

The Senate

Legal and Constitutional Affairs
Legislation Committee

Regulatory Powers (Standard Provisions) Bill
2014 [Provisions]

May 2014

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Recommendations

Recommendation 1

The committee recommends that the EM be amended to provide more detail on the government's strategy for progressively implementing the Bill including outlining any discussions, proposals or agreements with other agencies to develop or amend legislation to trigger the provisions in the Bill.

Recommendation 2

The committee recommends that the Bill be passed, but urges the government to seriously and urgently consider the preceding recommendation.

Chapter 1

Introduction

The referral

1.1 On 27 March 2014, the Senate referred, on the recommendation of the Selection of Bills Committee, the provisions of the Regulatory Powers (Standard Provisions) Bill 2014 to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 8 May 2014.¹

1.2 The Bill was introduced in the House of Representatives on 20 March 2014, by the Hon Mr Michael Keenan MP, Minister for Justice.² The Bill provides a framework of powers for general application across regulatory schemes for monitoring compliance with, investigating breaches of, and enforcing, Commonwealth laws. Enforcement provisions include civil penalties, infringement notices, enforceable undertakings and injunctions.

Rationale for the Bill

1.3 This Bill has been re-introduced following the lapsing of the *Regulatory Powers (Standard Provisions) Bill 2012* (the 2012 Bill) at the end of the 43rd Parliament.

1.4 The purpose of the Bill is to provide a framework of standard regulatory powers that may be exercised by Commonwealth agencies. The Bill would not apply to any particular legislation unless its provisions are specifically triggered through amendment or the introduction of new legislation.

1.5 The Minister for Justice explained the Bill was 'an important reform to achieve improved regulatory outcomes and enhance access to justice.'³

1.6 Specifically, the Bill:

will significantly simplify and streamline Commonwealth regulatory powers across the statute book[s] over time, and improve the accessibility efficiency and effectiveness of the federal justice system.⁴

1.7 A key benefit of the Bill would be avoiding the need to spell out specific regulatory powers in each separate piece of new or amended legislation. According to the minister:

¹ *Journals of the Senate Journals of the Senate* No. 26—27 March 2014, p. 741.

² *Votes and Proceedings* No 30—20 March 2014, p. 399.

³ The Hon Michael Keenan MP, Minister for Justice, Second Reading Speech, *House of Representatives Hansard*, 20 March 2014, p. 2577.

⁴ The Hon Michael Keenan MP, Minister for Justice, Second Reading Speech, *House of Representatives Hansard*, 20 March 2014, p. 2577.

Provisions relating to the enforcement of a regulatory regime can easily increase the length of legislation by 30 pages, and by up to 80 pages for some regimes.⁵

1.8 The government has proposed to roll out the implementation of the Bill in stages. Firstly, new laws that require the use by a Commonwealth agency of the powers under the Bill would be drafted to trigger the relevant provisions in the Bill. Further, over time, existing regulatory schemes would be reviewed and, if appropriate, amended to instead trigger the relevant provisions of the Bill.⁶

1.9 As a result, 'the amount of duplication between these laws will be significantly reduced'.⁷ Nevertheless, the government noted that:

In some cases the powers contained in this Bill will not be appropriate or sufficient for the requirements of particular regulatory agencies. 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 to not trigger the Bill's provisions.⁸

Provisions

1.10 The Bill has eight parts, with six substantive parts and two parts dealing with preliminary matters and general provisions. For any provisions in the Bill to apply, another Act must refer to those provisions.

1.11 Importantly, the Bill would expressly provide for the protection of legal professional privilege and the right against self-incrimination.⁹

1.12 Part 2 sets out monitoring powers — powers to monitor whether provisions of an Act or legislative instrument have been, or are being, complied with by an individual or organisation subject to a regulatory obligation. Powers include the powers to enter premises by consent or under a warrant. Part 2 also outlines occupiers' rights and responsibilities.

1.13 Part 3 sets out investigation powers — powers to gather material relating to the contravention of offence provisions and civil penalty provisions under Commonwealth law.

1.14 Part 4 would create a regime for the use and enforcement of civil penalty provisions. Under this part, civil penalty orders may be sought from a court for breach of a civil penalty provision. The part also sets out general application rules such as the

⁵ The Hon Michael Keenan MP, Minister for Justice, Second Reading Speech, *House of Representatives Hansard*, 20 March 2014, p. 2577.

⁶ EM p. 2.

⁷ The Hon Michael Keenan MP, Minister for Justice, Second Reading Speech, *House of Representatives Hansard*, 20 March 2014, p. 2578.

⁸ EM p. 2.

⁹ See, for example, s17 and s47.

absence of a need to prove intention to prove a breach of a civil penalty provision. The part also provides for a defence of mistake of fact.

1.15 Part 5 would create a regime for the use of infringement notices. Under this part, an infringement officer may issue an infringement notice if they reasonably believe that a provision subject to an infringement notice under this Part has been contravened. Provisions subject to an infringement notice may be strict liability offences and/or civil penalty provisions. A person issued with an infringement notice under this part would have the choice to pay the amount of the notice, or alternatively face court proceedings in relation to the contravention.

1.16 Part 6 would create a regime for the use of enforceable undertakings. Under this part, an authorised person may accept an undertaking in relation to compliance with a provision which is enforceable under this part. The undertaking may be enforced in a court, with the court having the power to issue a range of orders including an order directing compliance, an order requiring any financial benefit from non-compliance to be surrendered, and an order for damages.

Conduct of the inquiry

1.17 In accordance with the usual practice, the committee advertised the inquiry on its website. The committee also wrote to relevant organisations inviting submissions by 16 April 2014. The committee received 3 submissions. A full list of submissions is provided at Appendix 1.

1.18 Given the small number of submissions, and the committee's consideration of a previous iteration of the Bill 12 months ago, the committee decided not conduct a public hearing on the Bill.

Acknowledgement

1.19 The committee thanks the organisations and individuals who made submissions.

Chapter 2

Key issues

2.1 The committee received three submissions on the Bill. Two of those submissions were from statutory agencies with existing regulatory powers. Both of those agencies highlighted that their existing legislation provided them with appropriate and necessary regulatory powers and that the powers in the Bill were insufficient for their organisation. For example, ASIC suggested that:

If ASIC were required to rely on the powers in the Bill there would be a material reduction in the quantity, quality and scope of information that ASIC could gather. This would result in a direct and material adverse impact on the quantity, quality and scope of surveillances, enforcement and regulatory outcomes that ASIC presently delivers.¹

2.2 In similar evidence, the Fair Work Ombudsman (FWO) submitted that:

The investigative and monitoring powers under the Bill are distinctly different from those provided for in the Fair Work Act. There are also significant differences to the civil remedy provisions and important mechanisms in the Fair Work Act that are not included in the Bill...Should a decision be made to extend these standard regulatory powers to the FWO, we consider the FWO's capacity to deliver our statutory functions would be impeded.²

2.3 Nevertheless, the Attorney-General's Department has consistently argued that the Bill would not be applied universally as the regulatory powers in the Bill may not be appropriate for certain agencies. Specifically, the department explained:

In some cases the powers contained in this Bill will not be appropriate or sufficient for the requirements of particular regulatory agencies. 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 to not trigger the Bill's provisions. Alternatively, agencies may choose to only trigger certain provisions that are relevant to carrying out their regulatory functions.³

Committee view

2.4 Two Bills were passed by the previous parliament, which have provisions that are contingent on the passage of this Bill.⁴ If this Bill passes, the National Offshore

¹ *Submission 1*, p. 2.

² *Submission 2*, p. 1.

³ EM p. 2.

⁴ *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*.

Petroleum Safety and Environmental Management Authority (NOPSEM) would be the first agency to rely, in part, on the regulatory powers which are set out in this Bill.

2.5 Beyond NOPSEM, the committee notes that there is little detail from the Attorney-General's Department on how it intends to progressively implement the Bill and specifically which agencies have agreed that their legislation should be amended to trigger the Bill.

2.6 The committee notes that for the Bill to realise its intended deregulatory effect, legislation affecting multiple Commonwealth agencies would need to be amended to rely on this Bill. It would be useful for the Attorney-General's Department to provide more information on both their progress in discussions with other Commonwealth agencies and the specific areas of deregulation it has already identified.

Recommendation 1

2.7 The committee recommends that the EM be amended to provide more detail on the government's strategy for progressively implementing the Bill including outlining any discussions, proposals or agreements with other agencies to develop or amend legislation to trigger the provisions in the Bill.

The committee's previous consideration of the Bill

2.8 The committee considered the precursor to this Bill, the 2012 Bill, in March 2013. The committee recommended, subject to a number of amendments, that the 2012 Bill be passed.

2.9 The committee recommended in its March 2013 report:

Recommendation 1

2.36 The committee recommends that the Regulatory Powers (Standard Provisions) Bill 2013 be amended to remove the power to trigger the provisions of the Bill by regulation.⁵

2.10 The Bill before the committee has been amended to remove this power. Accordingly, the provisions of the Bill must be triggered through primary legislation.⁶ The explanatory memorandum accompanying the Bill stated that:

This will mean that any future legislation that proposes to trigger provisions in this Bill will be introduced and scrutinised by Parliament.⁷

2.11 In addition, the committee recommended in its March 2013 report:

Recommendation 2

2.37 The committee recommends that the Explanatory Memorandum to the Regulatory Powers (Standard Provisions) Bill 2012 be revised and reissued

⁵ Legal and Constitutional Affairs Legislation Committee, *Regulatory Powers (Standard Provisions) Bill 2012 [Provisions]*, March 2013, p. 16.

⁶ For example see section 7 of the Bill which provides that Part 2 does not apply unless legislation specifically enlivens the powers in that Part.

⁷ EM p. 2.

to stipulate that each time a bill is introduced into the parliament that provides for the triggering of the provisions in the Regulatory Powers (Standard Provisions) Bill 2012, this must be explicitly articulated and explained in the Explanatory Memorandum to the relevant bill.

Recommendation 3

2.37 The committee recommends that in the future, each time a bill is introduced into the parliament that seeks to trigger the provisions of the Regulatory Powers (Standard Provisions) Bill 2012, the Explanatory Memorandum to that bill must clearly set out the relevant agency's current regulatory powers, a comparison with the powers in the Regulatory Powers (Standard Provisions) Bill 2012 that will be triggered, and, in the case of any expansion of that agency's powers, a detailed explanation of the reasons for the expansions of the power.⁸

2.12 The EM to the Bill clearly addressed these recommendations. Specifically, the EM stated that:

For the regulatory provisions in this Bill to be activated, new or existing legislation would need to be amended to remove existing regulatory powers and trigger the provisions of this Bill....The Explanatory Memorandum to each Bill 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.⁹

2.13 The committee acknowledges that the government has considered the committee's previous recommendations in this iteration of the Bill. Accordingly, the committee recommends that the Bill be passed.

Recommendation 2

2.14 The committee recommends that the Bill be passed, but urges the government to seriously and urgently consider the preceding recommendation.

Senator the Hon Ian Macdonald

Chair

⁸ Legal and Constitutional Affairs Legislation Committee, *Regulatory Powers (Standard Provisions) Bill 2012 [Provisions]*, March 2013, p. 16.

⁹ EM p. 2.

Appendix 1

Public submissions

- 1 Australian Securities & Investments Commission (ASIC)
- 2 Fair Work Ombudsman
- 3 Attorney-General's Department

