Chapter 15 Some specific types of empowering provisions

This chapter provides guidance on three specific types of empowering provisions—those that delegate a power to amend or override an Act; those that delegate the commencement of legislation; and those that enable material to be incorporated by reference. These types of empowering provisions must always be considered in light of the principles for all secondary legislation described in Chapter 14, but give rise to specific issues that need to be dealt with in the empowering Act.

Guidelines

15.1 The interaction of secondary legislation with primary legislation

Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power.

The nature of secondary legislation is that it generally takes effect subject to all primary legislation. It is possible, however, for secondary legislation to amend or override an Act. This requires that Parliament enact an empowering provision expressly authorising secondary legislation with that effect. Empowering provisions of this nature are sometimes called “Henry VIII clauses”.

By virtue of the fact that this type of empowering provision enables the Executive to override Acts of Parliament, these provisions create a risk of undermining the separation of powers. However, such clauses come in various types and, although each must be carefully considered, they do not all raise the same level of constitutional concern.

Towards one end of the spectrum are powers to adjust legislation in such a narrowly circumscribed way that the policy for the adjustment is fully or largely set by Parliament and the subject matter would in any case be appropriate for secondary legislation. Examples include adjusting an amount to reflect changes in the New Zealand Consumer Price Index, adding to a list of types of people under a test set by an Act or, one step further, defining terms that do not set the scope of the Act (so are not central to the policy or principle of the Act). That type of empowering provision amends an Act by augmenting it. If the power is appropriately limited and the matter is otherwise appropriate for secondary legislation, it augments the Act in a manner that is consistent with Parliament’s intention and that does not pose significant constitutional risk.

At the other end of the spectrum is an empowering provision that permits secondary legislation to override an Act in ways that affect its policy or, more significantly still, that amends other Acts. Examples include emergency powers created for post-earthquake responses or epidemics. These types of powers pose more risk, require strong justification, and need very careful designing of appropriate safeguards.

In each case, the questions to be asked are:

- Why delegate this power? What is the need or benefit that justifies delegating the power to amend the Act? Examples of a justification include that there is:
• an emergency that requires a quick response;
• a complicated transition between two statutory regimes; or
• a benefit to the public in having an amount (or list) stated (and so easily accessible) in the Act but also able to be easily adjusted over time.

• If there is a need, what is the extent of delegation that is being permitted? What is the significance of the policy being delegated? How does that compare to what would generally be appropriate for delegation under 14.1? As noted above, there is a spectrum. The larger the delegation, the greater the constitutional risk or significance, and so the greater must be the justification or need for the power. If it is judged that the power is needed, the empowering provision must be drafted in the most limited terms possible to address the need, and it must be consistent with and support the provisions of the empowering Act.

• If the power is justified, what additional safeguards are needed? Safeguards should be designed to address the risks posed by the actual provision. Safeguards may include:
  • requiring consultation with people or bodies likely to be affected;
  • providing that the power to make the secondary legislation is exercised by the Governor-General in Council (so at the highest level of delegation);
  • for broader powers:
    o limiting the time period within which secondary legislation that amends primary legislation is possible (for example, including a “sunset clause”, so the power exists only for the reasonable period of a transition from one regime to another);
    o establishing a review panel to consider and report to Parliament or the Minister on the use of the power; or
  • making the use of the power subject to parliamentary approval (rather than only disallowance).

15.2 Commencement

*If the commencement of legislation is to be delegated, the need for that delegation must be justified and there should generally be a backstop commencement date.*

Commencement dates may be set by Orders in Council but only if flexibility is needed for good reason. Otherwise, delegation of commencement risks the will of Parliament being thwarted by an executive that no longer supports the policies of the Act or (on a more practical level) large amounts of latent legislation creating, over time, increased uncertainty and complexity. For this reason, if commencement is delegated, the Government should have a realistic
timetable for bringing legislation into force.

15.3 Does the legislation authorise “incorporation by reference”?

Incorporation by reference should be used only if there are clear benefits to doing so or it is impractical to do otherwise.

Incorporation by reference refers to creating or defining rights, powers, or obligations by a reference in primary or secondary legislation to another document (usually prepared by someone outside government), or part of a document, the provisions of which are not set out in legislation.

The issue of incorporation by reference can be considered in relation to principles of good law making. There are four main issues with incorporation by reference:

- **Quality**—There is a risk that the material incorporated is not sufficiently certain or understandable to be appropriate for legislation. This is particularly important if the material is the basis for offences and is a common problem if the material incorporated was developed for another purpose (for example, guidance).

- **Accessibility**—Legislation should be easy to find, use, and understand. The incorporated material needs to be accessible to the same extent as the legislation that incorporates it.

- **Legitimacy**—If it is possible to change the incorporated material and for those changes to automatically flow through into the legislation, Parliament or the other law maker does not have control over the content of the secondary legislation. Subdelegation of this kind needs to be carefully considered and specifically authorised.

- **Good process**—An appropriate process should be followed in making the law and if incorporation by reference enables the usual process to be bypassed, this can be problematic.

Incorporation by reference is, to a certain extent, inconsistent with these fundamental principles of good law making (particularly if it allows for amendments to the document incorporated to be automatically part of the law). Accordingly, incorporation by reference should be used only if there is a strong need or benefit from doing so or it is impracticable to do otherwise.

The possible benefits from incorporation by reference are:

- It can enable the law to be shorter, simpler, and more consistent. It can remove significant technical detail that undermines the ease of finding and using the core requirements. It can simplify compliance by allowing users to rely on material they are already complying with in another context.

- It can allow rules to be developed by people who have specialist knowledge or expertise, which improves the quality of the law. Those who work in the affected
area may then better understand the rules.

- It can facilitate convergence and consistency of standards being used and enable rules to remain up to date with international and national standards.

Practical examples of the cases where incorporation by reference may be appropriate, after considering the risks above, are:

- The document is long or complex, covers technical matters only, and few people are likely to be affected.
- The document has been agreed with one or more foreign governments, cannot easily be recast into an Act or secondary legislation, and deals only with technical or operational details of a policy already approved by Parliament.
- It is appropriate for the document to be formulated by a specialist government or inter-governmental agency or private sector organisation, rather than by Parliament or Ministers.
- The document has been developed by an organisation for use in respect of a product (such as motor vehicles) manufactured by it or its members.

Part 3 of the Legislation Act 2012 provides general authority for secondary legislation to incorporate by reference certain types of material and prescribes rules that apply when this general authority is relied on. The rules include a range of standard safeguards that address some of the above risks and issues. For example, amendments to the incorporated material do not become part of the law unless the amendments are specifically incorporated by a later instrument. Further, consultation is required on the proposal to incorporate material and there are rules about how the material must be held and made available.

Section 30 of the Standards and Accreditation Act 2015 provides general authority for New Zealand Standards (which include joint AS/NZS standards) to be incorporated by reference into secondary legislation, including bylaws. Section 29 deems a reference to a New Zealand standard in legislation to be a reference to the latest New Zealand Standard with that citation, together with any modifications to it, promulgated before the enactment in which it is cited was passed or made. This means that, consistent with the Legislation Act 2012, amendments to a standard do not take effect until specifically incorporated by a later instrument.

Legislation should not repeat the provisions of the Legislation Act 2012 or the Standards and Accreditation Act 2015 and those provisions should not be overridden in other legislation unless a different policy approach is necessary. Any different policy approach may need to be justified to the Regulations Review Committee.

In addition, each decision to incorporate material under the general authority in Part 3 of the Legislation Act 2012 or section 30 of the Standards and Accreditation Act 2015, needs to be

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36 For example, if the standard maker is an expert body and it is critical to the policy that there be consistency with those standards, it is more likely to be appropriate for an Act to permit amendments to apply automatically as part of the secondary legislation or with a simpler updating process.
justified on its own merits—ie, that there are sufficient benefits in the particular case as described above to justify the costs in terms of the risks described above.