



Australian Government

Department of Immigration and Citizenship

DIAC Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012

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people our business

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1.0 Introduction

1. The Department of Immigration and Citizenship (**the Department**) welcomes the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012 (**the Bill**) following the introduction of this Bill into the House of Representatives on 10 October 2012. On 28 November 2012 the Senate referred the Bill to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report.

2.0 Purpose of the Bill

2. The Bill provides a framework of standard regulatory powers that, once activated, would provide Commonwealth agencies and regulators with a suite of regulatory compliance and enforcement tools. The Bill sets out standard provisions, based on existing laws, which relate to:
 - monitoring and investigation powers (including entry, search and seizure);
 - civil penalty provisions;
 - infringement notices;
 - enforceable undertakings; and
 - injunctions.
3. Once enacted, the Bill would not itself change the regulatory provisions in other Commonwealth legislation. The provisions in the Bill would only have application to other Commonwealth Acts or legislative instruments once they are triggered by that other Act or legislative instrument. The powers in the Bill could be triggered in whole, or in part, in respect of a particular regulatory regime.
4. The Bill was developed by the Attorney-General's Department (**the AGD**) and the Office of Parliamentary Counsel (**the OPC**) as part of the *Clearer Laws* project, which aims to reduce complexity in legislation. Specifically, the Bill aims to:
 - cut the amount of Commonwealth legislation;
 - assist information gathering consistent with Australia's human rights obligations;
 - facilitate compliance with law; and
 - improve litigation outcomes.
5. On 5 July 2012, officers from the Department were invited to attend an information session by OPC who outlined the features of the Bill and provided officers with a limited exposure draft of the Drafting Direction in relation to Regulatory Powers.
6. In this information session, officers were made aware of the proposed implementation of the Bill, once enacted. In Stage One, new Bills or

legislative instruments that require investigation or enforcement powers of the kind available under the Bill, once enacted, would be drafted to trigger those provisions. In Stage Two, Acts and legislative instruments that have been drafted over the previous 18 months using precedents based on the Bill would be amended to remove those provisions and instead trigger the Bill once enacted. In Stage Three, where substantial amendment is required to existing investigation and enforcement regimes in current Acts and legislative instruments, those regimes will be reviewed and, if appropriate, amended to instead trigger the relevant measures in the Bill once enacted.

3.0 Regulatory regimes administered by the Department

7. Under the *Migration Act 1958* (**the Migration Act**), the Department regulates, in the national interest, the coming into, and presence in, Australia of non-citizens. In this context, the Department administers a number of regulatory regimes in relation to:
 - sponsorship obligations which is also known as the worker protection regime (Division 3A of Part 2);
 - duties of masters in relation to crews (Division 11 of Part 2);
 - offences in relation to entry into, and remaining in, Australia which includes the employer sanctions regime (Division 12 of Part 2);
 - chasing, boarding etc. ships and aircraft (Division 12A of Part 2);
 - reporting on passengers and crew of aircraft and ships (Division 12B of Part 2);
 - examination, search and detention (Division 13 of Part 2);
 - monitoring compliance with student visa conditions (Division 14A of Part 2);
 - disciplining registered migration agents for engaging in vexatious activity (Division 3AA of Part 3); and
 - investigations and decision-making by the Migrations Agents Registration Authority (Division 4 of Part 3).
8. From the above schemes, the Department is of the view that the Migration Act currently creates two regimes that are compatible with the standard provisions contained in the Bill in relation to monitoring, investigation, civil penalty provisions and infringement notices:
 - the worker protection regime; and
 - the employer sanctions regime (which will be amended by a Bill that is currently before Parliament).
9. Due to a range of factors, the Department is of the view that the policy intention of the other schemes listed in paragraph 7 could not be accurately captured by the standard set of provisions contained in the Bill or alternatively, by including provisions that vary the effect of the Bill. On this basis, the Department considers that these regimes contained in the Migration Act should remain unamended as “stand-alone” schemes as they are not compatible with the provisions contained in the Bill.

10. The Department notes that this is consistent with the Explanatory Memorandum to the Bill which states that:

In some cases the powers contained in this Bill will not be appropriate/and or sufficient for some regulatory agencies requirements. For example, law enforcement agencies that deal with national security will still require their own specialised powers. Similarly, some regulatory agencies may have specific requirements not met in this Bill and consequently may decide not to trigger the Bill's provisions.

3.1 Worker protection regime

11. On 14 September 2009, the *Migration Amendment (Worker Protection) Act 2008* introduced a new enforcement regime into the Migration Act in respect of the temporary sponsored worker program (**the worker protection regime**). The regime includes monitoring and enforcement powers in relation to sponsors who have failed to comply with sponsorship obligations set out in the *Migration Regulations 1994* (**the Migration Regulations**).

12. The enforcement tools include a civil penalty regime and an infringement notice scheme which provides the Department with the flexibility to appropriately, and expeditiously, deal with less serious contraventions of the sponsorship civil penalty provisions.

13. Division 3A of Part 2 of the Migration Act was inserted by the *Migration Legislation Amendment (Worker Protection) Act 2008* and relates to sponsorship. Relevantly, Division 3A creates sponsorship civil penalty provisions that are contravened:

- if an approved sponsor or a former approved sponsor fails to satisfy a sponsorship obligation (subsections 140Q(1) and 140Q(2));
- if a person does not comply with a requirement to tell an inspector the person's name and address if the inspector reasonably believes that the person has contravened a civil penalty provision; or to give evidence of the correctness of the person's name and address if the inspector reasonably believes that the name or address provided by the person is false (subsection 140XE(3));
- if a person does not comply with a notice to produce a record or document to an inspector (subsection 140XF(3)).

14. Subsection 140R(1) of the Migration Act provides that the regulations may make provision enabling a person who is alleged to have contravened a civil penalty provision to pay to the Commonwealth, as an alternative to civil penalty proceedings against the person, a specified penalty. This scheme enables the Migration Regulations to prescribe matters in relation to infringement notices and these are currently set out in Division 5.4 and 5.5 of Part 5 of the Migration Regulations.

15. As the only civil penalty provisions created by the Migration Act are in relation to breaching sponsorship obligations (part of the worker protection regime), Part 8D of the Migration Act (which creates a civil penalty framework) only operates in relation to the worker protection regime.
16. There is, however, the Migration Amendment (Reform of Employer Sanctions) Bill 2012 (**the Employer Sanctions Bill**) currently before Parliament which will, inter alia, amend and extend the application of Part 8D to the employer sanctions regime in addition to the worker protection regime. The Employer Sanctions Bill will amend Part 8D of the Migration Act to reflect the modern approach to enforcing civil penalty provisions and it resembles the standard provisions on civil penalties contained in Part 4 of the Bill.
17. The Department is of the view that the worker protection regime may be compatible with certain provisions in the Bill. However, the Department also notes that the worker protection regime also contains distinct provisions that are not contained in the Bill. This broadly includes provision for the appointment of inspectors with powers to enter premises and require documents or things in relation to a sponsor's compliance with the sponsorship obligations and extension of liability provisions to various non-legal entities such as partners in a partnership.
18. The Department believes that any changes to these inspector powers that may arise out of the Bill could significantly affect investigation and service timeframes. This is because the ability to quickly and easily acquire documentary evidence to determine whether contraventions of relevant sponsorship obligations occur is essential to the Department's responsibilities to relevant visa holders. The Department notes that this approach is consistent with the Explanatory Memorandum to the Bill which states that agencies may choose to only trigger certain provisions that are relevant to carrying out their regulatory functions.
19. The Department is of the view that the worker protection regime could be compatible with Part 3, Part 4 and Part 5 of the Bill which deals with investigation, civil penalty provisions and infringement notices and may consider triggering these provisions subject to consultation with internal and external stakeholders.

3.2 *Employer sanctions regime*

20. The Employer Sanctions Bill will amend the existing regime in the Migration Act dealing with employers and labour hirers who allow or refer non-citizens to work without the required permission (**the employer sanctions regime**).
21. The Employer Sanctions Bill was introduced into the House of Representatives on 19 September 2012. It passed the House of Representatives on 27 November 2012 and was introduced in the Senate the following day.

It is anticipated that the Employer Sanctions Bill will be debated and passed in the Senate during the 2013 Autumn Parliamentary Sitzings.

22. The Employer Sanctions Bill will create non-fault civil penalty provisions and amend criminal offences (the work-related offences and work-related provisions) which would be contravened in circumstances where a person:

- allows, or continues to allow, an unlawful non-citizen to work;
- refers an unlawful non-citizen to a third person for work;
- allows, or continues to allow, a lawful non-citizen to work in breach of a visa condition that restricts or prohibits work (a work-related condition) where the breach occurs solely because of doing that work; or
- refers a lawful non-citizen to a third person for work who holds a visa that is subject to a work-related condition, and the non-citizen will be in breach of that condition solely because of doing the work in relation to which he or she was referred.

23. Infringement notices will also be made available as an alternative to proceedings for a civil penalty order and it is intended that the details of the infringement notice scheme would be prescribed in the Migration Regulations. The Employer Sanctions Bill will also introduce new investigation powers to allow authorised officers to gather evidence of suspected breaches of the work-related offences and work-related provisions.

24. The Department is of the view that the employer sanctions regime could be compatible with Part 3, Part 4 and Part 5 of the Bill which deals with investigation, civil penalty provisions and infringement notices and may consider triggering these provisions subject to consultation with internal and external stakeholders. However, the Department notes that there are some differences in these provisions which are discussed in detail below.

3.3 Potential for further application in the future

25. The Department considers that there may be potential to adopt the enforcement tools contained in the Bill in different regulatory contexts within its portfolio in the future.

26. In the worker protection regime context, Part 7 of the Bill will provide a framework for the use of injunctions. The Department believes that by triggering Part 7 of the Bill, interim injunctions could, for example, be sought to prevent a sponsor from paying their employees below the base rate of pay. The Department will explore such options from both a policy and operational perspective after the Bill is enacted.

27. In the employer sanctions regime context, the Department considers there may be further utility in triggering other provisions of the Bill in the context of the employer sanctions regime. Such options will be explored in due course following the enactment of the Bill.

28. Finally, in the context of regulating airlines which are required to report each passenger and crew member who will be on board the aircraft at the time of its arrival in Australia (see section 245L of the Migration Act), it is possible that the expanded enforcement tools may have some benefit. These are currently only criminal offences (see section 245AN of the Migration Act) and a civil penalty scheme may be explored in the future.

4.0 Compatibility of the Bill with migration legislation

29. As noted above, the provisions in the Bill are very similar and, in many instances, exactly the same as those in the Employer Sanctions Bill. We note that both the Bill and the Employer Sanctions Bill are currently before Parliament. Should the Employer Sanctions Bill pass in the Senate and commence prior to the Bill, subject to the availability of departmental and drafting resources, it should be relatively straightforward to subsequently amend the Migration Act to trigger the proposed standard provisions that are applicable to the employer sanctions regime.
30. However, the Department has identified a number of differences between the two bills. For example, new subsection 85(2) of the Bill provides that an application for a civil penalty order must be made within 4 years of the alleged contravention. New subsection 486R(2) of the Employer Sanctions Bill, however, requires an application to be made within 6 years.
31. The provisions dealing with identity cards in the Migration Act and in the Employer Sanctions Bill require an identity card to contain a *recent* photograph of the inspector or authorised officer (see paragraph 140W(2)(b) of the Migration Act and new subsection 487ZG(3) of the Employer Sanctions Bill). The standard provision contained in new paragraph 77(2)(b) of the Bill requires an identity card to contain a photograph that is *no more than 1 year old* of the authorised person.
32. Various provisions in the Migration Act are not reflected in the new standard provisions. For example, subsection 486R(6) of the Migration Act (which also appears in new subsection 486S(4) in the Employer Sanctions Bill) provides that, when determining an application for a civil penalty order, the court can order that any outstanding amounts owed be paid to the Commonwealth, State, Territory or another person as the case may be.
33. Similarly, there are a number of features of the Bill which are not found in either the Migration Act as it is currently drafted, or as it will be after the commencement of the new employer sanctions provisions. These include monitoring warrants, enforceable undertakings and injunctions.
34. The Department not consider these divergences create insurmountable difficulties. Noting that the powers of the Bill can be triggered in whole or in part, these issues could be resolved through careful consideration and

consultation through drafting of any amending legislation triggering the new Regulatory Powers provisions.

5.0 Perceived benefits

35. In the Department's view, the Bill represents an opportunity to achieve greater consistency across our regulatory regimes, as well as with other regulators in the Commonwealth. Greater consistency should result in greater clarity and better understanding of the regulatory powers framework – both for enforcement officers and those who are regulated. For example, using the same legislation as other regulator in specific circumstances would mean we can more confidently rely on case law considering different legislative schemes. This benefit, which we note is contingent on a sufficient number of agencies opting in to the Regulatory Powers legislation, may contribute to improved litigation outcomes across the Commonwealth.

6.0 Perceived concerns

36. Although the Bill contains powers that are based on standard powers across Commonwealth laws, for example, investigation powers and the use of civil penalty provisions, it does not account for variations in policy. While the Department understands that triggering provisions can account for specific variations in policy, we are concerned that the use of such provisions could create confusion operationally.

37. For example, in the context of infringement notices, officers of the Department exercising relevant powers under the Migration Act would be required to refer to the relevant provisions of the Bill, in addition to other relevant provisions contained in the Migration Act and the Migration Regulations (that would not be amended) and would also have to refer to any new triggering provisions. Such confusion may dilute the policy principles of the *Clearer Laws* project which the Bill gives effect to, in part. The relevant principles for clearer laws are:

Principle 3: Laws should be no more complex than is necessary to give effect to policy

Principle 4: Legislation should enable those affected to understand how the law applies to them

38. The Department welcomes the opportunity to view model provisions in other Commonwealth legislation to understand and appreciate how any perceived complexities could be reduced in the context of infringement notices, particularly where such schemes are contained in both principal legislation and subordinate legislation.

39. Further, the Department is of the view that consideration should be given to the flow-on financial impact of the Bill. As noted above, in order to derive the benefits of the Bill, the Department would be required to undertake a broad ranging review of its regulatory powers. While we consider such a review

could be beneficial, it would inevitably require considerable resources from within the Department and extensive consultation with both internal and external stakeholders. Any resulting changes to the legislation would also require considerable legislative drafting resources.

40. The Department would appreciate the ability to work through any policy and operational issues in the context of drafting triggering provisions and consult with relevant internal and external stakeholders noting the proposed staged implementation of the Bill.

7.0 Conclusion

41. The Department considers the Bill represents an opportunity to bring greater consistency and clarity to our various regulatory regimes. Should the Bill be enacted, the Department would carefully review our enforcement regimes and identify those that could benefit from the provisions in the Bill. While this process will be complex and resource intensive, it has the potential to enhance the Department's effectiveness as a regulator.
42. The Department welcomes any further discussions or consultations about the Bill and its implications for our regulatory functions and operations.