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**THE POWER TO EXEMPT FROM  
STATUTE LAW**

Submission from the Legislation Advisory  
Committee to the Regulations Review Select  
Committee on its Inquiry into the use of  
Instruments of Exemption in Primary Legislation

July 2008

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## EXECUTIVE SUMMARY

- 1 The power to exempt from the application of statute law raised by the Regulations Review Committee's Inquiry into the use of instruments of exemption in primary legislation raises important and hitherto unexplored constitutional issues. The issues not only have relevance to the rule of law but also to intensely practical questions about its administration. Parliament has the full power to make laws. It may delegate, but never surrender or abnegate its law-making power. Delegated exemption powers must not be exercised arbitrarily. There are two existing checks on the use of exemption powers: first, Parliamentary scrutiny of proposed Bills containing exemption powers; and secondly, exemptions are generally subject to judicial review. These checks are very important. Exemptions turn out to be an area of complexity requiring close analysis. Because of its importance the LAC has researched the issue in considerable depth.
  
- 2 This submission makes a number of observations about instruments of exemption in legislation. The most significant underlying observation is that exemptions occupy a sliding scale.<sup>1</sup> It can be difficult at the middle of that scale to distinguish exemptions that should be regulations for the purposes of disallowance from minor concessions that may not be regulations for the purposes of disallowance. At the top end of the scale are exemptions that are legislative in nature and clearly and significantly extend or vary the scope of an Act. At the other end of the scale are minor concessions to individuals or bodies that have a minimal or no impact on the scope of an Act and are administrative in nature. We use the term "exemption" for those at the top end of the scale, and "concession" for those at the bottom. They should be treated differently. But distinguishing the two must be done on a case by case basis. The LAC considers that the basic test that must be applied on a case by case basis is whether an "exemption" significantly varies or extends the scope or effect of an Act. If it does, certain safeguards must be applied. If an exemption has no, or only minimal, effect on the scope of an Act, then it is only a minor concession to an individual, and should not be subject to the same safeguards.

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<sup>1</sup> See paras 16 – 17.

3 This submission considers that exemptions should not be the norm.<sup>2</sup> It sets out several key principles that the LAC considers underlie the legitimate use of exemptions:

- The power to exempt from a statute or regulation should be conferred only where there is good reason.<sup>3</sup>
- Exemptions may be appropriate to deal with unforeseen circumstances that cannot be envisaged by a statute when it was enacted.<sup>4</sup>
- Exemptions may be appropriate where there is an urgent need to adapt the law to new circumstances,<sup>5</sup> particularly where that need is urgent and it would not be possible to change the law by quickly amending legislation, or where it is not appropriate to amend a general provision to take account of a one-off, exceptional circumstance.<sup>6</sup>
- Exemptions may be appropriate if an area of law must adapt to constantly or frequently changing circumstances;<sup>7</sup>
- Exemptions may be appropriate to avoid having to comply with an obligation that would otherwise be impracticable or unreasonable or would cause hardship.<sup>8</sup>
- Exemptions may be appropriate in dealing with departures from the legislative regime that are minor or inconsequential, as opposed to significant policy changes.<sup>9</sup>

4 This submission also makes a number of recommendations, which are summarised here:

- Consistent terminology should be used in drafting exemption provisions.<sup>10</sup>
- Standardized provisions should be used by PCO in drafting exemption authorizing provisions in Acts.<sup>11</sup>

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<sup>2</sup> See paras 57 – 58.

<sup>3</sup> See para 47.

<sup>4</sup> See para 48.

<sup>5</sup> See para 49.

<sup>6</sup> See para 50.

<sup>7</sup> See para 51.

<sup>8</sup> See para 52.

<sup>9</sup> See para 53.

<sup>10</sup> See paras 14 – 15.

<sup>11</sup> See para 15.

- If a proposed Bill contains an exemption power:
  - The Cabinet Paper that accompanies it should note this, give reasons why inclusion of such a power is necessary, and set out conditions and criteria that will apply to the granting of exemptions under the power.<sup>12</sup>
  - The Bill’s Explanatory Note should do the same.<sup>13</sup>
- If a proposed Regulation contains an exemption power, the Cabinet Paper that accompanies it should note this, give reasons why this is necessary, and set out conditions and criteria that will apply to the granting of exemptions under the power.<sup>14</sup>
- Provisions empowering the granting of exemptions should specify:
  - what form the exemption instruments should take;<sup>15</sup>
  - whether the exemption instruments will be regulations for the purposes of the Regulations (Disallowance) Act;<sup>16</sup>
  - whether the exemption instruments will be regulations for the purposes of the Acts and Regulations Publication Act 1989, and, if not, alternative publication requirements (if any) should be specified.<sup>17</sup>
- A number of safeguards should be applied to the use of exemption powers:
  - An exemption empowering Act should set out clear purposes for the granting of exemptions.<sup>18</sup>
  - An exemption empowering Act should set out clear criteria for the granting of exemptions. Those criteria should expressly include, at least, a requirement that granting the exemption is consistent with the objectives of the empowering Act, and ideally contain further guidance.<sup>19</sup>

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<sup>12</sup> See para 59.  
<sup>13</sup> See para 61.  
<sup>14</sup> See para 60.  
<sup>15</sup> See para 78.  
<sup>16</sup> See para 78.  
<sup>17</sup> See para 100.  
<sup>18</sup> See para 112.  
<sup>19</sup> See para 113.

- There should be a requirement to give reasons when an exemption is granted and to state them in the exemption instrument itself.<sup>20</sup>
- All exemption empowering provisions should state that exemption instruments granted under them should expire within five years.<sup>21</sup> Exemption instruments should contain a sunset clause to that effect.

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<sup>20</sup> See paras 114 – 115.

<sup>21</sup> See para 116.

## INTRODUCTION

### **This Submission**

- 5 This LAC submission responds to a letter from Dr Richard Worth, Chairman of the Regulations Review Committee (RRC), dated 10 April 2008.<sup>22</sup> The Law Commission supports this submission.
- 6 The power to exempt from the application of statute law raised by the Regulations Review Committee's Inquiry into the use of instruments of exemption in primary legislation raises important and hitherto unexplored constitutional issues. The issues not only have relevance to the rule of law but also to intensely practical questions about its administration. Parliament has the full power to make laws. It may delegate, but never surrender or abnegate its law-making power. Delegated exemption powers must not be exercised arbitrarily. There are two existing checks on the use of exemption powers: first, Parliamentary scrutiny of proposed Bills containing exemption powers; and secondly, exemptions are generally subject to judicial review. These checks are very important. Exemptions turn out to be an area of complexity requiring close analysis. Because of its importance the LAC has researched the issue in considerable depth.
- 7 This submission begins by setting out several ways in which Acts can empower exemptions, and lists a number of Acts that confer exemption powers. It discusses the two Acts under which the greatest number of exemption notices are granted. There is then a general discussion of exemptions and exemption notices and their implications. The last part of the submission individually addresses the numbered questions posed in Dr Worth's letter.

### **The LAC**

- 8 The LAC comprises lawyers who are private practitioners, Government lawyers, law teachers, a retired judge and a serving judge, and economists. The President of the Law Commission is the Chair of the LAC. The Committee advises the Government regarding good legislative practice. Its main work

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<sup>22</sup> Appended as Appendix V.

product is the Legislation Advisory Committee Guidelines, which have been adopted by Cabinet.

### **The LAC Guidelines and Delegation of Legislative Power**

- 9 The LAC has recently revised Chapter 10 of the LAC Guidelines, which deals with primary legislation that delegates legislative power.<sup>23</sup> The chapter gives particular consideration to the dividing line between material that is appropriate for statute and that which is appropriate for regulations. It lists a number of matters that are appropriate for including in regulations. It discusses matters that should not go into regulations, and spells out exceptional circumstances in which those matters might possibly go in regulations. The chapter also identifies criteria for deciding whether something is a matter for primary or delegated legislation when there are doubts.
- 10 Under section 15(1) of the Constitution Act 1986, Parliament has full power to make laws. Parliament usually exercises this power to pass Acts of Parliament (that is, primary legislation). But, it also has the power to confer its law-making power on another person or body, thus enabling that person or body to make laws. This process is the delegation of Parliament's legislative power, and the resulting laws are known as delegated, or subordinate, legislation. Delegated legislation is a generic term, including regulations,<sup>24</sup> deemed regulations, and other delegated legislation, such as (at least some) exemption notices.
- 11 The reasons why Parliament delegates its law-making powers have been summarised as follows:<sup>25</sup>

There is little doubt that regulations are a necessary part of New Zealand's legal landscape. This has long been the case. It is a simple reflection of the complexity of living in a civilised society and the necessity for so much law containing high levels of technical detail. It would be impossible for Parliament to retain absolute responsibility for all of it.

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<sup>23</sup> The revision of the chapter on delegated legislation arose out of a full day seminar that Professor John Burrows gave at the Parliamentary Counsel Office.

<sup>24</sup> As defined in section 29 of the Interpretation Act 1999 and section 2 of the Regulations (Disallowance) Act 1989.

<sup>25</sup> George Tanner QC and Mai Chen, *Delegated Legislation* (NZLS Seminar, May 2002), 95.

- 12 The LAC recognises the importance of, and need for, delegated legislation, but considers that effective safeguards and constraints are necessary to ensure that the power to make law is delegated only in appropriate circumstances. The LAC Guidelines are a useful tool for ensuring that primary legislation does not delegate law making power unnecessarily. While the Guidelines do not directly address the question of exemptions, a number of parts of the Guidelines are of relevance to this question.
- 13 When assessing delegated legislation, such as exemption notices, it is essential to remember that Parliament delegates, but never surrenders, its legislative powers. Exemptions, or any other kind of delegated legislation, should never exceed the scope of the delegated legislation power under which they are made.

## THE CURRENT USE OF EXEMPTIONS

### **What is an Exemption?**

- 14 The terminology around exemptions is not used consistently. There are a number of ways in which an exemption power can be framed. The most obvious is where an express power to exempt is conferred. But powers can be expressed in other ways that achieve the same result. Terms which effectively give a power to exempt include the following:
- power to **dispense** with a requirement (for example, section 147(2)(b) of the Public Trust Act 2001 confers power to make regulations that dispense with disclosure requirements relating to investments, funds, or investors in appropriate cases. Section 22(6) of the Tax Administration Act 1994 empowers the Commissioner, by notice in the *Gazette*, to dispense any class of taxpayers from the need to retain records);
  - power to **waive** requirements (for example, section 91ED(2) of the Tax Administration Act 1994 empowers the Commissioner of Inland Revenue to waive certain requirements relating to applicants for private rulings. Section 56G(2)(a) of the National Parks Act 1980 empowers the Director-General of Conservation to waive or reduce charges otherwise payable when a dog seized under the Act is returned to its owner);
  - power to **exclude** someone or something from the coverage of an Act (for example, section 29(4) of the National Expenditure Adjustment Act

1932 provides that “The Governor-General may at any time, by Order in Council published in the *Gazette*, exclude from the operation of this Part of this Act any specified class or specified classes of mortgages or other contracts.”);

- power to declare that someone or something is not covered by the Act or is not within a definition in the Act (for example, section 8(2) of the Health and Disability Services (Safety) Act 2001 provides that the Act does not apply to services in any premises of a kind declared by the Governor-General by Order in Council to be premises to which the Act does not apply.<sup>26</sup> Section 6(1) of the Motor Vehicle Sales Act 2003 provides that the definition of **motor vehicle** “does not include a vehicle of any other class or description declared by the Governor-General, by Order in Council, not to be a motor vehicle for the purposes of this Act”. Section 5(6E) of the Goods and Services Tax Act 1985 provides that the definition of **payment in the nature of a grant or subsidy** “does not include any payment of a kind that is declared by the Governor-General by Order in Council not to be a taxable grant or subsidy for the purposes of subsection (6D)” of that section.).<sup>27</sup>

- 15 This lack of consistency in terminology describing exemption powers is potentially misleading, and is not ideal. As will be discussed next, exemptions occupy a sliding scale – some uncertainty at the middle of a sliding scale is unavoidable. But that uncertainty should not be compounded by the confusing use of inconsistent terminology. Making terminology consistent could not solve all problems of uncertainty in terms of identifying exemption powers, but would be a helpful step. **The LAC recommends that consistent terminology should be used in drafting exemption provisions. Standard provisions could be used when the PCO drafts exemption empowering provisions.**

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<sup>26</sup> Similarly, the Machinery Act 1950, s 3(1)(g) provides that “nothing in this Act shall apply to... any machinery that is declared by the Governor-General by Order in Council not to be subject to the provisions of this Act.”

<sup>27</sup> The Income Tax Act 2007, s YA 1, defines “unit trust” as not including “any other trust of any specified kind that is declared by the Governor-General, by Order in Council, not to be a unit trust for the purposes of Section HD 13”.

### **Exemption Powers are on a Sliding Scale**

- 16 It is important to draw attention to the fact that exemptions occupy a sliding scale. That is, “exemptions” vary in terms of their significance and scope. At one end of the scale are exemptions that clearly extend or vary the scope of an Act. At the other end are minor concessions to individuals that do not vary the scope of an Act, but allow officials or bodies to administer an Act and apply it to individual circumstances. These are best not thought of as “exemptions” but as minor concessions to individuals, and are not regulations for the purposes of disallowance.<sup>28</sup> In the middle of the scale, it can be difficult to identify some “exemptions” as clearly altering the scope of an Act, or as clearly being mere administrative concessions to individuals.
- 17 The distinction is a question of degree. Grey areas exist which can make it difficult to draw a clear line between “exemptions” and non-exemptions – there is no firm test for distinguishing all exemptions from all non-exemptions. The LAC considers that exemptions should be treated differently from mere concessions to individuals. The fact that they occupy a sliding scale makes exemptions a very complex legal area. It is difficult to lay down broad guidelines for their use – in practice, exemptions need to be assessed and identified on a case by case basis. An exemption’s position on the sliding scale determines the safeguards that should apply to its use. The LAC considers that the test that should be used to assess where an exemption is placed on the sliding scale is that set out in the Regulations (Disallowance) Act 1989. That is, whether the exemption varies or extends the scope or provisions of an enactment.<sup>29</sup>

### **Administrative-Legislative Distinction**

- 18 Another useful reference point in considering the appropriateness of exemption instruments is the established administrative law distinction between administrative and legislative powers. Administration is not making the law, but applying it. This principle is relevant in the context of cases concerning subdelegation of a power – that is, the question of whether an action taken was

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<sup>28</sup> These will be discussed in more detail at paras 86 – 91.

<sup>29</sup> This will be discussed further at paras 74 – 97, which address Question 7 in Dr Worth’s letter.

ultra vires because the effective decision was taken by a person or body to whom the power did not properly belong. In reviewing whether a subdelegation to an official or body granting the official or body a discretion of some kind is appropriate, the question is whether the legislature has sufficiently circumscribed the way in which that discretion is to be exercised by laying down guidelines within which the administrator must act. Administration can involve decision-making and the exercise of discretion, but that discretion must not go too far. Subdelegation to a person or body administering legislation will be acceptable only if it is administrative or operational.<sup>30</sup>

- 19 The case *Hawke's Bay Raw Milk Producer Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218 summarised the effect of a line of cases looking at the administrative-legislative distinction:

The principle enunciated [in the line of cases]... does not preclude the making of regulations which confer on a subordinate body or official authority to make decisions and exercise discretionary powers within the limits prescribed by the regulations, but it is always to be borne in mind that the legislative power itself cannot be deputed.

- 20 The distinction between an official exercising a discretion in the administration of validly made regulations, and an official overstepping his or her delegated authority can be difficult to draw. But, as is noted in an administrative law text:<sup>31</sup>

That this distinction will not always be easy to draw is no reason for denying its existence. The wider the field of operation left to the subdelegate, the more likely it is that the court will take the view there has been a subdelegation of legislative power. Where, on the other hand, the matters left to be carried out by the subdelegate are questions of detail which merely fill the gaps left in the legislation itself, or which are to be carried out in accordance with guidelines laid down in the legislation, the more likely it will be that the courts will determine that the subdelegate is exercising administrative powers only, and the subdelegation will be valid.

- 21 This administrative-legislative distinction offers some guidance in distinguishing exemptions that alter the effect of legislation, and those that do not. The granting of an “exemption” may involve the exercise of a discretion on the part of an official or body, but if that exercise is administrative or

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<sup>30</sup> *Hookings v Director of Civil Aviation* [1957] NZLR 929.

<sup>31</sup> Dennis C Pearce and Stephen Argument *Delegated Legislation in Australia* (3 ed, LexisNexis, Chatswood, New South Wales, 2005), s 23.17.

operational, it may be more in the nature of a minor concession, rather than an exemption that is, or should be, a regulation for the purposes of disallowance.

### **Exemption Powers in Current Acts**

- 22 A large number of Acts confer exemption powers. There are a number of ways in which these exemption powers can be framed. Exemption powers vary in terms of the degree to which their exercise is subject to conditions or criteria, and notice requirements. As just discussed, they may or may not use the words “exempt” or “exemption”. They also vary in terms of exercise of the exemption power. Broadly speaking, an exemption power may be given to the Governor-General, to a Minister of the Crown, or to an official or body. We discuss these approaches in more detail below.

#### *Governor-General’s Exemption Power*

- 23 The first approach is for a section to authorise the Governor-General to make regulations, by Order in Council, for the purpose of exempting individuals, groups, or situations from all or any requirements under an Act, or a certain provision of an Act. Sometimes this kind of exemption specifically notes that the Governor-General can exercise this power only on the recommendation or advice of the Minister. An example of an Act under which the Governor-General may grant exemptions is section 9 of the Animal Products Act 1999, according to which the Governor-General may, by Order in Council, exempt a company registered under the Act from compliance with various provisions of the Companies Act 1993. We set out a longer list of examples of exemption powers accorded to the Governor-General in Appendix I.

#### *Ministerial Exemption Power*

- 24 A second approach is for a section to authorise a Minister of the Crown to grant exemptions. The Minister may exempt individuals, groups or situations from requirements under the Act or a part of the Act. This is often accompanied by a requirement to publish a notice in the *Gazette*. For instance, section 92E of the Health Act 1956 allows the Minister to exempt from sections 92B(1), 92B(2) and 92D(1) of the Act. We set out a list of Acts that confer exemption powers on Ministers in Appendix II.

### *Officials' and Bodies' Exemption Powers*

- 25 A third approach is to grant an exemption power to an official, such as a Chief Executive or Director-General of a government Department or to a body, such as a Commission, board or territorial authority. For instance, section 47(5) of the Cadastral Survey Act 2002 allows the Surveyor-General to exempt from standards or rules under Part 5 of the Act. A non-exhaustive list of Acts that confer exemption powers on officials and bodies is set out in Appendix III.

### **“Exemptions” that are only Minor Concessions to Individuals**

- 26 As discussed earlier, exemptions occupy a continuum. We found a number of exemptions that operate on a much smaller scale than many others. They are minor or mechanical kinds of exemptions. They allow an official to exempt an individual or individuals sometimes from just one, relatively mechanical, requirement under an Act. Often, exemptions of this kind allow officials or bodies to tailor the law to individual circumstances, often recognising that hardship or unfairness would result from applying the law to a particular individual. In the LAC’s view, while such provisions may be worded in the language of “exemption”, they are more properly viewed as limited concessions to individual persons at the discretion of the official.

- 27 We lay out some such limited concessions, which have already appeared in the lists in Appendices I, II and III, by way of example here:

- **Clean Air Act 1972**, s 21 (subsection 1 allows the Director-General, by notice in writing, to exempt any premises, fuel burning equipment, industrial plant, or chimney, or the use, acquisition, or sale of any fuel specified in the notice from the application of any provision of the Act, if he considers it expedient to do so for the purpose of enabling investigations or research relevant to the problems of air pollution);
- **Education Act 1989**, s 11PA (allows the Secretary to exempt a state school board, for up to three years, from the requirement under subsection 1 to annually review the operation of its enrolment scheme and the continued need for it);
- **Education Act 1989**, ss 21, 22 and 22A (s 21 allows an employee of the Ministry, designated by the Secretary for the purpose, to exempt, by certificate, a person aged between 6 and 16 from the requirement that they be enrolled in a registered school, provided that they are satisfied that the person will be taught regularly and well by another means; s 22 allows the

Secretary to grant the same kind of exemption; s 22A allows the Secretary to exempt a person from enrolment who has been placed in a residence or programme under the Children, Young Persons, and Their Families Act 1989);

- **Education Act 1989**, ss 26 and 27(allows a designated officer to exempt a student from legal school attendance requirements in certain circumstances; s 27 allows a school principal to exempt a student from legal attendance requirements for a short period given certain circumstances);
- **Fencing of Swimming Pools Act 1987**, s 6 (allows a territorial authority, by resolution, to grant an exemption from some or all fencing requirements under the Act in respect of an individual pool, given certain conditions);
- **Films, Videos, and Publications Classification Act 1993**, s 44 (allows the Classification Office to exempt from the provisions of the Act a particular publication);
- **Friendly Societies and Credit Unions Act 1982**, ss 15, 45 and 74 (s 15(2) allows the Registrar, in writing, to exempt any society or branch from the subsection (1) requirements to certify rates of contribution before registration if the Registrar thinks those requirements are inapplicable; s 45(2) allows the Registrar to exempt a registered society or branch from the subsection (1)(a) requirement to have proof of death before paying any money upon the death of a member, provided that the Registrar is satisfied on the fact of death; s 74(3) allows the Registrar to exempt a society from the requirements of subsection (1) for an actuarial valuation and report, provided that he thinks those requirements are inapplicable);
- **Gambling Act 2003**, s 178 (allows the Secretary to exempt a casino licence holder from the requirement to store all gambling equipment relating to the operation of the casino on the casino premises);
- **Student Loan Scheme Act 1992**, ss 38AJ and 57D (the Commissioner may, if he considers it fair and reasonable to do so, grant an exemption to a borrower's 183-day requirement in section 38AB; s 57D allows the Commissioner, in the case of financial hardship, to exempt part or all of a relevant refund made to a borrower from section 57C).

28 It would be absurd for an amending Act to be passed every time a swimming pool is to be exempted from the standard fencing rules, or a student is exempted from enrolment or attendance from school, or a Registrar has proof of death sufficient that he or she does not consider he or she needs to see a death certificate. We consider that these kinds of “exemptions” fall into a category separate from other, more significant exemptions. We do not think that the same principles apply to them. We also do not consider that all of these minor

exemptions are necessarily “regulations” for the purposes of disallowance.<sup>32</sup> It is these more significant exemptions that will be the focus of our submission.<sup>33</sup>

### **Acts under which the Greatest Volume of Exemptions are Granted**

29 At present, by far the majority of all exemptions are issued under two key Acts: the Securities Act 1978, granted by the Securities Commission; and the Takeovers Act 1993, granted by the Takeovers Panel. The Parliamentary Counsel Office has, since 1983, drafted exemption notices for the Securities Commission under the Securities Act 1978 and, since 2001, drafted exemptions for the Takeovers Panel under the Takeovers Act 1993. The number of exemptions drafted under the two Acts varies from year to year.<sup>34</sup> In the year ending 30 June 2007, the PCO drafted seventy nine notices under the Securities Act 1978 and the Takeovers Act 1993.<sup>35</sup> As is noted in the PCO Annual Report, “these notices can be complex instruments and are often required at short notice. The PCO accords high priority to the requirements of the Commission and the Panel in this regard.”<sup>36</sup>

30 Since a very large proportion of all exemptions are granted under these two Acts, it is useful here to consider each in more detail.

#### *Takeovers Act 1993*

31 The Takeovers Code applies to all transactions that involve the acquisition of 20% or more of the voting rights in specified companies or any increase in excess of 20% of the voting rights in the companies. Companies and investors are entitled and obliged to conduct their affairs on the basis of the provisions of the Code and the protections contained within it. The Code applies equally to all market participants.

32 The Takeovers Panel has power under section 45 of the Takeovers Act to grant exemptions from compliance with the Takeovers Code. However, the Panel is

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<sup>32</sup> See discussion at paragraphs 79 – 91.

<sup>33</sup> Though we will return to these minor concessions later with respect to Dr Worth’s question 7, at paragraphs 79 – 91.

<sup>34</sup> Though the PCO Annual Report for the year ended 30 June 2005 states that the average number of both classes of exemption for the four years preceding the report was 82.

<sup>35</sup> Eighty notices were drafted under the two Acts in the year ending 30 June 2006;

<sup>36</sup> *Report of the Parliamentary Counsel Office for the Year Ended 30 June 2007* (Wellington, 2007) 14.

constrained by section 45(4A) which requires it to *give reasons* for granting an exemption. These reasons must include:

- Why it is appropriate that the exemption is granted; and
- How the exemption is consistent with the objectives of the Code.

33 A “Guide to Applying for Exemptions from the Takeovers Code” is available on the Panel’s website.<sup>37</sup> It explains that:

The Panel recognises that in some cases there may be technical difficulties with complying with the Code, which justify an exemption being granted in order to facilitate the operation of the market. However, the objectives of the Code must not be compromised by the grant of such an exemption.

The Guide also explains that exemptions may be granted subject to certain conditions.

34 The full texts of exemption notices granted by the Panel are published on its website. Each notice is followed by the Panel’s statement of reasons for granting the exemption. The website currently lists over 130 exemption notices.

#### *Securities Act 1978*

35 The Securities Commission has exemption powers under the Securities Act 1978. Subsections 5(5) – (5B) of that Act provide that:

(5) The [Securities] Commission may, in its discretion and upon such terms and conditions (if any) as it thinks fit, by notice in the *Gazette*, exempt any person or class of persons or any transaction or class of transactions from compliance with any provision or provisions of—

- (a) Part 2 of this Act; or
- (b) Any regulations made under section 70(1) of this Act;

and may in like manner vary or revoke any such exemption. Every such exemption shall have effect according to its tenor.

(5A) The Commission's reasons for granting an exemption under subsection (5) (including why the exemption is appropriate) must be notified in the *Gazette* together with the exemption.

(5B) However, the Commission may defer notifying or not notify the reasons for granting an exemption if the Commission is satisfied that it is proper to do so on the ground of commercial confidentiality.

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<sup>37</sup> Takeovers Panel *Guide to Applying for Exemptions from the Takeovers Code* <[http://www.takeovers.govt.nz/publications/policy\\_applying.htm](http://www.takeovers.govt.nz/publications/policy_applying.htm)> (last accessed 14 June 2008).

- 36 The Securities Commission website lists the exemption notices that are currently in force.<sup>38</sup> The list is updated regularly, and notices are removed from it when they expire or are repealed. At present, the list contains 256 notices (made up of 175 exemption notices and 81 amendment notices). However, many more exemption notices than that have been granted since 1983 – hundreds have expired or been revoked and so are not part of the website’s list of exemptions currently in force. The website also includes a guide to how to apply for an exemption.
- 37 Exemptions granted under the Securities Act generally include brief reasons. These tend to be shorter than the reasons given in Takeovers Act exemptions, and generally do not include a factual summary. For instance, at the end of the Securities Act (Macquarie Investment Services Limited) Exemption Notice 2008 is the following:

**Statement of reasons**

This notice comes into force on the day after the date of its notification in the *Gazette* and expires on 1 June 2013. It exempts Macquarie Investment Services Limited (Macquarie), subject to conditions, from compliance with section 51 of the Securities Act 1978 (the Act) in respect of participatory securities issued under the Macquarie Highpoint Trust.

The Securities Commission considers that it is appropriate to grant the exemption because—

- Macquarie is required by Australian law to maintain its register of participatory securities in Australia. This is potentially in conflict with the requirement in section 51 of the Act that the register be maintained in New Zealand. The exemption resolves any conflict while ensuring that New Zealand investors have access to the same information as would ordinarily be available under section 51 of the Act by requiring that a copy of the register, which is available for inspection by investors, be kept at Macquarie's New Zealand office:
- the exemption is consistent with the policy of the Act requiring issuers to keep a register and to allow access to information on the register.

*Other Acts Conferring Exemption Powers*

- 38 While the greatest volume of exemptions is granted under the Securities Act 1978 and the Takeovers Act 1993, exemptions are also granted under a range of

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<sup>38</sup> Securities Commission <<http://www.seccom.govt.nz/notices/apply.shtml>> (last accessed 14 June 2008).

other Acts, such as: the Financial Reporting Act 1993; Social Security Act 1964; Biosecurity Act 1993; and Overseas Investment Act 2003.

- 39 However, some Acts contain exemption powers which in practice are not used. For instance, under section 7 of the Civil List Act 1979 the Minister of Finance may exempt the Governor-General or other specified persons from income tax. The LAC's understanding is that there are no current exemptions under this section. Many other such exemption powers are also likely to be dormant in this way.

### **Bills before the House**

- 40 Several Bills are before the House that, if enacted in their current form, will confer new exemption powers:

- **Real Estate Agents Bill 185-2 (2007)**, cl 12;
- **Reserve Bank of New Zealand Amendment Bill (No 3) 174-1 (2007)**, cls 157G and 157H;
- **Commerce Amendment Bill 201-1 (2007)**, cl 4 (repealing and replacing part 4 of the Commerce Act 1986, including a new 53ZF);
- **Climate Change (Emissions Trading and Renewable Preference) Bill 187-1 (2007)**, cl 67 (inserting new s 62F into Electricity Act 1992);
- **Public Health Bill 177-1 (2007)**, cl 322;
- **Financial Service Providers (Registration and Dispute Resolution) Bill 190-1 (2007)**, cls 6 & 42; and
- **Financial Advisers Bill 192-1 (2007)**, cl 136.

- 41 A further Bill before the House, the **Land Transport Management Amendment Bill 166-2 (2007)**, (cl 21 would insert a new s 26A into the principal Act) amends an existing exemption power by imposing certain publication requirements in respect of exemptions that the Agency with the exemption power grants to itself.

## GENERAL DISCUSSION

### Analogy with Henry VIII Clauses

42 A Henry VIII clause is a provision that enables a principal Act or any other Act to be amended, suspended, or overridden by delegated legislation. The LAC considers that exemption notices share something of the character of Henry VIII clauses.<sup>39</sup> There is little to distinguish the two in principle or effect. An exemption power delegates to the Executive the ability to exempt persons, groups or other categories of people or things from a principal Act. The effect of this is to change the practical scope or effect of the principal Act by delegated legislation. The exemption changes the ambit of the principal Act, and to that extent narrows or modifies Parliament's intention.

43 The Regulations Review Committee has in the past noted, in respect of Henry VIII clauses, that:<sup>40</sup>

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.

44 The LAC Guidelines do not deal directly with exemptions. However, they do consider Henry VIII clauses in some detail. Henry VIII clauses are a special subset of delegated legislation. The LAC Guidelines accept there is a case for amending primary legislation by delegated legislation. Indeed, Parliament is the supreme law-making body and may, in exceptional circumstances, consider that a Henry VIII clause is justified.<sup>41</sup> The Guidelines set out a number of factors which should be taken into account when considering whether such a clause is justified:<sup>42</sup>

- a provision allowing for the making of regulations to amend the empowering Act should only be used in exceptional circumstances and should not be used routinely in reforming legislation:

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<sup>39</sup> We refer here to significant or “full” exemptions, not to minor or mechanical concessions to individuals as discussed at paras 26 – 28.

<sup>40</sup> Regulations Review Committee *Report on the Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions allowing Regulations to Override Primary Legislation During a Transitional Period* [1995] AJHR I16C.

<sup>41</sup> *Legislation Advisory Committee Guidelines* (May 2001, Wellington) s 10.1.4, p 200.

<sup>42</sup> *LAC Guidelines*, s 10.1.8, p 206.

- a complex reform involving the amalgamation of a large number of statutes may justify the use of an empowering provision allowing for regulations to override the primary legislation. Technical amendments or a rewrite of an existing Act that does not amount to a substantial change in the principles and context do not justify such use:
- a regulation-making provision that provides for regulations to override primary legislation should be drafted in the most specific and limited terms possible and must at all times be consistent with and support the provisions of the empowering Act:
- that any such provisions should be limited in time. Statutory provisions permitting primary legislation to be modified by transitional regulations should generally be subject to a sunset clause of 3 years:
- regulations made under such a provision should also be subject to the sunset clause set out in the empowering provision or, where that is not considered feasible, subject to confirmation by Parliament:
- a provision for consultation may be appropriate.

45 It is the LAC's view that the principles that apply to Henry VIII clauses are also relevant to exemptions. Just as the use of Henry VIII clauses may be appropriate in rare circumstances, in certain circumstances it also may be appropriate for Parliament to delegate to the Executive an exemption power.

46 However, like Henry VIII powers, exemption powers should be used with care. Exemptions should not be the norm. When they are granted, this should be in accordance with specified criteria. There should be good reasons for granting exemptions, and these reasons should be made clear.

### **Key Principles behind the Legitimate Use of Exemptions**

47 The LAC considers that exemptions should be used only when there are good reasons for their use. In our view, several factors contribute to whether there are good reasons to employ exemptions in any particular circumstance.

48 The first principle is foreseeability. It can be difficult when designing an Act to lay down at the level of general principle, ahead of time, a set of provisions that will cover *all* circumstances that may eventually arise. If an area is complex or is rapidly changing and evolving, it can be difficult to predict all the circumstances which will arise in the future. An Act may work well for some time, only for difficulties to arise at a later time due to an unforeseen, and quite

possibly unforeseeable, development. In such an area, legislation needs to be flexible, so that it can respond to changes as they arise.

- 49 This leads to the second key principle: urgency. The mere fact that an area is not completely foreseeable does not on its own justify the use of exemptions. In many areas, if an unforeseen circumstance develops, the most appropriate response is likely to be to let Parliament amend the principal Act itself, or to let the Executive formally amend the regulations. No constitutional issues arise here – clearly Parliament can amend its own Acts whenever it wishes, and the Executive can amend regulations. However, there is a time factor involved in Parliament amending an Act or the Executive amending a regulation. These approaches may take too long.
- 50 Furthermore, the LAC notes here that while it may be necessary to exempt an individual from a general provision because of an individual’s particular circumstances, this does not mean that there is necessarily anything wrong with the general provision. Some unforeseen circumstances are one-off occurrences – the best and most efficient way to address some of these may be through a one-off exemption from a general provision, rather than trying to reframe a general provision in an Act to accommodate a particular individual or circumstance. These kinds of situations are different, however, from a possible situation where, over a course of time, similar “exceptional” circumstances arise repeatedly, all requiring exemptions. Indeed, if a type of exemption needs repeatedly to be granted in similar circumstances, it is not actually unforeseen, and there is a strong case for amending the provision itself.
- 51 This leads into a third principle: frequency of change. Exemptions are more likely to be necessary in areas that change very frequently. If an area changes infrequently, it is less onerous to adapt the law to these changes by amending the primary Act or altering the regulations. However, if an area is subject to more frequent changes, and there is some urgency to adapting the law to these changes, then the use of exemptions may be warranted. In some areas, not all circumstances are foreseeable.

- 52 A fourth related principle is that of hardship. In situations where enforcing a rule or requirement upon a particular person or body would be impracticable or unreasonable or would cause that person or body unnecessary or disproportionate hardship, an exemption may be justified.
- 53 A fifth principle also comes into play when determining whether the use of exemptions is appropriate in a particular area: significance. If an area changes in a way that would require significant changes to the law, at a policy or other level, there is a strong case to be made for making those changes via an amending Act rather than by an exemption. However, if the law needs to be adapted in only a minor or inconsequential way, there is a much weaker case for requiring that change to be made by statute. The legal principle *de minimis non curat lex* is relevant here – the law does not concern itself with trifles. Most “trifling” cases are at the bottom of the scale and are really concessions rather than exemptions. Consider section 178 of the Gambling Act 2003:

**178 Gambling equipment must be kept in casino venue**

- (1) Gambling equipment relating to the operation of a casino must be kept by the holder of the casino operator's licence in the casino venue.
  - (2) The Secretary may, on application by the holder of a casino operator's licence,—
    - (a) exempt the licence holder from compliance with subsection (1) in respect of specified gambling equipment; and
    - (b) permit the licence holder to temporarily remove specified gambling equipment from the casino venue.
  - (3) The Secretary may impose conditions on an exemption or permission under subsection (2) (for example, conditions relating to the security of the equipment or the period of its removal).
- 54 Subsection (2) of this provision allows the Secretary for Internal Affairs to grant an exemption from the requirement in subsection (1) that all gambling equipment relating to the operation of a casino must be kept at the casino venue. In the LAC’s view, it would be strange to insist that an exemption of this kind must only be made by an amending Act. This subsection allows the Secretary the discretion to make a limited concession to an individual person. The possible exemption only relates to one subsection. It is similar to the other kinds of discretions that are often delegated to officials by Acts. It just happens to be worded as an exemption. The provision could just as easily have been worded:

“The Secretary may require that gambling equipment relating to the operation of a casino must be kept by the holder of the casino operator’s licence in the casino venue”. This would give the Secretary a similar, in fact broader, discretion, but it is not an exemption power.

55 This discretion to grant a concession to an individual person seems to be in line with what the LAC Guidelines say about delegating discretionary powers to officials.<sup>43</sup> This is in the nature of applying the law to facts, not making law. The Secretary is not exercising a wide discretion; the decision is not high in policy-making content.

56 The LAC considers that minor or low level mechanical types of changes or exceptions of this kind are much more likely to justify the use of exemptions than are wider, more policy-laden decisions.<sup>44</sup>

### **Exemptions Should not be the Norm**

57 While acknowledging that the granting of exemptions may be justifiable where there is good reason, the LAC advises a cautious approach to their use. Exemptions are not appropriate when addressing large matters of general policy application. It would be improper to deal with such matters via an exemption rather than by an amending Act.

58 The body with the exemption authority must not, in effect, be legislating rather than granting an exemption. This is a difficult line to draw. One indicator that can help identify whether an exemption has crossed the line from exempting into legislating is to look at whether it is a complete exemption from the Act or regime, or whether it is a more minor exemption, and is subject to conditions.

### **Recommendations Regarding Bills that Contain Exemption Powers**

59 The LAC considers that there are several safeguards that could be used to ensure that exemption empowering provisions are only included in Acts when they are strictly necessary. Our first recommendation in this respect is that when

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<sup>43</sup> *LAC Guidelines*, s 8.2.2, p 160.

<sup>44</sup> Indeed, as was discussed above at paras 26 – 28, we think these kinds of minor concessions to individuals are in a separate category from more significant exemptions. As we discuss at paras 74 – 97, we do not think such minor concessions are regulations for the purposes of disallowance.

a proposed Bill that includes an exemption power is transmitted to Cabinet for approval before introduction, the Cabinet Paper should draw attention to that fact, and should set out the reasons why inclusion of such a power is necessary and set out what conditions and criteria should be imposed with regard to any exemptions.

60 Similarly, we recommend that the Cabinet Paper accompanying any proposed regulation that contains an exemption power should note this and explain why the power is necessary.

61 Our third recommendation is that the Explanatory Note of any Bill containing an exemption power should also set out a similar explanation of why an exemption power is necessary, and what conditions and criteria will apply.

### **Exemptions Less Likely to “Legislate” if Subject to Conditions**

62 Some exemptions are subject to conditions. Often these conditions are similar to the existing law, but with one or two deviations. Exemptions of this more limited kind are less likely to be inappropriate than are very wide-reaching exemptions. Empowering Acts deal with conditions in a range of ways. At the most permissive end of the scale, some Acts confer exemption powers without mentioning conditions at all. Slightly further along the scale are the many Acts that broadly allow exemptions to be subject to conditions, but do not require that be done, and do not set out what those conditions might be. These are often worded such that the exempting person or body can grant exemptions “upon such conditions as he or she thinks fit”<sup>45</sup> or “upon such conditions as he or she considers appropriate”<sup>46</sup> or according to some other similar wording.<sup>47</sup>

63 Further along the scale are empowering provisions that offer slightly more guidance as to what conditions might be imposed, although imposition of

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<sup>45</sup> Such as the Biosecurity Act 1993, s 69D(3); Charities Act 2005, s 43(2).

<sup>46</sup> Such as the Biosecurity Act 1993, s 69D(1); Civil Aviation Act 1990, s 37(1); Land Transport Act 1998, ss 13(1) and 166(1); and Maritime Transport Act 1994, ss 17(1) and 395(1).

<sup>47</sup> For instance, the Biosecurity Act 1993, s 80D; Civil List Act 1979, s 7(3); Crown Entities Act 2004, s 157; Engineers Registration Amendment Act 1944, s 9(2); Health Act 1956, s 118(e); Smoke-free Environments Act 1990, s 26(4); Video Recordings Act 64(1); Disabled Persons Employment Promotion Act 1960, s 41; Motor Vehicles Sales Act 2003, s 27(1); National Expenditure Adjustment Act 1932, s 51A; Railways Act 2005, s 59(h); Agricultural Compounds and Veterinary Medicines Act 1997, s 8B(2).

conditions is still not mandatory. For instance, section 157(3) of the Crown Entities Act 2004 provides that an exemption granted by the Minister of Finance under subsection (2) “may be granted subject to any conditions the Minister thinks fit (which may include the condition that the statement of intent or annual report of 1 of the parents [of the exempted subsidiary] must cover the multi-parent [exempted] subsidiary)”.<sup>48</sup>

- 64 At the far end of the scale, Acts can set out conditions that *must* accompany exemptions. For instance, the Public Finance Act 1989, s 45L(3)(a) allows the Minister to exempt an entity from the requirement to include certain statements in its final report, subject to two mandatory conditions.<sup>49</sup>
- 65 An exemption that is subject to mandatory conditions is very different from a complete exemption from one set of requirements under a provision in return for requiring compliance with a whole set of requirements that run counter to the Act or are significantly different (for instance, a new regime). In such cases, the body may, in effect, be closer to legislating than to exempting.

### **Considerations or Criteria for the Granting of Exemptions**

- 66 The LAC’s view is that an Act empowering any exemptions should specify the grounds or principles upon which they may be granted. The Act itself should set out clear criteria for, or considerations that must be taken into account regarding, the granting of exemptions.
- 67 These criteria should at least require that exemptions must be for, or consistent with, the purposes of the Act. An empowering Act should make it clear that exemption powers must be exercised consistently with its purposes and objects. However, if possible, the Act should go further and also contain more specific criteria that exemptions must meet. It is desirable that the Act should set out a clear purpose. However, the LAC accepts that, in practice, such purpose statements may be expressed at a high level.
- 68 For instance, section 6(3) of the Wine Act 2003 sets out the criteria that a Minister must have regard to in deciding whether to recommend the Governor-

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<sup>48</sup> Crown Research Institutes Act 1992, ss 16(3A) and 17(4) are very similar provisions.  
<sup>49</sup> See Appendix IV for full text of the section.

General by Order in Council grant an exemption under subsection (1).<sup>50</sup> Similarly, section 24B of the Conservation Act 1989 sets out two sets of detailed criteria, according to which exemptions can be granted.<sup>51</sup> Another example of a provision setting out clear criteria for the granting of an exemption is section 69D(2) of the Biosecurity Act 1993.<sup>52</sup>

- 69 Some exemption powers mention broad criteria that must be satisfied in order for the exemption to be granted. Acts set out various kinds of criteria for the granting of exemptions. Various, a decision-maker may grant an exemption provided that: “it would be unduly onerous” to comply with a requirement,<sup>53</sup> the decision-maker would be “justified in doing so”,<sup>54</sup> or the decision-maker “is satisfied” that they “should” grant the exemption.<sup>55</sup>

### **Exempting Body should be Required to Give Reasons**

- 70 The LAC considers that empowering Acts should also generally require reasons to be given for the granting of any exemption. This requirement follows logically from the requirement that Acts should set out criteria for the granting of exemptions; the reasons an exempting body would give for an exemption would be framed in terms of how the specified criteria were met in the particular set of circumstances. The exempting person or body, in effect, would be required to demonstrate that it had reached the decision to grant an exemption in accordance with statutory criteria. That is, that it had acted within the scope of its statutory discretion. Such a process is much more transparent than if a body reaches a decision but gives no reasons, or only general reasons.
- 71 The Takeovers Act 1993 is a good model to consider here. The Takeovers Panel is required to give reasons for granting an exemption.<sup>56</sup> These reasons must include, broadly, why it is appropriate to grant the exemption and, more

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<sup>50</sup> See Appendix IV for full text of the section.

<sup>51</sup> See Appendix IV for full text of the section. Another examples is the Biosecurity Act 1997, ss 7A(1) and (2).

<sup>52</sup> See Appendix IV for full text of the section. Other examples include the Biosecurity Act 1993, s 80D; Smoke-free Environments Act 1990, s 26(3); Animal Products Act 1999, ss 9(2) and 9(3).

<sup>53</sup> Crown Entities Act, s 157(2).

<sup>54</sup> Insurance Companies’ Deposits Act 1953, s 6A(2)

<sup>55</sup> Video Recordings Act 1987, s 64(1).

<sup>56</sup> Takeovers Act 1993, s 45(4A).

specifically, how the exemption is consistent with the objectives of the Takeovers Code. The Panel appears to have developed a practice of providing full reasons in accordance with this requirement. These generally include a summary of the facts as well as the reasons why an exemption was granted. Often these run to several pages. For example, at the end of the Takeovers Code (Abano Healthcare Group Limited) Exemption Notice 2008 (SR 2008/128) is the following:

#### **Statement of reasons**

This notice applies to acts or omissions occurring on or after 12 February 2008.

Abano Healthcare Group Limited (Abano) is a code company by virtue of being a party to a listing agreement with New Zealand Exchange Limited (NZX) and having voting securities quoted on the NZSX market.

Crescent Capital Partners Limited (Crescent) made an offer dated 17 December 2007 for all of the shares in Abano not already held by Crescent (the Crescent offer). The Crescent offer was despatched on 19 December 2007.

A complaint was made to the Takeovers Panel (the Panel) alleging that Crescent had made a statement, in its offer document in respect of its intentions in relation to Abano, which was inconsistent with other statements made by Crescent in December 2007 to the media and to certain Abano shareholders.

The Panel and Crescent entered into discussions to find an appropriate resolution to the potential misinformation in the market. As a result of those discussions, Crescent issued a statement to NZX on 21 December 2007 and posted it to Abano shareholders on 24 December 2007 clarifying its intentions in relation to Abano should its takeover offer be successful (the clarifying statement).

The Panel and Crescent also agreed that any Abano shareholder who had accepted the offer on or before 27 December 2007 should be afforded an opportunity to withdraw its acceptance. A small number of Abano shareholders were identified as having accepted the Crescent offer on or before 27 December 2007. On 12 February 2008, Crescent wrote to those Abano shareholders asking whether they wished to withdraw their acceptances in light of the clarifying statement. Each of those shareholders that indicated that it wished to withdraw its acceptance (a withdrawing shareholder) was given a right to withdraw its acceptance.

The Crescent offer period closed on 14 March 2008.

In order to vary the Crescent offer to permit a withdrawing shareholder to withdraw its acceptance of the offer, the Panel has granted an exemption from the following rules of the Takeovers Code:

- rule 20 (requiring the Crescent offer to be made on the same terms to all shareholders):

- rule 27 (prescribing the circumstances in which the Crescent offer may be varied):
- rule 28(1) (requiring a notice of variation to be given to every Abano shareholder and to NZX):
- rule 29 (specifying the time period in which the Crescent offer may be varied).

The Panel considers that the granting of those exemptions is appropriate and consistent with the objectives of the Takeovers Code because—

- a withdrawing shareholder accepted Crescent's offer before receipt of the clarifying statement and therefore its decision to accept the Crescent offer was not based upon the offer information as clarified by the clarifying statement; and
- the giving of the withdrawal right to a withdrawing shareholder, as facilitated by the granting of the exemptions, provides an efficient and effective solution to acceptances having been given during a period when there was or may have been misinformation in the market; and
- the exemptions will not disadvantage other Abano shareholders because the variation to the terms of Crescent's offer is specific only to a withdrawing shareholder. Requiring a notice of variation to be sent to all Abano shareholders and to NZX is not necessary and would create confusion; and
- in order to be effective, the right of withdrawal needed to be exercised before the closing date of the offer.

72 This model is a useful one. Clearly, if any exempting body is required to give reasons including an explanation of how the exemption is consistent with the objectives of the empowering Act, it should not be possible for the exemptions it grants to constitute legislating, rather than exempting.

#### QUESTIONS POSED BY THE RRC

73 Having discussed what we consider to be the broad issues regarding the use of exemptions, we turn now to the specific questions put to us in Dr Worth's letter. As noted in Dr Worth's letter, the first six questions posed by the RRC are not directly relevant to the LAC as this committee does not administer legislation. We address then questions 7 – 10.

## **Question 7: Should all exemption instruments be regulations for the purposes of disallowance?**

### **What is a Regulation for the Purposes of Disallowance?**

*Change in the Definition of “Regulations” in the Regulations (Disallowance) Act 1989*

- 74 It is worth noting here that the definition of regulation was amended as from 1 November 1999 by s 37 of the Interpretation Act 1999.<sup>57</sup> The earlier, now replaced, definition of regulations was in effect from 19 December 1989 to 31 October 1999. As of 1 November 1999, this definition was replaced with the current definition. The change in the definition of “regulations” that is of interest with regards to exemptions is the replacement of para (c) in the earlier definition with para (b) in the current version. The original para (c) defined as regulations a number of kinds of instruments which extend or vary the scope or provisions of any Act, provided that they were made by the Governor-General in Council, or by any Minister of the Crown. The current para (b) is somewhat broader. It defines regulations to include the same kinds of instruments which extend or vary the provisions of any Act, but does not specify that the instruments must have been made by the Governor-General or a Minister.

### **What is an “Instrument”?**

- 75 When interpreting para (b) of the definition of “regulations” in the Regulations (Disallowance) Act 1989, there is a question as to what types of documents are “instruments”. The term is not defined in the Interpretation Act 1999. However, interpreted very broadly, an instrument is simply “a piece of paper with writing or printing on it; a document”.<sup>58</sup> We consider that broad interpretation to be appropriate in the context of the definition of regulations in para (b).
- 76 The Australian Legislative Instruments Act 2003 defines “legislative instruments”<sup>59</sup> in terms of their substance or effect, rather than their form. A legislative instrument is one that is of a “legislative character”,<sup>60</sup> such that it

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<sup>57</sup> The earlier, now replaced, definition of regulations, and the current definition, are set out in Appendix IV.

<sup>58</sup> Martin Cutts *Making Sense of English in the Law* (Chambers, Edinburgh, 1992) 111.

<sup>59</sup> The United Kingdom is another jurisdiction that defines the term in statute. The Statutory Instruments Act 1946, s1, defines the term “statutory instruments”.

<sup>60</sup> Legislative Instruments Act 2003, s 5(1)(a).

“determines the law or alters the content of the law, rather than applying the law in a particular case”<sup>61</sup> and “has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.”<sup>62</sup> The LAC considers that the Australian approach should apply in New Zealand. Theoretically, any kind of written document, even a letter, could be an instrument, and could fall within paragraph (b) of the definition of “regulations” in the Regulations (Disallowance) Act 1989. The determinative question is the instrument’s effect, not its form – it must vary or extend the scope of an enactment.

77 The test in the Regulations (Disallowance) Act 1989 of whether or not an instrument varies or extends the scope or provisions of an enactment can be very difficult to apply. While many cases are clearly identifiable under the test, applying the test at the margins can be very difficult. **The LAC considers that attention should be turned to clarifying the definition of what instruments are regulations for the purposes of disallowance.**

78 **The LAC also considers that each statute that confers an exemption power should spell out clearly what form the exemption instrument should take. It should also state clearly whether the instrument is a regulation for the purposes of the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989.**

*Difference between Exemptions and Minor Concessions to Individuals*

79 As discussed earlier in this submission, the LAC considers that some discretionary decision-making powers that are worded as “exemptions” are really more in the nature of minor, mechanical concessions to individuals that do not change the law, but rather apply it. We think that the answer to the question of whether such minor concessions are, or should be, regulations for the purpose of disallowance is different to the answer in respect of more significant exemptions. For clarity, this part of the submission will use the terms “minor concessions” and “exemption” to refer to these two distinct concepts.

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<sup>61</sup> Legislative Instruments Act 2003, s 5(2)(a).  
<sup>62</sup> Legislative Instruments Act 2003, s 5(2)(b).

- 80 It can be difficult to speak about the differences between these two concepts in a way that is not circular. The feature that truly distinguishes them is that minor concessions are just that: minor concessions to individuals that do not alter the scheme or effect of the Act as a whole; whereas exemptions that are regulations for the purposes of disallowance do alter the scheme or effect of the Act.
- 81 The question of whether exemptions should be treated as regulations for the purposes of disallowance is difficult. The answer does rest on the application of the definition of regulations in the Regulations (Disallowance) Act 1989. The problem is difficult not because of any problem with that definition per se, but because it can be difficult to decide whether some exemptions satisfy that definition. Most “exemptions” either clearly do alter the scope of an Act, or clearly do not. But some inhabit a more difficult grey area in between.
- 82 However, the LAC considers that, in general, exemptions that extend or alter the scope of an Act are regulations for the purposes of disallowance, and also, that they should be. Conversely, we also consider that minor concessions to individuals that do not alter the scope of an Act do not fall under para (b) of the definition of regulations in the Regulations (Disallowance) Act 1989. In general, we also do not think that they need to be subject to disallowance. We will first address exemptions before turning to minor concessions.

### **Exemptions that are Regulations for Disallowance Purposes versus Minor Concessions to Individuals that are not**

#### *Exemptions*

- 83 The LAC agrees with the view of the former Chief Parliamentary Counsel, George Tanner QC, as set out in Dr Worth’s letter, in which he considers the definition of regulations in the Regulations (Disallowance) Act 1989:<sup>63</sup>

The purpose of para (b) [*of the definition of regulations: instruments that vary or extend the scope or provisions of legislation*] is to catch instruments that, in effect, alter legislation. Instruments that exempt persons or classes of persons from the operation of an Act or regulations may be regarded as varying the scope or provisions of the Act or regulations and so fall within para (b). Examples are exemptions granted under the Securities Act 1978, the Securities Amendment Act 1988, the Overseas Investment Regulations 1995, and the Takeovers Act

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<sup>63</sup> Mai Chen and George Tanner *Delegated Legislation* (NZLS Seminar May 2002) 8.

1993. An instrument that extends the meaning of an existing definition would also be covered.

- 84 Our view is that many exemptions do vary or extend the scope or provisions of legislation, and as such are regulations for the purpose of the Regulations (Disallowance) Act 1989. In light of this, the current law requires exemptions that vary or extend the scope of legislation to be laid before the House of Representatives within 16 sitting days of the day on which they are made.<sup>64</sup>
- 85 Furthermore, we do not only make the descriptive observation that such exemptions that vary or extend the scope of an Act are regulations for the purpose of disallowance. We make the normative statement that this is desirable. Exemptions of this kind, by definition, have the effect of allowing the Executive to change the scope and effect of principal legislation; that is, to alter the effect of Acts passed by Parliament. Exemption instruments of this kind should be laid before the House and the House should have the opportunity to inspect and, if it wishes, to disallow them.

*Minor Concessions to Individuals*

- 86 On the other hand, the LAC does not consider that minor concessions to individuals are regulations for the purposes of disallowance. A minor concession does not vary or extend the scope or provisions of the empowering Act, or any other Act. That is what makes it a minor concession. Recalling one of the examples listed earlier at paragraph 27, it seems simply incorrect to suggest that a school principal who, under section 27 of the Education Act 1989, “exempts” an individual student from legal attendance requirements for a short period given certain criteria, has in fact varied or extended the scope or provisions of the Education Act. What has occurred is much more minor than that. The principal has simply exercised a reasonable discretion, of a fairly routine and mechanical nature, that is necessary for the day to day administration of the school. It is very likely that most school principals, from time to time, may need to exercise discretion of this kind. Within any school, a number of these “exemptions” might be required in a year.

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<sup>64</sup> Regulations (Disallowance) Act 1989, s 4.

87 Furthermore, in general we do not consider that minor concessions to individuals *should* be subject to disallowance. We do not think that a school principal, “exempting” an individual student from attendance for a short period, should have to table written notice of that decision in Parliament, or that that “exemption” needs to be subject to disallowance. A minor concession to an individual, or a waiver, that can be made by a letter is simply a mechanical, administrative discretionary power that happens to have been worded as an exemption. It does not fall within the definition of regulations for the purposes of disallowance, nor should it.

*Analogy between Minor Exemptions and Other Discretions such as Deadline Extensions*

88 A minor concession of this kind, though phrased as an “exemption”, is similar to a range of other kinds of administrative discretions. For instance, many tribunals have discretions to grant extensions to deadlines regarding the filing of applications for appeals or rehearing. Section 139AZB of the Education Act 1989 concerns appeals to the District Court of decisions made by a Disciplinary Tribunal or Teachers Council. Subsection (2) specifies that an appeal under the section must be made within 28 days of receipt of written notice of a decision or “any longer period the court allows”.<sup>65</sup> The provision could just as easily be worded as an exemption, imposing 28-day deadline, but according the court the power to grant exemptions from that requirement. Deadline extension powers of this kind are very common. Extending a deadline of this kind is not lawmaking, but law application.

*Distinguishing Exemptions from Minor Concessions*

89 In practice, distinguishing real exemptions from minor concessions to individuals is a matter of looking at an exemption’s effect and deciding whether it does fall within the definition of regulations in the Regulations (Disallowance) Act 1989. This can be difficult in practice when an “exemption” occupies the grey area between exemptions that are regulations for disallowance purposes and those that are minor concessions.

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<sup>65</sup> The section is set out in full in Appendix IV.

90 Some of the considerations set out in the LAC Guidelines regarding the appropriate use of deemed regulations may offer some guidance here.<sup>66</sup> A significant consideration is “the number of people affected [by the “exemption”] and the impact on these people”.<sup>67</sup> If an instrument will have a material effect on the rights of a large group of people then it is more likely to alter the scope or effect of the Act, and thus to be a regulation for the purposes of disallowance. If it affects only one person, or a small number of people, it may not alter the Act’s effect, and may be just a minor concession.

91 A second consideration suggested by the Guidelines is the exemption’s timeframe. Generally speaking, if an “exemption” applies for only a short period, particularly if it applies only to an individual applicant, it is less likely to alter the scope or effect of the Act, and so looks more like a minor concession. A third consideration is whether, for whatever reasons, there is a “need for Parliamentary control” over the “exemption”.<sup>68</sup> If a matter is mechanical or minor, it probably does not alter the effect or scope of the Act, and so there is little need for Parliament to be able to inspect or disallow it.

*The Use of “Ouster Clauses” to Remove Exemption Notices from the Ambit of the Regulations (Disallowance) Act 1989*

92 The LAC would like to note here an interesting point about the use of a kind of “ouster clause”, designed to remove exemption notices from the ambit of the Regulations (Disallowance) Act 1989. While this does not appear to be a widespread phenomenon, it is of some concern. We are aware of at least two Acts that authorise exemption notices to be granted, but expressly state that those exemptions are not regulations for the purposes of disallowance. Section 81 of the Electricity Industry Reform Act 1998 gives the Commerce Commission the power to exempt businesses or persons from the application of the Act. Subsection (7) states that:

An exemption under this section is not a regulation within the meaning of the Regulations (Disallowance) Act 1989.

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<sup>66</sup> These considerations are set out above at paragraph 44 of this submission.

<sup>67</sup> *LAC Guidelines*, s 10.4.1, p 214.

<sup>68</sup> *LAC Guidelines*, s 10.4.1, p 214.

Section 43(5) of the Charities Act 2005 is a similarly worded “ouster clause”.<sup>69</sup>

- 93 It is not certain whether these ouster clauses would indeed be effective should the Regulations Review Committee wish to scrutinise exemptions made under these Acts, or should the House wish to disallow them. The scrutiny functions of the RRC complement the power of judicial review of delegated legislation. A person contemplating making an application for judicial review might first consider whether he or she should seek the Committee’s assistance. If an “ouster clause” of the kind above were successful, that would have the effect of limiting the resources open to a person contemplating judicial review. That is, the person would not be able to seek the assistance of the Committee as they would otherwise have been able. Arguably, removing a regulation from the scrutiny of the RRC is undesirable in much the same way as it is undesirable to “oust” the prospect of judicial review. Both are important checks on the Executive’s exercise of delegated legislative power.
- 94 However, assuming that the “ouster clauses” in the Electricity Industry Reform Act 1998 and Charities Act 2005 would indeed have their intended effect, two points can be made. First, that the fact that ouster clauses have been included in these two Acts seems to support the view of the former Chief Parliamentary Counsel, discussed above, that exemption notices are regulations for the purposes of disallowance. Logically, at least in the eye of the drafter, it would only be necessary to include an ouster clause stating that exemption notices are *not* regulations for the purpose of the Regulations (Disallowance) Act 1989, if exemption notices ordinarily would be regulations for the purposes of the Act.
- 95 Secondly, the LAC considers that ouster clauses of this kind are inappropriate. As we have discussed already in this submission, exemptions alter the practical effect of an Act. They allow the executive to alter the effect of an Act of Parliament, and are in this sense analogous to Henry VIII clauses. The LAC

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<sup>69</sup> Interestingly, the Financial Reporting Act 1993, s 35B(6) provides that:  
Each [exemption] notice published in the Gazette under this section is a regulation for the purposes of the Regulations (Disallowance) Act 1989 but is not a regulation for the purposes of the Acts and Regulations Publication Act 1989.  
Similar provisions are set out in a number of Acts including: the Foreshore and Seabed Act 2004, s 26(10); Plumbers, Gasfitters, and Drainlayers Act 2006, ss 12(4) and 52(3); Airport Authorities Act 1966, s 9A (4); and the Insurance Companies’ Deposits Act 1953, s 22E(6).

Guidelines acknowledge that the use of Henry VIII clauses may be appropriate in rare circumstances. Similarly, our view is that it may be appropriate for Parliament to delegate an exemption power when there is good reason to do so. However, exemptions powers should only be granted when there are good reasons and, when used, they should be used in accordance with specified criteria.

96 Exemption powers need to be treated carefully. It is difficult to see any justification for removing exemption notices from the ambit of the Regulations (Disallowance) Act 1989. Such instruments should be subject to scrutiny of the RRC and should be subject to disallowance by the House – after all, they alter the effect of an Act of Parliament.

97 The LAC considers that exemption notices (as opposed to minor concessions to individuals) do fall under the Regulations (Disallowance) Act 1989. We would not like to see the proliferation of “ouster clauses” of the kind in the Electricity Industry Reform Act 1998 and Charities Act 2005.

**Question 8: Do you agree that the principles relating to the delegation of lawmaking power should generally apply to provisions empowering exemptions?**

98 Yes. The LAC’s view is that the principles that relate to the delegation of lawmaking power apply equally to provisions empowering exemptions.

99 The LAC accepts that exemptions are a useful and necessary tool in certain circumstances. However, we think that their they should be used only where there are good reasons – that is, where there are real problems foreseeing future circumstances, where there is urgency, where the need for change is frequent, where the a compliance with a requirement would be impracticable or unreasonable or would cause hardship, or where exemptions would be of a minor or inconsequential nature.

**Question 9: Should all instruments of exemption be required to be published?**

100 The LAC does not consider that all instruments of exemption should be required to be published in the Statutory Regulations series. We do consider that some

exemption notices should be published in the SR series. However, this should be determined on a case by case basis, rather than imposed as a blanket requirement. The LAC considers that exemptions that have significant or wide ranging effects should be published in the SR series. However, exemptions that are minor concessions to individuals and of real interest only to those individuals may not need to be published in the SR series. Some of these more minor exemptions might be published instead on a website for instance. Very minor concessions to individuals may not even require publication of that kind. **We recommend that each empowering Act should specify whether an exemption granted under it needs to be published in the SR series, published in some other way, or not published at all.**

101 We acknowledge that the exemptions granted under even a single Act can occupy a sliding scale. For instance, exemptions under the Securities Act and Takeovers Act can be very significant, altering the effect of the Act or having significant implications for a sector or the wider public. For instance, when AMP demutualised in 1998, it was exempted from sections 33(1)(a) and (c),<sup>70</sup> 37,<sup>71</sup> and 37A<sup>72</sup> of the Securities Act, and from the Securities Regulations,<sup>73</sup> in respect of any offer of interests in the superannuation scheme known as the New Zealand Retirement Trust.<sup>74</sup> Although this exemption technically related only to a single body (that is, AMP), in reality, hundreds of thousands of policy holders in New Zealand were all affected by the exemption. In one sense, the demutualisation and associated exemptions was a one off event, but in practice it had a significant impact.

102 However, in other cases, exemptions under the same Act can much closer resemble concessions to individuals for a limited time. For instance, clause 5 of

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<sup>70</sup> Section 33(1)(a) and (c) provided that: “(1) No security shall be offered to the public for subscription, by or on behalf of an issuer, unless— (a) The offer is made in, or accompanied by, an authorised advertisement that is an investment statement that complies with this Act and regulations;... or (c) The offer is made in, or accompanied by, a registered prospectus that complies with this Act and regulations.”

<sup>71</sup> Section 37 sets out the circumstances in which irregular allotments of securities are void.

<sup>72</sup> Section 37A sets out the circumstances in which irregular allotments of securities are voidable.

<sup>73</sup> Except regulations 8 to 23.

<sup>74</sup> Securities Act (AMP Superannuation (NZ) Limited) Exemption Notice 1998 (1998/182), cl 3; Securities Act (AMP Superannuation (NZ) Limited) Exemption Notice (No 2) 1998 (1998/316), cl 3.

the Securities Act (ABN AMRO Australia Pty Limited) Exemption Notice 2007 (SR 2007/341) exempts ABN AMRO and every person acting on its behalf from the requirement in clause 4(1)(a) of Schedule 7 of the Regulations to hold an annual general meeting. The exemption expires on the close of 16 November 2012.<sup>75</sup> This is an exemption from a single requirement in the regulations, applying for a limited time and only to ABN AMRO and its employees. This appears to be a minor concession to an individual entity.

*Case by Case Approach at the Level of Empowering Provisions*

- 103 While recognising that exemption instruments issued under a single exemption power may occupy a sliding scale, the LAC considers that the question of publication requirements should be approached on a case by case basis with regard to empowering provisions in Acts, not at the level of exemptions themselves.
- 104 For instance, an Act's exemption power could state that exemption notices granted under it are regulations for the purposes of the Acts and Regulations Publication Act and as such are required to be published in the SR series. We prefer this approach to the alternative of specifying that every exemption instrument must be individually assessed to determine how it should be published. The former approach ensures certainty, consistency and accessibility and prevents fragmentation – all “exemptions” granted under the Act will be published in the SR series.
- 105 One reason for this is that, in a sense, exemptions granted under an exemption power can accumulate in a way analogous to the way the common law is built up. A person or body considering applying for an exemption may wish to look at previous exemptions that have been granted to see whether they are likely to also be exempted. From this perspective, it is desirable that all of these “precedent” exemptions are published in the same way. In this way, a person who finds some Securities Act exemptions in the SR volumes can be assured that he or she is not missing others because all are published in the series. He or

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<sup>75</sup> Securities Act (ABN AMRO Australia Pty Limited) Exemption Notice 2007 (SR 2007/341), cl 3.

she will be able to get a complete picture of the decisions that have been made on the exemption power.<sup>76</sup>

- 106 This makes the choice of a default publication mechanism very important. This might require an assessment of the kind of exemption that is likely to be the most common. The LAC recognises that this means that some exemptions that are more in the nature of minor concessions to individuals may be published, as well as more significant exemptions. But we consider that the case by case approach should, for practical reasons, be applied at the level of empowering provisions, rather than the level of exemption instruments.

#### *Other Modes of Publication*

- 107 The LAC recognises that it may be appropriate to publish some classes of exemption in a forum other than the SR series. One such forum is the website of the body or official that is authorised to grant the exemptions. Online publication is a way of making exemption instruments accessible to the public. In fact, it should be noted that publication in the SR series and on a website are not mutually exclusive. The Takeovers Panel and Securities Commission both make good use of their websites for publishing exemption instruments or summaries of such instruments. This is notwithstanding the fact that exemptions under the Takeovers Act and Securities Act are also published in the SR series. Other forums besides online publication may also be appropriate.

#### *Criteria for Deciding the Appropriate Means of Publication*

- 108 Chapter 10, Part 4 of the LAC Guidelines discusses criteria for deciding how deemed regulations should be published. The criteria are based on principles recommended by the RRC for considering the controls that should be in place regarding the publication of deemed regulations. The government endorsed these principles.
- 109 We consider that these criteria offer some guidance in relation to the publication of exemption instruments. With regard to deemed regulations, the presumption is that they should be published in the SR series. There must be good reason for

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<sup>76</sup> Another approach would be to make all exemptions under an Act available on a website, so that they are accessible as a collection there.

publication in a different forum (or “separate publication”). The LAC considers that the following points are relevant to the question of whether an exemption should be published in the SR series, or in some other forum:

- an exemption should be published in the SR series if it affects the scope or impact of an Act in a way that is of general application or interest to the public. On the other hand, if an exemption affects only a small class of individuals, separate publication of some form may be appropriate:
- separate publication of an exemption instrument may be appropriate if it:
  - contains technical matters relevant to a particular group, and the benefits of separate publication outweigh the costs of separate publication:
  - the exemption implements detailed provisions of international agreements or standards:
  - the exemption is a short-term or emergency measure:
- every submission to Cabinet seeking approval for the introduction of a Bill containing an exemption power under which exemption instruments may be separately published should state the reasons for separate publication:
- every Bill that provides for separate publication of exemption instruments should state the reasons for separate publication in the explanatory note:
- a provision for separate publication of exemption instruments should specify—
  - that notice must be given in the *Gazette* and any other publication relevant to the individuals or organisations affected:
  - that the exemption instrument is available for inspection free of charge and for purchase at a reasonable price (wherever possible):
  - that notice is given of the places where the instrument can be inspected or purchased.

110 The LAC also notes here that there is always scope under section 14 of the Acts and Regulations Publication Act 1989 to publish as if it were a regulation an instrument that is not defined as a regulation for the purposes of the Act. That is, even if an empowering provision specifies that an exemption instrument does

not have to be published in the SR series, it is always open to the Attorney-General or Chief Parliamentary Counsel to direct that it will be published in the SR series.

**Question 10: What limits or safeguards should apply to the terms and conditions that may be imposed in relation to the grant of an exemption?**

- 111 The LAC considers that several key safeguards are crucial in relation to exemptions.

*Purposes of the Act to be Clear*

- 112 First, as discussed earlier, it is desirable that the empowering Act sets out clear purposes for the Act itself and any exemptions granted under it. We accept that such purpose statements may in practice be expressed at a high level. The person or body with the power to grant exemptions under the Act must consider whether, and be sure that, any exemption granted under the Act is consistent with the purposes and objectives of the Act.

*Clear Criteria for the Granting of Exemptions*

- 113 Secondly, as considered earlier in this submission, the provision that empowers the granting of exemptions should set out clear criteria for the making of that decision. Those criteria should at the very least include a requirement that granting the exemption is consistent with the objectives of the empowering Act. This is implied in all cases anyway, but the LAC considers it would be useful to make this requirement express. Ideally, in addition, further criteria and guidance should also be included.

*Requirement to Give Reasons*

- 114 Thirdly, as discussed at paragraphs 70 – 72 of this submission, the LAC considers that when an exemption is granted, reasons should be given. A possible template for this requirement is section 45(4A) of the Takeovers Act 1993 (which was inserted, as from 1 June 2001, by section 10(4) Takeovers Amendment Act 2001 (2001 No 30)):

(4A) The Panel’s reasons for granting an exemption under subsection (1) must include—

- (a) why it is appropriate that the exemption is granted; and

- (b) how the exemption is consistent with the objectives of the takeovers code.

115 The use of exemptions should not be the norm. They should be used only when there is good reason to. In order to assess whether a decision-maker has made an appropriate decision in granting an exemption, that decision-making needs to be transparent – the reasons behind it must be clear.

#### *Sunsetting of Exemptions*

116 Fourthly, the LAC considers that exemptions that are not time limited are not desirable. Exemptions under the Securities Act often contain an expiry provision.<sup>77</sup> We recommend that, in general, exemption instruments should contain a sunset clause providing for expiry of the exemption within five years. All exemption empowering provisions should state that exemptions granted under them should expire after a specified period. This would provide a valuable control on the use of exemptions, as they would need to be revisited within that period in order to decide whether to renew the exemption, let it expire, or to amend the Act itself.

#### CONCLUSION

117 The Regulation Review Committee's Inquiry into the use of instruments of exemption in primary legislation is an important project. The LAC recognises that exemption powers can provide useful and necessary flexibility in areas which change rapidly, frequently or unforeseeably. They can also provide a means for mechanical or minor changes that need not be made via legislative amendment. We do not think they should be the norm. But their use can be appropriate in a range of circumstances given the proper safeguards. The LAC stresses the importance of three four safeguards: first, that the purposes of the empowering Act are set out clearly; secondly, that the Act sets out criteria for the granting of exemptions; and thirdly, that the granter of an exemption is required to set out the reasons behind the decision; and fourthly, that exemptions should expire after a specified period. We also recommend that

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<sup>77</sup> For instance, Securities Act (Airedale Developments (Auckland) Limited) Exemption Notice 2004 (SR 2004/197), cl 3.

empowering Acts should set out how exemptions granted under them will be published.

## APPENDIX I: ACTS EMPOWERING THE GOVERNOR-GENERAL TO GRANT EXEMPTIONS

The following is a non-exhaustive list of Acts that confer exemption powers on the Governor-General, as referred to in para 17:

- **Animal Products Act 1999**, s 9 (in which “the Governor-General may, from time to time, by Order in Council made on the recommendation of the Minister, exempt from the operation of all or any of the provisions of this Act” a range of animal products and materials, or producers, exporters etc of such products);
- **Airport Authorities Act 1966**, s 9A(1)(k);
- **Co-operative Companies Act 1996**, s 32 (according to which the “Governor General may from time to time, by Order in Council, and on such terms and conditions as may be specified in the Order, exempt a company registered under this Act from compliance with the provisions of sections 209 to 209B of, and paragraph (i) of Schedule 4 to, the Companies Act 1993).
- **Corrections Act 2004**, s 114 (according to which a prisoner’s phone call is exempt from monitoring under the Act if it is to a person of a kind or description that is exempted from monitoring under the Act by the Governor-General by Order in Council (being an order specifying a purpose or purposes for which the exemption is granted));
- **Credit Contracts and Consumer Finance Act 2003**, s 138(1)(a) (according to which the Governor-General, by Order in Council, may make regulations exempting any class of credit contract from being a consumer credit contract, and prescribing terms and conditions applying to the exemption);
- **Crown Entities Act 2004**, ss 142, 143, 153, 173 and schedules 1 and 2;
- **Crown Minerals Act 1991**, s 105;
- **Disabled Persons Employment Promotion Act 1960**, s 4;
- **Education Act 1989**, s 91H;
- **Electricity Act 1992**, s 169(1)(29);
- **Financial Transactions Reporting Act 1996**, s 56;
- **Gas Act 1992**, s 54(1)(p);

- **Goods and Services Tax Act 1985**, s 5(6E)(b)(iii) (which defines the term “payment in the nature of a grant or subsidy” for the purposes of subsection (6D));
- **Health Act 1956**, 118(e);
- **Income Tax Act 2007**, s YA 1 (which defines the term “unit trust”);
- **Machinery Act 1950**, s 3(1)(g).
- **Motor Vehicle Sales Act 2003**, ss 6 and 27;
- **National Expenditure Adjustment Act 1932**, s 51A;
- **New Zealand Public Health and Disability Act 2000**, Schedule 3, cl 44(3) and schedule 6, cl 29(3);
- **Overseas Investment Act 2003**, s 61(1)(j);
- **Radiation Protection Act 1965**, s 31;
- **Railways Act 2005**, s 59(h);
- **Secondhand Dealers and Pawnbrokers Act 2004**, s 84;
- **Toxic Substances Act 1979**, s 82(1)(p);
- **Weights and Measures Act 1987**, s 41;
- **Wine Act 2003**, s 6.

## APPENDIX II: ACTS EMPOWERING MINISTERS TO GRANT EXEMPTIONS

Below is a non-exhaustive list of Acts that confer exemption powers on Ministers, as referred to in para 18:

- **Biosecurity Act 1993**, s 69D (which provides, subject to certain criteria, that “where any action taken in accordance with any provision in Part 6 of this Act in an attempt to eradicate any organism would be in breach of Part 3 of the Resource Management Act 1991, the responsible Minister may exempt the actions taken in relation to that organism from the provisions of the Resource Management Act 1991 for up to 20 working days”);
- **Civil List Act 1979**, s 7 (according to which the Minister of Finance may exempt the Governor-General and other specified people from any public or local tax, duty, rate, levy or fee);
- **Civil Union Act 2004**, schedule 2;
- **Conservation Act 1987**, s 24B;
- **Crown Entities Act 2004**, ss 143, 142, 153 and schedules 1 and 2;
- **Crown Research Institutes Act 1992**, ss16(3A), 17;
- **Diplomatic Privileges and Immunities Act 1958**, s 19;
- **Health Act 1956**, s 92E (according to which the Minister may grant exemptions from compliance with the provisions of sections 92B(1), 92B(2) and 92D(1));
- **Human Tissue Act 2008**, s 60;
- **Insurance Companies’ Deposits Act 1953**, s 6A(2);
- **Overseas Investment Act 2005**, ss 20 and 61(1)(k) (under s 20, the relevant Ministers may, by notice in the *Gazette*, exempt an overseas investment from the criterion set out in s 16(1)(f) of the Act);
- **Ozone Layer Protection Act 1996**, s 8(1);
- **Public Finance Act 1989**, s 45L;
- **Securities Markets Act 1988**, s 36E;
- **Smoke-free Environments Act 1990**, ss 26 and 26A;
- **Video Recordings Act 1987**, s 64.

### APPENDIX III: ACTS EMPOWERING OFFICIALS AND BODIES TO GRANT EXEMPTIONS

Below is a non-exhaustive list of Acts that confer exemption powers on officials and bodies, as referred to in para 19:

- **Agricultural Compounds and Veterinary Medicines Act 1997**, s 8A;
- **Animal Products Act 1999**, s 167
- **Animal Welfare Act 1999**, s 48
- **Cadastral Survey Act 2002**, s 47(5) (according to which the Surveyor-General may grant exemptions from the requirements of standards or rules under Part 5 if he or she considers compliance would be impracticable or unreasonable);
- **Charities Act 2005**, s 43 (according to which the Commission may grant exemptions to entities from compliance with s 17; Part 2, Subpart 2; or any regulations made under the Act on whatever terms/conditions the Commission thinks fit);
- **Children and Young Persons Act 1974**, s 73;
- **Civil Aviation Act 1990**, s 37;
- **Civil Union Act 2004**, Schedule 2;
- **Clean Air Act 1972**, s 21;
- **Companies (Bondholders Incorporation) Act 1934-35**, s 22(2)(f);
- **Crown Pastoral Land Act 1998**, s 18;
- **Food Act 1981**, 8F;
- **Forests Act 1949**, s 67ZP;
- **Education Act 1989**, ss 11PA, 21, 22, 22A, 26, 159Q, 159U;
- **Electricity Industry Reform Act 1998**, s 81;
- **Employment Relations Act 2000**, s 24 (under which the Chief Executive may issue a certificate of exemption from requirements of s 23);
- **Estate and Gift Duties Act 1968**, s 72 (under which the Commissioner can grant an exemption for gifts of maintenance or education of family members from the obligation to pay gift duty);

- **Fencing of Swimming Pools Act 1987**, s 6 (under which a Territorial Authority may, by resolution, grant an exemption from requirements of the Act in the case of a particular pool);
- **Films, Videos, and Publications Classification Act 1993**, s 44 (under which the Classification Office can exempt a restricted publication from requirements of the Act);
- **Financial Reporting Act 1993**, ss 4B, 35A and 35B (under which the Securities Commission may grant exemptions from the requirements of certain sections of the Act, and the Registrar of Companies may grant exemptions to overseas companies);
- **Fisheries Act 1996**, s 186Q;
- **Forests Act 1949**, s 67ZP;
- **Friendly Societies and Credit Unions Act 1982**, ss 15(2); 45(2); 74(2);
- **Gambling Act 2003**, s178(2) (under which the Secretary can grant exemptions from the requirements of s 178(1));
- **Hazardous Substances and New Organisms Act 1996**, ss 19 and 25C;
- **Insurance Companies' Deposits Act 1953**, s 22E;
- **Law Practitioners Act 1982**, s 6 (under which the Council of the New Zealand Law Society may grant exemptions from the requirements of ss 64, 66, and 67(1). However, note that this Act is due soon to be repealed by Lawyers and Conveyancers Act 2006);
- **Marine Mammals Protection Act 1978**, s 17(2);
- **Marriage Act 1955**, s 32(c);
- **Meat Board Act 2004**, s 51 (under which the Board may grant written exemption from the requirements of s 48);
- **New Zealand Horticulture Export Authority Act 1987**, ss 40 and 41 (under which the Authority can, respectively, grant an exemption from the s 34 requirement to hold an export licence, and from the general requirement that exporting operations be carried out in such a way as not to prejudice the current export marketing strategy for the product to which the licence relates);
- **Plumbers, Gasfitters and Drainlayers Act 2006**, s 55(6);
- **Retirement Villages Act 2003**, s 41 (under which the Registrar may exempt operators from s 38 requirement to appoint statutory supervisor);
- **Securities Act 1978**, s 5(5);

- **Social Security Act 1964**, ss 60Q(7) and 105;
- **Student Loan Scheme Act 1992**, s 38AJ (under which the Commissioner can grant an exemption to the 183-day requirement in s 38AB);
- **Takeovers Act 1993**, s 45, (under which the Takeovers Panel may grant exemptions from the Takeovers Code);
- **Wine Act 2003**, ss 11 and 39 (under which the Director-General can grant a limited exemption from the requirement to have a wine standards management plan, and can by notice under s 120 exempt certain consignments from the requirements of part 2, subpart 3 regarding the export of wine).

## APPENDIX IV: FULL TEXT OF CITED LEGISLATION

### **Public Finance Act 1989, s 45L<sup>78</sup>**

#### **45L Minister may allow certain information to be included in another entity's annual report if operations transferred**

- (1) This section applies if—
  - (a) an entity is disestablished during the entity's financial year; and
  - (b) that entity's operations are transferred to 1 or more entities; and
  - (c) those operations are, at the time of the transfer, to be carried out on substantially the same terms by the entity to whom they are transferred.
- (2) The Minister may exempt the entity from whom operations are transferred from the requirement to include in its final report—
  - (a) a statement of service performance; and
  - (b) a full report on its operations.
- (3) The Minister may grant an exemption under subsection (2)—
  - (a) on the condition that—
    - (i) the information referred to in subsection (2)(a) and (b) is subsequently included, at the end of that financial year, in the annual report of the entity to whom the operations are transferred; and
    - (ii) the entity to whom those operations are transferred has not been exempted under section 45I; and
  - (b) only if the Minister is satisfied that the inclusion of that information in the other entity's annual report in accordance with paragraph (a)(i) does not unreasonably compromise accountability for the performance of those operations during that financial year.

### **Wine Act 2003, s 6<sup>79</sup>**

#### **6 Exemptions from application of Act**

- (1) The Governor-General may from time to time, by Order in Council made on the recommendation of the Minister, exempt any of the following from all or any of the provisions of this Act:
  - (a) any class, description, or kind of wine:

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<sup>78</sup> Referred to in para 64. This section is an example of an exemption power that is subject to mandatory conditions.

<sup>79</sup> Referred to in para 68. Subsection (3) of this section is an example of a provision setting out criteria for the granting of an exemption.

- (b) any commodity or any class, description, or kind of commodity from which wine is made:
  - (c) any 1 or more classes or descriptions of winemakers or exporters of wine:
  - (d) any 1 or more classes or descriptions of operations, premises, or places in relation to the making or export of wine:
  - (e) any combination of the above.
- (2) The Minister may not recommend the making of an order under this section unless satisfied, having regard to the matter to be exempted, that the risk to human health and to trade of providing the exemption is negligible.
- (3) In determining whether or not to recommend the making of an order the Minister is to have regard to the following:
- (a) the desirability of maintaining consistency between New Zealand wine standards, New Zealand Food Standards, and any relevant standards, requirements, or recommended practices that are accepted internationally:
  - (b) the desirability of maintaining consistency with New Zealand's international obligations:
  - (c) the desirability of facilitating access to overseas markets:
  - (d) the need to protect the health of consumers of wine:
  - (e) the relative cost of having the exemption or not having it, who bears the cost, and the positive and negative impacts on New Zealand consumers:
  - (f) such other matters as the Minister considers relevant.

...

**Conservation Act 1989, s 24B(1)-(3)<sup>80</sup>**

**24B Power to declare certain dispositions to be exempt from section 24**

- (1) Subject to subsection (2) of this section, the Minister may at any time before the disposition by the Crown of any land extending along and abutting the bed of any river or stream (being a bed of not less than 3 metres in width), by notice in the Gazette, declare that section 24 of this Act shall not apply to the proposed disposition.
- (2) The Minister may make a declaration under subsection (1) of this section only if satisfied—
  - (a) That the land has little or no value in terms of the purposes specified in section 24C of this Act; or

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<sup>80</sup> Referred to in para 68. Subsections (1) to (3) of this section set out two sets of criteria according to which exemptions can be granted.

- (b) That any value the land has in those terms can be protected effectively by another means.
- (3) Notwithstanding subsection (2) of this section, where the Minister proposes to grant an exemption under this section in respect of the renewal of a lease or licence under the Land Act 1948 but is precluded from doing so by that subsection, the Minister may grant the exemption if satisfied that the proposal is equitable and in the public interest.

...

**Biosecurity Act 1993, s 69D(2)**<sup>81</sup>

...

- (2) Before granting an exemption under this section [from a rule in a national pest management strategy made under this Act], the Minister must be satisfied in the circumstances of each case that—
  - (a) The requirement has been substantially complied with and that further compliance is unnecessary; or
  - (b) The action taken or provision made in respect of the matter to which the requirement relates is as effective or more effective than actual compliance with the requirement; or
  - (c) The prescribed requirements are clearly unreasonable or inappropriate in the particular case; or
  - (d) Events have occurred that make the prescribed requirements unnecessary or inappropriate in the particular case,—
 and that the granting of the exemption will not significantly prejudice the attainment of the objectives of the strategy.

...

**Regulations (Disallowance) Act 1989, s 2** [Old version of the definition of regulations: in effect from 19 December 1989 to 31 October 1999]<sup>82</sup>

**2 Interpretation**

In this Act, unless the context otherwise requires,—

...

Regulations means—

- (a) Regulations, rules, or bylaws made under the authority of any Act—

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<sup>81</sup> Referred to in para 68. Subsection (2) of this section sets out criteria according to which exemptions can be granted.

<sup>82</sup> Referred to in para 75.

- (i) By the Governor-General in Council; or
- (ii) By any Minister of the Crown:
- (b) Instruments, other than Acts of Parliament, which revoke regulations:
- (c) Orders in Council, Proclamations, notices, Warrants, and instruments of authority made under any Act by the Governor-General in Council or by any Minister of the Crown which extend or vary the scope or provisions of any Act:
- (d) Orders in Council bringing into force, or repealing, or suspending any Act or any provisions of any Act:
- (e) Rules or regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand:
- (f) Instruments deemed by any Act to be regulations for the purposes of the Regulations Act 1936 or this Act.

**Regulations (Disallowance) Act 1989**, s 2 [Current version of the definition of regulations: in effect from 1 November 1999]<sup>83</sup>

## 2 Interpretation

In this Act, unless the context otherwise requires,—

...

Regulations means—

- (a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
- (b) An Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
- (c) An Order in Council that brings into force, repeals, or suspends an enactment:
- (d) Regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:
- (e) An instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or this Act:
- (f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

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<sup>83</sup> Referred to in para 75.

**Education Act 1989, s 139AZB<sup>84</sup>**

**139AZB Appeals**

- (1) The teacher who is the subject of a decision by the Disciplinary Tribunal made under section 139AU(2) or section 139AW, or a decision by the Teachers Council made under section 139AZC, may appeal that decision to a District Court.
- (1A) The Complaints Assessment Committee may, with the leave of the Teachers Council, appeal to a District Court against a decision of the Disciplinary Tribunal made under section 139AU(2) or section 139AW.
- (2) An appeal under this section must be made within 28 days of receipt of written notice of the decision, or any longer period that the court allows.
- (3) Subsections (3) to (7) of section 126 apply to every appeal under this section as if it were an appeal under subsection (1) of section 126.

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<sup>84</sup> Referred to in para 88.

## APPENDIX V: DR WORTH'S LETTER

See following pages.