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**PUBLIC FINANCE (DEPARTMENTAL GUARANTEES AND INDEMNITIES)
REGULATIONS 2007**

1. The purpose of this Circular is to advise that:
 - a. the Public Finance (Departmental Guarantees and Indemnities) Regulations 2007 (the Regulations) will come into force on 19 July 2007; and
 - b. the sub-delegation by the Secretary to the Treasury to departmental Chief Executives dated 3 March 2005, which authorises certain departmental guarantees and indemnities, will expire when the Regulations come into force.

Background

2. The Public Finance Act 1989 (the PFA) prohibits the giving of guarantees or indemnities on behalf of the Crown, except as expressly authorised by statute.
3. Before the Public Finance Amendment Act 2004 came into force, section 58A of the PFA stated that:

“Except as expressly authorised by any Act, it shall not be lawful for any person to give a guarantee or indemnity that imposes a contingent liability on the Crown”.
4. The PFA defined “contingent liability” to exclude those types of guarantees and indemnities listed in Schedule 3 to the PFA. Consequently, departments were able to give certain types of guarantees without breaching section 58A of the PFA.

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5. The Public Finance Amendment Act 2004 amended the PFA provisions relating to guarantees and indemnities. In particular:
 - a. section 58A of the PFA and Schedule 3 to the PFA were repealed; and
 - b. section 65ZE of the PFA was inserted to allow departments to give, on behalf of the Crown, a guarantee or indemnity of a type specified in regulations under the amended PFA.
6. To maintain the status quo position for departments until relevant regulations were made, the Minister of Finance provided a limited delegation of his powers to give guarantees and indemnities, via the Secretary to the Treasury, to departmental Chief Executives. The sub-delegation dated 3 March 2005 was limited to guarantees and indemnities of the types listed in the former Schedule 3 to the PFA (Treasury Circular 2005/5 refers).

Regulations promulgated

7. The Regulations will come into force on 19 July 2007.
8. The Regulations give effect to section 65ZE of the PFA. They set out: (a) the types of indemnities and guarantees that a department may give; and (b) the notification requirements where the indemnity or guarantee given exceeds \$10 million.

Departmental indemnities and guarantees

9. The guarantees and indemnities in the Regulations are based on the types listed in the former Schedule 3 to the PFA, with minor extensions and refinements. The new types of permitted guarantees and indemnities are those contained in:
 - a. any overseas loan agreement entered by the Crown as borrower, or any agreement ancillary to that loan agreement;
 - b. a contract to licence for real property entered by the Crown as licensee; and
 - c. the standard terms and conditions for the operation of a Crown Bank Account or Departmental Bank Account.

See Annex A for regulation 4 of the Regulations – the underlined text show the minor extensions and refinements referred.

10. It is important to note that section 65ZE of the PFA limits a department's ability to give guarantees or indemnities to cases where it is "necessary or expedient in the public interest to do so".
11. To satisfy section 65ZE of the PFA, departments will need to assess the risks and benefits of each guarantee or indemnity requested, and limit the giving of a guarantee or indemnity to cases where the benefits (financial or otherwise) are sufficient to outweigh the level and cost of the risks that the Crown would be assuming.

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12. A departmental guarantee or indemnity should not be given simply to provide comfort against general unspecified events, for example, where the risks involved have not been explicitly identified. To the extent possible, departments should also limit the scope, amount and duration of any guarantee or indemnity given. This approach ensures that the Crown is only exposed to minimum risks that are necessary to achieve particular Crown objectives.

Notification requirements

13. Where the departmental indemnity or guarantee given exceeds \$10 million, the department must as soon as practicable after giving the guarantee or indemnity:
 - a. give notice to its Responsible Minister and the Secretary to the Treasury of the contingent liability and accompany the notice with a copy of the guarantee or indemnity; and
 - b. make arrangements for its Responsible Minister to make a statement, for publication in the Gazette and presentation to the House of Representatives, that such guarantee or indemnity has been given.
14. There will be cases where the contingent liability is not limited or quantified. In those cases, a reasonable view should be taken as to the potential liability to determine whether the notification requirements in paragraph 13 apply.

Expiry of sub-delegation

15. Departments have been allowed to give guarantees and indemnities of the types listed in the former Schedule 3 of the PFA. The authorisation, given under the sub-delegation dated 3 March 2005 from the Secretary to the Treasury to departmental Chief Executives, will expire when the Regulations come into force on 19 July 2007.
16. Other than the sub-delegation dated 3 March 2005, the Regulations do not affect the operation of other delegations relating to specific guarantees or indemnities that may be given by departments.

Annex A

Public Finance (Departmental Guarantees and Indemnities) Regulations 2007

Regulation 4 – Guarantees or indemnities that may be given by departments

The types of guarantees or indemnities that a department may give under section 65ZE(1) of the Act are as follows:

- (a) any guarantee or indemnity in any agreement that relates to the use by the New Zealand Defence Force of any military equipment owned by (i) any nation; or (ii) any international body:
- (b) any guarantee or indemnity in respect of any claim by a third party, for the infringement of any copyright or other intellectual property rights that arises as a result of the Crown using, or providing for the processing or storage of, data or other items under a contract that relates to the provision of information technology services to the Crown [note: previously the underlined text was “computer services”]:
- (c) any guarantee or indemnity that (i) relates to any claim by a third party; and (ii) is contained in a contract for the provision of advisory or consulting services to the Crown:
- (d) any guarantee or indemnity that relates to, and is contained in, -
 - (i) any overseas loan agreement that is lawfully entered into by the Crown as a borrower or any agreement ancillary to that loan agreement; or
 - (ii) a contract to lease, or a lease of, or a licence for real property that is lawfully entered into by the Crown as lessee, tenant, or licensee or the assignee of the lessee, or tenant, or licensee; or
 - (iii) a contract of bailment by way of hire that is lawfully executed by the Crown in the ordinary course of the Crown’s operations:
- (e) any guarantee or indemnity contained in the standard terms and conditions for the operation of –
 - (i) a Crown Bank Account that is opened, maintained, and operated at a bank or banks that the Minister may direct under section 65R of the Act; or
 - (ii) a Departmental Bank Account that is opened, maintained, and operated at a bank or banks that the Minister or the Treasury may direct under section 65S of the Act.