23 January 2013

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Canberra ACT 2600
Australia

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Dear Committee Secretary

REGULATORY POWERS (STANDARD PROVISIONS) BILL 2012

I am writing to you in response to the Senate Legal and Constitutional Affairs Committee’s (the Committee’s) Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012 (the Bill).

The Bill has already been the subject of an inquiry conducted by the Parliamentary Joint Committee on Law Enforcement (PJCLE). After receiving submissions and hearing evidence from the Attorney General’s Department, the PJCLE declined to comment or make recommendations in respect of the Bill. Instead the PJCLE concluded that the Bill raises issues, potentially including constitutionality, which merit closer consideration and that these issues would be best considered by the Senate Legal and Constitutional Affairs Committee. As a result, the Bill was re-referred by the Senate to your Committee.

The Law Council made a submission to the PJCLE inquiry on 9 November 2012. That submission continues to represent the Law Council’s overall views on the Bill. A copy of the submission is included at Attachment A for consideration by the Committee.

The Law Council also wishes to make some additional comments on the Bill in light of:

- the further information provided on the Bill by the Attorney-General’s Department (AGD) in its evidence before the PJCLE; and
- the Law Council’s review of some examples of existing legislation governing small regulatory agencies, which may be amended or augmented by reference to the Bill.

These matters are discussed below and at Attachment B.
I note that the Law Council does not propose to address issues of constitutionality in its submission.

**PJCLE Hearing**

The PJCLE received evidence from the AGD in relation to the Bill at a hearing conducted on 20 November 2012. The Law Council would like to make the following additional comments in light of this evidence.

**Parliamentary Scrutiny**

If the Bill is passed, it will be possible to trigger its provisions by regulation. Where a regulatory agency wishes to leave open the option of triggering a Part of the Regulatory Powers Act by regulation, the head Act under which that regulation is made must include a provision allowing this to be done. According to the draft Drafting Directions prepared by the Office of Parliamentary Counsel, such a provision would take the following form:

**Section xx**

*The regulations may:*

(a) *make a regulation subject to monitoring under Part 2 of the Regulatory Powers (Standard Provisions) Act 2013 (monitoring powers); and*

(b) *make information given in compliance, or purported compliance, with a regulation subject to monitoring under Part 2 of the Regulatory Powers (Standard Provisions) Act (monitoring powers); and*

(c) *make a regulation subject to investigation under Part 3 of the Regulatory Powers (Standard Provisions) Act (investigation powers); and*

(d) *make a regulation a civil penalty provision under Part 4 of the Regulatory Powers (Standard Provisions) Act; and*

(e) *make a regulation subject to an infringement notice under Part 5 of the Regulatory Powers (Standard Provisions) Act (infringement notices); and*

(f) *make a regulation enforceable under Part 6 of the Regulatory Powers (Standard Provisions) Act (enforceable undertakings); and*

(g) *make a regulation enforceable under Part 7 of the Regulatory Powers (Standard Provisions) Act (injunctions); and*

(h) *make provision in relation to monitoring, investigation and the use of infringement notices, enforceable undertakings and injunctions under the Regulatory Powers (Standard Provisions) Act in relation to a regulation; and*

(i) *modify the Regulatory Powers (Standard Provisions) Act as it applies in relation to a regulation.*
As stated in its original submission, the Law Council is concerned that the ability to trigger the Bill’s provisions by regulation may dilute parliamentary scrutiny of precisely what powers are available to an agency in a specific regulatory context, and limit the opportunity for meaningful discussion about whether those powers are appropriate in the circumstances.

This concern was also raised by the Chair of the PJCLE, Mr Chris Hayes MP, with representatives of the AGD during the PJCLE hearing on 20 November 2012. The AGD responded that where the provisions of the Bill are enlivened by regulation, parliamentary scrutiny will be possible at two points: first, when a relevant head Act is passed or amended which provides for the regulation-making power; and secondly, when the regulations are tabled and subject to disallowance.

This response does not assuage the Law Council’s concerns. This is because at the initial stage (of passing or amending the head Act) Parliament will not know and will not be able to assess the specific context in which the Bill’s regulatory powers will be available and employed. At the second stage (tabling of regulations), where such details will be available, consideration of the appropriateness of the provisions in the circumstances will likely fall under Parliament’s radar and not receive the attention it requires. The Law Council continues to hold concerns about diminished parliamentary scrutiny in this regard.

**Privilege against Self-incrimination/ Legal Professional Privilege**

Clause 25 of the Bill envisages that regulatory agencies will have the power under a monitoring warrant to require any person on the premises where the warrant is executed to answer questions and produce evidence, and that failure to comply, without reasonable excuse, will constitute an offence.

The Explanatory Memorandum to the Bill states that “this clause is not intended as an abrogation of the privilege against self-incrimination”.

1 However, the Bill itself is silent on this issue. In addition, no mention is made in either the Explanatory Memorandum or the Bill about whether legal professional privilege is intended to be abrogated.

Further, Clause 55 of the Bill envisages that regulatory agencies will have the power under an investigation warrant to require any person on the premises where the warrant is executed to provide information or documents and that failure to comply, without reasonable excuse, will constitute an offence. Again, the Explanatory Memorandum states that the clause “does not impinge on the privilege against self-incrimination and a person is not required to answer questions or produce documents if the material would tend to incriminate them.” However, again, the Bill itself is silent on the issue and no mention is made in either the Explanatory Memorandum or the Bill about whether legal professional privilege is intended to be abrogated.

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1 Explanatory Memorandum to the Bill, page 11
In its original submission, the Law Council noted and raised concerns about the fact that the Bill was silent in relation to both the privilege against self-incrimination and legal professional privilege.

During the PJCLE hearing, the Chair of the Committee questioned representatives of the AGD about this matter. The AGD assured the Committee that, under the provisions of the Bill, a person cannot be compelled to answer questions or produce evidence where that would require them to incriminate themselves. Further the AGD suggested that:

"The right to protection against self-incrimination is provided for in that the person entering the premises and speaking to the occupier is required to inform them of what their rights are with respect to the warrant or the consent, if they are entering by consent. Even then, they have to explain the circumstances of their being at the premises, what those rights of the occupier are and what the limits on their warrant or consent are."

The AGD’s answer is somewhat misleading, as is the Explanatory Memorandum at paragraphs 45 and 97. Both the AGD’s answer and the Explanatory Memorandum suggest that there is some obligation on an officer executing a warrant to inform an occupier about his or her rights in relation to the warrant in a general sense (including, for example, his or her rights in relation to self-incrimination). In fact, the obligation on the executing officer is limited to informing the occupier about his or her right to be present during the search and his or her obligation to assist in the execution of the warrant (see clauses 29(2)(b) and 59(2)(b)).

The Law Council acknowledges that the privilege against self-incrimination and legal professional privilege are probably preserved under the Bill because they are not specifically, or by necessary implication, abrogated and, at least in the case of the privilege against self-incrimination, the Explanatory Memorandum expresses an intention not to abrogate the privilege. Nonetheless, it would seem more prudent to address these matters directly in the provisions of the Bill, particularly given that so often litigation concerning the limits of regulatory agencies’ powers is generated by uncertainty about the extent to which these privileges have been preserved or abrogated.²

If the Bill is to be passed, the Law Council recommends that a specific provision be inserted that clarifies that nothing in the Bill is intended to interfere with the law concerning legal professional privilege or the privilege against self-incrimination. Alternatively, the Law Council recommends that a note be added below the relevant provisions of the Bill in the terms recommended by the Office of Parliamentary Counsel in other contexts. That is:

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² For example, see Daniels Corporation Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 48; 213 CLR 543; 192 ALR 581; 77 ALJR 46; Mansfield v ACC [2003] FCA 1059; and Deputy Commissioner of Taxation v De Vonk (1995) 61 FCR 564; (1995) 133 ALR 303
"This section does not abrogate or affect the law relating to legal professional privilege, or any other immunity, privilege or restriction that applies to the disclosure of information, documents or other things." 

In addition, the Law Council recommends that consideration be given to amending proposed paragraphs 29(2)(b) and 59(2)(b) to clarify that the obligation to inform the occupier of a premises subject to a warrant about their rights, includes an obligation to inform them about their right with respect to the privilege against self-incrimination and legal professional privilege.

Increased Powers

During the PJCLE Hearing, both the Chair and Senator Stephen Parry questioned whether the result of the Bill may be that more agencies have access to coercive powers, and/or that those agencies which currently have information gathering and enforcement powers may, by recourse to the 'standard' provisions, expand their existing powers as a matter of course.

In this context, the Law Council notes the response of the Fair Work Ombudsman (the FW Ombudsman), in its submission to the PJCLE. The FW Ombudsman indicated a general desire to retain its current investigative and monitoring powers under the Fair Work Act 2009 (the FW Act), particularly where these go beyond the Bill’s powers, in order to perform its functions and responsibilities effectively. However, the FW Ombudsman noted that triggering certain parts of the Bill could provide a useful addition to the current powers under the FW Act, for example, Part 7 which provides a framework for injunctions.

The Law Council considers that the FW Ombudsman’s submission may be indicative of the likely response from most agencies. That is, while resistance to any perceived diminution of existing powers is probable, the possibility of new or expanded powers will most likely be embraced. In further submissions to the PJCLE, other agencies such as the Australian Electoral Commission and the Australian Safeguards and Non-Proliferation Office also indicated that they would be likely to seek to retain their existing specialised powers while augmenting them with certain provisions from the Bill.

Need for, and Alternatives to, the Bill

In its original submission the Law Council commented that, based on the materials provided in support of the Bill, it was not possible to assess whether there was an identifiable need for a range of standard regulatory powers and whether the Bill effectively responds to this need.

The Law Council considers that even after the AGD’s evidence to the PJCLE, the impetus for this reform and whether it effectively addresses a current need or problem is still unclear. During the PJCLE hearing, Senator Parry questioned the AGD regarding the need for the Bill, asking whether agencies had been seeking legislation of this kind. The AGD confirmed that agencies had not made such requests and that the Bill was prompted more by the Clearer Laws project.

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3 See for example: s156, Paid Parental Leave Act 2010 (Requirement for person to assist in applications for civil penalty orders); s219TSGF, A New Tax System (Family Assistance) (Administration) Act 1999 (Minister requiring person to assist in applications for civil penalty orders)
The Law Council acknowledges that the Bill may have positive impacts. Some of these have been identified in submissions to the PJCLE. For example, the Department of Infrastructure and Transport has noted that the administration of the *Motor Vehicle Standards Act 1989* would be greatly simplified with regard to the verification of evidence, monitoring and enforcement if the Bill were passed.

Furthermore, in theory, it is possible to see that the Bill may have the following results:

- It may be easier for businesses dealing with multiple regulatory agencies to understand their rights and responsibilities, and respond accordingly;
- Agencies (particularly smaller agencies) may be able to rely on common training materials and operational manuals, and to share lessons learned and innovations amongst agencies;
- A more consistent best practice with respect to when and how regulatory powers are employed may emerge amongst agencies; and
- A more consistent body of case law of broader application may emerge about the exercise of powers and their limitations.

However, it is not clear the extent to which this type of "cross-fertilisation" already occurs, or, more importantly, does not occur because of disparities in existing legislation. This has not been addressed in the supporting material to the Bill.

The Law Council considers that the objectives of the Bill, in a generic sense, have merit. However, in the absence of a broader discussion about the current legislative landscape and the practices and procedures it has resulted in, it remains difficult to comment on the necessity for the Bill and whether it offers the best method of delivering a more efficient and consistent outcome.

During the PJCLE Hearing, the AGD advised that the Bill is modelled on an Office of Parliamentary Counsel Drafting Direction which has been used for the last 18 months in order to ensure that there is a more consistent approach taken to the way government agencies' regulatory powers are enacted. This raises for consideration whether such an approach might be sufficient in itself to deliver greater uniformity and clarity as new agencies are established and existing agencies consider the need for revised or additional regulatory powers.

As another alternative, the Law Council notes that during the PJCLE hearing Senator Parry queried why each principal Act or regulation as it currently stands, could not just be amended to conform with a single regulatory model, rather than using a separate Bill. The AGD's response was that this would not have the advantage of streamlining the statute book. However, the Law Council notes that this potential advantage must be weighed against the risk of confusion if agencies need to refer to multiple statutes for the source of their powers, rather than a single principal Act.

**Review of Existing Legislation Governing Small Regulatory Agencies**

In order to better understand how the Bill might work in practice, the Law Council has examined some examples of existing legislation governing the operation of smaller regulatory agencies, and compared this legislation to the provisions of the Bill. This analysis is set out at Attachment B. The legislation chosen predates the Office of Parliamentary Counsel Drafting Direction.
While there may be other examples of Acts or regulations that could be streamlined in a straightforward manner to incorporate the provisions of the Bill, the examples chosen in Attachment B suggest that the process of resolving the differences between existing legislation and the Bill will often be complicated and require substantial consultation and negotiation.

The examples emphasise the risk that, if passed, the Bill may have the opposite effect to that intended. Rather than resulting in clearer, streamlined legislation, current legislation may, in fact, be largely preserved in its current form, with the provisions of the Bill simply used to augment and thereby complicate existing regulatory regimes.

Conclusion

The Law Council considers that a further public review, which seeks detailed comments from agencies as to the need for the Bill, and how they would seek to reconcile existing legislation with it, is needed in order to establish the efficacy and likely outcomes of the Bill if enacted.

However, if the Bill is to be passed without such a review, the Law Council submits that the Bill should at least be amended to:

- Ensure that the provisions of the Bill may only be triggered by another Act and not by regulation; and
- Provide directly that the privilege against self incrimination and legal professional privilege are not abrogated by the provisions of the Bill;

This submission has been lodged by the authority delegated by the Directors to the Acting Secretary-General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.

Yours sincerely

Mr Martyn Hagan

Acting Secretary-General
9 November 2012

Ms Fiona Bowring-Greer
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Via email le.committee@aph.gov.au

Dear Ms Bowring-Greer

INQUIRY INTO THE REGULATORY POWERS (STANDARD PROVISIONS) BILL 2012

I refer to your letter inviting the Law Council to make a submission to the Parliamentary Joint Committee on Law Enforcement’s inquiry into the Regulatory Powers (Standard Provisions) Bill 2012 (Cth) (the Bill). Your letter was received on 29 October 2012 and called for submissions by 7 November 2012.

While the Law Council welcomes this invitation, it has been unable to prepare a detailed submission within the short time frame allowed even with an extension to 9 November 2012. The Law Council has been unable to undertake a full analysis of the Bill or consult with its Constituent Bodies, Committees and Sections in the nine business days allowed for the preparation of a submission.

Despite these constraints, the Law Council is keen to use this opportunity to outline some of the key issues and questions that it considers should be explored by the Parliamentary Joint Committee on Law Enforcement (the Committee). In particular, the Law Council suggests that the Committee should seek further information about the types of agencies likely to access the powers contained in the Bill, and the shortcomings in existing powers for these agencies. Without this information, it is difficult to determine whether the Bill is likely to achieve its stated aim.

Key Features of the Bill

The Bill contains a range of standard powers that can be exercised by Commonwealth regulatory agencies. As outlined in clause 3, the Bill provides regulatory authorities with powers for the purpose of:

(a) monitoring whether provisions of an Act or a legislative instrument have been, or are being, complied with;

(b) monitoring whether information given in compliance, or purported compliance, with a provision of an Act or a legislative instrument is correct;
(c) gathering material that relates to the contravention of an offence or a civil penalty provision;

(d) the use of civil penalties to enforce provisions;

(e) the use of infringement notices where there is a reasonable belief that a provision has been contravened;

(f) the acceptance and enforcement of undertakings relating to compliance with provisions;

(g) the use of injunctions to enforce provisions.

Clause 3 also explains that:

A provision of an Act or a legislative instrument is not subject to monitoring, investigation or enforcement under this Act by force of this Act. This Act must be triggered by another Act or by a regulation.

The power to make a regulation triggering this Act must be found in another Act.

The powers contained in the Bill are said to be based on the standard monitoring and investigative powers already available to regulatory agencies responsible for compliance activities. However, neither the Explanatory Memorandum nor the Second Reading Speech provides any examples of the types of regulatory agencies that have similar powers, or that have identified a need for the standard range of powers.

Purpose of the Bill

When introducing the Bill into Parliament, the Attorney-General explained that the Bill was part of the Commonwealth Government’s Clearer Laws project, which is designed to ‘increase access to justice and improve the accessibility, equity, efficiency and effectiveness of the federal justice system by simplifying and streamlining the statute book.’ The Attorney said that the Bill would remove ‘up to 80 pages from Commonwealth Acts and Regulations. She also stated that it would provide greater clarity to those agencies that use regulatory powers and make the law ‘easier to understand for Australians and Australian businesses that are the subject of a regulatory regime.’

The Attorney explained that, before they can be used, the powers contained in the Bill must be triggered in whole or in part by a regulatory agency’s governing legislation. The Attorney also explained that:

In some cases the powers contained in this bill will not be appropriate or sufficient for some regulatory agencies’ requirements. For example, law enforcement agencies that deal with national security will continue to require their specialised powers. Similarly, some regulatory agencies may have specific requirements that are not met in this bill and consequently they may

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1 Details of the Clearer Laws Project are available from the Attorney General’s Department’s website at http://www.ag.gov.au/DevelopingClearerCommonwealthLaws/Pages/default.aspx

2 Regulatory Powers (Standard Provisions) Bill 2012 (Cth) Second Reading Speech, Attorney General, the Hon Nicola Roxon MP, Hansard, House of Representatives, 10 October 2012, p. 8 available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%22Hansard%2F84910c49-3706-419c-93d6-134b34c0ae37%2F0027%22

3 Ibid.

4 Ibid.
choose to not trigger the bill. Alternatively, they may choose to only trigger certain parts.\textsuperscript{5}

The Attorney also outlined a three stage process for implementing the Bill:

\textit{In stage 1, new bills or regulations that require investigation or enforcement powers of the kind available under the Regulatory Powers (Standard Provisions) Bill will be drafted to trigger the relevant provisions.}

\textit{In stage 2, acts and regulations that have been drafted over the past 18 months using precedents based on the Regulatory Powers Bill will be amended to remove those provisions and instead trigger the relevant provisions.}

\textit{In stage 3, where substantial amendment is required to existing investigation and enforcement regimes in current acts and regulations, those regimes will be reviewed and, if appropriate, amended to instead trigger the relevant provisions in the Regulatory Powers Bill.}\textsuperscript{6}

No examples were provided in the Second Reading Speech or the Explanatory Memorandum of the type of existing or future Acts, Bills or Regulations that would be likely to be considered within any of these stages.

\textbf{Law Council’s Preliminary Concerns}

\textit{Difficulties associated with evaluating the necessity and appropriateness of the Bill}

As noted above, the Bill is intended to provide a catalogue of powers that are available to Commonwealth regulatory agencies when they have been ‘triggered’ by the relevant legislation governing the particular agency. The powers contained in the Bill are extensive and some are intrusive, including powers to enter and search premises, to seize items and access equipment and to question people. Some of these powers are confined to investigating and enforcing civil penalty provisions and others extend to the collection of evidence that could relate to the commission of an offence.

The Law Council is of the view that the powers contained in the Bill cannot be evaluated in isolation from the Acts, Bills or Regulations governing the regulatory agencies that are likely to make use of them. By failing to provide information about these agencies and their existing regulatory functions and powers, it is not possible to determine:

- whether there is an identifiable need for this range of standard powers;
- whether the Bill effectively responds to this need;
- whether the powers contained in the Bill go beyond those already available to regulatory agencies; or
- whether the powers contained in the Bill include appropriate safeguards or limits on the use of these powers.

Despite the repeated references to clarifying the law in this area, there are no examples in the Explanatory Memorandum or the Second Reading Speech of any existing complex or


\textsuperscript{6} Ibid.
inconsistent provisions in the legislation governing regulatory bodies that would justify the need for the Bill.

The Law Council understands that both the Attorney-General’s Department and the Department of Finance have conducted informal consultations with a number of Commonwealth regulatory bodies and have received feedback that supports the need for the Bill. However, this information has not been made publicly available or reflected in any of the legislative materials accompanying the Bill.

The difficulties associated with identifying the types of agencies likely to access the powers contained in the Bill arise from the large number and disparate range of Commonwealth regulatory agencies which could use the powers in the Bill. The only guidance as to which agencies may be targeted by the Bill is the reference by the Attorney-General in the Second Reading Speech that in some cases the powers in the Bill will not be ‘appropriate or sufficient for some regulatory agencies’ requirements.’

This suggests that many large Commonwealth regulatory agencies, such as the Australian Competition and Consumer Commission, which are currently invested with an extensive range of specialist compliance powers, are unlikely to surrender these powers in favour of adopting the ‘standard powers’ contained in the Bill. It is also apparent from the Second Reading Speech that the Bill is not intended to be utilised by law enforcement agencies or agencies that deal with national security, which will instead continue to use their specialised powers.

As a result, it would appear that the Bill is targeted primarily at smaller regulatory agencies, such as the Great Barrier Reef Marine Park Authority, the Registrar of Indigenous Corporations, the Australian Nuclear Science and Technology Organisation or the Australian Pesticides and Veterinary Medicines Authority, which have a limited range of monitoring, investigation or enforcement powers designed to give effect to their respective statutory functions. These functions range from ensuring that a person in charge of a vessel in a Marine Park does not cause damage to the environment, to inspecting premises for prohibited chemicals. Some of these powers are limited to monitoring compliance and enforcing civil penalty provisions, while others extend to investigating and collecting evidence in respect of criminal offences.

While it may be the case that these authorities would benefit from being able to access a standard set of regulatory powers, on the basis of the publicly available materials, it is not clear that this would be the case.

It also appears from the Second Reading Speech that a review of whether existing ‘investigation and enforcement regimes in current acts and regulations…’ should be amended to ‘trigger’ the standard powers in this Bill will only occur at the ‘third stage’ of the implementation of the Bill. The Law Council consider that this type of review – which would identify the extent to which there may be problems with existing powers - should have preceded the development of the Bill and the results of the review should have been made publicly available.

As the Senate Scrutiny of Bills Committee (the Scrutiny Committee) observed:

The appropriateness of coercive regulatory powers will depend on the particular statutory context to which they are applied. Thus, although in

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7 For example, Part VI of the Competition and Consumer Act 2010 contains provisions relating to pecuniary penalties and offences, injunctions and undertakings which can be pursued by the Australian Competition and Consumer Commission.
8 Great Barrier Reef Marine Park Act 1975 s38DB
9 Agricultural and Veterinary Chemicals (Administration) Act 1992 s69EB
general it does not appear that the bill departs in any significant detail from the broad principles set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, whether or not the approach taken to particular questions is appropriate is difficult to assess without reference to a particular statutory context and the nature of the regulatory regime. For example, the justification of placing an evidential burden on a person wishing to rely on any exception, exemption, excuse or justification provided in relation to the creation of a civil penalty provision (see clause 99) cannot be assessed in the abstract.\(^{10}\)

The Parliamentary Joint Committee on Human Rights (the Human Rights Committee) echoed these concerns, noting that:

\[A\]s the bill is one of general application, it would be difficult to reach a definitive view on its human rights compatibility and each application of its provisions would need to be assessed on a case by case basis. However, the overall likelihood of compatibility would be improved by the inclusion of adequate safeguards to ensure that the relevant powers are, as far as possible, appropriately targeted and circumscribed to minimise the risk that they could be exercised inconsistently with human rights.\(^{11}\)

For these reasons, the Law Council recommends that the Committee should ask for further details from the Government regarding:

- The legislation for regulatory agencies that currently contains the types of powers included in the Bill;
- Examples of complexity in this legislation or unnecessary inconsistencies in different pieces of legislation relating to regulatory agencies;
- Examples of the type of regulatory agencies that are likely to access the powers in the Bill in stages two and three; and
- Examples of the types of draft legislation which could ‘trigger’ the powers in the Bill.

The Law Council notes that the Scrutiny Committee left the overall question of the appropriateness of enacting the Bill to the Senate as a whole, but warned that:

where future legislation applies part or all of the powers in the bill, such bills should be accompanied by detailed consideration in the explanatory memorandum explaining the appropriateness of the standard provisions adopted. This will facilitate adequate Parliamentary scrutiny of such legislation.\(^{12}\)

The Human Rights Committee has sought further clarification from the Attorney-General on how the specific entry, monitoring, search, seizure and information gathering powers in the Bill are likely to impact on the right to privacy in article 17 of [International Covenant on Civil and Political Rights](https://www.un.org/en/documents/declared/udcprr/) before forming a view on the compatibility of the Bill with human rights.

\(^{10}\) Senate Scrutiny of Bill's Committee, Alert Digest No.13 of 2012


\(^{12}\) Senate Scrutiny of Bill's Committee, Alert Digest No.13 of 2012
Potential for the Bill to dilute Parliamentary scrutiny

The Law Council is also concerned that the ‘framework’ approach adopted by the Bill may result in a dilution of parliamentary scrutiny of the content of compliance powers of regulatory bodies. Robust parliamentary scrutiny of these powers is critical, particularly given the intrusive and sometimes coercive nature of these powers and their potential impact on the privacy and fair trial rights of the individuals subject to these powers.

In the Second Reading Speech the Attorney stated that:

*All three stages of the bill’s application will still be required to undertake the scrutiny and approval processes of the parliament. For the regulatory provisions in the bill to be activated, new or existing legislation would need to be amended to remove its existing regulatory powers and incorporate the Regulatory Powers Bill’s provisions. This also ensures that individual assessments of human rights engagement and compatibility will also be apparent in the drafting and scrutiny process.* \(^{13}\)

However, the Bill appears to permit the activation of these powers through Regulations. As the Scrutiny Committee explained:

*Although the bill also provides that a legislative instrument may only provide that a provision activates a provision in this bill if the power to do so is given under another Act (see, for example, clause 18), it remains the case that the provisions of this Act can be triggered by regulations.* \(^{14}\)

These concerns led the Scrutiny Committee to conclude that the Bill

*may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.* \(^{15}\)

As a result, the Law Council recommends that the Committee ask for further details from the Government regarding why it is considered appropriate to enable the application of the provisions of the Bill through Regulations.

*Extensive and coercive nature of powers demands careful consideration of adequacy of safeguards and oversight*

The Law Council is also concerned that the Bill does not contain the types of safeguards and oversight protections that exist in analogous statutory regimes, such as in the Crimes Act 1914 (Cth) (the Crimes Act), that are designed to limit the interference these powers may have with the rights of individuals, including the right to a fair trial.

For example, the investigation powers contained in Part 3 of the Bill — which include powers to enter and search premises, \(^{16}\) to operate electronic equipment, \(^{17}\) seize documents or items \(^{18}\) and to subject people to coercive questioning \(^{19}\) — have the potential to be utilised by a broad range of regulatory officers in the context of a very broad range of

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\(^{14}\) Senate Scrutiny of Bill’s Committee, Alert Digest No.13 of 2012

\(^{15}\) Ibid.

\(^{16}\) Regulatory Powers (Standard Provisions) Bill 2012 (Cth) clause 51.

\(^{17}\) Regulatory Powers (Standard Provisions) Bill 2012 (Cth) clause 52.


\(^{19}\) Regulatory Powers (Standard Provisions) Bill 2012 (Cth) clause 55.
penalty or offence provisions. This is because each of these powers is available to regulatory bodies for the purpose of collecting "evidential material" which includes:

- a thing with respect to which an offence or a civil penalty provision subject to investigation under this Part has been contravened or is suspected, on reasonable grounds, to have been contravened;
- a thing that there are reasonable grounds for suspecting will afford evidence as to the contravention of such an offence or a civil penalty provision;
- a thing that there are reasonable grounds for suspecting is intended to be used for the purpose of contravening such an offence or a civil penalty provision.\(^{20}\)

Without knowing for what penalty or offence provisions these powers might be used, it is difficult to evaluate the need for safeguards and oversight mechanisms to protect against undue interference with individual rights.

The Law Council notes that the need for safeguards and oversight mechanisms could be addressed if clear examples were provided of the type of agencies that would be likely to access these powers and the types of compliance powers they already possess or may require. This would allow appropriate comparisons with powers available to other Commonwealth agencies and the protections that exist in relation to those powers.

The Law Council acknowledges that there may be an opportunity for this type of analysis to take place if and when the legislation governing the particular regulatory body is amended to 'trigger' the powers in this Bill. However, without at least a preliminary consideration of these matters, it is not possible to assess whether the Bill is in fact needed or is appropriately suited to achieving its aims, or whether an alternative approach to standardising the powers available to smaller regulatory bodies should be pursued.

**Concerns arising from particular features of the Bill**

The Law Council has not had the opportunity to consider each of the 132 provisions of the Bill and is constrained in its analysis of the key provisions for the reasons outlined above. However, the following examples illustrate the type of issues in relation to which the Law Council considers the Committee should seek further information.

- Clause 21: Operating electronic equipment

Clause 21 invests an authorised person with the power to operate electronic equipment (such as computers) when entering premises with the consent of the occupier or under a warrant and extends to copying "relevant data"\(^{21}\) from the electronic equipment onto storage devices. The Explanatory Memorandum Bill states that this power is 'necessary to ensure an authorised person can obtain access to electronic records that may indicate whether the Act or regulation is being complied with or whether information provided under the Act or regulation is correct.' The Law Council is concerned that this clause does not contain an appropriate threshold for operating electronic equipment and accessing data, which has the potential to interfere significantly with the right to privacy of any person who might operate or own the equipment or data.

\(^{20}\) *Regulatory Powers (Standard Provisions) Bill 2012 (Cth) clause 40.*

\(^{21}\) ‘Relevant data’ is defined as information relevant to determining whether (a) a provision that is subject to monitoring under Part 2 of the Bill has been, or is being, complied with; or (b) information subject to monitoring under Part 2 is correct.
In previous submissions relating to analogous provisions in the Crimes Act, the Law Council has pointed out that a computer is materially different from a desk or filing cabinet – both in terms of the volume and type of material it may contain and in terms of the fact that it may allow access to data held off-site at multiple secondary locations.\(^{22}\) The privacy implications of searching a computer and all data accessible from it are considerably more far-reaching than the privacy implications of searching a desk or filing cabinet. For this reason, the Law Council would be concerned if clause 21 could provide a blanket authorisation to operate a computer found on premises and to access any and all of the data available from it. The Law Council suggests that some further threshold test, whether it be a reasonable belief or a reasonable suspicion that the operation of the computer is likely to provide access to relevant material, should be explored.

- **Clause 22: Securing electronic equipment to obtain expert assistance**

Clause 22 permits an authorised person to secure electronic equipment under a monitoring warrant for up to 24 hours (which can be extended for a further 24 hours) to provide the authorised person time to engage expert assistance to operate the electronic equipment. An authorised person may only secure equipment if the person has reasonable grounds to believe that relevant data on the equipment may be destroyed or altered if the equipment is not secured.

There is no material provided in the Explanatory Memorandum that explains why this power is necessary and why the time period of 24 hours has been chosen. There is no example given of any regulatory agency that currently has powers to operate electronic equipment for the purpose of monitoring compliance, which has called for the need to secure such equipment to seek expert assistance. Nor is there any example of why a time period of 24 hours, which can be extended to 48 hours, is necessary to obtain this assistance. Without this information the Law Council queries why this power is necessary, particularly in light of the potential for the use of this power to interfere with the privacy rights of any individual with data contained on the equipment and its potential to seriously disrupt the lives of those who may rely upon that equipment for employment or communication purposes.

The Law Council also notes that this power does not require the same level of judicial oversight as a similar power contained in section 3LA of the Crimes Act.

- **Clause 25: Authorised persons may ask questions and seek production of documents**

Clause 25 provides that when an authorised person enters premises with the consent of the occupier or under a monitoring warrant, he or she may ask the occupier to answer any questions or produce documents relevant to the monitoring function. Failure to comply with this request carries a penalty of 30 penalty units.\(^{23}\)

While the Explanatory Memorandum states that this clause ‘is not intended as an abrogation of the privilege against self-incrimination...’, the Law Council is concerned that this provision does not explicitly provide adequate protections against self-incrimination. The clause also does not address the possibility of the documents or information being subject to legal professional privilege. Similar concerns apply in relation to the coercive

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\(^{22}\) Law Council of Australia, Submission to the Senate Committee on Legal and Constitutional Affairs inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009 (19 October 2009) pp. 21-23 available at http://www.lawcouncil.asn.au/shadowx/apps//fms/fmsdownload.cfm?file_uuid=3306f4a4-1e4f-17fa-d253-3263ba339c41&siteName=la

\(^{23}\) The Law Council notes that the clause contains a defence of non-possession of the documents or the occupier having taken reasonable steps to locate the required documents without success.
questioning powers contained in clause 55, which also allows an authorised person to request information or documents relevant to the person's entry to the premises to search for evidential material.

- **Clauses 33 and 71: Monitoring and investigation warrants**

Clause 33 outlines the process for regulatory bodies to obtain a warrant to exercise monitoring powers under Part 2 of the Bill. Under clause 33, an issuing officer may issue the warrant if satisfied that it is reasonably necessary that one or more authorised persons should have access to the premises for the purpose of determining whether: (a) a provision that is subject to monitoring under Part 2 has been, or is being, complied with; or (b) information subject to monitoring under Part 2 is correct.

In addition to the general concerns described above relating to the absence of rigorous thresholds that need to be satisfied before particular monitoring powers can be exercised under these warrants, the Law Council is also concerned that clause 33 does not require the authorised person to be named in the warrant, and permits such warrants to be in force for up to three months.

No justification is provided for why such warrants – which authorise a broad range of coercive and intrusive powers, including the power to enter premises – should be in force for a period of up to three months. No examples are provided that illustrate why a shorter period of time would not suffice for the purposes of any particular regulatory body which already possesses or otherwise requires these types of monitoring powers. The Law Council notes, for example, that under section 39U of the *Great Barrier Reef Marine Park Act 1975* (Cth), warrants to enter premises for the purpose of ascertaining a person's liability to charge or pay a certain amount, are available to the Great Barrier Reef Marine Park Authority only for a maximum period of 14 days.

Similar concerns apply in relation to clause 71 of the Bill which outlines the process for obtaining a warrant to exercise the broad range of investigation powers contained in Part 3 of the Bill. This clause allows investigation warrants to be obtained if the issuing officer is satisfied there are reasonable grounds for suspecting that there is, or there may be within the next 72 hours, evidential material on the premises. These warrants can be in force for a period of up to one week.

For the reasons outlined above, the Law Council queries why the time periods in the Bill have been considered appropriate, and notes that they appear to go beyond the authorisation periods in analogous existing provisions.

- **Clause 40: Evidential material**

Clause 40 outlines what constitutes 'evidential material' for the purposes of exercising the extensive investigative powers contained in Part 3 of the Bill. As noted above, evidential material includes:

- a thing with respect to which an offence or a civil penalty provision subject to investigation under this Part has been contravened or is suspected, on reasonable grounds, to have been contravened;
- a thing that there are reasonable grounds for suspecting will afford evidence as to the contravention of such an offence or a civil penalty provision;
- a thing that there are reasonable grounds for suspecting is intended to be used for the purpose of contravening such an offence or a civil penalty provision.
This definition of ‘evidential material’ goes well beyond the definition contained in the Crimes Act which is limited to ‘a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.’\textsuperscript{24} It also appears to go beyond the scope of the existing powers of a number of smaller regulatory authorities.

Without a clear justification for this definition, the Law Council considers that it fails to sufficiently define and limit the scope of the powers contained in Part 3 of the Bill. For example, when applied in conjunction with the powers in clause 49 of the Bill, this definition allows an authorised person to enter premises if the person suspects that there may be ‘evidential material’ which includes a thing that there are reasonable grounds for suspecting will afford evidence as to the contravention of a civil penalty provision. This appears to set an unreasonably low threshold for the use of a power that has the potential to significantly interfere with the privacy rights of individuals.

- Clause 60 Completing execution after temporary cessation

Clause 60 provides that, even where the authorised person and all persons assisting in the execution of an investigation warrant leave the premises, the warrant will continue to apply if the authorised person and all persons assisting are absent from the premises for:

- one hour or less in any situation other than an emergency;
- for twelve hours in an emergency situation;
- for longer than 12 hours where the occupier consents in writing; or
- where an issuing officer considers there are exceptional circumstances that justify authorising a longer period than 12 hours (e.g. the emergency preventing the execution of the warrant continues for more than 12 hours).

In other words, this clause allows for interruptions to occur during the execution of a warrant, and then the resumption of the use of powers under the warrant without further authorisation or oversight being required (except where resumption after 12 hours is authorised).

The Law Council notes that this clause has also attracted the attention of the Scrutiny Committee which has observed that:

\textit{Although it may be the case that flexibility is appropriate in some contexts, it is important to ensure (as the explanatory memorandum also recognises) that searches are undertaken in a ‘timely fashion and that a warrant does not authorise an authorised person to search a premises on multiple occasions from time to time.}

\textit{... Noting that the importance of flexibility may vary depending on the details of a particular regulatory context and that this can be assessed case-by-case as relevant legislation is brought before Parliament, \textbf{the Committee leaves the appropriateness of this provision to the Senate as a whole}(emphasis in original).}\textsuperscript{25}

- Clause 67: Return of seized things

\textsuperscript{24} Crimes Act 1914 (Cth) s3C
\textsuperscript{25} Senate Scrutiny of Bill’s Committee, Alert Digest No.13 of 2012 p 19
Clause 67 places limits on the purposes for which material can be seized under an investigation warrant, and requires the relevant chief executive of a regulatory agency to take reasonable steps to return to the owner, or the person from whom it was seized, any thing seized under the Bill. Clause 67 provides that this must occur within 60 days, or before 60 days if the seized thing is not required for evidence or the reason the thing was seized is no longer relevant.

In the absence of any examples provided in the Explanatory Memorandum to the Bill, the Law Council queries why this time period has been identified as appropriate.

Similarly, the Law Council questions why clause 68, which permits an issuing officer to issue an order extending the period for which a thing may be retained up to a maximum period of three years, is considered to be a necessary and appropriate standard power for regulatory bodies to access.

Conclusion

As noted above, the Law Council has not been able to carefully consider each of the provisions contained in the Bill in the short period of time allocated for making submissions to this inquiry.

The absence of adequate time to consider the provisions of this Bill is particularly regrettable in the context of the principles contained in the Attorney-General’s Department’s Clearer Laws Project, the objects of which this Bill is said to further.

The Law Council notes that the Clearer Laws Project acknowledges the need to allow adequate time for public consideration and scrutiny of proposed legislative changes. For example, one of the causes of legislative complexity identified as part of this project is ‘the pressure to prepare legislation in constrained timeframes, so that the focus becomes getting the legislation drafted rather than making it clear.’ One of the strategies to address this is to release ‘an exposure draft for public comment...’ or use ‘focus groups to test how easy the legislation is understand.’

The Clearer Laws Project also emphasises the need to conduct an in-depth analysis into the need for any substantive law reform. For example, one of the strategies to address legislative complexity advises that ‘at the beginning of the process, careful attention should be given to identifying what the problem is and what policy options could be used to address the problem.’

The Law Council is of the view that the information currently available suggests that there has been a failure to comply with these important principles.

The Law Council notes the submission to the Committee by the Australian Law Reform Commission which states that the Bill has a similar aim to one of its key


recommendations in its report *Principled Regulation: Federal Civil and Administrative Penalties in Australia*. That recommendation was for a Regulatory Contraventions Statute of general application to cover various aspects of the law and procedure governing non-criminal contraventions of federal law.

However, the Law Council notes that almost ten years has elapsed since that recommendation was made. The Bill will apply to a wider range of legislation than was examined by the ALRC in its 2003 Report. The Bill also extends to criminal as well as non-criminal contraventions. Accordingly, the Law Council considers that it is important that the Committee seeks information about the types of regulatory agencies that will be likely to access the powers under the Bill and information about the shortcomings in the existing powers of these agencies.

The Law Council does not oppose statutes of general application per se but considers that it is important to assess the necessity of any proposed legislation in the context of existing regulatory powers.

The Law Council hopes that the matters raised in this letter are of some assistance to the Committee.

Due to time constraints, this submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely

[Signature]

Professor Sally Walker

Secretary-General

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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

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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. The warrant is available on application to a Magistrate. 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, and seven days for investigatory warrants. 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. However, there are more specific vessel monitoring powers under which information may be sought. The GBR Act also makes provision for regulations which enable information and documents to be required from a person who holds a chargeable permission. 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.

While both the GBR Act and the Bill provide for Enforceable Undertakings, 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. In the Bill, no such contravention is required for an Enforceable Undertaking to be made.

In addition, the GBR Act provides for “Emergency Directions” 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. These are

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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\textsuperscript{16} are broadly similar to those in the Bill. The GBR Act also provides for Remediation Orders\textsuperscript{17} and Publicity Orders\textsuperscript{18} to be made. There are no parallel provisions in the Bill.

While both the GBR Act\textsuperscript{19} and the Bill\textsuperscript{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,\textsuperscript{21} compared to four years under the Bill.\textsuperscript{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,\textsuperscript{23} as well as more general matters which are also contemplated under the Bill.\textsuperscript{24} Unlike the Act, the Bill also sets limits on the pecuniary penalty payable.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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

\textsuperscript{16} Part VIII, Subdivision G
\textsuperscript{17} Part VIII, Subdivision H
\textsuperscript{18} Part VIII, Subdivision K
\textsuperscript{19} Part VIII, Subdivision I
\textsuperscript{20} Part 4, Division 2
\textsuperscript{21} s61AIC, GBR Act
\textsuperscript{22} Cl 85(3), the Bill
\textsuperscript{23} s61AIC (1), GBR Act;
\textsuperscript{24} Cl 85(6), the Bill
\textsuperscript{25} Cl85(5), the Bill
\textsuperscript{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.
\textsuperscript{27} s486J, EPBDC Act

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

\textit{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 \textit{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:

\begin{itemize}
  \item Stop, board and search boats for fish or fishing equipment,\textsuperscript{30} or to ascertain whether fishing concession conditions are complied with;\textsuperscript{31}
  \item Search persons on foreign boats for weapons or evidence of the commission of an offence;\textsuperscript{32}
  \item Enter and search land or premises;\textsuperscript{33} or stop, detain, enter and search vehicles or aircraft;\textsuperscript{34} if the officer has reasonable grounds to believe that the search may provide evidence as to the commission of an offence;
  \item Break open and search compartments, containers, cupboards, drawers and other receptacles upon reasonable belief that it will produce such evidence;\textsuperscript{35}
  \item 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;\textsuperscript{36}
  \item 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;\textsuperscript{37}
  \item Arrest a person who the officer has reasonable grounds to believe has committed an offence;\textsuperscript{38} and
  \item Require a person to give information about boat and crew, and produce information and documents about fish.\textsuperscript{39}
\end{itemize}

\textsuperscript{28} s443A(6) EPBDC Act
\textsuperscript{29} s440, EPBDC Act
\textsuperscript{30} ss84(1)(aa)&(a) FMA
\textsuperscript{31} s84(1)(b)
\textsuperscript{32} s84(1)(aaa)
\textsuperscript{33} s84(1)(d)
\textsuperscript{34} s84(1)(e)
\textsuperscript{35} See eg. s84(1)(e)(ii)
\textsuperscript{36} s84(1)(e)(iv)
\textsuperscript{37} s84(1)(g)
\textsuperscript{38} s84(1)(j)
\textsuperscript{39} ss84(1)(p)&(s)
In some cases, officers may exercise these powers without a warrant – for example, searching persons on foreign boats\(^\text{40}\) and arresting persons reasonably believed to have committed offences.\(^\text{41}\) 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.\(^\text{42}\) 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.\(^\text{43}\)

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\(^\text{44}\) and to use such force as is necessary and reasonable to execute a warrant.\(^\text{45}\) 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.\(^\text{46}\) 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.\(^\text{47}\)
- 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.\(^\text{48}\) 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.\(^\text{49}\)
- Search warrants are issued under the FMA for a maximum of seven days,\(^\text{50}\) 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.

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\(^{40}\) 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  
\(^{55}\) *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.