropriate to regard the whole project as an affair of capital. In other words, if **[(2010) Vol 16:3 NZJTLP 307, 315]** individual parts of the total project can be separated and characterised as repairs, and if their cost can be segregated and accurately quantified, their cost is deductible."

By contrast, following the reasoning in *Auckland Trotting Club*, in New Zealand it is not possible to treat capital expenditure as notionally spent on repairs when that is not what happened. So, genuine repairs that are performed in the course of a capital improvement are generally not deductible. The Court said:

> "We agree that it is not possible to claim as expenditure on a repair a payment which has not actually been expended for that purpose. There cannot be a dissection of what is spent upon a capital work because part of it might otherwise have been laid out on repairs, but was not."

This approach was confirmed by the Court of Appeal in *Colonial Motors*:

> "That statutory inquiry relates to the work that was actually done. If there was one overall construction project, it is the total work involved in relation to the particular premises which has to constitute 'repairs or alterations of any such asset' so as to come within the proviso."

However, the Court in *Colonial Motors* also acknowledged that "[i]nevitably there may be grey areas where the application of that test involves questions of fact and degree." As a result, the position is not clear and whether work constitutes repair or capital improvement is always a question of fact and degree in each instance. It is generally understood that in distinguishing income expenditure from capital expenditure, the solution is not to be found by any rigid test or description. Instead, the answer depends upon a consideration of all the circumstances, and relevant criteria may not all point in the same direction. For instance, the Privy Council in *Auckland Gas* cautioned:

> "Authority on the question of repair or replacement is of limited assistance. The physical objects to which the test of repair has to be applied vary widely. So does the nature of the work done. Judicial dicta applicable to one set of circumstances may be unhelpful or misleading when applied in different circumstances. …"In the last resort, as with the general question of distinguishing income expenditure from capital expenditure, the solution is not to be found by any rigid test or description: see Lord Pearce in *BP Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia*[1966] AC 224 at p 264. The answer depends upon a consideration of all the circumstances. They may not all point in the same direction. …"

The poor state of the law in this area has often been acknowledged by the Courts. Many years ago, the United Kingdom Court of Appeal commented:

> "… in many cases it is almost true to say that the spin of a coin would decide the matter [as to capital or revenue] almost as satisfactorily as an attempt to find reasons."

[(2010) Vol 16:3 NZJTLP 307, 316] As one commentator recently concluded on the state of the law in this area:

> "Determining the boundary between expenditure that is on revenue account and deductible or on capital account and non-deductible is often a difficult task. The distinction between what constitutes repair or is a replacement in the decided cases can also seem somewhat arbitrary."

This lack of certainty will simply breed disputes over how to categorise expenditure on buildings. This possibility was recognised by the New Zealand Institute of Chartered Accountants (NZICA), which concluded:

> "We note [that Inland Revenue is] not intending to alter the boundary between repairs and maintenance and capital expenditure …"In the Institute's view, with the removal of the ability to depreciate buildings with a useful life of 50 years or more, considerable pressure will come on the boundary between what is deductible as repairs and maintenance. …"Rather than wait until the inevitable disputes arise, we would recommend a comprehensive review be undertaken, or at the very least a statement from IRD on what the appropriate test is …"

Unfortunately, no statement from Inland Revenue has been forthcoming and future disputes appear inevitable.

6.0 Assets included within the building category

The second problem raised by the disallowance of depreciation is precisely what items must be incorporated into the building for tax purposes. The term "building" is not defined in the Income Tax Act and, therefore, it assumes its ordinary or conventional meaning. Inland Revenue's Interpretation Statement IS 10/02: *Meaning of Building in the Depreciation Provisions* interprets a building as having the following characteristics:

- It is a structure of considerable size.
- It is permanent in the sense that it is intended to last a considerable time.
- It is fixed to the land on which it stands, and normally is legally part of that land.
- It includes walls and a roof, generally for the purpose of shelter. **[(2010) Vol 16:3 NZJTLP 307, 317]**
- It functions independently of any other structure, even if it is not physically a separate structure.

Importantly for the potential scope of the new depreciation regime, various structures that would not be considered "buildings" under the conventional meaning have been found to come within that definition for particular purposes. These have included:

- Fences;
- Grain silos;
- Tunnels; and
- Concrete driveways.

However, as noted by McMullin J in *Spencer v Soljan*, "[w]hat is a building for the purposes of one statute may not be a building for the purposes of another". For tax purposes, most of those assets have a separate depreciation category based on their particular useful life (generally short of 50 years) and, therefore, would not be classified as buildings with the applicable nil rate of depreciation.

IS 10/02 concludes that the following items constituted buildings for depreciation purposes:

- Fowl houses;

- Grandstands or bleachers;
- Hothouses;
- Pigsties;
- Dairy milking sheds;
- Carpark buildings (but not simply a paved parking surface); and
- Barns.

[(2010) Vol 16:3 NZJTLP 307, 318] Even before the nil depreciation rate was introduced, some taxpayers had attempted to obtain a tax advantage by reclassifying parts of a building as separate assets. In extreme instances, the owners of residential rental properties were claiming separate depreciation deductions for items within the property, such as electrical wiring, plumbing, hot water systems, carpets, fixed wardrobes and internal walls. This practice replicated the treatment of separate internal parts of the building that is often applied to commercial buildings, using the assets and depreciation rates set out under the commercial building fit-out category in Determination DEP1: *Tax Depreciation Rates General Determination Number 1*.

This practice resulted in taxpayers claiming higher depreciation deductions for those separate items than the deduction available for depreciating the building as a whole. In effect, the building was broken down into its constituent parts, with each part depreciated separately using its own category, rather than including their value within the general building category. This led to considerable variation in the tax liabilities of two different taxpayers with otherwise identical properties but who took different approaches to splitting out building components. When addressing this problem in 2008, Inland Revenue acknowledged that:

> “There is some uncertainty as to what assets can be depreciated separately, and this can lead to substantial differences in deductions claimed by two landlords with identical properties.”

At the time, Inland Revenue recognised that taxpayers were faced with conflicting options:

> “Under the first option, a set of separately depreciable assets would be identified, as happens in Australia. These would include lifts, domestic appliances, hot water cylinders, air conditioning systems, light fittings and carpets. However, the set of separately depreciable assets would be limited, and the remainder of the building – including wiring, plumbing and internal walls – would be depreciable at the building depreciation rate, as part of the building. This option would require taxpayers to obtain market values of these separate assets at purchase and sale to determine the tax basis for depreciation rates and to determine any gain or loss on sale. An alternative would be to depreciate all of these assets as part of the building, which would remove any need for separate valuations on purchase or sale.”

Interestingly, the discussion then concludes that taxpayers who chose to calculate depreciation on the entire building as a single asset, rather than on the separate components of the building, would:

> “have [a] wider scope for deducting expenses as repairs and maintenance. For example, a replacement hot water cylinder would be capitalised and depreciated for taxpayers depreciating these assets separately, but would normally be a deductible expense for taxpayers depreciating these assets as part of the building.”

This view obviously adds impetus to taxpayers’ arguments regarding the categorisation of expenditure on the no-longer depreciable building as repairs and maintenance (discussed above).

So the question remains, what items must be included within the category of the building and, therefore, may not be separately depreciated? Inland Revenue concluded that, although there is some **[(2010) Vol 16:3 NZJTLP 307, 319]** scope for identifying assets and depreciating them separately from the building itself, breaking the building out into sub-categories for components such as electrical wiring, plumbing and internal walls, is impermissible as those components are arguably not separately identifiable assets. So Inland Revenue has already stated its position regarding what assets it considers come within the depreciable category of commercial buildings and residential rental property. With regard to the latter, the policy recognised that:

> "[the] property comprises several different items. It is important that the correct approach is applied to determine whether these items are regarded as distinct from or part of the building, because this affects the depreciation rate to be applied and the tax treatment of expenditure on repairs."

The policy concluded:

> "The Commissioner considers that it is not correct to break down a residential rental property into such separate items for depreciation purposes. While this statement applies only in respect of residential rental properties, many of the principles are also likely to apply in the context of commercial properties and other assets."

Helpfully, the policy identified a three-step test to determine whether a particular item is part of, or separate from, the building:

- **Step 1**: Determine whether the item is in some way attached or connected to the building. If the item is completely unattached, then it will not form a part of the building. An item will not be considered attached for these purposes, if its only means of attachment is being plugged or wired into an electrical outlet (such as a freestanding oven), or attached to a water or gas outlet. If the item is attached to the building, go to step 2.
- **Step 2**: Determine whether the item is an integral part of the residential rental property such that a residential rental property would be considered incomplete or unable to function without the item. If the item is an integral part of the residential rental property, then the item will be a part of the building. If the item is not an integral part of the residential rental property, go to step 3.
- **Step 3**: Determine whether the item is built-in or attached or connected to the building in such a way that it is part of the "fabric" of the building. Consider factors such as the nature and degree of attachment, the difficulty involved in the item's removal, and whether there would be any significant damage to the item or the building if the item were removed. If the item is part of the fabric of the building, then it is part of the building for depreciation purposes.

Applying those steps, Inland Revenue concluded that such items as plumbing and piping, electrical wiring, internal walls, and doors must be treated as part of the building and could not be separately identified, valued and depreciated. Likewise, fitted furniture (wardrobes and cupboards built into the wall), kitchen cupboards, bathroom fittings and furniture, linoleum, and tiles (wall and floor) were not **[(2010) Vol 16:3 NZJTLP 307, 320]** separate assets, but were part of the building. By contrast, wardrobes and cupboards not built into the wall, carpets, curtains, blinds, water heaters and hot-water cylinders can be regarded as separate from the building. Therefore, they can be depreciated at a different rate.

In Inland Revenue's view, all items that are "integral to the integrity of the building" or its function must be treated as part of that building. If a building would be expected to have a particular item and would not function normally without it, then this points strongly towards that item forming part of the building rather than a separate asset. Likewise, the degree to which that item is connected to the structure of the building will influence its classification, with those items more easily removed from the building likely to be separate assets.

This approach mirrors the test under English tax law for determining whether expenditure related to premises or plant. Factors considered relevant for those purposes (whether the items were included in the original construction of the building or added subsequently) are:

- Whether the item appears visually to retain a separate identity;
- The degree of permanence with which it has been attached;
- The incompleteness of the structure without it; and
- The extent to which it was intended to be permanent or whether it was likely to be replaced within a relatively short period.

This approach by Inland Revenue would limit the range of assets that could be separately identified and, thus, expands the general category of non-depreciable buildings. While such policy is binding neither on the Commissioner nor on taxpayers, it puts taxpayers on notice that Inland Revenue will apply a wide interpretation of what items constitute the building for depreciation purposes.

Interestingly, in reaching that conclusion the policy acknowledges the potential effect the wider category of building may have on the deductibility of repairs and maintenance, as discussed above:

> "This statement does not consider the deductibility of expenditure on repairs and maintenance. However, it is noted that some expenditure upon an item that may have been regarded as a separate asset under the 'smallest asset' approach might be deductible as repairs and maintenance under the approach taken in this statement. This is because, whereas expenditure on a separate item of property may have to be treated as capital, if the item is more correctly characterised as a small part of a larger item, the expenditure may qualify as repairs and maintenance."

Accordingly, the policy appears to concede that, by adopting the broadest interpretation of "building", it correspondingly expands the possibility for taxpayers to argue the cost of work done to any part of that asset is fully deductible under the test for repairs and maintenance. **[(2010) Vol 16:3 NZJTLP 307, 321]**

7.0 The requirement to separately value assets not forming part of building

One practical difficulty for taxpayers is the additional compliance costs required for valuing individual assets separately for depreciation purposes. While these compliance costs may not have warranted separate asset valuation in the past, it may become economic to do so in future. The possibility of taxpayers valuing and depreciating separate parts of the building may give rise to extra work for valuers. This has certainly been the case in the United States, where taxpayers may distinguish assets that form part of a building or structure (defined as 1250 property) and other separately depreciable property (defined as 1245 property), which has a shorter economic life. As Inland Revenue itself noted:

> "In the United States a distinct industry sector has developed to provide studies for buildings and building projects that distinguish 1245 assets from 1250 assets. These studies are designed to enable taxpayers to maximise depreciation deductions on a building. The results of these studies are sometimes contentious, especially when they seek to treat portions of building components as 1245 property. The contentious nature of the studies is compounded by the lack of standards regarding the preparation of these studies."

The author suggests that similar boundary problems will arise in New Zealand and generate compliance costs for taxpayers seeking to establish the factual basis for the valuation and separate depreciation of identifiable parts of a building. Given the uncertainty as to whether an item is part of the building, and the tax advantages that can be gained by taxpayers who arrange to have the costs of the building broken down into a schedule of fixed assets, it is an area of law that is bound to be tested sooner rather than later.

At the time of announcing the nil depreciation rate, the Minister of Revenue confirmed that Inland Revenue would review the range of items that may be included within the category of building fit-out. Inland Revenue was determined to prevent commercial property owners from identifying and depreciating different components of the building as separate assets to circumvent the prohibition on

depreciation of the building as a whole.

The result of this review was published in August 2010. It concluded that the reasoning applied to residential rental properties in IS 10/02 (that is, that many items are part of the building and so cannot be separately depreciated but must be depreciated at the nil depreciation rate) is equally applicable to commercial properties. Accordingly, Inland Revenue propose to amend the Income Tax Act to clarify which assets may be categorised as fit-out and, therefore, can be depreciated separately from the commercial building. The proposed reform would:

- Expressly permit a taxpayer to continue depreciating at current rates all separate assets listed in the asset category “Building Fit-out (when in books separately from building cost)”, in the present depreciation determination. Items not listed in that category would henceforth be treated as part of the building and, therefore, non-depreciable.
- Continue to permit the separate depreciation of items of plant. **[(2010) Vol 16:3 NZJTLP 307, 322]**
- Permit taxpayers who had not separately identified items of fit-out in their commercial buildings to date to, henceforth, calculate what amounts to a notional fit-out cost of 15 percent of their building’s current tax book value, and continue to depreciate that portion at the old building depreciation rate of 2 percent. The remaining 85 percent of the current book value would remain non-depreciable.

The effect of Inland Revenue’s proposals would be that, like the treatment of residential rental properties, fewer parts of a commercial building could be valued and depreciated separately.

The proposals have generally met with cautious approval by taxpayers. They were described by NZICA in its public response as “a good start to looking at what constitutes a building fit-out and can be depreciated separately” – but the likelihood of future problems remains. As noted by NZICA:

> “We agree that the building structure would include: foundations, the building frame, floors, external walls, exterior cladding, windows, doors, stairs, roof and load-bearing structures … . However, some of the items like doors, internal walls and stairs – might qualify as fit-out if they were removable … it is not always clear cut. This grey area needs prescriptive rules to clarify the boundary. In the absence of more prescriptive rules there is a potential for disputes, with resultant deadweight cost.”

8.0 Depreciation recovered on sale of building

The new rules do not remove a building from the definition of “depreciable property” but simply give that asset a nil depreciation rate. The practical reason for this classification is that previously accumulated depreciation on a building remains recoverable at the time of any future sale, under s EE 48(1) ITA 2007. By contrast, under a long-established exception, depreciation losses on the sale of building (that would be available for all other asset types) remain non-deductible.

Disposal of the building for less than its adjusted tax value obviously has the consequence that a loss has been suffered. However, since 1988 no further depreciation deduction was allowed for any loss crystallised upon disposal. The sole exception is that full depreciation is available upon the sudden, unintentional destruction of the property by an act-of-God, being natural disasters such as an earthquake, fire or floods. This exception permits a further depreciation loss if all of the following requirements are satisfied:

- The building is irreparably damaged and unable to be used to derive assessable income;
- The damage generally occurred in the 2006 or later income years; and
- The damage was not caused by the taxpayer or an agent or associate of the taxpayer. **[(2010) Vol 16:3 NZJTLP 307, 323]**

These narrow requirements exclude a building that has gradually fallen into disrepair and is becoming uneconomic because of non-compliance with regulatory standards. In such cases, any loss that is of a capital nature is not allowed as a deduction.

Given the total denial of depreciation deductions from 1 April 2011, the exception still permitting the complete deduction of a building's remaining book value following its destruction can only be considered an anomaly.

9.0 Leaky buildings?

The author predicts that the first foreseeable test to the efficacy of the nil depreciation rate will arise with taxpayers attempting to rectify properties with "leaky building syndrome". Although such work cannot reasonably be considered a remedy for accumulated wear and tear on the property, it is also unlikely to substantially alter or improve the building from its new state, and therefore may arguably not constitute capital expenditure. The difficulty for taxpayers will arise if the remedial work on the building requires a complete rebuild of large parts of the building, or where re-cladding of the whole building in a different material as a permanent solution to prevent further water damage is required. It will also impact landlords who purchase a leaky building at a discount intending it for future rental purposes.

The financial size of the leaky building problem is staggering, most recently estimated to be $11.2 billion. With that volume of work required on New Zealand's building stock, it can be expected that at least a minority of taxpayers will attempt to claim deductions for the cost of remedial work as repairs and maintenance on the ground that the work merely restores the building to its original state. The obvious incentive for taxpayers to treat this type of expenditure as immediately deductible, rather than simply capitalise its value to the non-depreciable building, may substantially reduce the revenue gains the Government expects from the denial of depreciation deductions.

10.0 Conclusion

Good income tax policy prevents revenue leakage by minimising boundary issues. By contrast, the nil depreciation rate for buildings has created a significant new boundary issue for taxpayers. The existing boundary between capital expenditure (which is depreciable) and repairs and maintenance expenditure (which is immediately deductible) merely gives rise to a timing advantage. Likewise, the consequences of separately categorising some parts of the building rather than treating the building as a single asset only resulted in accelerated depreciation for normally low-value items. However, by **[(2010) Vol 16:3 NZJTLP 307, 324]** making buildings entirely non-depreciable, these boundaries now create substantial and permanent tax differences.

The nil rate of depreciation has created an entirely new and massive category of black-hole expenditure. Unfortunately, the boundaries of this new category are uncertain and, therefore, likely to be porous. Taxpayers are bound to test these uncertainties to the fullest extent rather than lose all tax benefits from their expenditure on buildings. Accordingly, the author suggests that the Government should not rely on gathering as much revenue from this change as it had expected.

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FOOTNOTES

1 The author would like to thank Kirsty Maclaren, Director, Ernst & Young, for her advice and assistance during the writing of this article.

1 Victoria University of Wellington Tax Working Group, *A Tax System for New Zealand's Future: Report of the Victoria University of Wellington Tax Working Group*, (Wellington, January 2010), available at: <http://www.victoria.ac.nz/sacl/cagtr/pdf/tax-report-website.pdf> (as at 1 November 2010).

2 See A Gibson, "Relief in Property Circles as Most Tax Options Ruled Out", *New Zealand Herald* (10 February 2010), quoting Andrew King, Vice-President of the Property Investors Association: "As for the May Budget, King said he was not too concerned and predicted only one change to the system. 'I think [John Key's] going along the lines of disallowing building depreciation.'" The report is available at: <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10625225> (as at 1 November 2010).

3 Primarily s EE 30Income Tax Act 2007.

4 Under s EE 28Income Tax Act 2007

5 New Zealand Government, *Fact Sheet – Building Depreciation*, (Wellington, 20 May 2010), available at: <http://taxpolicy.ird.govt.nz/sites/default/files/news/2010-05-20-budget2010-building-depreciation-fact-sheet.pdf> (as at 1 November 2010).

6 See A Gibson, "Budget 2010: Like Being in a Car Wreck, Investor Says", *New Zealand Herald* (20 May 2010), available at: <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10646407>(as at 1 November 2010).

7 This statement has been accepted as correct in a number of cases, including *Para Handkerchief and Textiles (1964) Ltd v CIR* (1992) 14 NZTC 9,125; (1992) 16 TRNZ 921 (HC); and *Peterson v CIR*[2006] 3 NZLR 433; (2005) 22 NZTC 19,098 (PC).

8 B English and P Dunne, "Property Tax Changes Increase Fairness", *Media Release* (20 May 2010), available at: <http://www.taxpolicy.ird.govt.nz/sites/default/files/news/2010-05-20-budget2010-media-release2.pdf> (as at 1 November 2010).

9 Inland Revenue, *Guide to the Tax Changes Proposed in the Taxation (Budget Measures) Bill 2010*, (Wellington, 2010), "Depreciation & Capital Contributions", p 24, available at: <http://taxpolicy.ird.govt.nz/sites/default/files/2010-sr-budget2010-special-report.pdf> (as at 1 November 2010).

10 See n 10, "Depreciation & Capital Contributions", p 24.

11 Victoria University of Wellington Tax Working Group, *A Tax System for New Zealand's Future, Report of the Victoria University of Wellington Tax Working Group*, (Wellington, January 2010), Ch 4: Conclusions and a Way Forward, p 65. The report is available at: <http://www.victoria.ac.nz/sacl/cagtr/pdf/tax-report-website.pdf> (as at 1 November 2010).

12 See n 6.

13 Inland Revenue and the Treasury, *Repairs and Maintenance to the Tax Depreciation Rules: An Officials' Issues Paper*, (Wellington, July 2004), available at: <http://taxpolicy.ird.govt.nz/sites/default/files/2004-ip-depreciation.pdf> (as at 1 November 2010).

14 See n 14, Part 1: Review of the Depreciation Rules, Ch 1: Introduction, p 12.

15 See n 14, Part 3: Specific Issues, Ch 9: Tax Treatment of Rental Housing, p 105, para 9.43.

16 *CIR v National Distributors Ltd*[1989] 3 NZLR 661; (1989) 11 NZTC 6,346; (1989) 13 TRNZ 671 (CA)

17 *Lowe v CIR*[1983] NZLR 416; (1984) 6 NZTC 61,712 (PC).

18 See n 17, p 678; p 6,361; p 688.

19 For example, see the Trinity tax avoidance arrangement reported as *Ben Nevis Forestry Ventures Ltd v CIR*[2008] NZSC 115; [2009] 2 NZLR 289; (2009) 24 NZTC 23,188 (SC), and the ACTONZ tax avoidance arrangement reported as *Erris Promotions Ltd v CIR*[2004] 1 NZLR 811; (2003) 21 NZTC 18,330 (HC).

20 See n 14, Part 3: Specific Issues, Ch 9: Tax Treatmen of Rental Housing, p 103, para 9.35.

21 *Milburn New Zealand Ltd v CIR*(2001) 20 NZTC 17,017 (HC).

22 *The Trustees of the CB Simkin Trust and the Trustees in the NC Simkin Trust v CIR*[2003] 2 NZLR 315; (2003) 21 NZTC 18,117 (CA).

23 A trademark has an indefinite useful life and, therefore, is excluded from the definition of "fixed life intangible property" in Schedule 16 of the ITA 2007.

24 Under s CD 2 ITA 2007.

25 M Rudd, "High-Tech Companies – Deductibility of Expenditure", (2004) No 6 NZ Tax Planning Report 5.

26 See P Lui and C Elliffe, "The Problem with "Black Hole" and Feasibility Expenditure: Some Suggestions for Reform", (2011) Vol 17:1 *New Zealand Journal of Taxation Law and Policy* [forthcoming].

27 B English and P Dunne, "Tax Policy Work Programme Focused on International Competitiveness, Retaining Revenue", *Media Release* (20 March 2009), available at: <http://taxpolicy.ird.govt.nz/news/2009-03-20-govt-announces-tax-policy-work-programme> (as at 1 November 2010).

28 New Zealand Government, *Fact Sheet – Building Depreciation*, (Wellington, 20 May 2010).

29 Formerly s DA 1 ITA 2004 and s BB 7 ITA 1994. Prior to 1994, repairs and maintenance expenditure was governed by a separate provision with its own particular criteria, in s 108 ITA 1976.

30 A Maples, “The Fixed and Circulating Capital Test: Down and Now Out in New Zealand?”, (2005) Vol 11:3 *New Zealand Journal of Taxation Law and Policy* 315.

31 Most notably, the six criteria proposed by the Privy Council in *BP Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia* 112 CLR 386; [1966] ALR 274; 44 ATC 312; [1966] AC 224; [1965] 3 All ER 209; [1965] 3 WLR 608 (PC), adopted into New Zealand law by the Court of Appeal in *CIR v LD Nathan & Co Ltd* [1972] NZLR 209 (CA).

32 See the discussion by Geoff Harley in “Repairs and Maintenance”, (1984) No 4 *NZ Tax Planning Report* 25.

33 *Auckland Trotting Club Inc v CIR* [1968] NZLR 967 (CA).

34 *CIR v Auckland Gas Co Ltd* [1999] 2 NZLR 418; (1999) 19 NZTC 15,011 (CA).

35 *Poverty Bay Electric Power Board v CIR* [1999] 2 NZLR 438; (1999) 19 NZTC 15,001 (CA).

36 *W Thomas & Co Pty Ltd v FCT* [1965] HCA 54; (1965) 115 CLR 58 (HCA).

37 See n 37, p 66 per Windeyer J.

38 Australian Taxation Office, Taxation Ruling TR 97/23: *Income Tax: Deductions for Repairs*, (Canberra, 1997), p 11, para 43.

39 See *The Law Shipping Co Ltd v IRC* (1923-24) 17 Ll L Rep 184; 1924 SC 74; 1923 SLT 742; (1923) 12 TC 621 (IHCS), and *Collector of Inland Revenue, Cook Islands v AB Donald Ltd* [1965] NZLR 679 (SC). See also *Odeon Associated Theatres Ltd v Jones* [1973] CH 288; [1972] 1 All ER 681; [1972] 2 WLR 331; 48 TC 257 (CA), which established the limits of that restriction. See also the examples discussing this restriction in Inland Revenue, “Repairs and Maintenance”, (1994) Vol 5:9 *Tax Information Bulletin* 1, p 2.

40 See n 39, pp 13-14, para 55.

41 *Auckland Trotting Club Inc v CIR* [1968] NZLR 967, 980 (CA).

42 *Colonial Motor Co Ltd v CIR* (1994) 16 NZTC 11,361, 11,366; (1994) 19 TRNZ 67, 72 (CA).

43 See n 43, p 11,366; p 72.

44 See Lord Pearce in *BP Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1965) 112 CLR 386, 397; [1966] AC 224, 264; [1965] 3 All ER 209, 218 (PC).

45 *Auckland Gas Co Ltd v CIR* [2003] 3 NZLR 6, 9; (2000) 19 NZTC 15,702, 15,706-15,707; [2000] 1 WLR 1783, 1788-1789 per Lord Nicholls (PC).

46 *IRC v British Salmson Aero Engines Ltd* [1938] 2 KB 482, 492; [1938] 3 All ER 283, 289 (CA).

47 AJ Maples, “Just when You thought Auckland Gas was the Final Word on Replacement with Polyethylene Pipe”, (2002) Vol 8:4 *New Zealand Journal of Taxation Law and Policy* 351, p 351.

48 G Nightingale and C Macalister, “Officials Issue Paper – Post-Budget Depreciation Issues”, (Submission of the NZICA to Inland Revenue on the Officials’ Issues Paper, 8 September 2010), available at: <http://www.nzica.com/Technical%20and%20business/Tax/Tax%20submissions/Recent%20submissions.aspx> (as at 1 November 2010).

49 Inland Revenue, “IS 10/02: Meaning of “Building” in the Depreciation Provisions”, (2010) Vol 22:5 *Tax Information Bulletin* 24.

50
Stevens v Gourley 141 ER 752; (1859) 7 CBNS 99 (Court of Common Pleas).

51
See n 51.

52
See n 51; *Melfort Danceland v Star City (Rural Municipality)* [1977] 3 WWR 737; *Dew Engineering & Development Ltd v R* [1996] 3 CTC 2,904; 96 DTC 1,765 (TCC); *R v Swansea City Council ex p Elitestone Ltd* [1993] 66 P & CR 422; [1993] 2 PLR 65; [1993] 46

EG 181 (CA).

53
Moir v Williams[1892] 1 QB 264 (CA); *Hilderbrandt v Stephen*[1964] NSWR 740 (NSWSC); *Australian Building Construction Employees' & Building Labourers' Federation v Dillingham Australia Ltd*[1982] FCA 23; (1982) 58 FLR 170 (FCA).

54
Barat v Minister of National Revenue[1991] 2 CTC 2,360; 91 DTC 1,097 (TCC); *Dew Engineering & Development Ltd v R*, n 53; *Spencer v Soljan*(1984) 10 NZTPA 289 (CA).

55
Buckleigh v Brown[1968] NZLR 647 (SC).

56
Chief Executive of the New Zealand Customs Service v Rakaia Engineering & Contracting Ltd[2002] 3 NZLR 24 (CA).

57
Schweder v Worthing Gas Light & Coke Co (No 1)[1912] 1 Ch 83 (HC).

58
Clarke v Wilkie(1977) 17 SASR 134 (SASC).

59 *Spencer v Soljan*, n 55, pp 291-292. See also *Cobb & Co Ltd v Commissioner of Taxation*[1959] HCA 38; (1959) 101 CLR 333 (HCA).

60 Although the final two items listed fall within the definition of "grandfathered buildings" in s EE 37 ITA 2007, if purchased or constructed prior to July 2009, excluding any later additions, and therefore may continue to be depreciated at their former rate.

61 Inland Revenue and the Treasury, *Repairs and Maintenance to the Tax Depreciation Rules: An Officials' Issues Paper*, (Wellington, July 2004), Part 1: Review of the Depreciation Rules, Ch 1: Introduction, p 12.

62 See n 62, Part 1: Review of the Depreciation Rules, Ch 1: Introduction, p 12.

63 See n 62, Part 1: Review of the Depreciation Rules, Ch 1: Introduction, p 12.

64 See n 62, Part 3: Specific Issues, Ch 9: Tax Treatment of Rental Housing, para 9.16, p 100.

65 See Inland Revenue, "IS 10/02: Meaning of "Building" in the Depreciation Provisions", (2010) Vol 22:5 *Tax Information Bulletin* 24.

66 See Inland Revenue, "IS 10/01: Residential Rental Properties – Depreciation of Items of Depreciable Property", (2010) Vol 22:4 *Tax Information Bulletin* 16.

67 See n 67, p 16.

68 See n 67, p 16.

69 See n 67, p 16.

70 The policy cites *Case 11/97*35 ATR 1,022; 97 ATC 173 (AAT) in support of this conclusion.

71 See Inland Revenue's adoption of these tests in Inland Revenue, "IS 10/01: Residential Rental Properties – Depreciation of Items of Depreciable Property", (2010) Vol 22:4 *Tax Information Bulletin* 16, p 41, para 160.

72 See *Wimpy International Ltd v Warland (Inspector of Taxes)*(1987) BTC 591, 615 per Hoffman J (HC).

73 See *Allen v CIR*[2006] NZSC 19; [2006] 3 NZLR 1; (2006) 22 NZTC 19,827 (SC).

74 See n 72, p 18, para 13.

75 Inland Revenue and the Treasury, *Repairs and Maintenance to the Tax Depreciation Rules: An Officials' Issues Paper*, (Wellington, July 2004), Part 3: Specific Issues, Ch 9: Tax Treatment of Rental Housing, p 101, para 9.23.

76 Inland Revenue, *Guide to the Tax Changes Proposed in the Taxation (Budget Measures) Bill 2010*, (Wellington, May 2010), "Depreciation & Capital Contributions", p 24, available at:
<http://www.taxpolicy.ird.govt.nz/publications/2010-sr-budget2010-special-report/depreciation-and-capital-contributions> (as at 1

November 2010).

77 Inland Revenue and the Treasury, *Post-Budget Depreciation Issues: An Officials' Issues Paper*, (Wellington, August 2010).

78 See n 78, Section 1: Introduction, p 1, paras 1.3-1.4.

79 G Nightingale and C Macalister, "Officials' Issues Paper – Post-Budget Depreciation Issues", (Submission of the NZICA to Inland Revenue on the Officials' Issues Paper, 8 September 2010), available at: <http://www.nzica.com/Technical%20and%20business/Tax/Tax%20submissions/Recent%20submissions.aspx> (as at 1 November 2010).

80 Section EE 48(3) ITA 2007.

81 This exception was reaffirmed by Inland Revenue in the 2 May 2005 Officials' Report on the Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004, which concluded that losses on the disposal of buildings should remain non-deductible.

82 See Inland Revenue, "Losses on Buildings", (2005) Vol 17:7 *Tax Information Bulletin* 38.

83 Support for this approach can be found in the reasoning in *Case T43*(1998) 18 NZTC 8,287 (TRA), in which reasonably extensive repairs to most parts of a recently-purchased commercial building (including replacing a leaking fibrolite roof with corrugated iron, replacing rotten floorboards with a new covering of particle board and renewing stormwater drains) were held to constitute repairs and maintenance.

84 See *Law Shipping Co Ltd v IRC*(1923-24) 17 Ll L Rep 184; 1924 SC 74; (1923) 12 TC 621 (Court of Session), and *Collector of Inland Revenue, Cook Islands v AB Donald Ltd*[1965] NZLR 679 (SC), which determined that the cost of putting a newly-acquired asset in working order is properly part of the acquisition cost of the asset and not its maintenance. Contrast with *Odeon Associated Theatres Ltd v Jones*[1973] Ch 288; [1972] 2 WLR 331; [1972] 1 All ER 681; 48 TC 257 (CA), which established the limits of that restriction if the new asset is immediately capable of use without the immediate need for repairs.

85 See E Gay, "Fair Solution to Leaky Homes Crisis Revealed", *New Zealand Herald* (17 May 2010), available at: <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10645561> (as at 1 November 2010).