



Further inquiry into material incorporated by reference

Report of the Regulations Review
Committee

Forty-eighth Parliament
(Dr Richard Worth, Chairperson)
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Presented to the House of Representatives

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Further inquiry into material incorporated by reference

Recommendations

The Regulations Review Committee makes the following recommendations to the Government:

- That the Legislation Advisory Committee (LAC) Guidelines be amended to explicitly alert readers to the potential copyright problems presented by requiring material incorporated by reference to be made available on the internet. The guidelines should give alternatives to mandatory publication, and criteria for varying the mandatory publication requirement.
- That the model clauses published in our report *Regulations Review Committee, Inquiry into Material Incorporated by Reference*, and clauses reflecting alternatives to mandatory publication also be published in the LAC Guidelines.
- That submissions to Cabinet on legislation that proposes to permit incorporation by reference be required to address any copyright issues, and the proposed means of making the material available to the public if internet publication is not practical because of copyright issues.
- That the model clauses published in our report be enacted in a statute of general application such as the Interpretation Act 1999, so that they need not be re-enacted each time they are required.

Introduction

In July 2004 we reported to the House on our inquiry into material incorporated by reference.¹ The report includes model provisions for incorporation by reference, that contain a requirement that material incorporated by reference should be made available free on the internet. Material incorporated by reference becomes part of the law of New Zealand, and the standard requirement reflects the need for easy public access to the law.

The Government Administration Committee subsequently considered the Legislation (Incorporation by Reference) Bill. This bill addressed the concern that requirements in four bills for material incorporated by reference to be made available on the internet free of charge potentially breached the copyright interests of third parties. The bill was passed and divided into four amendment Acts, with provisions relaxing the requirement for material incorporated by reference to be made available free on the internet.

¹ Regulations Review Committee, *Inquiry into Material Incorporated by Reference*, 2002–2005, AJHR, I.16G

Background to this inquiry

Following our initial inquiry, we resolved to undertake a further inquiry to examine two specific areas:

- access to material incorporated by reference, including its availability on the internet
- the copyright interests of third parties in material incorporated by reference.

Submissions were sought from a number of organisations and people who develop, administer, and have expertise in material incorporated by reference. In response we received seven submissions. However, the 47th Parliament was dissolved before these submissions could be considered. In February 2008 we invited submitters to update their submissions. We received three updated submissions, including a substantial submission from the LAC.

Issues raised in submissions

A common theme in the submissions was that a requirement to provide material incorporated by reference free of charge on the internet is not always appropriate. Such a requirement may breach international copyright conventions or laws and deprive domestic copyright holders of their property rights.

It was noted that there was no simple solution to the conflict between ensuring public access to material incorporated by reference on the one hand, and the need to protect the commercial interests of third parties who hold copyright in such material that is incorporated by reference into legislation on the other. However, there was general agreement that, where practical, material incorporated by reference should be publicly available and easily accessible.

There was some divergence among submitters as to how referenced material should be made available, especially in the presence of copyright issues. The New Zealand Law Society (NZLS) proposed a default position that material incorporated by reference should be freely available on the internet, with any variation from the model clauses to be dealt with case by case, taking into account the following considerations:

- whether the material to be incorporated is subject to third-party copyright interests
- whether any compelling copyright concerns make it necessary to allow provision for discretionary internet access
- whether the proponents of the provision can reasonably be expected to negotiate with the copyright owner for internet access
- whether the provisions for availability for inspection and purchase should be enhanced if free internet access is not mandatory.

Other submitters, including the LAC, proposed amending the LAC guidelines to alert readers explicitly to potential copyright problems resulting from internet publication; publishing the model clauses in the LAC guidelines; and setting out alternatives to mandatory publication.

The LAC also proposed that submissions to Cabinet on legislation proposing to permit incorporation by reference should be required to address any copyright issues. The submissions should have to include proposals for making the material publicly accessible if internet publication is not practical for copyright reasons.

A further LAC proposal was to enact the model clauses in a general application statute, such as the Interpretation Act 1999, to remove the need for repeated enactment of the model clauses.

Conclusion

We agree with the approach suggested by the LAC, and this forms the basis for the recommendations we make to Government. A requirement to address copyright issues in submissions to Cabinet on proposed legislation would mean officials would have to justify alternative approaches. We believe the criteria set out by the NZLS provide a useful starting point for any such analysis in submissions to Cabinet.

Inserting the model clauses into the Interpretation Act 1999 as default provisions for incorporation by reference would address the point made by the NZLS and remove the need to set them out in full in every piece of legislation involving such provisions.

Recommendations

The Regulations Review Committee makes the following recommendations to the Government:

- That the Legislation Advisory Committee Guidelines be amended to explicitly alert readers to the potential copyright problems presented by requiring material incorporated by reference to be made available on the internet. The guidelines should give alternatives to mandatory publication, and criteria for varying the mandatory publication requirement.
- That the model clauses published in our report *Regulations Review Committee, Inquiry into Material Incorporated by Reference*, and clauses reflecting alternatives to mandatory publication also be published in the LAC Guidelines.
- That submissions to Cabinet on legislation that proposes to permit incorporation by reference be required to address any copyright issues, and the proposed means of making the material available to the public if internet publication is not practical because of copyright issues.
- That the model clauses published in our report be enacted in a statute of general application such as the Interpretation Act 1999, so that they need not be re-enacted each time they are required.

Appendix

Committee procedure

We received seven submissions from organisations and individuals in 2005. In 2008 the committee invited submitters to update their submission and received three updated submissions in response.

Committee members

Dr Richard Worth (Chairperson)
Hon Mark Burton
Hon Marian Hobbs
Eric Roy
Dr Pita Sharples
Lesley Soper
Lindsay Tisch

Committee staff

Tim Workman, Clerk-Assistant (Legal Services)
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Andy Gardner, Clerk of Committee