

Report & Resource Kit

Offshore Education: Minimum Regulatory Requirements, Including Quality Assurance Measures

Prepared for Education New Zealand

by

**Vince Catherwood
Vince Catherwood & Associates Ltd
13 Seaview Terrace
Northland
Wellington
New Zealand
Ph 64-4-475 3269
E-mail: vincec@xtra.co.nz**

30 June 2006

Table of Contents

| | |
|---|----|
| Introduction..... | 3 |
| Background..... | 3 |
| Terms of Reference..... | 3 |
| Methodology..... | 3 |
| General Overview..... | 4 |
| Preamble..... | 4 |
| Offshore Education..... | 4 |
| Policy..... | 6 |
| Jurisdiction..... | 6 |
| Scope of these Guidelines..... | 7 |
| Quality Assurance..... | 8 |
| Quality Assurance of School Education..... | 8 |
| Quality Assurance of Tertiary Education..... | 11 |
| PTEs, GTEs, Wananga and Unitec..... | 15 |
| Institutes of Technology and Polytechnics (ITPs)..... | 16 |
| Universities..... | 17 |
| Financial Obligations..... | 24 |
| Schools..... | 24 |
| State Tertiary Education Institutions..... | 25 |
| Registered Private Training Establishments..... | 26 |
| Annexes..... | 29 |
| Annex 1: Terms of Reference..... | 29 |
| Annex 2: List of People Consulted..... | 30 |
| Annex 3: Schools' Financial Powers..... | 31 |
| Annex 4: Boards of Trustees and Quasi-Commercial Activities: Impact of Crown Entities Act 2004..... | 49 |

Introduction

Background

The Export Education Innovation Programme (EEIP) was launched by the Minister of Education in 2004 and is administered by Education New Zealand. The EEIP is an initiative aimed at further developing the New Zealand export education industry as a world class and innovative provider of education overseas, and is designed to encourage educational institutions to develop offshore education opportunities and partnerships with overseas institutions and organisations. This approach is designed to promote internationalisation within New Zealand institutions and to expand the opportunities for better links between the export education industry and overseas providers.

The EEIP Advisory Board is seeking information on whether the EEIP Programme can assist in helping bridge any deficit/gap between current minimum requirements and what institutions should be doing as part of good practice. This brief research assignment has been commissioned by Education New Zealand to assist in meeting that objective.

The research has been undertaken by Vince Catherwood of Vince Catherwood & Associates Ltd., a Wellington-based education management consultancy firm.

Terms of Reference

The objective of this assignment was to map the current New Zealand regulatory requirements, including quality assurance measures and financial obligations, that apply to New Zealand's offshore education, including distance education and internet based courses.

The full terms of reference are set out in Annex 1.

Methodology

The basis of the methodology adopted was a literature search and consultation (either by face-to-face interviews, telephone, or email) with key selected stakeholders. A list of people consulted is included as Annex 2. The stakeholders included the following:

- Ministry of Education
- Tertiary Advisory Monitoring Unit
- New Zealand Qualifications Authority
- Tertiary Education Commission
- New Zealand Vice-Chancellors' Committee
- New Zealand Universities Academic Audit Unit
- Institutes of Technology and Polytechnics Quality
- Education Review Office

General Overview

Preamble

There are a number of issues surrounding delivery of offshore education by New Zealand providers which are complex and not easily resolved. It was not the intention of this research exercise to comment on matters of policy development or to identify areas where policy is either silent, unclear, or could be further developed.

Rather, the intention has been to describe the current New Zealand legislative and regulatory environment that applies to education institutions and establishments delivering offshore education, and to identify the existing operating guidelines (with respect to quality assurance and financial obligations) provided by central education agencies to provide guidance for those New Zealand education institutions that are seeking entry to this field.

Nevertheless, some brief initial overview comments to describe the “territory” are appropriate.

Offshore Education

An important caveat is that the regulations and guidelines that apply to “offshore education” may depend on what is included and excluded within that term.

The working definition of “offshore education” that has been adopted is the definition employed in the earlier research conducted by Vince Catherwood and Lester Taylor for Education New Zealand¹.

“Offshore education is an area of growing importance. The core of offshore education denotes any teaching or learning activity in which the students are in a different country (the host country) from that in which the institution providing the education is based (the home country). This situation requires that national boundaries be crossed by information about the education, and by staff and/or educational materials (whether the information and the materials travel by mail, computer network, radio or television broadcast, or other means). Offshore education is not restricted to these services, since the term is also interpreted to cover associated activities such as consultancy services and trade in educational “products” like learning materials or educational software.

Offshore education is a component of “export education”. The World Trade Organisation (WTO) General Agreement on Trade in Services (GATS), APEC and other international bodies use four classifications of “export education”:

¹ *Offshore Education Stocktake and Analysis*, (prepared for Education New Zealand as part of the Export Education Innovation Programme), Vince Catherwood & Lester Taylor, November 2005.

- (a) consumption abroad (in which the student moves to the country of the supplier to receive education, such as an international student studying in New Zealand);
- (b) cross-border supply (or distance education) (in which an educational service is provided across borders but without the movement internationally of either student or teacher, such as an international student enrolled in a correspondence or distance course through a New Zealand provider, but studying from his or her home country);
- (c) commercial presence (in which the provider establishes a presence in the country in which the student resides, for example through a twinning programme or establishment of an offshore campus);
- (d) Presence of natural persons (in which the educator moves to the country of residence of the student to provide the service).

*In practice, these types of services are often combined. For example, twinning programmes normally involve elements of both “commercial presence” offshore and some “consumption abroad”. There may also be an element of provision via distance education (over the internet, or by traditional correspondence learning), and/or staff from the provider country may travel to the student’s country to deliver components of the programme, to assure quality in some of the course, or to provide advice. **“Offshore education” is used here as a short-hand term to encompass all modes of delivery and provision of education services (and combinations of these) where the student or intended audience is outside New Zealand.***

It is acknowledged that terminology used internationally to refer to what is called in this report “offshore education” has not been standardised. Various other terms such as “transnational education” or “cross-border education” are used in the literature to refer to what is broadly described here as “offshore education”. “Offshore education”, as used in this report, is taken to exclude student exchange programmes and research, both of which are activities sometimes conducted outside New Zealand’s shores and which could possibly be included within the scope of “offshore education”. The terms of reference for this assignment also require consideration of distance education and delivery of education through the internet, which arguably might not be considered part of “offshore education”. Distance education is excluded from say, “transnational education”, at least as this term is defined in Australia.

The key point is that the issue of defining “offshore education” is not purely semantic. The scope of what institutions and establishments may or may not legally or practically do outside New Zealand’s shores may depend upon the particular nature of the educational activity that is considered to fall within the definition of “offshore education”.

In order to manage the assignment, this research has focused upon the delivery of New Zealand formal educational qualifications by New Zealand providers outside New Zealand’s shores.

Policy

The policy of the Ministry of Education with respect to offshore education is that the New Zealand legislative provisions, as set out in relevant legislation, apply.

In general, legislation (including the Education Act 1989) is silent about delivery of offshore education, and, since no specific prohibition of delivery of offshore education exists, it can be supported in a guarded way. Legislation such as the recent Crown Entities Act 2004, however, does place some restrictions on certain categories of education providers such as schools. (These issues are discussed in more detail in the section on Financial Obligations later in this report).

Relevant policy statements issued by the Ministry of Education include the following:

Export Education in New Zealand: A Strategic Approach to Developing the Sector, August 2001

Export Education Innovation Programme: Strategic Overview and Operational Guidelines, November 2004

Jurisdiction

It is also important to note that the scope of this research is confined to New Zealand's legislative and regulatory requirements, which apply to New Zealand educational providers.

The New Zealand Qualifications Authority stipulates that there are requirements that New Zealand providers (for which NZQA has jurisdiction) must abide by. These requirements are governed by New Zealand's legislation. Universities (over which the New Zealand Vice-Chancellors' Committee has oversight, in lieu of NZQA) are also subject to New Zealand legislation.

A New Zealand institution or establishment that is delivering education offshore in another country is also subject to that other country's legislative and regulatory environment. This research does not attempt to map the legislative and regulatory environment in all the other countries of the world where New Zealand providers could potentially deliver offshore education. These requirements, however, cannot be ignored.

In international law, the principle of territoriality means that New Zealand laws apply within New Zealand, but in another country that country's laws will apply.

The New Zealand Qualifications Authority notes that there are in-country requirements overseas that must be followed, and that these requirements differ in each specific country. It is an NZQA requirement that a New Zealand education provider must meet the legal and regulatory requirements of the country in which the offshore education is being delivered. New Zealand education providers include state

education institutions, registered Private Training Establishments (PTEs), or Government Training Establishments (GTEs).

Education providers seeking to deliver education offshore are therefore urged to seek their own legal advice that is specific to the country in which they are contemplating delivery of programmes. There are many dimensions on which legal advice may be required. These dimensions may include aspects such as education law, employment law, contract law, property law, taxation law, management of finance, repatriation of funds, permitted and proscribed activities, and so on.

Scope of these Guidelines

These guidelines consider offshore education in relation to two broad sectors of the education system (the compulsory schools sector, and the tertiary education sector), and in relation to the different categories of education institutions and establishments within those sectors.

The Early Childhood Education sector has not been considered. There is (as yet) no apparent evidence of any New Zealand early childhood establishment seeking to deliver early childhood education offshore.

Quality Assurance

“Quality assurance” in the education sector is an ongoing process to ensure the delivery of agreed standards of education. The process of quality assurance uses evidence to check that goals are being achieved, and that objectives and practices are being reshaped to bring about improvement. Meaningful quality assurance is based on documented standards and best practice; the often-quoted yardstick is “fitness for purpose”.

UNESCO, in Article 11 of the World Declaration of Higher Education, notes that

“Quality in higher education is a multidimensional concept, which should embrace all its functions, and activities: teaching and academic programmes, research and scholarship, staffing, students, buildings, faculties, equipment, services to the community and the academic environment. ... [It] also requires that higher education should be characterised by its international dimension: exchange of knowledge, interactive networking, mobility of teachers and students, and international research projects, while taking into account the national cultural values and circumstances.”

Quality Assurance for the Pastoral Care of International Students

The Ministry of Education operates a Code of Practice for the Pastoral Care of International Students. This code applies to international students enrolled onshore in New Zealand educational institutions. The Code (introduced in October 2002) provides a framework for delivery of pastoral care, accommodation and provision of information by education providers and their agents to international students. It sets out minimum standards of advice and care that are expected of education providers. All education providers that enrol international students must be signatories to the Code. The Code can be viewed on the Ministry's website at:

www.minedu.govt.nz/goto/international.

Signatories, however, are not required to apply the Code in relation to international students whose study is carried on outside New Zealand (offshore).

Quality Assurance of School Education

General Overview

In the compulsory schools sector, the Ministry of Education sets national standards and the Education Review Office has responsibility for monitoring that these standards are achieved.

The Ministry of Education is responsible for setting standards for the schools system through its administration of the various empowering provisions of the Education Act

1989 (which incorporates subsequent amendments such as the Education Standards Act 2001). These standards include matters such as the National Education Guidelines (governing the school curriculum), the National Administration Guidelines, standards for governance and management of schools, and standards for teacher registration. Other legislation such as the Public Finance Act and the Crown Entities Act 2004 also has relevance in respect of financial matters.

The Education Review Office (ERO) (www.ero.govt.nz) oversees quality assurance of school education. ERO reports on the education and care of students in primary and secondary schools, and early childhood centres. It carries out reviews of individual schools and early childhood centres, home-based education reviews, cluster reviews of schools and early childhood centres, and national evaluations of education issues. ERO reports on individual schools and centres are freely available to the public.

The New Zealand Qualifications Authority (NZQA) (www.nzqa.govt.nz) sets and regularly reviews standards as they relate to qualifications, administers national examinations, and approves courses that are mainly or wholly for international students in schools.

The New Zealand Teachers Council (www.teacherscouncil.govt.nz) registers teachers, renews their practicing certificates and approves teacher education programmes that lead to registration. All state and private schools and kindergartens employ only teachers with a current practising certificate, or a limited authority to teach.

Offshore Education

The Education Act 1989 is generally silent with respect to the provision of offshore education by schools.

The Education Review Office, as part of its regular reviews of schools, will ask schools about their enrolment of international students. The response to this question will reveal whether or not international students are enrolled onshore or offshore.

The Education Review Office advises that there is no New Zealand legal authority permitting the establishment of a school overseas. The situation is less clear if an education provider structures its affairs so that it is seen as a domestic provider operating a classroom overseas.

If a school is found to be offering what may be considered “offshore education”, the Education Review Office will examine its operation in the light of current legislation. The relevant legislation includes Section 61 of the Education Act 1989 dealing with the school charter. Section 61 (3) (a) (i) specifies that a school charter must contain a section that includes the aim of developing, for the school, policies and practices that reflect New Zealand’s cultural diversity and the unique position of the Maori culture. The school would need to justify that provision of any offshore education is “meeting New Zealand’s cultural diversity”.

Another relevant part of the legislation for school boards of trustees is Schedule 6 of the Education Act 1989, dealing with other provisions applying to Boards. A Board (and not the school) is a body corporate. Schedule 6 specifies the things that a Board may do. It may do anything authorised by the Education Act 1989, or anything that a natural person of full age and capacity may do, for the purpose of performing its functions, provided it is not contrary to, or outside the authority of, any other Act. These provisions allow reasonably wide scope to Boards of Trustees and do not appear to prohibit delivery of offshore education.

The situation with respect to financial powers of schools is dealt with in a following section of this report. There are implications for the financial powers that schools may exercise overseas as a result of the passage of the Crown Entities Act 2004, including some restrictions that may have downstream implications for joint ventures with overseas partners.

Section 327 of the Education Act 1989 allows the Education Review Office to conduct inspections and inquiries of an applicable organisation, at any reasonable time and having given reasonable notice, for the purposes of enabling any functions of the Chief Review Officer to be performed. The Education Review Office could use this legislative provision to investigate a school's provision of offshore education if it had reason to do so.

As one example of current practice, the following description is published on the website of Marlborough Boys' College.

“Marlborough Boys' College of Blenheim, New Zealand and Changzhou International School of Changzhou, Peoples' Republic of China have forged a special relationship. These two schools have outstanding academic, sporting and cultural records. The campus in Changzhou enables students to gain New Zealand qualifications that should gain them entry to tertiary education in New Zealand and in Australia and allow further seamless progression into international vocations and study. The facilities on offer at Changzhou are world class. The classrooms are modern and well-equipped. The air-conditioned environment facilitates effective learning.”

Reference is made on the school website to two experienced teachers (one with prior teaching experience at Marlborough Boys' College and one who taught previously at Marlborough Girls' College) who are responsible for the planning and teaching at the International Campus at the Changzhou International School.

In its review of Marlborough Boys' College in June 2004, the Education Review Office commented that Marlborough Boys' College was a signatory to the *Code of Practice for the Pastoral Care of International Students* (the Code). As part of its review, ERO evaluated the extent to which Marlborough Boys' College had implemented the Code and in particular its compliance with the sections relating to student welfare and accommodation. It noted that the college was unique in that it had a campus at Changzhou International School in China. In June 2004 there were five boys from this campus attending Marlborough Boys' College. They all considered

that prior attendance at Changzhou International School had assisted them to settle into the college both socially and academically.

Quality Assurance of Tertiary Education

General Overview

There is no specific legislative clause in the Education Act 1989 prohibiting the delivery of New Zealand tertiary education qualifications overseas. As in the schools sector, the Education Act 1989 is generally silent with respect to the provision of offshore education by tertiary education providers.

The general provisions of the Education Act 1989 apply, particularly as set out in Part XV (Administration of Tertiary Institutions), Part XVI (Courses and Students), and Part XVIII (Private Training Establishments).

However, the following sections of the Education Act 1989 may have more particular relevance to any arrangements for provision of offshore education:

- Section 184, dealing with an institution's charter;
- Section 191A, dealing with an institution's profile;
- Section 192, (especially subsection 2), dealing with Powers of Institutions;
- Section 193, dealing with Powers of Councils;
- Section 200, dealing with Bank Accounts;
- Section 201A, dealing with How Institutions May Use Income and Capital;
- Section 202, dealing with Application of Money; and
- Section 203, dealing with the Application of the Public Finance Act 1989;
- Section 228, dealing with Fees for Foreign Students;
- Section 232, dealing with Courses for Foreign Students to be Quality Assured Unless Exempt;
- Section 258, dealing with Approval of Courses; and
- Section 259, dealing with Accreditation of Institutions or Private Training Establishments as Providers of Approved Courses.

The Tertiary Education Commission (TEC) advises that any tertiary education organisation that was considering delivering education offshore would have to include this initiative in their charter and profile, and that TEC would need to seriously consider how this initiative might impact on their overall provision with respect to quality, relevance, and so on, on a case by case basis.

Financial obligations of tertiary education providers are dealt with in more detail in a subsequent section of this report.

In the tertiary education sector, there are two main external quality assurance bodies with responsibility for monitoring quality: the New Zealand Qualifications Authority (NZQA) and the New Zealand Vice-Chancellors' Committee (NZVCC).

NZQA has delegated authority for the approval and accreditation of polytechnics and institute of technology courses at undergraduate degree, diploma and certificate levels to the Institutes of Technology and Polytechnics Quality (www.itpq.ac.nz).

Within that context, autonomous tertiary education institutions are primarily responsible for maintaining their own standards of quality.

Quality assurance of tertiary education in New Zealand focuses on the quality of learning outcomes recognised through qualifications as a whole, and also on the systems and processes that support quality delivery by providers.

Only those tertiary qualifications and providers that are quality assured by a quality assurance body are eligible for Government financial assistance. Quality assurance bodies decide whether providers and qualification developers meet appropriate standards.

UNESCO and the OECD have collaborated on the development of *Guidelines for Quality Provision in Cross-Border Higher Education*, Paris, 2005. These guidelines provide guidance for governments, for higher education institutions, for student bodies, for quality assurance and accreditation bodies, for academic recognition bodies, and for professional bodies. While these guidelines are voluntary and non-binding, they do provide a source of useful advice to support and encourage international co-operation and to enhance the understanding of quality provision in cross-border higher education. The text of these guidelines may be found at <http://www.oecd.org/dataoecd/27/51/35779480.pdf>

Gazetted Criteria

The formal criteria for the approval and accreditation of all courses were gazetted (published in the New Zealand Gazette) by the Qualifications Authority in December 2002, pursuant to section 253 (3) of the Education Act 1989.

The formally gazetted criteria for the approval and accreditation of all courses are set out in full in the two following NZQA publications (available at <http://www.nzqa.govt.nz/for-providers/aaa/course-approval.html>:)

Approval and Accreditation of Courses Leading to Degrees and Related Qualifications 2003; and

Criteria, Requirements and Guidelines for Course Approval and Accreditation, 2003 (for non-degree courses)

Institutions and Private Training Establishments need to meet these criteria in order to be accredited and to deliver approved courses. In summary, the criteria deal with the following:

- Title, aims, learning outcomes and coherence (the adequacy and appropriateness of the title, aims, stated learning outcomes and coherence of the whole course);
- Delivery and Learning Methods (the adequacy and appropriateness of delivery and learning methods, for all modes of delivery, given the stated learning outcomes);
- Assessment (the adequacy of the means of ensuring that assessment procedures are fair, valid, consistent and appropriate, given the stated learning outcomes);
- Acceptability of the course (the acceptability of the proposed course to the relevant academic, industrial, professional and other communities, in terms of its stated aims and learning outcomes, nomenclature, content and structure);
- Regulations (the adequacy and appropriateness of the regulations that specify requirements for admission, credit for previous study, recognition of prior learning, course length and structure, integration of practical/work-based components, assessment procedures, and normal progression within a course);
- Resources (the capacity of the organisation to support sustained delivery of the course, in all delivery modes, with regard to appropriate academic staffing, teaching facilities, physical resources, and support services);
- Evaluation and Review (the adequacy and effectiveness of the provision for evaluation and review of courses: for monitoring the on-going relevance of learning outcomes, course delivery and course standards; for reviewing course regulations and content; for monitoring improvement following evaluation and review; and for determining whether the course shall continue to be offered);
- Research (the adequacy of provision of research facilities and support of staff involved in research, the levels of research activity of staff involved in the course and of ways by which the research-teaching links are made in the curriculum).

Institutions and Private Training Establishments will need to check the appropriate NZQA documentation to determine the application of relevant criteria for their purposes, and also to consider the detail of the NZQA requirements that accompany the criteria. The criteria differ, depending on whether accreditation and approval is sought, approval only, or accreditation only. Some criteria apply only to higher level courses such as degrees. There are also separate criteria and requirements for approval and accreditation of courses leading to doctoral qualifications.

Consultation is currently (June 2006) under way on a proposed change to the gazetted criteria for course approvals and accreditation.

Collaborative Arrangements

NZQA has published a policy document entitled *Principles and Parameters for Agreements Between Tertiary Education Providers Involved in Collaborative Arrangements November 2005*. The document is available from the NZQA website at <http://www.nzqa.govt.nz/for-providers/aaa/resources.html>

The guidelines are predicated on quality assurance arrangements under the Education Act 1989 entered into by a New Zealand tertiary education provider (excluding universities) either in New Zealand or overseas. They are a useful adjunct to current quality assurance standards and practice. They provide additional assurance regarding contracting and formal collaborative arrangements between tertiary education providers, and serve to further protect the interests of learners. The application of the policy is, in the first instance, the responsibility of providers. The quality assurance bodies will ensure that this is occurring through the usual processes of registration, course approval, accreditation and quality audit effective from mid 2006. From 1 July 2006, NZQA expects that any collaborative arrangements between tertiary education providers (excluding universities) will reflect the principles and parameters set out in this policy document.

Since most offshore education delivered by New Zealand's tertiary education institutions is managed in collaboration with a joint venture partner, these guidelines provide substantial and helpful guidance regarding the terms and operation of memoranda of understanding, memoranda of agreement, or memoranda of practice.

Offshore Education

The two formal NZQA documents dealing with approval and accreditation (cited above) include advice about the delivery and awarding of New Zealand qualifications overseas.

NZQA notes that with the demand for quality education and training outcomes outstripping supply in many overseas countries, there is growing interest in New Zealand qualifications. The Qualifications Authority is concerned for the reputation of New Zealand qualifications to be maintained, regardless of whether they are delivered in New Zealand or overseas.

Additional information requirements apply to New Zealand providers offering approved qualifications overseas as either stand-alone or joint ventures. Such arrangements to offer any Qualifications Authority approved qualification overseas require separate, site-specific accreditation.

NZQA is progressively developing formal agreements between relevant overseas accreditation bodies and NZQA. Such agreements would reflect the following:

1. An overseas accreditation body would check with
 - NZQA, in respect of NZQA approved qualifications and accredited providers; or
 - the Committee on University Academic Programmes (CUAP), in respect of New Zealand university qualifications.

that the relevant quality assurance requirements and standards had been met before accrediting a new joint venture involving a New Zealand qualification or provider.

2. The overseas body would, at least annually, advise NZQA and the Committee on University Academic Programmes (CUAP) (where

necessary) on the body's perceptions of the quality of New Zealand joint ventures entered into pursuant to the formal agreements.

Any organisation considering delivering a course or courses overseas, needs to contact the Manager Course Approvals and Accreditation at aaaoverseas@nzqa.govt.nz to get detailed information about what is required.

NZQA is using draft guidelines on a trial basis during 2006 to assist staff and evaluators of the NZQA and its delegated agent, ITP Quality, as they consider applications for approval and accreditation involving overseas delivery. The guidelines are entitled *Draft Quality Assurance of the Overseas Delivery and Awarding of Approved Courses and Registered Qualifications*. These operational guidelines supersede the advice contained in the 2003 NZQA publications cited above about the delivery and awarding of New Zealand qualifications overseas.

These draft guidelines have not been published, since the review of the formally gazetted criteria for approval and accreditation may lead to a requirement for changes to the draft document to be made later in 2006. The document would be provided on request by NZQA to any provider that approached NZQA and indicated it was intending to offer qualifications overseas. In order to provide a context, and to ensure appropriate discussion with any provider intending to deliver courses overseas, NZQA prefers at this stage not to make the draft guidelines generally available, but to encourage providers to approach it directly (as indicated above).

NZQA is willing for these Guidelines to be made available to Education New Zealand and to its EEIP Advisory Board on a confidential basis. They are attached in a separate Confidential Annex 5 (not for general publication) with this report.

PTEs, GTEs, Wananga and Unitec

NZQA registers private education providers and recommends the approval of government training establishments to the Minister of Education. It also manages quality assurance arrangements for wananga and for Unitec Institute of Technology. It accredits and audits educational institutions and other registered learning establishments that offer approved courses and award credit for registered qualifications. It also accredits industry training organisations to register workplace assessors. All registered education providers and approved courses and qualifications outside the universities are listed on NZQA's website (www.nzqa.govt.nz).

NZQA also audits those providers for which it has quality assurance responsibilities. An audit verifies the performance of the provider as a whole, their management processes for achieving quality learning, and their success as an education organisation. The quality audit is intended to safeguard the interests of existing and prospective students. The audits are conducted against the *Quality Assurance Standard for PTEs, GTEs and Wananga*, (Quality Assurance Standard One), available at <http://www.nzqa.govt.nz/for-providers/aaa/resources.html>

As part of its regular audits of tertiary education providers, NZQA will ask what education and training was planned and why, what resources and processes were put in place, and will endeavour to ascertain what actually happened, whether the programmes were run as planned and the aims met, what was changed, and why. In the course of an audit, questions would be asked about where international students were enrolled, and whether any offshore delivery occurred. If there were any quality concerns identified, appropriate steps would be taken. The sanctions available to NZQA include increased monitoring, more frequent audits, the setting of conditions, issuing of a compliance notice, or, as an ultimate sanction, withdrawal of approval, accreditation and/or registration.

Institutes of Technology and Polytechnics (ITPs)

As mentioned above, NZQA has delegated authority for the approval and accreditation of polytechnics and institute of technology courses at undergraduate degree, diploma and certificate levels to the Institutes of Technology and Polytechnics Quality (ITP Quality) (www.itpq.ac.nz).

ITPs contemplating offering qualifications offshore should contact the Director ITP Quality or the Manager Degree Programmes in the first instance.

ITP Quality has published two relevant guideline documents:

Guidelines for Polytechnics Applying for Sub-degree Approval and Accreditation
Guidelines for Polytechnics Applying For Degree Approval and Accreditation

These guidelines reflect the quality assurance standards that institutes of technology and polytechnics must meet. They reflect NZQA processes and procedures, and incorporate the formally gazetted criteria.

The sections of these guidelines relating to overseas delivery stipulate that any New Zealand-based provider operating overseas must provide evidence that the overseas operations

- are covered by the provider's quality management system;
- are consistent with the standards of the provider's New Zealand operations;
- comply with legal requirements in the particular country; and
- are acceptable to the relevant education authorities in the particular country.

The following additional information is required for New Zealand providers offering approved qualifications overseas as collaborative, "twinning", franchise or joint venture activities with an overseas provider:

- a statement on the standing of the overseas provider and evidence that this organisation meets appropriate quality and programme management requirements. The requirements must essentially be equivalent to those expected of a New Zealand provider;

- a formal Memorandum of Co-operation between the New Zealand provider and the overseas provider. This must include a detailed outline of processes for the management and award of the qualification for students, including the provisions for the management of students and student results should the proposed arrangement cease to operate;
- details of the quality assurance processes applying to the overseas provider, where appropriate, with respect to the approval, accreditation and monitoring of the particular qualification under consideration.

Monitoring requirements are also set out. Courses delivered overseas that lead to the award of New Zealand qualifications are subject to the same monitoring requirements as courses delivered within New Zealand, and the monitoring process may be extended to meet the requirements of any relevant overseas accreditation body. In addition, where courses are delivered in conjunction with an overseas provider, the monitoring process must include a formal evaluation of the effectiveness of the collaborative arrangements.

A similar approach to that adopted by NZQA is being used by ITP Quality. The draft NZQA Guidelines mentioned above (*Draft Quality Assurance of the Overseas Delivery and Awarding of Approved Courses and Registered Qualifications*) are also being trialled by ITP Quality. These operational guidelines now effectively supersede the part of formal guidelines relating to overseas delivery in the published ITP Quality documents cited above.

ITP Quality undertakes regular quality audits of the institutes of technology and polytechnics that are members of ITP New Zealand. These audits are undertaken against a set of twelve documented standards. Details of the audit policies, procedures guidelines and standards are set out at <http://www.itpq.ac.nz/auditOverview.html>

Although there is no explicit reference to delivery of offshore education in the ITP New Zealand Academic Quality Standards, auditors would assess any offshore education provision against two standards: Standard 2.1 and Standard 7.2. Standard 2.1 deals with the development and review of qualifications and educational programmes, and specifies that an educationally sound, effective process is used for the development, approval and review of all qualifications, programmes and courses associated with the institution. Standard 7.1 deals with programme delivery, and specifies that the institution defines and implements effective teaching and learning practices that are educationally sound, and appropriate to the programme of study and mode of delivery.

Universities

The New Zealand Vice-Chancellors' Committee (NZVCC) (www.nzvcc.ac.nz) provides quality assurance for university qualifications through the Committee on University Academic Programmes (CUAP). This Committee oversees inter-university course approval and moderation procedures, provides advice and comment on academic developments, encourages the coherent and balanced development of curricula, and facilitates cross-crediting between qualifications.

The New Zealand Universities Academic Audit Unit (NZUAAU) established by NZVCC, carries out university academic quality audits, drawing on both New Zealand and international experts.

NZVCC and NZQA use common criteria for the approval and accreditation of degrees (the “gazetted criteria” referred to earlier in this report).

The CUAP Guidelines are published on the NZVCC website at <http://www.nzvcc.ac.nz/default.aspx?l=3&p=1>. The relevant guidelines that apply to overseas delivery are included at Appendix F. The text is as follows:

Qualifications with Significant Contributions from Overseas Institutions

Definition of significant contribution

A significant contribution is one in which the overseas institution contributes one or more of the following:

- the core of a programme
- an entire major subject
- more than 60 credits (0.5 EFTS)

Note: Any papers that are delivered electronically, e.g. via World Wide Web, are considered to be contributions to the programme.

Circumstances in which applications might arise

The following circumstances pertain:

1. A university develops a new qualification and wishes to award it jointly with an overseas institution or institutions.
2. A university wishes to award an existing qualification jointly with an overseas institution or institutions.
3. A university develops a new qualification which will be taught wholly or in part by an overseas institution or institutions.
4. A university makes arrangements for an existing qualification to be taught wholly or in part by an overseas institution or institutions.

In all cases a Memorandum of Understanding (MoU) must be drawn up and signed by all institutions making a significant contribution to the delivery. Only in the case of new qualifications (1 and 3 above) must the MoU be submitted to CUAP, as set out below, as part of the proposals for those qualifications.

Requirements where the qualification is new (1 and 3 above)

A New Zealand university proposing a jointly-awarded qualification with an overseas institution or institutions should provide:

- (a) A statement on the standing of the overseas institution(s) and sufficient information to ensure that CUAP recognises the overseas institution(s) as meeting appropriate quality and programme management requirements, that are essentially equivalent to those expected by a New Zealand university.
- (b) A statement of formal agreement between the New Zealand university and the overseas institution(s), that must include a detailed outline of processes for the management of the qualification and students, including the provisions for the management of students should the proposed arrangement cease to operate.
- (c) Details of the qualification approval and accreditation processes applying to the overseas institution(s) with respect to the particular qualification under consideration.
- (d) A proposal (Sections A and B) outlining the relevant contributions of the institution(s) to the qualification proposed.
- (e) A detailed statement of operational performance and effectiveness, in respect of the qualification, as part of the Graduating Year Review.

CUAP may seek to invoke the Review Panel process, costs to be apportioned equally among the institutions making the application.

CUAP may require further and ongoing monitoring of the arrangement with an overseas institution, depending upon issues raised at the time of programme approval or as a result of a Graduating Year Review.

Requirements where the qualification currently exists (2 and 4 above)

There is no requirement to report to CUAP, but universities must ensure that an appropriate MoU is in place.

The Memorandum of Understanding

An MoU should be between institutions, not between individual departments or staff members.

Preamble

Approval of any New Zealand programme or qualification involving contributions from an international provider is based on the following principles:

1. that the relationship with the partner will not cause damage to the reputation of the individual New Zealand university, or to New Zealand universities as a whole.

2. that the partner has experience in tertiary education, has sufficient resources and has the necessary local legal standing to offer the programme or courses

3. that consideration is given by both parties to the national and local contexts within which the partners are working, including in particular:

- ◆ the local higher education system and the partner institutions' positions in it

- ◆ the statutory requirements governing national and international recognition of awards

- ◆ any relevant professional requirements governing recognition of awards and qualifications (e.g. registration)

- ◆ transfer of credit arrangements

- ◆ portability of the award or qualification

- ◆ local educational tradition and conventions, including practices relating to delivery and assessment

- ◆ local cultural relevance and acceptability of curriculum and modes of delivery

- ◆ copyright and intellectual property protection

- ◆ maintenance of professional and ethical standards which are consistent with those expected in New Zealand.

CUAP requirements

All proposals for programmes or awards to be offered by a New Zealand university and involving participation by an international partner, must satisfy normal CUAP assessment requirements. *In addition*, in the case of a new qualification the universities must confirm the existence of an MoU with the overseas institution which includes the issues outlined in section 17.5.3 below. This part of the MoU must be available to CUAP as part of Section B of the proposal submitted under section 5.1.

Where a New Zealand university has academic collaboration with more than one international institution, whether as partners or through sub-contracting, then an MoU must be agreed to for all partners individually.

The Agreement

Agreement to incorporate courses or programmes from an international provider will be based on a written Memorandum of Understanding which defines the means whereby the quality of the student experience will be assured and the academic standards of the programme maintained, and which ensures that the collaborative arrangements operate smoothly in terms of clear channels of communication, accountability and authority.

There are nine issues to be addressed. The MoU must:

1. Affirm that staff teaching the course or programme are appropriately qualified and have employment conditions which enable them to contribute to the course to a satisfactory New Zealand standard (time availability; professional support etc).
2. Include agreements about availability of required staffing, libraries, equipment and other resources, for both students and staff.
3. Confirm that the international programme and institution comply with local law.
4. Specify any approval already received (and provide documentation on request) from:
 - ◆ any local accrediting agency
 - ◆ any relevant professional body
 - ◆ any other statutory body which has programme approval authority in that country
5. Outline procedures which will be adopted to ensure academic standards appropriate to a New Zealand qualification are met, including in particular:
 - ◆ procedures for initial validation and approval
 - ◆ procedures for monitoring and periodic review
 - ◆ assessment and examination arrangements
 - ◆ responsibility for oversight of the above, and procedures for resolving any difference which might arise between the collaborating institutions
6. Outline procedures which will be adopted to ensure student interests are considered, in particular with respect to:
 - ◆ academic grievance and appeal procedures
 - ◆ means of, and responsibility for, communicating to students any particular requirements of the programme arising out of its collaborative nature
 - ◆ culturally-specific needs in terms of academic practice and access to resources
7. Confirm the financial stability of all partners with respect to their capacity to contribute to the programme.
8. Outline the procedures to be adopted should any of the provisions of the MoU with respect to academic programmes not be met, for whatever reason.
9. Specify the individuals from each institution responsible for oversight of the MoU, with respect to the above academic requirements.

Audit of Universities

Universities are regularly audited by the New Zealand Universities Academic Audit Unit (NZUAAU). Information about the audit processes for universities, the current cycle, and good practice, the approach to auditing New Zealand's universities, and access to reports and other public documents is available at <http://www.aau.ac.nz/>

NZUAAU as part of the regular cycle of audits will ask universities about any offshore delivery of programmes. If there are any quality concerns, these will be followed up. The questions asked cover the following:

- What offshore programmes are offered (including twinning arrangements)?
- A request for a list of courses and/or subjects delivered offshore as university courses or subjects; and
- What quality assurance processes are in place to ensure that the quality of delivery, assessment, student experience, and learning outcome in each subject/course delivered offshore is “equivalent” to the subject/course as delivered to students on the home campus at the university?

As an example, the recent Academic Audit Report of the University of Waikato (Cycle 3, January 2006) included a section on partnerships and offshore teaching. It stated that:

“The University has developed partnership arrangements in which programmes of study are offered by two Chinese universities – Shanghai International Studies University and Zhejiang University City College – providing half of a Waikato degree. The first two years of a degree are taught in China, with credit from the Chinese institutions in courses acceptable to the University of Waikato being transferred to the appropriate degree programme at Waikato. For the last two years of the programme, students transfer to the University of Waikato in New Zealand as international students and complete a Waikato degree. The self-review portfolio contained the October 2004 self-audits (based on the cycle for this Cycle 3 academic audit) of the Chinese programmes. The self-audits provided evidence of appropriate preparation for students transferring to New Zealand, while reports on visits to both institutions by the Deputy Vice-Chancellor (Academic) identified a number of issues in each to be addressed and changes monitored.

The panel was told of intentions to develop the offshore delivery of a complete Waikato degree programme in Vietnam. The panel was pleased to be told by the newly-appointed Pro Vice-Chancellor (International) that a rigorous procedure of programme approval is being developed, along with rigorous protocols and procedures for transnational initiatives. Partnerships and offshore delivery require robust systems including the annual quality monitoring of student performance and satisfaction, the moderation of standards, and the use of retention, attrition and satisfaction survey data. A formal review process related to the review of the contract with the offshore deliverer is also to be developed and the panel strongly supports this.

The panel cannot comment on the appropriateness and probable effectiveness of these protocols and processes as they were still in the developmental stage at the time of the Audit Visit. The panel supports the intention to follow models

already in place in Australian universities that are known to be effective, and expects such protocols and procedures will be adapted to existing partnership arrangements to ensure quality delivery of courses by overseas partners. The University is aware of the need for a careful risk analysis of partnerships with overseas institutions.”

Financial Obligations

Schools and state tertiary education institutions are crown entities, and are therefore required to meet the appropriate requirements set out in legislation with respect to financial obligations. The relevant legislation includes the Education Act 1989, the Public Finance Act 1989 and the Crown Entities Act 2004.

Private Training Establishments (PTEs) are not bound by the same set of legislative requirements that state education providers have to meet with respect to financial obligations, although they are required to meet the requirements of general New Zealand law and the appropriate requirements of the Education Act 1989. They do, however, have to manage their finances prudently in order to stay in business. There are also some financial obligations that registered PTEs must meet if they wish to access government funding and have their courses approved.

Schools

The Education Act 1989 empowers the boards of state and state integrated schools with almost complete discretion in the control and management of the school². These powers are limited to some extent by other provisions in the Education Act, by other legislation, and by the limitations of general law (e.g. the law of torts and contract law). Within the Education Act itself many of the limitations placed on boards relate to financial management. For example, a board is restricted in its ability to borrow money or in its ability to enter into contracts with its trustees.

School boards of trustees are a category of Crown Entity, and expressly subject to specified provisions of the Crown Entities Act 2004³. This Act amended the Education Act by requiring Boards to disclose some of their actions and further clarified or limited many of the financial powers of boards. The key changes in respect of school boards are in relation to:

- restrictions on the operation of bank accounts;
- restrictions on the acquisition of securities;
- restrictions on borrowing;
- restrictions on giving of guarantees and indemnities;
- restrictions on the use of derivatives; and
- gifts

The substantive provisions of these changes are located in the Crown Entities Act, and these provisions have been duplicated in the Education Act for ease of reference by school boards and principals.

The specific requirements of the items above have been described in more detail in Annex 3.

² Education Act 1989 s.75

³ Crown Entities Act s.5 and s.7 and Schedule 3.

Because a school that is contemplating the delivery of offshore education is likely to have to manage financial transactions overseas and negotiate with a joint venture partner, and possibly operate a bank accounts overseas or consider the provision of guarantees for a partner, these requirements of the Crown Entities Act are important.

A further useful resource that provides some advice and guidance about Boards of Trustees and quasi-commercial activities (and specifically on the impact of the Crown Entities Act 2004) is included in the papers from a Law Society seminar on education law⁴. The relevant article is attached as Annex 4.

The Crown Entities Act 2004 and the Crown Entities (Financial Powers) Regulations 2005 are available for download at <http://www.treasury.govt.nz/crownentities/>

State Tertiary Education Institutions

The legislative requirements relating to financial obligations that tertiary education institutions are required to meet are set out in the Education Act 1989, the Public Finance Act 1989 and the Crown Entities Act 2004.

The following sections of the Education Act 1989 are relevant to the financial obligations of tertiary education institutions:

- Section 192, (especially subsection 2), dealing with Powers of Institutions;
- Section 193, dealing with Powers of Councils;
- Sections 195A-195F, dealing with Institutions at Risk;
- Section 200, dealing with Bank Accounts;
- Section 201A, dealing with How Institutions May Use Income and Capital;
- Section 202, dealing with Application of Money;
- Section 203, dealing with the Application of the Public Finance Act 1989; and
- Section 220, dealing with the Annual Report.

There are also requirements for tertiary education institutions set out in the Crown Entities Act 2004, although Schedule 4 of the Crown Entities Act stipulates the list of specific clauses of that Act that they (TEIs) are bound by (and not all clauses apply). Tertiary education institutions are therefore not required to meet all the requirements of the Crown Entities Act 2004, and have more flexibility than do schools in this respect because of the nature of their functions.

Under section 220 of the Education Act 1989, the annual report of each tertiary education institution (including its financial statements) is required to be tabled in Parliament.

⁴ See Papers from a New Zealand Law Society Seminar “Education Law”, May/June 2006. Presenters John Hannan, Paul Rishworth, Patrick Walsh.

The Tertiary Advisory Monitoring Unit (TAMU) of the Ministry of Education monitors the financial performance of tertiary education institutions. TAMU is shortly to be transferred to the Tertiary Education Commission.

The main regulations that TAMU operate within are the intervention criteria (see sections 195A, 195B, 195C and 195D of the Education Act 1989). The TAMU website has the details, although the criteria mainly deal with matters such as requesting information, the appointment of a Crown Observer and the appointment of a Crown Commissioner. TAMU includes a section on the risk assessment criteria at its website at:

<http://www.minedu.govt.nz/index.cfm?layout=document&documentid=4613&CFID=2998316&CFTOKEN=40315701>

TAMU does have some recommended financial guidelines (surplus, cash ratios, etc) but they apply to an institution's whole operation, rather than components such as the New Zealand-based operations or offshore-based operations.

TAMU encourages institutions to approach it for advice when setting up operations or projects offshore, but there is no legal requirement for them to do so. Nor are institutions required to accept TAMU's advice. TAMU would look at any application and assess the risk to both the institution and to the national interest, should the project or proposal fail.

TAMU would also like to ensure the proper use of taxpayer funds to ensure that funds given for providing education to New Zealand residents are not being used or put at risk by providing education offshore. There have been examples of exposure to large possible downside risks in the past as a result of offshore initiatives by tertiary education providers.

Although not formally part of TAMU's guidelines, officers will extend their view of the institution's strategy, and therefore their questioning, by discussing parts of the Education Act with institutions, such as section 181 dealing with the duties of Councils. The relevant clause in that section is the clause to ensure that the institution operates in a financially responsible manner that ensures the efficient use of resources and maintains the institution's long-term viability.

Registered Private Training Establishments

The New Zealand Qualifications Authority requires registered private training establishments to provide information about their financial status in order to gain an assurance that they are able to operate in a financially sound manner throughout any programme in which students are enrolled.

These requirements apply both to private training establishments that are new PTEs seeking to be registered (or that have not previously been registered with NZQA as a private training establishment), and to those establishments that have been in business

for some time and/or have been receiving government funding (and which are required to provide the appropriate financial assurances annually).

Section 236(1)(ba) of the Education Act 1989 requires that the establishment, in the case of an establishment that is not already operational, is likely to have acceptable financial management practices and performance, and in the case of an establishment that is already operational, has acceptable financial management practices and performance.

The assurances requested include an attestation from the private training establishment itself, and a formal professional attestation from a chartered accountant. Forms for the purpose of providing these assurances may be downloaded from the NZQA website at <http://www.nzqa.govt.nz/for-providers/aaa/finreqments.html> These forms must be supplied to the Qualifications Authority with a copy of the annual financial statements as part of the initial application for registration. Providers that have been operational for some time must provide the necessary attestations annually, within three months of the end of the financial year.

Where the Qualifications Authority becomes aware of any circumstances affecting a provider's ability to offer programmes, or has any concerns over an establishment's financial management practices, it will seek further assurance that the provider will be able to rectify those concerns, or is able to continue as a going concern, or will be able to terminate its operations appropriately.

Required Information

Organisations applying for registration must provide the following on application, plus part 2 of Form B:

For a new applicant for registration that has not operated before:

Form A, plus forecast financial statements for the next financial year (including a statement of financial performance, statement of cash flows and a statement of financial position), reviewed by an independent Chartered Accountant, using the attestation in part 1 of Form B.

For a new applicant for registration that has been operational for some time:

Form A, plus either audited financial statements covering the most recent financial year, or where the establishment is not subject to audit, unaudited financial statements covering the most recent financial year, plus forecast financial statements for the next financial year (including a statement of financial performance, statement of cash flows, and statement of financial position), reviewed by an independent Chartered Accountant, using attestation in part 1 of Form B.

Where the financial year end is more than three months before the application date, a set of financial statements covering those three months, attested to by an external independent Chartered Accountant, using attestation in Form B.

Providers that are part of a larger organisation and do not have separate accounting and reporting systems, should supply the consolidated financial statements of the parent organisation.

On-going Monitoring

Providers are required to submit the NZQA forms, plus financial statements, annually and no later than three months from the end of the financial year. The documents will be reviewed by the Quality Auditor and specialist staff within NZQA's Approval Accreditation and Audit Division (AAA). If the returns indicate any issues of potential concern, the provider will be contacted and appropriate actions will be agreed as required. Any agreed actions will be monitored to ensure commitments to actions by the PTE are completed as detailed.

AAA works with the Tertiary Education Commission (TEC) for providers who access government funding, to avoid duplication of compliance requirements.

Code of Practice Requirements

Section 238E of the Education Act 1989 stipulates that a provider may enrol a person as an international student, or continue to have an international student enrolled, so long as the provider is a signatory to the Code of Practice. While the Code of Practice technically does not apply to students who are studying offshore, almost without exception PTEs in New Zealand who are enrolling international students at an offshore campus will also have students enrolled at an onshore campus, and must therefore be signatories to the Code of Practice.

Annexes

Annex 1: Terms of Reference

OFFSHORE EDUCATION MINIMUM REGULATORY REQUIREMENTS, INCLUDING QUALITY ASSURANCE MEASURES

Objective:

The objective of this project is to map the current New Zealand regulatory requirements, including quality assurance measures and financial obligations that apply to New Zealand's offshore education – including distance education and internet based courses.

This will be used as a reference document for Education New Zealand (ENZ), the Export Education Innovation Programme (EEIP) Advisory Body, and educational institutions that are considering entering/engaging in offshore education.

The research will be cross sector (offshore education provided by universities, ITP's, schools and PTE's) and will identify the minimum New Zealand regulatory requirements (inclusive of both legal and central agency requirements) all institutions must undertake when involved in delivering their services offshore.

The purpose of this research is to develop a baseline of minimum requirements, to compare alongside international good practice in offshore education. It is expected that outcomes from consultation with the MoE, NZQA, TEC, NZVCC, ITPQ, TAMU and ERO will contribute to the development of this baseline.

The completed research will inform discussions by the EEIP Advisory Board on whether the EEIP Programme can assist in helping bridge any deficit/gap between current minimum requirements and what institutions should be doing as part of good practice.

Expected Outcomes of the Project:

Upon completion of this research there will be a resource kit available that will assist institutions on the quality assurance strategies and financial considerations required within New Zealand to be undertaken prior to implementing educational service delivery offshore. This kit will be delivered to ENZ for distribution.

Annex 2: List of People Consulted

| Name of Person | Organisation | Position |
|-----------------------|---|---|
| Peter Scanlan | Institutes of Technology and Polytechnics Quality | Director |
| Peter Osborn | Institutes of Technology and Polytechnics Quality | Manager Degree Programmes |
| Angela Werren | New Zealand Vice-Chancellors' Committee | Manager Academic Policy |
| John Jennings | New Zealand Universities Academic Audit Unit | Director |
| Chris Winstanley | New Zealand Qualifications Authority | Group Manager, Approvals, Accreditation and Audit |
| Richard Matthews | New Zealand Qualifications Authority | Adviser |
| Neil Scotts | Ministry of Education | Senior Manager International |
| Brett Parker | Ministry of Education | Senior Policy Analyst, International Division |
| Jan Breakwell | Ministry of Education | Office Solicitor |
| Rob Maclean | Ministry of Education | Chief Business Analyst, Tertiary Advisory Monitoring Unit |
| James Turner | Tertiary Education Commission | Policy Manager |
| Stuart Cambridge | Tertiary Education Commission | Policy Advisor |
| Frances Salt | Education Review Office | National Manager, Reporting Services |
| Mark Canning | Education Review Office | National Manager, Ministerial and Legal Services |
| Shan Pather | Education Review Office | Office Solicitor |

Annex 3: Schools' Financial Powers

Schools' Financial Powers

1.0 Overview

The Education Act 1989 empowers the boards of state and state integrated schools with almost complete discretion in the control and management of the school⁵. These powers are limited to some extent by other provisions in the Education Act, by other legislation and by the limitations of general law (e.g. the law of torts and contract law). Within the Education Act itself many of the limitations placed on boards relate to financial management, for example a board's ability to borrow money or its ability to enter into contracts with its trustees.

School boards of trustees are a category of Crown entity and expressly subject to specified provisions of the Crown Entities Act 2004⁶. This Act amended the Education Act by requiring Boards to disclose some of their actions and further clarified or limited many of the financial powers of boards. The key changes in respect to school boards are in relation to:

2. Restrictions on the operation of bank accounts
3. Restrictions on the acquisition of securities
4. Restrictions on borrowing
5. Restrictions on giving of guarantees and indemnities
6. Restrictions on the use of derivatives
7. Gifts

The substantive provisions of these changes are located in the Crown Entities Act, and these provisions have been duplicated in the Education Act for ease of reference by school Boards and principals.

The specific requirements of items 1 to 7 are detailed below.

1.1 Transitional Provisions

The transitional provision in s.197 of the Crown Entities Act specifies that any security, borrowing, guarantee, indemnity or derivative transaction lawfully acquired, given or entered into before 1 April 2005 is not affected by enactment of the Crown Entities Act but that their terms may be amended, or any options taken up, only if permitted by the Minister of Finance.

2.0 Restrictions on the operation of bank accounts

The new provision applies to all school bank. School bank accounts must:

1. Be held at one or more of the following:
 - a. a registered bank or registered building society⁷ that meets a relevant credit-rating test specified in the Crown Entities (Financial Powers) Regulations 2005⁸; or

⁵ Education Act 1989 s.75

⁶ Crown Entities Act s.5 and s.7(1)(d) and Schedule 3

⁷ *ibid* s.158(1)(a)

⁸ Crown Entities (Financial Powers) Regulations 2005, reg 5

- b. a registered bank or registered building society¹⁰ that meets the conditions of any relevant approval given by the Minister of Finance by notice in the Gazette¹¹; or
 - c. a bank outside New Zealand if that meets the conditions of any relevant approval given and Gazetted by the Minister of Finance¹².
2. Be denominated in New Zealand dollars unless the Minister of Finance allows otherwise¹³.

Approvals have been given by the Minister of Finance to allow Crown entities to hold bank accounts at TSB Bank Limited (TSB) and registered building societies, subject to certain conditions. These conditions require that:

- 1. TSB does not fall below its current credit rating by Standard & Poor's of BBB- and continues to comply with the conditions of registration by the Reserve Bank; and
- 2. a registered building society confirm in writing that it has total equity of at least \$15 million and is in compliance with the terms of its prospectus and trust deed related to the offer of debt securities, and has not notified that it no longer satisfied these conditions.

-
- (1) The minimum requirement in order to be a bank account under these regulations and sections 158 and 161 of the Act is that there is a contract with a registered bank, registered building society, or a bank outside New Zealand that—
 - (a) contains a covenant by the bank or building society to keep a record of the amount it owes its account customer by reason of the deposit of money with the bank or building society for the account of its account customer; and
 - (b) provides that that amount is repayable in whole or in any part upon demand by the account customer; and
 - (c) does not comprise—
 - (i) a cash or term deposit; or
 - (ii) a fund; or
 - (iii) any other form of investment in the debt securities of the bank or building society consisting of a specified amount of debt that is repayable only in whole.
 - (2) Other contracts or accounts are not bank accounts for the purposes of these regulations or sections 158 and 161 of the Act.

⁹ Ibid reg .7,

- (1) A registered bank or registered building society satisfies the credit-rating test referred to in section 158(1)(a) of the Act only if—
 - (a) it satisfies 1 of the specified tests and does not have a credit rating assigned to it by any other specified credit-rating organisation; or
 - (b) it satisfies the specified test that applies to each of the specified credit-rating organisations that have assigned a credit rating to it.
- (2) The following are specified tests for the purposes of section 158 of the Act:
 - (a) Standard & Poor's Ratings Group (or its successors or assigns) rates the credit of the relevant registered bank or registered building society ``A-'' or higher or, if that credit is short term, ``A-1'' or higher; or
 - (b) Moody's Investors Service, Inc (or its successors or assigns) rates the credit of the relevant registered bank or registered building society ``A3'' or higher or, if that credit is short term, ``Prime-1'' or higher.

Or: s.7(3) a notice in the Gazette published by the Minister of Finance under section 158(1)(a) of the Act.

¹⁰ ibid s.158(1)(a)

¹¹ ibid s.158(1)(b)

¹² ibid s.158(1)(c) and (d)

¹³ ibid s.158(6)

The Reserve Bank maintains a list of registered banks and their credit ratings at <http://www.rbnz.govt.nz/nzbanks/0091622.html>. As at 27 April 2006 the following registered banks met the credit-rating test specified in the Regulations or conditions approved by the Minister of Finance:

- ABN AMRO Bank NV
- ANZ National Bank Limited
- ASB Bank Limited
- Bank of New Zealand
- Citibank N A
- Commonwealth Bank of Australia
- Deutsche Bank A G
- Kiwibank Limited
- Rabobank New Zealand Limited
- Rabobank Nederland
- The Bank of Tokyo-Mitsubishi, Ltd.
- The Hongkong and Shanghai Banking Corporation Limited
- TSB Bank Limited
- Westpac Banking Corporation

The following building societies met the conditions at the time that the Minister's approval was given:

- Southland Building Society
- Southern Cross Building Society
- Ashburton Building Society

All money received by a school must be paid, as soon as practicable after it is received, into the school's bank account and the account must comply with the Act's requirements at all times¹⁴. School Boards must properly authorize the withdrawal or payment of money from their bank accounts¹⁵. In practice this means that:

1. School bank accounts must be in the name of the school only and may not include the name of a service provider. For example 'Petone West School' or 'Petone West School Board of Trustees'
2. Boards may grant a power of attorney to a service provider to use the bank account but those Boards will still be responsible for that account
3. No income for the school can be paid directly to a service provider trust account, proprietors account, or the account of any other third party.

2.1 Bank accounts ceasing to qualify as authorized

Should a bank account cease to qualify as an account authorized by s.158(1) of the Act, as detailed in section 2.0 above, a board has a period of grace in which it may continue to operate that bank account¹⁶. By the end of that period, it must have closed the account and transferred all the money in the account to another account that does qualify as an authorized account¹⁷. This situation would arise, for example, if a registered bank no longer satisfied the credit-rating

¹⁴ *ibid* s.158(1)

¹⁵ *ibid* s.158(7)

¹⁶ *ibid* s.158(8)(a)

¹⁷ *ibid* s.158(8)(b)

test or TSB or a registered building society ceased to satisfy any of the conditions of the approval given by the Minister of Finance.

The period of grace ends on the earlier of:

- two months after the bank account ceases to qualify¹⁸; or
- a date specified by the Minister of Finance and notified to the board¹⁹

2.2 Approval of bank accounts

Under s.158(1)(b) the Minister of Finance may, by notice in the Gazette, set conditions that, if met by a registered bank or registered building society which does not meet the credit rating test specified in the Regulations, allow a board to operate a bank account with that registered bank or registered building society. In making such a decision the Minister can be expected to take into account the following considerations:

- why an individual board, group of boards, or all boards collectively, want or need to bank with a bank or building society that does not meet the specified credit rating test
- the nature and size of the board/boards seeking approval and the likely amounts that will be kept in the bank from time to time
- the bank or building society's credit rating, the reasons it has not been able to satisfy the specified credit rating test, and the significance of those reasons, in terms of investment risk to the board/boards, as a banking customer
- whether the bank or building society is prudently managed and meets its statutory obligations
- the ability of the bank or building society to meet the needs of the board/boards and the relative convenience of the board/boards using that bank or building society
- the level of risk that the bank or building society might default on its obligations (and any attendant Crown risk)
- whether there is any other factor which might point to it being financially irresponsible for the board/boards to bank with the particular institution.

In the event that a school Board seeks approval under s.158(1)(b), the Ministry of Education will liaise with the Treasury and provide advice to the Minister of Finance that addresses the considerations above.

2.3 Approval of bank accounts outside New Zealand

School boards of trustees may not operate a bank account outside New Zealand unless they receive prior approval.²⁰ That approval may be subject to conditions relating to the bank, a Board or group of Boards, or a type of account. Approvals relating to a bank must be notified in the *Gazette*. Those relating to one or more Boards or types of account may be given by the Minister of Finance in writing (and gazetted) or contained in regulations.

Requests for approval to the operation of a bank account outside New Zealand must be forwarded to the Ministry and approval must be obtained prior to opening the account.

The application would need to include:

- (a) information relating to business reasons for operating a bank account outside New Zealand

¹⁸ *ibid* s.158(9)(a)

¹⁹ *ibid* s.158(9)(b)

²⁰ Crown Entities Act 2004 ss.158(1)(c) & (d)

- (b) information relating to any other benefits expected to accrue to the Board if it operates a bank account outside New Zealand
- (c) a copy of the Board's latest audited financial statements and current year to date financial information for the school
- (d) the likely dollar amount to be held in the proposed bank account
- (e) any interest, financial or other of a board trustee in the bank where the bank account will be held and the nature, extent and monetary value of that interest
- (f) any credit-rating or other financial risk information about the bank
- (g) any security offered by the bank
- (h) an assessment of the potential effect on the school in event of default by the bank
- (i) information relating to actions taken, or proposed to be taken, by the Board to minimise and/or mitigate credit risk exposure if the application is approved (for example, has the Board set a maximum value on the funds that will be held in the account)
- (j) any other information pertinent to the application

The following considerations will be used to assess the application:

- (a) the reasons why the Board wants to operate the bank account for which approval is sought, and specifically whether the benefits to the Board outweigh any additional risk to the Board and the Crown from operating a bank account outside New Zealand
- (b) the likely dollar amount to be held in the proposed bank account
- (c) the likely risks to the school
- (d) the likely risks to the Crown
- (e) whether operation of the proposed bank account would be financially prudent having regard to the particular business circumstances of the Board
- (f) the general soundness of the bank
- (g) any conflict of interest of a trustee
- (h) educational considerations in relation to the applying Board and/or the wider school sector

Any approvals will be given on a case-by-case basis and typically subject to conditions specific to the transaction for which approval was sought. Approvals take effect from the date granted and cannot be retrospective. The Crown does not guarantee any funds deposited in bank accounts approved in this manner.

2.3.1 General expectations in relation to accounts at banks outside New Zealand

In addition to the above guidelines, if a school Board wishes to operate a bank account outside New Zealand, the Board must demonstrate that the business purpose is consistent with the strategic direction and objectives reflected in its charter.

Requests for approval to operate a bank account outside New Zealand are unlikely to be viewed with favour given the relatively higher risk associated with off-shore accounts.

2.3.2 Minimum requirements of banks outside New Zealand

The minimum requirements for a bank outside New Zealand are that the financial institution must be entitled by the laws of the jurisdiction in which it operates to include the word 'bank', 'banker', or 'banking'²¹ in its title.

Where authority to operate a bank account outside New Zealand is given by the Minister of Finance under s.158(2)(b)(ii) of the Crown Entities Act the bank account is approved if:²²

- the bank account comprises debt owed and payable in New Zealand currency; and
- the credit of the bank satisfies the credit-rating test for registered banks and registered building societies stipulated in section 2.0 above as if it were a registered bank or a registered building society²³; and
- the laws of the jurisdiction under which the bank operates the bank account do not discriminate between classes of unsecured creditors except upon grounds, and only to the extent, set out in a subordination covenant; and
- the central bank of the jurisdiction in which the bank operates the bank account is a shareholder in the Bank for International Settlements.

2.4 Approval of bank accounts denominated in foreign currency

The bank account of a school board of trustees at a registered bank or building society must be denominated in New Zealand dollars unless the board obtains the prior approval of the Minister of Finance.²⁴

An application for approval would need to include:

- (a) information relating to any business reasons for operating a bank account that is not denominated in New Zealand dollars
- (b) information relating to any other benefits expected to accrue to the Board if it operates a bank account that is not denominated in New Zealand dollars
- (c) a copy of the Board's latest audited financial statements and current year to date financial information for the school
- (d) the likely New Zealand dollar value of the amount to be held in the proposed bank account
- (e) any interest, financial or other of a board trustee in this transaction and the nature, extent and monetary value of that interest
- (f) any credit-rating or other financial risk information about the bank
- (g) any security offered by the bank
- (h) an assessment of the potential effect on the school in event of default by the bank
- (i) information relating to actions taken, or proposed to be taken, by the Board to minimise and/or mitigate credit risk exposure if the application is approved

²¹ or any of these words as a part of another word, or a translation of these words into another language (Regulation 6, Crown Entities (Financial Powers) Regulations 2005)

²² Regulation 8, Crown Entities (Financial Powers) Regulations 2005

²³ Except that credit means either:

- long-term unsubordinated unsecured foreign currency debt obligations payable in the home jurisdiction of that foreign currency; or
- if a bank outside New Zealand does not issue long-term debt as set out in paragraph (a), short-term unsubordinated unsecured foreign currency debt obligations payable in the home jurisdiction of that foreign currency.

²⁴ Crown Entities Act 2004 s.158(6)

The following considerations will be used to assess the application:

- (a) the reasons why the Board wants to operate the bank account for which approval is sought, and specifically whether the benefits to the Board outweigh any additional risk to the Board and the Crown from operating a bank account that is not denominated in New Zealand dollars
- (b) the likely New Zealand dollar value of the amount to be held in the proposed bank account
- (c) the likely risks to the school
- (d) the likely risks to the Crown
- (e) whether operation of the proposed bank account would be financially prudent having regard to the particular business circumstances of the Board
- (f) the general soundness of the bank
- (g) any conflict of interest of a trustee
- (h) educational considerations in relation to the applying Board and/or the wider school sector

Any approvals will be given on a case-by-case basis and typically subject to conditions specific to the transaction for which approval was sought. If approval is granted the approval is from the date of the decision and is not retrospective. Also, the Crown does not guarantee any funds deposited in bank accounts approved in this manner.

2.4.1 General expectations in relation to bank accounts not denominated in New Zealand dollars

In addition to the above guidelines, if a school Board wishes to operate a bank account at a registered bank or building society that is not denominated in New Zealand dollars, the Board must demonstrate that the business purpose is consistent with the strategic direction and objectives reflected in its charter.

Requests for approval to operate a bank account that is not denominated in New Zealand dollars are unlikely to be viewed with favour given the relatively higher risk associated with off-shore accounts.

3.0 Restrictions on acquisition of securities

Until the introduction of the Crown Entities Act, section 73 of the Education Act allowed Boards to invest money on deposit with a registered bank or to invest in public securities. Approval of the Minister of Education was required to invest in any other security. The new section 73(1) applies the Crown Entities Act to school Boards. It relates to the acquisition of securities and does not refer to investment of money.

²⁵This 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.

A security is any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person²⁶. Types of securities include:

- debt securities (an 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

²⁵ Crown Entities Act s, 161 (2)

²⁶ Crown Entities Act s.136. Securities Act 1978 s.2D

- secured by a charge over any property) and includes debentures, debenture stock, bonds, notes, certificates of deposit, and convertible notes); and
- equity securities (an interest in or right to a share in, or in the share capital of, a company, including preference shares and company stock); and
- a unit in a unit trust.²⁷

The most common form of security held by boards is a term deposit at a bank.

Under s.161 of the Crown Entities Act and s.73 of the Education Act Boards may not acquire securities other than²⁸:

1. a debt security denominated in NZ dollars that:
 - a. is issued by a registered bank, or other institution, whose credit:
 - i. is rated as "A-", or "A-1" for short term securities, or higher by Standard & Poor's Ratings Group (S&P), or
 - ii. is rated as "A3", or "Prime-1" for short term securities, or higher by Moody's Investors Service Inc

Or

- b. meets a credit rating test that is specified for another credit-rating organisation in a notice in the Gazette published by the Minister of Finance.
Note: as at 1 January 2006 no such notice has been published.

Where the issue is rated by one of S&P, Moody's or another specified organisation, it must satisfy the test for that agency. Where the issue is rated by Boardh S&P, Moody's or another specified organisation, it must satisfy the test for each agency.

2. a public security (this 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).²⁹
3. a security authorised by regulations or approval given jointly by the Ministers of Education and Finance.³⁰

3.1 Approval of securities

There are two possible ways to seek approval for the acquisition of debt securities that do not meet the tests listed in 3.0 above: joint approval by the Ministers of Education and Finance under section 160(1)(b); or approval via a the establishment of a credit-rating test specified by notice in the Gazette published by the Minister of Finance.

3.1.1 Joint Approval by the Minister of Finance and Minister of Education

It is expected that securities authorised by s.73(2) of the Education Act will accommodate Boards normal investment needs and that requests for acquisition of other securities will be

²⁷ The definition in s.136 of the Crown Entities Act excludes an interest in a superannuation scheme and life insurance policies from the definition of 'security' in s.2D of the Securities Act.

²⁸ Crown Entities Act s.161(1)(a) and (b). Regulation 9, Crown Entities (Financial Powers) Regulations 2005.

²⁹ S.2(1), Public Finance Act 1989

³⁰ Education Act s.73(2)(c)(ii) and s.160(1)(a) or (b) of the Crown Entities Act

rare. However, Boards may seek Joint Ministers approval for the acquisition of individual securities under s. 73(2)(c)(ii) of the Education Act. To consider such a request a board must forward to the Ministry (attention Senior Financial Advisor, PO Box 1666, Wellington) a written application and receive approval prior to acquiring a security.

The application would need to include:

- (a) information relating to any business reasons for acquiring securities not provided for in the standard authorisations in section 73 of the Education Act
- (b) information relating to any other benefits expected to accrue to the Board if they acquire the security
- (c) a copy of the Board's latest audited financial statements and current year to date financial information for the school
- (d) full description of security being acquired, the value and, where applicable, the term of the security the Board wishes to make
- (e) any interest, financial or other of a board trustee in the security being acquired and the nature, extent and monetary value of that interest
- (f) any credit-rating or other financial risk information about the issuer of the security or in relation to the security itself
- (g) any security (i.e. guarantee or underwriting) offered by the issuer
- (h) an assessment of the potential effect on the school in event of default by the issuer
- (i) information relating to actions taken, or proposed to be taken, by the Board to minimise and/or mitigate credit risk exposure if the application is approved
- (j) any other information pertinent to the application

The following considerations will be used to assess the application:

- (a) the reasons why the Board wants to acquire securities for which approval is sought, and specifically whether the benefits to the Board outweigh any additional risk to the Board and the Crown from acquiring securities not provided for in the standard authorisations in section 161(1)(a) and (b) of the Crown Entities Act or approvals given by the Ministers of Education and Finance under section 160(1)(b) of the Crown Entities Act
- (b) the scale and type of transaction
- (c) the ability of the issuer to deliver the expected return and the general soundness of the issuer
- (d) whether the proposed transaction would be financially prudent having regard to the particular business circumstances of the Board
- (e) any interest, financial or other of a board trustee in the issuer or the organization offering the security for sale
- (f) educational considerations in relation to the applying Board and/or the wider school sector

If approval is granted the following conditions will apply:

- (a) the approval is from the date of the decision and is not retrospective
- (b) the Crown does not guarantee securities acquired by school Boards
- (c) any approvals will be given on a case-by-case basis and typically subject to conditions specific to the transaction for which approval was sought

The guidelines above apply to the acquisition of debt securities not authorised by s 160(1)(a) / s 73(2) and of all equity securities.

3.1.2 Additional conditions for equity securities

In addition to the above guidelines, if a school Board wishes to acquire equity securities, the Board must demonstrate that the business purpose is consistent with the strategic direction and objectives reflected in its charter.

Requests for approval to acquire equity securities as an investment to earn a return, rather than for a business purpose, are unlikely to be viewed with favour given the relatively higher risk associated with these instruments.

3.1.3 Debt securities ceasing to qualify as authorized

Should a change in the credit rating of a debt security result in the credit-rating test no longer being satisfied, a Board has a period of grace at the end of which it must not hold that security³¹.

The period of grace ends on the earlier of:

- two months after the bank account ceases to qualify³²; or
- a date specified by the Minister of Finance and notified to the board³³

From the time that the Board becomes aware that the debt security no longer satisfies the credit rating test it must diligently monitor the credit rating of the debt security and take all prudent steps to avoid loss, including (if necessary) transferring to a third party³⁴.

3.1.4 Exceptions

Section 68 in the Education Act applies to Boards that receive gifts of money or property. Under this provision it may be possible for Boards to hold securities that are not otherwise authorized. For further details see section 7.0 below.

4.0 Restrictions on Borrowing

Section 67(2) of the Education Act prohibits a board from borrowing, or amending the terms of existing borrowing, except as provided in:

- regulations made under Part 4 of the Crown Entities Act
- approval given jointly by the Minister of Education and the Minister of Finance

Borrowing includes entering into hire purchase agreements and finance lease arrangements, the issuance of any security or other financial instrument, and accepting debt on assignment, but does not include the purchase of goods and services on credit or obtaining an advance by use of a credit card for a period of 90 days or less, an operating lease or bailment by way of hire.³⁵ This means that borrowings by a Board includes amounts owing on leases-to-buy, the drawn down portion of a flexible borrowing facility or overdraft, property maintenance schemes, Ministry borrowings and any other forms of borrowing or term financing

Boards should note that s.66A of the Education Act prohibits them from delegating any power to borrow money. This means that any decision to borrow, including entering into hire

³¹ Crown Entities (Financial Powers) Regulations 2005, reg.10

³² *ibid* reg 10(2)(a)

³³ *ibid* reg 10(2)(b)

³⁴ *Ibid* reg 10(3)

³⁵ s.136 Crown Entities Act, and Crown Entities (Financial Powers) Regulations 2005 reg.11

purchase agreements, finance leases, or property maintenance schemes must be made by the Board and recorded in Board minutes.

4.1 Regulations

Reg.12 of the Crown Entities (Financial Powers) Regulations 2005 allows a board of trustees to:

in any calendar year, borrow any amount it thinks fit from any source it thinks fit provided that the total annual cost to the board of trustees in repaying all outstanding borrowings (including Boardh principal and interest repayments) is equal to or less than one-tenth of the value of the grants determined by the Minister of Education to be paid to the board for operational activities for that year.

This regulation replicates the former arrangement under the former s 67A of the Education Act for Boards borrowing without Ministerial consent.

From time to time changes in a Board's environment may cause the board to exceed the 1/10th limit. For example, increases in interest rates and/or a fall in a school's roll and therefore operational funding, may cause the Board to have borrowing in excess of the limit. If this occurs the Board is not required to seek retrospective approval for the borrowing, because at the date the borrowing was entered into the board met the restrictions.

However, if because of changes to a school's environment it exceeds the 1/10th restriction and subsequently enters into overdraft (which is repayable on demand), then it is in breach of the Act.

If borrowing has been entered into within a Boards borrowing limit and the Board subsequently decides to retire the debt early, when the repayment of the principal plus interest costs for the year exceed the school's 1/10th limit, the repayment of principal will not cause the school to breach reg.12 of the of the Crown Entities (Financial Powers) Regulations 2005 or s.67 of the Education Act..

4.2 Joint Ministerial Approval

If a Board intends to borrow in excess of the limit set out in reg.12 of the Crown Entities (Financial Powers) Regulations 2005 the Board must obtain the prior approval of the Ministers of Education and Finance³⁶.

For such a request to be considered a Board must forward to the Ministry (attention Financial Advisor, Ministry of Education, PO Box 1666) a written application.

The information provided in the application must be appropriate for the circumstances, and would need to include:

- (a) information relating to any business reasons for entering into a borrowing arrangement that exceeds the 1/10th restriction laid out in reg.12 of the of the Crown Entities (Financial Powers) Regulations 2005
- (b) information relating to any benefits expected to accrue to the Board if they enter into the borrowing arrangement

³⁶ Education Act 1989 s.67(2)(b) / Crown Entities Act 2004, s 160(1)(b)

- (c) information relating to any negative implications that may accrue to the Board if the borrowing arrangement is not approved
- (d) the value and the term of the proposed borrowing arrangement, along with any associated security, contractual restrictions, obligations or covenants
- (e) Any conflict of interest of a trustee
- (f) any credit-rating or other financial risk information about the proposed lender
- (g) a copy of the board's latest audited financial statements and current year to date financial information for the school
- (h) a copy of the Boards financial plan (including a projected statement of cash flow) which demonstrates the schools ability to meet its obligations under the proposed borrowing arrangement
- (i) a copy of the Boards minutes showing its resolution that the proposed borrowing is necessary to achieve the Boards aims as set out in the school charter
- (j) any wider educational considerations that should be considered in reviewing the application

The following considerations will be used to assess the application:

- (a) the reasons why the school board want to enter into the borrowing arrangement for which approval is sought, and specifically whether the benefits to the Board outweigh any additional risk to the Board and the Crown from exceeding the 1/10th restriction set out in Regulation 12(1) of the Crown Entities (Financial Powers) Regulations 2005
- (b) the scale and type of transaction
- (c) the likely risks to the school
- (d) the likely risks to the Crown
- (e) whether the proposed transaction would be financially prudent having regard to the particular business circumstances of the Board
- (f) the general soundness of the lender
- (g) any conflict of interest of a Board member
- (h) the current financial position of the school and the trends for the last 3 years
- (i) the forecast financial position and performance of the school for the duration of the borrowing
- (j) the potential risks and costs that may accrue to the board if the application is declined
- (g) educational considerations in relation to the applying Board and/or the wider school sector

If approval is granted the following conditions will apply:

- (a) the approval is from the date of the decision and is not retrospective
- (b) the approval is for the proposed borrowing arrangement only
- (c) the Crown does not guarantee any borrowing arrangements entered into by boards.

If a board exceeds the limit and does not obtain prior Ministerial approval then that board is deemed to be in breach of the Education Act 1989, and retrospective approval cannot be given.

4.3 General expectations in relation to borrowing

In addition to the above guidelines, if a board wishes to enter into borrowing arrangements the board must demonstrate that the business purpose is consistent with their strategic direction and objectives per its charter.

Requests for approval to enter into borrowing arrangements in excess of the 1/10th restriction are unlikely to be viewed with favour unless the funds acquired through the borrowing are

intended provide ongoing benefit to the school through increased capacity, improved performance, or for the acquisition of physical assets, or if the borrowing is intended to smooth the intergenerational cost to students of the acquisition of physical assets.

5.0 Restrictions on giving of guarantees and indemnities

A Board must not, with or without security, give a guarantee to, or indemnify, another person other than as provided in regulations made under Part 4 of the Crown Entities Act or any approval given jointly by the Ministers of Education and Finance under s 163 of that Act.

5.1 Regulations

Reg.14 of the Crown Entities (Financial Powers) Regulations 2005 allows a Board to give a guarantee:

that is limited to a covenant to perform personally another entities non-monetary covenant to perform³⁷

For example, a Board may undertake to perform the functions of a lead school in an administration cluster, a schooling improvement cluster, or an RTLB cluster.

Reg.14 of also allows a Board to give an indemnity relating to, and contained in³⁸:

- (a) a loan agreement lawfully entered into by the board as borrower, or an agreement ancillary to that loan agreement*
- (b) a contract to lease, or a lease of, real property entered into by the board as lessee, tenant, or the assignee of the lessee or tenant*
- (c) a contract (including a deed) executed by the board to settle litigation brought against it by a third party*
- (d) a contract of bailment by way of hire executed by the board in the ordinary course of its operations*
- (e) a contract of insurance entered into by the board as the insured party in the ordinary course of its operations*
- (f) a contract for the sale and purchase of goods entered into by the board in the ordinary course of its operations*
- (g) a contract for the procurement of services entered into by the board in the ordinary course of its operations*
- (h) a contract for the purchase of an intangible (including intellectual property or a license of intellectual property) entered into by the board in the ordinary course of its operations.*

Note: An indemnity given by a board that relates to a class of contract referred to in (d) to (h) above may be contained in an ancillary contract or instrument (including a trust) relating to that class of contract, but only if that indemnity is contained in the standard printed terms and conditions of the board or the counterparty as the case may be.³⁹

³⁷ Crown Entities (Financial Powers) Regulations 2005, reg.14(1)(a)

³⁸ Crown Entities (Financial Powers) Regulations 2005, reg.14(2)

³⁹ Crown Entities (Financial Powers) Regulations 2005, reg.14(3)

5.2 Joint Ministerial Approval

If a board intends to give a guarantee or indemnity outside of that permitted by reg.14 of the Crown Entities (Financial Powers) Regulations 2005 the board must obtain the prior approval of the Ministers of Education and Finance⁴⁰.

For such a request to be considered a board must forward to the Ministry (attention Financial Advisor, Ministry of Education, PO Box 1666) a written application.

The application would need to include:

- (a) information relating to any business reasons for providing the guarantee or indemnity
- (b) information relating to any risks and benefits expected to accrue to the board if they provide the guarantee or indemnity
- (c) information relating to any negative implications that may accrue to the board if the guarantee or indemnity is not approved
- (d) the maximum value and term of the proposed guarantee or indemnity
- (e) any conflict of interest of a trustee
- (f) any credit-rating or other financial risk information relating to the proposed guarantee or indemnity
- (g) a copy of the board's latest audited financial statements and current year to date financial information for the school
- (h) a copy of the boards financial plan which demonstrates the schools ability to meet its obligations under Boardh the Education Act and the proposed guarantee or indemnity should the guarantee or indemnity be called upon
- (i) a copy of the boards minutes showing its resolution that the proposed guarantee or indemnity is necessary to achieve the boards aims as set out in the school charter
- (j) any wider educational considerations that should be considered in reviewing the application

The following considerations will be used to assess the application:

- (a) the reasons why the school board want to provide guarantees or indemnities for which approval is required, and specifically whether the benefits to the Board outweigh any additional risk to the Board and to the Crown
- (b) the scale and type of transaction
- (c) the likely risks to the school
- (d) the likely risks to the Crown
- (e) whether the proposed transaction would be financially prudent having regard to the particular business circumstances of the Board
- (f) any conflict of interest of a trustee
- (g) the current financial position of the school and the trends for the last 3 years
- (h) the forecast financial position and performance of the school for the duration of the guarantee or indemnity
- (i) the benefits and to the school board if they provide the proposed guarantee or indemnity
- (j) the potential risks and costs that may accrue to the board if the application is declined
- (h) educational considerations in relation to the applying Board and/or the wider school sector

If approval is granted the following conditions will apply:

- (a) the approval is from the date of the decision and is not retrospective

⁴⁰ Education Act 1989 s.67A(2)(b) / Crown Entities Act 2004, s 160(1)(b)

- (b) the approval is for the proposed guarantee or indemnity only

If a board enters into a guarantee or indemnity not provided for in reg.14 of the Crown Entities (Financial Powers) Regulations 2005 and does not obtain prior Ministerial approval then that board is deemed to be in breach of the Education Act 1989, and retrospective approval cannot be given.

5.3 General expectations in relation to the giving of guarantees and indemnities

Requests for approval to provide guarantees or indemnities beyond those provided for in the Crown Entities (Financial Powers) Regulations 2005 are unlikely to be viewed with favour unless the board can clearly demonstrate that the proposal is financially prudent and the business purpose is consistent with its strategic direction and objectives per its charter.

5.4 Exceptions

Restrictions on the ability of boards to provide guarantees and indemnities do not apply where the board indemnifies a trustee, office holder, committee member, employee or other individual in relation to any claim or proceeding under: ⁴¹

- s.122 of the Crown Entities Act (which allows Boards to indemnify trustees, office holders and employees in respect of their acts or omissions)⁴²; or
- the board's natural person powers or other powers in the Education Act

5.5 Guarantees provided by trustees or employees of boards

In no circumstance should a trustee or employee of a Board provide a personal guarantee or indemnity in relation to any contract or transaction carried out in the Board's name.

6.0 Restrictions on the acquisition of derivatives

In common terms, a derivative is a contract or security that derives its value from that of an underlying asset or from the value of a rate (e.g. an interest rate or currency exchange rate) or index of asset value (e.g. a stock index such). An example of a derivative is a foreign exchange option, i.e. a contract that allows a board to purchase a set amount of foreign currency at a set price on a set date in the future.

The Crown Entities Act 2004 provides a very broad definition of derivative transactions and includes, amongst other things⁴³, foreign exchange transactions.

⁴¹ Crown Entities Act 2004, s.163(2)(a)(iii)

⁴² Such indemnity is limited to liability for conduct and costs incurred in defending or settling any claim or proceeding relating to that liability.

⁴³ Crown Entities Act 2004, s.136 – rate swap transactions, swap options, basis swaps, forward rate transactions, interest rate options, foreign exchange transactions, cap transactions, floor transactions, collar transactions, currency swap transactions, cross-currency rate swap transactions, currency options, commodity swaps, commodity options, equity or equity index swaps, equity or equity index options, bond options, credit protection transactions, credit swaps, credit default swaps, credit default options, total return swaps, credit spread transactions, 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).

s.67B of the Education Act prohibits a board from entering into a derivative transaction, or amending the terms of that transaction, except as provided in:

- regulations made under Part 4 of the Crown Entities Act
- approval given jointly by the Minister of Education and the Minister of Finance

6.1 Regulations

Reg.15 of the Crown Entities (Financial Powers) Regulations 2005 allows a Board to carry out its ordinary business transactions, including routine foreign exchange transactions, without the need for further approval. Accordingly Boards are permitted to enter into the following derivative transactions:

- (a) a foreign exchange transaction with a registered bank or registered building society that satisfies the credit-rating test stipulated in section 2.0 above (Regulation 7(1) of the Crown Entities (Financial Powers) Regulations 2005), or a bank outside New Zealand that satisfies the credit-rating test stipulated in regulation 8(1)(b) of the Crown Entities (Financial Powers) Regulations 2005, for the purpose of:
 - (i) procuring foreign exchange (including negotiable instruments and other documentary choses in action) for use by board members, officials, or employees while in the country of that foreign currency or while en route to that country;
 - (ii) procuring foreign exchange in order to discharge a liability arising under any of the classes of contract or instrument referred to in 5.1 (a) to (h) above⁴⁴;
 - (iii) procuring foreign exchange in order to—
 - (1) deposit funds into a bank account;
 - (2) invest in debt securities;
 - (3) repay borrowing;
 - (4) pay a guarantee or indemnity:provided that the bank account, borrowing, guarantee, or indemnity is in a currency other than New Zealand currency and is properly authorised in accordance with the Education Act.
- (b) a futures contract having the sole purpose of covering any foreign exchange transaction authorised by this regulation;
- (c) a foreign exchange transaction undertaken with a foreign exchange dealer on a cash-for-cash basis;
- (d) the sale and purchase of goods or intangibles (including intellectual property rights, but not including securities) that are not traded in the commodities or the capital markets, delivery of which is to occur in the future;
- (e) an option to purchase or bail, or to renew the bailment by way of hire of, goods that are not traded in the commodities markets;
- (f) a covenant to assign intellectual property rights, or other property rights, contained in a contract of employment;
- (g) a contract to acquire debt securities lawfully entered into in accordance with section 161 of the Act and, if applicable, regulation 9, where delivery must take place in the future.

⁴⁴ Regulation 14, Crown Entities (Financial Powers) Regulations 2005

6.2 Joint Ministerial Approval

If a board intends to enter into a derivative transaction not authorized by section 6.1 above⁴⁵ the Board must obtain the prior approval of the Ministers of Education and Finance⁴⁶.

For such a request to be considered a board must forward to the Ministry (attention Financial Advisor, Ministry of Education, PO Box 1666, Wellington) a written application.

The application would at the minimum need to include:

- (a) information relating to any business reasons for entering into the derivative transaction
- (b) information relating to any benefits expected to accrue to the board if it enters into the proposed derivative transaction
- (c) information relating to any negative implications that may accrue to the board if the derivative transaction is not approved
- (d) the nature, value, and, where applicable, the term of the proposed derivative transaction, along with any associated security, contractual restrictions, obligations or covenants
- (e) Any conflict of interest of a board member
- (f) any credit-rating or other financial risk information about the other party to the derivative transaction
- (g) a copy of the board's latest audited financial statements and current year to date financial information for the school
- (h) a copy of the boards financial plan which demonstrates the schools ability to meet its obligations under Boardh the Education Act and the proposed derivative transaction
- (i) a copy of the boards minutes showing its resolution that the proposed derivative transaction is necessary to achieve the boards aims as set out in the school charter
- (j) any wider educational considerations that should be considered in reviewing the application

The following considerations will be used to assess the application:

- (a) the reasons why the school board want to enter into the derivative transaction for which approval is required
- (b) the scale and type of transaction
- (c) the likely risks to the school
- (d) the likely risks to the Crown
- (e) the general soundness of the other party to the derivative transaction
- (f) any conflict of interest of a trustee
- (g) the current financial position of the school and the trends for the last 3 years
- (h) the forecast financial position and performance of the school for the duration of the transaction
- (i) the benefits to the school board if they enter into the derivative transaction
- (j) the potential risks and costs that may accrue to the board if the application is declined
- (k) educational considerations in relation to the applying Board and/or the wider school sector

If approval is granted the following conditions will apply:

- (a) the approval is from the date of the decision and is not retrospective
- (b) the approval is for the proposed derivative transaction only

⁴⁵ Education Act, s.67B(2)(a), and Regulation 15 Crown Entities (Financial Powers) Regulations 2005

⁴⁶ Education Act, s.67B(2)(b)

(c) the Crown does not guarantee any derivative transactions entered into by boards.

If a Board enters into a derivative transaction not authorized by section 6.1 above⁴⁷ and does not obtain prior Ministerial approval then that board is deemed to be in breach of the Education Act 1989, and retrospective approval cannot be given.

6.3 General expectations in relation to derivative transactions

Requests for approval for derivative transactions beyond those provided for in reg 15⁴⁸ are unlikely to be viewed with favour unless the board can clearly demonstrate that the proposal is financially prudent and the business purpose is consistent with its strategic direction and objectives per its charter.

7.0 Gifts

s.68 of the Education Act allows a board to accept or disclaim any gift of money or property. If the gift is in a form that could otherwise not be held by a board (e.g. real property or a security which does not meet the tests set down in the Education Act) may continue to be held for a period that is reasonable in the circumstances.

Neither the Education Act nor the Crown Entities Act defines the length of a 'reasonable period' or provides guidance on how to assess what period might be reasonable under certain circumstances. However, where a Board has been gifted property or securities not authorised in the Education Act or by approvals given by the Ministers of Education and Finance under that Act it would be prudent for schools which wish to retain the gifts to seek approval within 12 months of receiving them.

Applications for approval to retain securities will be assessed on a case by case basis as specified in section 3 above and take into account any restrictions placed on the gift and/or the financial risk associated with retaining the securities in their current form.

In some circumstances a Board may receive a gift or bequest where, as a condition of the gift or bequest, the Board must continue to hold a security in its current form. This form of gift or bequest is common in schools where the donor or testator determines that the school should continue to hold the security and fund activities or prizes from any return on that security. In these circumstances the acceptance of a conditional gift or bequest creates a trust and section 161(2) of the Crown Entities Act exempts the Board from the requirement to hold only authorised securities. The Board may therefore continue to hold the gifted or bequeathed security in perpetuity without need to seek approval.

⁴⁷ Education Act, s.67B(2)(a) / Crown Entities Act s.164

⁴⁸ Education Act 1989, s.67B, and Regulation 15 Crown Entities (Financial Powers) Regulations 2005

Annex 4: Boards of Trustees and Quasi-Commercial Activities: Impact of Crown Entities Act 2004

The text of this Annex is not available electronically, but is available in the hard copy of this Report. The text is taken from papers published from a New Zealand Law Society Seminar “Education Law”, May/June 2006, by presenters John Hannan, Paul Rishworth, and Patrick Walsh. This paper was presented by John Hannan.