Review of Current Legislation Governing Small Regulatory Agencies

In order to better understand how the Bill might work in practice, the Law Council has conducted some analysis of the regulatory regimes contained in two examples of existing legislation governing small regulatory agencies and compared these regimes to the provisions of the Bill.

The two examples are the *Great Barrier Reef Marine Park Act 1975* which establishes the Great Barrier Reef Marine Park Authority (GBMPA) and the *Fisheries Management Act 1991* which establishes the Australian Fisheries Management Authority (AFMA).

The second example was chosen because during the PJCLE Hearing, AFMA was an example identified by the AGD as an agency which might benefit from the standard provisions contained in the Bill. During follow up questions, however, it noted that AFMA's powers are "broader than this Bill, more comprehensive and more intrusive".

The following analysis is relatively rudimentary and is only intended to provide an indication of how existing legislation might interact with the Bill, given the lack of such discussion in the Bill's supporting information. The respective regulatory agencies are, of course, best placed to comment themselves on their existing powers and procedures and how they might be affected for better or worse by any adoption of the Bill's provision.

1. GBMPA

The GBMPA is primarily administered under the *Great Barrier Reef Marine Park Act 1975 (the GBR Act)*. The GBR Act contains a range of offences and penalties in relation to the Great Barrier Reef Marine Park and Region, as well as certain monitoring and enforcement provisions. However, inspectors also have powers to enforce the GBR Act under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBDC Act), where specified by the GBMPA.[1] Some further details about the EPBDC Act are provided below.

The GBR Act includes some search and investigatory powers, which are more specific than the general monitoring and investigatory powers under the Bill. These include the power to stop, detain and search an aircraft or vessel for the purpose of ascertaining a person's liability to charge or paying a collected amount.[2] The inspector may inspect, take extracts from and make copies of any documents in or on the aircraft or vessel which are relevant to the purpose. Unlike the Bill's monitoring and investigatory search provisions, an inspector does not need a warrant or a person's consent in order to exercise these powers. Nor is a warrant required in relation to specific powers for an inspector to search a vessel in a compulsory pilotage area on reasonable suspicion that it has navigated without a pilot.[3]

[1] s43, GBR Act
[2] s39S, GBR Act
[3] s59L GBR Act

However, a warrant or an occupier's consent is required if the inspector wishes to enter and search premises, and inspect and take extracts or copies of documents from the premises for the purpose of ascertaining a person's liability to charge or to pay a collected amount.[4] This warrant is available on application to a Magistrate.[5] The provisions regarding the warrant differ from the Bill in that the warrant may authorise the use of such force as is necessary and reasonable, and it remains in force for only up to 14 days. As the Law Council submission notes, this contrasts with the three months allowed under the Bill for monitoring warrants[6], and seven days for investigatory warrants.[7] The GBR Act is much less detailed than the Bill regarding the warrant issuing process: for example, in relation to the content of the matters specified in the warrant and the rights of occupiers and responsibilities of inspectors. It does not, for example, provide for urgent warrants to be provided by telephone or fax.

In addition, the search powers of the GBR Act are generally far less detailed than the monitoring and investigation powers contained in the Bill. For instance, they do not address electronic equipment, obtaining expert assistance, seizing or securing evidence, compensation for damage or acquisition of property. However, several of these matters are addressed in the EPBDC Act.

The GBR Act does not include the same general power to ask questions and seek production of documents during a monitoring or search process as that set out in the Bill[8]. However, there are more specific vessel monitoring powers under which information may be sought.[9] The GBR Act also makes provision for regulations which enable information and documents to be required from a person who holds a chargeable permission.[10] Unlike the Bill, the relevant section addresses the issue of self-incrimination by stating that a person cannot be excused from providing such information or documents on the grounds of self-incrimination, but that limits on its admissibility in criminal and other proceedings apply.[11]

While both the GBR Act and the Bill provide for Enforceable Undertakings,[12] a key difference is that under the GBR Act, Enforceable Undertakings may only be made where the Minister considers that a person has contravened a duty to prevent or minimise harm to the Marine Park environment, or a civil penalty provision.[13] In the Bill, no such contravention is required for an Enforceable Undertaking to be made.

In addition, the GBR Act provides for "Emergency Directions"[14] to be made by the GBMPA with the Minister's consent. The Minister can also make Enforceable Directions to prevent conduct which would be an offence or contravene a civil penalty provision.[15] These are

[4] s39T
[5] s39U
[6] Cl33
[7] Cl71
[8] Clauses 25 and 55
[9] S.61AAA
[10] s39P
[11] s39P(4)
[12] Part 6, Division 2, the Bill; Part VIII, Division 1, Subdivision B, GBR Act
[13] s61ABA(1)
[14] Part VIII, Subdivision C
[15] Part VIII, Subdivision D

directions to a party, rather than undertakings made by the party, and there does not appear to be a parallel provision for such directions to be made in the Bill.

The provisions for Injunctions to be made under the GBR Act[16] are broadly similar to those in the Bill. The GBR Act also provides for Remediation Orders[17] and Publicity Orders[18] to be made. There are no parallel provisions in the Bill.

While both the GBR Act[19] and the Bill[20] contain civil penalty provisions, there are several differences. For instance, an application for a pecuniary penalty order for breach of a civil penalty provision must be made within six years of the contravention under the GBR Act,[21] compared to four years under the Bill.[22] In determining the amount of the pecuniary penalty, the Federal Court must have regard specifically to the harm caused to the environment as well as any benefit obtained through the contravention,[23] as well as more general matters which are also contemplated under the Bill.[24] Unlike the Act, the Bill also sets limits on the pecuniary penalty payable.[25]

EPBDC Act

As noted above, GBRPA inspectors (as well as other authorised officers) may also have access to enforcement powers under the EPBDC Act, which includes far more detailed provisions than the GBR Act. Part 17 of the EPBDC Act relates to enforcement and covers more than 120 pages. It includes detailed provisions in relation to appointment of authorised officers, boarding of vessels and access to premises, monitoring of compliance (including through monitoring warrants), search warrants, arrest, powers to ask questions and seek information, seizure and forfeiture, conservation orders, injunctions, remediation determinations, civil penalties, enforceable undertakings and infringement notices.

The Law Council has not had the opportunity to analyse the EPBDC Act in any depth. However, it does appear to include broader powers than the Bill in several respects (eg. arrest, remediation determinations, use of necessary and reasonable force).[26] Unlike the Bill, the EPBDC Act does include some sections dealing with legal professional privilege and the privilege against self-incrimination. For example, a person who is required by the Minister to provide information, documents or appear is not excused from doing so on the grounds of self-incrimination, although there are limits on the use that may be made of information and materials provided.[27] However, if an authorised officer seeks information from a person about the nature or origin of specimens, the person does not have to answer if

[16] Part VIII, Subdivision G
[17] Part VIII, Subdivision H
[18] Part VIII, Subdivision K
[19] Part VIII, Subdivision I
[20] Part 4, Division 2
[21] s61AIC, GBR Act
[22] Cl 85(3), the Bill
[23] s61AIC (1), GBR Act;
[24] Cl 85(6), the Bill
[25] Cl85(5), the Bill
[26] It is noted that the proposed Drafting Directions to the Bill provide standard paragraphs which could be utilised in triggering Acts if agencies wish to introduce powers to use necessary and reasonable force.
[27] s486J, EPBDC Act

doing so would tend to incriminate himself or herself.[28] The EPBDC Act also states that Part 17, which relates to Enforcement, does not affect the law of legal professional privilege.[29]

Comment

Overall, while there are some similarities between the GBR Act and the Bill, it appears that it would be a complex exercise to reconcile the two pieces of legislation. This is particularly the case given that the GBR Act is already supplemented by, and must be read together with, the EPBDC Act. For the GBMPA, unless amendments are made incorporating only peripheral aspects of the Bill, any attempt to prescribe the agency's regulatory powers primarily by reference to the Bill will result in a substantial review workload and possible procedural and operational changes.

2. AFMA

The AFMA is primarily administered under the *Fisheries Management Act 1991* (the FMA), which sets out a range of relevant investigatory, monitoring and enforcement powers. These are highly detailed and specific to AFMA's functions. The FMA includes powers for appointed officers to:

- Stop, board and search boats for fish or fishing equipment,[30] or to ascertain whether fishing concession conditions are complied with;[31]
- Search persons on foreign boats for weapons or evidence of the commission of an offence;[32]
- Enter and search land or premises; [33] or stop, detain, enter and search vehicles or aircraft;[34] if the officer has reasonable grounds to believe that the search may provide evidence as to the commission of an offence;
- Break open and search compartments, containers, cupboards, drawers and other receptacles upon reasonable belief that it will produce such evidence;[35]
- Examine and take possession of or secure things which the officer has reasonable grounds to believe may provide evidence as to the commission of an offence;[36]
- Seize, detain, remove or secure fish, boats or other equipment or things on reasonable grounds that these have been used in a contravention of the FMA;[37]
- Arrest a person who the officer has reasonable grounds to believe has committed an offence;[38] and
- Require a person to give information about boat and crew, and produce information and documents about fish.[39]

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[28] s443A(6) EPBDC Act
[29] s440, EPBDC Act
[30] ss84(1)(aa)&(a) FMA
[31] s84(1)(b)
[32] s84(1)(aaa)
[33] s84(1)(d)
[34] s84(1)(e)
[35] See eg. s84(1)(e)(ii)
[36] s84(1)(e)(iv)
[37] s84(1)(g)
[38] s84(1)(j)
[39] ss84(1)(p)&(s)

In some cases, officers may exercise these powers without a warrant – for example, searching persons on foreign boats[40] and arresting persons reasonably believed to have committed offences.[41] In other cases, either the consent of an owner or occupier or a warrant is necessary, such as in relation to the search of land or premises.[42] In the case of a vehicle or aircraft, while either consent or a warrant is usually necessary, an officer may exercise powers under the Act where consent is refused and he or she believes on reasonable grounds that applying for a warrant would frustrate its execution.[43]

As well as being more specific, the powers granted under the FMA are in many cases stronger than relevant provisions of the Bill. For example, under the FMA, officers may search persons, vehicles or aircraft without a warrant in certain circumstances. This power does not appear to be available under the Bill, whose monitoring and investigatory powers are limited to circumstances in which either consent is given or a warrant obtained. Unlike the Bill, the FMA also permits officers to carry arms in the exercise of their powers[44] and to use such force as is necessary and reasonable to execute a warrant.[45] Under the FMA, officers may also break open containers and other receptacles for searching purposes. This power does not appear to be available under the Bill.

However, in other cases, the provisions in the FMA appear to be narrower than under the Bill. For example:

- The FMA only permits the execution of a search warrant to be temporarily ceased for one hour unless the owner or occupier consents in writing.[46] However, the Bill allows for a delay in executing an investigation warrant in an emergency situation of up to 12 hours or longer if an issuing officer is satisfied of exceptional circumstances.[47]
- The Bill also appears to provide stronger questioning powers to officers. It states that in the case of a monitoring or investigation warrant, an authorised person may require any person to answer relevant questions and produce documents, with offences applicable for failure to comply.[48] The questioning powers of an officer under the FMA appear to be more limited to requiring the details of boat and crew as well as information and documents relating to any fish found.[49]
- Search warrants are issued under the FMA for a maximum of seven days,[50] which is the same period for investigatory warrants as under the Bill. Monitoring warrants, which under the Bill involve more substantial timeframes, do not appear to be available.

[40] s84(1)(aaa)
[41] s84(1)(j)
[42] s84(1)(d); s85
[43] s84(1AA) &(1AB)
[44] s84C
[45] s85B
[46] s85D(2)
[47] Cl 60(3)
[48] Cl25(3)(4) &(5); Cl55(3)(4)&(5)
[49] ss84(1)(p)&(s)
[50] s85(3)(e)

- Search warrants are issued if the magistrate is satisfied that there are reasonable grounds to believe that there is, or will be, evidential material on the premises.[51] "Evidential material" is defined as "a thing relevant to an indictable offence, or a thing relevant to a summary offence, against this Act or the regulations, including such a thing in electronic form." This definition is similar to the definition of "evidential material" in the Crimes Act. As noted in the LCA submission, the definition of "evidential material" in the Bill is broader, creating a lower threshold.

The FMA includes provisions relating to the use of electronic equipment during a search, dealing with things seized and forfeiture of property.[52] However, it does not address a number of subjects addressed in the Bill such as civil penalty provisions, enforceable undertakings and injunctions.

Comment

Currently, a review of Australia's fisheries management system is underway[53] which includes the *FMA* and other relevant legislation. The AFMA's submission to this review[54] supports incorporating alternative compliance approaches to broaden the suite of measures available to it. [55] These include measures such as civil and administrative penalty provisions including suspensions, enforceable undertakings and injunctions, as well as strengthening existing penalty provisions. The AFMA also supports greater powers for officers to ask questions about the origin of fish and carry out searches and inspections "where appropriate, preferably without warrants."[56]

AFMA's submission indicates that if the Bill were passed, it may seek specific amendments adopting additional powers from the Bill including civil penalty provisions, enforceable undertakings and injunctions, as well as greater questioning and search powers. However, it seems likely that otherwise, the FMA's provisions relating to monitoring, investigation and enforcement would be largely retained, given their specificity, strength of powers and level of detail compared to the equivalent provisions in the Bill. The overall result could be that the FMA may be augmented, rather than streamlined, as a result of the Bill.

It is worth noting that if the FMA were augmented through references to the Bill, officers would also need to consult multiple pieces of legislation as to the source of their powers.

Conclusion

While there may be other examples in which existing legislation could be simply amended and streamlined so as to reference and incorporate the provisions of the Bill, the examples above suggest that the process could in other instances be complicated and require substantial consultation and negotiation.

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[51] s85

[52] Part 6, Division 6

[53] Announced 13 September 2012 by the Minister for Agriculture, Fisheries and Forestry, review being conducted by Mr David Borthwick AO PSM

[54] *AFMA submission to the review of Commonwealth fisheries legislation*, available at http://www.afma.gov.au/about-us/legislation-and-policy/fisheries-policy-review/afma-submission-to-the-review-of-commonwealth-fisheries-legislation/

[55] *Ibid*., page 7

[56] See n54, page 31

The examples above also emphasise the risk that, because of the specific and different focus of each agency's regulatory activities, rather than resulting in the streamlining of legislation, the Bill may simply complicate current legislative frameworks, with large parts of the regulatory power provisions in existing legislation necessarily preserved, but then further augmented by the provisions of the Bill.