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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



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THINGS FALL APART: HOW LEGISLATIVE DESIGN BECOMES UNRAVELLED

*Debra Angus**

A little-publicised activity commonly exercised by regulators involves the grant of an exemption from primary legislation. Exemptions have become so numerous or broad that they may undermine a substantive legislative framework. Understanding how an exemptions regime operates assists in understanding the full extent of a legislative framework. A plethora of exemption instruments reduces accessibility and clarity about the full extent of the law. This practice continues without effective oversight and often in the face of frustratingly slow legislative reform.

I INTRODUCTION

The starting point of good legislative design is the well-established legislative framework of primary and subordinate legislation. This article focuses on one aspect of what lies beneath that framework: how the exemption instrument can unravel legislative design.

The practical effect of a power to provide an exemption from primary legislation may be as serious as a power to amend primary legislation. Exemptions may be so numerous or broad that they may supplant the legislative framework to which they relate.¹ There is little third-party scrutiny or oversight of this activity, yet without understanding its extent the full picture of legislative design is not known.

II THE PROBLEMS WITH EXEMPTION-MAKING IN LEGISLATIVE DESIGN

Sometimes primary legislation contains provisions that allow the granting of an exemption to the law, particularly where compliance may cause hardship or be unreasonable or impracticable. In some

* Barrister, Wellington. This article is based on a presentation given by the writer at the conference "Advancing Better Government Through Legislative Stewardship", hosted by the New Zealand Centre for Public Law at Victoria University of Wellington on 27–28 October 2016.

¹ See generally Regulations Review Committee *Inquiry into the use of instruments of exemption in primary legislation* (30 September 2008).

cases the power of exception is set out in subordinate legislation. However, it is also common for legislation to empower a regulatory body to exempt a person or an activity from the application of an Act or regulations.

Exemptions may be available to cover the broad spectrum of activities regulated by legislation. For example, an individual may apply to be exempted from detailed requirements in aviation, land or maritime transport rules, such as the need to hold a particular licence or operating certificate or to carry certain equipment. Exemptions may be sought from financial markets law requirements, including broker or custodial obligations, or registration as a financial adviser and information requirements. Exemptions may be granted for businesses, transactions, products, services or customers from anti-money laundering and countering financing of terrorism requirements. Obligations to meet certain standards for food, health and safety and certain financial products can also be exempted.²

The instrument authorising an exemption may go under a variety of names: exemption, waiver, concession, dispensation or exclusion. Exemptions can vary, from a minor "one-off" made to an individual, to, at the other end of the spectrum, having the effect of extending or varying the scope or application of primary legislation (a form of Henry VIII clause). Whatever the terminology, exemptions have the effect of dis-applying the law: the substantive law remains in effect but it does not apply to a particular person, class of person or activity.

Exemption instruments often fall into the grey area between legislative and administrative action. Exemptions may waive legislative requirements, but the instruments may not be themselves of legislative character. They may dis-apply known legal requirements and substitute new requirements in their place. They may be discriminatory, confer benefits or allow commercial advantage. Exemption instruments reduce accessibility to the law, leading to a lack of clarity about the full extent of a legislative framework. There may be a significant impact on the law generally and particularly on individuals.

Some instruments are clearly legislative instruments and published on the New Zealand Legislation website and are subject to scrutiny by the Regulations Review Committee.³ The nature of other exemption instruments is unclear and it is difficult to discern whether they are law-making or individual concessions. These exemptions may not be published at all or published with so little detail that the full extent of the exemption and the impact on the law is obscured.

2 See for example the powers to make exemptions under the Land Transport Act 1998, Civil Aviation Act 1990, Maritime Transport Act 1994, Financial Markets Conduct Act 2013, Financial Advisers Act 2008, Anti-Money Laundering and Countering Financing of Terrorism Act 2009, Food Act 2014, Health and Safety at Work Act 2015 and the Fair Trading Act 1986.

3 See for example class exemptions granted by WorkSafe NZ under the Health and Safety at Work Act 2015, s 221.

A quick scan of any *New Zealand Gazette* will show that hundreds of exemptions are being granted by regulatory agencies every year, but there is little real information about this activity. Greater transparency is needed about who has been granted an exemption, the reasons, how many times, any conditions imposed or the period of the exemption. The effectiveness of the legislative design is obscured.

In 2004, the Regulations Review Committee raised an issue about the extent to which the law may become obscured in a "fog" of exemptions.⁴ But for the most part, inadequate public notification means that exemptions are largely invisible to the external observer, preventing any proper evaluation of the regulator's actions in granting or declining exemptions. The full impact of primary or subordinate legislation cannot be known without an awareness of relevant exemption decisions and their conditions.⁵

III KEY PRINCIPLES AND SAFEGUARDS FOR EXEMPTION POWERS

There may be good reasons for legislation to allow regulatory agencies powers to grant exemptions. The Legislation Advisory Committee has identified certain factors that favour the granting of an exemption power where the statute relates to a complex and rapidly developing field such that the boundaries may be difficult to foresee or where an urgent decision on an exemption may be required. In some cases, the circumstances requiring an exemption may be so exceptional or "one off" as not to justify amending an Act or an area may require frequent adaptation to changing factual or policy circumstances. There may be minor unforeseen developments or technical issues with the law that do not justify amending an Act. Alternatively, compliance may be impractical, inefficient or unduly expensive but the policy objective can be achieved by imposing conditions in the exemption.⁶

Where a power of exemption is so broad it may grant a power to the Executive or a regulatory body to change the scope or operation of an Act of Parliament. In such a case, it may be that an amendment to the legislation is more appropriate.

The granting of exemptions should not be viewed as a routine activity. Powers of exemption should be exceptional, rather than the norm. Such powers should not supplant a proper legislative amendment process, shore up an incomplete policy process or allow arbitrary exceptions to the law.

4 Regulations Review Committee *Activities of the Regulations Review Committee in 2003* (15 June 2004) at 5.

5 Jason Karl "Submission in response to the Regulations Review Committee's Inquiry into the use of instruments of exemption in primary legislation".

6 See generally Legislation Design and Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (2014) at ch 14.

A Safeguards in Legislation

Because exemptions can have the effect of amending or overriding primary legislation, the exemption power in legislation should be designed with care. While some legislative design gives very broad powers,⁷ it is preferable that legislation sets out clear criteria, time limits and transparency requirements.⁸

The Legislation Advisory Committee recommends that a power of exemption should be subject to safeguards. The power must be exercised consistently with the purpose of the Act. The circumstances in which the exemption may be granted or the criteria for the exercise of the power should also be consistent with the purpose of the Act. This is often incorporated into the criteria. Legislation should set out the criteria for granting the exemption. Clear criteria will reduce the likelihood of a successful judicial review of the decision to grant or refuse an exemption.

Legislation should include a requirement to give reasons for the exemption, although this requirement may not be necessary for minor or trivial exemptions. Exemptions should be subject to an expiry date to ensure regular review of the exemption, except where the exemption must necessarily be permanent if granted or will naturally expire.

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

Legislation may include a provision that the power of exemption is reviewed at a set future date to assess whether or not permanent legislative amendment is required. The person or body that exercises the power may be required to submit a report to Parliament detailing the number of times and circumstances in which a power of exemption was exercised.⁹

B The Imposition of Conditions

The imposition of conditions has been used as a way to manage or regulate the grant of exemptions. The Regulations Review Committee has recommended that where the power to make an exemption is supplemented by a power to impose conditions, these conditions should be consistent with the requirements of the empowering legislation and no more onerous than the requirements they

7 See for example Financial Markets Conduct Act 2013, s 556.

8 Compare Health and Safety at Work Act 2015, s 221.

9 Legislation Design and Advisory Committee, above n 6.

replace.¹⁰ Regulators should also have a process in place for monitoring the performance of these conditions.

IV EXEMPTIONS AS A SUBSTITUTE FOR REGULAR LAW-MAKING

The granting of exemptions is largely the province of regulatory bodies such as the Financial Markets Authority, Ministry of Primary Industries, the Electricity Authority, Department of Conservation, WorkSafe, New Zealand Transport Agency, Civil Aviation Authority and Maritime New Zealand. These agencies are usually carrying out multiple roles in operational delivery, policy and law development and regulating conduct. For regulators, particularly when dealing with emerging issues or disruptive technology, legislative change can be extraordinarily slow and difficult to progress.

One of the benefits of using an exemptions process is that there is current and practical information available to a regulator to show how well or poorly rules are working. Yet in response, regulatory change occurs very slowly. There is the potential for exemptions to become a de facto legislative scheme if the law does not keep pace with developments. Managing a regulatory environment through an exemptions process is an attractive option for regulators because of the flexibility, immediacy and control it can provide.

Exemptions are often granted under delegated authority and even within an organisation there may be little information about which parts of legislation are subject to exemption. All this can lead to a disconnect between the state of the law and its actual operation as there is no overall picture about the need for a law change. If numerous exemptions are continually being granted by regulatory agencies, there is an issue whether the law is fit for purpose. Unfortunately, the lack of reporting on or measuring this activity means the feedback value from an exemptions process is lost.

V THE PERFORMANCE OF NEW ZEALAND'S REGULATORY SYSTEM

It is worth looking at the bigger picture of the performance of New Zealand's regulatory system to understand why exemptions may be used to manage challenges of a regulatory regime.

The Productivity Commission, in a review of regulatory institutions in 2014, identified some key points of the New Zealand regulatory system.¹¹ The performance of the regulatory system is determined by internal and external factors, including pressure from the public for or against new regulation, internal quality processes (such as regulatory impact analysis and select committee review of bills), judicial oversight of regulator behaviour and processes for reviewing the currency of

¹⁰ Regulations Review Committee, above n 4, at 4.

¹¹ Productivity Commission *Regulatory institutions and practices* (June 2014) at 28.

regulatory regimes. While there are some checks, constraints and rules in place to test that a proposed new regulation is in the public interest, few of these controls are binding.

New Zealand's very centralised constitutional system, and the absence of a "budget constraint" on the production of regulation create a bias in favour of more regulation.

One key constraint in the system is the limited availability of parliamentary time. New Zealand makes more use of statutes in implementing regulation compared to other countries, and statutes often address matters in considerable detail. One effect of scarce parliamentary time is that it can be difficult to carry out "repairs and maintenance" on existing legislation. As a result regulatory agencies often work with legislation that is out of date or not fit for purpose.

The ability of the courts to review the behaviour of regulators and, in many cases, the merits of regulator decisions is the other significant constraint on the exercise of regulatory power in the system. New Zealand does not have strong processes for reviewing regulatory regimes, leading frequently to a "set and forget" mindset.

The regulatory system's current performance indicates that there is clear room for improvement, particularly around priority of regulatory efforts, the development and maintenance of the capability needed for effective regulatory implementation and the ability to identify and resolve areas of risk and to learn from experience.

A How Regulation Fails

The Commission concluded the factors implicated in the failure of regulation were the lack of clarity of the regulator's role, the complexity of regulatory regime, and weak governance and management of both regulator and regulated parties. Regulators were subject to weak accountability, monitoring and oversight. The capability and resourcing of the regulator, failures of compliance and enforcement, and failure to understand and assess risk were also factors in regulatory failure. Other issues arose from poor engagement and communication about regulatory requirements and the culture and leadership of both regulators and regulated parties. Significant challenges arose from out-of-date regulation or lack of review of regulation.

As put by the Productivity Commission:¹²

Regulatory failure occurs where regulations fail to improve outcomes, or even make outcomes worse, than had there been no regulation. The two main ways that regulation can fail are failures of design or failures of operation. Poorly conceived and implemented regulatory arrangements not only fail to achieve stated objectives, but also impose significant costs that can undermine the very purpose of regulatory intervention.

12 At 21.

B Out-of-date Regulation or Lack of Review of Regulation

Both regulatory complexity and out-of-date regulation or lack of regulation review have a part to play in driving a need to find another solution in legislative design. Almost two-thirds of public sector chief executives who participated in the Productivity Commission's survey in 2014 either agreed or strongly agreed with the proposition that agencies with regulatory functions "often have to work with legislation that is outdated or not fit for purpose".¹³

Regulators and public sector agencies have acknowledged that the inflexibility of some legislative frameworks impeded the introduction of new technologies, created an increased expense in compliance and administrative costs and required the use of work-arounds.

C Role Clarity

Clear regulatory roles are critical to regulator accountability and focus, predictable decisions and enforcement. This aids operator–client compliance and regime legitimacy. Poor role clarity can lead to a regulator's scope expanding beyond its original mandate, in duplicative or contradictory regimes, gaps in regulation, monitoring or enforcement and inconsistent enforcement.

The Productivity Commission concluded that regulatory regimes may lack clarity because the standards used do not fit the industry or activity being controlled and policymakers give insufficient guidance about the desired objectives. Regulators have functions that create conflicts of interest or the regime does not recognise the role of other regulators or the interaction of different regimes on regulated firms.

It suggested actions to improve the clarity of regulator roles, functions and objectives by choosing the right regulatory standard (outcome-, principle-, process- or input-based) and applying greater discipline in designing regulatory regimes. When allocating regulatory functions to agencies, it is important to avoid perverse incentives and establish processes to minimise or resolve problems from overlapping regimes. There is little doubt that legislative frameworks that minimise the number of objectives and conflicts and provide a clear hierarchy of objectives do help to support consistent and predictable decision making by regulators.

One suggestion is that, before new regulatory functions are allocated to an existing agency, policymakers should assess whether the mission of the agency is compatible with the objective of the new regime and whether the agency is likely to give sufficient resources and attention to the new functions.

D Exemptions

It has been suggested that overlapping regimes can sometimes be managed with the use of exemptions. A regulator may, for example, allow a person or operator not to comply with their regime

¹³ At 37.

on the basis that compliance with another similar regulatory regime provides sufficient assurance. For example, the Financial Markets Authority may grant exemptions on certain grounds including where the person, service or transaction is subject to the regulations of an overseas jurisdiction and the Authority is satisfied that the protection of the New Zealand public is unlikely to be prejudiced.¹⁴

E Greater Transparency or Oversight

An argument can be made for exemption powers to have a place in legislative design, provided their limitations are clearly prescribed. There is greater transparency where the exemption-making power is specified in primary legislation covering the purpose, criteria, reasons, limits set by a sunset clause, and where the exemption instrument and reasons must be published.

There appears to be a wide divergence in the information provided by regulators about how they go about their exemption-making practice. Some exemption instruments are legislative instruments and are published on the New Zealand Legislation website under the Legislation Act 2012.¹⁵ Some exemption instruments are published in full in the *New Zealand Gazette*, give reasons and identify persons or bodies granted exemptions.¹⁶ On the other hand, some notices have a minimalist summary, including only the number of exemptions and the legislative provisions exempted without specifying the reasons, or the person or body to whom an exemption is granted.¹⁷

While there may be privacy or commercial issues which might impact on full disclosure, it would be possible for regulators to be more transparent. For example, the exemption notice could identify in plain language what is being exempted rather than just identifying the rule number, and provide the grounds or exemption criteria relied on. All agencies should be transparent about the basis for their exemption decisions and provide guidance about how to find more information on their decision-making process.¹⁸

Some instruments are not published at all. As a result, it is impossible to get an overall picture of how or where the legislative framework is impacted by exemption instruments. The guidance and

14 Financial Advisers Act 2008, s 148.

15 See for example class exemptions granted by WorkSafe NZ under the Health and Safety at Work Act 2015, s 221.

16 For example, exemption notices made under the Electricity Industry Act 2010, s 11.

17 For example, exemption notices made under the Land Transport Act 1998, s 166; the Civil Aviation Act 1990, s 7; and the Maritime Transport Act 1994, s 395.

18 The Civil Aviation Authority's exemption notices specify that the exemption files may be viewed on prior request.

good practice recommendations about exemption powers and their use has been around nearly a decade yet there still appears to be little oversight or transparency about this activity.¹⁹

F Reporting and Auditing

One of the good practice recommendations is that the person or body that exercises the power may be required to submit a report to Parliament detailing the number of times and circumstances in which a power of exemption was exercised.²⁰ This would seem naturally to be part of the annual reporting of a regulatory agency yet exemption reporting does not appear to be done in any systematic way. While some agencies report on exemptions in their annual reports, most agencies who grant large numbers of exemptions do not.²¹ For the most part, regulatory agencies are very informative (through websites, forms and publications) about how to apply for an exemption, but there is noticeably less transparency about the grant, extent or reasons for exemptions.

Given the use of exemptions to manage overlaps, frequency of change and unduly onerous or burdensome requirements, this must have an impact on organisational performance. Potentially this suggests an area for performance auditing and possibly a role for the Auditor-General when examining an agency's performance. Exemptions are one way for regulators to receive real-time and practical feedback about the currency and workability of the law. Exemptions may be sought because of outdated, inflexible or unworkable legislative requirements. But the lack of monitoring and reporting means the opportunity is lost to use this information to drive legislative reform.

There is something of a perverse incentive at play by providing the power to grant an exemption in legislation. The more that individual exemptions are granted, the less likely it is that outdated or unworkable legislation will be changed, unless there is a regular monitoring and review of the reasons and extent of exemption activity.

VI IMPROVING THE DESIGN AND IMPLEMENTATION OF EXEMPTION POWERS

While the overall picture is still of concern, some progress has been made in the design and implementation of the exemption powers in two recent examples.

19 Regulations Review Committee, above n 4; and see generally Legislation Design and Advisory Committee, above n 6, at ch 14.

20 At ch 14.

21 The Financial Markets Authority is one of the few agencies that reports on exemption applications in its Annual Report.

A Financial Markets Conduct Act 2013

The former exemptions regime under the Securities Act 1978 has been replaced under the Financial Markets Conduct Act 2013.²² The new legislation continues a broad power of the Financial Markets Authority to grant exemptions to any person or class of persons or any transaction or class of transactions "on the terms and conditions (if any) that it thinks fit" from compliance with "any provision or provisions" of parts of the Act or any regulations. There are some restrictions: the granting of the exemption must be necessary or desirable to promote the main purpose of the Act and any of the additional purposes; the extent of the exemption is not broader than necessary to address the matters that gave rise to the exemption and the exemption is limited to five years.

While the grant of these powers is very broad, there is transparency in practice about the exercise of the exemption powers. The Financial Markets Authority publishes details of exemptions on its website, identifying the names of organisations granted exemptions, the nature of the exemption and includes copies of the instruments themselves.²³ The Financial Markets Authority is also one of the few agencies that reports in its Annual Report on the number of applications and exemptions granted.

B Health and Safety at Work Act 2015

Under the Health and Safety at Work Act 2015, a regulator may exempt any person or class of persons from compliance with any regulation.²⁴ The regulator must be satisfied that the extent of the exemption is broader than reasonably necessary to address the matters that gave rise to the proposed exemption. The exemption must not be inconsistent with the purposes of the Act. An exemption may be subject to terms and conditions imposed by the regulator and expires after five years (although it can be replaced with another exemption).

The status and publication of exemptions is clearly set out in the legislation. Class exemptions are legislative instruments for the purposes of the Legislation Act 2012 and must be presented to the House and are subject to Regulations Review Committee scrutiny. Other exemptions are expressly stated not to be legislative instruments. All exemptions must be notified in the *Gazette* and published on the regulator's website, along with the regulator's reasons for granting the exemption.²⁵

22 See generally Financial Markets Conduct Act 2013, ss 556–561.

23 Financial Markets Authority "Exemptions" <www.fma.govt.nz>.

24 Health and Safety at Work Act 2015, ss 220–221.

25 One example of this is the bundle of exemptions, with reasons, addressing asbestos removal at Scott Base: "Exemption for Antarctica New Zealand and Antarctic Heritage Trust" (20 October 2016) 95 *New Zealand Gazette*.

VII GOOD PRACTICE FOR REGULATORS

Regulatory bodies who grant exemptions have their part to play in maintaining good legislative design by using exemptions in cases that are exceptional, rather than the routine. Regulators have been granted a significant power which could obscure the law or the need to change the law if exercised too frequently or improperly.

Good practice for regulators involves greater transparency, either by publishing the exemption instruments or providing more informative summaries of the nature and reasons for exemptions, if the instrument itself is not published. Regulators should regularly review exemptions and any conditions and monitor patterns or significant numbers which may indicate that a change in the law is required. This exemption-related activity should be reported in their annual reports. Legal advice should be sought about whether to grant an exemption to ensure it does not risk law-making without authority. Finally, information from the exemptions process should inform decisions about the currency and workability of the law and any need for reform.

VIII REGULATORY STEWARDSHIP

The matters discussed in this article raise an issue of *regulatory design* as well as *legislative design*. The use of exemption powers highlights that there is a need for regulatory stewardship in partnership with good legislative stewardship. Legislative design sets the framework but that is only part of the picture. Good regulatory stewardship and oversight is needed to prevent legislative design from becoming unravelled by the use of exemptions from legislative requirements.

