

Regulatory Impact Statement

TRANSPORT RULE MAKING PROCEDURES

Executive Summary

Transport rules provide technical detail to support primary transport legislation (the Land Transport Act 1998, the Civil Aviation Act 1990 and the Maritime Transport Act 1994). Rules take time, are often complicated to make and do not enable government to implement decisions quickly even if they are beneficial. A high priority rule can be turned around in less than 12 months. However, rules have been known to take several years. This is in part due to the safeguards that have been introduced into the process over the past 17 years. The challenge is to re-design the system to provide appropriate safeguards while at the same time delivering required legislation in a timely manner.

To improve the rule-making system, the Ministry of Transport has considered ways to create administrative efficiencies, commissioned a report from Richard Clarke, QC and consulted the President of the Law Commission Sir Geoffrey Palmer and the Legislation Design Committee. The options outlined in this paper are a result of this work.

The preferred options in this paper propose to maintain the rule-making system, but to allow for flexibility in rule-making to be achieved through:

- 1) an additional order in council-making power; and
- 2) incorporation by reference of technical matters.

Options that were considered and not preferred were to:

- 1) tailor or remove consultation requirements for rules;
- 2) remove the power to make rules and instead require that all matters now covered by rules be in future set out in regulations; and
- 3) provide Crown Entities with legislation making powers for technical issues.

In addition to the preferred options in this paper, a number of further changes to streamline the rules process have been recommended to Cabinet. They propose to:

- 1) remove the mandatory requirement to refer rules the Regulations Review Committee prior to enactment; and
- 2) remove the mandatory minimum coming into force period of 28 days after publication in the *Gazette* requirement for rules;
- 3) make the rule-making criterion in relation to international standards discretionary; and
- 4) give more clarity to the actions the Director of Civil Aviation can take under rules.

These proposals have not been included in this paper as they relate to internal government processes and do not affect industry and other non-government stakeholders.

Adequacy Statement

This regulatory impact statement has been reviewed by the Ministry of Transport and is consistent with the adequacy criteria set out in the Ministry of Economic Development Regulatory Impact Regulatory Impact Analysis Guidelines.

Status Quo and Problem

Ministers' rules are the principal form of delegated legislation in the transport portfolio. While primary legislation is used to implement many international obligations, especially in the aviation and maritime sectors, and to set out many of New Zealand's transport legal requirements, rules are required to specify the details of those obligations and requirements, particularly for safety, security and environmental performance.

The chief features of ordinary transport rules are:

- (a) they are made by a Minister – either the Minister of Transport or the Minister for Transport Safety;
- (b) they are regulations for the purpose of disallowance but they are not usually published in the Statutory Regulation series;
- (c) content must be noted by Cabinet [EDC Min (07) 11/6];
- (d) they have their own publication requirements;
- (e) there is a mandatory minimum 28 day period after publication in the *Gazette* before they come into force;
- (f) they have a statutory consultation requirement; and
- (g) there is very limited power for the relevant Directors of the transport agencies to make technical determinations.

The Directors also have the power to make emergency rules to deal with a narrowly defined range of issues – chiefly safety related. The power to make emergency rules has been exercised on only one or two occasions in the civil aviation area.

There are a number of advantages to the rule-making process. Processes in the Ministry of Transport and in the Crown entities include checks and balances to ensure that rule-making is done in a constitutionally appropriate way. The quality of the product has generally been good and the process is becoming increasingly efficient. The relevant industry sectors also make a large contribution. Indeed, in most cases, industry input is essential to ensure that rules are robust and practical. However, industry influence can also lead to delays when controversial issues require balance.

Despite the advantages of the rule-making system, portfolio ministers both previous and current have recognised that the system is not sufficiently responsive to government's need to govern or indeed the needs of the general public. In striking the balance of power between the three parties – the government, industry and public – it is usually the government, through the political process, that represents the public interest, especially in the aviation and maritime modes where there are no dedicated passenger user groups. Industry can also be frustrated when standards in rules, for example, for new aircraft or vehicles imported into New Zealand lag behind the latest standards to which these are manufactured.

Much of this problem is the result of an accretion of safeguards, instituted over time for the best possible reasons, causing the system to become weighed down. The combination of regulation-like administrative referrals to Cabinet and the statutory consultation and mandatory 28 day rule has a “flow on effect” to those preparing the legislation. It can be difficult and time consuming to make straightforward amendments once a rule has been made, so the legislation is made in a very risk-averse environment. A previous Minister of Transport has commented that in this context the pursuit of the excellent has become the enemy of the good.

Objectives

The objective is for a system that provides appropriate safeguards while delivering required legislation in a timely manner.

Alternative Options

Option 1: Remove or tailor consultation requirements

Consultation provisions under the current legislation could be relaxed to allow for a more flexible approach. Consultation could then be an administrative matter determined by the Minister and/or Authority concerned or the requirements could be replaced with a provision to the effect that, before a rule is made, there must be consultation with such persons (if any) as the Minister thinks appropriate in that case and that any such consultation must be undertaken in such a manner as the Minister thinks appropriate. Under this approach, the mandatory notification and calling for submissions would become administrative, along with the other consultation requirements.

Consultation is an important part of good law making, however, it is recognised that a ‘one size fits all’ approach is not always appropriate. Additionally the current legislation leads to an unnecessarily conservative approach to law making.

However, the current provisions provide important safeguards and the transport industries have become accustomed to the consultation regime. Removing consultation requirements altogether removes those safeguards and could send the wrong indication to industry that government no longer intends to consult.

Including a provision conferring discretion on a Minister as to the form of consultation to take place would provide flexibility, however it could be criticised for providing the Minister with too wide a discretion and rules could be challenged regarding the appropriate level of consultation.

Option 2: Require all matters now covered by rules to be set out in regulations

Under this proposal the power to make rules would be removed and replaced with the requirement that all matters now covered by rules be in future set by regulations. As consultation is not normally required as a matter of law before regulations are made, this would mean that the consultation would in most cases be left to the administrative decision of the Minister.

This option invokes the same criticism as option 1 as it would reduce the safeguards inherent in the current consultation requirements in the same manner. In addition, regulations are drafted by Parliamentary Counsel Office and have a particular format different from that of rules. Requiring all matters now covered by rules to be set out in regulations would have significant implications for Parliamentary Counsel Office and the Authorities' rule drafters. Changing the rules back into regulations would be a major task.

Option 3: Provide authorities with greater ability to determine technical matters

Another way to build flexibility into the system would be to enact legislation to give more power to the transport Crown entities to determine technical matters. However, this option is not preferred as a major problem of the previous regulatory system (before the rules system) was the plethora of tertiary legislation and it would be unwise to recreate that system. The regulatory impact of these instruments could also cause concern, and for this reason, the power to make such legislation would best sit with Ministers. Furthermore any tertiary legislation would have to comply with standard constitutional arrangements and could well look similar to rule-making.

Preferred Option

Additional order in council-making power

The preferred option is to maintain the rule-making system, but to allow for flexibility in legislation to be achieved through an additional order in council-making power. This power would allow rules made by order in council to introduce changes of such importance, urgency or necessity that it justifies departure from the ordinary rule-making process.

It is proposed that the power to make rules by order in council should lie with the Governor General. Making rules by order in council provides flexibility because they are not subject to some of the statutory safeguards built into the ordinary rules system. Rather, they have the safeguards of an instrument being made by the Governor General and the oversight of Cabinet. The procedural requirements for making ordinary rules, such as the requirement to give notice of intention to make rules and the statutory consultation process for rules, would not apply where rules are enacted by orders in council. They would be orders in council in the procedural and legal sense, but would become part of the rules system. Rules enacted by orders in council would be able to be amended by ordinary rules. Incorporation by reference provisions would apply, as well as any exemption powers.

While this proposal is complicated in the sense that there is a divide between an ordinary rule and a rule made by order in council, this proposal would preserve the safeguards inherent in the consultation requirements, while allowing the government to be responsive to developments in the transport sector that required urgent address.

Parliament has recently enacted a similar order in council-making provision in the Civil Aviation Act 1990 for aviation security. It is proposed that this model should be extended to all transport delegated legislation currently made by rules. This approach is recommended by Sir Geoffrey Palmer and the Legislation Design Committee. It was also mentioned as a possible option by Mr Clarke.

It is proposed that the publication arrangements for rules made by order in council should be the same as for ordinary Ministerial rules. The Parliamentary Counsel Office should draft these orders in council and the Chief Parliamentary Counsel should oversee publication requirements exercising his or her powers under section 14 of the Acts and Regulations Publication Act 1989. The legislation will have to be administered carefully in order to ensure that any changes to rules made via orders in council fit seamlessly and the delegated legislation system retains coherence.

Incorporation by reference

In addition to the proposed order in council-making power, it is proposed legislation provide for the following material to be able to be incorporated by reference in line with the Legislation Advisory Committee Guidelines:

- a document that is long and complex, covers technical matters only and few persons are likely to be affected;
- international standards and obligations;
- where, in the opinion of the Minister, it is appropriate that the document should be formulated by a specialist government or inter-government agency, or private sector organisation (whether of New Zealand or otherwise) in the transport sector. This may include 'national standards';
- where the document has been developed by an organisation for use in relation to its products (for example, a motor vehicle manufacturer).

This content will enable documents produced by the transport Crown entities to be incorporated in appropriate circumstances, while preserving constitutional safeguards by limiting the power of Crown Entities to make legislation.

Implementation and Review

It is proposed that the required changes for land will be made through the Land Transport (Repeal of Transport Act 1962 and Road Safety) Amendment Bill which has a priority 4 on the 2008 legislative programme and is expected to be in force by the end of the 08/09 financial year. Changes to the Civil Aviation Act 1990 and Maritime Transport Act 1994 will be included in the next amendment Bills for those Acts. Review of the effectiveness of these changes will be ongoing.

Consultation

In 2005 the Ministry of Transport commissioned Richard Clarke QC to:

- identify problems regarding the legal aspects of the rule-making processes;
- examine possible solutions for these problems;
- consider any risks associated with these solutions and how these might be managed; and
- recommend changes to the rule-making process.

As part of this Mr Clarke attended meetings to discuss these matters with the Ministry of Transport, Land Transport NZ, the Civil Aviation Authority and Maritime New Zealand.

The Ministry of Transport has also consulted the President of the Law Commission, Sir Geoffrey Palmer, and the Legislation Design Committee on administrative aspects of the rules process as well as the recommendations in the Clarke report.

The Ministry has not consulted with the industry but has some general observations:

- Many members of industry would welcome suggestions that will streamline the process.
- Transport industry members, organisations and associations value consultation and the ability to participate in the process. They are likely to be concerned about any diminution of the ability to participate in a positive way within rules.
- The aviation industry has a special participation process (administrative) and would probably wish to see that maintained. This process involves an industry advisory group that is consulted on what rules should be made.

The following government agencies have been consulted on this paper and associated Cabinet paper: Land Transport New Zealand, Maritime New Zealand, Civil Aviation Authority, Parliamentary Counsel Office, Ministry of Economic Development, Ministry of Justice, New Zealand Police and The Treasury. Department of Prime Minister and Cabinet was informed.