



Legislation (Incorporation by Reference) Bill

250-1

Report of the Government Administration Committee

Contents

Recommendation	2
Inquiry into material incorporated by reference	2
Identification of problem	2
Consideration	3
National minority report	3
Conclusion	4
Appendix	5

Recommendation

The Government Administration Committee has examined the Legislation (Incorporation by Reference) Bill and recommends, by majority, that it be passed.

Inquiry into material incorporated by reference

The bill removes the mandatory requirement in the Building Act 2004, the Commerce Act 1986 and the Health Act 1956 that material incorporated by reference be made available free of charge on the Internet. In July 2004, the Regulations Review Committee reported back to the House their inquiry into material incorporated by reference, in which the committee expressed a number of concerns about the use of incorporation.¹

In response to this report, the Government agreed that where deemed regulations incorporate material by reference, the standard clauses should be used with appropriate modifications to meet particular circumstances. Where they cannot be used, the Government considered that drafting should comply with the Legislation Advisory Committee Guidelines wherever possible.²

We note that the Regulations Review Committee recently considered this bill and concluded that standard clauses should be used wherever possible. But in a letter to the Government Administration Committee, the Regulations Review Committee states:

We consider the copyright issues provide appropriate reasons for the changes proposed in the bill. We wish to make it clear that in the absence of these issues we would be opposed to the bill. By removing the requirement to place incorporated material on the Internet, the bill in effect creates a barrier to accessing legislation.

However, we accept that difficulties with copyright justify not using the standard clause in this case, and that this is an appropriate exception to the principles identified in our report.

Identification of problem

After the Government Administration Committee had reported the Building Bill to Parliament, a number of standard clauses prepared on Legislation Advisory Committee Guidelines were inserted in the bill, including the present section 409 of the Building Act 2004 which imposed a mandatory requirement to post material incorporated by reference free of charge on the Internet. When the Building Bill underwent its third reading in August 2004, concerns were raised that this mandatory requirement could infringe the copyright interests of third parties.

Once these issues had been highlighted, the Department of Building and Housing and the Ministry for Economic Development sought legal advice, which resulted in a number of legal opinions expressing a divergence of views. Further investigation also revealed that similar standard clauses had been inserted in the Commerce Act 1986 and the Health Act

¹ Regulations Review Committee, *Inquiry into material incorporated by reference*, July 2004 (I.16G), p. 12.

² Government Response to Report of the Regulations Review Committee on *Inquiry into material incorporated by reference* (A.5), p. 3.

1956. We note that the detailed investigation and the divergence of views accounts for the amount of time that has elapsed between the identification of the problem and the introduction of this amendment.

Consideration

During our examination, we heard evidence from Standards New Zealand on the possible implications if the copyright issues were not addressed. Given the implications should the current mandatory requirement continue, we are satisfied that New Zealand cannot afford to ignore the potential risks.

Legal implications

We note that the present mandatory requirements could infringe the copyright interests of third parties in New Zealand and overseas. In serious cases, this could result in costly legal action for breach of copyright.

International implications

We note that many New Zealand standards are jointly defined and made in consultation with overseas organisations, particularly with Australia. Should material incorporated by reference continue to be made free of charge over the Internet, Australia would be likely to “de-joint” its shared standards with New Zealand in the interests of protecting the copyright of its third party holders. We also note that New Zealand’s contribution to the setting of new international standards could be seriously compromised and that should New Zealand be denied a role in the setting of international standards, the international trading market for New Zealand exports could also be adversely affected.

Impact on revenue

Standards New Zealand also informed us that serious risks to its own sources of revenue would become apparent should the law remain unchanged. As Standards New Zealand relies on revenue from the sale of standards, the present mandatory requirement would undermine the organisation’s long-term viability by frustrating the opportunity to recover such costs. We note that 40 percent of Standards New Zealand’s income results from the sale of standards, which amounts to \$3.6 million per annum.

National minority report

The committee only received this bill on Tuesday, 29 March 2005 and has been required to report it back by 31 March 2005. It is this sort of rushed lawmaking that results in the very errors that are trying to be corrected.

National is particularly disturbed to note that officials became aware of the copyright problems during the third reading of the Building Act 2004 in August 2004 but a bill was introduced only days before it took effect. We also note with concern that the Department of Building and Housing is going to be in breach of the law from 31 March.

National further expresses concern at the changes to the Commerce Act 1986, Copyright Act 1994 and Health Act 1956 for which there is no great urgency as there is no breach. A bill going through the normal process should deal with these issues.

National further notes that this is only one of the problems with the new Building Act 2004 and believes a more comprehensive bill was required before it came into effect.

Conclusion

The majority of us agree that the copyright of third parties in New Zealand and overseas should be protected and are concerned that New Zealand could be in breach of its copyright obligations if material incorporated by reference was required to be posted free of charge on the Internet. The majority of us are satisfied that by removing this obligation and imposing a discretion, the copyright interests of third parties will be protected.

Appendix

Committee process

The Legislation (Incorporation by Reference) Bill was referred to the committee on 29 March 2005. We received and considered 2 submissions from interested groups and individuals. We heard 1 submission. Hearing of evidence took 50 minutes and consideration took a further 35 minutes.

We received advice from the Ministry of Economic Development and the Department of Building and Housing.

Committee membership

Dianne Yates (Chairperson)
Shane Ardern (Deputy Chairperson)
Steve Chadwick
Hon David Cunliffe
Lindsay Tisch