

# Referring to standards

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*IN REGULATION AND GUIDANCE*

June 2019

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## When to use this operational policy

This operational policy applies when you are providing advice:

- to MBIE about whether a particular standard should be incorporated by reference in a regulation
- about incorporating a standard in a safe work instrument (SWI), or
- about referring to a standard in guidance material (including *Gas Codes of Practice and Electricity Codes of Practice*).

## What does this operational policy cover

This operational policy describes:

- Why we refer to standards in guidance and regulation
  - the benefits of using standards.
- Why we take a considered approach to referring to standards
  - the drawbacks of using standards.
- What to consider when providing advice about incorporating a standard by reference.
- Our approach to referring to standards in guidance.
- Accessibility and quality requirements for standards.

**This operational policy applies when we are considering incorporating or referring to part of a standard or a full standard.**

## Background

### What are standards?

Standards are published documents that establish specifications or characteristics to ensure the safety, performance and reliability of goods, services, and systems. Standards are developed by:

- national or international standards organisations
- regulators, and
- industry groups, and firms (private standards)<sup>1</sup>

Standards are generally proprietary documents that duty holders must purchase, or pay to access.<sup>2</sup>

### Incorporation by reference

What is meant by incorporation by reference into regulations or SWI?

Incorporation by reference means creating obligations by referencing another document in primary or delegated legislation. The whole or part of a standard can be incorporated by reference. When a standard is incorporated by reference in regulation such as a SWI, the relevant text of the standard has legal effect.

Depending on how the provision is drafted, incorporation can:

- make compliance with the standard mandatory, or
- establish the standard as an acceptable way to comply with the legislation.

When a standard that is incorporated by reference refers to another standard, the cross-referenced standard doesn't have legal effect.

<sup>1</sup> See appendix A for more information about standards and material that can be incorporated by reference.

<sup>2</sup> Note: Members of the public can view standards incorporated in legislation free of charge at MBIE (standards incorporated in regulations) and WorkSafe (standards incorporated in SWIs). The Electrical Workers Registration Board has a commercial arrangement with Standards New Zealand to allow registered electricians to access relevant New Zealand standards for free.

## THE LEGISLATION ACT 2012

Section 49 of the *Legislation Act 2012* provides that 'material', including a 'standard', can be incorporated by reference in regulation. The Act places a number of obligations on the agency responsible for the instrument.

Obligations include:

- public consultation prior to incorporation
- providing access to the incorporated material, and
- retaining a certified copy of material incorporated by reference<sup>3</sup>

Under section 53, changes to material after incorporation have no legal effect, unless they are specifically incorporated by a later instrument.<sup>4</sup>

## Referring to standards in guidance

Our guidance refers to standards that establish technical specifications, and/or performance requirements, for the design and manufacture of plant, substances, and structures. We don't generally refer to standards that contain general health and safety guidance.

It's not mandatory for duty holders to conform to a standard referred to in guidance (unless the standard is also incorporated in legislation). However, duty holders should adopt a risk management approach that achieves the same (or a higher) level of health and safety protection as the referenced standard.

## Why do we refer to standards?

### The benefits of using standards

#### STANDARDS ESTABLISH DETAILED TECHNICAL REQUIREMENTS

Standards can be used to establish detailed requirements for products and processes. For example: characteristics, test methods, acceptable measurement procedures, labelling requirements and performance specifications.

Describing detailed requirements can make legislation and guidance long and complex. Incorporating or referencing standards instead helps keep legislation and guidance focused on core requirements without lots of technical detail.

#### STANDARDS CAN SUPPORT DUTY HOLDERS TO MEET GENERAL AND PERFORMANCE BASED DUTIES

The *Health and Safety at Work Act 2015* (HSWA), follows the Robens model for health and safety regulation. HSWA establishes broad general duties; the regulations made under HSWA describe performance based requirements, process requirements, and prescriptive requirements.

The Robens model gives duty holders the flexibility to determine how to meet their obligations. This can create uncertainty for some duty holders who are not sure how risks should best be managed. When standards give detailed health and safety requirements this can help duty holders.

The *Gas (Safety and Measurement) Regulations 2010* and the *Electricity (Safety) Regulations 2010* use standards to establish specific requirements, and establish a health and safety performance benchmark for safe installations and appliances.

<sup>3</sup> Legislation Act 2012, s 52.

<sup>4</sup> Legislation Act 2012, s 53.

## **UTILISING WORK OF TECHNICAL EXPERTS AND COMMITTEES**

Referring to existing standards avoids duplicating technical work completed by national or international experts and standards organisations. Following international standards or regional standards (that are aligned with international standards) help New Zealand businesses keep pace with changes in health and safety, and energy safety related technology and practices.

## **FLEXIBILITY AND TECHNICAL DEVELOPMENTS**

Standards organisations periodically update their standards as technologies change and more is learnt about how to control risks (including lessons learned from incident investigations).

Incorporating standards in SWIs allows WorkSafe to establish technical or detailed requirements that can be updated more quickly than regulations. This approach is beneficial where technical matters are likely to change frequently.

## **ACCEPTANCE AND COMPLIANCE**

Industry groups are likely to accept and support standards developed following a consensus approach, with input from industry, government and other stakeholders.

New Zealand, Australian and joint AS/NZS standards are developed following a consensus approach. Draft New Zealand standards are available for public comment for a specified period (usually eight weeks). Standards proposed to be withdrawn are available for comment for two weeks. Drafts of these standards can be downloaded free during the consultation period.

## **TO MEET INTERNATIONAL TRADE OBLIGATIONS AND FACILITATE TRADE**

As a member of the World Trade Organisation (WTO), New Zealand must ensure technical regulations are not unnecessarily obstructive to trade. The WTO encourages regulators to use relevant international standards, guides or recommendations as the basis for developing technical regulations or conformity assessment procedures.

International standards and conformance assessment<sup>5</sup> help reduce trade barriers caused by different certification requirements across the world. They reduce the costs associated with testing and approval; this facilitates the introduction of new products in to the New Zealand market and the export of New Zealand products. For example, standards in the *Gas (Safety and Measurement) Regulations 2010* and *Electricity (Safety) Regulations 2010* facilitate trade of electrical and gas products with New Zealand's major trading partners.

## **Why do we think carefully before referring to standards?**

The drawbacks of using standards

### **COST OF ACCESSING THE LAW**

Incorporation by reference creates a compliance cost for duty holders, who must pay to access information about their obligation, and how to meet them. This expense can be onerous for small businesses and can impact workers as the main beneficiaries of the PCBU's health and safety obligations.

The same cost and access issues arise when referring to standards in guidance. The cost of standards may mean that PCBUs are unable, or unwilling, to purchase standards and make them available to workers.

<sup>5</sup> Conformance assessment is testing or other activities that determine whether a process, product, or service complies with the requirements of a specification, technical standard, contract, or regulation.

## UPDATING LEGISLATIVE REFERENCES

Delays in updating references to standards may impact on a duty holder's ability to adopt new safe practices and technologies described in amended standards.

Duty holders must comply with the version of the standard cited in regulations or an SWI. WorkSafe can update references to standards in SWIs to ensure they remain up to date. However, the process of updating references to standards in regulations may take longer and requires Cabinet approval.

## OTHER CONCERNS

- Not all standards are readily available to purchase. Standards that create legal obligations should be easily accessible (but not necessarily freely available).
- Some private standards are not drafted so that the requirements are clear and measureable. When a standard is incorporated into legislation, the obligations it creates should be clear and enforceable.
- Standards are technical documents used by technical specialists; they don't provide accessible general information to workers and the public.
- The development process for some standards is not tripartite, workers and their representatives may not be aware of the standard project, or have the resources to participate.
- The high volume of cross-referencing between standards creates uncertainty for duty holders about which standards they need to access.

## How do we decide whether to recommend a standard is incorporated by reference?

### The Legislation Guidelines

We will follow the Legislation Guidelines<sup>6</sup> when deciding whether to incorporate material by reference in regulations or SWIs. The guidelines allow incorporation by reference when:

- the document is long or complex, covers technical matters only, and few people are likely to be affected
- the document has been agreed with one or more foreign governments, cannot easily be recast in an Act or secondary legislation, and deals only with technical or operational details of a policy already approved by Parliament
- it is appropriate for the document to be formulated by a specialist government or inter-governmental agency or private sector organisation, rather than by Parliament or Ministers
- the document has been developed by an organisation for use in respect of a product (such as motor vehicles) manufactured by it or its members.

<sup>6</sup> Legislation Design and Advisory Committee, Legislation Guidelines (2018 ed, Parliamentary Counsel, Wellington, 2018) at 15.3.

## Our approach

We ask:

- Is there is a high level of risk to health and safety from an activity, plant, equipment or hazardous substance? Does a standard describe a prescriptive approach to effectively manage the risk?
- Are there good reasons to establish an acceptable way to comply with a performance based duty? Are there good reasons to create mandatory obligation or list prescriptive approaches?

### Should we use the standard to create an acceptable way to comply or prescriptive obligation?

Consider using a standard to create an **acceptable way to comply** when:

- there are a number of ways to manage the risk, and
  - some duty holders have the expertise and resources to determine how to comply with a performance based duty
  - some duty holders do not have the time, resources and expertise to determine how to comply, or prefer the certainty of adopting an acceptable way to comply, or
- an international agreement requires New Zealand to recognise a standard.

Consider using a standard to create a **prescriptive obligation** when:

- the risk is best managed by one or a limited number of methods
- there is a risk of serious injury, death or catastrophic harm if the risk is not managed effectively
- the high level of risks warrants a prescriptive approach (at the cost of flexibility for duty holders), and
  - the standard reflects an effective practice that is widely accepted and followed by the regulated community, or
  - a specific or consistent design is required for plant or installations.

### Should the standard be incorporated in regulations or a SWI?

Consider recommending incorporation in **regulations** (to MBIE) when:

- the standard is fundamental to the functioning of the regulatory regime
- the standard relates to a stable technology
- the safety requirements in the standard are unlikely to change substantively when the standard is reviewed.

**Note:** MBIE leads regulatory review and development work.

Consider incorporation in a **SWI** when:

- the standard relates to technology that is changing rapidly
- the standard is likely to be updated quickly
- we have determined that the standard should be incorporated in regulations and consider a SWI to be an appropriate interim measure until the regulations are reviewed.

## When do we refer to refer to standards in guidance?

### THE STANDARD IS INCORPORATED IN LEGISLATION

It is appropriate to refer to standards incorporated by reference where they are incorporated into legislation or SWI. Duty holders need to be aware of standards that describe mandatory requirements, benchmark requirements, or an acceptable way to comply with a performance requirement.

### THE STANDARD COVERS TECHNICAL MATTERS RELEVANT TO UPSTREAM PCBUS

We may refer to technical standards that establish specifications and/or performance requirements for designing, manufacturing, installing and testing plant, equipment and structures. These standards are intended to be used as a resource for relevant upstream PCBUS.

## **THE STANDARD ESTABLISHES ACCEPTABLE DESIGN SPECIFICATIONS**

Our guidance may also list acceptable design standards for certain high risk plant and equipment, and personal protective equipment. This list is for PCBUs and workers to refer to when making purchasing decisions. PCBUs do not need to access or purchase these standards.

Circumstances where it is not appropriate to refer to standards

## **HIGH QUALITY INFORMATION IS AVAILABLE IN THE PUBLIC DOMAIN**

We won't refer to standards if other appropriate sources of information are freely available. For example, we prefer to adopt or adapt relevant guidance material produced by the Health and Safety Executive (United Kingdom) or Australian health and safety regulators.

## **Accessibility and quality requirements for standards**

This section describes our quality and access requirements for standards incorporated by reference in SWIs or referred to in guidance.

### **STANDARDS MUST ALIGN WITH OUR OBJECTIVES**

The technical requirements described in a standard must align with our strategic and harm prevention objectives. Standards must be suitable for application in New Zealand and provide a proportionate response to the risk.

### **STANDARDS MUST BE REASONABLY ACCESSIBLE**

Standards incorporated or referred to, must be accessible to duty holders. Standards are accessible if they are readily available to purchase and available in an official language of New Zealand.

### **STANDARDS SHOULD BE DEVELOPED USING A ROBUST PROCESS**

We will prefer standards that have been developed using a transparent, robust and tripartite process that includes public consultation.

Standards organisations such as the International Standardisation Organisation, the International Electrotechnical Commission, Standards New Zealand, and Standards Australia, have transparent and robust processes for developing standards.

We will prefer standards that are developed by technical committees with experts from industry, academia, consumer associations, NGOs and government. International standards and domestic standards are also subject to public consultation. The final text of standards is agreed by consensus of the technical committee. This approach provides some assurance that the resulting standards reflect the views of a wide range of stakeholders, and is not biased towards the interests of one particular party.

### **IS THERE AN APPLICABLE INTERNATIONAL STANDARD?**

This section applies when incorporating or referring to a standard which could restrict trade.

New Zealand is party to the *World Trade Organisation Technical Barriers to Trade Agreement* (TBT). Article 2.4 of the TBT includes an obligation to base technical regulations on relevant international standards. Where there is an appropriate international standard (or New Zealand adoption of an international standard), we will refer to or incorporate that standard.

However, in some circumstances we may decide not to refer to an international standard because it:

- isn't appropriate for application in New Zealand
- doesn't establish an appropriate level of health and safety protection
- doesn't align with the policy intent for the SWI or guidance.

The TBT allows parties to develop specific technical requirements to achieve a legitimate purpose, such as the protection of health and safety.

For more information about international standards and the TBT obligations see: [A Regulator's Guide to New Zealand's Technical Barriers to Trade Obligations](#)

### **STANDARDS MUST CREATE CLEAR REQUIREMENTS THAT CAN BE ENFORCED**

This consideration applies when considering incorporation by reference. The standard should be well drafted and establish requirements that are enforceable. The language used should be clear, direct and precise. The text should differentiate between mandatory requirements that have legal effect and explanatory content which does not have legal effect.

## Appendix 1: Terms and relevant legislation

In this Policy the term 'standard(s)' is used to describe standards developed by:

- national and international standards organisations
- regulators in other countries, and
- private organisations.

**Note:** the term 'standard' is defined in the Standards and Accreditation Act 2012.

### Standards and Accreditation Act 2012 definitions

#### **standard**

- a. means a specification relating to goods, services, processes, or practices approved or adopted by a standards organisation; and
- b. includes modifications to any such specification.<sup>7</sup>

#### **standards organisation**

- a. the NZ Standards Organisation;
- b. an international, national, or regional organisation with functions similar to the NZ Standards Organisation.<sup>8</sup>

### Legislation Act 2012

The *Legislation Act 2012* provides the authority to incorporate a broad range of material by reference.

It provides the authority to incorporate the following material by reference:

- a. a standard, framework, code of practice, recommended practice, or requirement of an international organisation or a national organisation
- b. a standard, framework, code of practice, recommended practice, or requirement prescribed in any country or jurisdiction, or by any group of countries
- c. any other written material that deals with technical matters and that can reasonably be regarded as being too large or impractical to include in, or publish as part of, the instrument.

<sup>7</sup> Section 4, Standards and Accreditation Act 2015.

<sup>8</sup> Section 4, Standards and Accreditation Act 2015.

Published: June 2019

PO Box 165, Wellington 6140, New Zealand

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