



Australian Government
Attorney-General's Department

Civil Law Division

14/1468

16 April 2014

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
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Dear Ms Dunstone

Submission to inquiry into the Regulatory Powers (Standard Provisions) Bill 2014

Thank you for your letter of 1 April 2014 inviting the department to provide a submission addressing the Regulatory Powers (Standard Provisions) Bill 2014 (the Bill).

The department would like to provide the following information to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee).

Background

The key purpose of the Bill is to simplify and streamline the law by creating a standard set of provisions that provide for the exercise of monitoring and investigation powers by Commonwealth regulatory agencies, and enforcement provisions through civil penalties, infringement notices, enforceable undertakings and injunctions.

The provisions in the Bill can only be triggered in whole or in part by the governing legislation of a regulatory scheme.

There are a large number of regulatory schemes across the Commonwealth, each with its own governing legislation. This has resulted in inconsistency and duplication of provisions across the statute book and in the exercise of powers by regulatory agencies.

The application of standard provisions to Commonwealth regulatory regimes would benefit both regulators and those subject to regulation. Agencies that exercise powers across multiple regimes are less likely to make inadvertent procedural errors if the regimes provide for consistent powers and procedures. The result would be greater compliance and enforcement outcomes for the Commonwealth.

Standard legal frameworks would also help to reduce the unnecessary compliance burden for individuals and businesses that are subject to multiple regimes. Small differences between regimes make it more difficult for individuals and businesses to be aware of, and to exercise, their rights and obligations in compliance with various laws.

The Bill has been reintroduced after the Regulatory Powers (Standard Provisions) Bill 2012 (the 2012 Bill) lapsed at the end of the 43rd Parliament.

The 2014 Bill has a key point of difference from the 2012 Bill, in that it expressly preserves the privilege against self-incrimination and legal professional privilege. While the 2012 Bill did not propose abrogation of these privileges, the positive statements included in the 2014 Bill recognise the importance of protecting fundamental privileges which are enshrined in common law, and addresses the concern raised by some stakeholders that the 2012 Bill was silent on this issue.

Key issues raised by the Bills

The 2014 Bill addresses the concerns raised by the Committee in its examination of the 2012 Bill. At the time, the Committee was concerned that the provisions in the Bill could be triggered by a Regulation and this would not provide Parliament with an appropriate level of oversight. The Committee highlighted that the Bill should not be used as an opportunity for agencies to expand their powers without strong justification to the Government and to Parliament.

The 2014 Bill ensures that its provisions can only be triggered by primary legislation. This provides Parliament with the ability to closely scrutinise the ongoing suitability of powers made available to regulatory agencies.

It will be appropriate for some agencies to retain their existing powers to ensure they are able to continue to carry out specialised powers and functions.

It is important to highlight the policy intent and scope of this Bill. These can be summarised in three key points:

1. The Bill will not in itself make powers available to an agency.
2. It is not intended that the powers available through the application of this Bill would supersede an agency's existing powers. It is appropriate that agencies requiring specialised powers continue to operate under unique frameworks.
3. The provisions in the Bill are intended to only be triggered where they would provide appropriate and sufficient powers in the context of the particular regulatory scheme.

The Bill is not intended to be used as a vehicle for agencies to expand their powers without a justifiable need. As outlined earlier, there will be a high level of Parliamentary oversight of any proposal that seeks to trigger provisions in the Bill.

Agencies will need to give careful consideration as to whether or not the provisions in the Bill are suitable in the context of their particular regulatory scheme, either when setting up a new scheme, or when seeking to amend an existing scheme. To help ensure proper consideration to this, and provide greater transparency to Parliament, the Explanatory Memorandum to the current Bill directs that where another Bill seeks to trigger the standard provisions:

...the Explanatory Memorandum should clearly set out the relevant agency's current regulatory powers, a comparison with the powers in the Regulatory Powers Bill that will be triggered, and in the case of any expansion of the agency's powers, a detailed explanation of the reasons for the expansion of powers.

This seeks to address the key recommendations made by the Committee in relation to the 2012 Bill.

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has examined both the 2012 Bill and the Bill currently before Parliament. In its more recent report,¹ the Scrutiny of Bills Committee noted the changes to the Bill and the Explanatory Memorandum and thanked the Attorney-General for these changes.

The Scrutiny of Bills Committee has highlighted that clause 59 of the Bill may unduly trespass on personal rights and liberties. The provision provides that an investigation warrant may continue to have effect even if the authorised person, and all persons assisting, ceases the execution and leaves the premises. Additional authorisation is not required to continue to execute the warrant if the individuals who are executing the warrant are not absent for more than one hour, or up to 12 hours in an emergency situation.

As the Explanatory Memorandum to the Bill suggests, this provision provides flexibility to ensure that an authorised person can leave the premises if required, without the warrant ceasing to have effect. The provision contemplates that the execution of warrants may be interrupted by an emergency or dangerous situation. For example, this could be due to a fire alarm or bomb threat, or a threat or risk to personal safety. The 12 hour period would allow for proper precautions to be taken by the authorising officer and persons assisting, while the situation is dealt with. Examples of such circumstances include delay while the fire brigade inspects the property, or a police authority arriving on site to diffuse a potentially violent situation.

As the Scrutiny of Bills Committee has noted, the need for providing this flexibility in executing a warrant will depend on the context of the particular regulatory regime. Parliament will have the opportunity to scrutinise and seek further detail about any proposal that seeks to trigger this provision to ensure there is sufficient justification and procedural safeguards, for example, reporting requirements.

The Parliamentary Joint Committee on Human Rights (PJCHR) also examined and reported on both the 2012 Bill and the Bill currently before Parliament. In 2012, the PJCHR noted that the Statement of Compatibility with Human Rights did not provide sufficient detail about individual provisions and how these are likely to impact on human rights, and sought further clarification from the Attorney-General about how particular provisions impact on human rights.²

The department has ensured that the Statement of Compatibility accompanying the current Bill addresses the issues identified by the PJCHR. The PJCHR has welcomed the additional detail and the two key changes to the Bill (to remove the ability for regulations to trigger the provisions of the Bill, and the express preservation of the common law privileges).³ The PJCHR reiterated its previous conclusion that a final assessment of compatibility with human rights will need to be undertaken in the context of each regulatory scheme that seeks to trigger the Bill. This is consistent with the Statement of Compatibility for the Bill which acknowledges that:

The human rights implications will differ with each circumstance in which elements of the framework contained in this Bill are triggered. These must be considered specifically and in context.

¹ Alert Digest No. 4 of 2014 (26 March 2014).

² Sixth Report of 2012 (October 2012).

³ Fifth Report of the 44th Parliament (Bills introduced 17-20 March 2014).

Amendments contingent on the passage of the Bill

Two Bills were drafted to include amendments to trigger the relevant provisions of the Regulatory Powers (Standard Provisions) Bill 2012, in anticipation of its passage. This was consistent with the previous Government's intention that the provisions in the 2012 Bill be triggered where appropriate, to help streamline the statute book.

These Bills were passed by the previous Parliament but their commencement will now be contingent on the passage of the current Bill. The Acts are the:

- *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Act 2013*, and
- *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Act 2013*.

I appreciate the opportunity for the department to provide a submission addressing the Bill, and would be willing to provide any further information that the Committee may require.

Yours sincerely

Andrew Walter
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