

Attorney-General's Department submission

Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012

The Attorney-General's Department provides the following information to clarify the approach taken in the Bill on a number of issues raised in other submissions. These issues are:

- Parliamentary Scrutiny
- Privilege against Self-Incrimination
- Legal Professional Privilege
- Augmented powers for regulatory agencies
- Constitutional issues
- Possible impact on agencies

Background

The Regulatory Powers (Standard Provisions) Bill 2012 is one of the initiatives of the Government's *Clearer Laws* project.

The purpose of the Bill is to simplify the law by creating a standard set of provisions to deal with monitoring or investigation by regulatory agencies and enforcement using infringement notices, enforceable undertakings and injunctions.

The Bill is based on existing regulatory provisions in Commonwealth laws, including the *Crimes Act 1914* and is consistent with 'A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers' approved by the Minister for Home Affairs in September 2011.

The Bill will provide greater clarity to agencies that utilise regulatory powers and to Australians and Australian businesses that are the subject of a regulatory regime. Where powers exercised by its officers are consistent with less scope for procedural errors, it will offer the Australian Government superior compliance and enforcement outcomes. The Bill has the potential to also reduce the size of each new Commonwealth Act or regulation requiring regulatory provisions by up to 80 pages.

The powers contained in the Bill can be triggered in whole or in part by a regulatory agency's governing legislation. The 'triggering' process is designed to ensure that the Parliament will continue to scrutinise the granting of regulatory powers to agencies.

It is envisaged that some regulatory agencies' powers go beyond the scope of standard regulatory functions provided by the Bill. Agencies such as the Australian Federal Police and the Australian Security Intelligence Organisation that require specialised regulatory powers would continue to exercise powers under specific laws and would not trigger any of the Bill's standard provisions.

The Bill:

- sets out standards for Commonwealth provisions dealing with monitoring, investigations (search and seizure), civil penalty provisions, infringement notices, enforceable undertakings and injunctions enforcement which would provide:
 - o investigative and enforcement powers to be used by authorised persons appointed to an office and holding an identity card and for warrants to be issued by issuing officers
 - o general monitoring powers including where a monitoring warrant may provide evidence of the contravention of a related provision but excluding use of force provisions
 - o gathering material powers relating to the contravention of offence provisions and civil penalty provisions but excluding use of force
 - o generic application provisions in respect of civil penalty provisions, mistake of fact, and state of mind
 - o enforcing provisions using infringement notices subject to a standard time limit
 - o accepting and enforcing undertakings in relation to compliance with provisions which will require the written consent of an authorised person to the withdrawal or variation of an enforceable undertaking, and
 - o using injunctions to enforce civil penalty provisions

Parliamentary Scrutiny

The Bill is designed to ensure that Parliament continues to scrutinise the granting of regulatory powers to agencies. This is achieved by the mechanism of having a primary Act trigger provisions of the Bill in whole or in part consistent with the primary Act. The Bill does not grant powers to any agency of its own force.

Parliament will have the opportunity to scrutinise the need for regulatory powers on each occasion that a primary Act triggers the provisions in this Bill.

The triggering process was considered by the Senate Scrutiny of Bill Committee, which accepted the Attorney-General's explanation of the process in its report of 6 February 2013.

Privilege against Self Incrimination

The Queensland Council for Civil Liberties and the Law Council of Australia in their submissions argued that the Bill should expressly and clearly reserve the right not to incriminate oneself in respect of all offence provisions under the Bill.

The Australian Government's position is that the express preservation of the privilege should not be legislated for. In the *Guide to Framing Commonwealth Offences* it states that:

“Privilege against self-incrimination is available unless expressly abrogated by legislation. Accordingly, the Commonwealth does not consider it necessary to make that explicit in legislation.”

Legal Professional Privilege

The Law Council of Australia raised a concern that the Bill is silent in relation to legal professional privilege.

Legal professional privilege exists at common law and is available unless abrogated by legislation. Accordingly, there is no need to expressly preserve the privilege in the Bill.

If it intended that the privilege is to be abrogated in relation to a particular regulatory scheme, the abrogation would need to be contained in the scheme's substantive legislation rather than in a law of general application such as the Bill.

Augmented Powers for Regulatory Agencies

Some submissions suggested that the result of the Bill may be that more regulatory agencies have access to coercive powers and expand their powers as a result.

This is not intended. The purpose of the Bill is to provide a suite of generic regulatory powers for the many Commonwealth agencies already using those types of powers.

The provisions in the Bill cannot alone augment an agency's powers without deliberate consideration about the context in which the powers would be used - by the agency, its policy department, scrutinizing agencies, and Parliament. The Bill will only apply where another primary Act triggers its provisions.

Constitutional Issues

The Senate Committee on Scrutiny of Bills and the Joint Parliamentary Committee on Law Enforcement formed the view that the Bill required consideration about its constitutionality.

The Bill relies on the power in section 51(xxxix) of the Constitution to deal with matters incidental to the execution of another power vested in the Parliament. In this sense, it is like the *Acts Interpretation Act 1901*, Part 1AA of the *Crimes Act 1914* and Chapter 2 of the *Criminal Code*.

It operates in a very similar way to those Acts in that it houses provisions that are then used in the interpretation of provisions in other Acts or the enforcement of offences under other Acts.

As with all Commonwealth legislation, the legal and constitutional issues have been carefully considered and the Department is confident there are no constitutional problems with the Bill.

Impact on Agencies

The Bill is an opportunity to achieve great consistency across the Commonwealth's regulatory regimes and regulators. The advantages of this approach would be greater transparency and understanding of the regulatory powers framework for regulators and those who are regulated. The use of identical powers for regulators is intended to lead to a body of consistent case law for different legislative schemes and improved and cost effective litigation outcomes for the Commonwealth.

It is expected that agencies will undertake reviews of their regulatory powers provisions within existing resources. Indeed, policy departments should review their legislation on a regular basis – litigation or changes in policy dictate a review of provisions to ensure they are working appropriately in the context of the agency's functions. The staged approach proposed for implementing the Bill is to ensure that any review of regulatory powers undertaken by departments will be achieved within normal timeframes and resources.