

Attorney-General's Department submission

Inquiry into the Regulatory Powers (Standardisation Reform) Bill 2020

The Attorney-General's Department (AGD) provides the following submission to aid the Parliament in its considerations to ensure the Regulatory Powers (Standardisation Reform) Bill 2020 (Bill) is properly drafted and there are no unintended consequences.

Background

The *Regulatory Powers Act (Standard Provisions) Act 2014* (Regulatory Powers Act) provides for a standard suite of provisions in relation to monitoring and investigation powers, as well as enforcement provisions through the use of civil penalties, infringement notices, enforceable undertakings and injunctions.

The Regulatory Powers Act commenced on 1 October 2014. The Regulatory Powers Act only has effect where Commonwealth Acts expressly trigger its provisions. The 'triggering' process is undertaken through primary legislation to ensure that the Parliament can scrutinise the granting of regulatory powers to agencies.

The use of regulatory powers in any given policy context supports overarching policy objectives by facilitating robust enforcement of Commonwealth laws. Implementing the Regulatory Powers Act simplifies and streamlines the Commonwealth's regulatory frameworks, providing regulatory agencies with more consistent powers and increasing legal certainty for businesses and individuals that are subject to those powers. This makes it easier for businesses and individuals to know and understand their rights and responsibilities, and more readily comply with the law.

The Regulatory Powers Act provides a 'best practice' suite of provisions that strike an appropriate balance between coercive powers that are warranted to ensure effective regulatory oversight; and protections that should be afforded to those regulated. They were based on powers which already existed across Commonwealth Acts, but tailored to ensure they conform with key legal principles such as those set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide). For example, the Guide states that (with regard to offences) infringement notices should only be applied to strict liability offences. Part 5 of the Regulatory Powers Act, which sets out the standard infringement notice provisions, states that the standard infringement notice provisions can only be applied to strict liability offences (or civil penalty provisions). Triggering the standard provisions as they appear in the Regulatory Powers Act allows for their centralised maintenance and ongoing improvement to incorporate lessons learnt from their use across the Commonwealth regulatory landscape.

For this reason monitoring, investigation and enforcement powers required by new or amending Acts should not usually be established as stand-alone schemes but should instead be drafted to trigger the relevant provisions of the Regulatory Powers Act. Currently, over 50 Commonwealth Acts trigger parts, or all, of the standard provisions. The majority of Acts which have triggered the standard provisions have done so independently of legislation sponsored by the Attorney-General, through the introduction of new legislation or amendments sponsored by administering Ministers.

Overview of the Bill

The Bill amends six Commonwealth Acts in order to implement the Regulatory Powers Act. This standardisation project is the second of its kind, following the *Regulatory Powers*

(Standardisation Reform) Act 2017 which amended 15 Commonwealth Acts to repeal existing provisions providing for regulatory regimes and instead trigger the standard provisions of the Regulatory Powers Act.

- The Bill amends the following Commonwealth Acts to trigger the standard provisions of the Regulatory Powers Act:
 - the *Defence Force Discipline Act 1982*
 - the *Education Services for Overseas Students Act 2000*
 - the *Fisheries Management Act 1991*
 - the *Tertiary Education Quality and Standards Agency Act 2011*
 - the *Tobacco Advertising Prohibition Act 1992*
 - the *Tobacco Plain Packaging Act 2011*.

The purpose of these amendments is to:

- (i) repeal current provisions providing for regulatory regimes in the Education Services for Overseas Students Act, Fisheries Management Act and Tertiary Education Quality and Standards Agency Act, and instead trigger the standard provisions of the Regulatory Powers Act. This is to align those Acts' regulatory regimes with the standard provisions;
- (ii) trigger the standard provisions of the Regulatory Powers Act in the Defence Force Discipline Act, Tobacco Advertising Prohibition Act and Tobacco Plain Packaging Act, to provide those Acts with compliance and enforcement mechanisms as required, which align with best practice.

Modifications to the standard powers are included where necessary for effective regulation in the context of each Act. Further detail on these amendments, including modifications to the standard powers, is at [Attachment A](#).

- The Bill also makes minor amendments to the Regulatory Powers Act itself to ensure that the regulatory requirements and underlying penalty and offence provisions of Acts that trigger the Regulatory Powers Act can be effectively enforced. These amendments concern:
 - the ability of monitoring powers to be exercised in relation to 'matters';
 - the description of offence provisions, and;
 - the description of provisions relating to infringement notices which might apply to the contravention of both a civil penalty and criminal offence provision.

Triggering standard provisions of the Regulatory Powers Act

Triggering the standard provisions of the Regulatory Powers Act for any particular Act requires:

- the identification of provisions within the triggering legislation in relation to which specific regulatory powers can be used;
- appropriate nomination and delegation provisions for the exercise of powers conferred on authorised persons, authorised applicants, infringement officers and relevant chief executives;
- the nomination of issuing officers for monitoring and investigation warrants; and,
- the explicit provision for extra-territorial application of powers (if applicable).

Schedules 2 to 7 of the Bill set out the triggering provisions for each of the Acts being amended by the Bill. These provisions apply regulatory powers in contexts where their use is necessary and appropriate.

Triggering provisions follow a standard format and their drafting is guided by the Office of Parliamentary Counsel's *Drafting Direction 3.5A*.

Modifications

The Regulatory Powers Act contemplates that modifications to the standard provisions may be required to suit specific regulatory contexts.

Where strong policy justifications exist, limited modifications are included in the Bill to tailor the standard provisions to the regulatory context of each Act. Modifications to the standard provisions are justified in the Explanatory Memorandum to the Bill, and summarised at Attachment A.

Process for developing the Bill

As a standardisation reform project, the Bill was developed by AGD in conjunction with the Office of Parliamentary Counsel, administering agencies, departments and Ministers. Responsible agencies and departments identified which regulatory powers were necessary to meet their overarching policy objectives, the scope of those powers, and suitable nomination and delegation provisions, and the Bill was circulated for broader legislative scrutiny in accordance with the Office of Parliamentary Counsel's *Drafting Direction 4.2*.

The Bill is accompanied by a comprehensive Explanatory Memorandum, including a Statement of Compatibility with Human Rights. In developing these materials AGD was mindful of prior comments made by the Legal and Constitutional Affairs Legislation Committee and the Parliamentary Joint Committee on Human Rights regarding the importance of explicit acknowledgement and justification of any expansion of powers resulting from triggering of the Regulatory Powers Act, and detailed assessment of any associated human rights impact.

Amendments to the Regulatory Powers Act standard provisions

The Bill makes minor amendments to the Regulatory Powers Act standard provisions to clarify their operation and ensure that the regulatory requirements and underlying penalty and offence provisions of Acts that trigger the Regulatory Powers Act can be properly enforced. These amendments ensure the standard provisions work effectively and as intended, refining the operation of these best practice provisions in response to lessons learnt through their use over the past five years. The need for these amendments was identified by the Office of Parliamentary Counsel.

- *Expanding monitoring to include 'matters'*: Currently, monitoring powers under the Regulatory Powers Act are confined to determining compliance with a provision or the correctness of information given in compliance with a provision. The proposed change would allow Regulatory Powers Act monitoring powers to be exercised in relation to other matters (for example, whether or not a circumstance, such as adherence to performance standards, exists). This expanded scope will only apply where triggering Acts are drafted or amended to nominate particular matters that may be subject to monitoring.
- *Change in how offence provisions are described*: The Bill amends the Regulatory Powers Act to change references to an "offence against an Act or a legislative instrument" to "an offence provision of an Act or a legislative instrument". The

proposed change would ensure consistency throughout the Regulatory Powers Act when referring to a provision that creates an offence and allow Acts triggering the Regulatory Powers Act to more accurately describe the provisions being covered. This amendment does not alter the effect of the law, but clarifies its intended application.

- *Multiple consequence provisions and infringement notices:* Subsection 103(5) of the Regulatory Powers Act currently provides that if a single provision can constitute both a civil penalty provision and an offence provision, an infringement notice issued for contravention of that provision must relate to the offence. However, drafting practice in relation to “multiple consequence” provisions has changed, and civil and criminal penalties for proscribed conduct are not always contained in a single provision. Drafting changes to subsection 103(5) are required to ensure that it applies in situations where criminal and civil liability are imposed for the same conduct in separate provisions. This amendment does not alter the effect of the law, but clarifies its intended application.

AGD appreciates the opportunity to provide a submission addressing the Bill, and would be willing to provide any further information that the Committee may require.

ATTACHMENT A

Amendments contained in the Bill

Defence Force Discipline Act

- The Bill amends the Defence Force Discipline Act to trigger Part 3 of the RPA, expanding the Act's investigative powers, in relation to service offences by a defence member or defence civilian, beyond service land. The Defence Force Discipline Act has not previously triggered any provisions of the Regulatory Powers Act. Amendments to the Defence Force Discipline Act include the following modifications to the standard investigation provisions:
 - the power to use force against things as is necessary and reasonable in the circumstances by authorised persons and persons assisting authorised persons;
 - the ability of an authorised person to be accompanied by, and make use of, an animal in the course of an investigation.
- The use of force provision included as a modification to the Part 3 standard provisions of the Regulatory Powers Act is a lesser and restricted form of the use of force provision currently in the Defence Force Discipline Act in relation to investigation powers which can be used on service land. The modification would permit, for example, the opening of locked cabinets, but not the use of force against a person.
- The use of an animal during an investigation would permit, for example, the use of a canine explosives detection capability and canine drug detection capability, in searches of premises, during investigations for breaches of various service offences.

Education Services for Overseas Students Act

- The Bill amends the Education Services for Overseas Students Act to trigger Parts 2, 3, 5 and 6 of the Regulatory Powers Act, providing powers relating to monitoring, investigation, infringement notices and enforceable undertakings. Triggering these Parts of the Regulatory Powers Act replaces existing regulatory powers contained in the Education Services for Overseas Students Act and the *Education Services for Overseas Students Regulations 2019*. Amendments to the Education Services for Overseas Students Act restrict powers available under that Act to align with best practice regulatory policy, and will be supported by associated amendments to the Regulations. Amendments to the Education Services for Overseas Students Act include the following modifications to the standard provisions:
 - the power to use force against things as is necessary and reasonable in the circumstances by authorised persons and persons assisting authorised persons, which is a modification to both the standard monitoring and investigation provisions (Parts 2 and 3 of the Regulatory Powers Act);
 - the power to accept a written undertaking given by a registered provider regarding a condition of registration, which is a modification to the standard enforceable undertakings provisions (Part 6 of the Regulatory Powers Act).
- Both of these modifications are retained from the existing suite of regulatory powers under the Education Services for Overseas Students Act.

Fisheries Management Act

- The Bill amends the Fisheries Management Act to trigger Part 5 of the Regulatory Powers Act, providing the standard infringement notice provisions. Triggering this Part of the Regulatory Powers Act will replace the Fisheries Management Act's existing infringement notice scheme which is set out in the *Fisheries Management Regulations 2019*. Amendments to the Fisheries Management Act will restrict the

application of the infringement notice scheme to align with best practice regulation, and will be supported by associated amendments to the Regulations. No modifications to the standard provisions are sought with regard to the Fisheries Management Act.

Tertiary Education Quality and Standards Agency Act

- The Bill amends the Tertiary Education Quality and Standards Agency Act to trigger all Parts of the Regulatory Powers Act, providing the Tertiary Education Quality and Standards Agency Act with standard powers relating to monitoring, investigation, civil penalty provisions, infringement notices, enforceable undertakings and injunctions. Triggering these Parts of the Regulatory Powers Act replaces existing regulatory powers relating to monitoring, investigation, civil penalty provisions, enforceable undertakings and injunctions contained in the Tertiary Education Quality and Standards Agency Act. Amendments to provide for an infringement notice scheme expand the regulatory powers available under the Tertiary Education Quality and Standards Agency Act. Amendments to the Tertiary Education Quality and Standards Agency Act include two modifications to the standard provisions:
 - Part 4 of the Regulatory Powers Act is modified with regard to how the maximum pecuniary penalty in certain civil penalty orders is to be determined. This modification removes the application of the corporate multiplier provided by the Regulatory Powers Act for some provisions where it would not be appropriate. This is because the entities subject to some civil penalty provisions in the Tertiary Education Quality and Standards Agency Act will only be bodies corporate and not individuals, and so the attached pecuniary penalty amounts stated in the legislation for these provisions have been determined with reference to corporations.
 - Part 6 of the Regulatory Powers Act is modified to allow an authorised person to publish an accepted undertaking given by a regulated entity on the National Register of Higher Education Providers. This modification reflects the existing power of Tertiary Education Quality and Standards Agency to publish an undertaking on the Register under subsection 125(5) of the Tertiary Education Quality and Standards Agency Act.

Tobacco Advertising Prohibition Act

- The Bill amends the Tobacco Advertising Prohibition Act to trigger Parts 2, 3, 6 and 7 of the Regulatory Powers Act, providing powers relating to monitoring, investigation, enforceable undertakings and injunctions. The Tobacco Advertising Prohibition Act does not currently contain any regulatory powers. Amendments to the Tobacco Advertising Prohibition Act include a modification to the standard investigation provisions:
 - Part 3 of the Regulatory Powers Act is modified to extend the standard 60 day period in which evidential material seized under an investigation warrant must be returned, to 90 days. This is designed to provide sufficient time for legal advice to be obtained and properly considered, natural justice requirements to be met, as well as for related documents to be drafted and enforcement outcomes to be sought.

Tobacco Plain Packaging Act

- The Bill amends the Tobacco Plain Packaging Act to trigger Parts 2, 6 and 7 of the Regulatory Powers Act, providing powers relating to monitoring, enforceable undertakings and injunctions. The Tobacco Plain Packaging Act has previously

triggered the Regulatory Powers Act in relation to Parts 3, 4 and 5, regarding investigation, civil penalty provisions and infringement notices. Amendments to the Tobacco Plain Packaging Act include the following modifications:

- the power to use force against things as is necessary and reasonable in the circumstances by authorised persons and persons assisting authorised persons, in executing a monitoring warrant (Part 2 of the Regulatory Powers Act);
- abrogation of the privilege against self-incrimination in relation to monitoring (Part 2 of the Regulatory Powers Act). This is a replication of the same modification which exists in relation to investigation under the Tobacco Plain Packaging Act and reflects the difficulty of obtaining material relevant to this specific regulatory regime without the full cooperation of individuals who might be implicated in potential contraventions. However, the abrogation is accompanied by a use immunity which prevents such material from being used in proceedings against the individuals who provided it, or provided access to it, other than in very limited circumstances;
- the power to take samples during monitoring (Part 2 of the Regulatory Powers Act). This same power is provided for under the Tobacco Plain Packaging Act's existing investigation powers.
- Part 2 of the Regulatory Powers Act is modified to extend the standard 60 day period in which evidential material seized under an investigation warrant must be returned, to 90 days. This is designed to provide sufficient time for legal advice to be obtained and properly considered, natural justice requirements to be met, as well as for related documents to be drafted and enforcement outcomes to be sought.