



Law Council
OF AUSTRALIA

Office of the President

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Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Legislation Committee
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Dear Chair

Regulatory Powers (Standardisation Reform) Bill 2020

1. The Law Council of Australia welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) inquiry into the Regulatory Powers (Standardisation Reform) Bill 2020 (**Bill**).
2. The Law Council does not object to the passage of the Bill but recommends some improvements to certain proposed amendments to the standard provisions in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**RPA**) in Schedule 1 to the Bill. The Law Council also recommends some improvements to matters of legal policy concerning the process for the implementation and development of the RPA.
3. Given the condensed timeframe provided for consultation, the Law Council does not make detailed comment on the measures in Schedules 2-7, which trigger provisions of the RPA in relation to six individual Acts establishing regulatory regimes, but would be pleased to assist the Committee with any specific questions.¹
4. As a general comment on Schedules 2-7, the Committee may wish to explore with the proponents of the Bill whether regulated entities, and not merely the responsible regulatory agencies, were consulted on the proposals, as the Explanatory Memorandum is silent on this matter. The Law Council emphasises that consultation with affected entities on legislative proposals, before Bills are introduced to Parliament, is a fundamental matter of good practice that should be incorporated routinely into the legislative development process.

Background to the RPA

5. The RPA establishes a standard suite of provisions prescribing investigative, compliance monitoring and enforcement powers, which can be applied to individual pieces of Commonwealth regulatory legislation. The legislation that applies provisions of the RPA to an individual Act establishing a regulatory regime is commonly described as '**triggering legislation**' or a '**triggering Act**'.

¹ These six Acts are: *Defence Force Discipline Act 1982* (Cth); *Education Services for Overseas Students Act 2000* (Cth), *Fisheries Management Act 1991* (Cth), *Tertiary Education Quality and Standards Agency Act 2011* (Cth); *Tobacco Advertising Prohibition Act 1992* (Cth); and *Tobacco Plain Packaging Act 2011* (Cth).

6. The RPA does not have a direct legal effect, in the sense of conferring powers on regulatory agencies, or imposing duties or liabilities on regulated entities. Rather, its provisions have effect if a new Act is drafted to establish a regulatory regime, or if an existing Act establishing a regulatory regime is amended, to apply the standard provisions of the RPA to an individual Act. The process of amending existing regulatory legislation that pre-dates the RPA to repeal its existing provisions and replace them with some or all of the standard provisions of the RPA is commonly referred to as ‘**standardisation**’.

Policy objectives of the RPA

7. The RPA was developed as part of the ‘Clearer Laws Project’, which was initiated in 2011-13 and comprised various policy, administrative and legislative measures intended to improve clarity and reduce complexity of Commonwealth legislation.²
8. The stated objective of standardisation is to ‘simplify and streamline’ Commonwealth regulatory powers across the statute book, by creating a consistent set of provisions that can be applied to multiple individual enactments.³ It has been said that standardisation has the potential to reduce the compliance burden for individuals and businesses subject to multiple regulatory regimes, by reducing unnecessary differences in equivalent provisions of multiple Acts.⁴
9. As noted in the Law Council’s submissions on the originating Bill to the RPA in 2013, the Law Council acknowledges that the broad objectives of standardisation have the potential to improve the usability of legislation and, in turn, improve compliance outcomes and enforcement practices. However, the effectiveness of the RPA in achieving those objectives will depend on how it is implemented across the Commonwealth statute book. This requires effective mechanisms for transparency and performance evaluation to be incorporated into the implementation process.⁵
10. The objectives of streamlining and simplifying legislative provisions and facilitating regulatory compliance are unlikely to be met if legislation routinely triggers the standard provisions of the RPA subject to extensive statute-specific modifications, or while also retaining or conferring substantial additional powers that have no equivalent in the RPA. Similarly, the objectives are unlikely to be met if there is inconsistent treatment of similar, existing regulatory regimes that pre-date the RPA, in assessing whether the legislation governing those regimes should be subject to standardisation, including with any modifications. It is also important that standardisation does not become a ‘back door’ means of expanding an agency’s powers without compelling justification, which could occur if a regulator’s powers under its pre-existing governing legislation are more limited than the corresponding provisions of the RPA that are proposed to be triggered.

Schedule 1: proposed amendments to the standard provisions of the RPA

11. Schedule 1 to the Bill proposes to amend certain standard provisions of the RPA, principally aspects of the monitoring powers in Part 2, which enable regulatory agencies to monitor whether an entity is complying with the provisions of the relevant regulatory legislation that has triggered the RPA.

² Explanatory Memorandum, Regulatory Powers (Standard Provisions) Bill 2012, 3.

³ Bill, Explanatory Memorandum, 5 at [6].

⁴ Ibid.

⁵ Law Council, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Regulatory Powers (Standard Provisions) Bill 2012*, (January 2013), 6-7.

Compliance monitoring powers

12. The standard compliance monitoring powers include the following intrusive powers:
- powers to enter and search premises, which are exercisable either under warrant, or with the consent of the occupier;⁶
 - powers to deal with evidence found on those premises—including inspection or examination, making records, and securing items on the premises pending the regulatory agency obtaining a separate authorisation to seize them;⁷ and
 - powers to require any person who is on premises to answer questions or produce documents.⁸
13. The monitoring powers are capable of applying in relation to the following broad matters, the substance of which are to be designated by the individual triggering Act:
- **‘provisions subject to monitoring’**, which can be any provision of a triggering Act as specified in that Act.⁹ The Law Council understands that the policy intent is for this concept to cover the ‘core’ regulatory obligations imposed by individual triggering Acts, but the RPA does not provide any criteria for prescribing a provision of a triggering Act as being a ‘provision subject to monitoring’;
 - **‘information subject to monitoring’**, being information given in compliance, or purported compliance, with a provision of a regulatory Act, or specified legislative instrument, which requires the disclosure of that information. The relevant triggering Act may specify a particular provision requiring the disclosure of information as being ‘information subject to monitoring’ for the purpose of the compliance monitoring powers of the RPA;¹⁰ and
 - **‘related provisions’**, being any provision of a triggering Act that is prescribed by that Act as being related to a ‘provision that is subject to monitoring’ or ‘information subject to monitoring’.¹¹ The RPA does not set any statutory conditions for a particular provision of an Act to qualify as a ‘related provision’ for the purpose of applying the RPA. Nor does it establish a framework for distinguishing between ‘provisions subject to monitoring’ or ‘information subject to monitoring’ on one hand, and ‘related provisions’ on the other, which could promote a consistent approach across multiple triggering Acts.

Proposed amendments

14. Items 1 to 28 of Schedule 1 to the Bill propose to expand the matters in respect of which monitoring powers can be exercised. In addition to the three categories noted above, the Bill proposes to create an additional category of a **‘matter subject to monitoring’**, being any matter designated by a triggering Act.¹²
15. The Bill also proposes to amend the definition of a ‘related matter’ to cover matters which are prescribed in a triggering Act as being related to a ‘matter subject to monitoring’.¹³ As with the existing approach taken to defining ‘provisions subject to monitoring’ and ‘information subject to monitoring’, there are no statutory criteria for identifying a ‘matter subject to monitoring’ in relation to a particular triggering Act.

⁶ RPA, section 18 and paragraphs 19(a) and (b).

⁷ Ibid, paragraphs 19(c)-(g).

⁸ Ibid, section 24.

⁹ Ibid, section 8.

¹⁰ Ibid, section 9.

¹¹ Ibid, section 10.

¹² Bill, Schedule 1, item 5 (inserting proposed section 9A of the RPA).

¹³ Ibid, Schedule 1, item 6 (inserting new subsection 10(3) of the RPA).

16. Any proposal to amend the standard provisions of the RPA is highly significant. Such amendments will apply to all existing legislation that has already triggered the relevant provisions of the RPA, as well as all future triggering legislation. Consequently, if the Bill is passed, all legislation which has already triggered the compliance monitoring provisions of Part 2 of the RPA could be further amended to expand the scope of monitoring powers to 'matters subject to monitoring' (in addition to the provisions that have already been prescribed as 'provisions subject to monitoring' or 'information subject to monitoring'). This has the potential to result in significant coercive powers being available in a much wider range of circumstances.
17. The extrinsic materials to the Bill do not provide any indication of the individual, existing regulatory regimes that were in contemplation as the basis for the proposed expansion of the standard monitoring powers in the Bill. Nor do they provide any indication of the existing, individual Acts that are likely to be the subject of proposed amendments to prescribe 'matters subject to monitoring'. Presumably, this information would have informed the development of the proposed amendments to the RPA in the present Bill. Its disclosure to the Parliament and the public would usefully inform the scrutiny of the Bill, by providing important context.

Ambiguity in the meaning of a 'matter subject to monitoring'

18. There is significant ambiguity in the concept of a 'matter subject to monitoring', as distinct from the existing concepts of a 'provision subject to monitoring' or 'information subject to monitoring'. The Bill does not propose any statutory criteria to distinguish between these concepts. This will be left entirely to the discretion of the proponents of individual triggering Acts, and the Parliament in scrutinising legislative proposals.
19. The absence of any statutory parameters in the RPA itself creates a significant risk of inconsistencies in application and interpretation in the context of individual triggering legislation. This may also make it very difficult for the Parliament and other stakeholders to scrutinise proposed legislation with a view to assessing matters of consistency across multiple enactments establishing comparable legislative regimes.
20. The single sentence justification provided in the Explanatory Memorandum indicates that there is an intention to ensure that compliance monitoring powers are available in relation to matters other than determining compliance with a provision or the correctness of information given in compliance with a provision. It identifies an *ad hoc* example of a 'matter subject to monitoring' as the issue of 'whether or not a circumstance exists'.¹⁴ However, it does not identify any clear framework or methodology for ascertaining the scope and limits of the concept.
21. Further, the example provided in the Explanatory Memorandum (being the issue of 'whether or not a circumstance exists') appears capable of being covered by the existing categories of 'provisions subject to monitoring' and 'related provisions'. A provision of a triggering Act that imposes a regulatory obligation, and is designated as a 'provision subject to monitoring' for the purpose of the RPA, will necessarily prescribe the factual circumstances in which that regulatory obligation is enlivened. In other words, regulatory 'provisions' necessarily prescribe 'matters'. For example:
 - a provision of a triggering Act which imposes a notification or reporting obligation on regulated entities will necessarily prescribe the circumstances in which that obligation arises (such as the occurrence of a particular event, which may be the passage of a prescribed period of time, the receipt of money or goods, or a matter coming to the knowledge of a regulated entity); and

¹⁴ Explanatory Memorandum, 8 at [19] and 38 at [211].

- a provision of a triggering Act which imposes a civil penalty provision, will necessarily prohibit a regulated entity from engaging in specified conduct in prescribed circumstances, by making them liable to penalty if they do so.

Apparent expansion of monitoring powers

22. Courts are obliged to strive to give meaning and effect to all words of a statute, and are not at liberty to consider any word or phrase as redundant or otherwise of no practical effect, if by any other construction all such words or phrases can be made useful and pertinent.¹⁵ Consequently, for the proposed concept of a ‘matter subject to monitoring’ to have any legal meaning that is distinct to the existing concept of a ‘provision subject to monitoring’ it would need to extend beyond the elements of provisions in triggering legislation that prescribe regulatory obligations (including civil penalty provisions that impose prohibitions and apply sanctions to contraventions), and related provisions (such as stand-alone application provisions applying to provisions prescribing regulatory obligations). Beyond this, however, the scope and limits of the proposed concept of a ‘matter subject to monitoring’ are indeterminate.
23. It is a fundamental tenet of the rule of law that the law must be both readily known and available, and reasonably certain and clear, in advance of its application to specific factual circumstances.¹⁶ This is particularly important for intrusive powers, such as those in Part 2 of the RPA, which have the potential to significantly limit rights and cause loss or damage, including to people who have not contravened any laws.
24. If the Committee is nonetheless persuaded that there is a gap in the scope of the existing monitoring powers in the RPA, then the scope of any expanded powers must be set down with a greater degree of precision than is currently proposed in the Bill. The RPA should impose statutory pre-conditions for the prescription of ‘provisions subject to monitoring’, and ‘matters subject to monitoring’, rather than leaving the determination entirely to individual triggering Acts.

Absence of adequate evidence base for the proposed amendments to the RPA

25. The monitoring powers in Part 2 of the RPA constitute significant intrusions into the privacy of regulated entities. Further, the standard power in section 22 to secure items on premises, pending separate authorisation of their seizure, has the potential to cause significant loss to regulated entities, by preventing them from using an asset that is necessary to conduct their business or otherwise derive an income.
26. It is therefore critical that all proposals to expand the standard powers in the RPA are accompanied by a rigorous and detailed policy justification. Such a justification must provide evidence, by reference to existing practice in applying the RPA, of a gap in the existing powers. It must also demonstrate that the proposed expansion is proportionate to the legitimate regulatory objective of addressing the identified gap.

Legal policy matters concerning the implementation and evaluation of the RPA

27. The Bill is the second ‘omnibus Bill’ to trigger provisions of the RPA in relation to multiple, unrelated regulatory Acts that predate the RPA, and to make various amendments to the standard provisions of the RPA. The first such Bill was the Regulatory Powers (Standardisation Reform) Bill 2016 (**2016 Bill**) (Act 124 of 2017).
28. The Law Council concurs with the observations in the Parliamentary Library Bills Digest on the 2016 Bill that ‘there appears to have been limited public transparency about the process the Government has engaged to apply the RPA to existing

¹⁵ See, for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (per McHugh, Gummow, Kirby and Hayne JJ).

¹⁶ Law Council of Australia, *Policy Statement, Rule of Law Principles* (March 2011), 2.

regulatory legislation'.¹⁷ This comment continues to have force in relation to the present Bill. This absence of transparency may limit the ability of the Parliament and the public to effectively scrutinise individual pieces of triggering legislation, and evaluate the effectiveness of the RPA in achieving the policy objectives of improving consistency and reducing unnecessary complexity.¹⁸ For example:

- the extrinsic materials to the Bill do not identify how individual Acts that pre-date the RPA are assessed as being suitable for standardisation, including details of the review process, decision-making criteria and mechanisms to ensure the consistent treatment of comparable regulatory regimes in different Acts;¹⁹
- there does not appear to be a publicly available register of individual Acts that have triggered the standard provisions of the RPA, including with modifications. While two omnibus triggering Bills have been introduced to date, many individual Acts have also triggered provisions of the RPA in relation to existing or new regulatory regimes. A consolidated register of existing triggering legislation could aid Parliamentary and public scrutiny of future triggering legislation, by readily facilitating comparisons of different approaches to the triggering of the RPA, including approaches taken to modifications. This could enable areas of inconsistency to be rapidly identified and scrutinised;²⁰ and
- there does not appear to be any information on the public record about the means by which the effectiveness of the RPA in achieving its stated policy objectives is being measured, evaluated or reported. In contrast, other Acts commonly include provisions requiring a statutory review to be completed after a period of operation, with requirements for the Parliamentary tabling of their reports.²¹ Such a provision could usefully be included in the RPA.

29. The Committee, in its 2014 report on the originating Bill to the RPA, also commented on the need for a highly transparent process for the standardisation of legislation that pre-dated the RPA, to ensure that Parliament had access to important contextual information when scrutinising triggering legislation.²²

30. Thank you again for the opportunity to make this submission. Please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or natasha.molt@lawcouncil.asn.au if the Law Council may be of any further assistance.

Yours sincerely



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President

¹⁷ Parliamentary Library, *Regulatory Powers Standardisation Reform Bill*, Bills Digest No 42, 2016-17 (November 2016), 63 (**Bills Digest**).

¹⁸ *Ibid*, 59-60, 61-62 and 63-64. While Commonwealth First Parliamentary Counsel has issued a drafting direction relevant to triggering of the RPA, that direction necessarily does not provide direction about the underlying policy of whether existing regulatory legislation should be standardised, and whether modifications should be applied, and what arrangements are in place to moderate and promote consistent decisions. Office of Parliamentary Counsel, *Drafting Direction 3.5A: Regulatory Powers*, (February 2015). (This reflects that such matters of legislative design policy are not in the functions of Parliamentary Counsel. Rather, such policy direction would need to be set by the Attorney-General and administered by their department.)

¹⁹ Bills Digest, 59-60 and 63-64.

²⁰ *Ibid*, 61.

²¹ *Ibid*, 61-62. See further: Department of the Prime Minister and Cabinet, *Legislation Handbook*, (February 2017), 26 at [5.26].

²² Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Regulator Powers (Standard Provisions) Bill 2014* (May 2014), 6 and recommendation 1. See also: Bills Digest, 15.