MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

# Guide to regulatory instrument choices

New Zealand Government

## Acknowledgement

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# Purpose

This guide provides practical and legal guidance on choices between different types of regulatory instruments.

The guide sets out various categories of regulatory instruments, and provides information about the benefits, problems and issues that may arise with each.

It is intended to assist greater understanding of the different instrument options for achieving regulatory outcomes and better inform choices between those instruments and in implementing them.

## How this guide fits within the broader policy process

This guide does not primarily address the high level policy decisions about the fundamental regulatory strategy to adopt. (But see mechanism choice later in this guide for further information on choices between command and control and other basic regulatory strategies).

It focusses on helping decisions on the best legal means to implement those high level policy decisions. Its primary audience is the policy and legal advisors seeking to take high level policy decisions to a greater degree of specificity or when writing drafting instructions.

## Why does it matter?

There is much currently being written on the importance of efficient and effective regulatory systems, and on the high risks of regulatory failure.

The Productivity Commission's Regulatory Institutions and Practices report, Treasury's "best practice principles" of regulation, the concept of departments as regulatory stewards, and MBIE's development of a process and programme for assessing its regulatory systems are all responses to these concerns.

The instruments used to implement and support regulatory systems are critical to how a regulatory system performs over time:

- The use of regulatory instruments significantly affects how *flexible* a regulatory system can be to respond to changing problems and needs over time.
- The person deciding on the regulatory instrument defines the degree to which those with *technical expertise* determine standards and elected officials determine policy.
- The nature of regulatory instruments available to regulators affects both the character and *capability* of regulators.
- Poor coordination between multiple instruments within one regulatory system can lead to gaps or inefficient overlaps – well coordinated instruments promote *coordination and predictable* in regulatory regimes.
- Instrument choices affect the degree of *transparency and accountability* within a regulatory system.
- Levels of regulatory instruments, and their interaction, affect the extent to which regulatory decisions can be *understood and accessed* by the public.

Ensuring policy and legal advisors are better informed about the nature and effect of instrument choices is a key element of supporting better regulatory systems.

Below are some of the core tensions that need to be balanced – where regulatory instruments present both opportunities and potential risks to regulatory systems:

***Flexibility and durability*****:** The Productivity Commission report noted that almost two thirds of regulator chief executives surveyed considered that agencies often work with legislation that is outdated or not fit-for-purpose. The report indicated that a key reason for this lack of flexibility is New Zealand's heavy reliance on primary legislation. This guide covers the core role of primary legislation in setting the policies and principles of a regulatory framework. Properly designed regulatory instruments must allow detailed requirements to adjust to changing circumstances or allow flaws to be fixed. This approach accepts at the outset that there is always a risk of regulatory failures, meaning that ability to adapt or modify systems incrementally over time is increasingly important. With more delegation however come increased risks of the proliferation of poorly designed subordinate legislation. Appropriate checks and balances are important. Equally, these checks and balances must be carefully designed to not undercut the value of flexibility that different regulatory instruments can bring to a system.

***Technical expertise vs democratic policy***: Regulatory instruments can be relied on to shift some regulatory decision-making functions to technical experts. In an increasingly complex world where regulatory capacity is stretched, an important strategy is co-opting external expert actors into building the rules, requirements, standards, and decisions in a regulatory system. This approach mitigates the risks of knowledge gaps and unintended consequences. Again there is a balance to be struck. While the commonly understood distinction between primary legislation setting the policy and delegated legislation setting the detail is easy to articulate in theory, it can be much more complex in practice.

***Capability of regulators***: Regulatory instruments are not the only, or even primary, element in ensuring capable regulators. A flexible regulator needs an appropriate suite of tools. Choosing regulatory instruments is not only a question about who has the best technical expertise to formulate, and make, an instrument. The instruments selected will also impact whether the regulator has proportionate tools to act.

***Coordination and coherence of the regulatory system***: How the total package of instruments interact and complement each will affect the coherence of a regulatory system. Any regulatory system is likely to involve more than one regulatory instrument type. Being clear about how those instruments relate to each other, and their respective functions in the system, is likely to promote predictability in the regulatory regime over time.

***Transparency and accountability***: Who makes regulatory instruments, and by what processes, impacts the transparency and accountability of a regulatory system. With greater use of regulatory instruments comes greater pressure to provide adequate checks and balances. At the same time it is important that any regulatory system is not too "over-proceduralised".

***Accessibility***: With layers of regulatory instruments and proliferation of different types of instruments comes a risk of fragmentation of a regime and reduced accessibility. In this sense,

accessibility needs to be considered both in terms of how easy it is to find any instrument and the risk that one instrument may always be affected by another.

**Related Information**

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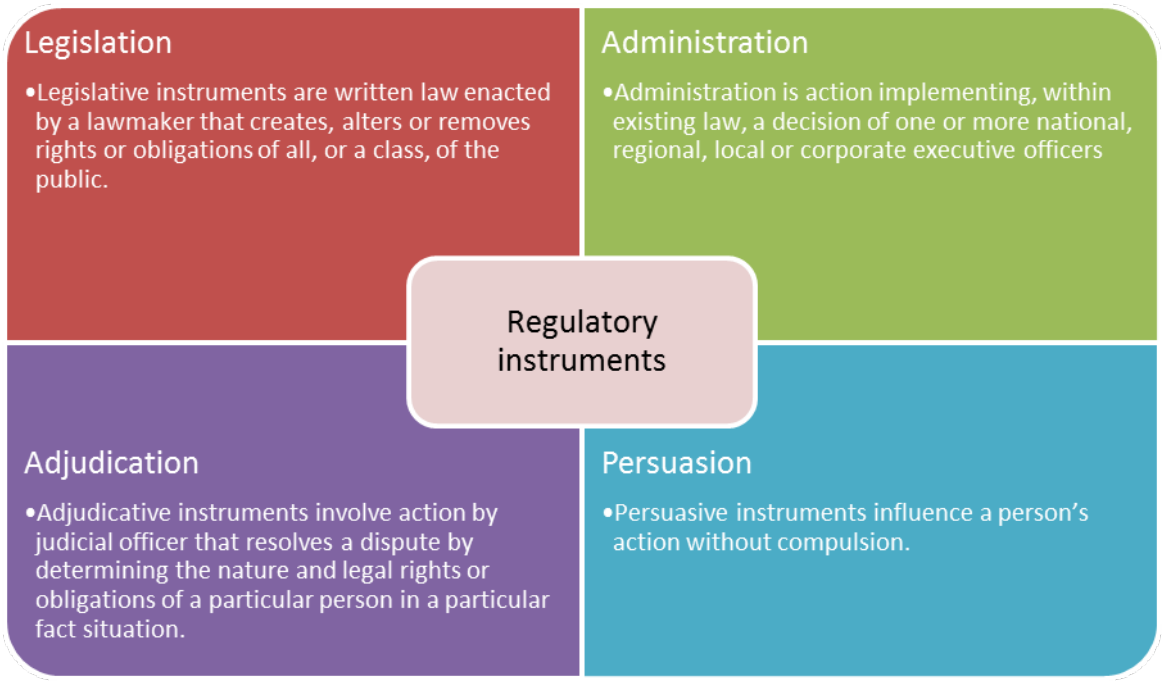
| The Productivity Commission's Regulatory Institutions and Practices report: http://www.productivity.govt.nz/inquiry-content/1788?stage=4 |
| Treasury's best practice principles: |
| http://www.treasury.govt.nz/economy/regulation/bestpractice |

# How to categorise regulatory instruments

This guide groups regulatory instruments into four different broad areas: ***legislation***, ***administration***, ***adjudication***, and ***persuasion***.

This categorisation focuses on the nature of the regulatory effect or outcome achieved, rather than on who implements the regulatory instrument (government, an administrator, a judge, or regulator), the form the instrument takes (e.g. exemption vs guidance) or the name used to describe it (e.g. standard).




Even here however the characterisation is not absolute – the different uses of regulatory instruments mean that they may exist in one or more categories and a desired outcome can be achieved in different ways. As a result, an instrument can inhabit multiple categories depending on its ultimate effect. For example, an exemption can be prescribed in the legislative instrument itself or it might be implemented via the administrative action of a regulator. The name of any regulatory instrument is not determinative (eg legislative versus administrative).

In practice existing instruments often straddle the boundaries and defy easy classification. This is often a result of path dependence and circumstantial context involving previous policy decisions or trade-offs made as part of the legislative process.

# Related issues addressed in this guide

Mechanism choice for further information on this and how this interacts with this guide.

Standards and the Standards and Conformance system for information about this core part of many regulatory systems.

Adoption and alignment with international treaties for information about referring to treaties, restating treaties in our law and changing law to align with the treaty.

Incorporation by reference.

# Further reading

For further information about regulatory design and the use of regulatory instruments in New Zealand see:

Legislation Design and Advisory Committee: LAC Guidelines: 2014 Edition http://www.ldac.org.nz/guidelines/lac-revised-guidelines/

Treasury's best practice regulation

New Zealand Productivity Commission "Regulatory institutions and practices" final report, 16 July 2014 http://www.productivity.govt.nz/inquiry-content/1788?stage=4

See Victoria University of Wellington's Regulations Review Committee Digest.

For an example of an **Australian governmental approach** to regulatory design see:

> Department of Treasury and Finance, *Victorian Guide to Regulation*

For a wider approach to the different approaches to **classifying regulatory tools** (focusing more at the policy process stage than simply on the instruments themselves) see:

> Freiberg, Arie (2010) *The Tools of Regulation*, Sydney: The Federation Press

For a clear and comprehensive **guide to New Zealand subordinate legislation** see:

> Carter, Ross, McHerron Jason and Malone, Ryan (2013) *Subordinate legislation in New Zealand*, Wellington: LexisNexis

For more information about **mechanism choice** see:

> Weiner, Jonathan B. and Barark D. Richman, (2010) 'Mechanism Choice' in *Research Handbook on Public Choice and Public Law*, ed Daniel Farber and Anne Joseph O'Connell, 363-396, Northampton, Mass.: Edward Elgar.

For more information about **measuring regulatory performance** see:

> Coglianese, Cary (2012), "Measuring Regulatory Performance – Evaluating the Impact of Regulation and Regulatory Policy ", Expert Paper, No 1, OECD.
>
> Parker, David and Colin Kirkpatrick (2012), "Measuring Regulatory Performance – The Economic Impact of Regulatory Policy". A Literature Review of Quantitative Evidence", Expert paper, No 3, OECD.
>
> Radaelli, Claudio and Oliver Fritsch (2012), "Measuring Regulatory Performance – Evaluating Regulatory Management Tools and Programmes", Expert Paper, No 2, OECD.

# Legislation

Legislative instruments are written law, enacted by a lawmaker that creates, alters or removes rights or obligations of all, or a class, of the public.[1] In this guide, legislation refers to instruments that are disallowable instruments under the *Legislation Act 2012*.

Legislation can be primary or subordinate. Primary legislation is made by Parliament.[2] Subordinate legislation is made under an empowering law. Almost all subordinate legislation is made under delegation from the legislature or under a sub-delegation from Parliament's delegate (if Parliament has provided for sub-delegation in the empowering law).

### Regulatory instruments within the Legislation category are:

**ACT OF PARLIAMENT**

Primary legislation.

**STATUTORY REGULATIONS**

The Act provides for regulations to be made by Order in Council.

**ORDER IN COUNCIL TO AMEND AN ACT OR ADJUST APPLICATION OF AN ACT**

The Act provides for the Act itself to be amended by regulations or terms used in the Act to be defined in regulations, for a type of thing to be prescribed, or for lists to be added to or limited by Order in Council. Sometimes referred to as Henry VIII clauses.

**REGULATIONS MAY INCORPORATE STANDARDS OR OTHER DOCUMENTS BY REFERENCE**

Regulations (or other instruments) require compliance with or refer to another document, such as an New Zealand, an international or other national standard. Often used to provide for a means of demonstrating compliance, but may also be mandatory requirements.

**TERMS IMPLIED BY LAW**

Regulations (or other instruments) may be made that imply terms into contracts or other documents entered into by third parties.

**DISALLOWABLE NOTICES**

The Act provides that rights or obligations apply in respect of matters referred to in a notice and that the notice is a disallowable instrument.

**DESIGNATION**

The Act provides for activities of a class to be "called in" or reclassified by way of designation.

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1 Carter, R McHerron, J and Malone, R (2013) *Subordinate Legislation in New Zealand*: LexisNexis at 1.

2 There is also a residual Royal prerogative power to legislate.

Exemptions from an Act

The Act provides for exemptions to its provisions to be granted, usually by a regulator.

**RULES**

The Act provides for rules to be made under the Act. Rules are equivalent to regulations but are likely to be more technical in nature.

**CODES**

The Act provides for a "code" to be made that has legislative effect.

**INSTRUMENTS, FRAMEWORKS AND METHODOLOGIES**

The Act provides for disallowable instruments to be made that statutory regulations may refer to.

# Administrative

Administration is action implementing, within existing law, a decision of one or more national, regional, local or corporate executive officers.[3]

The boundary between administrative actions and decisions that have a legislative effect is often not clear-cut. This is because administrative actions can affect legal rights. The best way to distinguish between the two is to clearly state in the legislation whether or not the instrument that results from the decision is disallowable. A disallowable instrument is a legislative instrument.

Conditions on a licence offer a good example of the boundary between administrative actions and decisions that have a legislative effect in practice. Regulations can be used to impose general conditions on a licensee. At the same time, individual conditions can be imposed administratively by the licencing body. Often the individual conditions will stipulate which, and to what extent, any general conditions specified in legislation must be met by a licensee.

Administrative decisions are not reviewable by Parliament. Legislative (disallowable) instruments are. If it is proposed to include administrative actions within any regulatory design, it will be important to consider how these actions can, and should, be reviewed (ie consideration of the role of the court; the Regulations Review Committee and classification of the instrument under the *Legislation Act 2012*).

### Regulatory instruments within the administrative category are:

**LICENCES, AUTHORISATIONS AND PERMITS**

The Act requires a person to be licensed or to hold a permit or to otherwise be authorised before carrying out an activity. Licences generally include terms and conditions that have effects similar to legislation.

**UNDERTAKINGS**

The Act provides for a person to give a binding undertaking.

**APPROVAL OF RULES OF PRIVATE ORGANISATIONS**

The Act provides for the rules of a private organisation to be approved by a Minister or another body.

**ADMINISTRATIVE NOTICES**

The Act provides for administrative matters to be done by way of a notice, usually in the Gazette.

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[3] Carter, R McHerron, J and Malone, R *Subordinate Legislation in New Zealand*, LexisNexis (2013) at 1.

Directions

An Act provides for a person to give a direction.

# Adjudicative

Adjudication is an action by a person, acting judicially, that resolves a dispute by determining the nature and legal rights or obligations of a particular person in a particular situation.

Adjudicative actions can have a similar effect to legislative instruments or administrative actions. A good example of this cross over is Part 5 of the *Commerce Act 1986.* Under Part 5 the Commerce Commission is responsible for clearing or authorising certain business transactions. This function of the Commerce Commission is adjudicative because is the Commission is responsible for confirming that the transaction does not breach the law. An authorisation granted by the Commerce Commission is similar to an exemption. This is because it allows a transaction that would otherwise be in breach of the law to occur. Exemptions are matters usually prescribed in legislation or provided for by administrative action. Adjudicative actions commonly include rights of appeal to the courts as the default review mechanism.

### Regulatory instruments within the adjudicative category are:

**DETERMINATIONS**

An Act provides for a person to make a determination.

**CLEARANCES AND AUTHORISATIONS**

The Act provides for a person to clear or authorise a transaction or state of affairs as complying with the law.

# Persuasive

Persuasive instruments influence a particular action without strictly being compulsory. Examples include voluntary standards, guidance, codes of practice, government policy statements and strategies. In practice, persuasive instruments can have a similar effect to legislation because they influence or affect how legislation is applied.

Codes of practice under health and safety laws are persuasive instruments. Although it is not strictly compulsory to comply with a code, it may be relied on by the courts to determine the standard of behaviour expected under the law. Immigration instructions are another example. The instruments set out government's policies relating to the immigration system and specify application criteria for visa classes set out in legislation. The *Immigration Act 2009* describes immigration instructions as statements of government policy; they are not disallowable instruments.

### Regulatory instruments within the persuasive category are:

**PROGRAMMES OR INSTRUCTIONS**

The Act provides for the Minister to set out government policy and administrative processes.

**GOVERNMENT POLICY DIRECTIONS OR STRATEGIES**

The Act provides for the Minister to give a direction or make a statement about Government policy, usually to a Crown entity.

**GUIDANCE**

The regulator has a function of issuing guidance on how it interprets legislative requirements.

**CODES OF PRACTICE**

The Act provides for codes of practice to be made. Codes of practice are usually persuasive only, and reflect best or good practice. See also codes.

**VOLUNTARY NATIONAL AND INTERNATIONAL STANDARDS**

New Zealand, international or other national standards may provide a voluntary means of providing for best practice outcomes. May include NZS, ISO, IEC or other internationally or nationally recognised standards eg Codex Standards. Can also be incorporated by reference - see above.

**VOLUNTARY INDUSTRY STANDARDS**

Standards developed by an industry may provide a voluntary means of providing best practice outcomes.

**TRANS-NATIONAL PRIVATE REGULATION**

Regulatory Instruments, standards and guidance developed by private actors (sometimes in single or multi-stakeholder organisations), representing firms, industries, independent experts or NGOs.

# Typology

## Legislation

## Act of Parliament

**Primary legislation.**
Acts of Parliament are primary legislation. These are divided into public, private and local Acts. Private and local Acts are fairly uncommon.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Matters of significant policy or principle should be included in primary legislation. Such matters may be controversial, including:<br>  ▪ policies that impact fundamental human rights<br>  ▪ changes to the common law<br>  ▪ the creation of serious offences<br>  ▪ imposing significant penalties<br>  ▪ imposing taxes (taxes can only be imposed by primary legislation but levies and fees can, and are, usually imposed by regulations)<br>  ▪ amending primary legislation<br>  ▪ making retrospective changes to the existing law.<br>▪ For further guidance and information see LAC Guidelines 2014, chapter 13. | ▪ Primary legislation is not easy to change. This means it may not be suitable if it is likely that the Government will need respond quickly to emerging issues.<br>▪ Existing primary legislation may already prescribe an appropriate mechanism to achieve the desired policy outcome; for example, through a power to make regulations.<br>▪ Creating primary legislation is costly. Non-legislative means of achieving the objectives should always be considered. |

**Things to think about if you use it**

- The substance of an Act cannot be challenged in the courts due to the principle of Parliamentary sovereignty. The same does not apply to delegated legislation.
- The key tension is between balancing legislative certainty with need for flexibility. Primary legislation is hard to make and change. It needs to be designed to be enduring. This also means it needs to work at the right level of generality. Some of this tension can be addressed by releasing an exposure draft of the Act to socialise the detail of the proposals. An exposure draft can help to identify initial areas of public concern and reduce the issues that will need to be dealt with at select committee.
- Try to consider the known unknowns and the risk of unknown unknowns of the policy issue that has given rise to the need for legislation. This will help you to identify whether other regulatory instruments might be fit for purpose. It is always important to consider what other regulatory instruments will need to form part of your regulatory design and include appropriate powers, rights and criteria for the making of these regulatory instruments within the primary legislation.
- For further matters to consider refer LAC Guidelines 2014, chapters 1 to 13.

## Statutory regulations

**The Act provides for regulations to be made by Order in Council.**
An Order in Council is made on the recommendation of the relevant Minister, subject to any statutory prerequisites (e.g. consultation).

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Regulations can be used to fill in the detail of primary legislation or form part of its implementation.<br>▪ For example, regulations could:<br>  ▪ impose fees<br>  ▪ specify forms<br>  ▪ provide details of procedures<br>  ▪ provide for indexation.<br>▪ If the legislation is directed at a limited audience or the subject matter is highly technical it may be appropriate to make regulations dealing with these specific matters.<br>▪ If the matter is likely to be changed or updated at frequent intervals, it may be better to use delegated legislation. This avoids writing unnecessary detail into primary legislation, detail that could compromise the generality of the Act.<br>▪ For further detail see LAC Guidelines 2014 Chapter 13 | ▪ Similar matters need to be considered when making regulations as with primary legislation:<br>  ▪ When developing the policy and the regulatory strategy or strategies and non-legislative options should be considered.<br>  ▪ Making regulations can be costly, and other means of achieving the policy objectives should always be identified and considered.<br>  ▪ Regulations are drafted by Parliamentary Counsel and require a high degree of policy input from a department and a formal process for making them (including drafting time). |

**Things to think about if you use it**

- The Act must include specific regulation-making powers that stipulate the nature and extent of the regulations that can be made. Regulation-making powers in Acts are interpreted strictly.
- When inserting a regulation-making power into an Act, consider the level of detail of regulations to be made under that power. A very detailed regulation making power can result in there being limited future flexibility.
- Consider how the power will be used: does there need to be any sub-delegation? Will the regulations need to incorporate or build on existing frameworks or methodologies? If so, this must be expressly authorised (refer LAC Guidelines 2014 Chapter 14).
- Care needs to be taken when writing processes into regulation. Good process is important and can give a level of certainty but legislating for process can result in cumbersome or impractical and ineffective powers.
- Regulations should be precise, reflecting the details not suitable to be written into primary legislation.

## Order in Council to amend an Act or adjust application of an Act

The Act provides for the Act itself to be amended by regulations or terms used in the Act to be defined in regulations, for a type of thing to be prescribed, or for lists to be added to or limited by Order in Council. Sometimes referred to as Henry VIII clauses.

Most commonly, these sorts of powers are limited to amending or replacing a schedule to an Act or a specified sum, percentage or similar in legislation. The Order in Council will usually be made on the recommendation of the relevant Minister following the satisfaction of any statutory pre-requisites (such as a statutory test or a recommendation from a third party).

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Ease of access - a rate or amount specified in the Act may need to be amended from time to time, but it might also be important to ensure it is accessible and therefore specified in the Act. For example: it was envisaged that the initial regulated services under the *Telecommunications Act 2001* were to be added to and changed from time to time, and it was felt preferable that the schedule to the Act set out all the regulated services.<br>▪ Durability and flexibility - the Order in Council can be used where rules are certain, but there is some uncertainty about the scope of the thing the rules should apply to. For example in the *Financial Advisers Act 2008* certain financial products are described as 'Category 2 products' and as new financial products are developed they can be categorised as 'Category 2 products' by regulations. | ▪ Henry VIII clauses should only be used in exceptional circumstances as they can lead to controversy in the legislative process.<br>▪ The Regulations Review Committee has issued guidance on the use of empowering provisions:<br>*"An empowering provision that enables legislation to be amended by regulation provides the Executive with the power to override Parliament. The committee believes that this power should be granted by Parliament rarely and with strict controls".*<br>▪ You need to consider carefully whether you can defend the necessity of such powers and ensure their use is appropriately limited.<br>▪ If you propose to define the terms of an Act by regulations, consider what will need to be defined, and how that will impact the provisions in the Act. Defining terms in regulations can make legislation less accessible as users will need to refer to both to understand the law.<br>▪ For more information see LAC Guidelines 2014, Chapter 13. |

**Things to think about if you use it**

- Consider what process should precede use of the power. Who is involved? If the process is too cumbersome it may be more practicable to simply amend the Act. Acts can be amended fairly quickly if there is a strong will.
- Make considered and deliberate decisions about who is doing what to ensure there is no duplication of effort, confusion over relative roles, or risks of legal challenge.
- A power to make regulations that define a *type* of thing, where thing is defined in the Act, is less likely to be cause for controversy or concern. This is an important but subtle distinction. By limiting the power like this it ensures that Act operates coherently when it is viewed standalone.
- A test for exercising the power is likely to be necessary. Refer *Financial Markets Conduct Act 2013*, section 550 for an example of a test.

**Examples**

**Telecommunications Act 2001** - "regulated services" and "specified services" may be added or removed from Schedule 1. The Act prescribes a process involving a Commerce Commission investigation, a recommendation to the Minister of Communications, and an Order in Council

**Health and Safety in Employment Act 1992** - serious harm means death or harm of a kind declared by Order in Council to be serious. If no Order is made, the definition in Schedule 1 applies

**Financial Advisers Act 2008 –** a category 2 product includes any other product specified by the regulations

**Financial Markets Conduct Act 2013** - prescribed intermediary services means intermediary services of a kind that are prescribed for the purposes of the definition. The dollar amounts in Schedule 1 can be amended by regulations to increase them.

## Regulations may incorporate standards or other documents by reference

**Regulations (or other instruments) may require compliance with or refer to another document, such as a New Zealand, an international or other national standard.**

This type of instrument is often relied on to demonstrate international compliance. Regulations that incorporate a standard by reference avoid the duplication of policy work or technical work that has been completed internationally. A good example of this is New Zealand's compliance with the World Trade Organisation Technical Barriers to Trade Agreement. Under Article 2.4, where technical regulations are required and there is a relevant international standard, that standard should be used, in whole or in part, as a basis for that technical regulation unless the standard would be an ineffective or inappropriate means of achieving legitimate objectives (refer https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm).

Other ways standards can be used include providing that compliance with a standard be a defence to a criminal prosecution (though that would be likely established by the primary legislation).

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Incorporation by reference avoids duplication of effort, particularly in areas of technical regulation and where there is international standardisation. The LAC Guidelines 2014 indicate this arises where:<br>  ▪ the document is long or complex, covers technical matters only, and few persons are likely to be affected;<br>  ▪ 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 that has been approved by Parliament;<br>  ▪ 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;<br>  ▪ the document has been developed by an industry organisation for use in respect of particular products manufactured (e.g. motor vehicles).<br>▪ Standards can also be incorporated to specify test methods, acceptable | ▪ Regulations that incorporate a technical standard are unlikely to be suitable where the standard must be applied by the general public or a part of the public.<br>▪ It may be undesirable if the particular standard is not a New Zealand, international or other national standard and there is inadequate assurance about how the standard has been developed.<br>▪ If it is likely to be difficult or costly to access the document incorporated.<br>▪ Where there are a multitude of stakeholders and it is difficult to identify which use the standard and which do not.<br>▪ If the standard is too vague or there are low incentives for the industry to adopt it. |

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|---|---|
| measurement procedures, performance specifications for products and processes and labelling requirements or specifications.<br>▪ Certain parts of very detailed or technical standards can be incorporated by reference. In such cases the standard might form a baseline of what acceptable practices are. | |

**Things to think about if you use it**

- Think about who produced the standard, how it was developed, ease of access to it, and its purpose (e.g. is it intended to establish normative rules?). The material incorporated should be clearly drafted, understandable and consistent with other applicable law.
- Consider relying on a standard as a way to demonstrate compliance (e.g. by aligning with international standards for example).
- See the World Trade Organisation's six principles for international standards development. They are; transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, development dimension. **(G/TBT/1/Rev 11 refers** http://www.jsm.gov.my/documents/10180/332895/1R11.pdf/e14b3eea-8d47-42ec-9742-f9d4a2e9df0d**).**
- If the standard is updated the regulations will need to be changed to incorporate the new reference. There are some specific exceptions in legislation - arguably these exceptions delegate the law-making power to the standard setting body.
- Specific consultation requirements are imposed in the *Legislation Act 2012* and additional requirements may be set out in the empowering Act. **The *Legislation Act 2012* also sets out rules for making incorporated material available. It does not necessarily require that the material is available for free.**
- Think carefully about incorporating material that may be slow to adapt or has low levels of stakeholder buy-in.

**Examples**

**Standards and Accreditation Act 2015** - Regulations and bylaws may be made under any Act by referring (with or without modification) to any New Zealand Standard relating to goods, services, processes, or practices of any kind. Subject to any copyright, regulations and bylaws may be made under any Actby incorporating in whole or in part (and with or without modification) any New Zealand Standard relating to goods, services, processes, or practices of any kind.

**Legislation Act 2012** - An instrument that may be made under any Act for the following purposes may incorporate material by reference: 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.

**Numerous other Acts** have their own rules on incorporation by reference. Some examples: Standards are incorporated by reference in the following: Building Code, Acceptable Solutions often rely on New Zealand Standards e.g. NZS3604 timber framed buildings (cited in Building Code compliance documents E1, G13, B1 and others and Licensed Building Practitioner Rules 2007; Electricity (Safety ) Regulations 2010 refer S 59-61A. Note Standards New Zealand's website identifies where specific standards are cited: https://shop.standards.govt.nz/default.htm?mod=catalog&action=browseLegStandards

## Terms implied by law

**Regulations (or other instruments) may imply terms into contracts or other arrangements**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Can be used to adjust new or existing arrangements with immediate effect. Provides an ability to affect private arrangements, and is particularly useful for consumer protection.<br>▪ Can be relied on to set out default terms where the contract or arrangement does not deal with the matter. | ▪ Enforcement can be an issue, because a breach of a term implied into a contract is usually a breach of the contract rather than a contravention of the statute.<br>▪ Overrides private arrangements.<br>▪ Implied terms are not generally prescribed pro-actively, they apply where something 'goes wrong'.<br>▪ The legislation must prescribe the exact words that will be implied into the contract and there is a risk that will cause conflict with other explicit provisions in the contract.<br>▪ May not be very transparent as "implied terms" may not be referred to the terms of the contract.<br>▪ Parties cannot seek recourse for retroactive application of the implied terms. |

**Things to think about if you use it**

- Who the implied term is intended to affect?
- How will the implied term be enforced? Is failure to comply with the implied term to be enforceable by a regulator or is it subject only to private enforcement of the relevant agreement or other document?
- Should there be scope to opt out of the implied term? If you consider it might be appropriate for the implied term to apply strictly, consider whether the benefit of addressing the issue outweighs any potential detriment to private arrangements.
- Should the implied term be a short term stop-gap or a permanent measure? Implied terms may not be appropriate in the long-term if circumstances are bound to change.
- What are the potential compliance costs for those subject to the implied terms?

**Examples**

**Financial Markets Conduct Act 2013** - regulations may imply terms into certain trust deeds and client agreements relating to regulated financial products and services.

**Employment Relations Act 2000** - provides for an implied term of mutual trust and confidence between employers and employees.

Building Act 2004 - contains implied warranties for building work in relation to household units.

## Disallowable notices

**The Act provides that rights or obligations apply in respect of matters referred to in a notice and that the notice is a disallowable instrument.**
Commonly notices will need to be published in the *New Zealand Gazette*.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ This mechanism means the framework of rules can be set up in the Act and who the rules apply to can be specified as and when they are identified.<br>▪ This is a highly flexible instrument that can accommodate changes to who the rules are intended to apply to over time. | ▪ The mechanism means that there will always be inherent uncertainty as to which persons are subject to the legislation. |
| **Things to think about if you use it** | |
| ▪ Unless the legislation explicitly states that the notices are disallowable instruments they will likely be treated as administrative notices. Parliament oversees the creation of disallowable instruments only, although both types of notice will be subject to judicial review.<br>▪ If the notice grants significant regulatory-type powers, common practice is to prescribe the instruments as disallowable. | |

**Examples**

**Telecommunications Act 2001, Gas Act 1992 and Electricity Act 1992**: Minister may declare a person to be a network operator.

## Designation

**The Act provides for activities of a class to be "called in" or reclassified by way of designation.**
In some cases instruments described as designations are not disallowable instruments.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Designation instruments allow for policy “future-proofing” and reflect the fact that one size might not fit all. **They can be used as a flexible tool to regulate markets or activities where things are constantly changing.**<br>▪ It enables activities to be left unregulated until a case is made for regulation.<br>▪ In terms of regulatory design, a designation approach contrasts with "catch and release" exemptions focussed approach. In the financial markets context for example, a designation tool enables the reclassification of financial goods based on substance over form. | ▪ Provides significant discretion to the decision-maker.<br>▪ Creates some uncertainty for those within the potential scope of designation. In order to mitigate this uncertainty outer limits on what can be "called in" by a designation should be defined. |
| **Things to think about if you use it** | |
| ▪ Consider the incentive around using a designation tool. If a regulator is reluctant to take on a perceived moral hazard by designating the power it? is unlikely to be used frequently. Willingness to use a designation tool will be impacted by how clearly the power is prescribed and the nature of the designations being made.<br>▪ Consider the procedural tests or substantive criteria that might precede use of the designation power. While you do not want the tool to be too cumbersome to be useful, it can reduce certainty if it is too flexible.<br>▪ See LAC Guidelines 2014 Chapter 16. | |

**Examples**

**Financial Markets Conduct Act 2013** - The Financial Markets Authority (FMA) has a power to designate "securities" to be regulated as a designated class of financial products and to reclassify financial products between classes.

**Commerce Act 1986** - the Commerce Commission holds an inquiry into whether, and if so how, to regulate goods or services, and then makes a recommendation to the Minister. The Minister considers the recommendation and decides whether to recommend regulation to designate the service.

**Building Act 2004 -** The Governor-General may, by Order in Council made on the recommendation of the Minister, designate a licensing class or classes for carrying out or supervising particular types of building or inspection.

**Telecommunications (Interception Capability and Security) Act 2013 –** the Minister for Communications and Information Technology may direct that a network operator may have a higher level of interception capability (moving up the hierarchy of obligations) (sections 16-20), and/or require that a service provider have a level of interception capability (bringing them in to a new kind of obligation) (sections 38-41).

## Exemptions from an Act

**The Act provides for exemptions to its provisions to be granted, usually by a regulator.**
Exemptions can be class or individual.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Durability - it can allow for a level of “future-proofing”, reflecting that one size does not fit all.<br>▪ Allows law to be made with broad application, while catering to unknowns.<br>▪ Enables activities to be placed outside the regulatory net as necessary and appropriate.<br>▪ This is a “catch and release” mechanism that can be used as an alternative to designations. | ▪ Overly broad scope imposes compliance costs of either obtaining an exemption or living with the regulation.<br>▪ Unless policy objectives are clear, exemptions may be refused on grounds that do not align with the policy intent. Can result in significant layering of the legislative scheme and so a complex scheme that is hard for the public to understand.<br>▪ Unless the Act has clear guidance, criteria or test for when exemptions can be granted it can generate a significant number of requests in early stages.<br>▪ It is not a substitute for doing policy work up-front. |

| Things to think about if you use it |
|---|
| ▪ Think about incentives. A regulator may be reluctant to exempt people, or will do so only subject to strict conditions, due to perceived moral hazard. As a result, exemptions may not be granted as frequently as you intend. Be careful that exemptions are not used as an alternative to carefully considering the scope of the Act in the first place.<br>▪ Under the *Legislation Act 2012* an individual exemption may be classed as an administrative rather than legislative power, but legislation often states that both are disallowable instruments.<br>▪ In rare circumstances both class and individual exemptions are treated as administrative see http://www.parliament.nz/resource/en-nz/50SCLO_ADV_00DBHOH_BILL12123_1_A349119/bcad17fdb741bf31c160feca0030356f54bbcc14. |

**Examples**

**Financial Markets Conduct Act 2013** - FMA may grant class or individual exemptions from most provisions of the Act and regulations. Exemptions may be granted subject to specific terms and conditions. Class exemptions are drafted by PCO and published in the SR series. Individual exemptions are published by FMA and are disallowable.

**Takeovers Act 1993** - The Panel may, in its discretion and subject to such terms and conditions (if any) as it thinks fit, exempt from compliance with any provision of the takeovers code. It has the same disallowance and drafting rules as for Financial Market Act exemptions.

**Telecommunications (Interception Capability and Security) Act 2013 –** a "designated officer", or the Minister for Communications and Information Technology, may exempt one or a class of network operators from interception capability requirements (sections 29-37). While there is ability for class exemptions to be made by Order in Council, other class exemptions are not disallowable instruments. The Director of the Government Communications Security Bureau (GCSB) may exempt network operators from network security requirements (section 49). A class exemption must be published on a website maintained by the GCSB, but is not a disallowable instrument.

## Rules

**The Act provides for rules to be made under the Act. Rules are equivalent to regulations but are likely to be more technical in nature.**
Rules are useful to provide details in areas of specialisation or where high levels of technical detail are necessary.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Useful in an area of specialisation and with a high level of technical detail. Sometimes used to enable development to be done by expert bodies.<br>▪ Could be used to avoid technical detail from having to be drafted by Parliamentary Council Office.<br>▪ May avoid the need to be considered by Cabinet. | ▪ May end up being harder to make than regulations, particularly if there are significant process requirements (and therefore more risk of judicial review). These risks can lead to very conservative behaviour to avoid review.<br>▪ Delegation of development of rules creates quality risks and potential rework, which can be inefficient. |

| Things to think about if you use it |
|---|
| ▪ Essential to have good process requirements (to avoid possible review), but be very careful when setting process requirements.<br>▪ Avoid rigid cost benefit tests.<br>▪ Be clear who the decision-maker is, and who does what. Avoid multiple decision-makers.<br>▪ Do as much as you can outside of the rule-making powers to ensure good process - such as through the functions of the agency or accountability documents such as Statements of Intent. |

**Examples**

**Gas Act 1992** - The Minister may make a gas governance rule for all or any of the purposes for which a gas governance regulation may be made. Rules can generally only be made on the recommendation of the regulator after a process is followed.

**Registered Architects Act 2005** - The Board must make and always have rules containing minimum standards. Rules are subject to approval of the Minister before being made.

## Codes

**The Act provides for a "code" to be made that has legislative effect.**
The power to develop codes is commonly given to a regulator. Binding codes of this kind are different than codes of practice that may provide a safe harbour or be evidence of good practice (referred to "codes of practice" below).

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Similar to rules, but intended to give a sense that there is a complete set of conditions or requirements that must be met.<br>▪ As a result, they are generally used where regulation for an area of law is delegated to a highly focussed expert body which is given a high degree of discretion. There needs to be assurance that the discretion can be suitably exercised. In the case of the Electricity Industry Act, a key aspect is that the Codes are binding on the Authority itself. | ▪ May end up being harder to make than regulations, particularly if there are significant process requirements (and therefore more risk of judicial review). These risks can lead to very conservative behaviour to avoid review.<br>▪ Delegation of development of rules creates quality risks and potential rework, which can be inefficient. |

| Things to think about if you use it |
|---|
| ▪ Essential to have good process requirements (to avoid possible review), but be very careful when setting process requirements. |

- Avoid rigid cost benefit tests.
- Be clear who the decision-maker is, and who does what. Avoid multiple decision-makers.
- Do as much as you can outside of the rule-making powers to ensure good process - such as through the functions of the agency or accountability documents such as Statements of Intent.
- Who is to approve and what are the criteria for approval of the rules?
- Be wary of complex approval procedures. It can be difficult for a decision-maker to approve such rules without feeling responsible for all content (leading to inefficiency and undermining the purpose of only approving and not taking over the rule-making function).
- Consider how rules will be enforced and what the level of public policy interest in enforcement is.

**Examples**

**Electricity Industry Act 2010** - The Electricity Authority makes and administers the Electricity Participation Code, with which electricity industry participants must comply.

**Takeovers Act 1993** - Takeovers Code may be made by Order in Council on the recommendation of the Minister, after consulting the Takeovers Panel.

**New Zealand Institute of Chartered Accountants Act 1996** - The Institute must always have a code of ethics that governs the professional conduct of its members.

## Instruments, frameworks and methodologies

**The Act provides for instruments to be made by the regulator that statutory regulations may adopt**

This differs from incorporation by reference as the power to change the instrument is delegated in the legislation to the person making it.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Allows the Minister and responsible department to use the instrument to give more freedom to the regulator to develop technical rules.<br>▪ Useful when the regulator has the expertise to develop the instruments but the Government wishes to retain some control<br>▪ Enables the enactment to require compliance with the instrument that is in force from a specified time period. | ▪ Differs from incorporation by reference as the power to change the instrument is delegated in the legislation to the person making it.<br>▪ The instrument to provide regulation is reliant on action by another decision-maker - if that decision-maker is reluctant or slow to act, scheme may falter. |

**Things to think about if you use it**

- Who develops and who makes the instrument? Is it the same person?
- If the Minister retains the power to approve the instrument, consider allowing for the delegation of the power to the regulator - the Minister will still control the use of the instrument through the statutory regulations.
- Essential to have good process requirements (to avoid possible review), but be very careful when setting process requirements.
- Avoid rigid cost benefit tests.
- Be clear who the decision-maker is, and who does what. Avoid multiple decision-makers.
- Do as much as you can outside of the rule-making powers to ensure good process - such as through the functions of the agency or accountability documents such as Statements of Intent.
- Contrasts with incorporation by reference.

**Examples**

**Financial Markets Conduct Act 2013** - Regulations may require compliance with frameworks and methodologies made by FMA.

**Health and Safety Reform Bill** - regulations made under relevant health and safety legislation may require compliance with safe work instruments developed by the regulator and approved by the Minister.

**Financial Reporting Act 2013 –** a range of regulations require compliance with financial reporting standards, auditing and assurance standards and authortative notices prepared and issued by the External Reporting Board.

# Administration

## Licences, authorisations and permits

**The Act requires a person to be licensed or to hold a permit or to otherwise be authorised before carrying out a specified activity. Licences generally include terms and conditions that have effects such as penalties similar to legislation.**

Licencing regimes are a very flexible way to impose requirements on particular occupations, roles or activities that can be adapted to meet individual circumstances as appropriate.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Imposes a gateway to an occupation, role or activity and enables general and tailored controls to be imposed. For example that the practitioner is a fit and proper person.<br>▪ Usually used where there is significant risk to health, safety or livelihood from unscrupulous or ineffective providers of services.<br>▪ Can be a very flexible way to impose requirements that are adapted to individual circumstances. | ▪ Can be a significant barrier to entry into the occupation, role or activity, resulting in high compliance costs.<br>▪ Licencing regimes are resource intensive. For example, there is a need to have an appropriate party as the licencing authority.<br>▪ There is significant risk of anti-competitive effects.<br>▪ Can create a conservative approach of the licensor in issuing of licences due to the perceived risk of moral hazard. Often no or low public understanding of effect of licences.<br>▪ May not result in consistent rules for everyone (e.g. discretion often in application of terms and conditions which is necessary to enable adaption to individual circumstances as appropriate). |

**Things to think about if you use it**

- Try to limit anti-competitive effects by keeping a tight focus on the purpose of the licencing.
- Recognise that those in the regime have an interest in using requirements as a barrier to entry.
- Recognise that the content of requirements is highly dependent on the licensing authority, requiring a high level of confidence in that authority if licensing is being used as a means to impose tailored controls.
- Consider how the Trans-Tasman Mutual Recognition Arrangement applies to the licensing regime.

**Examples**

**Numerous.** Occupational regulation includes provisions that require electricians and other building industry professions, immigration advisers, and lawyers to hold certified licences provided under specific legislation. Licences and permits are required before carrying out activities under the Financial Markets Conduct Act, Crown Minerals Act, Radiocommunications Act.

## Undertakings

**The Act provides for a person to give a binding undertaking.**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Can provide another means of ensuring practical compliance - undertakings given to (usually) a regulator in the context of an understanding that the regulator will not take legal action, avoiding costly litigation.<br>▪ Flexible - may obtain remedies that are not strictly available under law and relevant agencies develop their bespoke solutions. | ▪ Requires individual action (including levels of discretion over the nature of the undertaking, though legislation can restrict how and when undertakings can be used, for example restricting the use of undertakings by providing that they be given only in respect of minor offences).<br>▪ Creates perception of buying a way out of trouble.<br>▪ Can give the regulator significant power over alleged wrongdoers. This may be depicted in the media as a 'soft' option, providing leverage to obtain significant concessions on the promise of avoiding litigation. |

**Things to think about if you use it**

- Should the "acceptance" of the undertaking by the regulator limit the enforcement action that may be taken by the regulator or another person?
- What happens if the undertaking is not fulfilled or a party breaches it?
- What is appropriate to include in an undertaking and how can it be given? For example, should the undertaking be able to include an amount to be paid in lieu of penalty?
- Does the undertaking affect private rights of action? For example, how does it affect any rights of private prosecutions or other parties involved in the matter obtaining any redress?
- Transparency of enforcement is a consideration and whether and how undertakings are to be publicised is important.
- What is the public appetite for this option?

**Examples**

**Fair Trading Act 1986, Financial Markets Conduct Act 2013, Health and Safety Reform Bill, Commerce Act 1986, Takeovers Act 1993 and numerous others** provide undertakings to be accepted by a regulator, which are then binding on the person giving them.

**Telecommunications Act 2001** – the Commerce Commission may accept undertakings from an access provider in relation to a telecommunications service as an alternative to regulating (schedule 3A).

**Telecommunications Act 2001** - Chorus is required to give undertakings to public/Commerce Commission relating to the supply of certain services.

## Approval of rules of private organisations

**The Act provides for the rules of a private organisation to be approved by a Minister or another body**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Recognises that there in a public policy interest in the content of the rules, but that it is not government's role to devise the rules.<br>▪ Having an approval enables an assurance that the rules are consistent with public policy, without being responsible for the detail.<br>▪ Tends to recognise also that implementation and monitoring of the rules is not government's role. | ▪ Not desirable where the rules have a high degree of public policy interest in the content. |

**Things to think about if you use it**

- Who is to approve and what are the criteria for approval of the rules?
- Be wary of complex approval procedures. It can be difficult for decision-maker to approve such rules without feeling responsible for all content (leading to inefficiency and undermining the purpose of only approving and not taking over rule-making function).
- Consider how rules will be enforced and what the level of public policy interest in enforcement is.

**Examples**

**Financial Markets Conduct Act 2013** - the contractual rules of a licensed market (e.g. NZX) must be approved by the FMA. In most circumstances breach of those rules has only private law consequences so will not be subject to legal consequences.

**Financial Service Providers (Registration and Despite Resolution) Act 2008** - approved dispute resolution schemes must have rules that are approved by the Minister.

## Administrative notices (other*)

**The Act provides for administrative matters to be done by way of a notice, usually in the Gazette.**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Enables the legislative instrument to apply to circumstances as they arise that are identified by the decision-maker.<br>▪ Important if there is an element of judgement required, within clearly defined criteria. | ▪ Requires administrative action.<br>▪ If circumstances are objectively verifiable, the Act should apply to the circumstances specified. |

| Things to think about if you use it |
|---|
| ▪ See disallowable notices.<br>▪ Not disallowable instruments unless they have significant legislative effect.<br>▪ How are they made, by whom and on what grounds? This will help to determine what, if any, conditions or criteria are to be imposed on the use of the administration notice. |

*The guide has already identified a number of things such as designation, exemptions and disallowable notices that are generally (but not always) made through administrative notices – this is essentially an "other" category.

**Examples**

**Crown Minerals Act 1991** - Ministers may, by notice in the Gazette, designate areas as a gold fossicking area.

## Directions

**An Act provides for a person to give a direction**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ A tool for requiring action without having to go through a formal court process.<br>▪ Would usually only be issued following a very clear statutory process (with significant checks and balances). | ▪ Risk of arbitrary use or outcome of the use of such power. |

| Things to think about if you use it |
|---|
| ▪ What are the safeguards? For example is there to be criteria on the use and/or nature of the direction? Who is the most appropriate party to hold the power? What review rights are there (would need to be subject to judicial review but should there be any other review rights)? |

**Examples**

**Financial Markets Conduct Act 2013 -** The Minister may, after having regard to any advice of the FMA, give a written direction to a licensed market operator if the Minister considers that the licensed market operator has failed or is failing to meet any one or more of its market operator obligations and the licensed market operator has not provided an action plan when required under section 340 or in certain other circumstances.

**Telecommunications (Interception Capability and Security) Act 2013** – The Minister responsible for the Government Communications Security Bureau may make a direction to a specific network operator to take steps, as specified by the Minister, to prevent, sufficiently mitigate, or remove the significant network security risk (section 57).

# Adjudication

## Determinations

**An Act provides for a person to make a determination.**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Enables the regulator to impose detailed requirements where the parties fail to agree.<br>▪ The compliance costs may be less than would be the case if the determination power was given to the Court.<br>▪ Useful if the regulator has specialised knowledge.<br>▪ As a general rule determination powers are only used in the context of a regulated activity. Otherwise determinations are generally made by a court or a tribunal. | ▪ Significant administrative and compliance costs.<br>▪ A high level of technical ability is required by the person holding the power to make the determination. |

**Things to think about if you use it**

- What are the rights to challenge and review? For example should a more accessible means of review than simply judicial review by allowed for?
- Should there be appeal rights? Determinations are highly technical and detailed decisions and consideration of whether they are the appropriate subject-matter for appeal rights (or the appropriate type and nature of any such rights) is needed.
- Part 4 of the *Commerce Act 1986* is a special case. It provides for "merits review" in the High Court (with a judge sitting with experts) of input methodologies and, in some cases, the application of the input methodologies to individual regulated entities. Merits review is undertaken in the courts, but is more in the nature of review than appeal.

**Examples**

**Telecommunications Act 2001**: An access seeker or an access provider of a designated access service or specified service may apply to the Commission for a determination of all or some of the terms on which the service must be supplied during the period of time specified in the application.
The Commission may make, as an alternative to a determination, a determination of the terms on which a designated access service or specified service must be supplied with reference to all access seekers and all access providers of the service.
The Telecommunications Industry Forum may prepare telecommunications access codes for approval by the Commission, or the Commission may approve codes on its own initiative. Access codes must be complied with in a similar manner to determinations

**Commerce Act 1986 Part 4**: Commerce Commission must make determinations specifying how the relevant forms of regulation apply to suppliers of regulated goods or services.

**Building Act 2004**: Binding decision may be made by the regulator to provide a way of resolving disputes, questions, or interpretations about the rules that apply to buildings, how buildings are used, building accessibility, and health and safety. In broad terms, the rules arise from the requirements of the Building Act or the Building Code.

**Construction Contracts Act 2002:** Determinations may be sought from an adjudicator in relation to disputes under the Act.

## Clearances and Authorisations

**The Act provides for a person to clear or authorise a transaction or state of affairs as complying with the law.**

A clearance is where the decision-maker decides the action does not contravene the statute.

An authorisation is where the action contravenes the general rule but should be authorised in accordance with statutory criteria. The decision protects the person from future legal action.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Provides an option to obtain comfort and certainty in respect of the legality of the matter.<br>▪ Very useful in the context of principles-based regulation where obligations are widely expressed and there can be multiple means or ways of compliance with the principle depending on the situation or circumstances. | ▪ Labour intensive and can have administration and other continuing costs for the decision-maker.<br>▪ Because of the risk of creating precedent which could apply to other similar situations there is often a high risk of conservative approaches being taken by the decision-maker that will act to undermine the benefits.<br>▪ Risks creating a quasi-judicial system within the decision-maker. |

**Things to think about if you use it**

- Does action have precedent effect?
- Should usually be subject to a right of appeal (see LAC Guidelines 2014 Chapter 25).
- Is there a counterparty?
- Clearances and authorisations under the *Commerce Act 1986* serve different purposes. Clearances are intended to give certainty to businesses that their conduct is lawful. This is useful in the context of complex principle-based legislation such as the Commerce Act because it is often difficult for businesses to assess whether their conduct falls on the right side of the law. An authorisation serves a different purpose. It authorises conduct that would otherwise be prohibited on the basis that it is in the public interest. In this respect it is more like an individual exemption.

**Examples**

**Commerce Act 1986:** The Commerce Commission may give authorisations for restrictive trade practices and clearances or authorisations for business acquisitions.
**Building Act 2004**: A party may apply to the chief executive for a determination, for example, as to whether particular matters comply with the Building Code.

# Persuasion

## Programmes or Instructions

**The Act provides for the Minister to set out government policy and administrative processes.**
(See also Government policy directions or strategies)

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Increases certainty about government processes, encouraging confident participation. | ▪ Limits the regulator's discretion.<br>▪ There is a risk of these documents morphing into rigid rules. |

| Things to think about if you use it |
|---|
| ▪ What is the status of the document? Are they disallowable instruments under the *Legislation Act 2012*? (Note that immigration instructions are explicitly stated to not be disallowable).<br>▪ How does it fit with the legal requirements? Need to consider and establish a clear boundary between this and legal requirements. For example, these documents will not be able to override the Act unless the Act specifically authorises this. |

**Examples**

**Crown Minerals Act 1991**: The Minister must prepare minerals programmes in certain circumstances. The process includes public consultation. Minerals programmes set out or describe how the Minister or the chief executive will exercise any specified powers or discretions.

**Immigration Act:** The Minister may certify immigration instructions relating to certain entry visa and permissions. Note however Immigration instructions are statements of government policy and are neither legislative instruments nor disallowable instruments.

## Government policy directions or strategies

**The Act provides for the Minister to give a direction or make a statement about Government policy, usually to a Crown entity.**
This approach has been largely superseded by the *Crown Entities Act 1991*. The Act could also provide for the Minister to issue a strategy in relation to a policy area.

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Provides a means for Government to express its policy view, and for that to be taken into account or given effect to.<br>▪ Could require Government to have a clear view on the matter. | ▪ Limited effectiveness, as decisions are usually made based on individual statutory criteria that the statement cannot override.<br>▪ Can risk the regulator's independence or create false impressions about compliance.<br>▪ Can create judicial review risk. |

| Things to think about if you use it |
|---|
| ▪ What is the effect of the statement? Is it:<br>  ▪ Declaratory.<br>  ▪ A mandatory consideration (that you must have regard to).<br>  ▪ Mandatory (that you must give effect to). |

**Examples**

**Commerce Act 1986 -** In the exercise of its powers, the Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister.

**Fair Trading Act 1986 -** The Minister may issue a product safety policy statement that (a) relates to goods of any description or any class or classes of goods; and (b) provides guidance on the safety of those goods to consumers, retailers, and manufacturers.

**Radiocommunications Act 1989** - In the exercise of certain functions, duties, and powers, the Secretary shall have regard to the general policy of the Government in relation to the functions, duties, and powers, as that policy is communicated to the Secretary from time to time by notice in writing by the Minister, and shall comply with any directions given by the Minister to the Secretary by notice in writing pursuant to such policy.

**Telecommunications Act 2001** - In the exercise of its powers under Schedule 3, the Commission must have regard to any economic policies of the Government that are transmitted, in writing, to the Commission by the Minister.

**Electricity Industry Act 2010** - In performing its functions, the Authority must have regard to any statements of government policy concerning the electricity industry that are issued by the Minister.

**Energy Efficiency and Conservation Act 2000** - The Minister must publish a national energy efficiency and conservation strategy, which is to give effect to the Government's policy on the promotion in New Zealand of energy efficiency, energy conservation, and the use of renewable sources of energy.

## Guidance

**The regulator has a function of issuing guidance on how it interprets legislative requirements.**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Can assist compliance by promoting certainty.<br>▪ Can promote best practice in a way strict legal requirements may not. | ▪ Cannot override the law. Risks criticism of "regulating by press release". |

| |
|---|
| ▪ An essential "top of cliff" tool for an active regulator – it can address issues before they arise by being clear about minimum standard levels and how compliance can be achieved.<br>▪ Flexible and easy to change. Regulator much more likely to use it than more formal rule-like tools. |
| **Things to think about if you use it** |
| ▪ How is it developed and given?<br>▪ Is specific authority to issue guidance needed or desirable? |

**Examples**

**Financial Markets Authority Act 2011** – The FMA's functions include:

- Stating whether or not, or in what circumstances, the FMA intends to take or not take action over a particular state of affairs or particular conduct.
- Issuing warnings, reports, or guidelines, or making comments.
- Providing information about its functions, powers, and duties under this Act and other enactments.

**WorkSafe New Zealand Act 2013**: Once the Health and Safety Reform Bill is enacted WorkSafe's functions will include providing guidance, advice, and information on workplace health and safety to duty holders and the public.

**Building Act 2004 -** The Chief Executive may publish information for the guidance of certain persons to assist them in complying with this Act. The guidance does not relieve any person of the obligation to consider any matter to which that information relates according to the circumstances of the particular case.

**Telecommunications (Interception Capability and Security) Act 2013** – The Director of GCSB may issue guidelines in relation to network security requirements (section 58). The guidelines are not binding. However, evidence of compliance with the guidelines will be treated as evidence of compliance with applicable requirements in any proceeding relating to the Act.

## Codes of practice

**The Act provides for codes of practice to be made. Codes of practice are usually persuasive only, and reflect best or good practice. See also codes.**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Codes of practice can establish an accepted way of complying with an Act, without limiting other acceptable ways of complying.<br>▪ It can provide certainty to those who seek guidance on how to comply with the Act.<br>▪ Can be industry-led which can ensure industry best practice is considered by relying on the expertise of the industry (this can also lower costs which can be meet indirectly by industry voluntary involvement). | ▪ More likely to be complied with than a voluntary standard, but still not mandatory.<br>▪ Failure to follow an approved code of practice is not an offence in itself.<br>▪ Approved codes are admissible in court by either the prosecution or defence as evidence of good practice - but the reliance placed on them is a matter of discretion for the judge. |
| **Things to think about if you use it** | |
| ▪ To what extent is non-compliance a problem within the population you are seeking to influence? Does the level of non-compliance indicate failure to comply with industry standards or disagreement as to what equals appropriate industry standards.<br>▪ Will it be obvious whether a person is complying?<br>▪ How should the Code be made and how much "buy-in" is required from those who the code will apply to at the development stage?<br>▪ Who is the audience and how will it be made available? For example will it be freely available or will a charge have to be paid? | |

**Examples**

**Health and Safety Reform Bill** - The Minister may approve codes of practice developed by the regulator. Codes are developed through a tripartite process involving the Minister, the regulator and those industry organisations such as unions, employer organisations and other persons or representatives of other persons affected by the code.

## Voluntary national and international standards

**New Zealand, international or other national standards may provide a voluntary means of providing for best practice outcomes. May include New Zealand Standards, ISO International Standards, International Electrotechnical Commission Standards or other internationally or nationally recognised standards eg Codex Standards. Standards can also be incorporated by reference - see Incorporation by Reference.**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ They can be used to ensure that materials, products, processes and services are fit for their purpose and are at an agreed international/national recognised standard.<br>▪ Encouraging compliance with voluntary standards can promote quality (and therefore compliance with legislative obligations in some cases), without inhibiting innovation.<br>▪ Process of development includes broad-based stakeholder involvement and consensus – this will act to ensure end document reflects agreed industry standard.<br>▪ Potentially lower cost to Crown if development is led and paid for by the relevant industry. | ▪ Are not mandatory. |

**Things to think about if you use it**

- To what extent is non-compliance a problem?
- Will it be obvious whether a person is complying?
- Compliance can be demonstrated where the standards have a corresponding conformity assessment process e.g. ISO 9001 certification (as a voluntary measure).
- Who is the audience and how will it be made available? For example will it be freely available or will a charge have to be paid?

**Examples**

Standards and Accreditation Act 2015 – the Act makes provision for a standards system that:
(i) is consistent with international practice
(ii) facilitates trade
(iii) protects the health, safety, and well-being of individuals

The Standards Approval Board must have regard to whether a proposed standard would meet an identified industry, consumer, or regulatory need, and whether the expected benefit of the standard to the relevant sector or to New Zealand as a whole can be demonstrated.

**ISO Standards**: Many international standards govern the food industry. Out of more than 19000 ISO International Standards, some 1000 are specifically dedicated to food. The purpose of these standards is to create confidence in the products we eat or drink by ensuring the world uses the same standards when it comes to food quality, safety and efficiency. This is particularly relevant because food products regularly cross national boundaries at every stage of the supply chain.

## Voluntary industry standards

**Standards developed by an industry may provide a voluntary means of providing best practice outcomes.**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Encouraging industry led voluntary standards can promote qualify, while not inhibiting innovation. | ▪ Are not mandatory.<br>▪ May not have undergone the same rigorous development process as New Zealand or international standards. |

**Things to think about if you use it**

- Think about who produced the material, how the standard was developed, its availability, and its purpose (e.g. is it intended to establish normative rules?)

**Examples**

The Residential Construction Sector Market Study found that the steel construction industry had developed its own standard

## Trans-national private regulation

**Regulatory Instruments, standards, guidance developed by private actors (sometimes in single or multi-stakeholder organisations, representing firms, industries, independent experts or NGOs).**

| Why you might use it | Why you might not use it |
|---|---|
| ▪ Can complement public regulation.<br>▪ Can develop in fast-changing environments where public regulation cannot keep up.<br>▪ Some goods and services are not readily regulated on a national/territorial basis. | ▪ Varying levels of robustness and transparency in development and multiple competing schemes in some areas may make it confusing to users and consumers. |

| Things to think about if you use it |
|---|
| ▪ The process by which they have been made is an important consideration.<br>▪ Consider the extent of their adoption - do they have a strong international normative effect.<br>▪ Note OECD is doing some work on private standards in this area (not yet all published). |

**Examples**

Examples include private standards or instruments regulating a range of areas including environmental protection, fair trade, forestry management and food safety.

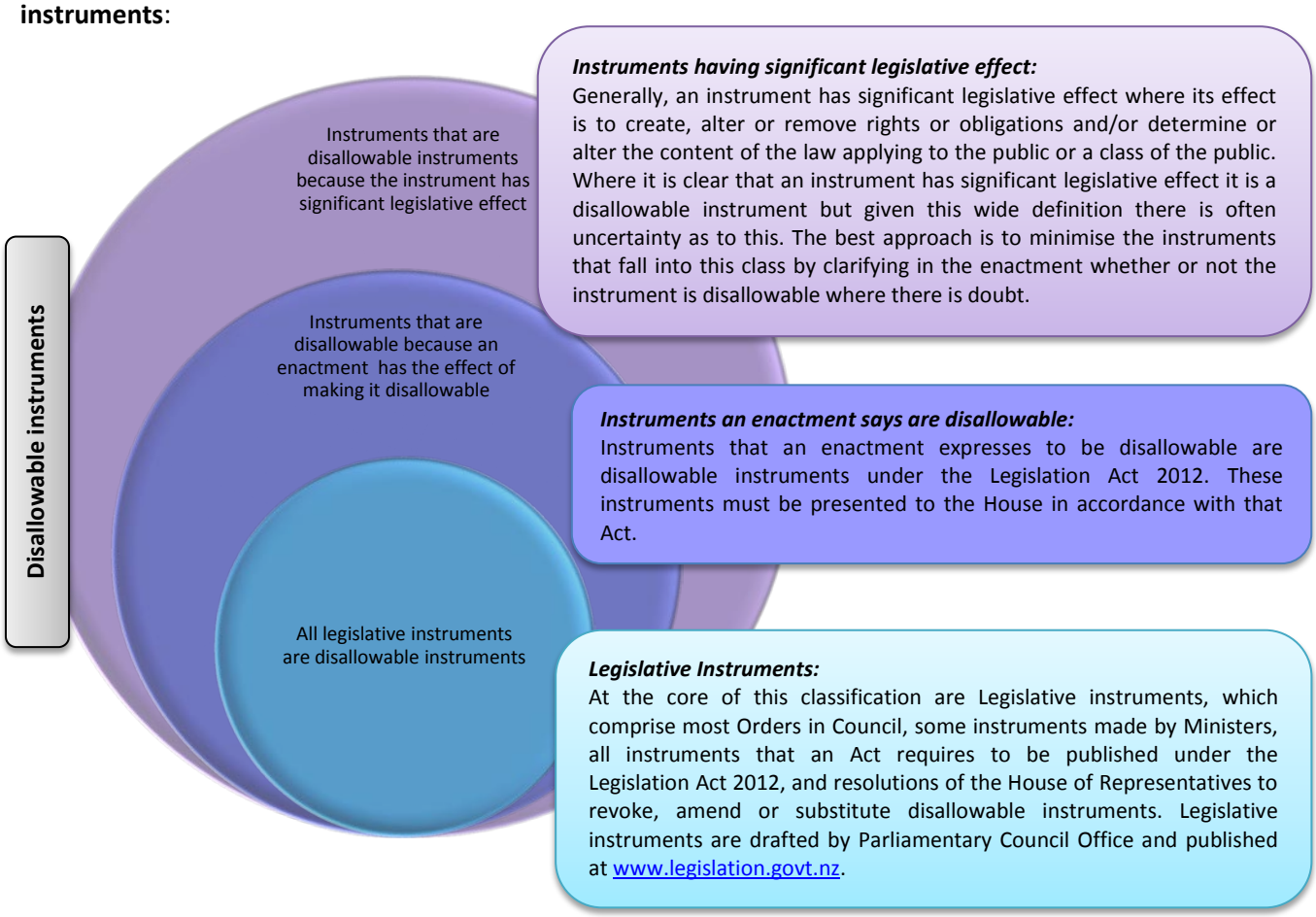
# Themes

## Legislation and the *Legislation Act 2012*

In this guide regulatory instruments are categorised as Acts of Parliament (often referred to as primary legislation) or disallowable instruments under the *Legislation Act 2012*. This categorisation of regulatory instruments (other than Acts of Parliament) as disallowable instruments contrasts with other approaches. For example, the division of subordinate legislation into secondary and tertiary legislation, where:

- Secondary legislation refers to subordinate legislation made by Order in Council. It comprises regulations and other Orders that are drafted by the Parliamentary Council Office and subject to the full Cabinet process, including regulatory impact requirements.
- Tertiary legislation refers to everything else that has legislative effect. These are instruments made by Ministers, Crown entities, or other authorised persons and may (or may not) be subject to the Cabinet process. This includes a very broad class of instruments that have normative effect.

The *Legislation Act 2012* does not use the terms secondary or tertiary legislation, choosing to characterise subordinate legislation through the creation of the concept of **disallowable instruments**:



A key modifier to this classification system is that the status of an instrument as disallowable can be determined by the relevant enactment by directly stating that the instrument is, or the extent to which it is not, a disallowable instrument. This allows any uncertainty surrounding whether an instrument will have significant legislative effect to be resolved by direct classification. Some good examples of where instruments are directly stipulated as not being disallowable instruments, which might otherwise have been disallowable (due to potentially having significant legislative effect) include: immigration instructions under section 22(8) of the *Immigration Act 2009*; and class exemptions under section 32(6) of the *Telecommunications (Interception Capability and Security) Act 2013*.[4]

Due to this ability to classify instruments as not being disallowable in situations of uncertainty, some instruments that could be thought of as "tertiary legislation" because they have effects similar to legislation ( eg some codes of practice) are not classified as legislative under the *Legislation Act 2012*.

[4] For an explanation for the approach taken to class exemptions under the Telecommunications (Interception Capability and Security) Act 2013 refer http://www.parliament.nz/resource/en-nz/50SCLO_ADV_00DBHOH_BILL12123_1_A349119/bcad17fdb741bf31c160feca0030356f54bbcc14

# Mechanism choice

There is no single, recognised approach to classifying how regulatory outcomes can, or should be produced. Rather, the overall regulatory strategy (or policy design) taken is contingent on the nature and objectives of the problem being addressed.[5] A key component of policy design is consideration of what is often termed "mechanism choice".

Mechanism choice can broadly be described as "the selection of some way to structure rules for social behaviour".[6] While there is a relationship between this and the form and type of regulatory instrument that you may wish to use, for the purposes of this guide, mechanism choice is the general, overarching basis or reasoning behind the general regulatory design adopted to address the policy problem, not the particular instruments you elect to do this.

MBIE refers to such overarching, effect-based approaches as a **regulatory strategy**. Regulatory strategies form part of the policy process when determining the best, overall regulatory approach to ensure the appropriate outcome is achieved.

MBIE's guide, Regulating for Success: A Framework identifies six general regulatory strategies:

**Command and control**

- Regulation is used to prohibit certain forms of conduct or to demand certain positive actions.
- The essence of a command and control approach is the exercise of influence or control by imposing standards which are backed by sanctions.
- A spectrum of standards exist which each represent different degrees of government intervention at different stages in the risk management process, in part based on the different degrees of prescription contained in the standard. Standards can be divided into three categories which correspond to the three stages of intervention - ***specification standards***; ***performance standards***; or ***principle-based standards***.

**Specification standards** (also referred to as prescriptive rules or standards) specify the technical means for achieving any particular regulatory goal. They set out a single criterion or conditions that have to be satisfied for the rule to apply or be complied with. They focus on prevention by controlling the processes that give rise to dangerous situations.

**Performance standards** require certain conditions or parameters of quality and/or quantity to be met but leave the individual or firm free to choose how to best meet those conditions. This means they demand a certain level of delivery or place conditions of quality (normally within the Act) but do not specify how that delivery is achieved.

**Principle-based standards** (also referred to as goal-based standards) describe, in general terms, the objective sought. They do not prescribe a particular input or level of risk creation that is acceptable but articulate specific policy outcomes, the application of which require interpretation according to the circumstances. They give individuals and firms a choice about how to achieve the goal or outcome.

[5] Freiberg, Arie (2010) *The Tools of Regulation*, Sydney: The Federation Press at 82.

[6] Weiner, Jonathan B. and Richman, Barak D. (2010) 'Mechanism Choice' in *Research Handbook on Public Choice and Public Law*, at 363.

- The category of standard itself does not necessarily determine the type of regulatory instrument used (though generally either the standards or ability to create them will be placed within an Act). Rather, this will be represented in the structure of the drafting of the obligation or standard within the regulatory instrument.

### Self-regulation

- Self-regulation occurs where an industry body regulates its members in the absence of direct government interest in the way those members are regulated.
- Self-regulation can be seen as taking place when a group of individuals, firms or an industry itself exerts control over its membership and their behaviour.

### Co-regulation

- Co-regulation usually refers to a situation where industry or professional associations develop and administer their own arrangements in association with government.
- For example, this may include the use of regulatory instruments to provide legislative support to industry-based codes or standards or delegating power to industry to regulate and enforce codes.

### Disclosure regulation

- Disclosure regulation requires business and the marketplace to disclose, in a certain way (e.g. publication or labelling), information about attributes of a product, process or service.
- This may include the use of regulatory instruments to establish the disclosure regime and specify its requirements.

### Economic and market instruments

- Economic and market instruments are used by both governmental and non-governmental actors to change behaviour, acting to encourage desirable behaviour through financial incentives rather than legal compulsion.
- The most common economic or market-based instruments are charges and taxes.

### Status quo

- The option of not taking specific government action should always be considered.
- There is the real possibility that government action will not resolve a regulatory problem or, alternatively, that the problem may "self-correct".
- Government action risks shifting regulatory problems elsewhere and may impose greater costs than the costs imposed by the problem the intervention seeks to correct.

In establishing a regulatory system, regulatory strategies are not mutually exclusive and may incorporate multiple regulatory strategies to meet the policy objectives and desired outcomes. For example, the *Telecommunications Act 2001* represents a command and control based regulatory strategy with an information disclosure requirement incorporated into the Act, which is aimed at promoting competition in the telecommunications market.

While regulatory instruments are the means of giving effect to the regulatory strategy adopted, the regulatory strategy itself does not necessarily prescribe the particular regulatory instruments that should be used. The choice of regulatory instrument has much more to do with issues of delegation, flexibility and purpose-fit than any overarching, definitive conceptual structure.[7]

For example, the principles-based regime in the *Consumer Guarantees Act 1993* uses only one type of regulatory instrument: an Act; the new Health and Safety at Work Act, will imposes principle-based standards, uses several types of regulatory instruments: an Act; regulations; and persuasive instruments such as codes of practice and guidance, which act to give clarification to the broad, outcome-based standards in the Act.

[7] *Ibid* at 82-83.

# Delegation of legislative powers

Most regulatory systems combine the use of primary and subordinate legislation. Where subordinate legislation is used within regulatory design the issue of delegation will need to be carefully considered.

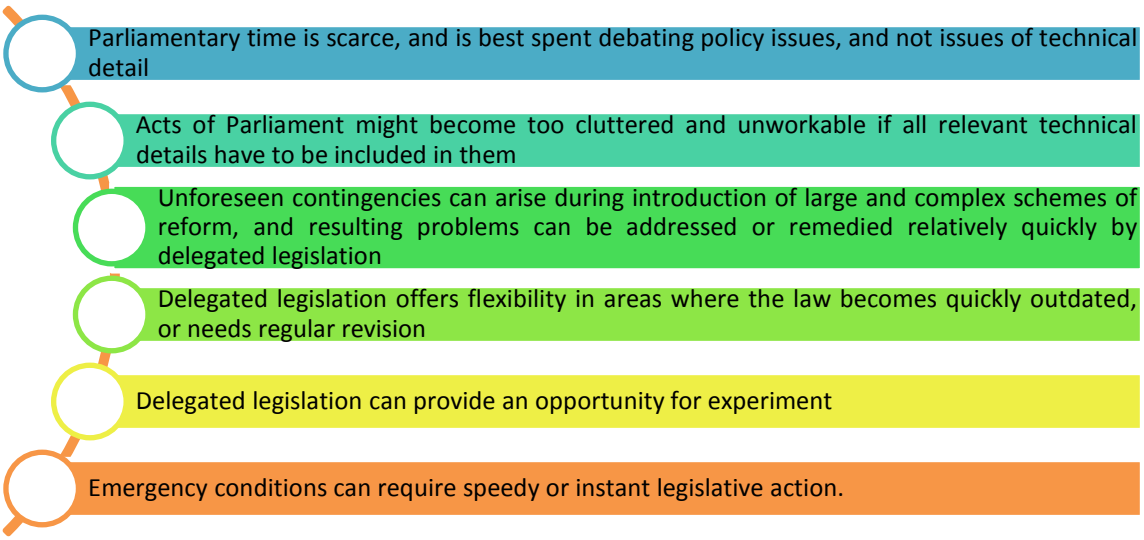
## What is delegation?

In New Zealand, Parliament is conferred full power to make laws.[8] While Parliament will exercise this power to pass all primary legislation (Acts), it traditionally delegates law-making power of subordinate legislation to another person or body. The nature and scope of any delegation of legislative power is determined by the manner such delegation is prescribed in the applicable primary legislation. The subordinate legislation that results from the exercise of such delegated power is generically referred to as "delegated legislation".

In practice delegation gives rise to the enactment of many different types of regulatory instruments and can require a number of pre-conditions (or checks and balances placed on the exercise of the delegated power). These pre-conditions must be met before the party holding the delegated power is able to exercise that power to enact the subordinate legislation. For example, the most common form of delegation is providing that regulations can be made on the recommendation of the Minister. More comprehensive pre-conditions can, and are, imposed. Generally the more distanced the delegation of power is from the parliamentary sphere, the more pre-conditions are imposed.

## Delegation is in the interests of efficient Parliamentary administration

Parliament's delegation of its legislative power is a fundamental and necessary practice for the effective running and administration of modern governments. This was first recognised in 1932 by the United Kingdom's Donoughmore Committee[9] which held that it was legitimate that Parliament could delegate its legislative power, on the basis that:




8 Refer section 15(1) of the *Constitution Act 1986*.

9 Committee on Ministers' Powers *Report on Ministers' Powers 1932*, Cmnd 4060 (1932) the Committee was chaired by Lord Donougmore.

This was reiterated in New Zealand in 1962 by the Algie Committee and the legitimacy and necessity for the use of delegation is now fundamentally accepted.

The acceptance of delegation is reflected in the LAC Guidelines 2014. However, Parliament must be satisfied that any delegation is objectively justifiable and contains sufficient and appropriate restraints on its exercise to ensure the power will not be abused. This means that, when determining whether delegation is needed within your regulatory design, and who the power should be delegated to, it is essential to consider the nature of the delegation, including its anticipated scope and what appropriate restraints should be imposed on the exercise of the delegated power.

## Sub-delegation

Primary legislation can also:

- Authorise that the sub-delegation of a power or function is able to be stipulated within subordinate legislation (e.g. the ability for regulations to be made under the *Securities Act 1978* to allow for the Registrar to prescribe forms).
- Authorise the original holder of a delegated power or function to delegate this to another person or body (e.g. authorising the Minister to delegate his power of approval of codes of practice to WorkSafe New Zealand under the *Health and Safety Reform Bill*).

In such circumstance whether any, pre-conditions should apply to the actual sub-delegation of the power to another person or body, and on the actual exercise of the sub-delegated power or function, will need to be considered.

For further information and issues with authoring subordinate legislation to sub-delegate powers or functions refer Carter, R, McHerron, J and Malone, R *Subordinate Legislation in New Zealand* (12.3).

| Why delegate | Why not delegate |
|---|---|
| • Delegation allows **flexibility** to ensure that where the regulatory instrument is intended to contain specific, technical or complex detail that it is reviewed and made by the most appropriate party while being able to impose appropriate pre-conditions and retain Ministerial oversight where desirable.<br>• Ensures **administrative efficiency**, not only by removing the making of appropriate regulatory instruments from the full Parliamentary process but by ensuring that the power can sit with the most appropriate party in the circumstances.<br>• Ensures **technical matters** can be dealt with by appropriate parties. | • Legislation Design and Advisory Committee (LDAC) Guidelines state that several matters do not justify delegation, including:<br>• *Incomplete policy development*<br>Using delegating law-making powers to allow for incomplete policy to be finalised at some future point through delegated legislation.<br>• *Avoiding Parliament*<br>LDAC warns against creating and using delegated law-making powers to avoid putting a policy proposal before Parliament.<br>• *Past practice*<br>The LAC Guidelines 2014 note that just because Parliament has delegated a |

power to legislate in the past this does not, by itself, justify doing so again.

- The matter is one that should only be specified in primary legislation. LAC Guidelines 2014 identify such matters as including:
  - very significant policy matters
  - provisions affecting fundamental rights
  - entitlements to state assistance
  - changes to common law
  - imposing taxes (except for cost recovery fees, levies and charges)
  - repealing or altering statute law (but there are many examples, including Henry VIII clauses)
  - creating offences (except for regulatory offences)
  - creating public bodies or officers (except for a few examples)
  - retrospective law change

**Things to think about when you delegate**

***LAC Guidelines 2014***

All primary legislation is certified for LDAC approval at the time of introduction to Parliament and the guidelines need to be carefully considered when determining when and how to delegate. The advice set out in the LAC Guidelines 2014:

- Is strongly influenced by common law values about what should be included in primary or delegated legislation.
- Emphasises the vital importance of context (i.e. what will be appropriate for primary legislation only in one context (e.g. the core criminal law) may be quite appropriate for delegated legislation in another context (e.g. the regulation of hazardous substances in the context of public welfare regulatory regulation).
- Is quite pragmatic in character (e.g. if regulation is likely to need to be changed frequently, this points in favour of setting out the rules in delegated legislation).
- Encourages legislators and regulatory designers to make decisions based on a case-by-case application of listed values, principles, and considerations, rather than in accordance with some predetermined scheme designed to produce greater consistency by the application of rules.

## Who is the most appropriate party to exercise the delegated power?

One of the most common reasons for delegation is efficiency and to allow for the most appropriate party to exercise the relevant power or function. Careful consideration needs to be had as to who is best suited to hold the power and why and what oversight of the exercise of the power may be needed. This may include consideration of matters such as:

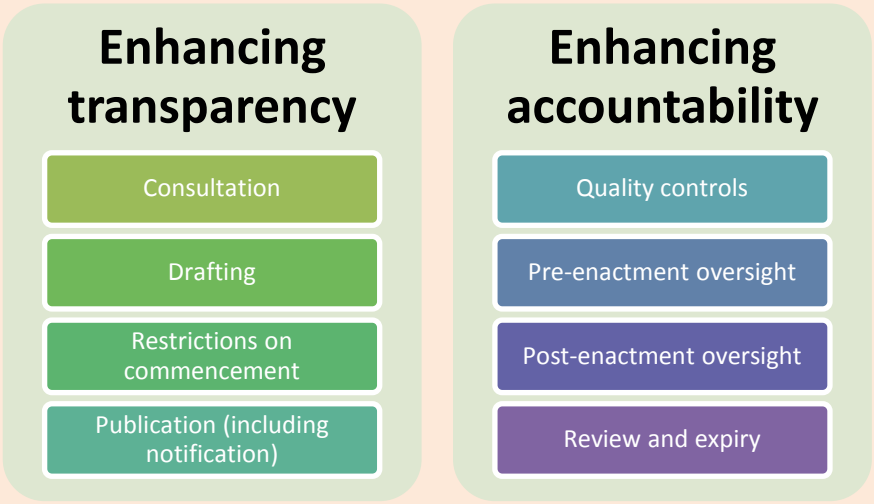
- What type of regulatory instrument or action (e.g. authorisation) arises from the exercise of the delegated power?
- Who is best placed to have the expertise to efficiently determine the appropriate content of the regulatory instrument or whether the statutory criteria has been meet?
- Who will be affected by the regulatory instrument/action and how?
- What are the existing controls on the exercise of the delegated power and should there be more?

## The nature and extent of any pre-conditions to exercise the delegated power

There is no exhaustive list on the nature and extent of pre-conditions to be placed on the exercise of any delegation of power. Generally the pre-conditions should be appropriate for the nature of, and to whom, the power is delegated.

Care should be taken to ensure that the process does not become too drawn-out and complex. If a more complex process is seen as necessary this may be an indication that the party to whom the power is delegated is not the most appropriate party to hold it.

Generally the type of special controls, or pre-conditions, to the exercise of the delegated power can be grouped into two classes of purpose – ***enhancing transparency*** or ***enhancing accountability***.




***Delegated legislation can be reviewed***

In addition to Parliament's ability to review and limit any delegation through the full consideration of the Act in which the delegation or authorisation to delegate is made, there are other checks on delegated legislation:

- The main role of the Regulations Review Committee is to examine all regulations, but the Committee may also consider provisions in Bills which relate to regulations and will investigate complaints about the operation of regulations. The Committee also has a wide mandate to

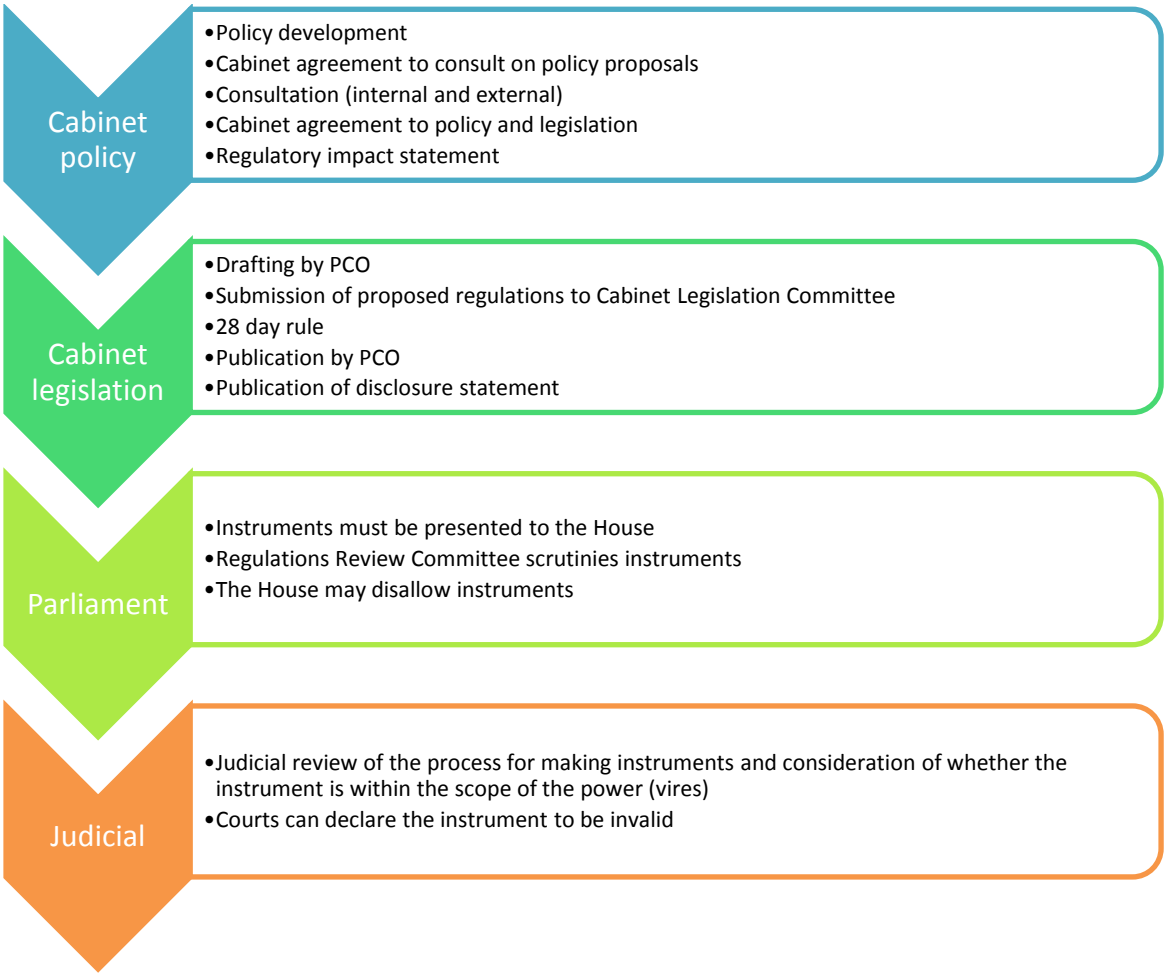
consider any other matter relating to regulations that it wishes to report to the House on.

- Delegated legislation is subject to review by the courts to ensure that they are, or were, made in compliance with the enabling Act. Where the provisions of any delegated legislation are in excess of the power granted under the Act, the Court can hold that the delegated legislation is invalid and of no legal effect.
- The Human Rights Commission, and ultimately the Human Rights Review Tribunal, can play a part in reviewing delegated legislation where any anti-discrimination complaint is made.

## General controls on delegation

***Legislative instruments***

There are well established and powerful controls which act to check legislative instruments throughout the development process and following enactment, including:[10]




In most cases these processes should not be supplemented by additional procedural or substantive requirements within the delegation. However, it is reasonably common to add a consultation requirement before the Minister may recommend that the regulatory instrument is made. Because

[10] Refer Cabinet Manual for further information on cabinet procedure and points of review within the policy process: http://cabinetmanual.cabinetoffice.govt.nz/.

consultation is a normal part of a policy process, a statutory consultation obligation does not usually add an additional process, but it does prevent the consultation step being left out.

Sometimes an Act will require additional steps before a regulatory instrument is made, such as requiring the Minister to act in accordance with the recommendation of a another person (e.g. a regulator or expert body). These processes should be used sparingly because they can result in inefficient processes, but they can be advisable and have advantages in certain circumstance (e.g. where the core work is intended to be done by an expert regulator, but the Minister is to retain oversight of the decision).

Contrasting case studies:

Telecommunications Act schedule 3

Health and Safety at Work Act – safe work instruments

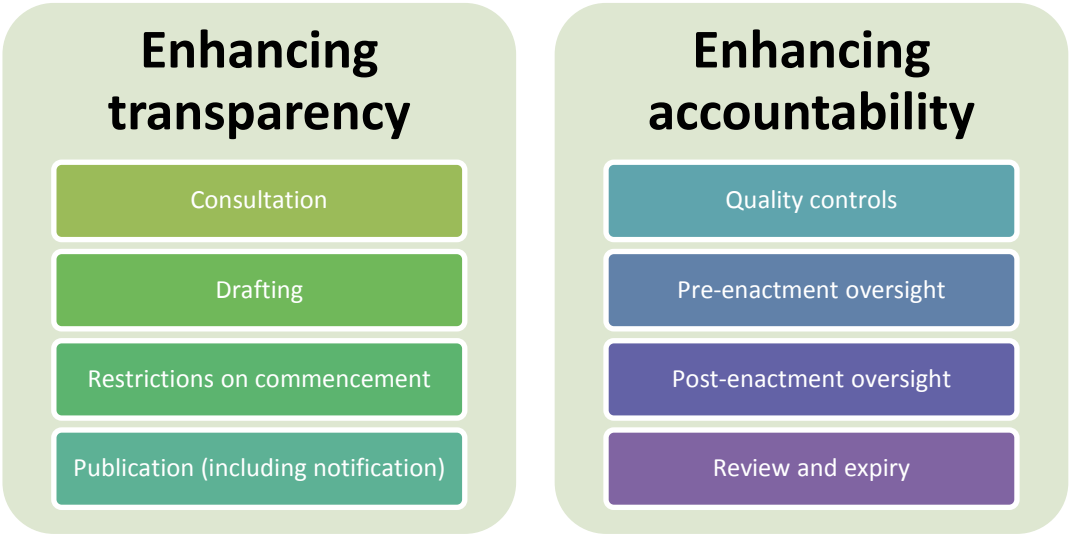
For an example see the process in Schedule 3 of the Telecommunications Act.

***Disallowable instruments that are not legislative Instruments***

These instruments are subject to Parliament and judicial oversight, but are often not subject to Cabinet requirements. Consequently, the transparency and accountability mechanisms for making these types of disallowable instruments require careful consideration.

## Special controls placed on the exercise of delegated powers

Generally the type of pre-conditions to the exercise of a delegated power can be grouped into two classes of purpose – ***enhancing transparency*** or ***enhancing accountability***.




Special controls can be placed on both legislative and non-legislative instruments. In the case of non-legislative instruments, one way of thinking about transparency and accountability issues is to replicate equivalent disciplines that would apply if the delegated legislation was made through Cabinet, by Order in Council. However, legislative requirements cannot be ignored and care needs to be taken because Cabinet can, and does, override normal processes in respect of the making of delegated legislation where Cabinet considers there is good reason.

Pre-conditions create additional grounds to challenge the making of a regulatory instrument where the pre-conditions can be shown to have not adequately been met prior to the exercise of the delegated power. This would be grounds for a court to find that the regulatory instrument was invalid and of no legal effect. Pre-conditions can also create incentives to challenge and lead to conservatism by the person making the instrument. Therefore, think carefully about the restrictions on the party holding the delegated power and the incentives that any pre-conditions will create when designing them.

## Enhancing transparency

### Consultation

Consultation is a core part of most policy processes and is a common pre-condition imposed on the exercise of a delegated power.

**Things to think about where consultation is a pre-condition to the exercise of a delegated power**

*What will a statutory consultation requirement add?*

A consultation pre-condition adds a level of assurance that the appropriate people have considered the nature and content of any regulatory instrument which will arise from the exercise of the delegated power.

A careful balance on consultation will be needed to ensure that consultation requirements are not unnecessarily wide or too narrow and that they do not unnecessarily stipulate consultation requirements that would already apply (e.g. because the regulatory instrument is subject to the Cabinet process).

*Who should the party with the delegated power have to consult with and why?*

Careful consideration will need to be given to who has to be consulted and why. Where the decision-maker is a Minister, in practice the appropriate Ministry will undertake consultation and it is not necessary to refer to the Ministry acting on the Minister's behalf in undertaking this process.

*Where onerous consultation provisions are included, is a fast-track process needed?*

A fast-track process may be appropriate where matters can become time sensitive and the need to enable the exercise of the delegation to allow for the regulatory instrument to be made is considered to outweigh the necessity for prolonged consultation.

Where a fast-track process is considered to be necessary, the anticipated use of that process should be considered. Anticipating that the fast-track process will be necessary more often than the consultation provisions, may signal that the consultation process involved is inappropriate.

Consultation is an essential element of the regulatory process and should not be overlooked or undertaken lightly and without substantive justification. It is also important to recognise that failure within the consultation process or failure to consult at all should not outweigh the need for certainty in the legal effect of the regulatory instrument to arise from exercise of the delegated power.

**What should or should not be included within a consultation pre-condition**

*A general consultation requirement*

A good general consultation requirement will provide that the party holding the delegated power may not exercise the power to make the regulatory instrument without first consulting all persons

and organisations they consider appropriate, having regard to the content of the regulatory instrument.

*Consideration of submissions*

It is not usually necessary to state that any submissions must be considered because ignoring submissions is unlikely to meet the requirement to consult, but there are examples of when this is included.

*Failure to consult does not affect validity of the regulatory instrument*

A provision that states that failure to consult does not affect the validity of the instrument should be included unless there is good reason not to. Failure to include this provision could mean that the regulatory instrument made under the delegated power is void *ab initio* and will give rise to problems if anyone has relied on that instrument in the past.

### Drafting

Drafting is relevant to transparency and accessibility because it affects whether those subject to the regulatory instrument are able to understand their rights and obligations under it. Currently, only legislative instruments within the meaning of the *Legislation Act 2012* are drafted centrally by PCO. Other instruments are drafted by those responsible for them (e.g. codes of practice being drafted by the regulator and approved by the relevant Minister).

### Restrictions on commencement

Subordinate legislation only operates prospectively, and where it is not subject to Cabinet process the Cabinet Manual and the 28 day rule will not apply. There are a few examples where the 28 day rule has been imposed as a legislative requirement (e.g. the Code of Professional Conduct for Authorised Financial Advisers must not come into force until the 28th day after it is *Gazetted* in accordance with section 94 of the *Financial Advisers Act 2008*).

Remember though that the 28 day rule is subject to a list of non-exhaustive exceptions and can be waived.

### Publication (including notification)

The government tends to require all disallowable instruments to be subject to a requirement to publish a disclosure statement which will be publically available.

There are however a range of possible publication requirements that can be imposed on the exercise of the delegated power, including:

- Publication on a website maintained by the relevant agency.
- Publication by the party exercising the delegated power to make the regulatory instrument (with an obligation to make copies available at a reasonable cost).
- Notification of the making of the regulatory instrument in the *Gazette* and newspapers, with information about where a copy of it can be obtained (this option is becoming less common).
- Publication in the legislation series (if required by the Act or at the direction of the Chief Parliamentary Counsel).
- Obligation to "promote awareness" of the regulatory instrument.

- Obligation to send the regulatory instrument directly to interested persons.

## Enhancing accountability

### Quality

A "test" can be legislatively imposed on the party holding the delegated power to consider and be satisfied of certain matters prior to making the regulatory instrument. The aim of such test is to ensure consideration of the appropriateness of the regulatory instrument is undertaken.

The nature of the test must be carefully thought through in terms of both its appropriateness and purpose. For example, while considering costs and benefits are a normal part of any policy process, including a requirement to undertake cost benefit analysis could lead to an overly quantitative approach to decision-making.

A good **general test**, particularly for modifications exemptions or exclusions, is to include an express requirement to consider the purpose and proportionality of the regulatory instrument. For example, including a legislative requirement that the decision-maker must, before making an instrument—

- have regard to the purpose of the Act; and
- be satisfied that the extent to which any provision is modified, or any requirements are modified, exempted, excluded, or applied (as the case may be) is not broader than is reasonably necessary to address the matters that gave rise to the proposed instrument.

**Other approaches** include a requirement to—

- take national or international best practice into account
- consider rights implications under the *New Zealand Bill of Rights Act 1990*.

### Pre-enactment oversight

Prospective oversight mechanisms include:

Oversight by a **separate administrative body**, for example:

- Rules containing Chartered Professional Engineering Standards are made by the Registration Authority, but must be pre-approved by the Chartered Professional Engineers Council (refer section 41 of the *Chartered Professional Engineers of New Zealand Act 2002*).
- A Judicial Control Authority has oversight of racing codes' rule-making function (refer section 37 of the *Racing Act 2003*).

Oversight by a **Minister**, for example:

- The Code of ACC Claimants' Rights. The draft code must be sent to the Minister under section 42(5) of the *Accident Compensation Act 2001*, and the code must be approved by the Minister under section 44 before it is made.
- Practice rules and regulations for lawyers and conveyancers must be pre-approved by the Minister (refer section 100 of the *Lawyers and Conveyancers Act 2006*).

Oversight by the **House**, for example:

- Affirmative resolution procedures. Orders in Council designating drugs to be restricted drugs must be approved by resolution of the House before being commenced by a subsequent Order in Council (refer section 34 of the *Misuse of Drugs Amendment Act 2005*).

### Post-enactment oversight

In addition to disallowance and the oversight function of the Regulations Review Committee, there are other possible, retrospective, oversight mechanisms. These are relatively rare, but include:

- Validation by Parliament (e.g. Orders in Council made under section 42A of the *Civil Aviation Act 1990* (imposing levies) expire unless they are expressly validated or confirmed by Act of Parliament (see also section 8 of the *Subordinate Legislation (Confirmation and Validation) Act 2008*)).
- Sighting by Minister (e.g. copies of racing rules or amendments must be sent to the Minister as soon as practicable after they are made, section 32(1) of the *Racing Act 2003*).

### Review and expiry

Instruments may be kept up-to-date by setting automatic expiry dates, or requiring regular review. For example:

- Local government by-laws must be reviewed every 5 years (refer section 158 of the *Local Government Act 2002*).
- Guidelines issued to the ethics committee under the *Human Assisted Reproductive Technology Act 2004* must be kept under review (refer section 35(1)(a) of that Act).

# Further Information

LAC Guidelines 2014 http://www.ldac.org.nz/guidelines/lac-revised-guidelines/

For general information about the Regulations Review Committee and delegation see:

Parliamentary Practice in New Zealand, chapter 28 https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-28-delegated-legislation/

Reports of the Regulations Review Committee can be viewed at:

www.victoria.ac.nz/law/centres/nzcpl/publications/regulations-review-committee-digest

# Standards and the Standards and Conformance system

## The role of Standards and Accreditation

Standards are often used in legislation and delegated legislation. Standards are published documents setting out agreed specifications for products, processes or services. They are developed by committees of experts representing different perspectives, including technical experts form industry and academia and consumer representatives, who agree by consensus on best practice in technical areas.

In New Zealand, the standards development function is the responsibility of the New Zealand Standards Executive, a statutory officer supported by Standards New Zealand, a business unit within MBIE. There is also an independent statutory board, the Standards Approval Board, which has the function of approving New Zealand Standards (NZS) and membership of Standards development committees.

NZS are recognised national standards. They are developed as part of the wider international system provided by membership of the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). NZS cover a range of topics from building materials and processes, energy safety, medical devices, to management systems.

Standards operate in conjunction with conformity assessment and accreditation arrangements.

Conformity assessment bodies test products and services to demonstrate they meet specified standards. They can include certification bodies, inspection bodies, and testing and calibration laboratories. In New Zealand conformity assessment bodies are generally privately owned.

Accreditation bodies assess the competence of conformity assessment bodies. They provide assurance that the results of tests and inspections can be relied upon. Two accreditation bodies operate in New Zealand:

a. The Joint Accreditation System of Australia and New Zealand (JAS-ANZ) established by Treaty with Australia
b. International Accreditation New Zealand (IANZ), the operating arm of the Accreditation Council, established and operating under the Standards and Accreditation Act 2015.

Together, standards, conformity assessment and accreditation provide assurance that products and services are fit for purpose. Regulators may recognise accreditation of conformity assessment to demonstrate compliance with regulatory requirements. For example, where products are regulated (such as electrical equipment), test certificates produced by overseas conformity assessment bodies, which are accredited by internationally recognised bodies equivalent to JAS-ANZ and IANZ, may be accepted in NZ.

## How are standards used in legislation?

Standards such as NZS or international standards are generally voluntary but may become mandatory when incorporated by reference in legislation or delegated legislation.

Where a standard is incorporated by reference it can be used in differing ways such as:

- Mandatory requirements that must be complied with, such as the energy efficiency testing and labelling requirements of the Energy Efficiency (Energy Using Products) Regulations 2002.
- One means of demonstrating compliance with the regulatory requirement, for example where a standard is specified in the NZ Building Code as an acceptable solution.
- A basis for defence to a criminal prosecution, for example in relation to health and safety where the ability to demonstrate compliance with a specified risk management standard may provide a defence to prosecution.
- A basis to support a consistent international approach where there are existing international standards and regulatory requirements that enable trade with other countries, such as for motor vehicles or electrical safety standards.

## Using standards in legislation and international obligations

When developing legislation or delegated legislation, there are choices to be made about whether to use a standard, and if so which standard, or part of a standard, is appropriate given the regulatory objectives.

There are also international obligations that need to be considered when developing delegated legislation that is technical in nature. New Zealand is a signatory to the World Trade Organisation Technical Barriers to Trade Agreement (WTO TBT Agreement) which sets out obligations for standards and conformity assessment procedures, and how they may be used in legislation or delegated legislation.

The WTO TBT Agreement (Article 2.4) includes an obligation to base delegated legislation of a technical nature on international standards where they exist or where their development is imminent. An exception to this is where international standards would be an ineffective or inappropriate means to fulfil the legitimate regulatory objectives, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

National standards such as NZS are often based on international standards and may be appropriate where there are important local factors that are not adequately addressed in international standards.

## When is it appropriate to use standards in legislation or delegated legislation?

Chapter 13 of the LAC Guidelines 2014 provides guidance on the use of material incorporated by reference in delegated legislation. The guidelines identify circumstances where it may be appropriate to incorporate material by reference, such as where:

- "the document is long or complex, covers technical matters only and there are few persons likely to be affected.
- the document has been agreed with one or more foreign governments, cannot easily be recast into an Act or Parliament or delegated legislation, and deals with technical or operational details of a policy that has been 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 Parliament or Ministers.
- the documents has been developed by an organisation for use in respect of products (for example motor vehicles) manufactured by it."

The *Legislation Act 2012* (Part 3, sub-part 2) also sets out requirements for material incorporated by reference, except NZS. The Legislation Act 2012:

- describes the types of material that may be incorporated by reference (section 49)
- requires consultation on proposals to incorporate material by reference, and the process for undertaking such consultation (section 51)
- describes minimum requirements for access to material incorporated by reference (section 52).

Material incorporated by reference, such as standards, should also be clearly drafted and understandable to those that will need to comply with it. It should also be consistent with other applicable law.

## Authorisation for the use of incorporation by reference

The incorporation of material, including standards, needs to be authorised in legislation. There are three ways this authorisation may be provided:

- The Legislation Act (Section 49) provides for material to be incorporated in legislation, including standards such as ISO or IEC standards or standards of other national standards bodies, but not NZS.
- The Standards and Accreditation Act 2015 (Section 30 ) provides for NZS to be referred to or incorporated in whole or in part and with or without modification in Acts, regulations or bylaws.
- The incorporation of standards or other material in delegated legislation may also be authorised in the specific empowering Act relevant to the subject matter.

## How to correctly cite a standard that is incorporated by reference in legislation or delegated legislation

Standards New Zealand (2013) provides guidance on how to correctly cite a standard[11]. It is important to include the notation code and number, the full title and the year of issue for the standard. It may also be helpful to name the issuing organisation. For example:

> *AS/NZS 2712: 2007 Solar and heat pump water heaters – Design and Construction, Standards New Zealand*.

Be aware that references to standards in legislation do not automatically update when a standard is revised. The specific standard incorporated by reference is the one relevant for compliance (section 53(3) Legislation Act). It is therefore important to stay in touch with Standards New Zealand where a standard is incorporated in legislation or delegated legislation. They can advise when a standard is being revised or updated.

Regulators may sometimes decide to commission development of a standard from Standards New Zealand that is intended to be used in delegated legislation. When this is the case there is a clear duty for the regulator to ensure the standard is reviewed regularly and kept up to date.

Section 10(1) of the Standards and Accreditation Act 2015also requires the NZ Standards Executive to advise the responsible Minister of any proposal to change or replace any standard incorporated by reference in delegated legislation. A decision can be made about whether the reference to the standard in regulation also needs to be updated.

## When is it not appropriate to use standards in legislation or delegated legislation?

[11] https://www.standards.govt.nz/assets/News/Regulations-and-Standards/Policy-and-legislation.pdf

It may not be appropriate to use standards in legislation or delegated legislation where:

- Substantive policy decisions need to be made including determining acceptable costs and benefits, or levels of risk appropriate in New Zealand. These are matters more appropriate for Parliament or the Executive.
- The standard does not meet the specific regulatory need.
- Access to the standard is required to be available to the wider public to enable compliance.
- There is uncertainty or a lack of assurance about the process for developing a standard.

## Ensuring ready access to standards incorporated by reference

As noted above the Legislation Act 2012 (section 52) sets out minimum requirements for providing access to material that has been incorporated by reference.

Standards are subject to copyright restrictions. This includes NZS, joint Australian/New Zealand Standards (AS/NZS), and international standards such as those from ISO or IEC. These types of standards are available for purchase from Standards New Zealand.

Standards incorporated by reference need to be readily accessible to those who need to comply. Specific access arrangements can often be provided for groups who need to comply. Options available to ensure ready access include:

- Making copies of a standard available for viewing free of charge at specified inspection sites such as MBIE offices (section 52).
- Providing information on where individuals may purchase standards (section 52).
- Providing access for particular professional groups via a closed, pay walled online environment for a reduced access fee. This may be part funded by a regulator with the balance funded via professional licensing or registration fees for the particular group of users. An example is access to electrical safety standards provided for electrical workers.
- Providing access to a standard free of charge, where a regulator has chosen to fund copyright royalty and any other access costs upfront, and a licensing agreement has been reached with the copyright owner.

Standards New Zealand can provide advice on the options available and the likely costs of different options for providing ready access to standards that are incorporated by reference in legislation or delegated legislation.

## Principles for development of standards

Standards organisations such as Standards New Zealand, Standards Australia, other national and international standards organisations such as ISO and IEC have robust and transparent development processes for developing and approving standards. They are consistent with international obligations set in the WTO TBT Agreement (Articles 2, 5 and Annex 3).

The WTO TBT Committee (2013) has also identified six principles for the development of international standards that further support the provisions in the WTO TBT Agreement. These principles are: transparency, openness, impartiality and consensus; effectiveness and relevance; coherence and a development dimension.

There are other types of documents similar to internationally recognised standards that may provide useful information but are not likely to be appropriate to incorporate by reference in legislation. For example:

- Standards organisations such as Standards New Zealand, Standards Australia, ISO and IEC, also sometimes develop other technical documents such as technical specifications or handbooks that are not standards. The development of these types of documents does not generally follow the same degree of scrutiny as a standard.
- Industry groups, firms or NGOs also develop standards (often referred to as private standards). In these situations the nature of the development process may not be known or does not meet the robust development process established by the ISO, IEC and the WTO TBT Agreement.

## Review of delegated legislation and incorporated material

The LAC Guidelines 2014 note that delegated legislation, including any material incorporated by reference, is subject to scrutiny by the Regulations Review Committee of Parliament. The Regulations Review Committee takes an active role in ensuring delegated law-making powers are used appropriately. The committee reports to the House and other committees on any issues it identifies. Standing Order 319(2) sets out the grounds on which a regulation ought to be drawn to the attention of the House.

# Further Information

*How are Standards used in policy and legislation*, October 2013;

https://www.standards.govt.nz/assets/News/Regulations-and-Standards/Policy-and-legislation.pdf

*Standing Orders of the House of Representatives, 2014.*

*WTO TBT Agreement*; www.wto.org/english/docs_e/legal_e/17-tbt.pdf

# Adoption and alignment with international treaties

## International influence on domestic regulation

In its 1996 report, *A New Zealand Guide to International Law and its Source*, the Law Commission noted that trans-national activity cannot function effectively without a degree of regulation and standardisation.[12] Given continuingly increasing globalisation, this observation is of even greater relevance today where international instruments strongly influence, constrain or determine the content of domestic law-making.

International instruments can take the form of:

- treaties (conventions or agreements) which are legally binding at international law
- arrangements which are not legally binding but have strong political and moral force
- model laws and statements of principle that have persuasive force.

Relevant international instruments should be identified and analysed as part of the policy development process – see LAC Guidelines 2014 chapter 8.

The decision of whether New Zealand becomes a party to a treaty or arrangement, or adopts an international model law or principle, is made by Cabinet. If regulatory or legislative implications arise from the implementation of an international treaty, the Regulatory Impact Analysis Handbook[13], requirements will apply if a paper is submitted to Cabinet. If the decision is made to proceed, the international instrument may then need to be incorporated into domestic law.

## Implementing treaties

Some treaties only operate between states and do not create any rights or obligations that operate at a national domestic level, (for example the *Hague Convention on the Pacific Settlement of International Disputes*). Others will require a change to domestic law. This change will need to be in place, even if not in force, before New Zealand can complete the treaty ratification process.

A treaty can be incorporated into domestic law in different ways and potentially more than one way could be used in a particular situation. Methods of incorporation can be described in various ways, but generally seem to fall into the following broad categories:

### Direct effect/adoption

To give the treaty direct effect, the treaty text would be appended to the legislation. The legislation would also include a statement describing that the treaty provisions have the force of law in New

[12] *A New Zealand Guide to International Law and its Source* (1996) http://www.lawcom.govt.nz/our-projects/international-law?id=788

[13] http://www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook

Zealand. Additional supporting provisions may be necessary to fully implement the treaty, such as designating a domestic court to resolve disputes.

An example is the *Sale of Goods (United Nations Convention) Act 1994* which implements the *United Nations Convention on Contracts for the International Sale of Goods*.

### Incorporation with reference

Sometimes part of the treaty wording is used in the body of the legislation or there is a clear link between the legislation and its treaty origins. A copy of the treaty may, or may not, be appended to the legislation.

This approach, referred to in the Legislation Design and Advisory Committee Guidelines as the **wording method**, tends to involve rewriting or converting treaty obligations into domestic language. The conversion process creates the risk that the domestic provisions may be interpreted differently from the treaty obligations from which they are derived. This can potentially put New Zealand out of step with other treaty parties, and make it difficult for New Zealand to rely on relevant treaty jurisprudence from other jurisdictions. Care needs to be taken in the drafting to minimise or remove this risk.

Examples of incorporation with reference include:

*Plant Variety Rights Act 1987 and other intellectual property legislation*

*Tariff Act 1988*

### Incorporation but without reference

This is essentially a variation of incorporation with reference where the substance of the treaty is incorporated into legislation but there is no obvious indication of this. This raises similar interpretation risks and the additional lack of any direct link to the treaty can also mean that people overlook the treaty and its obligations when making future changes to the legislation.

Instances of incorporation without reference may occur where New Zealand law already complies with the obligations in a treaty so no additional changes to domestic law are required at the time New Zealand ratifies the treaty.

Examples of this approach include some human rights conventions or international crime conventions. A commonly cited example is the *Abolition of Death Penalty Act 1989* which implements a treaty but contains no treaty references.

### Use of subordinate legislation

The legislation might authorise the making of subordinate legislation that give effect to identified treaties or take account of them. The subordinate legislation might take any of the approaches outlined above.

Examples include:

*Layout Designs Act 1994*, *s 37* – see the *Layout Designs (Eligible Countries) Order 2000*

*Patents Act 2013, Designs Act 1953 and the Trade Marks Act 1953* – see the *Patents, Designs, and Trade Marks Convention Order 2000*.

### Treaty taken into consideration

This option requires decision-makers, when exercising powers or performing functions under any regulatory instrument, to take relevant treaties into account, or to have regard to all, or part of their subject matter – or some other formulation. The requirements might be generally about any treaty - to take NZ's international obligations into account; or to have regard to NZ's international obligations. They can also be limited to specific kinds of treaties.

Examples of this approach include:

*Building Act 2004, s 355*

*Registered Architects Act 2005, s 68*

*Maritime Transport Act 1994,* s 298(3)

*Privacy Act 1993*, s 14

*Families Commission Act 2003, s 12*

### Treaty forms the backdrop for interpretation

New Zealand's international obligations can also have an impact on the interpretation of regulatory instruments, either expressly or implicitly, by:

- ?including a provision requiring it to be interpreted consistently with New Zealand's international obligations or requiring actions taken to be consistent with those obligations. Examples include the *Tariff Act 1988, ss 15C, 15F and 15H*; *Fisheries Act 1996 s 5*

- the treaty not being referred to in the instrument or being part of domestic law, but rather forming part of the backdrop for interpretation purposes. There is an increasing presumption that Parliament does not intend to legislate contrary to New Zealand's international obligations.

## Implementing other international instruments

The way that other international instruments are implemented will depend on the nature of the particular instrument. Some non-legally binding arrangements may require implementation in similar ways to a treaty. An example of a non-legally binding arrangement that has been implemented in domestic legislation is the Trans-Tasman Mutual Recognition Arrangement - see the *Trans-Tasman Mutual Recognition Act 1997.*

Adopting model laws or principles in domestic legislation is likely to be less complex because decisions about whether to use treaty text or reword do not risk getting out of step with international jurisprudence. Further, there is potentially more flexibility to depart from the models (since there is no binding or persuasive obligation), however, there are risks in doing so (e.g. undermining consistency with other countries).

An important benefit of model laws or common statements of principle is that, if they are widely adopted, they achieve a level of consistency and standardisation across states. Care should therefore be taken to ensure that domestic implementing legislation does not depart substantively from the model law or principles without good reason. Examples of model laws being incorporated into domestic legislation include the *Electronic Transactions Act 2002* and the *Arbitration Act 1996.*

# Further Information

Legislation Design and Advisory Committee Guidelines: LAC Guidelines 2014

http://www.ldac.org.nz/guidelines/lac-revised-guidelines/

Law Commission Report *A New Zealand Guide to International Law and its Sources*

http://www.lawcom.govt.nz/our-projects/international-law

CabGuide:

https://dpmc.govt.nz/publications/about-international-treaty-making

Ministry of Foreign Affairs:

https://mfat.govt.nz/en/about-us/who-we-are/treaties/

*Statute law in New Zealand* 4th Ed J F Burrows and R I Carter

# Incorporation by reference

Incorporation by reference is the method of giving legal effect to a document by referring to it in a legal instrument. The advantage of incorporation by reference is that it avoids unnecessary duplication and the need to include highly technical detail in the legislative instrument itself.

## Incorporation by reference is authorised

Subpart 2 of Part 3 of the *Legislation Act 2012* (the Act) authorises incorporation by reference in any instrument unless the empowering Act expressly provides to the contrary. The term 'instrument' is broadly defined to include any instrument that has legislative effect (whether called regulations, rules, an order in Council, a notice, a bylaw, a code, a framework or any other name) and is authorised by an enactment. However it does not include a bylaw that is subject to the Bylaws Act 1910.

The Act can be relied on regardless of whether the parent Act is passed before or after the commencement of the authorising provision or of whether the Act specifically authorises for incorporation by reference.

It is not necessary for the Act to specifically refer to section 49 of the Act to authorise incorporation by reference because the provisions of the Legislation Act apply automatically unless an Act excludes them.

It is important to note that the Act does not limit the application of sections 29-32 of the *Standards and Accreditation Act 2015* which provide for New Zealand Standards to be incorporated by reference into law, or any other enactment or rule of law.

## The status of authorising instruments

Instruments that incorporate material by reference are disallowable instruments. However it is not necessary to table the material that is incorporated in the House of Representatives. (Sections 56 and 55(2) of the Legislation Act.)

## What can be incorporated

A broad range of material can be incorporated by reference namely:-

- a standard, a framework, a code of practice, recommended practice, or requirement originating from an international organisation or a national organisation or prescribed in a country or jurisdiction or by any group of countries; or
- 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.

## Consultation required

Section 51 of the Act requires the Chief Executive of the promoting department or agency, before an instrument incorporating material by reference is made, to:-

- make copies of the material proposed to be incorporated by reference available for inspection during working hours for a reasonable period free of charge at inspection sites,
- state where copies of the proposed material are available for purchase
- make copies of the proposed material available on its internet unless doing so would infringe copyright
- publish a notice in the gazette specifying a number of matters (essentially relating to access to the proposed material).
- allow a reasonable opportunity for persons to comment and
- consider any comments made.

The Chief Executive may make the proposed material available in other ways but if he or she does so must include information about this in the Gazette notice.

## Access to incorporated material must be provided

Section 52 of the Act imposes similar requirements on the Chief Executive to provide access to the material once it has been incorporated by reference. The Chief Executive must:-

- make copies of the material incorporated by reference available for inspection during working hours for a reasonable period free of charge at inspection sites,
- state where copies of the material are available for purchase
- make copies of the material available on its internet unless to do so would infringe copyright
- publish a notice in the gazette specifying a number of matters ( the fact material has been incorporated, the date the instrument is made and how the material can be accessed).

The Chief Executive may make the material available in other ways but if he or she does so must include information about this in the Gazette.

## Changes to incorporated material

Section 53 of the Legislation Act prescribes what happens if material incorporated by reference changes (whether because it is amended, replaced, expires, is revoked or otherwise ceases to have effect). Changes to the material have no legal effect as part of the instrument unless they are specifically incorporated by a later instrument made in accordance with the Act.

## Proof of Material incorporated by reference

The Chief Executive must retain a copy of the material that is incorporated by reference and certify it as a correct copy. The production of a certified copy of the material in court proceedings is sufficient evidence of the material that has been incorporated in the absence of proof to the contrary.