Guidance for Crown Entities

Financial Powers Provisions of the Crown Entities Act 2004

THE TREASURY
Kaitohutohu Kaupapa Rawa

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Contents

Part A: Overview of Financial Powers Framework

Introduction

Purpose and Status of this Guide

This guide explains the financial powers provisions of the Crown Entities Act 2004 (the Act) and the Crown Entities (Financial Powers) Regulations 2005 (the Regulations).[1]

While the primary audience is intended to be Crown entities, the guide may also assist monitoring departments and the Treasury when processing requests for approval to exercise financial powers. It aims to present a working understanding of the legislative framework and to assist users to:

- comply with the financial powers provisions of the Act and Regulations
- determine whether authority is needed to undertake financial transactions, and
- identify the process to be followed when any authority is sought.

The guide is organised in two parts. Part A outlines the framework's scope, rationale and application. It also presents an overview of the core provisions, issues concerning authority to act, and the process for seeking approval to exercise financial powers. Part B discusses each of the legislative provisions in greater detail.

Information provided in the guide is not, and should not be treated as, a substitute for legal advice on the interpretation of particular provisions of the Act or the Regulations, or their application to particular circumstances or Crown entities. Nor does it constitute financial advice on the merits or otherwise of various transactions.

The guide is current as at March 2006. An electronic version is available on the Treasury's website at http://www.treasury.govt.nz/crownentities/. This will be updated for any changes to the provisions and for subsequent general Ministerial approvals. Any queries on the guide itself should be e-mailed to psmhelp@treasury.govt.nz.

Scope of Financial Powers Framework

Financial powers provisions form part of the accountability requirements located in Part 4 of the Act, which – along with the Regulations – is administered by the Treasury.[2] The core provisions are contained in sections 158 to 164 (excluding a commencement provision in section 159), which are reproduced in Annex 1 to this guide. They cover:

- bank accounts – section 158
- acquisition of securities – section 161
- borrowing – section 162
- giving of guarantees and indemnities – section 163
- use of derivatives – section 164

} each of which is subject to section 160.

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1 The Act and Regulations are available as pdf files at http://www.treasury.govt.nz/crownentities/.

2 The remainder of the Act is administered by the State Services Commission.

The core provisions restrict natural person powers, including the power to contract, that are conferred on Crown entities by the Act or other legislation. At the same time flexibility exists under sections 158 and 160 to authorise bank accounts and financial transactions to meet justified business needs. Mechanisms for giving authority are outlined on page 5.

The Regulations are made under Part 4 of the Act in terms of section 173(1)(b) to (g). They specify details required to implement the statutory provisions and should be read in conjunction with sections 158 to 164. All individual regulations referenced in this guide are contained in these Regulations.

Objectives of the Core Provisions

The main objectives of the core provisions are to:

- achieve a coherent and comprehensive approach to management of Crown entities' financial powers, and
- limit potential fiscal risk to the Crown and Crown entities.

The provisions contribute to the overall purpose of the Act, which includes:

- providing a consistent framework for the governance and operation of Crown entities
- clarifying accountability relationships between Crown entities, board members, and their responsible Ministers, and
- clarifying powers and duties of board members, including their duty to ensure the financial responsibility of a Crown entity.

The core provisions replace 'default' bank account and investment provisions in the Public Finance Act 1989 and a diversity of dedicated provisions in entities' own Acts. Those Acts were silent on some financial powers, which may have created uncertainty in practice.

Application of the Core Provisions

Entity Coverage

Section 7(1) of the Act defines five categories of Crown entities:

- statutory entities (named in Schedule 1)
- Crown entity companies (named in Schedule 2)
- Crown entity subsidiaries
- school boards of trustees, and
- tertiary education institutions.

Sections 158 to 164 apply to and restrict all Crown entities' financial powers unless an exception exists under the Act or an entity's Act[3], as indicated in Annex 2 to this guide.

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[3] The term "entity's Act" is defined in section 10(1) of the Crown Entities Act to mean, broadly, the Act under which an entity (or its parent Crown entity) is established or any other Act that expressly provides for its functions, powers and duties, but does not include a generic Act such as the Crown Entities Act or the Companies Act 1993.

Mechanisms to Provide Authority and Exceptions to the Core Provisions

As noted above, scope exists under the Act to relax the restrictions imposed on Crown entities by the core financial powers provisions. In particular:

- section 158(1)(b) to (d) and (2) allows authority to be given to hold bank accounts at certain institutions, and
- sections 161 to 164 apply subject to a number of mechanisms or exceptions provided in section 160(1) which allow authority to exercise other financial powers to be given directly or catered for through other means.

These mechanisms permit flexibility to:

- accommodate reasonable and legitimate business needs through:
  - the Regulations, which provide Crown entities or entity groups with authority in respect of specified bank accounts, securities, borrowing, guarantees, indemnities and derivatives, and
  - Ministerial approval, which may be given in response to requests by one or more Crown entities for authority in respect of any of the financial powers, or
- recognise distinctive functions or status of certain entities through:
  - exemption from one or more of sections 161 to 164, which is granted in Schedules 1 and 2 to specified statutory entities and Crown entity companies in light of their specialist financial or commercial character – recorded in Annex 2
  - provisions in an entity's Act that modify application of any of sections 158 to 164 – explicit instances of which appear in Annex 3, and
  - non-application of the financial powers provisions to tertiary education institutions by virtue of section 6 and Schedule 4 of the Act and Schedule 13A of the Education Act 1989.[4]

The following table summarises availability of the various mechanisms:

Financial Power	Relevant Provision	Regulations	Ministerial Approval	Exemption	Entity's Act
Bank accounts	Section 158(1)(b) to (d) and (2)	Yes	Yes	n/a	Yes [5]
Other financial powers	Section 160(1)	Yes	Yes	Yes	Yes

This guide deals with the Regulations and Ministerial approvals. It does not cover financial powers applicable to entities under their own Acts, the Companies Act 1993 (relevant to Crown entity companies and Crown entity subsidiaries) or other accountability arrangements.

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4 However, section 200(1) of the Education Act 1989 was amended to allow the council of a tertiary education institution to hold bank accounts in the institution's name at a registered building society with which a Crown entity may hold an account under section 158 of the Crown Entities Act.

5 In terms of section 4(2) rather than section 158 of the Act.

Crown Entity Subsidiaries

The core provisions apply to Crown entity subsidiaries in their own right as a category of Crown entity. This is made explicit in section 160(2) with reference to sections 161 to 164.[6]

Complexities may emerge in the case of a Crown entity subsidiary controlled by more than one parent Crown entity. Hence section 99 provides that where doubt exists about the application of sections 161 to 164, the responsible Ministers of two or more parents of a multi-parent subsidiary must agree on the restrictions and obligations that those provisions require.

Organisations Named or Described in Schedule 4 of the Public Finance Act 1989

Under sections 45M(1) and 45N(1) respectively of the Public Finance Act 1989, organisations named or described in Schedule 4 of that Act are, or may be made, subject to the financial powers provisions of the Crown Entities Act as if they were a Crown entity.[7] In such cases, references in this guide to a Crown entity apply also to a Schedule 4 organisation.

Commencement and Transitional Provisions

The financial powers provisions came into force as follows:

- bank accounts – on 25 July 2005, under section 195 of the Act, and
- other financial powers – on 1 April 2005, under section 159.

Section 195 provides a grace period for the commencement of section 158. No transitional period was allowed for existing bank accounts.

Section 197 contains a transitional authority for existing financial transactions. It provides that:

- any security, borrowing, guarantee, indemnity or derivative lawfully acquired, given or entered into before 1 April 2005 will not be affected by sections 160 to 164, but
- the terms of those transactions may not be amended, and options under them may not be exercised, without the permission of the Minister of Finance.

Renewal of a term deposit or an overdraft with a different interest rate or repayment date, for example, would require such authority.

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6 A Crown entity subsidiary is defined in section 7(1)(c) of the Act as a company that, under sections 5 to 8 (except section 5(3)) of the Companies Act 1993, is a subsidiary of one or more Crown entities. This excludes subsidiaries incorporated overseas. The meaning of "parent Crown entity" and "Crown entity subsidiary" is set out in section 8.

7 In terms of these Public Finance Act provisions, section 158 (bank accounts) applies to all Schedule 4 organisations, and sections 161 to 164 (other financial powers) apply to some, as indicated in Annex 2. In addition, the Asia New Zealand Foundation, Leadership Development Centre Trust and Pacific Co-operation Foundation are subject to section 161 by virtue of their trust deeds and section 36 of the Public Finance Amendment Act 2004.

Synopsis of the Core Provisions

The following tables present an overview of the core financial powers framework in the Act. Each provision is elaborated further in Part B of this guide.

Bank Accounts – Section 158 (see also pages 12 to 19 of this guide)

A Crown entity must pay all money it receives into a bank account held at a registered bank or building society, or a bank outside New Zealand, that meets the requirements of section 158.

Section 158(1)(a) and (6) of the Act allows an account to be held at a registered bank or building society where:

- the bank or building society satisfies a relevant credit-rating test specified in regulation 7 of the Regulations or a *Gazette* notice, and
- the account is denominated in New Zealand dollars.

Under section 158(1)(c), (1)(d) and (2), an account may be held at a bank outside New Zealand that meets conditions specified by the Minister of Finance or by regulation 8.

The terms “registered bank” and “registered building society” are defined in section 136(1) of the Act, and regulations 5 and 6 set out the minimum requirement for bank accounts and for banks outside New Zealand.

Approval of the Minister of Finance must be obtained to hold a bank account at:

- a registered bank or building society that does not satisfy a relevant credit-rating test, and/or where the account is denominated in a foreign currency, and/or
- a bank outside New Zealand that does not comply with regulation 8.

Approvals given by the Minister of Finance to date include a general authority for Crown entities to hold bank accounts at specified institutions that do not satisfy the credit-rating test (TSB Bank Limited and registered building societies), subject to conditions in each case.

Crown entities are required to monitor the credit rating of – and the conditions of any relevant approval relating to – registered banks and building societies. If a bank account ceases to qualify under section 158(1), then subsections (8) and (9) allow a period of grace of up to two months for closing the account.

Acquisition of Securities – Section 161 (see also pages 20 to 26 of this guide)

Section 161 of the Act provides that a Crown entity must not acquire securities other than:

- a debt security denominated in New Zealand dollars that is issued by a registered bank or any other entity that satisfies a credit-rating test specified in regulation 9 of the Regulations or a *Gazette* notice
- a public security, or
- any other security as provided in section 160 through the Regulations, any approval given jointly by the entity's responsible Minister and the Minister of Finance, the entity's Act, or an exemption granted in Schedule 1 or 2 of the Act.

The term "acquisition of securities" is wider than "investment in securities", which was used in the former 'default' provision in the Public Finance Act 1989. The terms "security", "debt security" and "public security" are defined in section 136(1) of the Crown Entities Act by reference to the Securities Act 1978 or the Public Finance Act. Other securities include equity securities (such as shares), which are also defined in the Securities Act.

Section 161 does not apply to the acquisition of shares allowed by sections 96 or 100 of the Act. These provisions relate to the acquisition or formation of a Crown entity subsidiary, and the acquisition of shares that otherwise give substantial influence in or over a company. Such acquisitions are likely to be for the purpose of pursuing a Crown entity's strategic and business objectives.

Nor does section 161 apply to any security held by a Crown entity on trust for any purpose or for another person.

Authority is required to acquire:

- a debt security that does not satisfy the credit-rating test
- a debt security that is not denominated in New Zealand dollars, or
- any other security that is not a public security, held on trust, or shares covered by sections 96 or 100.

Approvals given by Ministers to date include authority for school boards of trustees and specified organisations described in Schedule 4 of the Public Finance Act to acquire debt securities issued by certain institutions that do not satisfy the specified credit-rating test (TSB Bank Limited and registered building societies), subject to conditions in each case.

Crown entities are required to monitor the credit rating of debt securities they hold. Regulation 10 provides a period of grace of up to two months for disposing of a debt security from the date that the issuer ceases to satisfy the credit-rating test.

Borrowing – Section 162 (see also pages 27 to 29 of this guide)

Under section 162 of the Act, a Crown entity must not borrow from any person, or amend the terms of any borrowing, other than as provided in section 160 through the Regulations, joint Ministerial approval, the entity's Act, or an exemption granted in Schedule 1 or 2 of the Act.

The term "borrow" is defined in section 136(1) and regulation 11.

Authority is required to:

- borrow money or obtain an overdraft (even if unexpected and temporary)
- enter into a hire purchase agreement or a finance lease
- accept "debt on assignment" as defined by the Act, and
- issue any security or other financial instrument.

Authority is not required to:

- purchase goods or services on credit, or obtain an advance by use of a credit card or by a supplier for a period of 90 days or less, and
- enter into an operating lease or bailment by way of hire.

Regulations 12 and 13 provide authority for certain borrowing by school boards of trustees and district health boards.

Giving of Guarantees and Indemnities – Section 163 (see also pages 30 to 33 of this guide)

The general rule in section 163 of the Act is that a Crown entity must not give a guarantee to, or indemnify, another person except as provided in section 160 – that is, through the Regulations, joint Ministerial approval, the entity's Act, or an exemption granted in Schedule 1 or 2 of the Act.

Section 163 does not apply where:

- the other person is a board member, office holder, committee member, employee or other individual indemnified in relation to a claim or proceeding under certain statutory provisions, or is a delegate or agent indemnified under the entity's natural person powers or common law in relation to any claim or proceeding, or
- the guarantee or indemnity is implied at law.

Regulation 14 permits a Crown entity to give specified guarantees and indemnities without further authority. The list aims to cover guarantees and indemnities that arise in business transactions carried out in the ordinary course of an entity's operations. Other guarantees or indemnities would normally require Ministerial approval.

Use of Derivatives – Section 164 (see also pages 34 to 37 of this guide)

Section 164 of the Act covers the use of derivatives. It prohibits a Crown entity from entering into, or amending the terms of, a derivative transaction unless this is provided for under section 160 through the Regulations, joint Ministerial approval, the entity's Act, or an exemption granted in Schedule 1 or 2 of the Act.

The term "derivative transaction" is defined widely in section 136(1) and includes foreign exchange transactions.

Regulation 15 permits a Crown entity to undertake specified derivative transactions without further authority. The list covers those that tend to arise in the ordinary course of business, including basic foreign exchange transactions, associated futures contracts, and transactions related to certain goods, intangibles and options over real property.

Authority to Act and Approval of Financial Powers

Ultra Vires and Validity

Crown entities should understand the nature and extent of their statutory and natural person powers. This is important because generally acts done by a Crown entity, such as entering into financial transactions, are invalid if they breach or are outside the powers conferred by an Act, or are entered into other than for the purpose of performing the entity's functions. They are *ultra vires* (i.e. 'beyond the powers') and thus rendered illegal and void.

Sections 19 to 24 of the Act codify the common law *ultra vires* doctrine for statutory entities (those named in Schedule 1) and make an exception concerning illegal acts. The exception modifies the doctrine to enable third parties in certain circumstances to enforce acts done under a statutory entity's natural person powers (including entering into contracts for acquisition of securities, borrowing and derivative transactions). The entity cannot avoid its legal obligations by claiming that its acts are invalid, but its board may be able to bring an action against a member who voted for or otherwise authorised an act in breach of his or her individual duties.

Determining a Crown Entity's Financial Powers

A Crown entity should ascertain the restrictions on its financial powers in order to determine whether it requires authority through Ministerial approval or the Regulations under section 158(1)(b) to (d) and (2) for bank accounts and section 160(1) for other financial powers. Authority would be needed if the power in question is not provided by the Act, an existing approval or regulation, the entity's Act, an exemption granted in Schedule 1 or 2, or the transitional arrangements in section 197.

Ministerial Approval

Which Minister?

Exceptions to restrictions imposed by the core financial powers provisions may be approved:

- by the Minister of Finance in the case of bank accounts, and
- jointly by an entity's responsible Minister and the Minister of Finance in the case of acquisition of securities, borrowing, giving of guarantees and indemnities, and use of derivatives.

Process and Information Requirements

A Crown entity wishing to obtain a Ministerial approval should apply to its monitoring department in the first instance and provide supporting information. That department will be expected to liaise with the Treasury so that the entity's request may be submitted to the relevant Minister(s). Monitoring departments are indicated in Annex 2 to this guide for each Crown entity, Crown entity group and Schedule 4 organisation.

The level of information required depends on whether the entity is seeking to:

- obtain a new authorisation for transactions not previously approved – in which case, the entity should provide a detailed business case and explanation of risk-management mechanisms to be put in place, or

- renew or extend the scope or limits of an existing authorisation – for which the entity should update its analysis of business need, and indicate reasons for extending the authorisation and how potential risks would be managed.

The guiding principle is that sufficient information should be available to enable the monitoring department and the Treasury to advise Ministers on the justification for a proposal. Relevant considerations that would be taken into account are outlined on pages 15-16 below with reference to accounts held at registered banks or building societies. Comparable factors are likely to be brought to bear in decisions on other financial powers.

Gazetting and Effective Date of Approvals

The following table indicates whether Ministerial approvals are given by notice in the *Gazette*, must simply be notified in the *Gazette* or are not required to be gazetted, and when they take effect:

Approval under …	Approval of …	Given / notified …	Approval takes effect on …
Section 158(1)(b)	An account at a registered bank or building society	Approvals are given by notice in the *Gazette*	The date specified in the *Gazette* notice (which may not be earlier than the date on which the approval was given) or otherwise the day after publication of the *Gazette*
Section 158(1)(c)	An account at a bank outside New Zealand		
Section 158(1)(d) and (2)(a)(i) and (b)(i)	An account at a bank outside New Zealand	Approvals must be notified in the *Gazette*	The date approval is given or a later date specified in the notice
Section 160(1)(b)	Acquisition of securities, borrowing, giving of guarantees and indemnities, and use of derivatives		
Section 158(6)	A foreign currency account at a registered bank or building society	No requirement to gazette approvals	The date approval is given or a later date specified in the approval

Crown entities should ensure that approvals are obtained in advance of establishing a bank account or entering into a transaction, since an authorisation can only be prospective (i.e. retrospective authority cannot be given).

Ministerial approvals may relate to an individual Crown entity, a number or group of entities, or all Crown entities. To assist entities wishing to identify gazetted approvals, a summary table will be maintained at http://www.treasury.govt.nz/crownentities/. An authority granted to a given Crown entity – for example, to hold an account at a bank outside New Zealand on specified conditions – will not apply to other entities unless wider coverage is specified.

Part B: Core Financial Powers and Related Provisions – Fuller Information

Bank Accounts: Section 158

Two Categories of Banks

Under section 158 of the Act, a Crown entity must ensure that all money it receives is paid as soon as practicable into one or more bank accounts established, maintained and operated at:

- a registered bank or registered building society, or
- a bank outside New Zealand,

subject to approval where necessary. Unless an account is permitted by section 158 itself, then authority is required through either an approval by the Minister of Finance or the Regulations.

Current and Former Default Provisions Compared

Section 24 of the Public Finance Act 1989 – the former 'default' provision – allowed a Crown entity to hold an account at a registered bank or the Reserve Bank of New Zealand. Section 158 differs by:

- permitting an account to be held at a registered building society as well as a registered bank, but not the Reserve Bank
- introducing a credit-rating test for the registered bank or building society
- requiring the account to be denominated in New Zealand dollars unless the Minister of Finance allows otherwise, and
- providing for approval of accounts at banks outside New Zealand.

Accounts at Registered Banks or Registered Building Societies

Basic Authority

Under section 158(1)(a) and (6), a Crown entity may establish, maintain and operate one or more bank accounts at a registered bank or a registered building society without further authority as long as:

- the bank or building society satisfies a relevant credit-rating test specified in the Regulations or a notice in the *Gazette* published by the Minister of Finance, and
- the account is denominated in New Zealand dollars.

This general authority is expected to meet the requirements of the majority of Crown entities. If other needs can be justified, scope exists for the Minister of Finance to give approvals and impose conditions.

Definitions

The terms "registered bank" and "registered building society" are defined in section 136(1) of the Act as follows:

Registered bank has the meaning set out in section 2 of the Reserve Bank of New Zealand Act 1989, which states in turn that the term "means a person whose name is entered in the register maintained under section 69 of this Act or who continues to be a registered bank by virtue of the provisions of section 76 of this Act".

Registered building society "means a building society within the meaning of the Building Societies Act 1965 that is registered on the register of building societies kept under that Act".

Registered banks and their credit ratings are listed on the Reserve Bank's website at http://www.rbnz.govt.nz/nzbanks. They include some banks or branches of banks that are incorporated overseas. The Ministry of Economic Development administers the Building Societies Act and is responsible for maintaining a register of building societies.

Minimum Requirement for a Bank Account

Regulation 5 sets out the minimum requirement for an account to be a bank account under the Regulations and Act. This distinguishes bank accounts from debt securities, which are dealt with under section 161 of the Act. Amongst other things, regulation 5 requires that there is a contract with a registered bank or building society or a bank outside New Zealand that:

- contains a covenant to keep a 'running' record of the amount owed to an account customer, and
- provides that that amount is repayable in whole or part on demand by the customer.

Term deposits, funds, and any other forms of investment of a specified amount of debt repayable only in whole, do not constitute a bank account and are thus subject to section 161.

Credit-Rating Test: Rationale and Application

Credit ratings assess the credit quality and risk of default and consequent financial loss inherent in a specific bank or issuer of securities. They provide an independent measure of ability and willingness of a bank or issuer to service and repay its financial commitments, and are assigned to short-term and long-term obligations as defined by the credit-rating agency. 'Long-term' generally means an original maturity of 12 months or more.

Section 158(1)(a) refers to a relevant credit-rating test for a registered bank or building society that is specified in the Regulations or a notice in the *Gazette* published by the Minister of Finance. Regulation 7 sets out:

- the basis on which a registered bank or building society satisfies that test, and
- "specified tests" in relation to ratings by "specified credit-rating organisations".

Regulation 7(1) provides that a registered bank or building society meets the credit-rating test referred to in section 158(1)(a) only if it satisfies:

- one of the "specified tests" and is not rated by any other "specified credit-rating organisation", or
- each of the "specified tests" where ratings are assigned by more than one "specified credit-rating organisation".

In other words, the credit-rating test is met as long as the credit of a registered bank or building society does not fail any of the "specified tests".

Specified Tests: Ratings by Standard & Poor's and Moody's

Regulation 7(2) promulgates "specified tests" comprising ratings by Standard & Poor's Ratings Group (S&P) and Moody's Investors Service (Moody's) of the credit of the relevant registered bank or building society at the following levels:

Institution's Credit	S&P	Moody's
Long-term credit	A– or higher	A3 or higher
Short-term credit	A–1 or higher	Prime–1 (P–1) or higher

The term "credit" is defined in regulation 7(3) to mean long- or short-term unsubordinated unsecured New Zealand dollar debt obligations payable in New Zealand.

The minimum thresholds for long-term credit are at the seventh step in ten investment-grade ratings used by S&P and Moody's. Their rating scales are:

S&P[8]	Moody's[8]	Definition
AAA	Aaa	Highest quality, minimal credit risk
AA+ AA AA–	Aa1 Aa2 Aa3	High quality, very low credit risk, very strong capacity to meet financial commitments
A+ A A–	A1 A2 A3	Favourable quality, low credit risk, strong capacity to meet financial commitments
BBB+ BBB BBB–	Baa1 Baa2 Baa3	Medium quality, moderate credit risk, susceptible to adverse economic conditions or changes

Ratings below investment grade indicate speculative or default levels. Sort-term ratings used by S&P and Moody's are A–1, A–2 and A–3, and P–1, P–2 and P–3 respectively. They are not directly correlated with long-term ratings.

Where credit ratings are assigned by both S&P and Moody's, each must satisfy the specified test. Examples illustrating the application of the credit-rating test follow:

Long-Term Credit	S&P	Moody's	Satisfies the Credit-Rating Test?
Bank A	AA–	Aa3	Yes – satisfies both tests
Bank B	A–	Baa1	No – Baa1 fails the Moody's test
Bank C	No rating	A3	Yes – A3 satisfies the Moody's test
Bank D	BBB+	No rating	No – BBB+ fails the S&P test
Bank E	BBB–	Baa2	No – fails both tests

[8] The + and – signs in S&P's long-term AA, A and BBB rating bands indicate relative financial standing within each band. Its short-term A–1 rating may be modified as A–1+. The 1, 2 and 3 designations within Moody's long-term Aa, A and Baa bands similarly indicate relative strength.

Specified Tests: Ratings by Other Credit-Rating Organisations

No "specified test" has been approved to date by the Minister of Finance for ratings by an agency other than S&P and Moody's. Any such test would be added to the Regulations or published in a *Gazette* notice, as required by section 158(1)(a). It might apply generally or be limited to bank accounts held by individual Crown entities or groups of Crown entities, or to classes of accounts.

A Crown entity which wishes to seek the Minister's approval of a specified test for another credit-rating organisation would be expected to demonstrate that that agency's ratings are of a standard comparable to those of S&P and Moody's.

General Approvals: TSB Bank Limited and Registered Building Societies

The Minister of Finance has given two general approvals under section 158(1)(b) for Crown entities to hold a bank account at certain institutions that do not satisfy the specified credit-rating test – namely, TSB Bank Limited (TSB) and registered building societies – subject to conditions in each case.[9]

The first approval is subject to conditions that:

- TSB's credit rating by S&P does not fall below the existing level of BBB– or become subject at this level to credit watch with negative implications, and
- TSB complies with its conditions of registration imposed under section 74 of the Reserve Bank of New Zealand Act 1989.

The second approval authorises bank accounts to be held at a registered building society that, in essence, has:

- given written confirmation to the relevant Crown entity that it has total equity of at least $15 million, and is in compliance with the terms of offer of debt securities in its registered prospectus and with the terms of its trust deed, and
- undertaken in writing to notify the Crown entity, as soon as practicable, if it no longer satisfies any of the above conditions, and has not so notified.

Requests for Approval: Relevant Considerations

When considering a request by a Crown entity for approval under section 158(1)(b) to hold a bank account at a registered bank or building society, matters that the Minister of Finance may properly take into account include:

- the reasons why approval is sought
- the nature and size of the Crown entity for which approval is sought, and the likely amounts that would be kept in the account from time to time (and thus, the potential exposure in the event of default by the institution)
- any relevant provisions in the entity's Act that impose obligations in relation to banking

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9 Published in the *New Zealand Gazette* No. 105 of 7 July 2005, page 2495 (TSB) and No 110 of 21 July 2005, page 2643 (registered building societies).

- the level of risk that the registered bank or building society might default on its obligations and any attendant Crown risk
- why the registered bank or building society does not satisfy the credit-rating test
- whether the registered bank or building society is prudently managed and meets its statutory banking obligations
- the relative convenience of the Crown entity – for example, the availability of services of registered banks or building societies in its locality
- in the case of a statutory entity, whether approval would be consistent with the duties of the board in section 51 to ensure that the entity operates in a financially responsible manner, and
- whether there is any other factor which might point to it being financially imprudent for Crown entities or any particular Crown entity to bank with the particular institution.

Information supporting an entity's request should address these and any other relevant factors. In particular, the case for holding an account for which Ministerial approval is required should be clearly justified.

Foreign Currency Accounts

Approval of the Minister of Finance is required under section 158(6) to hold an account at a registered bank or building society that is denominated in other than New Zealand dollars, whether or not the institution satisfies a relevant credit-rating test. Such accounts may be sought to facilitate overseas payments, for instance. Separate and additional approval may be needed where transactions entered into for these purposes entail the use of derivatives.

Accounts at Banks Outside New Zealand

Minimum Requirement

Regulation 6 sets out the minimum requirement for an institution to be "a bank outside New Zealand". This term includes any bank that is not registered under the Reserve Bank of New Zealand Act. Such an institution must be entitled to call itself a bank by the laws of the jurisdictions in which it operates by using the words "bank", "banker" or "banking" in its name or title.

The purpose of regulation 6 is to ensure that, to the extent that overseas jurisdictions regulate banking, financial institutions at which a Crown entity is permitted to establish an account are "banks".

Mechanisms for Approval

The Act provides two mechanisms by which a Crown entity may be authorised to hold an account at a bank outside New Zealand – namely:

- under section 158(1)(c) if the bank meets the conditions of any relevant approval given by the Minister of Finance by notice in the *Gazette*, or
- under section 158(1)(d) if conditions specified in subsection (2) are met, i.e. if the Crown entity or its class of entities is authorised to hold the account, and the account or type of account is approved, by the Minister of Finance or the Regulations.

Approvals by the Minister of Finance under section 158(2)(a)(i) and (b)(i) must also be notified in the *Gazette*, pursuant to section 158(4).

Approvals Given to Date

The Minister of Finance has given approvals to a number of Crown entities or classes of entities under section 158(2)(a)(i) on the condition that the bank outside New Zealand satisfies the credit-rating test specified in regulation 7(1) for registered banks and building societies. Considerations taken into account included the factors noted on pages 15-16 with reference to approval of accounts at registered banks and building societies.

In addition, regulation 8(1) specifies that an account at a bank outside New Zealand is approved for the purposes of section 158(2)(b)(ii) if all of the following conditions are met:

- the account comprises debt denominated in New Zealand dollars
- the bank satisfies the credit-rating test specified in regulation 7(1) as if it were a registered bank or building society
- the relevant jurisdiction does not discriminate between classes of unsecured creditors except upon grounds, and only to the extent, set out in a subordination covenant, and
- the relevant central bank is a shareholder in the Bank for International Settlements.

In practice, most accounts held by Crown entities at banks outside New Zealand are unlikely to meet the requirements listed in regulation 8(1). They will generally be foreign currency accounts, in which case approval by the Minister of Finance would be required under section 158(1)(c) or (d).

Monitoring Credit Ratings and Approvals: Period of Grace

Crown entities are responsible for monitoring the credit-rating test and any conditions approved by the Minister of Finance in relation to a bank at which they hold an account. Section 158(8) and (9) provides a period of grace if a bank account ceases to qualify under subsection (1). This would arise where the credit-rating test or any of the conditions of an approval are no longer satisfied. If a Crown entity holds an account at such an institution, then to avoid breaching the legislation it must either:

- close that account by the earlier of two months after it ceases to qualify or a date specified by the Minister of Finance, or
- obtain approval of the Minister of Finance to maintain the account at the registered bank, registered building society or bank outside New Zealand.

Day-to-Day Banking Procedures

Crown entities must:

- as soon as practicable, pay all money they receive into one or more bank accounts provided for in section 158(1)
- hold no bank accounts other than those provided for in section 158(1), in accordance with subsection (5), and
- have a system in place for proper withdrawal or payment of money from their bank accounts, pursuant to section 158(7).

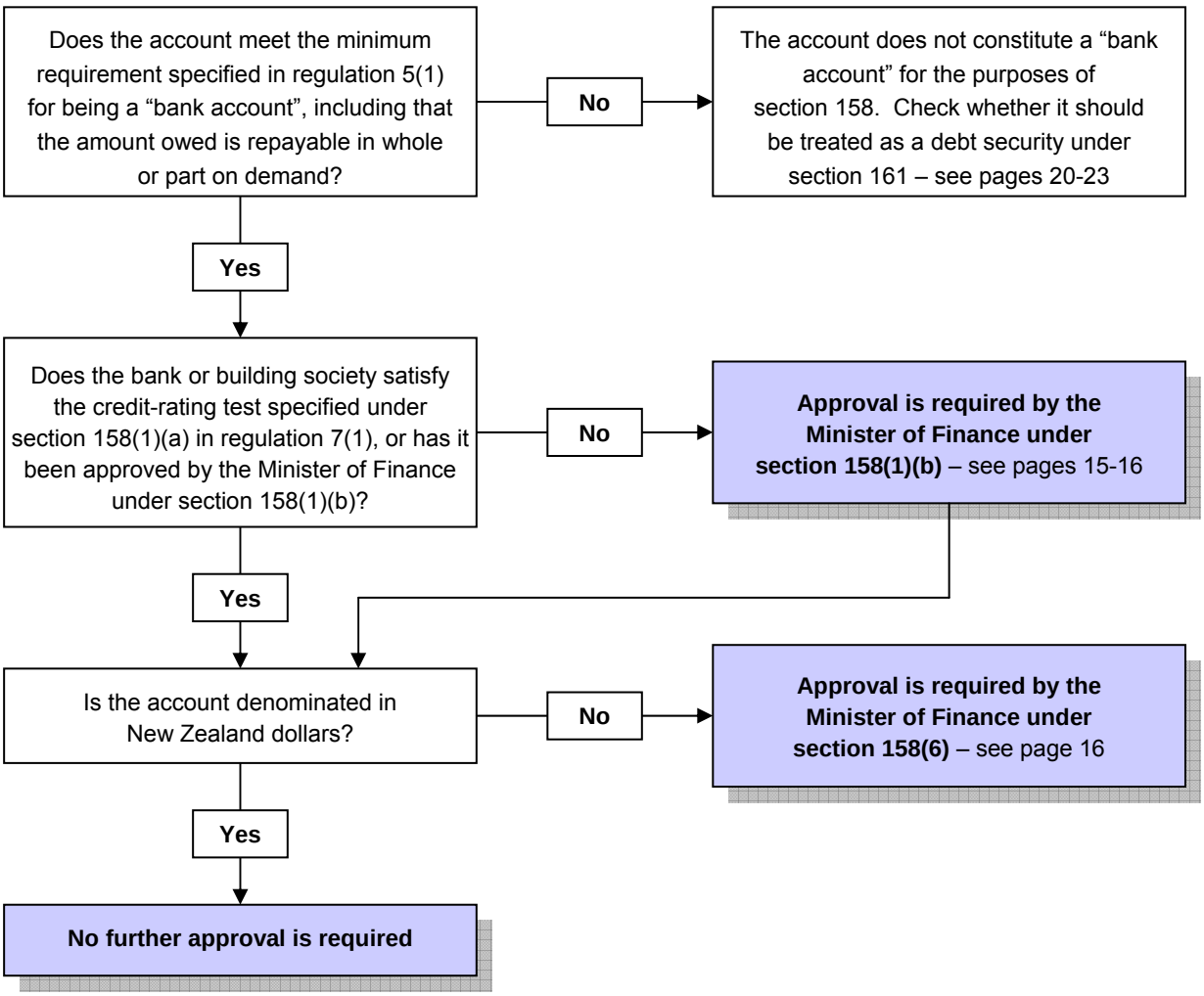
Gifted Money

Section 167 provides that any money or property gifted to a Crown entity may be accepted or disclaimed. Money accepted as a gift should be banked in accordance with section 158, which applies to "all money received by the Crown entity".

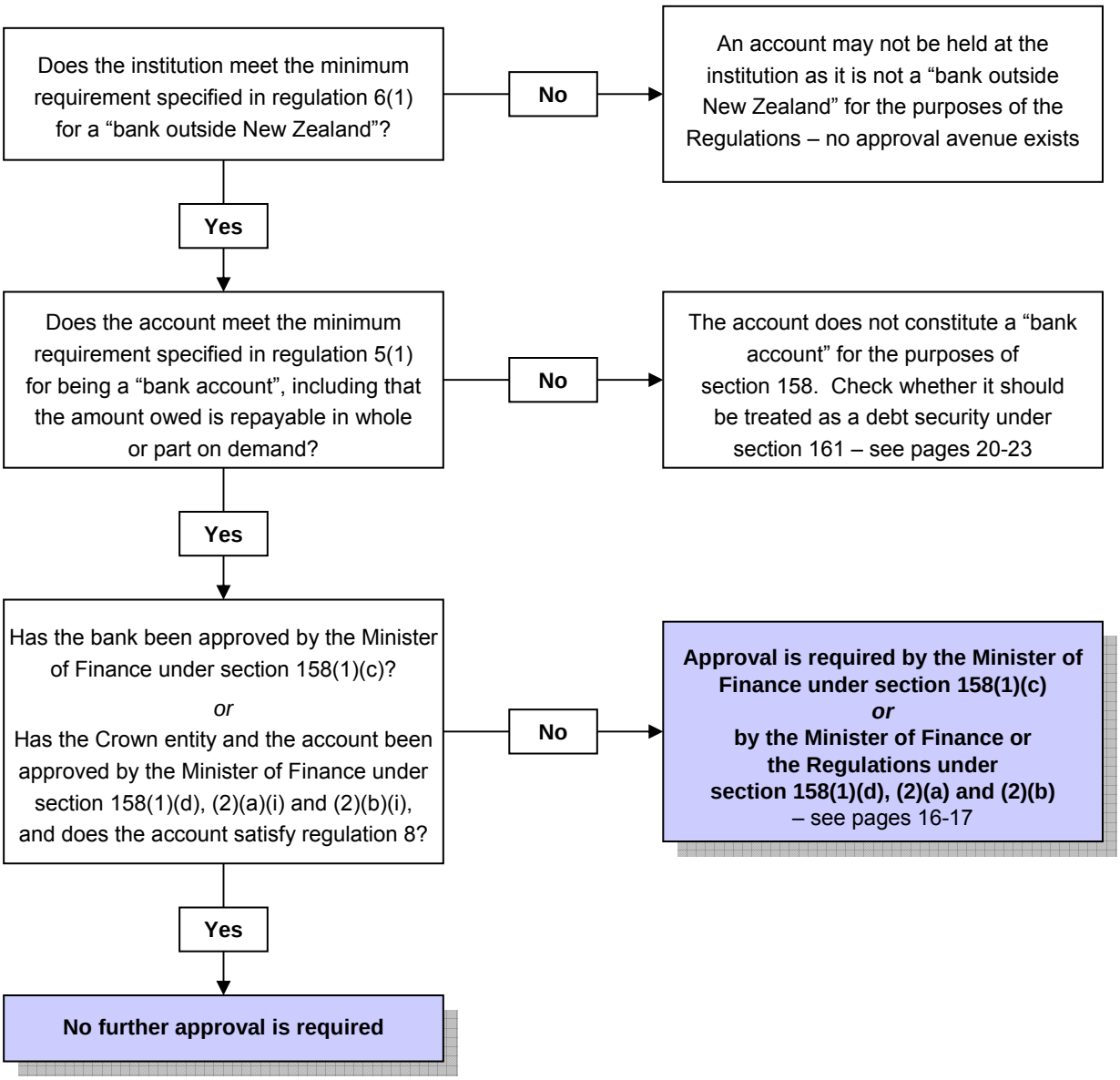
Bank Account Flowcharts

The following flowcharts outline a sequence of questions to help determine whether a Crown entity needs approval to hold an account at a registered bank or building society, or at a bank outside New Zealand. Entities should refer also to the Act and Regulations, obtain legal advice if appropriate, and not rely solely on the flowcharts or this guide.

Accounts at Registered Banks and Building Societies



Accounts at Banks Outside New Zealand



Acquisition of Securities: Section 161

Restrictions on Acquisition of Securities

Section 161 of the Act restricts the acquisition of securities. Subsection (1) states that a Crown entity must not acquire securities other than:

- a debt security denominated in New Zealand dollars that is issued by a registered bank, or by any other entity, that satisfies a credit-rating test that is specified in either regulations made under the Act or a notice in the *Gazette* published by the Minister of Finance
- a public security, or
- a security provided for under section 160 – namely, through the Regulations, any joint approval given by the entity's responsible Minister and the Minister of Finance, the entity's Act, or an exemption granted in Schedule 1 or 2.

The terms "security", "debt security" and "public security" are defined below.

This provision permits a Crown entity to acquire low-risk debt securities and public securities without further authority. Express authority is required to acquire other securities, including equity securities (such as shares), where possible changes in value may create greater risks. Any Ministerial approvals must be notified in the *Gazette* in accordance with section 160(3).

Section 161 does not apply to:

- any money, security or credit balance in a bank account held by a Crown entity on trust for any purpose or for another person, in accordance with subsection (2) of that section – such amounts would be subject to the terms of any trust deed or the Trustee Act 1956, or
- the acquisition by a Crown entity of shares in a Crown entity subsidiary, or otherwise in a company that gives substantial influence in or over that company, in accordance with subsection (3) of that section – such acquisitions are covered by sections 96 and 100 respectively and are discussed below.

Definitions

The following terms are defined in section 136(1) of the Act and other referenced Acts:

Security "has the meaning set out in section 2D of the Securities Act 1978 except that it does not include the things referred to in subsection (1)(d) to (f) of that section". Section 2D states that:

"(1) In this Act, unless the context otherwise requires, the term **security** means any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person; and includes –

(a) An equity security; and

(b) A debt security; and

(c) A unit in a unit trust; and

[…]

(g) Any renewal or variation of the terms and conditions of any such interest or right; –

but does not include any such interest or right […] that is declared by regulations not to be a security for the purposes of this Act.

(2) Where the terms of a security require or allow the subscriber to pay separate amounts of money at different times, each such payment shall, for the purposes of this Act, be treated as payment of the same security as each other payment."

Debt security "has the meaning set out in section 2 of the Securities Act 1978", which provides that this term "means any interest in or right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing by, any person (whether or not the interest or right is secured by a charge over any property), and includes:

(a) A debenture, debenture stock, bond, note, certificate of deposit, and convertible note, and

(b) An interest or right that is declared by regulations to be a debt security for the purposes of this Act, and

(c) A renewal or variation of the terms or conditions of any such interest or right or of a security referred to in paragraph (a) or paragraph (b) of this definition,

but does not include:

(d) An interest in a contributory mortgage where the interest is offered by a contributory mortgage broker, or

(e) Any such interest or right or a security referred to in paragraph (a) or (c) of this definition that is declared by regulations not to be a debt security for the purposes of this Act."

Public security "has the meaning set out in section 2(1) of the Public Finance Act 1989", which provides that this term "means any security issued under section 63 [of that Act] or any provision of any other Act; and includes any loan or credit agreement, guarantee, indemnity, bond, note, debenture, bill of exchange, Treasury bill, government stock, and any other security representing part of the public debt of New Zealand." Essentially a public security is a debt security issued by the Government under an enactment.

Current and Former Default Provisions Compared

The former general rule in section 25 of the Public Finance Act 1989 allowed money belonging to a Crown entity to be invested in the same way that public money was invested by the Treasury under section 23(1) – namely, on deposit with a registered bank in New Zealand or

with any bank outside New Zealand approved by the Minister of Finance, in public securities, or in other securities approved by the Minister of Finance.

The new 'default' provision in section 161 is similar in authorising a restricted and conservative list of securities, but differs in:

- focusing on the acquisition of, rather than investment in, securities
- widening the range of securities that may be acquired to include debt securities issued by registered banks and other issuers
- requiring, however, that these securities be denominated in New Zealand dollars and satisfy a credit-rating test
- not being limited to use of "money belonging to a Crown entity", thereby covering use of non-money assets (such as intellectual property used to acquire equity securities)
- explicitly excluding securities held on trust, and
- clarifying treatment of the acquisition of shares.

Scope of "Acquisition of" Securities

As just noted, section 161 differs from the former 'default' provision in that it restricts the *acquisition of*, rather than *investment in*, securities by a Crown entity. This represents a change in scope to the extent that "to acquire" is broader than "to invest". For example, it is likely that debt securities would be acquired through:

- lending or making an advance, regardless of whether interest becomes payable, and
- entering into an arrangement to fund another entity's business in exchange for a right to a proportion of any future cash flows.

Debt Securities

Specified Credit-Rating Test

Section 161(1)(a) of the Act refers to a credit-rating test for debt securities that is specified in regulations or a *Gazette* notice published by the Minister of Finance. Regulation 9 sets out:

- the basis on which a registered bank or other entity satisfies that test, and
- "specified tests" in respect of ratings by "specified credit-rating organisations".

Regulation 9(1) provides that a registered bank or any other entity that issues debt securities meets the credit-rating test only if it satisfies:

- one of the "specified tests" and is not rated by any other "specified credit-rating organisation", or
- each of the "specified tests" where ratings are assigned by more than one "specified credit-rating organisation".

In other words, the credit-rating test is met as long as the debt securities issued by a registered bank or other entity do not fail any of the "specified tests".

Regulation 9(2) sets out "specified tests" comprising ratings of such securities by S&P and Moody's at the following levels:

Debt Security	S&P Rating	Moody's Rating
Long-term debt security	A– or higher	A3 or higher
Short-term debt security	A–1 or higher	Prime–1 or higher

The credit-rating test and "specified tests" for debt securities are the same as those provided in regulation 7 for registered banks and registered building societies and their credit (see pages 13-14). No specified test has been approved to date for ratings of debt securities by an agency other than S&P and Moody's.

Monitoring Credit Ratings: Period of Grace

Regulation 10(1) provides a period or grace if the rating assigned to a debt security results in an issuer ceasing to satisfy the credit-rating test stipulated in regulation 9(1). If a debt security suffers a rating downgrade to a level below any of the specified tests in regulation 9(2) or in a notice gazetted by the Minister of Finance, then to avoid breaching these provisions a Crown entity must either:

- dispose of the debt security by the earlier of two months of the issuer ceasing to qualify or a date specified by the Minister of Finance in writing, as required by regulation 10(2) and (4), or
- obtain the approval of its responsible Minister and the Minister of Finance under section 160(1)(b) to continue to hold the debt security.

From the time that a Crown entity becomes aware that an issuer of a debt security it has acquired ceases to satisfy the credit-rating test, regulation 10(3) requires the entity to diligently monitor the credit rating of the security and to take all prudent steps necessary to avoid loss, including (if necessary) transferring the debt security to a third party.

Equity Securities

Distinction between Sections 96, 100 and 161

All acquisitions of equity securities or shares in a company by a Crown entity are subject to one of sections 96, 100 or 161. The general rule under section 161 that a Crown entity must not acquire shares is subject to:

- sections 96 and 100, and
- any exceptions authorised under section 160.

The implication of this demarcation is that where the acquisition of shares results in:

- a controlling interest in a Crown entity subsidiary, section 96 applies
- "substantial influence" in or over any other company,[10] section 100 applies, and
- neither a controlling interest nor "substantial influence", section 161 applies.

"Substantial influence" could be determined by a number of factors, including but not restricted to the proportion of voting shares held in a company. The term is defined in section 100(2):

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[10] "Substantial influence" would include a controlling interest in an overseas company that is not registered under the Companies Act 1993 and is therefore not a Crown entity subsidiary.

Substantial influence, "in relation to a company, means the capacity to affect substantially either the financial or the operating policies, or both, of the company".

A Crown entity would normally obtain a controlling interest in a Crown entity subsidiary, or substantial influence in or over another company (often a special-purpose vehicle), in order to pursue its core strategic and business objectives. Any other acquisition of shares would be subject to section 161, irrespective of whether it is undertaken to achieve those objectives or in the nature of an 'investment' to derive a direct financial gain.

Process Requirements and Other Interests: Sections 96 and 100

Where sections 96 and 100 apply,[11] a Crown entity must give written notice to its responsible Minister before acquiring a Crown entity subsidiary or shares that give substantial influence in or over a company. In addition, section 100 requires any acquisition to be:

- in accordance with procedures and conditions contained in a Crown entity's statement of intent or specified by the responsible Minister, and
- for the purpose of carrying out any of a Crown entity's functions and acting consistently with its objectives under any Act and its constitution (if any).

These conditions justify the lesser obligation of notification rather than approval as required under section 161. Section 100 also applies where a Crown entity:

- acquires an interest in any partnership, joint venture, or other association of persons, or in a company other than in its shares, or
- settles a trust, or is or appoints a trustee of a trust.

Requests for Ministerial Approval to Acquire Securities

Securities Not Permitted by Section 161(1)

Ministerial approval should be sought if a Crown entity wishes to acquire any of the following securities, which are not authorised by section 161(1):

- a debt security that does not satisfy a specified credit-rating test
- a debt security that is denominated in a foreign currency, or
- any other security that is not a public security, held on trust, or shares covered by sections 96 or 100.

Relevant Considerations and Supporting Information

Matters that Ministers may take into account when considering requests to acquire such securities are similar to those outlined in pages 15-16 in relation to requests for authority to hold bank accounts at a registered bank or building society. Decisions under section 160(1)(b) concerning securities differ from those on bank accounts in that joint approval of a Crown entity's responsible Minister and the Minister of Finance is required. This means that other factors related to the responsible Minister's role may be relevant.

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[11] Annex 3 indicates instances in which section 96 and/or 100 do not apply.

A request by a Crown entity for authority to acquire securities should be submitted to its monitoring department in the first instance and cover:

- the purpose of the acquisition and reason for departure from the "pre-approved" securities
- the credit rating (if any) of the issuer
- the type of securities and the desired portfolio mix
- an assessment of associated risks
- scope for, and costs of, exiting from the securities, and
- monitoring or accountability arrangements that would be put in place to manage risk.

Joint Ministerial Approvals to Date

Joint Ministerial approvals have been given under section 160(1)(b) to allow school boards of trustees[12] to hold debt securities issued by TSB Bank Limited, and to allow school boards of trustees and certain Schedule 4 organisations[13] to hold debt securities issued by registered building societies (which do not satisfy the credit-rating test), on the same conditions as those agreed for bank accounts held at those institutions.[14]

Approvals given to individual Crown entities include authority to:

- make foreign-currency term deposits
- enter into income-sharing arrangements as part of funding of media producers, and
- hold shares in a company to obtain information relevant to an entity's ongoing operations.

Gifted Securities

Section 167 provides that any money or property gifted to a Crown entity may be accepted or disclaimed and that the limitations of the Act (such as limitations on the form in which property may be held) do not apply to gifted property during a period that is reasonable in the circumstances.

In the absence of this provision, a Crown entity would require prior approval under section 160(1)(b) to accept a gift of debt securities not authorised by section 161(1) or of shares (being 'property'). The Act does not specify what holding period is "reasonable". While this should be determined on a case-by-case basis, as a general rule it would be prudent for a Crown entity wishing to retain such gifted securities to request Ministerial approval within 12 months.

The acquisition of shares by virtue of an entitlement and offered at no charge (other than as a gift) would require approval under section 160(1)(b).

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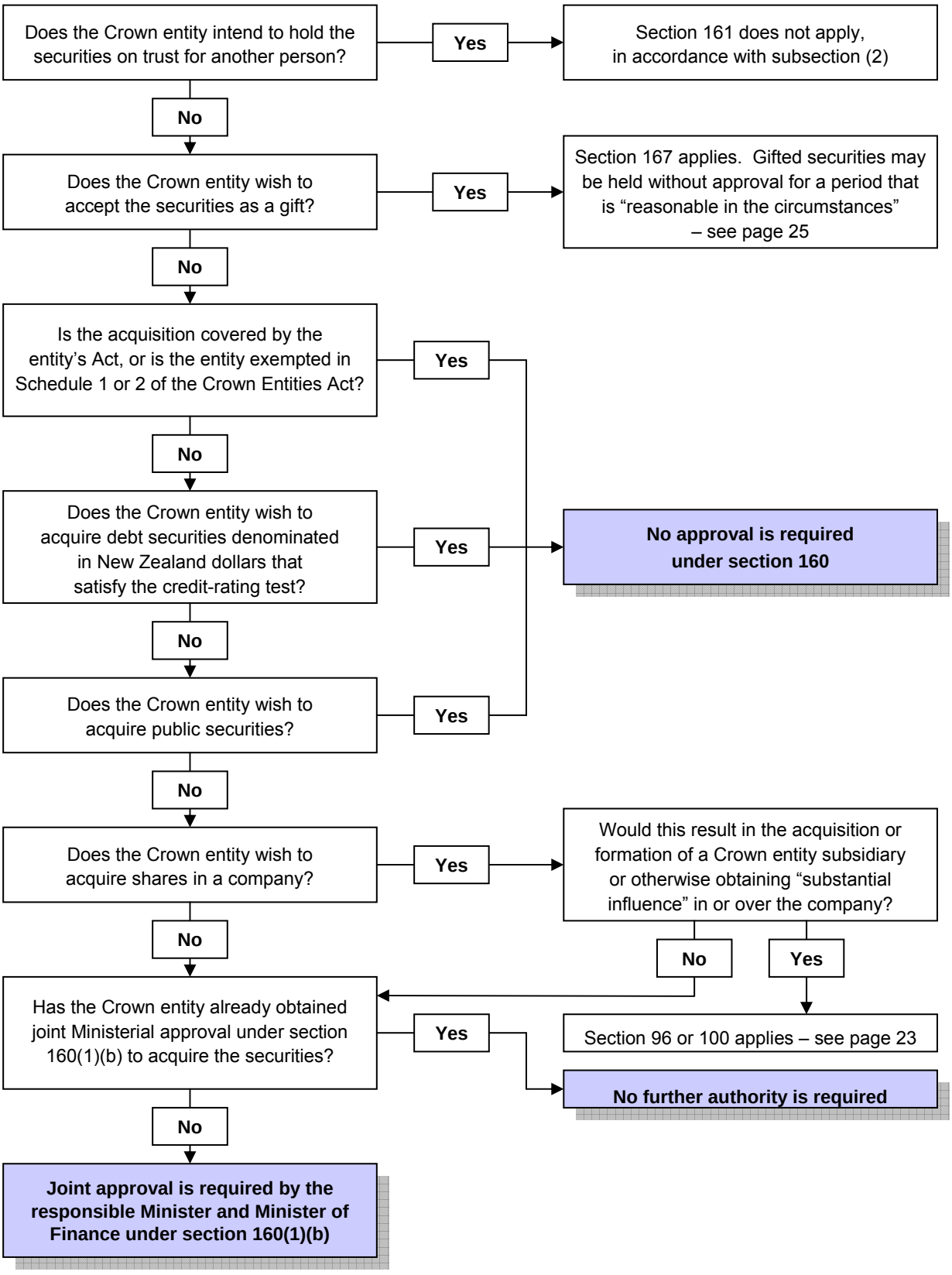
[12] School boards of trustees and their Crown entity subsidiaries are subject to sections 160 to 164 by virtue of section 5 and Schedule 3 of the Crown Entities Act, and Schedule 5A of the Education Act 1989. Application of these provisions is also stated in, respectively, sections 73, 67, 67A and 67B of the Education Act.

[13] Namely, the New Zealand Fish and Game Council, regional fish and game councils, New Zealand Game Bird Habitat Trust Board and reserves boards.

[14] Published in the *Gazette* No. 123 of 11 August 2005, page 3016 (TSB – school boards of trustees) and No 110 of 21 July 2005, page 2646 (building societies – school boards of trustees and specified Schedule 4 organisations).

Securities Flowchart

The following flowchart outlines a sequence of questions to help determine whether a Crown entity needs approval to acquire securities. Entities should also refer to the Act and Regulations, obtain legal advice if appropriate, and not rely solely on the flowchart or this guide.



Borrowing: Section 162

Restrictions on Borrowing

Section 162 of the Act provides that a Crown entity must not borrow from any person, or amend the terms of any borrowing, other than as provided in section 160 – that is, through the Regulations, any joint Ministerial approval, its own Act, or an exemption in Schedule 1 or 2.

Current and Former Provisions Compared

No 'default' requirements governing borrowing by Crown entities existed prior to the passage of the Act. More than half of entities' Acts required Ministerial consent (usually that of the Minister of Finance but sometimes the responsible Minister or both), and some specified partial or no restrictions. Other entities' Acts included no express authority.

Meaning of Borrowing

Taken together, section 136(1) and regulation 11 specify the meaning of "borrow" by reference to transactions that the term includes and excludes:

Borrow includes:

- entering into hire purchase agreements or agreements that are the same or substantially similar in nature
- entering into finance lease arrangements or arrangements that are of the same or a substantially similar nature
- "accepting debt on assignment" from other persons, as defined below, and
- the issuance of any security or any other financial instrument,

but does not include:

- the purchase of goods or services on credit or the obtaining of an advance by the use of a credit card or by a supplier supplying credit for the purchase of goods or services, for a period of 90 days or less from the date the credit card is used or the credit is supplied, and
- an operating lease or bailment by way of hire.

"Borrowing" as such is therefore not defined exhaustively but would include the receipt of funds that are to be repaid or the incurring of indebtedness by contract.

Regulation 11 also defines the term "accepting debt on assignment" as follows:

Accepting debt on assignment "(as that phrase is used in the definition of **borrow** in section 136(1) of the Act) includes a Crown entity (**entity A**) recording the indebtedness of another entity (whether or not a Crown entity) in the financial statements that entity A is required to prepare in accordance with section 154 of the Act, whether or not entity A incurs the legal obligation to repay that indebtedness by way of novation or otherwise".

Authority Given by Regulations and Ministerial Approvals

Regulations 12 and 13 provide authority for borrowing by school boards of trustees within a specified limit, and by district health boards from specified sources and subject to other conditions. These provisions continue former borrowing powers under the Education Act 1989 and New Zealand Public Health and Disability Act 2000 respectively.

In addition, joint Ministerial approval to borrow has been given to a number of Crown entities under section 160(1)(b).

Requests for Ministerial Approval to Borrow

A Crown entity would require authority to:

- issue any debt securities such as debentures, bonds and notes
- have an overdraft, even if a debit balance occurs for only a short period of time due to unexpected mismatches between receipts and payments,[15] and
- enter into a finance lease.

Most Crown entities wishing to borrow will require joint Ministerial approval under section 160(1)(b). Matters that Ministers may consider in making a decision are similar to those noted in pages 15-16 in relation to bank accounts.

A request by a Crown entity for Ministerial approval to borrow should be submitted to its monitoring department in the first instance and include the following information:

- why incurring debt is favoured and is considered an appropriate form of financing
- the type of borrowing – overdraft (short-term or ongoing), finance lease, or another form – and why the requested option is favoured
- appropriate conditions – for example, maximum limits in relation to amount, term, debt-servicing costs and, for a temporary overdraft, the number of working days within which a credit balance will be restored
- debt/equity ratios or other information that indicate the entity's ability to service the borrowing over time without impairing its financial position or operating performance, and
- exposure to interest-rate, exchange-rate or other risks and how these will be managed, including any use of derivatives for this purpose.

To date approvals have been given to individual Crown entities to borrow by way of overdraft, maintain term loan facilities, and enter into finance leases.

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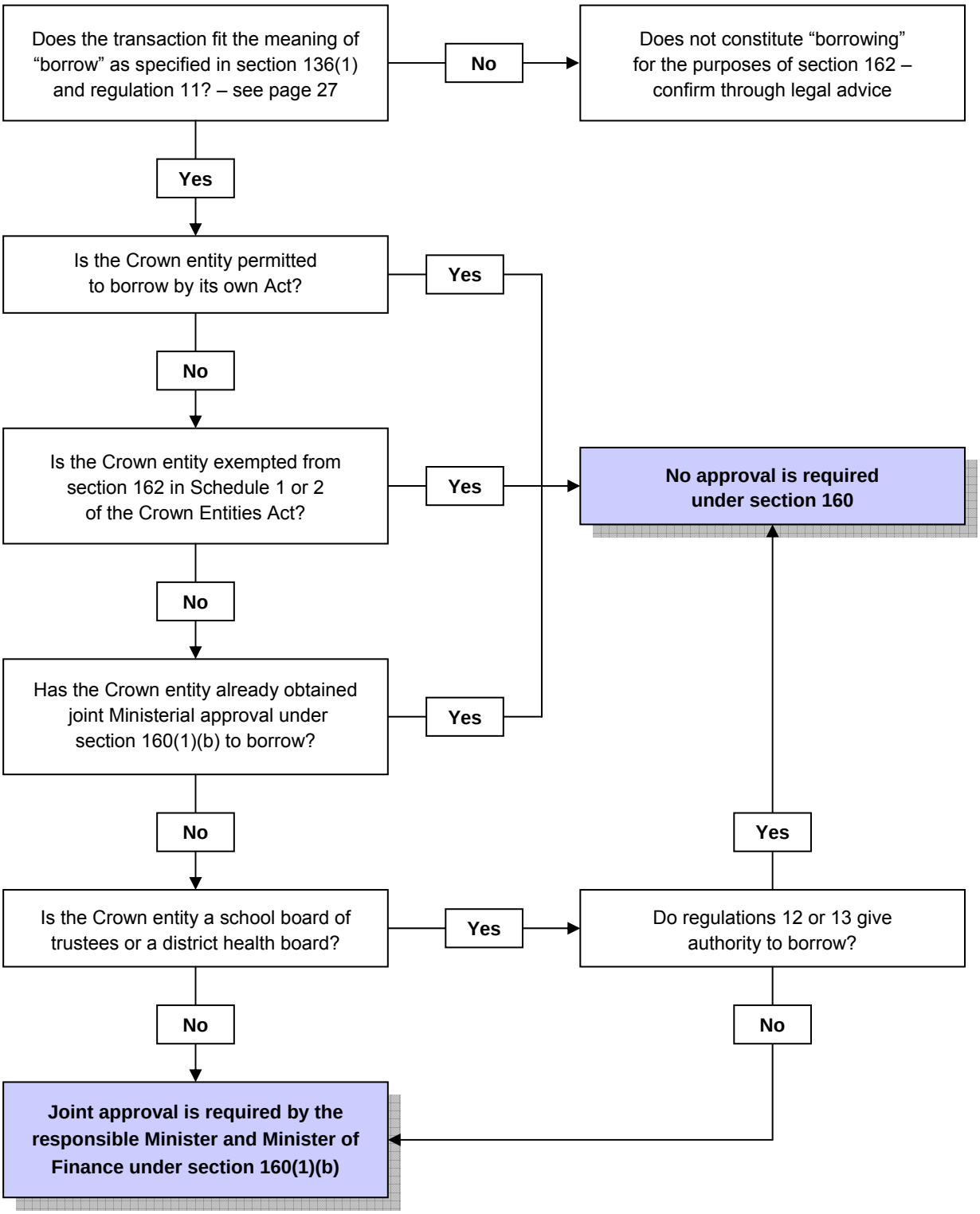
[15] In principle, separate approval should be sought for each overdraft. In practice, whether the amount of an overdraft may be offset against any credit balances in accounts held by a Crown entity is likely to depend upon the particular terms agreed with the lending bank.

Borrowing Flowchart

The following flowchart outlines a sequence of questions to help determine whether a Crown entity needs approval to borrow. Entities should also refer to the Act and Regulations, obtain legal advice if appropriate, and not rely solely on the flowchart or this guide.



Giving of Guarantees and Indemnities: Section 163

What are Guarantees and Indemnities?

A *guarantee* is a contractual undertaking made by one person (the guarantor) in favour of another (the creditor) to settle a debt or fulfil an obligation of a third party (the principal debtor) to the creditor, if the principal debtor fails to discharge that obligation. Guarantees generally relate to the payment of money, but may alternatively or in addition require the performance of services. A guarantor's liability would normally not be greater than that of the principal debtor. In practice, however, this will depend on the terms of the covenant.

Broadly speaking, an *indemnity* is a promise made by one person (the indemnifier) to another (the creditor) to compensate that other person for loss caused on the occurrence of certain events. The indemnity may oblige that the indemnifier assume a liability, do some act or exercise forbearance. For example, an indemnity may require a supplier (the indemnifier) to pay money to a customer (the creditor) – typically to reimburse the customer for loss incurred because the supplier has failed to meet a contractual obligation.

Whereas a guarantee always involves three parties with the guarantor assuming a secondary liability to the creditor in respect of default by the principal debtor, an indemnity involves two parties with the indemnifier assuming a direct or primary liability to the creditor irrespective of whether the loss is caused by the indemnifier or another party or event (such as exchange rate changes or an earthquake). Moreover, while a guarantee should be evidenced in writing, this need not apply in the case of an indemnity.

Restrictions on Guarantees and Indemnities

Section 163 of the Act regulates guarantees and indemnities given by a Crown entity that, for example, potentially present a *direct* financial risk to the Crown – that is, contracts that promise to pay money or that relate to financial loss, in certain circumstances. The general rule in section 163(1) is that a Crown entity must not, with or without security, give a guarantee to, or indemnify, another person unless permitted by section 160 – through the Regulations, any joint Ministerial approval, its own Act, or an exemption in Schedule 1 or 2 of the Act.

Section 163(2) provides that the restrictions do not apply if the other person is:

- a member, office holder, committee member, employee or other individual indemnified by the board in relation to any claim or proceeding under section 122 (which allows a statutory entity to indemnify in respect of an excluded act or omission), section 162 of the Companies Act 1993 (a comparable provision relating to companies), or the entity's natural person powers or other powers in its Act, and
- a delegate or agent indemnified by the board under its natural person powers, or the common law, in relation to any claim or proceeding.

Nor under section 163(3) do the restrictions apply to any guarantee or indemnity that is implied at law or arises from transactions authorised under the Regulations. This provision relates to contractual guarantees and indemnities

Current and Former Provisions Compared

Prior to the Crown Entities Act, no 'default' provision existed governing the giving of guarantees or indemnities by Crown entities. A few entities had such authority in their own Act and the capacity of other entities was often unclear.

Permitted Guarantees and Indemnities

Regulation 14 permits a Crown entity, without further authority, to give types of guarantees and indemnities that arise in the ordinary course of its operations. Given that the related contracts are forged in competitive markets, they are unlikely to present a material potential fiscal risk to the Crown. It would be inappropriate for a Crown entity to have to seek Ministerial approval in respect of each such obligation.

Guarantees

As discussed above, guarantees arise where a guarantor agrees to:

- pay money to a creditor, or
- do what a principal debtor agreed to do,

in the event that the principal breaches his or her contract. Guarantees of the second type do not present a *direct* financial risk to the Crown. Hence regulation 14(1)(a) permits a Crown entity to give a guarantee that is limited to a covenant to perform personally another entity's non-monetary covenant to perform.

In addition, regulation 14(1)(b) permits a guarantee to be given in respect of any of the low-risk contracts or instruments referred to in regulation 14(2) and (3) where an indemnity may be given.

Indemnities

Regulation 14(2) permits a Crown entity to give an indemnity related to a range of contracts covering routine business transactions, of which the following types are distinguished:

Indemnity related to / contained in …	Permitted by …
A loan agreement, or ancillary agreement, lawfully entered into by the Crown entity as borrower	Regulation 14(2)(a)
A contract to lease, or a lease of, real property lawfully entered into by the Crown entity as lessee or tenant or the assignee thereof	Regulation 14(2)(b)
A contract (including a deed) executed by the Crown entity to settle any litigation brought against it by any third party	Regulation 14(2)(c)
Standard and inoffensive contracts containing indemnities given in the ordinary course of a Crown entity's operations where it would be impracticable for the entity to modify the terms and inappropriate to render the contracts illegal simply because they contain an indemnity – namely, contracts:	
• of bailment by way of hire lawfully executed by the Crown entity	Regulation 14(2)(d)
• of insurance entered into by the Crown entity as insured party	Regulation 14(2)(e)
• for the sale and purchase of goods entered into by the Crown entity	Regulation 14(2)(f)
• for the procurement of services entered into by the Crown entity, and	Regulation 14(2)(g)
• for the purchase of an intangible (including intellectual property or a licence thereof) entered into by the Crown entity	Regulation 14(2)(h)

Some standard transactions are the subject of more than one written contract. For example, transactions in which a security interest is granted are not infrequently contained in an ancillary document (including a trust) associated with the main contract. Regulation 14(3) permits Crown entities to execute an indemnity relating to the classes of contracts referred to in regulation 14(2)(d) to (h) regardless of documentary form, provided that the indemnity is contained in the standard printed terms and conditions of the Crown entity or the counterparty.

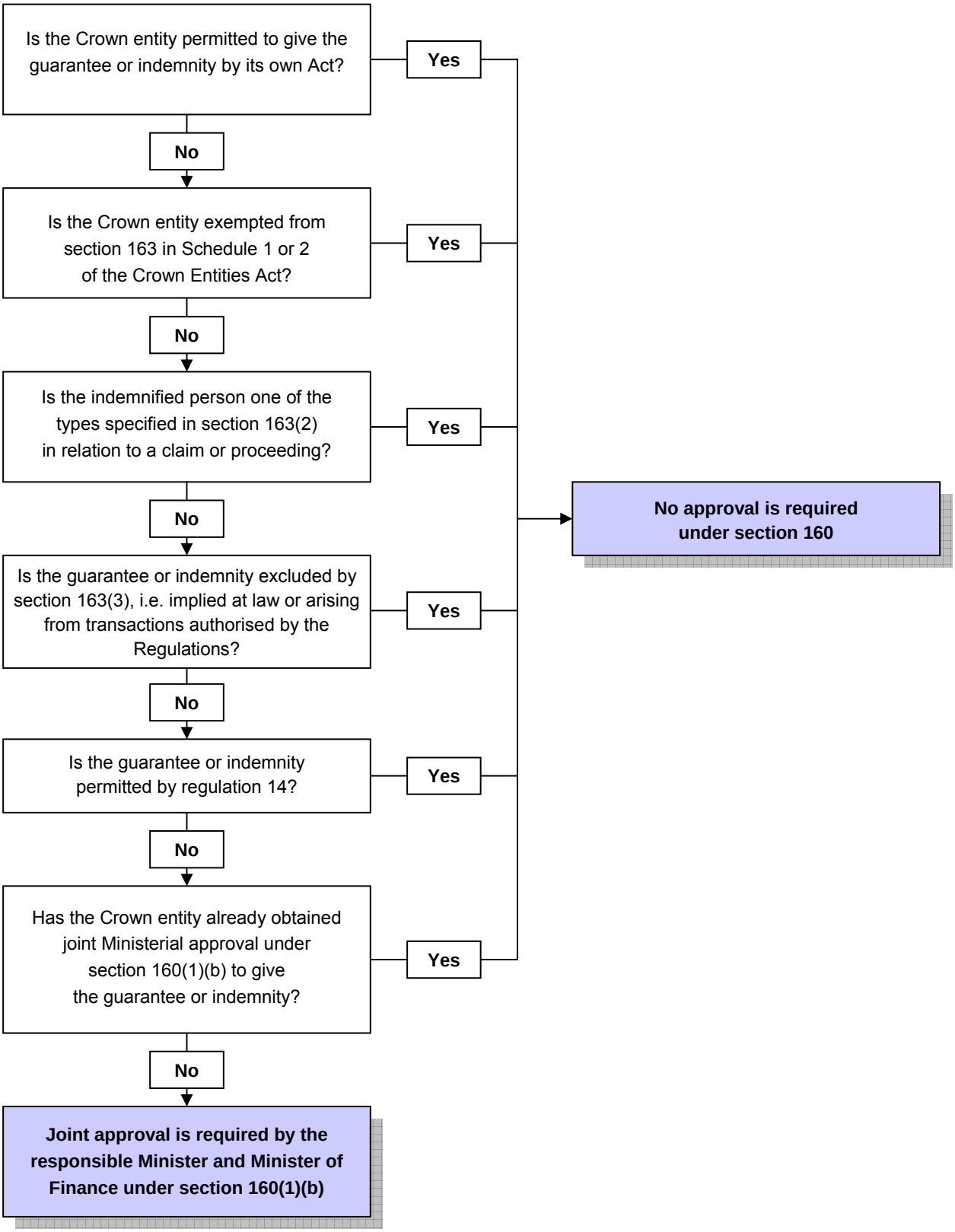
Requests for Ministerial Approval to Give Guarantees or Indemnities

A Crown entity wishing to obtain joint Ministerial approval under section 160(1)(b) to give a guarantee or indemnity not permitted by regulation 14 should submit a request to its monitoring department in the first instance together with information on business need and how risks would be managed. Matters that Ministers may consider are similar to those in relation to requests to hold bank accounts (see pages 15-16).

As an alternative to applying for authorisation, where feasible a Crown entity could seek to negotiate indemnities out of contracts not permitted by regulation 14.

Guarantees and Indemnities Flowchart

The following flowchart outlines a sequence of questions to help determine whether a Crown entity needs approval to give a guarantee or indemnity. Entities should also refer to the Act and Regulations, obtain legal advice if appropriate, and not rely solely on the flowchart or this guide.



Use of Derivatives: Section 164

What is a Derivative?

A derivative is a financial contract or instrument whose value is derived from the value of an underlying asset or market indicator – such as interest rates, exchange rates or indices – movements in which are used to determine a future obligation. Commonly cited forms of derivative transactions include "swaps", "futures contracts", "options" and "forward agreements".

Section 136(1) of the Act contains a wide definition of "derivative transaction".[16] It lists many types of transactions and allows for developments as the market continues to evolve. Notably, it includes foreign exchange transactions, which a Crown entity might not ordinarily recognise as a derivative. The full definition follows:

> **Derivative transaction** "means:
>
> (a) a transaction that is a rate swap transaction, swap option, basis swap, forward rate transaction, interest rate option, foreign exchange transaction, cap transaction, floor transaction, collar transaction, currency swap transaction, cross-currency rate swap transaction, currency option, commodity swap, commodity option, equity or equity index swap, equity or equity index option, bond option, credit protection transaction, credit swap, credit default swap, credit default option, total return swap, credit spread transaction, forward purchase or sale of a security, or commodity or other financial instrument or interest (including an agreement or option that relates to any of these transactions), or
>
> (b) a transaction that is similar to any transaction referred to in paragraph (a) that:
>
> (i) is currently, or in the future becomes, recurrently entered into in the financial markets, and
>
> (ii) is a forward, swap, future, option, or other derivative on 1 or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, economic indices or measures of economic risk or value, environmental or climatic variable, or other benchmarks against which payments or deliveries are to be made."

Restrictions on Derivative Transactions

Section 164 of the Act establishes the general rule that a Crown entity must not enter into a derivative transaction, or amend the terms of a derivative transaction, other than as provided under section 160 – that is, through the Regulations, any joint Ministerial approval, its own Act, or an exemption granted in Schedule 1 or 2 of the Act.

Current and Former Provisions Compared

As in the case of guarantees and indemnities, prior to the Crown Entities Act no 'default' provision existed for Crown entities wishing to enter into derivative transactions. While a few were given such authority in their own Act, it was often not clear whether other Crown entities had the power to use derivatives or whether specific Ministerial approval could be given.

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[16] The definition is adapted from the 2002 Master Agreement of the International Swaps and Derivatives Association.

Permitted Derivative Transactions

The definition of "derivative transaction" in section 136(1) is one used for trading in international financial markets. It is extremely broad and embraces transactions commonly undertaken in the course of ordinary business operations, including foreign exchange transactions and related futures contracts, transactions in certain goods and intangibles, options over real property, and contracts to acquire debt securities.

Regulation 15 makes exceptions to the prohibition in section 164 by allowing a Crown entity to enter into specified derivative transactions without further authority. It achieves this by permitting classes of transactions that are inoffensive from the perspective of the policy on limiting potential fiscal risk. This should provide considerable certainty for Crown entities.

Comments follow on transactions permitted by regulation 15:

Type of derivative transaction …	Permitted by …
A Crown entity may procure foreign exchange from a registered bank or building society, or a bank outside New Zealand, that meets the credit-rating test stipulated in the Regulations, in order to:	
• fund its members, officials or employees to purchase goods and services while overseas or en route on business for the entity	Regulation 15(1)(a)(i)
• discharge a liability under a class of contract referred to in regulation 14 and that transaction requires payment in a foreign currency, and	Regulation 15(1)(a)(ii)
• deposit funds into a bank account, invest in debt securities, repay borrowing or pay a guarantee or indemnity in a foreign currency where the entity has been authorised by the Act or the Minister of Finance.	Regulation 15(1)(a)(iii) and (2)
Where the Regulations authorise a foreign exchange transaction, a Crown entity may enter into a futures contract to manage the risk of changes in currency exchange rates.	Regulation 15(1)(b)
A cash-for-cash foreign exchange transaction with a foreign exchange dealer is permitted. This involves either no credit risk at all or a credit risk lasting only seconds.	Regulation 15(1)(c)
While section 164 of the Act would potentially prohibit any contract involving future performance, a Crown entity may nevertheless:	
• sell and purchase goods or intangibles (including intellectual property rights but not securities) that are not traded in the commodities or capital markets, where delivery follows payment, and	Regulation 15(1)(d)
• enter into a contract of employment which provides, whether expressly or impliedly, that future intellectual or other property rights generated during the scope of employment belong to the employer.	Regulation 15(1)(g)

Type of derivative transaction (continued) …	Permitted by …
A Crown entity may enter into a contract conferring an option to:	
• purchase, lease, or renew the lease of, real property, and	Regulation 15(1)(e)
• purchase, bail, or renew the bailment by way of a hire agreement for, goods that are not traded in the commodities markets.	Regulation 15(1)(f)
Section 161 of the Act authorises a Crown entity to acquire certain kinds of debt securities. An entity may enter into a contract to acquire such securities where delivery must take place in the future.	Regulation 15(1)(h)

Appropriate Use of Derivatives

Employed prudently, derivatives can provide efficient and effective means to reduce risks that arise from market fluctuations and thus achieve greater certainty in a Crown entity's cash flows and financial performance. For the most part, Crown entities subject to section 164 are likely to consider using derivatives for protecting or 'hedging' interest- or exchange-rate exposures related to investment and borrowing activities authorised by the Act or any other Act.

Several high-profile failures overseas show, however, that derivatives can entail huge cost. In no event should speculative or leveraged positions be adopted.

Requests for Ministerial Approval to Use Derivatives

A Crown entity can seek approval from its responsible Minister and the Minister of Finance under section 160(1)(b) to enter into a derivative transaction not permitted by regulation 15. A request should be submitted to its monitoring department in the first instance.

To help inform Ministers, requests for approval should contain details of the type of transaction proposed, the associated business purpose, planned risk-management practices and procedures, and any other relevant information.

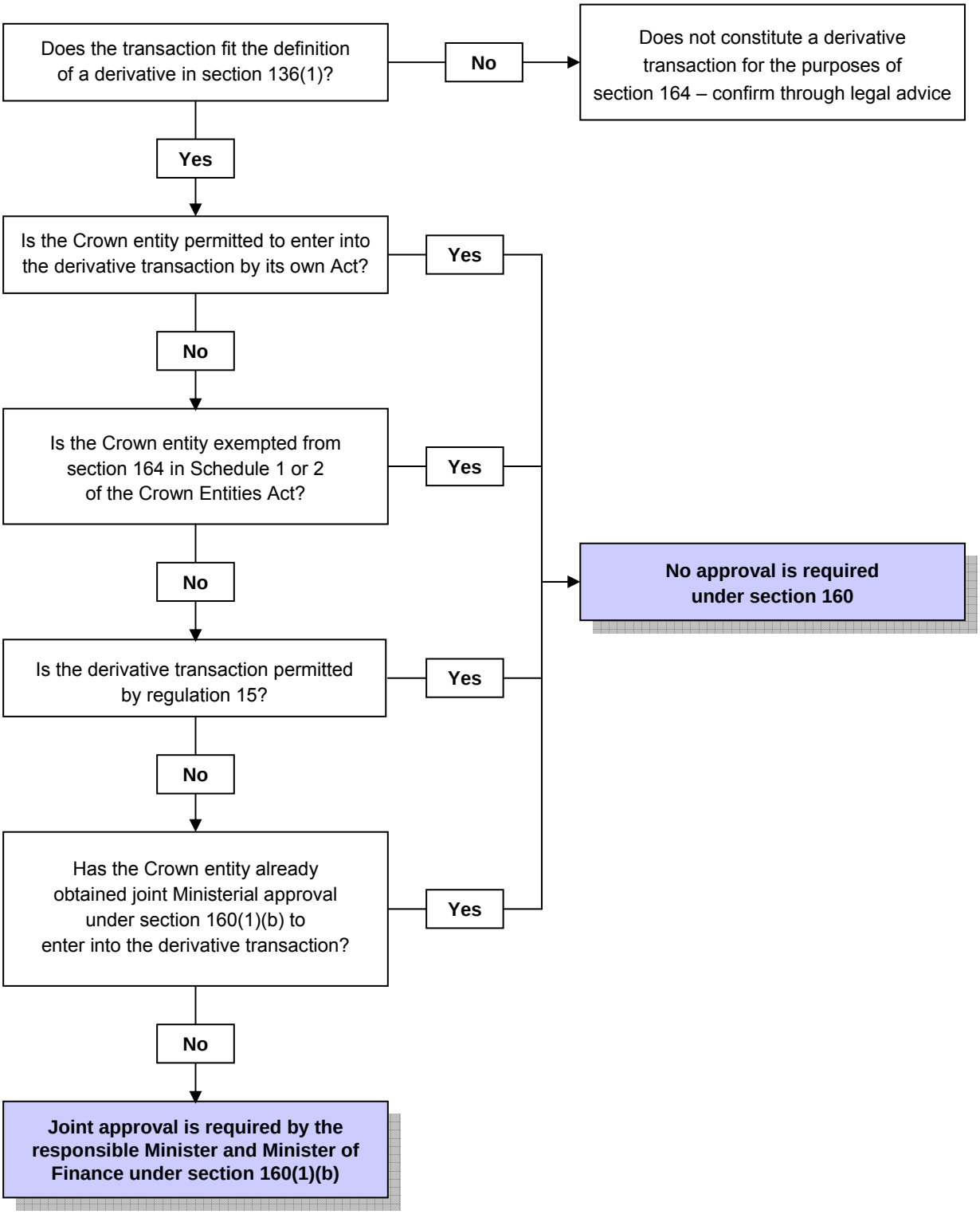
Matters that Ministers may take into account when considering a request for approval to enter into derivative transactions are similar to those in relation to requests to hold bank accounts (see pages 15-16). Ministers will need to be assured that the transactions are prudent and that business risks will be well managed.

A proficient understanding of derivatives markets is critical to assessment and monitoring of those risks by Crown entities. Expert advice should be sought if an entity does not have sufficient capability in-house.

To date Ministerial approvals have been given to allow certain Crown entities to enter into foreign-exchange and interest-rate derivatives and to manage treasury risks on borrowings, on specified conditions.

Derivatives Flowchart

The following flowchart outlines a sequence of questions to help determine whether a Crown entity needs approval to enter into a derivative transaction. Entities should also refer to the Act and Regulations, obtain legal advice if appropriate, and not rely solely on the flowchart or this guide.



Annex 1

Core Financial Powers Provisions in Sections 158 to 164[17]

Section 158 — Bank accounts of Crown entities

(1) A Crown entity must ensure that all money received by the Crown entity is paid, as soon as practicable after it is received, into 1 or more bank accounts that are established, maintained, and operated by the Crown entity at 1 or more of the following:

(a) a registered bank or registered building society that satisfies a relevant credit-rating test specified in either regulations made under this Part or a notice in the *Gazette* published by the Minister of Finance; or

(b) a registered bank or registered building society that meets the conditions of any relevant approval given by the Minister of Finance by notice in the *Gazette*; or

(c) a bank outside New Zealand that meets the conditions of any relevant approval given by the Minister of Finance by notice in the *Gazette*; or

(d) a bank outside New Zealand if the conditions specified in subsection (2) are met.

(2) The conditions referred to in subsection (1)(d) are —

(a) the Crown entity, or the class of Crown entities to which the Crown entity belongs, must be authorised to establish, maintain, and operate 1 or more bank accounts at 1 or more banks outside New Zealand by —

(i) the Minister of Finance in writing; or

(ii) any regulations made under this Part; and

(b) the bank account or bank accounts must be of a type approved by —

(i) the Minister of Finance in writing; or

(ii) any regulations made under this Part.

(3) A Crown entity must establish, maintain, and operate a bank account referred to in subsection (2) subject to —

(a) any regulations made under this Part; and

(b) if applicable, any conditions of the authorisation or approval given by the Minister of Finance; and

(c) the entity's Act.

(4) The Minister of Finance must notify in the *Gazette* an authorisation or approval given under subsection (2)(a)(i) or, as the case may be, subsection (2)(b)(i).

(5) A Crown entity must ensure that it does not establish, maintain, or operate a bank account other than as provided for in subsection (1).

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[17] Excluding section 159 (the commencement provision for sections 160 to 164).

(6) All money in a bank account at a registered bank or registered building society must be denominated in New Zealand dollars unless the Minister of Finance allows otherwise.

(7) A Crown entity must properly authorise the withdrawal or payment of money from a bank account of the Crown entity.

(8) There is a period of grace if a bank account ceases to qualify under subsection (1), and:

(a) during that period the Crown entity may continue to pay money into the bank account; but

(b) by the end of the period the Crown entity must have closed the account and paid all the money in the account into another bank account that does qualify under subsection (1).

(9) The period of grace ends on the earlier of —

(a) 2 months after the bank account ceases to qualify under subsection (1); or

(b) a date specified by the Minister of Finance and notified to the Crown entity.

Section 160 — Application of provisions relating to acquisition of securities, borrowing, guarantees, indemnities, and derivative transactions

(1) Sections 161 to 164 apply subject to —

(a) any regulations made under this Part; and

(b) any approval given jointly by the entity's responsible Minister and the Minister of Finance; and

(c) an entity's Act; and

(d) an exemption granted in Schedule 1 or Schedule 2.

(2) Sections 161 to 164 apply to a Crown entity subsidiary in the same way as they apply to its parent.

(3) The Minister of Finance must notify in the *Gazette* an approval given under subsection (1)(b).

Section 161 — Restrictions on acquisition of in securities

(1) A Crown entity must not acquire securities other than —

(a) a debt security denominated in New Zealand dollars that is issued by a registered bank, or by any other entity, that satisfies a credit-rating test that is specified in either regulations made under this Part or a notice in the *Gazette* published by the Minister of Finance;

(b) a public security;

(c) as provided in section 160.

(2) This section does not apply to any money, security, or credit balance in a bank account held by a Crown entity on trust for any purpose or for another person.

(3) This section does not prohibit a Crown entity from acquiring subsidiaries or shares if section 96 or, as the case may be, section 100 allows the acquisition.

Section 162 — Restrictions on borrowing

A Crown entity must not borrow from any person, or amend the terms of any borrowing, other than as provided in section 160.

Section 163 — Restrictions on giving of guarantees and indemnities

(1) A Crown entity must not, with or without security, give a guarantee to, or indemnify, another person other than as provided in section 160.

(2) This section does not apply if the other person is —

(a) a member, office holder, committee member, employee, or other individual indemnified by the board in relation to any claim or proceeding under —

(i) section 122 of this Act; or

(ii) section 162 of the Companies Act 1993; or

(iii) the entity's natural person powers or other powers in the entity's Act;

(b) a delegate or agent indemnified by the board under its natural person powers, or the common law, in relation to any claim or proceeding.

(3) This section does not apply to any guarantee or indemnity that is implied at law or arising from any transactions that may be authorised under regulations made under this Part.

Section 164 — Restrictions on use of derivatives

A Crown entity must not enter into a derivative transaction, or amend the terms of that transaction, other than as provided in section 160.

Annex 2

Application of Sections 158 to 164 to Crown Entities and PFA Schedule 4 Organisations

Crown Entities by Category[18]	Monitoring Department	Bank A/cs s 158	Securities s 161	Borrowing s 162	G'tees/Ind 163	Derivatives s 164
Statutory Entities						
Accident Compensation Corporation	DoL	Yes	Exempt	Exempt	Exempt	Exempt
Accounting Standards Review Board	MED	Yes	Yes	Yes	Yes	Yes
Alcohol Advisory Council of New Zealand	MoH	Yes	Yes	Yes	Yes	Yes
Arts Council of New Zealand Toi Aotearoa	MCH	Yes	Yes	Yes	Yes	Yes
Broadcasting Commission (New Zealand On Air)	MCH	Yes	Yes	Yes	Yes	Yes
Broadcasting Standards Authority	MCH	Yes	Yes	Yes	Yes	Yes
Career Services	MoE	Yes	Yes	Yes	Yes	Yes
Charities Commission	DIA	Yes	Yes	Yes	Yes	Yes
Children's Commissioner	MSD	Yes	Yes	Yes	Yes	Yes
Civil Aviation Authority of New Zealand	MoT	Yes	Yes	Yes	Yes	Yes
Commerce Commission	MED	Yes	Yes	Yes	Yes	Yes
Crown Health Financing Agency	MoH	Yes	Yes	Yes	Yes	Yes
District health boards (21)	MoH	Yes	P/A	Yes	Yes	Yes
Earthquake Commission	Tsy	Yes	Exempt	Exempt	Exempt	Exempt
Electoral Commission	MoJ	Yes	Yes	Yes	Yes	Yes
Electricity Commission	MED	Yes	Yes	Yes	Yes	Yes
Energy Efficiency and Conservation Authority	MfE	Yes	Yes	Yes	Yes	Yes
Environmental Risk Management Authority	MfE	Yes	Yes	Yes	Yes	Yes
Families Commission	MSD	Yes	Yes	Yes	Yes	Yes
Foundation for Research, Science & Technology	MoRST	Yes	Yes	Yes	Yes	Yes
Government Superannuation Fund Authority	Tsy	Yes	Exempt	Exempt	Exempt	Exempt
Guardians of New Zealand Superannuation	Tsy	Yes	P/A	P/A	P/A	P/A
Health and Disability Commissioner	MoH	Yes	Yes	Yes	Yes	Yes
Health Research Council of New Zealand	MoH	Yes	Yes	Yes	Yes	Yes
Health Sponsorship Council	MoH	Yes	Yes	Yes	Yes	Yes
Housing New Zealand Corporation *	DBH	Yes	Yes	Yes	Yes	Yes
Human Rights Commission	MoJ	Yes	Yes	Yes	Yes	Yes
Land Transport New Zealand	MoT	Yes	Yes	Yes	Yes	Yes
Law Commission	MoJ	Yes	Yes	Yes	Yes	Yes
Legal Services Agency	MoJ	Yes	Yes	Yes	Yes	Yes
Maritime New Zealand	MoT	Yes	Yes	Yes	Yes	Yes
Mental Health Commission	MoH	Yes	Yes	Yes	Yes	Yes

[18] Asterisked Crown entities are monitored by one or more departments other than that indicated in this table.

Crown Entities by Category (continued)	Monitoring Department	Bank A/cs s 158	Securities s 161	Borrowing s 162	G'tees/Ind 163	Derivatives s 164
Museum of New Zealand Te Papa Tongarewa Board	MCH	Yes	Yes	Yes	Yes	Yes
New Zealand Antarctic Institute	MFAT	Yes	Yes	Yes	Yes	Yes
New Zealand Artificial Limb Board	MSD	Yes	Yes	Yes	Yes	Yes
New Zealand Blood Service	MoH	Yes	Yes	Yes	Yes	Yes
New Zealand Film Commission	MCH	Yes	Yes	Yes	Yes	Yes
New Zealand Fire Service Commission	DIA	Yes	Yes	Yes	Yes	Yes
New Zealand Historic Places Trust (Pouhere Taonga)	MCH	Yes	Yes	Yes	Yes	Yes
New Zealand Lotteries Commission *	CCMAU	Yes	Exempt	Yes	Yes	Yes
New Zealand Qualifications Authority	MoE	Yes	Yes	Yes	Yes	Yes
New Zealand Sports Drug Agency	MCH	Yes	Yes	Yes	Yes	Yes
New Zealand Symphony Orchestra	MCH	Yes	Yes	Yes	Yes	Yes
New Zealand Teachers Council	MoE	Yes	Yes	Yes	Yes	Yes
New Zealand Tourism Board	MED	Yes	Yes	Yes	Yes	Yes
New Zealand Trade and Enterprise	MED	Yes	Yes	Yes	Yes	Yes
Office of Film and Literature Classification	DIA	Yes	Yes	Yes	Yes	Yes
Pharmaceutical Management Agency	MoH	Yes	Yes	Yes	Yes	Yes
Police Complaints Authority	MoJ	Yes	Yes	Yes	Yes	Yes
Privacy Commissioner	MoJ	Yes	Yes	Yes	Yes	Yes
Public Trust *	CCMAU	P/A	Exempt	Exempt	Exempt	Exempt
Retirement Commissioner	MSD	Yes	Yes	Yes	Yes	Yes
Securities Commission	MoJ	Yes	Yes	Yes	Yes	Yes
Social Workers Registration Board	MSD	Yes	Yes	Yes	Yes	Yes
Sport and Recreation New Zealand	MCH	Yes	Yes	Yes	Yes	Yes
Standards Council	MED	Yes	Yes	Yes	Yes	Yes
Takeovers Panel	MED	Yes	Yes	Yes	Yes	Yes
Te Reo Whakapuaki Irirangi (Te Māngai Pāho)	TPK	Yes	Yes	Yes	Yes	Yes
Te Taura Whiri i te Reo Māori (Māori Language Commission)	TPK	Yes	Yes	Yes	Yes	Yes
Tertiary Education Commission	MoE	Yes	Yes	Yes	Yes	Yes
Testing Laboratory Registration Council	MED	Yes	Yes	Yes	Yes	Yes
Transit New Zealand	MoT	Yes	Yes	Yes	Yes	Yes
Transport Accident Investigation Commission	MoT	Yes	Yes	Yes	Yes	Yes
Crown Entity Companies						
Crown research institutes (9) *	CCMAU	Yes	Exempt	Exempt	Exempt	Exempt
New Zealand Venture Investment Fund Limited *	CCMAU	Yes	Exempt	Exempt	Exempt	Yes
Radio New Zealand Limited *	CCMAU	Yes	Yes	Yes	Yes	Yes
Television New Zealand Limited *	CCMAU	Yes	Exempt	Exempt	Exempt	Exempt
School Boards of Trustees and Tertiary Education Institutions						
School boards of trustees (2,474)	MoE	Yes	Yes	Yes	Yes	Yes
Tertiary education institutions (33)	MoE	N/A	N/A	N/A	N/A	N/A

PFA Schedule 4 Organisations	Monitoring Department	Bank A/cs s 158	Securities s 161	Borrowing s 162	G'tees/Ind 163	Derivatives s 164
Agriculture and Marketing Research and Development Trust	MAF	Yes	N/A	N/A	N/A	N/A
Asia New Zealand Foundation	MFAT	Yes	Yes	N/A	N/A	N/A
Fish and game councils (12)	DoC	Yes	Yes	Yes	Yes	Yes
Leadership Development Centre Trust	SSC	Yes	Yes	N/A	N/A	N/A
New Zealand Fish and Game Council	DoC	Yes	Yes	Yes	Yes	Yes
New Zealand Game Bird Habitat Trust Board	DoC	Yes	Yes	Yes	Yes	Yes
New Zealand Government Property Corporation	Tsy	Yes	N/A	N/A	N/A	N/A
New Zealand Lottery Grants Board	DIA	Yes	N/A	N/A	N/A	N/A
Ngai Tahu Ancillary Claims Trust	MoJ	Yes	N/A	N/A	N/A	N/A
Pacific Co-operation Foundation	MFAT	Yes	Yes	N/A	N/A	N/A
Pacific Islands Business Development Trust	PIA	Yes	N/A	N/A	N/A	N/A
Reserves boards (24)	DoC	Yes	Yes	Yes	Yes	Yes
Road Safety Trust	MoT	Yes	N/A	N/A	N/A	N/A

Key

Application of Sections 158 to 164

Yes	indicated provisions apply in full to: • specified Crown entities – by virtue of sections 158 and 161 to 164 of the Crown Entities Act 2004, and • specified organisations named or described in Schedule 4 of the Public Finance Act 1989 – by virtue of sections 45M(1) and 45N(1) of that Act or, in the case of section 161, the deeds of three trusts and section 36 of the Public Finance Amendment Act 2004.
Exempt	exemption from indicated provisions granted in Schedule 1 (statutory entities) or Schedule 2 (Crown entity companies) of the Crown Entities Act, in which case the Crown entity's own Act or other accountability arrangements apply.
P/A	application of indicated provisions is explicitly modified by the Crown entity's own Act (see Annex 3).
N/A	indicated provisions do not apply to: • tertiary education institutions – by virtue of section 6 and Schedule 4 of the Crown Entities Act and Schedule 13A of the Education Act 1989, or • specified organisations named or described Schedule 4 of the Public Finance Act – by virtue of section 45N(1) of that Act (not being ticked in Schedule 4).

Monitoring Departments

DBH	Department of Building and Housing	MoH	Ministry of Health
DoC	Department of Conservation	MoJ	Ministry of Justice
DIA	Department of Internal Affairs	TPK	Ministry of Māori Development (Te Puni Kōkiri)
DoL	Department of Labour	MPIA	Ministry of Pacific Island Affairs
MAF	Ministry of Agriculture and Forestry	MoRST	Ministry of Research, Science and Technology
MCH	Ministry for Culture and Heritage	MSD	Ministry of Social Development
MED	Ministry of Economic Development	MoT	Ministry of Transport
MoE	Ministry of Education	SSC	State Services Commission
MfE	Ministry for the Environment	Tsy	The Treasury
MFAT	Ministry of Foreign Affairs and Trade	CCMAU	Crown Company Monitoring Advisory Unit

Annex 3

Financial Powers Provisions in Crown Entities' Acts

Provisions in Crown entities' own Acts that prevail over or modify application of specified financial powers and related provisions in the Crown Entities Act 2004 (sections 96, 100 and 158 to 164) and the Crown Entities (Financial Powers) Regulations 2005 are itemised below. This table is indicative only. Reference should be made to the entities' Acts for details. [19]

Crown Entities	Entity's Act Provision	Crown Entities Act Provision
Accident Compensation Corporation	Section 275(4), Injury, Prevention, Rehabilitation and Compensation Act 2001 (IPRC Act)	Section 100 does not apply to an investment made under section 275, IPRC Act.
Crown research institutes (CRIs)	Sections 10A(3)(d) and 12(4), Crown Research Institutes Act 1992	Section 100 does not apply to CRIs or their Crown entity subsidiaries.
District health boards	Section 28(4) and (5), New Zealand Public Health and Disability Act 2000 (NZPHD Act)	Sections 96 and 100 do not apply. Section 161 applies except in relation to acquisition of securities covered by section 28, NZPHD Act.
Earthquake Commission	Section 13(5), Earthquake Commission Act 1993	Section 100 does not apply to an investment that is part of the Natural Disaster Fund.
Government Superannuation Fund Authority	Section 15B(8), Government Superannuation Fund Act 1956 (GSF Act)	Sections 100 and 161 do not prevail over section 15B(5), GSF Act in relation to acquisition of shares or other securities.
Guardians of New Zealand Superannuation	Section 49(3), New Zealand Superannuation and Retirement Income Act 2001	Sections 100 and 160 to 164 do not apply to the Guardians in relation to the New Zealand Superannuation Fund.
Public Trust	Sections 6(4) and 36(1), Public Trust Act 2001 (PT Act)	Section 100 does not apply in relation to Public Trust's power to invest any estate money or settle a trust. Section 158 applies only in respect of its funds under section 35, PT Act.
Tertiary education institutions (TEIs)	Schedule 13A, Education Act 1989 (and Schedule 4, Crown Entities Act 2004)	Sections 96, 100 and 158 to 164 are not listed and therefore do not apply to TEIs or their Crown entity subsidiaries.

[19] The table excludes financial powers retained in entities' Acts that do not explicitly reference a provision in the Crown Entities Act.

References

Legislation, Regulations and Financial Powers

The following references are available as pdf files at http://www.treasury.govt.nz/crownentities/:

- Crown Entities Act 2004, No. 115 (as assented on 21 December 2004)
- Crown Entities (Financial Powers) Regulations 2005, 2005/68 (as assented on 21 March 2005)
- Table indicating application of sections 158 to 164, 96 and 100 of the Crown Entities Act 2004 to individual Crown entities and Schedule 4 organisations (a fuller version of Annex 2)
- Table identifying gazetted Ministerial approvals under sections 158 and 160 of the Crown Entities Act 2004

Crown Entities Act 2004, Continuing Legal Education Intensive, New Zealand Law Society, April 2005 – especially Chapter 3, Funding, Accountability and Financial Management (pp 52-61 on financial powers provisions)

Other References

Guidance on SSC's website available through http://www.crownentities.ssc.govt.nz:

- *Planning and Managing for Results: Guidance for Crown Entities*, September 2005
- *Preparing the 2006/07 Statement of Intent: Guidance and Requirements*, September 2005
- *Integrity and Conduct: Setting Standards for Crown Entities*, April 2005 (a discussion document)
- Letter to Statutory Crown Entities on the Crown Entities Act: expectations of the Ministers of State Services and Finance, 17 December 2004
- *Board Appointment and Induction Guidelines*, August 1999 [new edition in preparation]

Cabinet Office circulars available at http://www.dpmc.govt.nz/cabinet/circulars/index.html:

- CO (03) 4, Fees Framework for Members of Statutory and Other Bodies Appointed by the Crown, 1 July 2003
- CO (02) 16, Government Appointments: Increasing Diversity of Board Membership, 15 November 2002
- CO (99) 13, Ministers' Roles and Responsibilities in Relation to Crown Entities, 24 August 1999 [updated version in preparation]
- CO (99) 12, Guidance for Members of Statutory, Commercial and Other Bodies Appointed by the Crown, 23 August 1999

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