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1. Copyright Act 1968 (Commonwealth) Part VII
2. Poisons Act 1964 (WA) ss. 64A-64B
3. Dangerous Goods Safety Act 2004 (WA) ss. 18-20
4. Building Act 2011 (WA) ss. 149-150
5. Water Services Act 2012 (WA) ss. 222-225
6. Medicines and Poisons Act 2014 (WA) ss. 131-132
7. Public Health Bill 2014 (WA) cl. 294
8. Legislation Act 2012 (NZ) Part 3, Subpart 2
9. Legislation Advisory Committee Guidelines Chapter 13 Part 6
10. Victorian Office of the Chief Parliamentary Counsel: Notes for Guidance on the Preparation of Statutory Rules ss. 4.6-4.9
11. COAG "Best Practice Regulation" Appendix A



# Copyright Act 1968

No. 63, 1968

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Prepared by the Office of Parliamentary Counsel, Canberra

## **Part VII—The Crown**

### **Division 1—Crown copyright**

#### **176 Crown copyright in original works made under direction of Crown**

- (1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this subsection.
- (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

#### **177 Crown copyright in original works first published in Australia under direction of Crown**

Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic, musical or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.

#### **178 Crown copyright in recordings and films made under direction of Crown**

- (1) Where, apart from this section, copyright would not subsist in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the recording or film by virtue of this subsection.
- (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in a sound recording or cinematograph

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film made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

**179 Provisions relating to ownership of copyright may be modified by agreement**

The last three preceding sections have effect subject to any agreement made by, or on behalf of, the Commonwealth or a State with the author of the work or with the maker of the sound recording or cinematograph film, as the case may be, by which it is agreed that the copyright in the work, recording or film is to vest in the author or maker, or in another person specified in the agreement.

**180 Duration of Crown copyright in original works**

- (1) Copyright in a literary, dramatic or musical work of which the Commonwealth or a State is the owner, or would, but for an agreement to which the last preceding section applies, be the owner:
  - (a) where the work is unpublished—continues to subsist so long as the work remains unpublished; and
  - (b) where the work is published—subsists, or, if copyright in the work subsisted immediately before its first publication, continues to subsist, until the expiration of 50 years after the expiration of the calendar year in which the work was first published.
- (2) Subject to the next succeeding subsection, copyright in an artistic work of which the Commonwealth or a State is the owner, or would, but for an agreement to which the last preceding section applies, be the owner, continues to subsist until the expiration of 50 years after the expiration of the calendar year in which the work was made.
- (3) Copyright in an engraving or photograph of which the Commonwealth or a State is the owner, or would, but for an agreement to which the last preceding section applies, be the

owner, continues to subsist until the expiration of 50 years after the expiration of the calendar year in which the engraving or photograph is first published.

**181 Duration of Crown copyright in recordings and films**

Copyright in a sound recording or cinematograph film of which the Commonwealth or a State is the owner, or would, but for the operation of an agreement to which section 179 applies, be the owner, subsists until the expiration of 50 years after the expiration of the calendar year in which the recording or film is first published.

**182 Application of Parts III and IV to copyright subsisting by virtue of this Part**

- (1) Part III (other than the provisions of that Part relating to the subsistence, duration or ownership of copyright) applies in relation to copyright subsisting by virtue of this Part in a literary, dramatic, musical or artistic work in like manner as it applies in relation to copyright subsisting in such a work by virtue of that Part.
- (2) Part IV (other than the provisions of that Part relating to the subsistence, duration or ownership of copyright) applies in relation to copyright subsisting by virtue of this Part in a sound recording or cinematograph film in like manner as it applies in relation to copyright subsisting in such a recording or film by virtue of that Part.

**182A Copyright in statutory instruments and judgments etc.**

- (1) The copyright, including any prerogative right or privilege of the Crown in the nature of copyright, in a prescribed work is not infringed by the making, by reprographic reproduction, of one copy of the whole or of a part of that work by or on behalf of a person and for a particular purpose.
- (2) Subsection (1) does not apply to the making, by reprographic reproduction, of a copy of the whole or a part of the work, where a

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charge is made for making and supplying that copy, unless the amount of the charge does not exceed the cost of making and supplying that copy.

- (3) In subsection (1), *a prescribed work* means:
- (a) an Act or State Act, an enactment of the legislature of a Territory or an instrument (including an Ordinance or a rule, regulation or by-law) made under an Act, a State Act or such an enactment;
  - (b) a judgment, order or award of a Federal court or of a court of a State or Territory;
  - (c) a judgment, order or award of a Tribunal (not being a court) established by or under an Act or other enactment of the Commonwealth, a State or a Territory;
  - (d) reasons for a decision of a court referred to in paragraph (b), or of a Tribunal referred to in paragraph (c), given by the court or by the Tribunal; or
  - (e) reasons given by a Justice, Judge or other member of a court referred to in paragraph (b), or of a member of a Tribunal referred to in paragraph (c), for a decision given by him or her either as the sole member, or as one of the members, of the court or Tribunal.

## **Division 2—Use of copyright material for the Crown**

### **182B Definitions**

- (1) Subject to subsection (2), in this Division:

*collecting society* means a company in respect of which a declaration is in force under section 153F.

*copyright material* means:

- (a) a work; or
- (b) a published edition of a work; or
- (c) a sound recording; or
- (d) a cinematograph film; or
- (e) a television or sound broadcast; or
- (f) a work that is included in a sound recording, a cinematograph film or a television or sound broadcast.

*government* means the Commonwealth or a State.

Note: State includes the Australian Capital Territory, the Northern Territory and Norfolk Island: see paragraph 10(3)(n), as modified by the A.C.T. Self-Government (Consequential Provisions) Regulations (Amendment) (Statutory Rules 1989 No. 392).

*government copy* means a reproduction in a material form of copyright material made under subsection 183(1).

- (2) A reference in subsection (1) to a work does not include a reference to a literary work that consists of a computer program or a compilation of computer programs.

### **182C Relevant collecting society**

A company is the relevant collecting society in relation to a government copy if there is in force, under Division 3 of Part VI, a declaration of the company as the collecting society for the purposes of this Division in relation to:

- (a) all government copies; or
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- (b) a class of government copies that includes the first-mentioned government copy.

**183 Use of copyright material for the services of the Crown**

- (1) The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.
- (2) Where the Government of the Commonwealth has made an agreement or arrangement with the Government of some other country for the supply to that country of goods required for the defence of that country:
  - (a) the doing of any act in connexion with the supply of those goods in pursuance of the agreement or arrangement; and
  - (b) the sale to any person of such of those goods as are not required for the purposes of the agreement or arrangement;shall, for the purposes of the last preceding subsection, be each deemed to be for the services of the Commonwealth.
- (3) Authority may be given under subsection (1) before or after the acts in respect of which the authority is given have been done, and may be given to a person notwithstanding that he or she has a licence granted by, or binding on, the owner of the copyright to do the acts.
- (4) Where an act comprised in a copyright has been done under subsection (1), the Commonwealth or State shall, as soon as possible, unless it appears to the Commonwealth or State that it would be contrary to the public interest to do so, inform the owner of the copyright, as prescribed, of the doing of the act and shall furnish him or her with such information as to the doing of the act as he or she from time to time reasonably requires.



- (5) Where an act comprised in a copyright has been done under subsection (1), the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed between the Commonwealth or the State and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal.
- (6) An agreement or licence (whether made or granted before or after the commencement of this Act) fixing the terms upon which a person other than the Commonwealth or a State may do acts comprised in a copyright is inoperative with respect to the doing of those acts, after the commencement of this Act, under subsection (1), unless the agreement or licence has been approved by the Attorney-General of the Commonwealth or the Attorney-General of the State.
- (7) Where an article is sold and the sale is not, by virtue of subsection (1), an infringement of a copyright, the purchaser of the article, and a person claiming through him or her, is entitled to deal with the article as if the Commonwealth or State were the owner of that copyright.
- (8) An act done under subsection (1) does not constitute publication of a work or other subject-matter and shall not be taken into account in the application of any provision of this Act relating to the duration of any copyright.
- (9) Where an exclusive licence is in force in relation to any copyright, the preceding subsections of this section have effect as if any reference in those subsections to the owner of the copyright were a reference to the exclusive licensee.
- (11) The reproduction, copying or communication of the whole or a part of a work or other subject-matter for the educational purposes of an educational institution of, or under the control of, the Commonwealth, a State or the Northern Territory shall, for the purposes of this section, be deemed not to be an act done for the services of the Commonwealth, that State or the Northern Territory.

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**183A Special arrangements for copying for services of government**

- (1) Subsections 183(4) and (5) do not apply in relation to a government copy (whenever it was made) if a company is the relevant collecting society for the purposes of this Division in relation to the copy and the company has not ceased operating as that collecting society.
- (2) If subsection 183(5) does not apply to government copies made in a particular period for the services of a government, the government must pay the relevant collecting society in relation to those copies (other than excluded copies) equitable remuneration worked out for that period using a method:
  - (a) agreed on by the collecting society and the government; or
  - (b) if there is no agreement—determined by the Tribunal under section 153K.
- (3) The method of working out equitable remuneration payable to a collecting society in respect of government copies (other than excluded copies) for a period must:
  - (a) take into account the estimated number of those copies made for the services of the government during the period, being copies in relation to which the society is the relevant collecting society; and
  - (b) specify the sampling system to be used for estimating the number of copies for the purposes of paragraph (a).
- (4) The method of working out the equitable remuneration payable may provide for different treatment of different kinds or classes of government copies.
- (5) Subsections (3) and (4) apply whether the method is agreed on by the collecting society and the government or is determined by the Tribunal.
- (6) In this section:

*excluded copies* means government copies in respect of which it appears to the government concerned that it would be contrary to

the public interest to disclose information about the making of the copies.

**183B Payment and recovery of equitable remuneration payable for government copies**

- (1) Equitable remuneration payable to a collecting society under subsection 183A(2) must be paid:
  - (a) in the manner, and at the times, agreed on by the collecting society and the government; or
  - (b) if the Tribunal has made an order under subsection 153K(3) specifying how and when payments are to be made—in the manner, and at the times, specified in the order.
- (2) If equitable remuneration is not paid in accordance with the agreement or the Tribunal's order, the collecting society may recover the remuneration as a debt due to the society in a court of competent jurisdiction.

**183C Powers of collecting society to carry out sampling**

- (1) This section applies if the method of working out equitable remuneration payable under subsection 183A(2) for government copies made for the services of a government has been agreed on by the government and the relevant collecting society or has been determined by the Tribunal.
- (2) The collecting society may give written notice to the government that the society wishes to carry out sampling in accordance with the method during a specified period at specified premises occupied by the government. The period specified must not start earlier than 7 days after the day on which the notice is given.
- (3) The government may give the collecting society a written objection, based on reasonable grounds, to the proposal to carry out sampling during the period, or at the premises, specified in the notice. However, if it does so, the notice of objection must propose an alternative period during which, or alternative premises at which, as the case may be, sampling may be carried out.

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- (4) If the government gives the collecting society an objection, sampling may not be carried out during the period, or at the premises, to which the objection relates unless the objection is withdrawn.
- (5) If the government has not objected, or has withdrawn any objection it made, before or during the specified period, a person authorised in writing by the society may, during that period, enter the premises specified in the notice and carry out sampling in accordance with the method on any ordinary working day for government staff who work in the premises.
- (6) The government must take reasonable steps to ensure that the person who attends at the premises is given all reasonable and necessary facilities and assistance for carrying out the sampling.

**183D Annual report and accounts of collecting society**

- (1) As soon as practicable after the end of each financial year, a company that was a collecting society during any part of the year must prepare a report of its operations as a collecting society during the year and send a copy of the report to the Attorney-General.
- (2) A collecting society must keep accounting records correctly recording and explaining the transactions of the society (including any transactions as trustee) and the financial position of the society.
- (3) Accounting records must be kept in a manner that will enable true and fair accounts of the society to be prepared from time to time and to be conveniently and properly audited.
- (4) As soon as practicable after the end of each financial year, a company that was a collecting society during any part of the year must:
  - (a) have its accounts audited by an auditor who is not a member of the society; and

- (b) give a copy of the audited accounts and the auditor's report on the audit to the Attorney-General.
- (5) The Attorney-General must cause a copy of a document given to the Attorney-General under subsection (1) or paragraph (4)(b) to be laid before each House of the Parliament within 15 sitting days of that House after the Attorney-General received the document.
- (6) A collecting society must give its members reasonable access to copies of:
  - (a) all reports and audited accounts prepared by it under this section; and
  - (b) all auditors' reports on the audit of the accounts.
- (7) This section does not affect any obligations of a collecting society relating to the preparation and lodging of annual returns or accounts under the law under which it is incorporated.

#### **183E Alteration of rules of collecting society**

If a collecting society alters its rules, it must give a copy of the altered rules, together with a statement of the effects of, and reasons for, the alteration, to the Attorney-General and the Tribunal within 21 days after the day on which the alteration was made.

#### **183F Applying to Tribunal for review of distribution arrangement**

- (1) A collecting society or a member of a collecting society may apply to the Copyright Tribunal for review of the arrangement adopted, or proposed to be adopted, by the collecting society for distributing amounts it collects in a period.
- (2) If the Tribunal makes an order under section 153KA varying the arrangement or substituting for it another arrangement, the arrangement reflecting the Tribunal's order has effect as if it had been adopted in accordance with the collecting society's rules, but does not affect a distribution started before the order was made.

referred to in this subsection, the regulations made under this section shall prevail.

*[Section 64 amended by No. 23 of 1966 s. 17; No. 6 of 1969 s. 8; No. 43 of 1978 s. 7; No. 57 of 1981 s. 21; No. 28 of 1984 s. 92; No. 12 of 1994 s. 9 and 10; No. 48 of 1995 s. 37 and 39; No. 9 of 2003 s. 39; No. 28 of 2006 s. 282; No. 35 of 2010 s. 134.]*

**64A. Regulations may adopt standards**

- (1) The regulations may make provision for or in relation to any matter by applying, adopting or incorporating a standard or a part of a standard.
- (2) Without limiting subsection (1), a standard or a part of a standard may be applied, adopted or incorporated —
  - (a) as in force at a particular time or as in force from time to time; and
  - (b) with or without modification.

*[Section 64A inserted by No. 48 of 1995 s. 38.]*

**64B. Copies of standards to be kept and made available to public**

The CEO is to cause a copy of every standard referred to in this Act to be kept at the prescribed office of the department and to be available for inspection free of charge by members of the public at that office during normal office hours.

*[Section 64B inserted by No. 48 of 1995 s. 38; amended by No. 28 of 2006 s. 282.]*

### **Part 3 — Regulations and codes of practice**

#### **18. Regulations, general matters (Sch. 1)**

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.
- (2) Without limiting subsection (1), regulations may be made for all or any of the purposes, or about all or any of the matters, set out in Schedule 1.
- (3) Regulations may create offences and may provide for any such offence a maximum penalty of —
  - (a) for an individual, a fine of \$10 000 with or without imprisonment for 10 months;
  - (b) for a body corporate, a fine of \$50 000.
- (4) Regulations may control an activity by prohibiting it from being carried out by a person except under a licence or a permit issued by the Chief Officer to the person.
- (5) Regulations may control the possession of dangerous goods by a person by prohibiting it except under a licence or a permit issued by the Chief Officer to the person.
- (6) Regulations may control the possession, storage, handling or transport of particular dangerous goods by prohibiting them from being possessed, stored, handled or transported unless the goods are authorised by the Chief Officer.
- (7) Regulations may control the use of a place by prohibiting it from being used unless it is licensed by the Chief Officer.
- (8) Regulations may control the use of a thing or the use of plant or equipment, by prohibiting it from being used unless it is authorised by the Chief Officer.

- (9) Regulations may control the use of a vehicle, by prohibiting it from being used unless it is licensed by the Chief Officer.
- (10) Regulations may be made in relation to a reserve (within the meaning of the *Land Administration Act 1997*) on which activities relating to the storage, handling or transport of dangerous goods are carried out, but the regulations must not be inconsistent with that Act and in particular with —
  - (a) the order in effect under section 41 of that Act in relation to the reserve; and
  - (b) any management order in effect under section 46 of that Act in relation to the reserve.

**19. Regulations may adopt codes or legislation**

- (1) In this section —

*code* means a code, standard, rule, specification or other document, made in or outside Australia, that does not by itself have legislative effect in this State;

*subsidiary legislation* includes rules, regulations and instructions.
- (2) Regulations may adopt, either wholly or in part or with modifications —
  - (a) any code; or
  - (b) any subsidiary legislation made, determined or issued under any other Act or under any Act of the Commonwealth, another State or a Territory.
- (3) If the regulations adopt a code or subsidiary legislation, it is adopted as in force from time to time unless the regulations specify that a particular text is adopted.
- (4) If the regulations adopt a code or subsidiary legislation, the Chief Officer must —
  - (a) ensure that a copy of the code or subsidiary legislation, including any amendments made to it from time to time



that have been adopted, is available, without charge, for public inspection;

- (b) publish a notice in the *Gazette* giving details of where such documents may be inspected or obtained; and
- (c) if the regulations adopt a code or subsidiary legislation as in force from time to time and the code or subsidiary legislation is subsequently amended, publish in the *Gazette* a notice of the amendment.

**20. Codes of practice, approval of**

- (1) For the purpose of providing practical guidance to persons engaged, directly or indirectly, in storing, handling or transporting dangerous goods, the Minister may approve any code of practice as in force from time to time or as in force at a particular time.
- (2) A code of practice —
  - (a) may consist of any code, standard, rule, specification or provision relating to the storage, handling or transport of dangerous goods published by a body recognised as having an expertise on the subject; and
  - (b) may incorporate by reference any other such document as in force from time to time or as in force at a particular time.
- (3) The Minister may approve any revision of the whole or any part of a code of practice.
- (4) The Minister may cancel the approval of a code of practice.
- (5) The Chief Officer must —
  - (a) publish a notice in the *Gazette* giving details of any approval or cancellation made under this section;
  - (b) ensure that a copy of every approved code of practice, including any revision of the code and any document

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incorporated in it by reference, is available, without charge, for public inspection; and

- (c) publish a notice in the *Gazette* giving details of where such documents may be inspected or obtained.
- (6) An approval or cancellation made under this section comes into force on the day on which notice of it is published in the *Gazette* or on a later date specified in the notice.
- (7) A code of practice approved under this section is a regulation for the purpose of section 42 of the *Interpretation Act 1984*.
- (8) A person is not liable in any civil or criminal proceeding only because the person has not complied with a provision of an approved code of practice.

## **Part 14 — Regulations**

### **149. Regulations**

- (1) The Governor may make regulations prescribing all matters that are —
  - (a) required or permitted by the Act to be prescribed; or
  - (b) necessary or convenient to be prescribed for carrying out this Act.
- (2) Without limiting subsection (1), regulations may prescribe the fees to be paid for the purposes of this Act and the persons liable for payment.
- (3) The regulations may provide that contravention of a regulation is an offence, and provide, for an offence against the regulations, a penalty not exceeding a fine of \$5 000.

### **150. Regulations may refer to published documents**

- (1) Regulations made for the purposes of this Act may adopt the text of any published document specified in the regulations —
  - (a) as that text exists at a particular date; or
  - (b) as that text may from time to time be amended.
- (2) The text may be adopted —
  - (a) wholly or in part; or
  - (b) as modified by the regulations.
- (3) The adoption may be direct (by reference made in the regulations), or indirect (by reference made in the text that is itself directly or indirectly adopted).
- (4) The adoption of a text is of no effect unless —
  - (a) the adopted text; and
  - (b) if the text is adopted as it may be amended from time to time, either —
    - (i) the amendments to the text; or

- (ii) the text as amended,  
can at all reasonable times be inspected or purchased by the public.
- (5) The Building Commissioner must ensure that text mentioned in subsection (4)(a) and (b) —
- (a) can be inspected by the public at the Commissioner's office during business hours; and
  - (b) can be purchased by the public.
- (6) Regulations that adopt the text of a published document may contain provisions that are necessary or convenient for dealing with transitional matters related to the provisions that change or cease to have effect in relation to the text.

*[Part 15 (s. 151-175) omitted under the Reprints Act 1984 s. 7(4)(e) and (f).]*

- (5) If the notice is withdrawn, an authorised officer may, under the *Criminal Procedure Act 2004* Part 2, issue an infringement notice in relation to the alleged offence to another person, within 21 days after the day on which the person on whom the original notice was served complies with subsection (2).
- (6) The *Criminal Procedure Act 2004* Part 2 is modified to the extent necessary to give effect to this section.
- (7) If a term is given a meaning in the *Criminal Procedure Act 2004* Part 2, it has the same meaning in this section.

**222. Regulations**

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.
- (2) The regulations may —
  - (a) provide for the imposition, determination and payment of fees under this Act, including, without limiting the *Interpretation Act 1984* sections 43, 45 and 45A, the following —
    - (i) the time at which, or the periods for or during which, fees are to be paid;
    - (ii) the structure of fees;
    - (iii) the basis on which a fee is to be calculated;
    - (iv) interest on unpaid fees;
    - (v) penalties for late payment or underpayment of fees;
    - (vi) recovery of fees;
    - (vii) refunding of fees;
  - (b) without limiting paragraph (a), for a licence, approval or exemption granted under this Act (an *authorisation*) —



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- (i) prescribe fees that are payable before or when the authorisation is granted, issued or given and fees that are payable at specified intervals or in specified circumstances during the currency of the authorisation; and
  - (ii) provide for the authorisation to cease to have effect if a fee is not paid in accordance with the regulations;
- (c) in respect of fees and charges, deal with exemptions, discounts, rebates and concessions to be made available to customers;
- (d) provide for the protection of, and access to, water service works of licensees;
- (e) provide for the prevention or remedying of the waste, misuse, undue consumption, fouling or contamination of water;
- (f) provide for notice of plumbing work (as defined in the *Plumbers Licensing Act 1995* section 59I) to be given to licensees;
- (g) prohibit, impose restrictions on or otherwise regulate the use of water, including by authorising the making of orders by the Minister that impose water use restrictions provided for in the regulations;
- (h) provide for the estimation or calculation of the quantity or quality of water or wastewater if the quantity or quality cannot be, or was not, measured or measured properly;
- (i) deal with applications for and relating to licences, exemptions, approvals and declarations under this Act;
- (j) deal with giving notices and other instruments and documents under this Act;
- (k) provide for appeals from, or the review of, decisions under this Act, including by providing for applications

to be made to the State Administrative Tribunal for the review of such decisions;

- (l) in relation to specified provision of the regulations, provide for licensees to be able to give a compliance notice to a person in relation to a failure to comply with such provisions, and, for that purpose, the regulations may make the same or similar provision as is made by section 119;
- (m) declare a provision of this Act to be a Corporations legislation displacement provision for the purposes of the *Corporations Act 2001* (Commonwealth) section 5G (either generally or specifically in relation to a provision to which Part 1.1A of that Act applies);
- (n) declare a matter dealt with, provided for, done or occurring under this Act or the regulations to be an excluded matter for the purposes of the *Corporations Act 2001* (Commonwealth) section 5F in relation to —
  - (i) the whole of the Corporations legislation to which the *Corporations Act 2001* (Commonwealth) Part 1.1A applies; or
  - (ii) a specified provision of that legislation; or
  - (iii) that legislation other than a specified provision; or
  - (iv) that legislation other than to a specified extent;
- (o) declare a matter dealt with, provided for, done or occurring under this Act or the regulations to be an excluded matter for the purposes of the *Personal Property Securities Act 2009* (Commonwealth) section 259 in relation to —
  - (i) the whole of that Act (which, for the purposes of this paragraph, includes instruments made under that Act); or
  - (ii) a specified provision of that Act; or
  - (iii) that Act other than a specified provision; or

- (iv) that Act other than to a specified extent;
  - (p) provide that contravention of a provision of the regulations is an offence;
  - (q) provide, in relation to bodies corporate, for an offence to be punishable on conviction by the imposition of a fine not exceeding \$10 000 and, if the contravention is of a continuing nature, a daily penalty not exceeding \$2 000;
  - (r) provide, in relation to individuals, for an offence to be punishable on conviction by the imposition of a fine not exceeding \$5 000;
  - (s) provide for the imposition of a minimum fine for an offence;
  - (t) relate the level of a fine to —
    - (i) the circumstances or extent of the offence; or
    - (ii) whether the offender has committed previous offences and, if so, the number of previous offences that the offender has committed.
- (3) The regulations may adopt the text of any published document specified in the regulations —
- (a) as that text exists at a particular date; or
  - (b) as that text may from time to time be amended.
- (4) The text may be adopted —
- (a) wholly or in part; and
  - (b) as modified by the regulations.
- (5) The adoption may be direct (by reference made in the regulations), or indirect (by reference made in any text that is itself directly or indirectly adopted).
- (6) The adoption of text is of no effect unless —
- (a) the adopted text; and
  - (b) the amendments to the text or the text as amended (if relevant).



can at all reasonable times be inspected or purchased by the public.

**223. Notes in the text**

A note included in this Act is explanatory and is not part of this Act.

**224. Review of Act**

- (1) The Minister must carry out a review of the operation and effectiveness of this Act as soon as is practicable after every 5<sup>th</sup> anniversary of its commencement, and in the course of that review the Minister must consider and have regard to —
  - (a) the adequacy of the penalties imposed under this Act; and
  - (b) any other matters that appear to the Minister to be relevant to the operation and effectiveness of this Act.
- (2) The Minister must prepare a report based on the review carried out under subsection (1) and, as soon as is practicable after the preparation of the report, cause it to be laid before each House of Parliament.

**225. Transitional provisions**

Schedule 1 sets out transitional provisions.

## Part 8 — Regulations

### 131. General power to make regulations

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.
- (2) The regulations may —
  - (a) provide that a contravention of a regulation is an offence; and
  - (b) prescribe for such an offence a penalty not exceeding a fine of \$15 000.

### 132. Regulations may adopt codes

- (1) In this section —

*adopted code* means a code that is adopted by regulations made under this section;

*code* means a code, standard, rule, specification or other document;

*code documents*, in relation to an adopted code means —

  - (a) the adopted code; and
  - (b) if the code is adopted as amended from time to time, either —
    - (i) the amendments to the code; or
    - (ii) the code as amended.
- (2) The regulations may adopt a code —
  - (a) either wholly or in part; and
  - (b) with or without modifications.
- (3) If the regulations adopt a code, it is adopted as in force from time to time unless the regulations provide otherwise.

- (4) If the regulations adopt a code, the CEO must ensure that the code documents relating to the adopted code —
  - (a) are available for inspection by members of the public during normal office hours; and
  - (b) can be acquired by members of the public.

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- 1                    (k) specify the criteria and parameters that are to be applied
- 2                    in monitoring compliance with this Act;
- 3                    (l) provide that a failure to comply with the regulations
- 4                    constitutes grounds for the issue of an improvement
- 5                    notice or enforcement order.
  
- 6            (4) Without limiting subsection (1), the regulations may —
- 7                    (a) provide for offences against the regulations and
- 8                    prescribe penalties —
- 9                            (i) for an individual — not exceeding a fine of
- 10                            \$50 000;
- 11                            (ii) for a body corporate — not exceeding a fine of
- 12                            \$200 000;
- 13                    (b) prescribe daily penalties for offences against the
- 14                    regulations —
- 15                            (i) for an individual — not exceeding a fine of
- 16                            \$10 000;
- 17                            (ii) for a body corporate — not exceeding a fine of
- 18                            \$50 000.

19    **294. Regulations may adopt codes or legislation**

- 20            (1) In this section —
- 21                    *code* means a code, standard, rule, specification or other
- 22                    document, published in or outside Australia, that does not by
- 23                    itself have legislative effect in this State;
- 24                    *subsidiary legislation* includes rules, regulations, instructions,
- 25                    local laws and by-laws.
  
- 26            (2) Regulations may adopt, either wholly or in part or with
- 27                    modifications —
- 28                            (a) any code; or
- 29                            (b) any subsidiary legislation made, determined or issued
- 30                            under any other Act or under any Act of the
- 31                            Commonwealth, another State or a Territory.

- 1            (3) The adoption may be by —
- 2                (a) incorporating the code or subsidiary legislation in the
- 3                        regulations; or
- 4                (b) incorporating the code or subsidiary legislation by
- 5                        reference.
- 6            (4) If regulations adopt a code or subsidiary legislation by
- 7                        reference, then, unless the regulations specify that a particular
- 8                        text is adopted —
- 9                (a) the code or subsidiary legislation is adopted as existing
- 10                        or in force when the regulations are made; and
- 11                (b) any amendments made to the code or subsidiary
- 12                        legislation after the regulations are made have no legal
- 13                        effect as part of the regulations unless they are
- 14                        specifically adopted by later regulations or a later
- 15                        amendment to the regulations.
- 16            (5) If regulations adopt a code or subsidiary legislation by
- 17                        reference, the Chief Health Officer must —
- 18                (a) ensure that a copy of the code or subsidiary legislation,
- 19                        including any amendments made to it from time to time
- 20                        that have been adopted, is available, without charge, for
- 21                        public inspection; and
- 22                (b) if the code or subsidiary legislation, or any part of the
- 23                        code or subsidiary legislation, is in a language other than
- 24                        English, ensure that an accurate English translation of
- 25                        the code or subsidiary legislation, or of the relevant part,
- 26                        is also available, without charge, for public inspection;
- 27                        and
- 28                (c) publish a notice in the *Gazette* giving details of where
- 29                        those documents may be inspected or obtained.

**Reprint  
as at 1 February 2014**



**Legislation Act 2012**

Public Act 2012 No 119  
Date of assent 11 December 2012  
Commencement see section 2

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**Note**

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.

Note 4 at the end of this reprint provides a list of the amendments incorporated.

**This Act is administered by the Ministry of Justice and the Parliamentary Counsel Office.**

- (b) in the case of a resolution, must show the date on which the resolution was passed; and
  - (c) in the case of a notice of motion, must show—
    - (i) the date of the sitting day on which the notice of motion was given; and
    - (ii) the date of the 21st sitting day after the giving of the notice of motion.
  - (4) The notice is conclusive evidence of the matters stated in subsection (3)(b) and (c).
  - (5) The Chief Parliamentary Counsel must arrange for every notice forwarded under subsection (2) to be published under section 6 as if it were a legislative instrument.
- Compare: 1989 No 143 s 10

## Subpart 2—Incorporation by reference in instruments

### 48 Interpretation

- (1) In this subpart, unless the context otherwise requires,—
  - administering department** means the department, Ministry, Office of Parliament, or other organisation that is responsible for administering the instrument
  - chief executive** means the chief executive of the administering department
  - inspection sites** means the head office of the administering department and any other places that the chief executive may, at his or her discretion, determine are appropriate
  - instrument**—
    - (a) means any instrument (whether called regulations, rules, an Order in Council, a notice, bylaws, a code, a framework, or by any other name) that has legislative effect and that is authorised by an enactment; but
    - (b) does not include a bylaw that is subject to the Bylaws Act 1910
  - material** means—
    - (a) material referred to in section 49(3); but
    - (b) does not include anything incorporated by reference by that material

**parent Act** means an Act that is a parent Act for the purpose of section 49.

- (2) For the purposes of this subpart, unless the context otherwise requires, an instrument incorporates material by reference if the instrument does 1 or more of the following:
  - (a) incorporates the material in whole or in part, and with or without modification:
  - (b) incorporates amendments to which section 53 applies.

**49 Instruments that may incorporate material by reference**

- (1) An instrument that may be made under any Act (the **parent Act**) for a purpose specified in subsection (2) may incorporate material by reference under this subpart.
- (2) A purpose of the instrument must be to define terms, prescribe matters, or make other provision in relation to an activity or thing, including (without limitation) any asset, equipment, facility, goods, information, material, practice, premises, process, product, programme, service, or system.
- (3) This section, in so far as it applies, is sufficient authority for the instrument to incorporate 1 or more of the following by reference:
  - (a) a standard, framework, code of practice, recommended practice, or requirement of an international organisation or a national organisation:
  - (b) a standard, framework, code of practice, recommended practice, or requirement prescribed in any country or jurisdiction, or by any group of countries:
  - (c) any other written material that deals with technical matters and that can reasonably be regarded as being too large or impractical to include in, or publish as part of, the instrument.
- (4) Material incorporated by reference in reliance on this section has legal effect as part of the instrument that incorporates the material.

Compare: 1988 No 5 s 22(1)



**50 Application of this subpart**

- (1) This subpart applies in relation to the making of an instrument that incorporates material by reference in reliance on section 49, except where the parent Act expressly provides to the contrary.
- (2) This subpart applies, subject to the exception stated in subsection (1), regardless of whether the parent Act—
  - (a) is an Act passed before or after the commencement of this section; or
  - (b) provides for the incorporation of material by reference in an instrument; or
  - (c) expressly mentions the incorporation of material by reference in reliance on section 49.

**51 Requirement to consult on proposal to incorporate material by reference**

- (1) Before an instrument incorporating material by reference in reliance on section 49 is made, the chief executive must—
  - (a) make copies of the material proposed to be incorporated by reference (the **proposed material**) available for inspection during working hours for a reasonable period, free of charge, at the inspection sites; and
  - (b) state where copies of the proposed material are available for purchase; and
  - (c) make copies of the proposed material available, free of charge, on an Internet site maintained by or on behalf of the administering department, unless doing so would infringe copyright; and
  - (d) give notice in the *Gazette* stating—
    - (i) that the proposed material is available for inspection during working hours, free of charge, and stating the places at which it can be inspected and the period during which it can be inspected; and
    - (ii) that copies of the proposed material can be purchased and stating the places at which they can be purchased; and
    - (iii) if applicable, that the proposed material is available on the Internet, free of charge, and stating the Internet site address; and

- (e) allow a reasonable opportunity for persons to comment on the proposal to incorporate the proposed material by reference; and
  - (f) consider any comments made.
- (2) The chief executive—
- (a) may make copies of the proposed material available in any other way that he or she considers appropriate in the circumstances; and
  - (b) must, if paragraph (a) applies, give notice in the *Gazette* stating that the proposed material is available in other ways and giving details of where or how it can be accessed or obtained.
- (3) The chief executive may comply with subsection (1)(c) (if applicable) by providing a hypertext link from an Internet site maintained by or on behalf of the department to a copy of the proposed material that is available, free of charge, on an Internet site that is maintained by or on behalf of someone else.
- (4) The references in this section to material include, if the material is not in an official New Zealand language, as well as the material itself, an accurate translation in an official New Zealand language of the material.
- (5) A failure to comply with this section does not invalidate an instrument that incorporates material by reference in reliance on section 49.
- (6) For the purposes of subsection (1)(c), a chief executive may not rely on section 66 of the Copyright Act 1994 as authority to make the proposed material available on an Internet site.

## **52 Access to material incorporated by reference**

- (1) This section applies if an instrument incorporating material by reference in reliance on section 49 is made.
- (2) The chief executive must—
- (a) make the material (the **incorporated material**) available for inspection during working hours free of charge at the inspection sites; and
  - (b) state where copies of the incorporated material are available for purchase; and

- (c) make copies of the incorporated material available, free of charge, on an Internet site maintained by or on behalf of the administering department, unless doing so would infringe copyright; and
- (d) give notice in the *Gazette* stating—
  - (i) that the incorporated material is incorporated in the instrument and stating the date on which the instrument was made; and
  - (ii) that the incorporated material is available for inspection during working hours, free of charge, and stating the places at which it can be inspected; and
  - (iii) that copies of the incorporated material can be purchased and stating the places at which they can be purchased; and
  - (iv) if applicable, that the incorporated material is available on the Internet, free of charge, and stating the Internet site address.
- (3) The chief executive—
  - (a) may make copies of the incorporated material available in any other way that he or she considers appropriate in the circumstances; and
  - (b) must, if paragraph (a) applies, give notice in the *Gazette* stating that the incorporated material is available in other ways and giving details of where or how it can be accessed or obtained.
- (4) The chief executive may comply with subsection (2)(c) (if applicable) by providing a hypertext link from an Internet site maintained by or on behalf of the administering department to a copy of the incorporated material that is available, free of charge, on an Internet site that is maintained by or on behalf of someone else.
- (5) The references in this section to material are to—
  - (a) material incorporated by reference in the instrument; and
  - (b) if the material is not in an official New Zealand language, the material itself together with an accurate translation in an official New Zealand language of the material.

- (6) A failure to comply with this section does not invalidate an instrument that incorporates material by reference.
- (7) For the purposes of subsection (2)(c), a chief executive may not rely on section 66 of the Copyright Act 1994 as authority to make the incorporated material available on an Internet site.

**53 Effect of amendments to material incorporated by reference**

- (1) This section applies if the material incorporated by reference in reliance on section 49 is amended by the originator of the material after the instrument is made.
- (2) For the purposes of this section, material is **amended** if the material or any part of it—
  - (a) is amended or replaced; or
  - (b) expires or is revoked; or
  - (c) otherwise ceases to have effect.
- (3) Amendments made by the originator of the material have no legal effect as part of the instrument unless they are specifically incorporated by a later instrument made in accordance with this subpart.

**54 Proof of material incorporated by reference**

- (1) A copy of material incorporated by reference in an instrument in reliance on section 49 must be—
  - (a) certified as a correct copy of the material by the chief executive; and
  - (b) retained by the chief executive.
- (2) The production in proceedings of a certified copy of the material is, in the absence of evidence to the contrary, sufficient evidence of the material incorporated by reference in the instrument.

**55 Application of subpart 1 of Part 2 to instrument and material incorporated by reference**

- (1) Subpart 1 of Part 2 does not apply to material that is for the time being incorporated by reference in an instrument in reliance on section 49, even if the instrument is a legislative instrument.

- (2) To avoid doubt, the material does not have to be presented to the House of Representatives under section 41 even though the instrument is a disallowable instrument by virtue of section 56.

**56 Application of subpart 1 of this Part to instrument incorporating material by reference**

An instrument that incorporates material by reference in reliance on section 49 is a disallowable instrument for the purposes of subpart 1 of this Part.

**57 Application of Standards Act 1988, other enactments, and rules of law not affected**

Nothing in this subpart affects the application of sections 22 to 25 of the Standards Act 1988, any other enactment, or any rule of law.

## **Part 4**

### **Parliamentary Counsel Office**

#### *Constitution and functions*

**58 Parliamentary Counsel Office continues as separate statutory office**

- (1) The Parliamentary Counsel Office continues as an instrument of the Crown and a separate statutory office under the Attorney-General's control.
- (2) During any period when there is no Minister of the Crown who is Attorney-General, the Parliamentary Counsel Office is under the Prime Minister's control.
- (3) Every reference to the Parliamentary Counsel Office in any enactment, agreement, deed, instrument, application, notice, or other document in force immediately before the commencement of this section must, on and after that commencement, be read as a reference to the Parliamentary Counsel Office as continued by this section, unless the context otherwise requires.

Compare: 1920 No 46 s 2

**59 Functions of PCO**

- (1) The functions of the PCO are—



# LEGISLATION ADVISORY COMMITTEE

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## CHAPTER 13

### Delegating law-making powers to the executive

Parliament makes laws by enacting primary legislation (Acts); however, it is not always appropriate or possible for Parliament to deal with all of the detailed underlying systems and structures that give effect to an Act. In these cases Parliament often includes in an Act a provision that authorises another body, usually part of the executive, to exercise some of its law-making functions to deal with those detailed underlying systems. The Act that delegates this law-making power is known as the “empowering Act”. The specific provision containing the power is usually known as the “empowering provision”. The product of the exercise of this power is known as “delegated legislation”.

Delegated legislation can be made by different bodies or officers within or outside the executive. These include the Governor-General in the Executive Council (the most common), a Minister, or a statutory body or officer. Delegated legislation is referred to by a range of terms, including secondary legislation, tertiary legislation, regulation, Proclamation, Order in Council, bylaw, rule, code, notice, or warrant.

A powerful check on delegated legislation is the requirement for all regulations (defined in wide terms by s 29 of the Interpretation Act), but not including most bylaws and empowering provisions, to face Regulations Review Committee (“RRC”) scrutiny. The RRC is established and governed by the Standing Orders of the House of Representatives. The RRC might effect significant change to empowering provisions or regulations. The RRC may bring a regulation or empowering provision to the attention of the House for a variety of reasons, including that the empowering provision is drafted in such a way that regulations drafted under it may breach one of the grounds in Standing Order 319(2). Officials must be prepared to justify to the RRC why a power has been delegated to the executive or another body outside Parliament.

The Cabinet Manual establishes a number of rules and procedures for developing delegated legislation (see [7.77] of the Cabinet Manual).

This chapter will help identify those matters that are appropriate for Parliament to delegate, to whom the power should be delegated, what form the delegated legislation might take, and what matters the empowering provision should address.

Further guidance on codes will be provided in future updates to these Guidelines.

- Part 1: Is the matter appropriate for delegated legislation?
- Part 2: For what purposes may the power to make delegated legislation be exercised?
- Part 3: Who will hold the power to make delegated legislation?
- Part 4: Is the delegated legislation subject to appropriate safeguards?
- Part 5: Does the delegated power have any special features?
- Part 6: Does the legislation authorise “incorporation by reference”?

#### Part 1

#### Is the matter appropriate for delegated legislation?

*Legislation should not authorise delegated legislation to be made in respect of matters which are appropriate for primary legislation.*

As a general rule, matters of policy and principle should be included in primary legislation. Delegated legislation should deal with technical matters of implementation and the operation of the Act.

While valid reasons do exist for delegating a power to the executive, each decision to authorise the making of delegated legislation should be justified on its own merits.

Some matters, such as limiting fundamental human rights, are clearly appropriate only for primary legislation; but the decision will not always be clear-cut, and some matters may be appropriate for both primary and delegated legislation.

The following matters should ideally (or in some cases can only) be addressed in primary legislation:

- matters of significant policy;
- matters affecting fundamental human rights;
- the creation of significant new public powers such as search and seizure or confiscation of property;
- granting or changing appeal rights;
- variations to the common law;
- the creation of serious criminal offences and significant penalties;
- authorising the levying of a tax, borrowing of money, or spending of public money;
- the creation of a new public agency;
- amendments to another Act;
- retrospective changes to the law;
- procedural matters that go to the essence of the legislative scheme.

Delegated legislation should only be authorised when it is necessary to give effect to primary legislation. It is particularly useful in situations where the environment in which the legislation must operate is subject to frequent change or where flexibility is desired for some other reason.

The following may be appropriate for delegated legislation:

- the mechanics of implementing an Act, fees, format and content of documents, certain lower-level procedures;
- large lists, schedules of minor details, and matters suitable for inflation indexation within identified parameters;
- technically complex matters;
- allowing for potential, but as yet unknown, contingencies;
- a need for flexibility, or regular technical updating;
- a need to respond to emergencies or other matters that require speedy responses;
- matters that need to be consulted on before they are finalised or changed.

In limited cases, the setting of the commencement date may be delegated to the executive. Such provisions are likely to face additional RRC scrutiny and, as such, cogent reasons for the delegation must exist. The legislation should also incorporate a provision that the legislation is brought into effect automatically after a set period of no more than one year after its enactment, if not brought into force earlier by Order in Council.

**It will not** be appropriate to authorise delegated legislation:

- to fill any gaps in primary legislation that may have occurred as a result of a rushed or unfinished policy development process;
- to avoid full debate and scrutiny of politically contentious matters;
- solely to speed up its passage through Parliament;
- that simply follows a past practice of using delegated legislation.

## Part 2

### **For what purposes may the power to make delegated legislation be exercised?**

*The empowering Act should define clearly the purposes for creating delegated legislation.*

Before settling the purposes for creating the delegated legislation, it is advisable to consult those who will implement the Act. This will help to identify the extent of the powers they require and in what circumstances they anticipate exercising those powers.

A power to create delegated legislation should be wide enough for implementation of the Act, but it should not be unfettered. The RRC may criticise a general empowering provision on the basis that it is an unexpected use of the delegated power.

## Part 3

### **Who will hold the power to make delegated legislation?**

*The person authorised to make delegated legislation must have an appropriate level of expertise, and hold an appropriate office having regard to the importance of the issues and the nature of any safeguards that are in place.*

There are no absolute rules as to who should be authorised to make delegated legislation. Traditionally, delegated legislation is made by the Governor-General on the advice of Government Ministers, or is made by the relevant portfolio Minister(s). Key factors to take into account are the expertise required of the person making the delegated legislation, the importance of the issues in question, and what safeguards are in place (for example, publication, disallowance, Cabinet scrutiny or drafting by the PCO). The following is an indication of when a certain office holder might be the appropriate person to exercise a particular power.

- **Governor-General in Council:** Will be appropriate when the potential exists to significantly affect the population, a large number of people, or human rights. The Governor-General will also be appropriate when delegated legislation creates criminal sanctions (rarely done), amends Acts (very rarely), brings primary legislation into force, or deals with non-technical matters. By convention, the Governor-General will act on the advice of the Executive Council (ordinarily given after Cabinet decisions that confirm or alter decisions of Cabinet committee), and sometimes is expressed to be on the recommendation of one or more Ministers or after compliance with a statutory consultation requirement.
- **Government Ministers:** Will be appropriate where some law making is appropriately entrusted to the relevant portfolio Minister(s) acting (in exercising the power) independently from Cabinet colleagues. There is considerable overlap between those powers that a Minister and the Governor-General might appropriately hold.
- **Public service chief executives:** Will be appropriate where the matter is of minor technical detail, with little impact on the rights of individuals (such as setting the format of prescribed forms).



- **Independent statutory body or officers:** Will be appropriate where the subject matter is highly specialised or technical, where there will be less impact generally on individual rights, and where adequate safeguards are in place. This delegation choice is to empower, as a delegate, a law-maker legally independent of Ministers. Specialist or technical participation can also be achieved by preconditions (such as recommendations or consultation) before making delegated legislation.
- **Local government/local authorities:** Will be appropriate where the subject matter will have a localised impact that requires in-depth knowledge of the particular region, or local government accountability is needed or desirable.
- **Occupational and professional groups:** Will be appropriate if the subject matter will only affect a particular profession or occupation, and if adequate safeguards are in place.

In some of those cases it may be preferable to use primary legislation to directly empower a party to do something (“The Registrar may prescribe the forms ...”), rather than attempt to say that regulations may say who may prescribe the forms (if it is obvious that the person will be the Registrar).

## Part 4

### Is the delegated legislation subject to appropriate safeguards?

*All delegated legislation should be subject to an appropriate level of scrutiny, publication and review.*

What is considered an appropriate level of safeguards will increase with the significance of the delegated power. Each safeguard imposed will increase the complexity of the process, increasing the time and cost required to produce delegated legislation.

All delegated legislation should generally be subject to RRC scrutiny and judicial review.

- **Regulations Review Committee scrutiny:** The RRC will scrutinise all regulations regardless of their form.
- **Judicial review:** In contrast to primary legislation, delegated legislation may on many grounds be challenged in the courts and declared invalid on judicial review. Legislation should not restrict a right of access to the courts to challenge delegated legislation (see Chapter 25).

The form and substance of delegated legislation may trigger some further safeguards.

- **Publication:** Instruments that fall within the definition of “legislative instruments” in s 4 of the Legislation Act 2012 will trigger the publication requirements in the Legislation Act 2012. If the delegated legislation does not fall within this definition, the legislation must make it clear how the instrument will be made public. This can be achieved by stating in the legislation that the instrument is a “legislative instrument” (a “deemed legislative instrument”), or by stating alternative publication requirements such as placing it on a departmental website or publishing it in the Gazette.

- **Disallowance:** Instruments that fall within the definition of “disallowable instruments” (which includes all “legislative instruments”) in s 38 of the Legislation Act 2012 must be presented to the House of Representatives. The House may revoke or amend an instrument in accordance with Part 3 of the Legislation Act 2012. If the delegated legislation does not fall within this definition, the legislation must make it clear whether or not the instrument is a “disallowable instrument” and be tabled under the Legislation Act 2012.

An Order in Council will usually trigger the publication and disallowance procedures in the Legislation Act 2012, and will be subject to Cabinet requirements for consultation and certification by the PCO. Sometimes it will be necessary to consider modifying those procedures if there is a cogent reason for the Order in Council not to be published in the Legislative Instrument series or **not** to be a disallowable instrument).

It may be appropriate to make the exercise of the delegated power subject to preconditions, such as a consultation requirement or a requirement that the power is exercised only once the recommendation, approval, confirmation, concurrence or consent of another person has been sought or obtained. Other potential preconditions involve requiring that certain things are shown, or certain circumstances exist, before regulations are made.

It may be appropriate to provide that the delegated legislation lapses after a certain period if not confirmed by Parliament.

## Part 5

### Does the delegated power have any special features?

*Legislation should address any special features of the power to make delegated legislation.*

A delegated power may have certain features that should be explicitly addressed in the empowering Act.

- **Inconsistency with primary legislation:** Delegated legislation should rarely, if ever, override, suspend or amend primary legislation (empowering provisions that authorise delegated legislation of this nature are sometimes called Henry VIII clauses). Delegated legislation that attempts to do so without express authorisation is at risk of the courts declaring it unlawful and invalid, and it risks facing RRC criticism. In the rare cases where power of this kind is needed, it must be drafted in the most limited terms possible, must be consistent with and support the provisions of the empowering Act, and must be subject to adequate safeguards. The empowering provision should usually also be limited in time (that is to say, a temporary law), as should any regulations made under the power.
- **Retrospective effect:** Where delegated legislation is intended to have retrospective effect, the empowering provision must authorise that effect in clear and unequivocal terms.
- **Sub-delegation:** The identity or office of the person to whom the power to make delegated legislation is given is a key factor in the particular legislative scheme. Careful consideration should therefore be given as to whether that person should be able to sub-delegate a power given to them. Where the power to make delegated legislation is able to be sub-delegated, the empowering provision must clearly identify that intent.

- **Inconsistency with NZBORA:** In the rare cases where delegated legislation is required or permitted to be inconsistent with NZBORA, an express statutory provision authorising this outcome must exist. Despite s 4 of NZBORA stating that inconsistency with NZBORA is not a ground for invalidating an enactment, the courts have held that delegated legislation is invalid if it is inconsistent with NZBORA and the empowering provision does not expressly state that it may be inconsistent.

## Part 6

### Does the legislation authorise “incorporation by reference”?

*Incorporation by reference should only be used where it is impractical to do otherwise.*

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

Incorporation by reference might be appropriate where:

- 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 of Parliament or delegated 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 products (such as motor vehicles) manufactured by it or its members.

If not approached carefully, incorporation by reference can be inconsistent with some fundamental law-making principles, including the requirement for Parliament to have control over the law and the requirement for obligations imposed by law to be clear, understandable and accessible. It is therefore necessary to work closely with legal advisers to ensure adequate safeguards are in place and the requirements of the Legislation Act 2012 (where delegated legislation is incorporating the document) are complied with.

Consider whether any amendments to the incorporated material will automatically become part of the law. For instance, if a failure to comply with a requirement found in the incorporated material is an offence, those who subsequently amend the incorporated material are creating/amending the criminal law. The Legislation Act has default provisions addressing these issues (see Part 3, Subpart 2) that should be considered.

## Further reading

- LAC Guidelines on Process and Content of Legislation, 2001 edition and amendments (superceded) - see Chapter 10
- Legislative Advisory Committee *Principles for Incorporation by Reference* (August 2002). Extract from superceded Guidelines.

- Dr Ryan Malone, Tim Miller, and Luke Archer *Regulations Review Committee Digest* (5<sup>th</sup> ed, New Zealand Centre for Public Law, Wellington, 2013). Available at [www.victoria.ac.nz/law/centres/nzcpl/publications/regulations-review-committee-digest](http://www.victoria.ac.nz/law/centres/nzcpl/publications/regulations-review-committee-digest)
- Standing Orders of the House of Representatives 2014. Available at [www.parliament.nz/en-nz/pb/rules/standing-orders/00HOHPBReferenceStOrders4/standing-orders-of-the-house-of-representatives-2014](http://www.parliament.nz/en-nz/pb/rules/standing-orders/00HOHPBReferenceStOrders4/standing-orders-of-the-house-of-representatives-2014)
- Ross Carter, 'Disallowable Instruments' (2014), *New Zealand Law Journal*, July 2014 at 235.
- Cabinet Office *Cabinet Manual 2008*. Available at [cabinetmanual.cabinetoffice.govt.nz/7.7](http://cabinetmanual.cabinetoffice.govt.nz/7.7)
- Cabinet Office *CabGuide: Guide to Cabinet and Cabinet Committee Processes*. Available at [cabguide.cabinetoffice.govt.nz/procedures/legislation](http://cabguide.cabinetoffice.govt.nz/procedures/legislation)
- Regulations Review Committee *Inquiry into material incorporated by reference* (July 2004). Available at [http://www.parliament.nz/resource/en-nz/47DBSCH\\_SCR2794\\_1/fa349b1c81f369bef6395cf6bcdcd0e4e211a2ec](http://www.parliament.nz/resource/en-nz/47DBSCH_SCR2794_1/fa349b1c81f369bef6395cf6bcdcd0e4e211a2ec)
- Regulations Review Committee *Further inquiry into material incorporated by reference* (September 2008). Available at [www.parliament.nz/en-nz/pb/sc/documents/reports/48DBSCH\\_SCR4207\\_1/further-inquiry-into-material-incorporated-by-reference](http://www.parliament.nz/en-nz/pb/sc/documents/reports/48DBSCH_SCR4207_1/further-inquiry-into-material-incorporated-by-reference)
- Cabinet Office Circular *Delegated Legislation: Guidelines for Legislative Instruments that are not Regulations* (14 March 2008) CO (08) 4. Available at <http://www.dpmc.govt.nz/cabinet/circulars/co08/4>
- Regulations Review Committee *Inquiry into the oversight of disallowable instruments that are not legislative instruments* (11 July 2014). Available at [www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH\\_SCR56729\\_1/inquiry-into-oversight-of-disallowable-instruments-that](http://www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH_SCR56729_1/inquiry-into-oversight-of-disallowable-instruments-that)

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**OFFICE OF THE CHIEF PARLIAMENTARY COUNSEL  
VICTORIA**

**NOTES FOR GUIDANCE ON  
THE PREPARATION OF STATUTORY RULES**

**(Issued May 2013)**

- a plan or map should include a scale and should readily identify the location of the area.

Any doubts about the design or suitability of a form, plan, map or other art work should be discussed with OCPC. Images should be sent to OCPC in .jpg format to avoid problems in printing the images.

#### 4.6 What is Incorporated Material?

Under section 32 of the **Interpretation of Legislation Act 1984**, a subordinate instrument (a statutory rule or other instrument that is made under an Act and contains regulations, rules, by-laws, proclamations, Orders in Council, orders or schemes or is otherwise of a legislative character) may apply, adopt or incorporate provisions of:

- a Victorian Act,
- a Commonwealth Act,
- Victorian statutory rule
- Commonwealth statutory rule
- various Codes and Laws specified in section 32(1) of the ILA.

If the authorising Act under which a statutory rule is made specifically authorises it, the statutory rule may apply, adopt, or incorporate provisions of any other document, for example an Australian Standard.

If you propose that a statutory rule will apply, adopt or incorporate material, the Department must consider the following—

- there must be express power in the authorising Act to empower the application, adoption or incorporation of material in a statutory rule;
- members of the public affected by the rule must be able to access the incorporated document so that they can understand the contents and effect of the rule;
- whether the incorporated material is readily available at a reasonable cost;
- the requirements set out in section 32 of the **Interpretation of Legislation Act 1984** which are designed to facilitate Parliamentary oversight of incorporation of material and to ensure that the material is publicly available.

Remember that the incorporated material may not be a self-contained document and may apply, adopt or incorporate other material.

In drafting a statutory rule which refers to an Australian Standard, consideration should be given as to whether the reference to an Australian Standard should be to a specific standard or to a specific version of a standard by reference to its date. This may be constrained by the empowering provisions in the authorising Act. Some Acts authorise incorporation of a document as in force from time to time, whereas others are more limited and only permit incorporation of a document as at the date of publication of the document or the date of making of the statutory rule.

In deciding whether to incorporate material by reference, Departments need to take care to balance the drafting convenience with ease of access to the incorporated material and understanding of it by those affected by it or required to comply with it. Departments

should reserve the use of incorporated detailed and extensive technical material to statutory rules concerning industries familiar with and using the material. In such cases Departments should also consider whether performance standards are a more appropriate means of regulation.

If you incorporate material such as Australian Standards, you will need to provide a copy of that material to OCPC during the course of settling the proposed statutory rule as OCPC need to be satisfied that there is power to incorporate material and will need to check the citation and publication details to ensure compliance with the requirements of the Subordinate Legislation Regulations 2004.

OCPC will also check that the document is suitable for incorporation in a law but, due to the technical nature of some of these documents, we can only examine the documents from the perspective of whether or not it sets out a clear obligation if offences flow from contravention of the incorporated material, rather than recommendations which are not enforceable or certain. It is preferable that a copy of the material be sent to OCPC with the first draft of the statutory rules for settling.

A section 13 certificate cannot be issued if a document incorporated in a statutory rule is not in existence at the date of settling of the statutory rule or at the latest, the request for the section 13 certificate.

#### **4.7 Table of Applied, Adopted or Incorporated Matter Required by Subordinate Legislation Regulations 2004**

Regulation 5 of the Subordinate Legislation Regulations 2004 provides for the publication with a statutory rule of a footnote or endnote containing a Table—

- specifying a document containing any matter that is applied, adopted or incorporated by the statutory rule; and
- indicating the provision of the statutory rule to which any such matter relates.

The Table is printed as an endnote at the end of the statutory rule.

It is the Department's responsibility to ensure that the content of the Table is correct. Section 13(2) of the SLA provides that the Chief Parliamentary Counsel may qualify a section 13 certificate by specifying that the certificate applies only to the proposed regulations and does not apply to any matter contained in a document incorporated or applied by the regulation.

The Table should specify each document that is referred to in the statutory rule that contains the matter that is applied, adopted or incorporated and indicate the provision of the statutory rule to which the matter applied, adopted or incorporated relates. The documents should be described in the order in which they are referred to in the statutory rule. The full title of the document should be included together with any applicable publication date or reprint or edition number.

This requirement does not apply to Victorian and Commonwealth Acts and Victorian and Commonwealth statutory rules and various Codes and Laws specified in section 32(1) of the **Interpretation of Legislation Act 1984**. Nor does it apply to a document or matter referred to in the statutory rule if that document or matter does not affect the operation of the statutory rule (see section 32(14) of the ILA).

This Table need only to refer to the incorporated documents referred to in the statutory rule itself, usually the "primary incorporated documents". If the statutory rule specifically refers to a secondary incorporated document, e.g., by modifying a document incorporated in a primary incorporated document, this secondary incorporated document should be included in the Table.

The content of the Table does not mean that the Department does not also have to comply with the requirements of section 32 of the ILA, which may result in the tabling in Parliament of secondary incorporated documents or tertiary incorporated documents if those documents affect the operation of the statutory rule.

The following is the Form of the Table to be included in the endnotes to a statutory rule—

**Table of Applied, Adopted or Incorporated Matter**

The following table of applied, adopted or incorporated matter is included in accordance with the requirements of regulation 5 of the Subordinate Legislation Regulations 2004.

Statutory rule provision	Title of applied, adopted or incorporated document	Matter in applied, adopted or incorporated document
Insert the provision of the statutory rule which incorporates etc. the matter	Insert full title of document incorporated etc. together with Reprint or Edition number if applicable.	Indicate whether whole document is incorporated etc. or if only part of a document is incorporated etc. insert the appropriate page, section or item reference.
e.g.		
Regulation 4 (definition of <i>listed regulated poison</i> )	Poisons Code	Part 2 of Chapter 1
Regulation 5(6)	AS 1250—2005 Standards for Electrical Safety Edition 2 published by Standards Australia on 6 December 2005	the whole
Regulations 7 and 8	Australian Standard 3959—2009 Construction of buildings in bushfire-prone areas, published by Standards Australia on 10 March 2009, as amended on 16 November 2009.	the whole
Regulation 10	Greater Melbourne Melway Street Directory, Edition 18, 1988	Map 65, page 276

An example where a secondary or further incorporated document is also referred to specifically in the statutory rule is:

Statutory rule provision	Title of applied, adopted or incorporated document	Matter in applied, adopted or incorporated document
Insert the provision of the statutory	Insert full title of document	Indicate whether whole document



rule which incorporates etc. the matter	incorporated etc. together with Reprint or Edition number if applicable.	is incorporated etc. or if only part of a document is incorporated etc. insert the appropriate page, section or item reference.
Schedule 6, Item 13	Poisons Code which incorporates Appendix C of Part 5 of the Standard for the Uniform Scheduling of Drugs and Poisons as in force from time to time	Part 2 of Chapter 1
Schedule 2 Part 7 Clause 15(3) of the Principal Regulations	AS 4234—1994 as incorporated by AS/NZS 3500.4:2004 as incorporated by the Plumbing Code of Australia, produced by the National Plumbing Regulators Forum, published December 2004	Clauses 1.4.11, 1.4.13 and 3.1A

#### **4.8 Requirements of section 32 of the Interpretation of Legislation Act 1984 for incorporated material**

If a subordinate instrument that is required to be laid before Parliament applies, adopts or incorporates provisions of any document—

- the responsible Minister must ensure that a copy of the material is to be lodged with the Clerk of the Parliaments as soon as practicable after the subordinate instrument is tabled (section 32(3) ILA);
- the responsible Minister must ensure that a notice of the material and of the fact that copies have been lodged is to be published in the Government Gazette as soon as practicable after the lodging;
- the responsible Minister must ensure that a copy of the Government Gazette notice is to be laid before each House of the Parliament as soon as practicable after it is published.

Failure to comply with the lodging requirement does not affect the validity of the subordinate instrument. (Section 32(5) ILA)

Section 32(4) of the ILA requires the responsible Minister to lodge copies of later amendments with the Clerk of the Parliaments and to publish a notice in the Government Gazette. A copy of this notice must also be tabled. This is the responsibility of the Minister administering the Act under which the instrument is made, so the Department has the responsibility for ensuring this is complied with.

Note section 32(14) of the ILA which provides that a document is not incorporated only by reason of being referred to in a statutory rule if the document does not affect the operation of the statutory rule or other subordinate instrument. Sometimes this is a difficult matter to determine.

#### **4.9 Procedures for lodging matter applied, adopted or incorporated by or in a subordinate instrument with the Clerk of the Parliaments**

The incorporated documents are to be sent to the Clerk of the Parliaments on or as soon as possible after the day the subordinate instrument is made. This is to try and ensure that subordinate instruments are not tabled before attachments are received from the Department or statutory authority. Statutory rules are tabled at the next available opportunity after printed copies are sent to the Clerk.

The documents should be supplied and described in the order in which they are mentioned in the subordinate instrument.

Secondary level documents referred to in primary level documents (secondary incorporations) are also required to be lodged unless they do not affect the operation of the subordinate instrument. They should be attached together with the primary level document and supplied and described in the order that they appear in the primary level document. Tertiary and further level documents are to be treated similarly.

The covering memo to the Clerk is to be in the following form—

*Clerk of the Parliaments  
Parliament House  
Spring Street  
MELBOURNE VIC 3002*

*[Insert title of SR or subordinate instrument and number (if available)]*

*As required by section 32 of the **Interpretation of Legislation Act 1984**, I supply the enclosed documents that are referred to in this statutory rule/subordinate instrument which both Houses of the Parliament will receive for tabling after printing.*

S.R. Reg.<sup>1</sup>                      Title of document<sup>2</sup>                      Page of document<sup>3</sup>

*Yours sincerely*

Any queries concerning the Parliament's requirements should be directed to—

Legislative Assembly  
Table Office  
Tel: 9651 8559

Legislative Council  
Usher of the Black Rod  
Tel: 9651 8672

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<sup>1</sup> Insert regulation/provision of Statutory Rule which refers to the attachment (e.g. regulation 5(6); Schedule 6, Item 13.)

<sup>2</sup> Insert full title of document to be attached, together with Reprint or Edition Number, if applicable (e.g. Australian Standard AS 1250—1975; Greater Melbourne Melway Street Directory, Edition 18, 1988).

<sup>3</sup> If only part or a section of a document is supplied, insert the appropriate page, section or item reference.

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**COUNCIL OF AUSTRALIAN  
GOVERNMENTS**

**BEST PRACTICE REGULATION**

**A GUIDE FOR MINISTERIAL COUNCILS AND  
NATIONAL STANDARD SETTING BODIES**

**OCTOBER 2007**

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## APPENDIX A: FEATURES OF GOOD REGULATION

In formulating national standards and regulatory measures according to the above principles and guidelines, Ministerial Councils should also take into account the following practical features of good regulation.

### **Accountability**

As set out in the protocols for the operation of Ministerial Councils, it is the responsibility of Ministers to ensure that they are in a position to represent appropriately their Government at Council meetings. Therefore, to the greatest extent possible, Ministers should obtain full government agreement on matters which may involve regulatory action before they are considered at Ministerial Council level.

Where a Minister is dissatisfied with the outcome of the impact assessment process, the Minister may seek the agreement of his/her Head of Government to request an independent review of the assessment process.

### **Compliance strategies and enforcement**

Regulatory measures should contain compliance strategies which ensure the greatest degree of compliance at the lowest cost to all parties. Incentive effects should be made explicit in any regulatory proposals. Measures to encourage compliance may include regulatory clarity, brevity, public education and consultation and the choice of alternative regulatory approaches with compliance in mind.

The special characteristics of process regulation need to be considered. For example, the number of licences, certifications, approvals, authorities et cetera. should be kept to the minimum necessary to achieve the regulatory objectives.

The regulatory burden can be reduced if the public is required to undertake a minimum level of interaction with government to, for example, renew permits/ licences or file information. This can be achieved through measures such as 'one stop shops'; mutual recognition of approval processes within government as well as between governments; better forms and process design.

Having taken these steps to facilitate compliance, regulators also need to consider the feasibility of enforcing regulatory requirements through the detection of non-compliance.

Mandatory regulatory instruments should contain appropriate sanctions to enforce compliance and penalise non-compliance. However, enforcement options should differentiate between the good corporate citizen and the renegade, to ensure that 'last resort' penalties are used most effectively (rarely) but model behaviour is encouraged. Enforcement measures should not have the effect of encouraging otherwise good corporate citizens to subvert compliance measures.

### **Inclusion of standards in appendices**

Standards should be referenced as current editions in appendices to regulatory instruments rather than embodied in such instruments themselves. It may be appropriate in some circumstances for regulations to reference a specific standard (eg AS 1234).

A disadvantage of only referencing the title of a standard (eg AS1234) is that impact assessment is carried out only on the initial instrument and referenced standard. The standard, however, may be subsequently

changed or updated. This may result in significant changes to the costs or benefits of regulation, with no opportunity to review the implications of such a change. This can have the effect of transferring regulatory power from governments to standard setters. To prevent this, it may be appropriate in some circumstances for regulatory instruments to reference a specific version of a standard by referring to its date (for example, AS 1234, 1993). If an amended version of a standard is to be adopted any changes to this standard would then require amendment of the regulatory instrument and hence further impact assessment.

An advantage of only referencing the title is that changes to the standards do not render the regulations null and void.

In determining whether to include a standard, consideration should also be given to the costs of obtaining the standard in order to comply with it.

### **Performance-based regulations**

Regulatory instruments should be performance-based, that is, they should focus on outcomes rather than inputs. 'Deemed to comply' provisions may be used in instances where certainty is needed. In such cases, regulations might reference a standard or a number of standards deemed to comply with the regulation. There should be no restrictions on the use of other standards as long as the objectives of the regulation are met.

### **Plain language drafting**

Where possible, regulatory instruments should be drafted in 'plain language' to improve clarity and simplicity, reduce uncertainty and enable the public to understand better the implications of regulatory measures.

### **Date of effect**

The dates of commencement of proposed standards and regulatory measures should be carefully planned to avoid or mitigate unintended or unnecessary market consequences, such as the necessity to discard non-complying stock and to allow transition to compliance with new regulatory requirements.

### **Advertising the introduction of standards and regulations**

Public consultation usually only involves interested parties. Therefore, once produced, new regulatory measures should be advertised to bring them to the attention of the wider community.

### **International standards and practices**

Wherever possible, regulatory measures or standards should be compatible with relevant international or internationally accepted standards or practices in order to minimise the impediments to trade. Compatibility in this context does not necessarily imply uniformity, however.

National regulations or mandatory standards should be consistent with Australia's international obligations. Australia has obligations under the GATT Technical Barriers to Trade Agreement (Standards Code) and the World Trade Organisation's Sanitary and Phytosanitary Measures (SPS) Code. Regulators may refer to the Standards Code relating to the International Standards Organisation's Code of Good Practice for the Preparation, Adoption and Application of Standards.