

14. Granting powers of exemption

In some cases requiring a particular person to comply with legislation might be impractical or result in hardship to that person. In such cases, it may be necessary to empower a government body (including Crown entities and other State sector bodies) or office holders to exclude or exempt a particular person or class of people, transactions or things from the application of an Act or regulations (see, for example, s 70B of the Securities Act 1978¹⁰¹).

For convenience, the term “exemption” is used in this chapter to refer to all exemption powers regardless of whether they are called exemptions, waivers, dispensations, exclusions, concessions or otherwise. An exemption is distinct from a statutory exception. An exemption is a discretionary power granted to a particular body or office holder by primary legislation that, when exercised, will exclude or exempt certain things from the application of an act. An exception is a provision in primary legislation which states that the law does not apply to a certain person, group, thing or transaction.

Exemptions occupy a sliding scale and vary in terms of their significance and scope. At the one end of the scale are exemptions that vary the scope or application of an Act. At the other end are concessions that are “one off”, or minor allowances usually made only to individuals. The more significant the exemption, the more significant the procedural safeguards required in respect of its exercise. In the case of minor concessions, additional procedural safeguards may be unnecessary.

A power of exemption is a form of delegated power (see Chapter 13), though at times the distinction between a power of exemption and a discretion is hard to identify.

Guidelines

14.1. Should legislation grant a power of exemption?

There must be compelling reasons to grant a power of exemption.

Powers of exemption should not be the norm. They should not be granted to allow arbitrary exemption from the provisions of an Act, nor should they be granted to patch up incomplete policy development.

Where a power of exemption will delegate to the executive the power to change the scope or operation of an Act, or it reduces the accessibility of the law (because the law regarding to who or what legislation applies is spread across specific exemptions and the primary legislation), consideration should be given to whether that is a power better left to Parliament.

The Regulations Review Committee has expressed concern that in some cases exemptions have been so numerous and applied so broadly that the exemptions have supplanted the framework of rules to which they relate.

¹⁰¹ <http://www.legislation.govt.nz/act/public/1978/0103/latest/DLM26800.html>

Factors that may favour the granting of a power of exemption are:

- where the statute relates to a complex and rapidly developing field such that the boundaries may be difficult to foresee;
- fields where an urgent decision on an exemption may be required;
- where the circumstances requiring an exemption may be so exceptional or “one off” as not to justify amending an Act;
- where an area requires frequent adaptation to changing factual or policy circumstances;
- where minor unforeseen developments in, or technical issues with, the law may arise that do not justify amending an Act;
- where compliance is impractical, inefficient or unduly expensive but the policy objective can be achieved by imposing conditions in the exemption.

14.2. What safeguards apply to the exercise of the power of exemption?

Legislation must specify appropriate safeguards to apply to powers of exemption.

An exemption that varies the scope of legislation or applies to a class of people or things will require a greater level of safeguards than a minor concession to an individual which does not materially affect the scope or operation of the legislation. Where exemptions to individual parties may give an unfair advantage, consideration should be given to allowing class exemptions.

A power of exemption should generally be subject to the safeguards noted below.

- **Consistent with purpose of the Act:** The power must be exercised consistently with the purpose of the Act. The circumstances in which the exemption may be granted or the criteria for the exercise of the power should also be consistent with the purpose of the Act. This is often incorporated into the criteria (see next point).
- **Criteria for exercise of power:** Legislation should set out the criteria for granting the exemption. Clear criteria will reduce the likelihood of a successful judicial review of the decision to grant or refuse an exemption.
- **Reasons:** Legislation should include a requirement to give reasons for the exemption, although this requirement may not be necessary for minor or trivial exemptions.
- **Expiry:** Exemptions should be subject to an expiry date to ensure regular review of the exemption, except where the exemption must necessarily be permanent if granted or will naturally expire.

- **Judicial review:** The ability to seek judicial review of the exercise of an exemption power is an important safeguard. This right should not be unreasonably restricted (see Chapter 25).
- **Process review:** Usually there should be a process (which need not be in the legislation, but may be expected by Ministers or select committees) to review exemptions at regular intervals to identify a need to amend the primary legislation.

Two additional safeguards may also be appropriate: review requirements and annual reporting requirements.

- **Review requirements:** Legislation may include a provision that the power of exemption is reviewed at a future set date to assess whether or not permanent legislative amendment is required.
- **Annual reporting requirements:** The person or body that exercises the power may be required to submit a report to Parliament detailing the number of times and circumstances in which a power of exemption was exercised.

14.3. Will the power be subject to the publication or disallowance procedures in the Legislation Act 2012?

Legislation should clearly identify whether or not the power of exemption will be subject to the disallowance and/or publication procedures in the Legislation Act 2012.

For the avoidance of doubt, the Act should confirm whether or not the exemption instrument is a disallowable instrument, a legislative instrument, or both. Often a class exemption that is of general application will be a disallowable instrument and a legislative instrument. An “individual” exemption will often be a disallowable instrument yet not a legislative instrument (but in this case the legislation should provide for alternative publication requirements). Some “individual” exemptions will probably be neither, and publication may not be appropriate; for example, exemptions from wearing a seatbelts or helmets on health grounds in the Land Transport Act 1998 (s 166)¹⁰².

14.4. Will the exemption be subject to conditions?

Legislation must contain express authority to impose conditions on an exemption.

An exemption may either be granted on a blanket basis or may be subject to specific conditions. The ability to impose conditions on an exemption is a useful tool to ensure that the exemption granted is no broader than is strictly necessary, but the power to impose conditions must be explicitly authorised by the primary legislation. Conditions must also be consistent with the purpose of the Act.

¹⁰² <http://www.legislation.govt.nz/act/public/1998/0110/latest/DLM433613.html>