



SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

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Annual Review 2007
Regulations 2007

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**Scrutiny of Acts and Regulations
Committee**

**Subordinate Legislation
Regulations 2007**

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TERMS OF REFERENCE

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 17 of the *Parliamentary Committees Act 2003* are:-

17. Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are—

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly—
 - (i) trespasses unduly on rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent on non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities*;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament—
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- (c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill—
 - (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or
 - (ii) within 10 sitting days after the Act receives Royal Assent—whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;

- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (fa) the functions conferred on the Committee by the *Charter of Human Rights and Responsibilities*;
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

PRINCIPLES OF REGULATION REVIEW

The principles of regulation review are set out in Section 21 of the *Subordinate Legislation Act 1994*:-

21. Review of statutory rules by the Scrutiny Committee

- (1) The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament—
 - (a) does not appear to be within the powers conferred by the authorising Act;
 - (b) without clear and express authority being conferred by the authorising Act—
 - (i) has a retrospective effect; or
 - (ii) imposes any tax, fee, fine, imprisonment or other penalty; or
 - (iii) purports to shift the onus of proof to a person accused of an offence; or
 - (iv) provides for the sub-delegation of powers delegated by the authorising Act;
 - (c) appears to be inconsistent with the general objectives of the authorising Act;
 - (d) makes unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of that Act;
 - (e) contains any matter or embodies any principles which should properly be dealt with by an Act and not by subordinate legislation;
 - (f) unduly trespasses on rights and liberties of the person previously established by law;
 - (g) makes rights and liberties of the person unduly dependent upon administrative and not upon judicial decisions;
 - (ga) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (gb) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (h) is inconsistent with principles of justice and fairness;
 - (ha) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
 - (i) requires explanation as to its form or intention;
 - (j) has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature;
 - (k) is likely to result in administration and compliance costs which outweigh the likely benefits sought to be achieved by the statutory rule.

- (2) A report of the Scrutiny Committee under this section may contain any recommendations that the Scrutiny Committee considers appropriate, including a recommendation that a statutory rule should be—
- (a) disallowed in whole or in part; or
 - (b) amended as suggested in the report.

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CHAIRPERSONS' FOREWORD

There has been a long, proud tradition of bipartisan regulation review in the Victorian Parliament for over 50 years. We are pleased to present this Annual Review which summarises the operations of the Regulation Review Subcommittee during 2007.

Once again, the Subcommittee was fully engaged. It scrutinised 156 regulations. Of those 156 regulations, 38 were accompanied by regulatory impact statements. In addition, regulations the subject of regulatory impact statements were often accompanied by extremely large numbers of submissions. Often there were up to five hundred submissions accompanying a single regulation! In addition to the regulation, the Subcommittee considers each regulatory impact statement and submission in detail.

This year has been extremely interesting for the Subcommittee. It was required to consider each regulation in the context of the *Charter of Human Rights and Responsibilities Act 2007*. The Subcommittee has had to grapple with an entirely new area of scrutiny and a significant increase in its workload. The consideration of human rights issues can take a considerable amount of time at a meeting if the Subcommittee is to responsibly discharge its obligations. The scrutiny of human rights is discussed in greater detail in Chapter 2.

From the scrutiny perspective, the area of regulation review is working well. Our Legal Adviser, Ms Helen Mason wishes to thank those departmental officers with whom she liaises on a daily basis. The efficient and friendly manner with which the officers respond to queries greatly facilitates the Subcommittee's work. We wish to acknowledge the hard work of the Subcommittee members. Their constant attendance at meetings ensured that every statutory rule was reviewed in accordance with the strict legislative timeframe.

Finally we wish to thank our staff for their commitment and dedication. We thank Ms Helen Mason for her hard work, expertise and provision of timely legal advice. We thank Ms Sonya Caruana for her splendid administrative support and wish her well whilst she is on leave. We thank Dr Jeremy Gans, our legal consultant for the provision of human rights advice. We also thank Mr Simon Dinsbergs for his constant, efficient administrative support and assistance. Finally we thank Mrs Victoria Kalapac for her contribution to formatting this Review and look forward to working with her for the next year.

The area of regulation review continues to evolve. The Subcommittee will use its best endeavours to meet the challenges presented to it.

Ken Jasper MP
Chairperson
Regulation Review
Subcommittee

Carlo Carli MP
Chairperson
Scrutiny of Acts and
Regulations Committee

August 2008

CHAPTER 1 – INTRODUCTION

This *Annual Review* examines the major issues arising out of the scrutiny of Regulations made in Victoria in 2007 by the Regulation Review Subcommittee (the Subcommittee).

WHAT IS THE REGULATION REVIEW SUBCOMMITTEE?

The Scrutiny of Acts and Regulations Committee (the Committee) is a joint investigatory Committee of the Parliament of Victoria. It has members from the Upper and Lower Houses, the Government and the Opposition. The Regulation Review Subcommittee is a subcommittee of the Committee. The Subcommittee scrutinises regulations and conducts inquiries related to regulations.¹

WHAT ARE ‘REGULATIONS’?

Regulations are often referred to as ‘subordinate legislation’ or ‘statutory rules’. Legislation made by Parliament is referred to as primary legislation or Acts of Parliament. Legislation cannot be made by bodies other than Parliament unless Parliament authorises those bodies (by means of an Act of Parliament) to make ‘subordinate legislation’ or ‘statutory rules’. The Subcommittee prefers the word ‘regulations’ to ‘subordinate legislation’ or ‘statutory rules’. It is of the view that this is a more commonly understood term. In this *Annual Review* ‘regulations’ will be used to refer to all ‘statutory rules’ or ‘subordinate legislation’.

The term ‘regulations’ encompasses a variety of legislative instruments such as statutory rules, court rules, local laws, orders-in-council, proclamations, notices, guidelines, ministerial directions, codes of practice and so on. The power to make regulations is delegated by Parliament to the Executive and other non-Parliamentary bodies including government departments, statutory authorities and agencies. The powers delegated to the Executive by Parliament are contained in Acts of Parliament.

PARLIAMENTARY OVERSIGHT

The validity of a regulation depends upon the regulation-making power conferred by the Act under which the regulation is made. Parliament authorises the Executive to make regulations because there is insufficient time to debate and pass all the legislation which needs to be enacted. This is particularly the case where the proposed legislation is very technical or scientific.

While regulations are sometimes perceived to be of lesser importance than Acts of Parliament, regulations do control and prohibit the conduct of citizens and may adversely affect the rights and liberties of citizens in much the same way as Acts of Parliament. The potential for abuse of

¹ Prior to 1 May 2000 the Regulation Review Subcommittee was known as the Subordinate Legislation Subcommittee.

the regulation-making power and erosion of citizens' rights always exists. As Mr Justice Stephen commented in *Watson v. Lee*² the history of delegated legislation:–

reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed "requires an adequate measure of control if it is not to degenerate into arbitrary government".

Parliamentary scrutiny committees, with power to examine regulations made by the Executive, are one of the most important safeguards against the misuse of Executive power. Since the 1930s most Westminster style Parliaments have kept control over regulations through the use of scrutiny committees. Scrutiny committees exist in all Australian states and territories. Some of these scrutiny committees examine bills and regulations, while others examine only regulations.³

Victoria has scrutinised regulations since 1956.⁴ From 1982 to 1992 the Legal and Constitutional Committee was responsible for scrutinising regulations. In 1992, the Committee was created by the *Parliamentary Committees (Amendment) Act 1992* (Vic). It scrutinises regulations and bills.

SCOPE OF THE SUBORDINATE LEGISLATION ACT 1994

The *Subordinate Legislation Act 1994* (Vic) (the *Act*) contains the procedures for making regulations. It sets out the scrutiny functions of the Subcommittee. Only those regulations which come within the definition of 'statutory rule' as contained in section 3 of the Act are subject to the Act. Section 3 defines 'statutory rule' to include:–⁵

- Regulations made, approved or consented to by the Governor-in-Council;
- Regulations which may be disallowed by the Governor-in-Council excluding regulations made by local authorities;
- Rules relating to a court or tribunal or the procedure, practice or costs of a court or tribunal;
- Instruments prescribed to be statutory rules by the Governor-in-Council; and
- Instruments deemed to be statutory rules by their own authorising Act.

² (1979) 155 CLR 374 at 394.

³ Australian jurisdictions which examine regulations and bills include the ACT, the Commonwealth, New South Wales, Queensland and Victoria and those committees include – the Standing Committee on Legal Affairs; Scrutiny of Bills Committee (Cth); Senate Committee on Regulations and Ordinances (Cth); Legislation Review Committee (NSW), Scrutiny of Legislation Committee (Qld) and Scrutiny of Acts and Regulations Committee (Vic). The New South Wales Legislation Review Committee only recently acquired the function of scrutinising bills under section 8A of the *Legislation Review Amendment Act 2002*. Previously the Committee was known as the Regulation Review Committee and it scrutinised regulations only.

Australian jurisdictions which examine regulations only include Northern Territory, South Australia, Tasmania and Western Australia and those committees include – Subordinate Legislation and Publications Committee (NT); Legislation Review Committee (SA); Subordinate Legislation Committee (Tas) and Delegated Legislation Committee (WA).

⁴ *Subordinate Legislation Act 1956* (Vic).

⁵ *Subordinate Legislation Act 1994* (Vic), s. 3.

Regulations in the form of statutory rules constitute only a small portion of the continually growing number of different types of regulations made each year. Some examples of regulations which fall outside the definition of 'statutory rule' are – guidelines, ministerial directions, local laws, codes of practice, notices, declarations and licences. Regulations which fall outside the definition of 'statutory rule' are not subject to:–

- the procedures of the *Act*. However they remain subject to any requirements contained in legislation under which they are made;
- scrutiny by the Subcommittee and generally not subject to Parliamentary review. However it should be noted that some regulations which fall outside the definition of 'statutory rule' are subject to specific Parliamentary review requirements. For example, planning schemes (and amendments) must be tabled in Parliament within 10 sitting days after being approved.⁶

The Committee remains concerned about regulations which fall outside the definition of 'statutory rule' because it means that they are not subject to consistent regulation-making procedures nor generally to Parliamentary review, allowing the potential for powers to be used improperly and for rights to be adversely affected. This issue is discussed in detail in the Committee's *Report on the Subordinate Legislation Act 1994*.⁷

ROLE OF THE SUBCOMMITTEE

The Subcommittee examines and reviews:–

- Regulations within the meaning of 'statutory rule' contained in the Act;
- State Environment Protection Policies and Waste Management Policies made under the *Environment Protection Act 1970* (Vic);

The Subcommittee generally meets once each month to discuss regulations. Meetings of the Subcommittee are not open to the public. However the Subcommittee may invite members of the public or representatives from various organisations or government departments and agencies to address it at one of its meetings. At its meetings the legal adviser presents the Subcommittee with written and verbal advice in respect of each regulation. The Subcommittee members discuss each regulation and any issues and concerns. When the Subcommittee is satisfied that a regulation complies with the Act, it passes a motion of approval.

Where the Subcommittee is dissatisfied with any matters or needs clarification, it corresponds with the responsible Minister. The Subcommittee will highlight its concerns to the Minister. It will seek in the first instance an explanation or amendment of the regulation. If the Subcommittee does not receive a satisfactory explanation it may prepare a Report to Parliament. This Report is submitted to all members of the Committee for formal approval and adoption.⁸ The Committee may adopt or reject the Report or part of it or make any changes it deems necessary.⁹ A Report to Parliament may include a recommendation that a regulation be amended or disallowed in whole or in part. Alternately a Report provided by way of information to the Parliament may simply outline the Committee's concerns. As a regulation has already commenced operation by the time it comes before the Subcommittee, the power to recommend disallowance is only used in exceptional circumstances. Generally, such a power would be used where all other efforts to resolve the issue have failed.

⁶ *Planning and Environment Act 1987* (Vic).

⁷ This Report was tabled in Parliament in September 2002.

⁸ The Regulation Review Subcommittee has all the powers and privileges of the full Committee. However it cannot report directly to Parliament.

⁹ *Parliamentary Committees Act 1968* (Vic), s. 4L(5).

Where the Committee decides to Report to Parliament it may also recommend that a regulation be suspended whilst Parliament considers the issues contained in the Report.¹⁰ Such a course may be undertaken in the interests of justice and fairness. When regulations are suspended in this manner they are deemed not to have been made. This means they have no effect. People are not required to comply with them during the period of suspension.¹¹

DISALLOWANCE

Any Member of either House of Parliament may give notice of a disallowance motion but must do so within 18 sitting days of the tabling of the regulation in that House. Disallowance will not be effective unless that House passes a disallowance resolution within 12 sitting days of the disallowance notice. If the Committee wants to Report to Parliament recommending disallowance, it must also comply with the 18 sitting days requirement. This means that the Subcommittee must review and discuss all regulations within strict time limits.

SCRUTINY OF REGULATIONS

The Subcommittee scrutinises regulations after they have been made to determine whether they comply with the legislative principles specified in the Act.¹² These principles require the Subcommittee to ensure that regulations do not unduly trespass on rights and freedoms and comply with the procedural and practical requirements of the Act. The Subcommittee does not comment on matters involving government policy. The review focuses on the technical criteria contained in the Act. More specifically, under section 21 of the Act the Subcommittee ensures that regulations:–

- Are within the powers of the authorising Act;
- Do not, without clear and express authority;
 - have a retrospective effect;
 - impose a tax, fee, fine, imprisonment or other penalty;
 - purport to shift the onus of proof to a person accused of an offence;
 - provide for the sub-delegation of powers delegated by the authorising Act;
- Are consistent with the general objectives of the authorising Act;
- Do not make unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of the authorising Act;
- Do not contain any matters which should be contained in an Act of Parliament rather than subordinate legislation;
- Do not unduly trespass on rights and liberties of the person previously established by law;
- Do not make rights and liberties of the person unduly dependent on administrative rather than judicial decisions;
- Do not authorise or require any acts or practices which may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000* (Vic);
- Do not authorise or require any acts or practices which may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2000* (Vic);
- Are consistent with principles of justice and fairness;

¹⁰ *Subordinate Legislation Act 1994* (Vic), s. 22(1).

¹¹ *Ibid.*, s. 22(5).

¹² *Subordinate Legislation Act 1994* (Vic), s. 21.

- Is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- Do not require explanation as to form or intention;
- Do not substantially or materially contravene the practical requirements of the Act or the Premier's Guidelines;¹³ and
- Are not likely to result in administration and compliance costs which outweigh the benefits sought to be achieved.

The Subcommittee also ensures compliance with the procedural requirements of the Act. Where a Regulatory Impact Statement (RIS) has been prepared, some of the procedural issues the Subcommittee examines include whether:—

- all appropriate certificates have been received by the Subcommittee;
- consultation is adequate and in particular whether appropriate organisations and individuals have been consulted;
- certificates are dated and signed by the responsible Minister;
- certificates contain all the required information; and
- the RIS is adequate and in particular whether it properly explains the nature and extent of the problem to be dealt with by the new regulation; the extent to which alternatives have been considered and the appropriateness of those alternatives; the costs and benefits of the proposed regulations and whether the benefits outweigh the costs.

Where a regulation is excepted or exempted from the RIS process, some of the procedural requirements the Subcommittee examines include whether:—

- the regulation is correctly exempted or excepted or whether it should have been made with a RIS;
- the regulation is exempted or excepted under the appropriate category in the Act;
- the exemption or exception certificate specifies the section under which the exemption or exception was granted;
- the exemption or exception certificate is signed and dated by the responsible Minister;
- the exemption certificate contains reasons for granting the exemption as required by section 9(2);
- a regulation exempted by a Premier's certificate sunsets within 12 months.

The Subcommittee also ensures that:—

- explanatory memoranda clearly set out the nature and extent of any changes and the reasons for the changes; and
- there is compliance with all notice, gazettal and tabling requirements of the Act.

SCRUTINY OF ENVIRONMENT PROTECTION AND WASTE MANAGEMENT POLICIES

The Subcommittee also has responsibility for reviewing policies made under Part 3 of the *Environment Protection Act 1970* (Vic). These policies include State Environment Protection Policies and Waste Management Policies.

¹³ Department of Premier and Cabinet, Premier's Guidelines, December 2004.

More specifically State Environment Protection Policies include:–

- policies concerning the environment generally;¹⁴
- policies concerning the removal, disposal or reduction of litter in the environment;¹⁵
- policies concerning the re-use and recycling of substances.¹⁶

Until recently waste management policies made under the *Environment Protection Act 1970* (Vic) applied only to industrial waste. With changes brought about by the *Environment Protection (Resource Efficiency) Act 2002* (Vic) waste management policies now apply to waste generally.¹⁷ Waste management policies are now enacted under section 16A of the *Environment Protection Act 1970* (Vic).¹⁸

Waste Management Policies include policies dealing with:–¹⁹

- the generation, storage, treatment, transport and disposal and general handling of waste;
- the procedures to be implemented in the recycling, recovery, reclamation and re-use of waste and recycled substances;
- the methods of disposal of specified substances;
- the routes and methods of transportation of waste;
- the location of treatment and disposal plants;
- the allocation of responsibility for waste management operations and disposal; and
- the use and disposal of notifiable chemicals.

State Environment Protection Policies and Waste Management Policies are made by the Governor-in-Council on the recommendation of the Environment Protection Authority (EPA) by publishing an Order declaring the policy in the *Victorian Government Gazette*.²⁰ These policies must be tabled in each House of Parliament on or before the sixth sitting day after the Order is published in the *Victorian Government Gazette*.²¹

Section 18A of the *Environment Protection Act 1970* (Vic) sets out the requirements which must be followed when making State Environment Protection Policies and Waste Management Policies. Certain policies are excluded from the provisions concerning the preparation of policies. For example, the variation of a State Environment Protection Policy or Waste Management Policy which the EPA determines to be fundamentally declaratory, machinery or administrative in nature. Otherwise the following procedures must be followed:–

- during a minimum period of 21 days, the EPA must publish on three occasions in a relevant newspaper – notice of intention to declare a policy. The notice must include the area affected and advise that any person affected may submit information to the EPA;
- the EPA must consider information provided to it by any person affected or likely to be affected;

¹⁴ *Environment Protection Act 1970* (Vic), s. 16(1).

¹⁵ *Ibid.*, s. 16(1B).

¹⁶ *Ibid.*, s. 16(1C).

¹⁷ See definition of 'waste' in the *Environment Protection Act 1970* (Vic), s. 4.

¹⁸ Previously Industrial Waste Management Policies were made under section 16(1A) of the *Environment Protection Act 1970* (Vic).

¹⁹ *Environment Protection Act 1970* (Vic), s. 16A.

²⁰ *Ibid.*, s. 16(1).

²¹ *Ibid.*, s. 18D(1).

- the EPA must consult with any government department or statutory authority whose responsibilities may be affected by the policy;
- the EPA must prepare a draft policy;
- the EPA must prepare a draft impact assessment;
- during a minimum period of 21 days the EPA must publish on three occasions in a relevant newspaper – notice of preparation of a draft policy. The notice must include the reasons for and objectives of the policy, a description of the area affected, details of where a copy of the draft policy may be obtained and specify that any person likely to be affected may make a submission;
- the EPA must allow a period of at least three months for submissions;
- the EPA must consider all submissions; and
- the EPA must write a separate letter to each person who has lodged a submission.

Section 18C of the *Environment Protection Act 1970* (Vic) sets out the matters which a policy impact assessment must discuss:–

- the purposes of the policy;
- the alternatives for achieving the objectives, including consideration of not declaring the policy or varying the existing policy; and
- an assessment of the possible financial, social and environmental impacts of each alternative in qualitative and, where practicable, in quantitative terms.

A copy of the following documents must be forwarded to the Committee:–

- the final policy impact assessment;
- a summary of submissions;
- a statement of the EPA's evaluation of the submissions and any changes made to the draft policy;
- a copy of the review panel's advice if there was a review panel.

The Committee may report to Parliament where these policies are beyond power or do not comply with the provisions of the *Environment Protection Act 1970* (Vic). Section 18D(3) provides that the Committee may report to Parliament where a policy:–

- does not appear to be within the powers conferred by the *Environment Protection Act 1970* (Vic);
- has been prepared in contravention of the *Environment Protection Act 1970* (Vic); or
- contains any matter in contravention of *Environment Protection Act 1970* (Vic).

Initial reviews of State Environment Protection Policies and Waste Management Policies are carried out by the Subcommittee. Where the Subcommittee is unable to resolve any issues, it may recommend to the Committee that a report be made to Parliament. A report to Parliament by the Committee may make any recommendations considered appropriate including that a policy be disallowed in whole or in part.²²

²² Ibid., s. 18D(4).

The disallowance provisions contained in sections 23 and 24 of the Act apply to State Environment Protection Policies and Waste Management Policies.²³ This means that the 18 sitting day deadline applies, that is the Committee must table a motion for disallowance within 18 sitting days after the Policy has been tabled before that House.

NEW AREA OF SCRUTINY – THE SCRUTINY OF HUMAN RIGHTS – NEW LEGISLATIVE REQUIREMENTS THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

The *Charter of Human Rights and Responsibilities 2006* (the Charter) commenced operation on 1 January 2006. Pursuant to the Charter the Subcommittee is required to consider every statutory rule in the context of human rights and compatibility with the Charter. This applies to all statutory rules in the 2007 series, the subject of this Report. Mention is made here of this new area of scrutiny for the sake of completeness. It is discussed in further detail in Chapter 2.

²³ Ibid., s. 18D(6).

CHAPTER 2 – SIGNIFICANT ISSUES

In 2007, the Subcommittee held **9** meetings. During those meetings it considered **156** statutory rules made during 2007. Of those rules **38** were accompanied by Regulatory Impact Statements. Of the total regulations made **56** were actually considered by the Subcommittee in early 2008.

The Subcommittee did not make any reports to Parliament during 2007. However, the Subcommittee sought further clarification in relation to **six** statutory rules. In each instance, it wrote to the responsible Minister. Generally, the Subcommittee received satisfactory responses to the issues raised. The Subcommittee thanks the Ministers for their responses.

Generally, the Subcommittee has classified the issues it encounters into particular categories. This year the Subcommittee did not encounter any significant problems. From the Subcommittee's perspective, the area of regulation review is working well. Communication from Departments is generally punctual and addresses concerns. The Subcommittee wishes to thank departmental officers for the prompt and friendly manner with which they respond to queries. This greatly facilitates the work of reviewing regulations.

For the sake of consistency the areas which have been discussed on previous occasions are listed as follows:-

- (a) The statutory rule has been prepared in contravention of any of the provisions of the act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature.**
- (b) Consultation**
- (c) Consideration of submissions – general expectations – response required**
- (d) Technical matters – incomplete certificates – dates of publication in the government gazette and newspaper – premier's certificate – special circumstances**
- (e) Setting a package of fees – the basket approach – the impact of the premier's guidelines**
- (f) Sighting of material incorporated by reference**
- (g) Section 21(1)(i) – requires explanation as to its form or intention**
- (h) Other matters – general clarification – the 'balanced scorecard approach' – what is it?**
- (i) Section 9(1)(a) – is there any appreciable economic or social burden on any sector of the public?**
- (j) Commendations**
- (k) Human rights**

(A) THE STATUTORY RULE HAS BEEN PREPARED IN CONTRAVENTION OF ANY OF THE PROVISIONS OF THE ACT OR OF THE GUIDELINES WITH RESPECT TO THE STATUTORY RULE AND THE CONTRAVENTION IS OF A SUBSTANTIAL OR MATERIAL NATURE

Under section 21(1)(j) of the Act the Subcommittee examines regulations to ensure that they have been properly prepared. It examines them to see whether they have been prepared in contravention of any of the provisions of the Act or of the guidelines with respect to the statutory rule. It examines the regulations to see whether the contravention is of a substantial or material nature.

This year no statutory rules came within this category.

(B) CONSULTATION

Section 6 of the Act sets out the requirements for consultation. These requirements apply to regulations made with or without RIS's. Responsible Ministers must ensure that there is consultation "where the guidelines require consultation"²⁴ with "any sector of the public on which an appreciable economic or social burden may be imposed."²⁵

The Premier's Guidelines²⁶ provide as follows:-

5.19 If the proposed statutory rule is likely to impose any appreciable burden, cost or disadvantage on any sector of the public, consultation must take place with that sector, eg business groups, community groups, special interest groups. That consultation should include discussion of the need for and method of the proposed regulation.

The Premier's Guidelines indicate that the "nature and degree of consultation that is appropriate for any particular rule will vary with the nature of that rule".²⁷ This places the final responsibility on Ministers to ensure that appropriate consultation takes place and includes all those affected by a proposed regulation.

While the Premier's Guidelines provide assistance with the consultation process, the Subcommittee acknowledges that some sections are unclear and ambiguous. This makes it difficult for department and agency officers to determine in what circumstances consultation should take place. There is, for example, an inconsistency between the Act and the Premier's Guidelines as to whether consultation **must** or **should** occur in accordance with the Premier's Guidelines. It is the strong preference of the Subcommittee that consultation take place with all those affected by a particular regulation and that the current ambiguities be resolved.

The Subcommittee considers it is important for all consultation certificates to provide details of all those consulted.

²⁴ Section 6, Subordinate Legislation Act 1994.

²⁵ Ibid, Section 6(b).

²⁶ Paragraph 5.19, Premier's Guidelines, December 2004.

²⁷ Ibid, Paragraph 5.13.

(C) CONSIDERATION OF SUBMISSIONS – GENERAL EXPECTATION – RESPONSE REQUIRED**General Expectations**

Section 11(3) of the Act imposes a duty on Ministers “to consider all submissions and comments received on a draft statutory rule where a RIS has been prepared”.²⁸ The Premier’s Guidelines also emphasise the need for proper consultation²⁹ before a regulation is made.

The Subcommittee considers that appropriate consultation is essential for the effectiveness of the regulatory system. The Subcommittee expects that submissions will be appropriately considered. To that end, a considered response from the Department to an individual submission is tangible evidence that matters have been considered. The Subcommittee’s firm view is that responses ought to be sent to those who have taken the time and effort to send in a submission.

The Subcommittee understands that occasionally there may be a large number of submissions in respect of a particular regulation. However, the Subcommittee’s view is that the number of submissions does not alter the expectation that an appropriate response should be sent. It simply means that there are a large number of people who have issues with the proposed regulation. Whilst this may mean an increased workload occasionally, the Subcommittee’s strong view is that this is simply a part of the democratic regulatory process. Appropriate weight and consideration ought to be given to the submissions sent in. Transparency is a critical part of the process. The Minister is required to perform his or her duty in accordance with section 11(3) of the Act. The Subcommittee’s firm view is that publication of a response to issues on a website is a quite inadequate response.

The Subcommittee has generally noticed a considerable improvement in the quality of responses prepared by the Departments in respect of submissions. Generally, Departments prepare a table summary of the issues raised in the submissions. This is the case particularly where there are a large number of submissions. The Subcommittee finds this to be extremely helpful. This year, in many Regulations where there are a large number of submissions, Departments have sent a general letter covering the various themes to those who made submissions. In other instances, where there are a few submissions, Departments have written individual letters to those who made submissions, discussing the various matters raised in detail.

The Subcommittee considered the matter of responses to the submissions in relation to SR No. 2 – *Plumbing (Heat Pumps Amendment) Regulations 2007*. The Subcommittee advised the Minister of its expectations. The Subcommittee thanks the Minister for his prompt response. Set out below are the relevant letters.

Example 1:**SR No. 2 – Plumbing (Heat Pumps Amendment) Regulations 2007*****Subcommittee’s Letter***³⁰

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 16 May 2007.

²⁸ Section 11(3), *Subordinate Legislation Act 1994*.

²⁹ Sections 5.12 - 5.17, Premier’s Guidelines, December, 2004.

³⁰ Letter dated 21 May 2007 to the Hon. Justin Madden MP, Minister for Planning, from the Regulation Review Subcommittee.

The Regulatory Impact Statement Process

During the Regulatory Impact Statement (RIS) process sixteen submissions were received. The majority of the submissions supported the Regulations. However, five organisations opposed the Regulations. The basis of their opposition was that the RIS was flawed. They disputed the costs used in the RIS.

As a result of those submissions, the Plumbing Industry Commission retained an independent organisation, Energy Consult Pty Ltd to examine the data, assumptions and outcomes in the RIS. The report produced by Energy Consult Pty Ltd concluded that the RIS assumptions and outcomes were reasonable.

Committee's expectation – response to the submissions

The Committee made the following comments in the Annual Review 2005 at page 13:-

The Subcommittee considers that appropriate consultation is essential for the effectiveness of the regulatory system. The Subcommittee expects that submissions will be appropriately considered. To that end, a considered response from the Department to an individual submission is tangible evidence that matters have been considered. The Subcommittee's firm view is that responses ought to be sent to those who have taken the time and effort to send in a submission...Appropriate weight and consideration ought to be given to the submissions sent in. Transparency is a critical part of the process.

No written responses were sent to those who made submissions, although some organisations appeared to receive a copy of the independent Report. Meetings were also held in the post RIS period. The Subcommittee wishes to acknowledge the significant amount of work undertaken in responding to the matters raised during the RIS process. However, the Subcommittee's view generally is that a written response ought to be sent to those who send submissions. The Subcommittee requests that you advise those officers involved of its expectations.

Please do not hesitate to contact me should you wish to discuss the matter.

Plumbing Industry Commission Response³¹

I refer to your letter of 21 May 2007 to the Minister for Planning, regarding responses to the submissions made to the Plumbing Industry Commission (PIC) on the Regulatory Impact Statement (RIS) for the Plumbing (Heat Pump Amendment) Regulations 2007. I apologise for the lateness of this reply.

The Minister requested the PIC consider the Sub-Committee's comments regarding written submissions during an RIS process.

I can confirm that no written responses were made to those parties who made submissions on the RIS. However, the PIC conducted a series of meetings directly with those people and organisations who made submissions expressing concern about the RIS, to work through the issues raised.

The PIC is now fully aware of the expectations of the Scrutiny of Acts and Regulations Committee and has now amended its internal procedures to ensure that all parties responding during a RIS consultation period will be provided with a written response.

³¹ Letter dated 13 September 2007 to the Regulation Review Subcommittee from Commissioner, Plumbing Industry Commission.

Should you have any further queries in relation to this issue, please contact Mr Shayne La Combre, General Manager Operations, at the PIC on (03) 9880 6204.

The Subcommittee also considered the response to submissions in relation to SR No. 60 – Disability Regulations 2007. The correspondence is set out below.

Example 2:

SR No. 60 – Disability Regulations 2007

Subcommittee's Letter³²

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 3 October 2007. The Subcommittee has not yet approved the Regulations.

Four submissions were received in response to the Regulatory Impact Statement. Written responses were sent to all those who sent submissions. The Subcommittee understands how the prescribed amount specified in Regulation 5 is calculated. It is an amount equal to the sum of 75% of the Commonwealth Disability Support Pension (DSP) and 100% of the Commonwealth Rent Assistance (CRA) received by the person to whom the proposed residential charge relates.

The Subcommittee notes the response sent to Yooralla that:-

The prescribed threshold is based on a board and lodging model and includes all service items (a) to (h) listed in the Disability Act 2006.

The Subcommittee further notes the response sent to Ms Pauline Williams that:-

The Department's proposed threshold is informed by interstate benchmarks where board and lodging models apply.

Nevertheless, the Subcommittee is of the view that the responses sent do not adequately address the issues raised. Yooralla, Ms Pauline Williams and representatives at a meeting with the Department of Health Services on 13 June 2007 contend that the threshold being set at 75% of the DSP and 100% of the CRA is not appropriate.

They assert that there will be an inadequate balance to meet personal needs, transport, day program charges, medication and community access. In particular Yooralla has a strong objection. Yooralla asserts that the new limit has the potential to substantially erode the capacity of the individual to undertake any leisure interest or to meet other basic living expenses such as clothing and medication. The Yooralla submission was accompanied by two case studies to support this contention.

What is your response to these matters?

The Subcommittee must consider the Regulations within strict statutory time limits. It would appreciate your urgent response by no later than 1 November 2007.

³² Letter dated 3 October 2007 to the Hon. Linda Neville, MP, Minister for Community Services, from the Regulation Review Subcommittee.

Minister's Response³³

Thank you for your letter of 3 October 2007 in which you sought further advice on the Department's response to submissions relating to Regulation 5 of the Disability Regulations 2007 which sets the prescribed amount for a residential charge at 75% of the Disability Support Pension (DSP) and 100% of Commonwealth Rent Assistance (CRA).

Regulation 5 provides a maximum board and lodging residential charge threshold that should be taken into account by the Victorian Civil and Administrative Tribunal (VCAT) when it is requested to review whether a proposed increase to a residential charge by a disability service provider could be considered excessive.

Section 72(2) of the Disability Act 2006 requires VCAT to consider a range of relevant factors when reviewing claims of excessive residential charges. These factors include comparisons of residential charges between similar service provider models, locations, conditions and type of accommodation settings ensuring public accountability and equity, consistent with community norms. The section also requires VCAT to take into consideration any guidelines issued by the Department for the purposes of Section 65.

The Department has chosen to set a maximum threshold amount by regulation and not to prescribe the different amounts for the rent and service components as this would eliminate flexibility, stifle innovative responses and limit options and choices for people with a disability.

The Department does not regulate residential charges in the non-governmental sector. There is a diverse range of residential charges in the sector reflecting the different service components included in residential charges. The higher prescribed threshold provides coverage for a more comprehensive range of board and lodging services. A lower threshold may result in a larger number of VCAT reviews. It may also result in lower levels of service provision to people with a disability.

The Department has a policy that no eligible person is denied a service based on a lack of capacity to pay. This ensures that individuals who can afford to make a reasonable contribution towards the costs of government service provision do so whilst others, under more difficult circumstances, can retain a reasonable income for basic living needs in a community setting without undue financial hardship.

In regard to each of the case studies, it is very likely that the level of high expenditures in medication, RDNS nursing support and day program fees would be reduced by the individual accessing eligible safety net provisions under the pharmaceutical benefit schemes, the State Government Multi Purpose Taxi Program, subsidised Aids and Equipment program, and the reduction or waiving of fees under the numerous health programs of the Department, including disability services.

There will always be a small number of exceptional high cost, high support-needs individuals. These cases are more appropriately dealt with through the Department's discretionary fees review and financial hardship provisions rather than lowering the threshold for all individuals. A copy of the Department's Undue Financial Hardship Guidelines is included in Attachment 1 for your information.

It is reasonable to assume that community service organisations will adopt a responsible, fair and balanced approach towards fee levels. Notwithstanding this, there are adequate checks and balances in place under the Disability Act to protect

³³ Letter dated 5 November 2007 to the Regulation Review Subcommittee from the Hon. Lisa Neville, MP, Minister for Community Services.

the rights of residents and the development of appropriate Departmental policies and guidelines to give effect to the new legislation. In particular:

- *Section 57 requires a disability service provider to provide a statement of the residential charge and details of the residential services to be provided to the person residing at the residential service and to their guardian or administrator.*
- *Section 14 establishes the role of the Disability Services Commissioner who has a statutory role to investigate complaints relating to disability services.*

Disability Services Division will also be reviewing its Undue Financial Hardship Guidelines in consultation with the sector through National Disability Services – Victoria to ensure consistency, equity, transparency and simplicity in its application

I am advised that since the commencement of the Act from 1 July 2007, VCAT has not received any request for a review of an increase in residential charges.

Based on the above information I consider that the strong checks and balances and policies in place provide a fair and reasonable approach to inform residential fee setting.

If you require further clarification, please do not hesitate to contact my office, or Mr Arthur Rogers, Executive Director, Disability Services on 9096 8254.

Submissions received by the Subcommittee

This year the Subcommittee received three lengthy submissions in relation to SR No. 149 *Transport (Taxi-Cab Industry Accreditation) Regulations 2007*. The Subcommittee considered the submissions. The Subcommittee then decided to forward the submissions to the Minister for his further comments and consideration in relation to a number of matters. The Subcommittee wrote to the Minister:-

Example 1:

SR No. 149 – Transport (Taxi-Cab Industry Accreditation) Regulations 2007

Subcommittee's Letter³⁴

The above Regulations have not yet been tabled in the Parliament. The Regulation Review Subcommittee (the Subcommittee) has therefore not yet formally considered the Regulations. However the Subcommittee has received three substantive submissions in relation to the above Regulations. The submissions enclosed are from Davies Collison Cave Solicitors Pty Ltd, Middletons and Holding Redlich respectively.

However, in order to properly scrutinise the Regulations, the Subcommittee would appreciate your response to the matters raised in the submissions. A considered response to the issues would be of assistance to the Subcommittee in its deliberations in the New Year.

The Subcommittee has taken the view that it may be of assistance to send the submissions to you at this stage in the process to allow sufficient time given the impending Christmas break.

³⁴ Letter dated 17 December 2007 to the Hon. Lynne Kosky, MP, Minister for Public Transport, from the Regulation Review Subcommittee.

The Subcommittee looks forward to your considered response to the matters raised.

Set out below is the Minister's response to the matters raised:-

Minister's Response³⁵

I refer to your letter dated 17 December 2007 requesting my response to the matters raised in the submissions.

Recent amendments to the Transport Act 1983 establish an accreditation scheme for taxi-cab licence holders, operators and network service providers to raise safety, service and equity standards in the industry.

The accreditation scheme is comprised of three main regulatory instruments:

- *Transport Act 1983 – sections 130 – 137E inclusive;*
- *Business and Services Standards enacted by Ministerial Order published in the Government Gazette on 18 December 2007; and*
- *Transport (Taxi-cab Industry Accreditation) Regulations 2007 – which commenced on 31 December 2007*

The three submissions attached to your letter dated 17 December 2007 were received by the Department of Infrastructure (DOI) when the draft Business and Service Standards and the regulations were released for public comment from 24 October 2007 to 22 November 2007.

DOI and I have considered the matters raised in the submissions and written responses were sent to the relevant parties by DOI. Copies of the written responses are at Attachment A to assist in the Committee's deliberations.

Please note that only one submission (Holding Redlich) appears to relate to the regulations. The other two submissions appear to relate only to the Business and Service Standards.

Please do not hesitate to contact me if you have any questions.

Following is a copy of the letter, being Attachment A, sent to Mr Mark Howard and Mr Darren Saltzman.

Attachment A³⁶

Dear Mr Howard

Thank you for your submission about the Taxi-Cab Industry Accreditation draft business and service standards. Your contribution was appreciated and your comments were taken into consideration in the making of the final standards.

A range of issues were raised during the consultation process. While we are unable to respond to each of your points individually, below are responses to some of the key issues raised in the submissions

³⁵ Letter dated 20 February 2008 to the Regulation Review Subcommittee from the Hon. Lynne Kosky, MP, Minister for Public Transport.

³⁶ Copy of Letter dated 20 December 2007 to Mr Mark Howard of Middletons Lawyers and Mr Darren Saltzman of Davies Collison Cave, from the Department of Infrastructure.

Part 1, Standard 3

A number of submissions raised issues in relation to the information that the licence holder has access to. There was a concern that the licence holder could require access to sensitive commercial information held by an assignee. We have clarified the standard so that only customer service and safety related information, as defined by items 1(a), 1(i), 1(j), 1(k), 1(l) and 1(m) of schedule 1 of the Transport (Taxi-Cab Industry Accreditation) Regulations 2007, can be requested by licence holders.

Part 1, Standards 4, 5, 6

We received a number of submissions in relation to the power of the Government to give obligations to licence holders as part of the accreditation regime. The Government considers that the standards are clearly within power and necessary in order to give effect to the chain of responsibility regulatory mechanism.

The final standards clarify that the licence holder's obligation is to monitor and audit compliance by the assignee with the standards relating to safety and customer service.

Part 3 Standard 18 (previously Standard 19 in draft Standards)

A number of submissions were received in relation to the requirement that network service providers advise booked passengers about the likely appropriate time of arrival of a taxi-cab. The Government sees this as an important requirement to improve the standard of customer service; however after further consultation a modification was made in the wording. It now provides that a network service provider will advise the person making the booking or order for the hiring of a taxi-cab of any significant delay known to the network service provider in the arrival of a taxi-cab at the place of pick-up.

Part 3 Standard 21 (previously Standard 22 in the draft Standards)

The proposed standard regarding disciplinary proceedings attracted a number of comments. As a result, the following amendments have been made:

- The meaning of independent persons in section (e) has been clarified and examples given.
- Section (g) has been clarified so that drivers and operators may be represented in disciplinary matters but only at appeal hearings.
- Section (h) now provides that any bond money imposed on the operator or driver for lodging an appeal does not exceed \$150 and that the bond must be fully refunded upon appearance at the appeal irrespective of the outcome.
- Section (j) now provides that Network Service Providers are able to impose lawful financial penalties not exceeding \$100 as part of these disciplinary proceedings. Examples of lawful penalties have been given.

The standards have now been made and will come into effect from 31 December. If you would like to view the final document you can do so by visiting www.taxi.vic.gov.au.

Thank you again for taking the time to make a submission.

Following is a copy of the letter being Attachment A (part 2), sent to Mr Howard Rapke.

Attachment A, part 2³⁷

Dear Mr Rapke

Thank you for your submission of 22 November 2007, on behalf of Cabways Pty Ltd, concerning the proposed Transport (Taxi-Cab Industry Accreditation) Regulations 2007. The Department has considered all the submissions received and certain amendments have been made to the draft Regulations. Your contribution is appreciated and your comments were taken into consideration in the making of the final Regulations. A separate response is being sent to you concerning the draft business and service standards.

The following comments are made in response to the specific issues you have raised in relation to the draft Regulations.

Regulation 7

In your submission you state that "it is arguable that Regulation 7 does not have any effect".

The accreditation regime provides for accreditation as a licence holder and a separate accreditation as a taxi-cab operator (whether the operator is a licence holder, or the assignee of the right to operate a vehicle under a licence, or, as with Cabways, an operator in both of those capacities). In order to operate a taxi-cab under a licence that is not the subject of an assignment, the holder of the licence must hold accreditation both as a licence holder and as a taxi-cab operator. Regulation 7 makes it a condition of an accreditation as a taxi-cab operator that the operator keep a record of the specified information. The Department considers therefore that Regulation 7 clearly does have an effect.

In your submission you say that the requirement under Regulation 7 for operators to keep the records in Schedule 1 for five years "would give rise to an administrative nightmare".

The Department has reviewed the matter and believes that the requirement is reasonable. The requirement to retain records for a period of time, in this case, the maximum period for which an accreditation can last, is not unusual with Government regulatory and other regimes. It is needed to enable the licensing authority to monitor past and ongoing compliance with standards. No other submitter raised a concern over this issue.

Schedule 1

In your submission you refer to the effort and cost of recording and maintaining the information set out in Schedule 1. The Department considers that the requirements themselves are reasonable, given the business and service standards determined by the Minister and the need for compliance with the standards to be monitored. Appropriate and targeted record keeping requirements are a crucial part of monitoring this compliance. The basic information required under item 1(d) (i.e. the number of hirings during a shift) and item 1(e) (i.e. the total kilometres travelled during each shift when the vehicle was hired) in Schedule 1 is particularly important for measuring performance and utilisation. It is also vital for such purposes as taxi-cab fare reviews.

The new Transport (Taxi-cab Industry Accreditation) Regulations 2007 will come into effect on 31 December 2007. A copy can be obtained from Information Victoria, 505

³⁷ Copy of Letter dated 20 December 2007 to Mr Howard Rapke of Holding Redlich, from the Department of Infrastructure.

Little Collins St Melbourne, 1300 366 356 (www.information.vic.gov.au) or from www.legislation.vic.gov.au.

Thank you again for taking the time to make a submission.

The Subcommittee has frequently been provided with a thorough summary of the issues raised during the RIS process. The Subcommittee's view is that transparency is an important part of the regulatory statement process. To that end, the Subcommittee's view is that an appropriate response ought to be communicated to those members of the public involved in the process. The fruit of the considerable labour already undertaken needs to be shared to add a further degree of transparency.

(D) TECHNICAL MATTERS – INCOMPLETE CERTIFICATES – DATES OF PUBLICATION IN THE GOVERNMENT GAZETTE AND NEWSPAPER – PREMIER'S CERTIFICATE – DETAILS OF 'SPECIAL CIRCUMSTANCES'

The Subcommittee is concerned to ensure technical compliance with the Act. Pursuant to section 11(a) and (b) of the Act, the RIS must be published in the Government Gazette and a daily newspaper circulating generally throughout Victoria. All relevant certificates should accompany the regulations and be signed and dated. Failure to do so will ensure a letter from the Subcommittee requesting rectification of the matter.

The Subcommittee had no concerns in respect of this area this year.

(E) SETTING A PACKAGE OF FEES – 'THE BASKET APPROACH' – THE PREMIER'S GUIDELINES

The Guidelines³⁸ provide as follows:-

5.25 It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

By way of example SR No. 57 – *Plumbing (Fees Amendment) Regulations 2005*³⁹ increased a number of fees. This was done using the 'basket' approach. In this instance, four of the seventeen fee increases exceeded the Treasurer's approved rate of 2.25% although the actual monetary increases were extremely small. In addition, the package as a whole fell within the Treasurer's approved rate. The increases were 0.03% above the approved rate. The table set out below illustrates the dollar value of the four fee increases which were marginally above the approved rate. In real terms, the largest monetary amount above an increase of 2.5% was eight cents. The smallest monetary amount above an increase of 2.5% was three cents.

³⁸ Sections 5.12 - 5.17, Premier's Guidelines, December, 2004.

³⁹ Annual Review 2005 – Regulations; p. 21

Item	Current Fee	Proposed Fee	Dollar Increase Based on 2.5%	% Increase	Actual Increase
For registration under section 221O or a renewal of registration under section 221ZB	\$237.00	\$243.00	\$5.92	2.53%	\$6.00
For provisional registration or renewal of provisional registration	\$79.00	\$81.00	\$1.97	2.53%	\$2.00
For restricted registration or a renewal of restricted registration	\$237.00	\$243.00	\$5.92	2.53%	\$6.00
For an application to modify the plumbing regulations under section 221ZZO	\$79.00	\$81.00	\$1.97	2.53%	\$2.00

The Subcommittee is bound by the Guidelines. A strict interpretation of the Guidelines leads to the view that as a matter of principle individual fees in a 'basket' package should not exceed the Treasurer's annual rate. However, the Subcommittee is of the view that fee increases and the Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a 'basket' package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee's view is that it is a matter of balance. The 'basket' of fees in its entirety must not exceed the Treasurer's approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer's annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each Regulation will be examined on its merits and in context.

During the year when necessary there have been informal discussions with officers from the various Departments and the Legal Adviser. The discussions suggest that a strict interpretation of the Guidelines may make it difficult for Departments in practical terms in setting a package of routine fee increases. Ultimately, Regulations are the practical arm of the legislation. They need to function and be made in a commonsense and practical manner where possible. The Subcommittee will continue to monitor the impact of the Guidelines. If and when appropriate it will recommend changes to the wording of the Guidelines. At this stage, the Guidelines have only been in operation for over a year. The Subcommittee will carefully scrutinise the Regulations and the Guidelines during the coming year. The Subcommittee welcomes input from Departments.

(F) SIGHTING OF MATERIAL INCORPORATED BY REFERENCE

Regulations often include a table of applied, adopted or incorporated matter in accordance with the requirements of regulation 6 of the *Subordinate Legislation Regulations 1994*. Such a table lists all the material applied, adopted or incorporated by reference in the regulations. Occasionally, the Subcommittee is placed in the position where it has to consider and or approve regulations without sighting the material which is incorporated into them. Where the Subcommittee does not sight the material it cannot form a view as to whether it conforms with the requirements of the Act.

The Premier's Guidelines provide some assistance⁴⁰:-

7.03 Section 32 of the Interpretation of Legislation Act 1984 prescribes the procedural requirements which must be fulfilled whenever a statutory rule applies, adopts or incorporates material by reference. Section 32(5) of the Interpretation of Legislation Act 1984 provides that a failure to comply with the tabling requirements does not affect the validity, operation or effect of a statutory rule but agencies should nevertheless ensure compliance with the requirements of section 32 as amended by the Subordinate Legislation Act 1994.

7.04 When considering whether to incorporate a particular document in a statutory rule it should be remembered:

- *that the provisions of the rule will only refer to the incorporated material and members of the public affected by the rule must see the incorporated document before they can understand the contents and effect of the rule;*
- *that the incorporated material may not be readily available at a reasonable cost;*
- *that the procedures set out in section 32 are designed to facilitate Parliamentary oversight of incorporation of material and to ensure that such material is publicly available so that members of the public affected by the rule can have access to the rules with which they must comply.*

7.05 It needs to be remembered that the incorporated material may not be a single document. The problem is exacerbated by the drafting style adopted by the Standards Association of Australia as these standards are frequently not self contained but adopt the provisions of other standards. This can create a chain of material incorporated by reference leading to the possibility that the need to table a particular document will be overlooked.

7.06 Consideration should also be given in drafting statutory rules as to whether the reference to an Australian Standard should be to a specific standard (eg AS 1234) or to a specific version of a standard by reference to its date (eg AS 1234, 1997). The latter approach means that if a later amended version of a standard is to be adopted it will require the amendment of the statutory rule and the undertaking of the RIS process. The former approach may result in significant changes to the effect of the statutory rule with no automatic mechanism to review the changes to the costs and benefits of the statutory rule.

7.07 The aim of the procedures set out in section 32 of the Interpretation of Legislation Act 1984 is to guarantee the availability of any material which is incorporated into a statutory rule by reference, to ensure that citizens may have access to the laws with which they must comply.

7.08 In deciding whether to incorporate material by reference, agencies need to take care to balance the drafting convenience with ease of access to the incorporated material and understanding of it by those affected by it or required to comply with it. Agencies should reserve the use of incorporated detailed and extensive technical material to regulations concerning industries familiar with and using the material. The use of the material then has the benefit of removing duplication. In such cases agencies should also consider whether performance standards are the more appropriate means of regulations.

The Subcommittee's preference is that all material is provided to it simultaneously so that it can all be considered in the context of the Regulation.

⁴⁰ Sections 7.03 – 7.08, Premier's Guidelines, December 2004.

This year the Subcommittee has again noticed that generally material incorporated by reference has been provided to it with the original material in respect of the Regulation. This certainly makes the Subcommittee's task easier. The Subcommittee wishes to acknowledge and thank those Departments who make the effort to forward to it additional material.

(G) SECTION 9(1)(A) – SECTION 21(1)(L) – REQUIRES EXPLANATION AS TO ITS FORM OR INTENTION

This year the Subcommittee sought further explanation generally in relation to SR No. 41– *Aboriginal Heritage Regulations 2007*. In this instance the Subcommittee sought a briefing from the Department for Victorian Communities in relation to a number of matters.

On 8 August 2007, the Department for Victorian Communities attended Parliament House and provided a very extensive briefing to the members. The Subcommittee was greatly appreciative of the opportunity to clarify many matters. The Subcommittee is of the view that such cooperation can only assist it in its deliberations. The following letter expressing its gratitude was sent to the Executive Director of the Department for Victorian Communities:-

Example 1:

SR No. 41 – Aboriginal Heritage Regulations 2007

Subcommittee's Letter^{A1}

Thank you very much for attending Parliament House this morning to brief the members and myself in relation to the Aboriginal Heritage Regulations.

The detailed PowerPoint presentation and the information you provided was of tremendous assistance. It clarified many issues for the members and provided a wonderful opportunity to consider other related matters.

Please convey our sincere appreciation to Mr Ian Hamm, Ms Juliette Halliday and Mr Harry Webber for their valuable time, input and assistance with the Regulations.

Please do not hesitate to contact me should you wish to discuss anything further.

The Subcommittee also had a general query in relation to SR No.80 – *Heritage (Historic Shipwrecks) Regulations 2007*.

Example 2:

SR No. 80 – Heritage (Historic Shipwrecks) Regulations 2007

Subcommittee's Letter^{A2}

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 13 November 2007.

Are the Regulations compatible with the relevant Commonwealth legislation?

The Subcommittee would appreciate your advice.

⁴¹ Letter dated 8 August 2007 to Ms Angela Jurjevic, Department for Victorian Communities, from the Regulation Review Subcommittee.

⁴² Letter dated 19 December 2007 to the Hon. Justin Madden, MP, Minister for Planning, from the Regulation Review Subcommittee.

Minister's Response⁴³

Thank you for your recent letter in which you asked if the regulations in SR No. 80 are compatible with the relevant Commonwealth legislation.

Shipwrecks in Victoria are protected by two pieces of legislation; The Heritage Act 1995 (Victoria) and the Historic Shipwrecks Act 1976 (Commonwealth).

A proclamation by the Governor General declared that the Historic Shipwrecks Act 1976 applies to shipwrecks "adjacent to the coast of Victoria". (Commonwealth of Australia Gazette No. S 41, Thursday 11 March 1982). All remaining shipwrecks in Victoria are protected by the Heritage Act 1995 (Victoria).

In effect, this means that the Heritage Act 1995 only applies to shipwrecks within Port Phillip and Westernport bays and in inland rivers and waterways, whilst the Historic Shipwrecks Act 1976 applies to the remaining waters adjacent to the coast of Victoria.

Because Commonwealth and State shipwrecks legislation applies to separate, clearly defined groups of shipwrecks there is no conflict between the regulations made under the Heritage Act 1995 (Victoria) and the Historic Shipwrecks Act 1976 (Commonwealth).

(H) OTHER MATTERS – THE ‘BALANCED SCORECARD APPROACH’ – WHAT IS IT

The ‘Balanced Scorecard Approach’ – What is it?

Generally a RIS which accompanies the Regulations includes a summary of alternatives. Often the summary of alternatives includes a Table. The Table contains a subjective assessment of the proposed regulations and the alternatives compared to the ‘Base Case’ using the ‘Balanced Scorecard Approach’.

The Subcommittee reiterates the comments made in 2005⁴⁴. It is fair to say that the Subcommittee does not find that the use of such a Table provides great illumination in the context of an assessment of alternatives. On one view, the inclusion of such a Table to the average reader of the RIS adds little in terms of understanding and clarity. If such a Table is to be used, then there ought to be appropriate commentary which explains it.

The Subcommittee notes that some RISs this year have included further explanation. This is of assistance to the Subcommittee but more particularly to the average reader of the RIS. The Subcommittee acknowledges these efforts and hopes this trend will continue.

(I) SECTION 9(1)(A) – IS THERE ANY APPRECIABLE ECONOMIC OR SOCIAL BURDEN ON ANY SECTOR OF THE PUBLIC?

Many regulations are accompanied by a section 9(1)(a) certificate of exemption which states that they do not impose an appreciable economic or social burden on any sector of the public.

Paragraph 5.33 of the Premier's Guidelines⁴⁵ set out the particular requirements in respect of the exemption certificates:-

⁴³ Letter dated 13 December 2007 to the Regulation Review Subcommittee from the Hon. Justin Madden, MP, Minister for Planning.

⁴⁴ Annual Review 2005 – Regulations; p. 25.

⁴⁵ Section 5.33, Premier's Guidelines, December, 2004.

The Minister must include in the exemption certificate detailed reasons as to why the proposed rule does not impose an appreciable economic or social burden on a sector of the public under section 9(2). It will not be sufficient to simply assert that there is no appreciable economic or social burden on a sector of the public in the exemption certificate.

The Subcommittee also takes the view that it is not sufficient to simply assert that there is no appreciable economic or social burden on a sector of the public in the exemption certificate. The Subcommittee expects that detailed reasons will be given as to **why** there is no appreciable economic or social burden on a sector of the public and will examine those reasons closely.

This year there have been no Regulations on which the Subcommittee has commented in respect of this matter. The Subcommittee acknowledges the high standard of the exemption certificates provided to it. The quality of the work presented to the Subcommittee has made its consideration of these matters easier. The detailed nature of the exemption certificates signifies to the Subcommittee a very real attempt to grapple with whether there “is an appreciable economic or social burden” imposed or not. The Subcommittee is guided by the Premier’s Guidelines. It also uses a common sense approach. Each Regulation will be considered in its context and on its merits.

(J) COMMENDATION

The Subcommittee commends Ministers to the particular attention to detail in respect of the work presented to it. The Subcommittee acknowledges properly drawn certificates. The Subcommittee also acknowledges the excellent work by many Departments in responding to the large number of people and organisations who sent in submissions in respect of a particular RIS.

(K) NEW AREA OF SCRUTINY – NEW LEGISLATIVE REQUIREMENTS – HUMAN RIGHTS

History

SARC has a considerable history in terms of the protection of human rights. The review of subordinate legislation has been conducted in the Victorian Parliament since 1956. The scrutiny of bills⁴⁶ was first mooted and indeed recommended in 1987 in a “Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights”⁴⁷ prepared by the Legal and Constitutional Committee, the predecessor to this Committee. The scrutiny of bills commenced in Victoria in 1993. Section 21(f) of the *Subordinate Legislation Act 1994* uses the language of human rights. For several years, the Subcommittee has had to consider whether a regulation:–

Unduly trespasses on rights and liberties of the person previously established by law;

Rights

The Chair’s introduction to the First Annual Report⁴⁸ is useful in considering the concept of rights. It demonstrates the complexities associated with rights.

⁴⁹Human rights have been generally argued to include civil and political rights and legal and political rights⁵⁰. There is much greater division on the status of socio-

⁴⁶ Scrutiny of Acts and Regulations Committee, First Annual Report, April 1994, p. vii.

⁴⁷ Legal and Constitutional Committee, Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights, April 1987 pp. 123.

⁴⁸ Scrutiny of Acts and Regulations Committee, First Annual Report, April 1994, p. ix.

⁴⁹ Ibid.

economic rights and cultural rights.....The legislative charter of the Committee is broad. The word 'rights' include natural rights and other moral rights established by the writings of the philosophers, jurists and churchmen. It most certainly includes the positive, empirical category of legal rights – rights whose existence is established by examining existing statutes, codes and decisions comprising the common law of Victoria. There are also internationally acknowledged human rights which can be found in the instruments of international and domestic law.

It is now some thirteen years since the Committee was required to grapple with the concept of rights. The Australian Capital Territory introduced a statutory Bill of Rights in 2004. The idea of a Bill of Rights for Victoria was floated in 2004. The Victorian Government appointed a Human Rights Consultation Committee in 2005. During 2005 that Committee heard submissions and compiled a report. The report recommended a Bill of Rights in December 2005. The *Charter of Human Rights and Responsibilities 2006* (the *Charter*) was enacted in July 2006 and commenced operation on 1 January 2007. As a result of the introduction of the Charter and other legislative amendments there are now defined human rights which the Subcommittee must consider in the scrutiny of subordinate legislation.

Legislative scheme and requirements

The Charter of Human Rights and Responsibilities Act 2007

The *Charter of Human Rights and Responsibilities Act 2007* (the Charter) commenced on 1 January 2007. Section 30 of the Charter is set out:-

30. Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Note: The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see section 21 of the Subordinate Legislation Act 1994.

The Subordinate Legislation Act 1994 – section 21(ha)

Amendments were also made to the *Subordinate Legislation Act 1994*. The general principle of review is set out in section 21(ha) of the *Subordinate Legislation Act 1994*. Section 21(ha) is set out:-

Section 21. Review of statutory rules by the Scrutiny Committee

(1) The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament-

.....

(ha) is incompatible with the human rights set out the Charter of Human Rights and Responsibilities;

The particular responsibilities of the Subcommittee to review Human Rights certificates are set out in section 12A.

⁵⁰ Legal and Constitutional Committee, Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights, April 1987, Chapter 2 pp. 8-18.

12A. Human rights certificate

- 1) *The responsible Minister must ensure that a human rights certificate is prepared in respect of a proposed statutory rule, unless the proposed statutory rules is exempted under sub-section (3).*
- 2) *A human rights certificate must–*
 - (a) *certify whether, in the opinion of the responsible Minister, the proposed statutory rule does or does not limit any human right set out in the Charter of Human Rights and Responsibilities; and*
 - (b) *if it certifies that, in the opinion of the responsible Minister, the proposed statutory rule does limit a human right set out in the Charter of Human Rights and Responsibilities, set out–*
 - (i) *the nature of the human right limited; and*
 - (ii) *the importance of the purpose of the limitation; and*
 - (iii) *the nature and extent of the limitation; and*
 - (iv) *the relationship between the limitations and its purpose; and*
 - (v) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*
- (3) *Sub-section (1) does not apply if the responsible Minister certifies in writing that in his or her opinion–*
 - (a) *the proposed statutory rule is a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or*
 - (b) *the proposed statutory rule only–*
 - (i) *prescribes under section 4(1)(a) an instrument or class of instrument to be a statutory rule: or*
 - (ii) *exempts under section 4(1)(b) an instrument or class of instrument from the operation of this Act; or*
 - (iii) *extends under section 5(4) the operation of a statutory rule that would otherwise be revoked by virtue of section 5.*

Subcommittee's obligations – What are human rights?

Compatibility – Ensure that human rights protected and promoted by the Charter are protected in subordinate legislation

Essentially, the Subcommittee is required to consider whether each statutory rule is compatible with human rights as enunciated in the Charter. The Subcommittee needs to ensure that the human rights protected and promoted in the Charter are also protected in subordinate legislation.

In order to properly scrutinise and assess every statutory rule and the section 12A certificate, the Subcommittee must have a working knowledge of and consider the particular human rights set out in Part 2 of the Charter. The human rights are set out below.

- Recognition and equality before the law.
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Freedom from forced work

- Freedom of movement
- Privacy and reputation
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Protection of families and children
- Taking part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Children in the criminal process
- Fair hearing
- Rights in criminal proceedings
- Right not to be tried or punished more than once
- Retrospective criminal laws

These human rights are based in part on the International Covenant on Civil and Political Rights (ICCPR). The Subcommittee needs to consider whether there is any possibility that these human rights may be breached.

If a statutory rule does not comply with the Charter, there is a possibility that it may fall outside the scope of the authorising Act.

The Subcommittee is required to consider the compatibility of the regulations with the Charter and to report to Parliament where it considers a statutory rule to be incompatible with the Charter. In determining this, the Subcommittee must consider the section 12A Human Rights certificate provided by each Minister in respect of each statutory rule. First, the Subcommittee must consider whether it agrees an assessment that a particular regulation does not limit any human right set out in the Charter. However, if there is some limitation in respect of a human right, the Subcommittee must consider:-

- The nature of the human right limited; and
- The importance of the purpose of the limitation; and
- The nature and extent of the limitation; and
- The relationship between the limitation and its purpose; and
- Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

If the Subcommittee decides on the basis of the information that the proposed regulations are incompatible with the Charter, it may report this to the Parliament.

The operation of the Charter in relation to statutory rule series 2007

The Subcommittee has considered the Charter in relation to a number of statutory rules this year. Where necessary, the relevant section 12A Human Rights certificate accompanies a regulation. The Subcommittee then considers the regulation, the section 12A certificate and any issues raised.

The first occasion on which the Subcommittee commented in relation to the Charter was in a letter to the Honourable Bob Cameron, MP, the Minister for Police and Emergency Services. The Subcommittee acknowledged the work involved in the preparation of a very detailed section 12A Human Rights Certificate in relation to *SR No.18 – Sex Offenders Registration (Amendment) Regulations 2007*.

Example 1:

SR No. 18 – Sex Offenders Registration (Amendment) Regulations 2007

Subcommittee's Letter⁵¹

The Regulation Review Subcommittee considered and approved the above statutory rule at a meeting on 27 June 2007.

The Subcommittee was provided with a section 12A Human Rights certificate. The Subcommittee notes that this is a new area of review. The certificate provided to the Subcommittee was extremely detailed. It provided considerable assistance to the Subcommittee in the performance of its statutory obligations pursuant to the Charter of Human Right and Responsibilities 2006.

The Subcommittee acknowledges the work involved in the preparation of the section 12A certificate. Please convey its appreciation to those departmental officers involved.

Set out below is the relevant Section 12A Certificate.

Example 2:

Section 12A Human Rights Certificate⁵²

I, BOB CAMERON, Minister for Police & Emergency Services, certify under section 12A(2) of the Subordinate Legislation Act 1994 that, in my opinion the proposed Sex Offenders Registration (Amendment) Regulations 2007 (the 'Regulations') do limit a human right set out in the Charter of Human Rights and Responsibilities (the 'Charter').

Right to freedom of movement - s 12 of the Charter

The Regulations limit the right to freedom of movement but the limitation is reasonable and demonstrably justifiable under s 7 of the Charter.

1. The nature of the human right limited

The particular aspect of the right to freedom of movement that is affected by the Regulations is the right to move freely within Victoria, which is guaranteed by section 12 of the Charter. This freedom will be limited by the requirement that South Australian-registered sex offenders report to Victoria Police on a regular basis during the period of their registration under the Sex Offenders Registration Act 2004, (the 'Act').

⁵¹ Letter dated 27 June 2007 to the Hon. Bob Cameron, MP, Minister for Police & Emergency Services, from the Regulation Review Subcommittee.

⁵² Section 12A Human Rights Certificate, for SR No. 18 Sex Offenders Registration Amendment Regulations 2007, prepared by the Hon. Bob Cameron, MP, Minister for Police & Emergency Services, dated 19 March 2007

2. *The importance of the purpose of the limitation*

The Act establishes a scheme for the registration of certain persons who have received a sentencing disposition for specified offences in a register maintained and administered by the Chief Commissioner of Police. This scheme includes the following features:

- *The purpose of the Act, in broad terms, is to reduce reoffending by sexual offenders and to facilitate the investigation and prosecution of sexual offences, by establishing the register and requiring the information entered on the register to be updated: section 1.*
- *Several categories of registrable offenders are required to have their details entered on the register, including a person who is a 'corresponding registrable offender': section 6(2)(a).*
- *'Corresponding registrable offender' is a person: (a) who has been required to report to a 'corresponding registrar' in a foreign jurisdiction, or (b) who would, if currently in that jurisdiction, continue to be required to so report: section 9.*
- *A 'corresponding registrar' is the person having duties and functions under a 'corresponding Act' that most closely correspond to the duties and functions of the Chief Commissioner of Police under the Act: section 3.*
- *A 'corresponding Act' is: (a) a law of a foreign jurisdiction 'that provides for people who have committed specified offences to report in that jurisdiction information about themselves and to keep that information current for a specified period' and (b) which is stated by regulations as being a 'corresponding Act': section 3.*
- *The Sex Offenders Registration Regulations 2004, (the 'principal Regulations'), currently identify corresponding Acts for every State and Territory jurisdiction in Australia, other than South Australia.*

The Regulations will add the Child Sex Offender Act 2006 (SA), (the 'South Australian Act'), which was enacted in November 2006, to the set of corresponding laws identified by the principal Regulations, thereby adding persons registered under the South Australian Act who relocate to Victoria to the categories of persons currently required by the Act to become registered. This will result in the imposition of certain reporting obligations upon such persons, described more fully in the next section of this certificate.

The limitation imposed by the Regulations consists of restrictions on the free movement in Victoria of South Australian-registered sex offenders. The purpose of the limitation is to implement the public safety policy reflected in the Act in a more complete manner by extending the operation of the Act to a particular group of sex offenders who are currently not governed by the Act. This is an important purpose because incomplete coverage could undermine the scheme established by the Act, as a category of sex offenders (namely South Australian-registered sex offenders) would remain outside the operation of the Act.

The purpose of the limitation on the right to freedom of movement effected by the Regulations is to:

- *manage the risks to the Victorian community posed by South Australian-registered sex offenders who relocate to Victoria by making them subject to the Victorian sex offenders registration scheme*

- ensure that persons who are registered under equivalent laws in foreign jurisdictions and who move to Victoria should be registered under the Act and should have the same registration and reporting obligations as sex offenders who have received sentencing dispositions from Victorian courts.

3. *The nature and extent of the limitation*

The Act imposes a number of obligations on registered sex offenders. The obligations that directly affect offenders' right to freedom of movement are the reporting requirements. Offenders must make an initial report to the Chief Commissioner: section 14; advise the corresponding registrar of their home jurisdiction that they are registered under the Act: section 15; report annually to the Chief Commissioner: section 16; and keep the details reported to the Chief Commissioner updated continually: section 17.

Breaches of these reporting requirements are punishable as criminal offences: section 46. The Regulations will apply these restrictions to persons who are registered under the South Australian Act and who move to Victoria.

Therefore, the nature of the limitation is that the sex offenders must fulfil the reporting requirements or they will be subject to criminal liability. Their freedom of movement is limited to a moderate extent, i.e. there is not a full or general restriction on their movement but their ability to move freely in Victoria is subject to the reporting requirements.

4. *The relationship between the limitation and its purpose*

The limitation fulfils the purpose by extending to South Australian-registered sex offenders the same reporting requirements that apply under the Act to other sex offenders resident in Victoria, including offenders registered under the equivalent laws of all other Australian State and Territory jurisdictions, thereby ensuring complete coverage of the scheme.

5. *Any less restrictive means are reasonably available to achieve the purpose that the limitation seeks to achieve*

There are no less restrictive means reasonably available to achieve the purpose of the limitation. If the Regulations are not made, no alternative system of registration and reporting will apply under Victorian law to South Australian-registered sex offenders located in Victoria.

Right to privacy and reputation - s 13 of the Charter

The Regulations affect, but do not limit, the right to privacy and reputation.

The Act obliges a registered sex offender to divulge specified personal details to the Chief Commissioner of Police, such as his or her name (including informal names), address, date of birth, details of children he or she resides with, affiliations with specified clubs, details of vehicles owned or used, details of tattoos or other marks, details of criminal convictions, details of any periods of government custody: section 14. The person must report to his or her home 'registrar' that he or she has become subject to reporting under the Act: section 15. The person must make further reports to the Chief Commissioner annually: section 16. The information must be updated by the registered offender as necessary: section 17.

Details provided to the Chief Commissioner are recorded in the Register established under section 62(1) of the Act. In specified circumstances, third parties may be provided with this information: section 63.

The right to privacy is engaged because the Regulations will result in South Australian-registered sex offenders having to divulge personal information to the Chief Commissioner of Police, and to keep that information updated. The right to reputation is engaged because the Chief Commissioner, in specified circumstances, will be authorised to divulge the persons' status as registered sex offenders to third parties.

However, the right to privacy is not limited because the Regulations are neither unlawful nor arbitrary. They are not unlawful because they are imposed by the application of the Act. They are not arbitrary because they apply according to criteria and are subject to conditions. These criteria and conditions are established by the Act and the corresponding Act as a consequence of a person being a sex offender. This determination is made on a case-by-case basis through a sentencing disposition made by a court after a hearing and after considering evidence. Parliament has determined that the risk posed by such persons to the community should be managed in the manner provided by the Act. These limitations would be applied to South Australian-registered sex offenders resident in Victoria, by means of the Regulations. The specific reason for these measures is to implement the public safety policy reflected in the Act in a more complete manner by extending the operation of the Act to a particular group of sex offenders who are currently not governed by the Act.

Similarly, any effect on reputation would not be an 'unlawful attack' because there is lawful authority for the disclosure of information.

The Subcommittee considered the issue of a Human Rights certificate in relation to a proposed statutory rule if the rule is a rule which relates only to a court or a tribunal or the procedure, practice or costs of a court or a tribunal. Following is a copy of the letter the Subcommittee sent to the Attorney-General:-

Example 3:

Subcommittee's Letter⁵³

The Regulation Review Subcommittee is required to consider all statutory rules in a human rights context as a result of the commencement of the Charter of Human Rights and Responsibilities Act 2001 (the Charter) and amendments to the Subordinate Legislation Act 1994.

Section 12A(3) of the Subordinate Legislation Act 1994 provides an exemption from the requirement to prepare a human rights certificate if the proposed statutory rule is a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal.

The Subcommittee is curious as to the reason for the exemption. The Subcommittee would be grateful for your advice.

Attorney-General's Response⁵⁴

Thank you for your letter of 19 November 2007 concerning the exemption, in section 12A(3) of the Subordinate Legislation Act 2004, from the requirement to prepare a human rights certificate. As you have noted, the exemption applies in cases including where a proposed statutory rule is a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal.

⁵³ Letter dated 19 November 2007 to the Hon. Rob Hulls, MP, Attorney-General, from the Regulation Review Subcommittee.

⁵⁴ Letter dated 29 January 2008 to the Regulation Review Subcommittee from the Hon. Rob Hulls, MP, Attorney-General.

The reason for the exemption is that the Government was of the view that the exemptions should mirror the exemptions in section 8(1) of the Subordinate Legislation Act with respect to the requirement to prepare a regulatory impact statement in respect of statutory rules.

Despite the fact that these statutory rules do not require the preparation of a human rights certificate, I note that, pursuant to section 21(1)(ha) of the Subordinate Legislation Act, the Scrutiny Committee may nevertheless report to each House of the Parliament if the Committee considers that any statutory rule laid before Parliament is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities.

I trust this information is of assistance.

The Subcommittee also commented favourably on the section 12A certificate provided to it in respect of SR No.102 – *Child Wellbeing and Safety Regulations 2007*.

Example 4:

SR No. 102 – Child Wellbeing and Safety Regulations 2007

Subcommittee's Letter⁵⁵

The Regulation Review Subcommittee (the Subcommittee) considered and approved the above Regulations at a meeting on 21 February 2008.

The Subcommittee wishes to acknowledge the excellent standard of the Section 12A Human Rights provided to it. It was of great assistance to the Subcommittee in its deliberations.

Please convey this to the relevant departmental officers.

Section 12A Human Rights Certificate⁵⁶

I, Maxine Morand, Minister for Children & Early Childhood Development, certify under section 12A(2) of the Subordinate Legislation Act 2004 that, in my opinion the proposed Child Wellbeing and Safety Regulations 2007 do not limit any human rights set out in the Charter of Human Rights and Responsibilities (the Charter).

The reasons for my certification are set out below:

Section 13(a) of the Charter - Right not to have privacy unlawfully or arbitrarily interfered with.

The right of a person not to have his or her privacy unlawfully or arbitrarily interfered with is engaged by the Regulations, as they prescribe a birth notice form which involves the collection and distribution of personal information about the mother and new baby. However, this right is not limited, as the interference with privacy that may result from the collection of personal information set out in the birth notice form is neither unlawful nor arbitrary.

Part 7 (Birth Notification) of the Child Wellbeing and Safety Act 2005 (the Act) requires that notice of the birth of every child in Victoria be given to the Chief Executive Officer of the relevant municipal district, or the Secretary if the mother of

⁵⁵ Letter dated 25 February 2008 to the Hon. Maxine Morand, MP, Minister for Children & Early Childhood Development, from the Regulation Review Subcommittee.

⁵⁶ Section 12A Human Rights Certificate, for SR No. 102 *Child Wellbeing and Safety Regulations 2007*, prepared by the Hon. Maxine Morand, MP, dated 17 September 2007.

the child usually resides outside Victoria. Section 43(2) of the Act states that the notice must be in the prescribed form. The aim of this notification is to "link families to maternal and child health services", as stated in the second reading speech of the Act made on 6 October 2005. The Maternal and Child Health service is a free service provided to all families in Victoria with children aged from birth to six years. On receipt of the birth notice the Chief Executive Officer must send a copy to "the nurse whose duty it is to visit or communicate with the house to which the notice relates" (section 45 of the Act). Therefore the request for information for this purpose is lawful.

The request for information in the birth notice is not arbitrary. The Continuity of Care Protocol between Victorian public maternity services and the Maternal and Child Health service aims to enhance continuity of care for recent mothers and their babies from pregnancy through to early parenthood, and to clarifying processes to identify and actively engage families, with emphasis on those who are vulnerable or at risk. All of the information in the prescribed birth notice will assist in supporting the implementation of this protocol and ensure continuity of quality care, particularly to those who are vulnerable or at risk in some way.

The identifying information (name, address and telephone number of mother) and the information about the baby and its birth is required so that the maternal and child health nurse can contact the family of the new baby and provide appropriate support. This information is requested in the current prescribed notice of birth (in place until 1 October 2007), which is set out in the Sixth Schedule of the Health Act 1958.

The requests for additional information have specific policy reasons behind them, as follows:

- Aboriginal or a Torres Strait Islander status of child: The inclusion of a request for this information was highly recommended by a representative of Victoria's Koori Maternity Services and also by the maternity hospitals. If the nurse is aware of the Aboriginal and/or Torres Strait Islander status of the child, this will help to ensure a culturally appropriate and inclusive response is provided.*
- Interpreter / spoken language: In most cases initial contact is made with the mother of a new baby by the nurse via telephone to arrange a home visit. If the nurse is informed of the language spoken in the house she can organize an interpreter both for the initial call and subsequent consultations, including the home visit, in advance. This assists with engaging the family and with ensuring the nurse provides culturally sensitive care.*
- Special care nursery: Children in special care nurseries and their families are particularly vulnerable and may require specialist assistance and ongoing monitoring. If this information is passed onto the nurse through the birth notice she is then able to offer the mother appropriate support, as well as being able to monitor the baby's progress. Providing this information with the initial birth notification also makes it more likely that the nurse will be aware of any changes to the baby's condition, including if the baby dies in special care nursery, before contact is made with the family, enabling sensitive communication.*

In summary, the inclusion of the request for the information relating to each child born in Victoria does not interfere with privacy in a way that is unlawful or arbitrary. To the contrary, the information is necessary to enable appropriate, inclusive and culturally sensitive services to be provided to families with new babies, and to give full effect to the aims of the Act.

The more specific issue of lead monitoring in women arose in SR No.54 – Occupational Health and Safety Regulations 2007.

Example 5:

SR No. 54 – Occupational Health and Safety Regulations 2007

Subcommittee's Letter⁵⁷

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 13 November 2007.

The Subcommittee is now required to consider all statutory rules in a human rights context as a result of the commencement of the Charter of Human Rights and Responsibilities Act 2001 (the Charter) on 1 January this year.

Regulations 4.4.17, 4.4.3, 4.4.5, 4.4.22-23 and 4.4.25 require the monitoring and treatment of women on the basis of their reproductive capacity. The 'Lead Part' of the Regulations requires employers with employees in lead risk jobs to arrange monitoring at specified intervals to ensure that employees' blood lead levels are not at unhealthy levels.

The Subcommittee considered several matters during the course of its deliberations. The Subcommittee seeks your advice as to how the potential effect of lead on men's reproductive health differs from the potential effect of lead on women's reproductive health.

Minister's Response⁵⁸

Thank you for your letter of 19 November 2007 regarding the Occupational Health and Safety Regulations 2007 (the Regulations). In particular, you sought my advice on how the potential effect of lead on men's reproductive health differs from the potential effect of lead on women's reproductive health.

I have sought advice from the Victorian Workcover Authority (VWA) in preparing this response.

The Lead Part of the Regulations is based on the approach in the relevant National Standard – the National Standard for the Control of Inorganic Lead at Work. The National Standard was finalised having regard to an appeal decision by the Federal Court of Australia in 1993. The appeal (HREOC v Mt Isa Mines and Ors [1993] FCA 535) raised important questions about the impact of the Commonwealth's Sex Discrimination Act 1984 on the work of the (then) National Occupational Health and Safety Commission in declaring national occupational health and safety standards and codes of practice.

As the issues had arisen in the context of the Commission's preparation of the draft National Standard (and associated national code of practice), the judgment includes statements about the effects of lead on reproduction. In his judgment, Lockhart J stated: "It appears to be accepted by the parties, at least for the purposes of this case, that the reproductive capacity of women may be damaged by a lower lead level than is the case with males."

⁵⁷ Letter dated 19 November 2007 to the Hon. Tim Holding, MP, Minister for WorkCover, from the Regulation Review Subcommittee.

⁵⁸ Letter dated 1 February 2008 to the Regulation Review Subcommittee from the Hon. Tim Holding, MP, Minister for WorkCover.

The main reason for treating males differently to women of reproductive capacity and to women who are pregnant or breast feeding is to prevent an adverse pregnancy outcome and to protect an infant from exposure through breast feeding. I am advised that unborn children and infants are particularly susceptible to the effects of lead, and that the adverse effects of lead on men's sperm appear to occur at higher exposure levels. These differing susceptibilities are reflected in the Lead Part of the Regulations.

The preface to the National Standard states that although exposure to lead represents a risk for all people, it "represents a serious health risk to the unborn child by way of elevated maternal blood lead levels because the toxic effects of lead on the developing embryo/foetus are reached at blood lead levels significantly lower than those for adults".

As the Human Rights Certificate for the Regulations advised, the Lead Part of the Regulations requires the monitoring and treatment of women on the basis of their reproductive capacity. The Certificate also states that the Regulations are reasonably justifiable because they recognise a greater health risk for females, requiring differential, and thus unequal, treatment to protect women's reproductive health and that of their infants if they are breastfeeding.

At such time that a new or revised National Standard is declared regarding the control of exposure to lead in the workplace, the VWA will review the Lead Part of the Regulations accordingly.

Should the Subcommittee require any further information on this matter, please contact Ms Lynette Schrader, at the VWA, on (03) 9641 1555.

I trust this information is of assistance to you.

SR No. 109 - Tobacco Regulations 2007 raised interesting questions in relation to the lack of government attribution in respect of the signs for the prohibition of tobacco products. The Subcommittee sent the following letter to the Minister:-

Example 6:

SR No. 109 – Tobacco Regulations 2007

Subcommittee's Letter⁵⁹

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 12 December 2007.

The Subcommittee is required to examine all regulations in accordance with the Charter of Human Rights and Responsibilities 2006 (the Charter). The Subcommittee considered the accompanying section 12A Human Rights certificate.

In particular the Subcommittee considered Regulation 10. Regulation 10 prescribes the forms of the sign relating to the prohibition of the sale of tobacco products to persons under the age of 18 years. The form of the sign is set in Schedule 3 of the Regulations.

An issue has been raised in relation to the lack of government attribution in the sign set out in Schedule 3. Section 15(2) of the Charter provides that every person has the 'right to freedom of expression'. Similar rights have been held by overseas courts to include a right not to speak. The right not to speak was enunciated in the United

⁵⁹ Letter dated 17 December 2007 to the Hon. Daniel Andrews, MP, Minister for Health, from the Regulation Review Subcommittee.

States Supreme Court decision of West Virginia State Board of Education v Barnette 319 US 624,642 (1943). There is a body of international jurisprudence which specifically relates to warnings on tobacco packaging. The decisions of RJR-MacDonald In v Canada (1995) 3 SCR 199 and Canada v JTI-MacDonald Corp (2007) SCC 30 are directly relevant.

The Subcommittee seeks your advice as to the following matters:-

Why the notice required by Regulation 10 does not contain any attribution to the Victorian Government?

Whether Regulation 10 should permit the occupier of a retail tobacco premise to include an attribution to the Victorian Government?

The Subcommittee would appreciate your response at your earliest convenience.

Minister's Response⁶⁰

Thank you for writing to me seeking advice regarding the lack of government attribution in the notice required by Regulation 10 of the Tobacco Regulations 2007 (the Regulations).

In respect of the specific matters on which the subcommittee sought advice, I advise as follows:

- The notice required by Regulation 10 does not contain any attribution to the Victorian Government because it is essentially a statement of the law rather than a government health warning. The notice was first prescribed by a 2001 amendment to the Tobacco Regulations 1997. These Regulations were remade in largely identical terms in the Tobacco Regulations 2007, which had the benefit of reducing the regulatory impact on retailers (for example, by maintaining current signage requirements). However, the vast majority of retailers obtain these notices from the Department free of charge (samples as attached), which as a Departmental publication include a government attribution.*
- It is not considered necessary to explicitly permit the Regulation 10 notice to include a government attribution, given the nature of the notice and the fact that notices with a government attribution (including those supplied by the Department) are still considered to satisfy the Regulation's requirements.*

I note the Regulation Review Subcommittee considers the lack of attribution may be relevant to whether Regulation 10 is compatible with the human rights set out in the Victorian Charter of Human Rights and Responsibilities 2006 (the Charter). As noted in the Human Rights Certificate for the Regulations, my opinion is that the proposed Regulations do not limit the right to freedom of expression, because section 15(3) of the Charter allows lawful restrictions on that right that are reasonably necessary for public health. The Charter "Guidelines for legislation and policy officers in Victoria" (Department of Justice) were considered in preparation of the certificate, and the regulations were supported in consultations with tobacco retailers, manufacturers, and the health sector.

I note the Canadian decisions, to which your letter refers, are of some relevance and cover a range of factors in relation to tobacco control and the right to freedom of expression. However, the decisions relate to the right in section 2(b) of the Canadian

⁶⁰ Letter dated 26 February 2008 to the Regulation Review Subcommittee from the Hon. Daniel Andrews, MP, Minister for Health.

Charter of Rights and Freedoms, which is a 'fundamental right' of that Charter without a similar specific public health exception to that in section 15(3) of the Victorian Charter. The Victorian Human Rights Consultation Committee noted in its Report that this exception was important to avoid situations such as occurred in Canada:

"The Charter includes the specific limitation to the freedom of expression contained in ICCPR article 19(3). The Committee considers that this provision is important in recognising that a person's freedom of expression may be limited having regard to such matters as the rights or reputation of others, the protection of national security or public health. The Committee considers that it is important to make this limitation explicit to avoid situations such as occurred in Canada, where freedom of expression in tobacco advertising was upheld by the courts, even though it was contrary to the interests of public health." (Rights, Responsibilities and Respect; 2005, p44)

On balance, considering the above and the reasons set out in the Human Rights Certificate, my opinion remains that the Regulations are compatible with the Victorian Charter. I trust this information is of assistance, and would welcome the opportunity to clarify any matters of interest to the Subcommittee.

Attached Samples⁶¹

<p>Is your body telling you to quit?</p> <p>Quitline.137848 </p>	<p>Low-tar cigarettes kill too</p> <p>Quitline.137848 </p>	<p>Smoking causes cancer of the stomach, bladder, lung, mouth, kidney, cervix and pancreas</p> <p>Quitline.137848 </p>
<p>Smoking destroys more than your lungs</p> <p>Quitline.137848 </p>	<p>Smoking damages almost every organ</p> <p>Quitline.137848 </p>	<p>Smoking Kills</p> <p>Quitline.137848 </p>
<p>Toxins in tobacco smoke travel everywhere blood goes</p> <p>Quitline.137848 </p>	<p>"WE DON'T SELL TOBACCO TO U/18s."</p> <p>(SELLING TOBACCO PRODUCTS TO U/18s CAN INCUR A \$5000 PENALTY)</p> <p>NOW EVERYONE CAN BREATHE EASIER</p> 	

⁶¹ Samples attached to letter dated 26 February 2008 to the Regulation Review Subcommittee from the Hon. Daniel Andrews, MP, Minister for Health.

APPENDIX 1 — REGULATIONS 2007⁶²

REGULATION IMPACT STATEMENTS

SR No. 2	Plumbing (Heat Pumps Amendment) Regulations 2007
SR No. 12	Fisheries (Aquaculture Licences, Fees, Levies and Royalties) Regulations 2007
SR No. 15	Pipelines Regulations 2007
SR No. 36	Guardianship and Administration (Fees)(Interim) Regulations 2007
SR No. 37	Extractive Industries Development Regulations 2007
SR No. 40	Architects (Amendment) Regulations 2007
SR No. 41	Aboriginal Heritage Regulations 2007
SR No. 42	Evidence (Transcript Fees) Regulations 2007
SR No. 45	Subdivision (Registrar's Fees) Amendment Regulations 2007
SR No. 48	Trade Measurement Regulations 2007
SR No. 53	Equipment (Public Safety) Regulations 2007
SR No. 54	Occupational Health and Safety Regulations 2007
SR No. 60	Disability Regulations 2007
SR No. 61	Education and Training Reform Regulations 2007
SR No. 63	Drugs, Poisons and Controlled Substances (Health Professions Amendment) Regulations 2007
SR No. 68	Transport (Passenger Vehicles)(Amendment) Regulations 2007
SR No. 69	Transport (Taxi Cabs)(Amendment) Regulations 2007
SR No. 75	Water (Resource Management) Regulations 2007
SR No. 77	Environment Protection (Scheduled Premises and Exemptions) Regulations 2007
SR No. 78	Valuation of Land (General and Supplementary Valuation)(Amendment) Regulations 2007
SR No. 79	Estate Agents (Fees) Regulations 2007
SR No. 80	Heritage (Historic Shipwrecks) Regulations 2007
SR No. 82	Agricultural and Veterinary Chemicals (Control of Use) Regulations 2007
SR No. 89	Radiation Regulations 2007
SR No. 100	Gambling Regulation (Sports Betting Fees)(Amendment) Regulations 2007
SR No. 108	Transfer of Land (Fees)(Further Amendment) Regulations 2007
SR No. 109	Tobacco Regulations 2007
SR No. 113	Gas Safety (Gas Quality) Regulations 2007
SR No. 125	Supreme Court (Sheriff's Fees) Regulations 2007
SR No. 130	Owners Corporation Regulations 2007
SR No. 131	Mineral Resources Development (Amendment) Regulations 2007

⁶²

This Appendix lists all regulations made during 2007. The Appendix categorises regulations according to whether they were made with a Regulation Impact Statement or whether they were exempted or excepted from those requirements. The Committee did not move for disallowance of any of the regulations made in 2007, however the Regulation Review Subcommittee did correspond with responsible Ministers concerning some regulations.

SR No. 134	Legal Profession (Practising Certificate Fees) Regulations 2007
SR No. 137	Travel Agents Regulations 2007
SR No. 138	Environment Protection (Environment and Resource Efficiency Plans) Regulations 2007
SR No. 149	Transport (Taxi-Cab Industry Accreditation) Regulations 2007
SR No. 151	Road Safety (Road Rules)(Young Drivers) Regulations 2007
SR No. 152	Road Safety (Drivers)(Young Drivers) Regulations 2007
SR No. 153	Road Safety (General)(Young Drivers) Regulations 2007

EXCEPTIONS UNDER SECTION 8

S. 8(1)(a) — Fee Increases

SR No. 38	Road Safety (Drivers)(Fees Amendment) Regulations 2007
SR No. 51	Chattel Securities (Fees Amendment) Regulations 2007
SR No. 59	Working with Children (Amendment) Regulations 2007
SR No. 66	Transfer of Land (Fees)(Amendment) Regulations 2007
SR No. 67	Country Fire Authority (Charges) Regulations 2007
SR No. 85	Plumbing (Fees Amendment) Regulations 2007
SR No. 110	Planning and Environment (Fees) Amendment Regulations 2007
SR No. 111	Metropolitan Fire Brigades (General)(Charges Amendment) Regulations 2007
SR No. 115	Building (Amendment) Regulations 2007
SR No. 139	National Parks (Fees and Charges)(Amendment) Regulations 2007

S. 8(1)(b) — Court Rules

SR No. 5	Supreme Court (Chapter I Amendment No.7) Rules 2007
SR No. 6	Supreme Court (Chapter VI Amendment No.11) Rules 2007
SR No. 24	Children, Youth and Families (Children's Court Family Division) Rules 2007
SR No. 27	Supreme Court (Chapter I Amendment No.8) Rules 2007
SR No. 30	Magistrates' Court (Criminal Procedure) (Infringements Court) Rules 2007
SR No. 33	Magistrates' Court (Criminal Procedure) (Infringements Court Venue) Rules 2007
SR No. 43	Victims of Crime Assistance (Procedure) Rules 2007
SR No. 44	Supreme Court (Chapter V Amendment No. 3) Rules 2007
SR No. 52	Victorian Civil and Administrative Tribunal (Amendment No.18) Rules 2007
SR No. 56	Magistrates' Court (Committals)(Amendment) Rules 2007
SR No. 57	Magistrates' Court (Criminal Procedure)(Amendment) Rules 2007
SR No. 86	Magistrates' Court (Judicial Registrars)(Amendment) Rules 2007
SR No. 87	Court Security (Amendment) Regulations 2007
SR No. 91	Supreme Court (Chapter I Amendment No.9) Rules 2007
SR No. 92	Supreme Court (Chapter II Amendment No.7) Rules 2007
SR No. 93	Supreme Court (Chapter VI Amendment No.12) Rules 2007
SR No. 94	Supreme Court (Chapter VI Amendment No.13) Rules 2007
SR No. 103	Magistrates' Court Civil Procedure (Amendment No.19) Rules 2007
SR No. 104	Supreme Court (Chapter V Amendment No.4) Rules 2007
SR No. 118	Magistrates' Court (Criminal Procedure)(Prescribed Venue) Rules 2007
SR No. 119	Magistrates' Court Civil Procedure (Amendment No.20) Rules 2007
SR No. 120	County Court (Chapter I Amendment No.21) Rules 2007

SR No. 121	Supreme Court (Chapter II Amendment No.8) Rules 2007
SR No. 124	Victorian Civil and Administrative Tribunal (Amendment No.19) Rules 2007
SR No. 127	County Court (Chapter I Amendment No.22) Rules 2007
SR No. 128	Supreme Court (Chapter I Amendment No.10) Rules 2007
SR No. 142	Magistrates' Court Civil Procedure (Amendment No.21) Rules 2007

S. 8(1)(d)(iii) — Extension by 12 Months

SR No. 4	Subordinate Legislation (Health (Medical Radiation Technologists) Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 13	Subordinate Legislation (Equipment (Public Safety)(Incident Notification) Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 34	Subordinate Legislation (Estate Agents (General, Accounts and Audit) Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 47	Subordinate Legislation (Estate Agents (Professional Conduct) Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 55	Subordinate Legislation (Professional Boxing and Martial Arts Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 95	Subordinate Legislation (Births, Deaths and Marriages Registration Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 96	Subordinate Legislation (Co-Operatives Regulations 1997 –Extension of Operation) Regulations 2007
SR No. 97	Subordinate Legislation (Estate Agents (Contracts) Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 98	Subordinate Legislation (Chattel Securities Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 114	Subordinate Legislation (Environment Protection (Residential Noise) Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 117	Subordinate Legislation (Corrections Regulations 1998 – Extension of Operation) Regulations 2007
SR No. 129	Subordinate Legislation (Prevention of Cruelty to Animals Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 136	Subordinate Legislation (Second-Hand Dealers and Pawnbrokers Regulations 1997 – Extension of Operation) Regulations 2007
SR No. 141	Subordinate Legislation (Infertility Treatment Regulations 1997 – Extension of Operation) Regulations 2007

EXEMPTIONS UNDER SECTION 9

S. 9(1)(a) — No Economic Burden

SR No. 14	Road Safety (Vehicles)(Hybrid Vehicles Amendment) Regulations 2007
SR No. 22	Audit (Public Bodies)(Amendment) Regulations 2007
SR No. 23	Catchment and Land Protection (Amendment) Regulations 2007
SR No. 28	Coroners Regulations 2007
SR No. 31	Legal Profession (Amendment) Regulations 2007
SR No. 39	Road Safety (Vehicles)(Fees Amendment) Regulations 2007
SR No. 58	Victorian Civil and Administrative Tribunal (Fees)(Amendment) Regulations 2007
SR No. 64	City of Melbourne (Docklands Co-Ordination Committee) Regulations 2007
SR No. 65	Docklands (Register of Rights) Regulations 2007
SR No. 81	Terrorism (Community Protection)(Prescribed Standards) Regulations 2007
SR No. 83	Agricultural and Veterinary Chemicals (Control of Use)(Infringement

	Notices)(Amendment) Regulations 2007
SR No. 84	Drugs, Poisons and Controlled Substances (Precursor Chemicals) Regulations 2007
SR No. 90	Road Safety (Vehicles)(Heavy Vehicles Fees Amendment) Regulations 2007
SR No. 102	Child Well Being and Safety Regulations 2007
SR No. 105	Infringements (General)(Amendment) Regulations 2007
SR No. 106	Motor Car Traders (Amendment) Regulations 2007
SR No. 107	Second-Hand Dealers and Pawnbrokers (Exemption) (Amendment) Regulations 2007
SR No. 112	Legal Profession (Further Amendment) Regulations 2007
SR No. 122	Professional Standards Regulations 2007
SR No. 126	Taxation Administration Regulations 2007
SR No. 133	Victorian Civil and Administrative Tribunal (Fees)(Further Amendment) Regulations 2007
SR No. 140	Occupational Health and Safety (Chrysotile Exemption) Amendment Regulations 2007
SR No. 144	Prevention of Cruelty to Animals (Amendment) Regulations 2007
SR No. 150	Transport (Taxi-Cab Network Service Provider Accreditation Exemptions) Regulations 2007
SR No. 154	Road Management (Works and Infrastructure) (Amendment) Regulations 2007

S. 9(1)(b) — National Uniform Legislation

SR No. 16	Electricity Safety (Equipment Efficiency)(Amendment) Regulations 2007
SR No. 46	Fair Trading (Safety Standard)(Babies' Dummies) Regulations 2007

S. 9(1)(c) — Fundamentally Declaratory

SR No. 8	Associations Incorporation (Infringement Penalties Amendment) Regulations 2007
SR No. 9	Co-Operatives (Infringement Penalties Amendment) Regulations 2007
SR No. 10	Fund Raising Appeals (Infringement Penalties Amendment) Regulations 2007
SR No. 11	Residential Tenancies (Amendment) Regulations 2007
SR No. 17	Tobacco (Victorian Health Promotion Foundation)(Membership Amendment) Regulations 2007
SR No. 18	Sex Offenders Registration (Amendment) Regulations 2007
SR No. 19	Building and Construction Industry Security of Payment (Amendment) Regulations 2007
SR No. 20	Transport (Infringements)(Penalties) Regulations 2007
SR No. 32	Subordinate Legislation (Amendment) Regulations 2007
SR No. 70	Transport (Infringements)(Amendment) Regulations 2007
SR No. 71	Road Safety (General)(Prescribed Devices and Operator Onus Amendment) Regulations 2007
SR No. 116	Melbourne City Link (General)(Amendment) Regulations 2007
SR No. 123	Subdivision (Procedures)(Owners Corporations Amendment) Regulations 2007
SR No. 135	Charter of Human Rights and Responsibilities (General) Regulations 2007
SR No. 143	Fisheries (Western Port)(Amendment) Regulations 2007
SR No. 155	Road Safety (General)(Engine Reading Devices Amendment) Regulations 2007
SR No. 156	Road Safety (General)(Prescribed Devices and Other Amendments) Regulations 2007

S. 9(3) — Premier's Certificate

SR No. 3	Legal Profession (Practising Certificate Fees)(Interim) Regulations 2007
SR No. 7	Estate Agents (Fees)(Interim) Regulations 2007
SR No. 72	Road Safety (Drivers)(Young Drivers) Interim Regulations 2007
SR No. 73	Road Safety (General)(Young Drivers) Interim Regulations 2007
SR No. 74	Road Safety (Road Rules)(Young Drivers) Interim Regulations 2007
SR No. 145	Charter of Human Rights and Responsibilities (Public Authorities)(Interim) Regulations 2007
SR No. 148	Radiation (Tanning Units Amendment) Interim Regulations 2007

EXCEPTIONS AND EXEMPTIONS UNDER COMBINED SECTIONS**S. 9(1)(a) — No Economic Burden and S. 9(1)(c) — Fundamentally Declaratory**

SR No. 1	Road Safety (Road Rules)(School Days) Regulations 2007
SR No. 21	Children, Youth and Families Regulations 2007
SR No. 25	Domestic Building Contracts Regulations 2007
SR No. 26	Health Services (Community Health Centre Elections) (Amendment) Regulations 2007
SR No. 29	Borrowing and Investment Powers (Guarantees) Regulations 2007
SR No. 35	Accident Compensation (Employer Claim Report Revocation) Regulations 2007
SR No. 49	Transport Accident Regulations 2007
SR No. 50	Gene Technology Amendment Regulations 2007
SR No. 62	Health Professions Registration Regulations 2007
SR No. 76	Environment Protection (Prescribed Waste)(Amendment) Regulations 2007
SR No. 88	Crimes (Certified Statement of Conviction) Regulations 2007
SR No. 99	Confiscation (Amendment) Regulations 2007
SR No. 101	Borrowing and Investment Powers (Stock, Bonds and Debentures) Regulations 2007
SR No. 132	Health Professions Registration (Amendment) Regulations 2007
SR No. 146	Health (Pest Control)(Qualifications and Training) Regulations 2007
SR No. 147	Gene Technology (Further Amendment) Regulations 2007

APPENDIX 2 – MINISTERIAL CORRESPONDENCE

This Appendix contains a list of correspondence sent to responsible Ministers by the Subcommittee regarding regulations made in 2007. The Appendix categorises correspondence in accordance with the nature of the issue raised by the Subcommittee.

Regulation	Minister	Issue
SR 2 – Plumbing (Heat Pumps Amendment) Regulations 2007	Minister for Planning	Failure to respond to those who made submissions.
SR 18 – Sex Offenders Registration (Amendment) Regulations 2007	Minister for Police and Emergency Services	Acknowledgment of detailed section 12A Human Rights Certificate.
SR 41 – Aboriginal Heritage Regulations 2007	Executive Director, Aboriginal Affairs,	Acknowledgment of meeting to clarify regulations.
SR 54 – Occupational Health and Safety Regulations 2007	Minister for WorkCover	Sought clarification as to how the potential effect of lead in men's reproductive health differs from that of women's reproductive health.
SR 60 – Disability Regulations 2007	Minister for Mental Health	Sought further clarification on the issues raised by submissions. Was there an adequate response?
SR 80 – Heritage (Historic Shipwrecks) Regulations 2007	Minister for Planning	Sought clarification on the compatibility of the regulation with Commonwealth legislation.
SR 109 – Tobacco Regulations 2007	Minister for Health	Sought further clarification on the lack of Government attribution in relation to retail tobacco advertising.
SR 149 – Transport (Taxi-Cab Industry Accreditation) Regulations 2007	Minister for Public Transport	Sought the Minister's response to matters raised by Davies Collison Cave Solicitors Pty Ltd, Middletons and Holding Redlich.
	Attorney General	Sought further explanation of Human Rights exemption.

APPENDIX 3 – COMMITTEE PRACTICE NOTES

Exemptions and Exceptions

- **Dating Certificates.** The Subcommittee has been presented with a number of undated exemption and exception certificates. The Subcommittee expects all certificates to be dated.
- **Reasons for Exemption.** The Subcommittee has occasionally received regulations exempted under section 9 with certificates of exemption which fail to adequately explain the reasons for granting the exemption or with reasons for granting the exemption contained in the Explanatory Memorandum. It should be noted that it is a requirement of section 9(2) of the *Subordinate Legislation Act 1994* (Vic) that certificates of exemption 'specify the reasons for the exemption'. The Subcommittee expects all exemption certificates to contain adequate explanations of the reasons for granting the exemptions.
- **Extension of Regulations for Periods up to 12 months.** Regulations expire 10 years after they have been made. The Subcommittee has been presented with a number of regulations made under sections 8(1)(d)(iii) and 5(3) extending regulations due to expire for periods up to 12 months. Before an extension of time can be granted, the Minister must certify that due to 'special circumstances' there is insufficient time available to comply with the formal regulation-making requirements of the *Subordinate Legislation Act 1994*. The Subcommittee expects details of the 'special circumstances' to be contained in the section 5(3) certificate itself as required by the *Subordinate Legislation Act 1994*. Please see additional general comments below.
- **Using Appropriate Exemption and Exception Categories.** Department and agency officers need to be careful when determining which category to use when exempting and excepting regulations from the Regulation Impact Statement process. The Subcommittee has received regulations which are incorrectly exempted and excepted.
- **Typographical Errors.** Department and agency officers need to be careful when preparing certificates to ensure that they do not contain typographical errors.

Extension of time

The Subcommittee is often presented with regulations which require an extension of time for a period of twelve months. Such regulations are accompanied by a section 5(3) certificate of special circumstances which outlines the particular reasons for the extension. It is difficult for the Subcommittee to know whether any particular regulation has been accompanied by a previous extension of time certificate. Ongoing extensions of time in respect of a particular regulation are clearly matters upon which the Subcommittee would make adverse comment.

The Subcommittee expects that in the event that a second or subsequent extensions of time are sought for a regulation (in addition to an initial request), the Minister inform it that this is the case.

Explanatory Memoranda

The Subcommittee expects an Explanatory Memorandum to comply with the requirements contained in Paragraph 8.10 of the Premier's Guidelines. An Explanatory Memorandum must contain:—

- A brief outline of each provision;
- An explanation of the changes effected by each provision;
- A statement of the reasons for making the rule;
- Where applicable, the reasons why no regulatory impact statement was prepared;
- A statement as to whether consultation has taken place, and if it has not taken place, an explanation as to why a decision was made not to consult

Fee Increases: 8(1)(a) and 8(2)

Regulations increasing fees made under section 8(1)(a) of the *Subordinate Legislation Act 1994* (Vic) must not increase fees by more than the percentage set by the Treasurer. For each financial year a percentage increase is set by the Treasurer. The Treasurer notifies the Subcommittee in writing of the relevant percentage increase.

A regulation may increase a number of fees, with some individual fee increases falling outside the rate set by the Treasurer. However when the total average of fee increases for that regulation is calculated, it falls within the rate fixed by the Treasurer. This practice is referred to as the 'basket approach'. Paragraph 5.25 of the Premier's Guidelines provides that:—

It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

Section 8(2) of the *Subordinate Legislation Act 1994* (Vic) validates the rounding up of fee increases to the nearest whole dollar. Sometimes the total average increase may be greater than that set by the Treasurer but may be validated on the basis that there has been rounding up to the nearest whole dollar. The Subcommittee may only approve such increases where the extra amount can be considered trifling when compared to the whole fee. Where the amount is significant in proportion to the whole fee, the Subcommittee may request the Minister to reconsider the increase.

The Subcommittee is bound by the Guidelines. A strict interpretation of the Guidelines leads to the view that as a matter of principle individual fees in a 'basket' package should not exceed the Treasurer's annual rate. However, the Subcommittee is of the view that fee increases and the Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a 'basket' package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee's view is that it is a matter of balance. The 'basket' of fees in its entirety must not exceed the Treasurer's approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer's annual rate then that may not necessarily be an immediate cause for concern. Rather, the

Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each Regulation will be examined on its merits and in context.

The Subcommittee will continue to carefully scrutinise the Regulations and the Guidelines.

The preparation of a table showing new and old fees and including an indication of the percentage increase or decrease is of great assistance to the Subcommittee. The Subcommittee provides the following as an example:-

Description	Current Fee	Proposed Fee	% Increase
Application for	\$100.00	\$105.00	5.0
Application for ...	\$320.00	\$325.00	1.6

Independent Advice Certificates: 10(3)

Under section 10(3) of the *Subordinate Legislation Act 1994* (Vic) a Minister must ensure that independent advice as to the adequacy of a Regulation Impact Statement is obtained. The provision of that independent advice assists the Subcommittee in its review of the regulations.

Legislative Instruments outside the Subordinate Legislation Act 1994

The Subcommittee plays a vital role in ensuring that rights are adequately protected. It cannot do this if provisions are incorporated in legislative instruments outside its scrutiny. The Subcommittee prefers department and agency officers not to use Guidelines and Codes of Practice. Where Guidelines and Codes of Practice are used the Subcommittee would like those Guidelines and Codes of Practice to be published and available to the public at the same time as the regulation commences operation.

Provision of Documentation to Regulation Review Subcommittee

The Subcommittee needs to receive Explanatory Memoranda, all certificates, Regulation Impact Statements and comments and submissions made in relation to Regulation Impact Statements within 7 days after a regulation has been made. The Subcommittee has a limited time within which to review regulations. If the Committee wants to move for disallowance of a regulation it must do so within 18 sitting days of that regulation being tabled in Parliament. Prior to the Committee moving a motion for disallowance, the Subcommittee corresponds and negotiates with the particular Minister. The Subcommittee needs sufficient time for this process to take place.

Paragraph 5.51 of the Guidelines provides that:-

All certificates required under the Act are to be signed and dated with the date of the day of signing. Copies of all certificates prepared in the course of making statutory rules are to be forwarded to SARC within 7 days of the making of the statutory rule, or within 7 days of the establishment of SARC (whichever is the longer period of time).

Recommendations

The Subcommittee notes that some regulations are made on the recommendation of a Minister or some other authorised body. If the Subcommittee is provided with a copy of the recommendation, it can certify that the regulations have been validly made in accordance with that recommendation. Where the Subcommittee is not provided with a copy of that recommendation, it cannot certify that the regulations have been validly made. The Subcommittee would appreciate receiving copies of all recommendations.

