No. 7 of 2009

Tuesday, 23 June 2009

On the

Casino Legislation Amendment Bill 2009

Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009

Fair Work (Commonwealth Powers) Bill 2009

Food Amendment (Regulation Reform) Bill 2009

Gambling Regulation Amendment Bill 2009

National Parks Amendment (Point Nepean) Bill 2009

Occupational Health and Safety Amendment (Employee Protection) Bill 2009

Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009

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Glossary and Symbols

'*Article*' refers to an Article of the International Covenant on Civil and Political Rights;

'*Assembly*' refers to the Legislative Assembly of the Victorian Parliament;

'*Charter*' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006;*

'*child*' means a person under 18 years of age;

'*Committee*' refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;

'*Council*' refers to the Legislative Council of the Victorian Parliament;

'*court'* refers to the Supreme Court, the County Court, the Magistrates' Court or the Children's Court as the circumstances require;

'*Covenant*' refers to the International Covenant on Civil and Political Rights;

'*human rights'* refers to the rights set out in Part 2 of the Charter;

'***penalty units'*** refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette *(*currently one penalty unit equals $113.42).

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.

'***VCAT***' refers to the Victorian Civil and Administrative Tribunal;

'[ ]' denotes clause numbers in a Bill.

Useful provisions

Section 7 of the ***Charter*** provides –

Human rights – what they are and when they may be limited –

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the imitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Section 35 (b)(iv) of the ***Interpretation of Legislation Act 1984*** provides –

In the interpretation of a provision of an Act or subordinate instrument consideration may be given to any matter or document that is relevant including, but not limited to, reports of Parliamentary Committees.

Terms of Reference

Parliamentary Committees Act 2003

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 upon rights or freedoms;

  (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;

  (iii) makes rights, freedoms or obligations dependent upon 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.

The Committee has considered the following Bills –

Casino Legislation Amendment Bill 2009
Fair Work (Commonwealth Powers) Bill 2009
Food Amendment (Regulation Reform) Bill 2009
Gambling Regulation Amendment Bill 2009
National Parks Amendment (Point Nepean) Bill 2009

The Committee notes the following correspondence –

Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009
Occupational Health and Safety Amendment (Employee Protection) Bill 2009
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009

Role of the Committee

The Scrutiny of Acts and Regulations Committee is an all-party Joint House Committee, which examines all Bills and subordinate legislation (regulations) presented to the Parliament. The Committee does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan legislative scrutiny. These traditions have been developed since the first Australian scrutiny of Bills committee of the Australian Senate commenced scrutiny of Bills in 1982. They are precedents and traditions followed by all Australian scrutiny committees. Non-policy scrutiny within its terms of reference allows the Committee to alert the Parliament to the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances.

The *Charter of Human Rights and Responsibilities Act 2006* provides that the Committee must consider any Bill introduced into Parliament and report to the Parliament whether the Bill is incompatible with human rights.

Alert Digest No. 7 of 2009

Casino Legislation Amendment Bill 2009

Introduced	9 June 2009
Second Reading Speech	11 June 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tony Robinson MLA
Portfolio responsibility	Minister for Gaming

Background

The Bill amends the *Casino Management Agreement Act 1993* and the *Casino Control Act 1991* to —

- provide for the abolition of the Health Benefit Levy by repealing section 114A and 114B of the *Casino Control Act 1991* effective 1 July 2012. **[3 and 4]**
- ratify the ninth Deed of Variation to the management agreement for the Melbourne Casino to more closely align the rate of taxation that applies to gaming machine revenue in Victoria between the casino and other gaming venues through imposing additional taxes on the casino's gaming machines. The rate of tax for gaming machines will increase in six equal annual increments from the current level of 22.25 to 32.57 per cent by 2014/2015. **[5 to 8 and Schedule 10]**

The Committee makes no further comment.

Fair Work (Commonwealth Powers) Bill 2009

Introduced	2 June 2009
Second Reading Speech	3 June 2009
Royal Assent	17 June 2009*
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Minister for Industrial Relations

> ***Note:*** *The Bill received Royal Assent on 17 June 2009 and the Committee provides this report pursuant to section 17(c) of the Parliamentary Committees Act 2003.*

Background

The Bill refers certain workplace relations matters to the Commonwealth Parliament under section 51 (xxxvii) of the Commonwealth Constitution. This will facilitate the application of the *Fair Work Act 2009* (*Cth*) ('the Commonwealth Act') to Victorian employers that are not constitutional corporations and their employees.

Certain matters are excluded from this referral and these are mentioned briefly in the second reading speech extracts below.

The new referral will replace the current referral under the *Commonwealth Powers (Industrial Relations) Act 1996* and the Bill provides for repeal of this Act.

The Bill also repeals the *Victorian Workers' Wages Protection Act 2007* and certain provisions of the *Public Administration Act 2004* and *Parliamentary Administration Act 2005*.

The Bill amends the *Long Service Leave Act 1992*, *Public Sector Employment (Award Entitlements) Act 2006*, *Outworkers (Improved Protection) Act 2003*, Public *Holidays Act 1993* and the *Occupational Health and Safety Act 2004* so that they will continue to operate according to their original schemes after the Commonwealth Act and the associated Commonwealth's transitional legislation commence.

Committee comment

The Bill provides that Parts 1 and 2 of the Bill come into operation on the day on which the Bill receives Royal Assent and the remaining provisions will commence on a day or days to be proclaimed. The explanatory memorandum notes that no default commencement date for the remaining provisions is provided as they are intended to commence after the commencement of the Commonwealth Act and associated Commonwealth transitional legislation commences. **[2]**

The Bill provides for the reference of certain powers to the Commonwealth and for certain matters to be excluded from the reference. **[4 and 5]**

The Bill provides for the termination of the agreement by the State by the Governor in Council published in the Government Gazette. **[6]**

The Bill will repeal the *Commonwealth Powers (Industrial Relations) Act 1996*. **[8]**

> **Note:** From the explanatory memorandum – *The references under this Bill will replace the references under the Act to be repealed, once the new references are given effect by amendment of the Commonwealth Fair Work Act and associated Commonwealth transitional legislation.*

The schedule contains the proposed text of a new Division 2A of Part 1-3 of the Commonwealth Fair Work Act. This text would be inserted into that Act by the proposed *Fair Work (State Referral and Consequential and Other Amendments) Bill 2009* of the Commonwealth, with the support of the initial reference under the Bill.

Extracts from the Second Reading Speech

> *The Bill before the House today will make a new referral of industrial relations powers to the Commonwealth replacing the referral made in 1996. This will mean that all Victorian workplaces, as well as all Victorian workers, with some exceptions, will have the benefit of the Federal Fair Work Act 2009.* **[4 and 5]**
>
> *…*
>
> *The Fair Work Act, like the WorkChoices legislation it replaces, is based on the corporations power. Were this Parliament not to make this referral, then only workplaces where the employer is a constitutional corporation could be assured of proper coverage by the new federal laws.*
>
> *...*
>
> *Whilst the new referral will result in almost all Victorian workers having the protection of the federal laws, it is important to note that some exemptions are made.*
>
> *These exemptions are similar to those that have operated since the Kennett government made the first referral of industrial relations powers in 1996. Members of Parliament, the judiciary, members of administrative tribunals, ministerial officers and senior executives in the public sector are all excluded. Persons holding office as parliamentary officers and certain other office-holders are also excluded.*
>
> *Victoria will not refer certain matters in relation to public sector employees. In particular, the State will not refer matters relating to the number, identity and appointment (but not the terms and conditions of appointment) and redundancy of public sector employees. These matters were excluded from Victoria's previous referral. They relate to matters that the High Court in the Re AEU decision held to be essential to the functioning of the states. For this reason, the High Court decided that such matters could not be subject to Commonwealth legislation.*
>
> *Victoria also will not refer matters in relation to transfer of public sector employees and directions given to public sector employees under state laws dealing with essential services and situations of emergency services. These matters were excluded from Victoria's previous referral. This will maintain the integrity of state laws dealing with these matters.*
>
> *Victoria will not refer certain additional matters in relation to law enforcement officers. Again these matters were excluded from Victoria's previous referral. They are appropriate to maintaining the integrity of state laws governing law enforcement officers.* **[5]**
>
> *…*
>
> *The Bill will make a number of amendments to other Acts so that they continue to operate according to their original schemes.* **[9 to 35]**
>
> *The Bill will repeal the unfair dismissal jurisdiction for public sector employees under the Public Administration Act 2004 and parliamentary officers under the Parliamentary Administration Act 2005. This State jurisdiction gave officers and employees of small public sector organisations a place to bring unfair dismissal claims after they lost unfair dismissal rights under the WorkChoices '100 employees or less' exclusion. Because the fair work laws drop this exclusion, the state jurisdiction is no longer needed.* **[37 to 40]**

Charter Report

Statement of compatibility – Clear and helpful analysis

The Committee observes that the statement of compatibility appropriately contains a full analysis of the human rights impact of the *Fair Work Act 2009* (Cth), which the Act authorises the Commonwealth parliament to extend to new categories of Victorian employers and

employees. The Committee considers that the statement provides an especially clear and helpful analysis of the complex human rights issues raised by the Commonwealth Act.

Charter's requirement for scrutiny of bills – No Committee report before the Bill became an Act

The Committee notes that it did not report on the Act's compatibility with human rights while it was a Bill, although it is now exercising its power to report on the Act.[1]

In its *Alert Digest No. 1 of 2009*, the Committee expressed its concern that this procedure may not satisfy the mandatory requirement for human rights scrutiny of new bills imposed by Charter s. 30.[2] The Attorney-General has not yet responded to the Committee's earlier queries about the requirements and effects of Charter s. 30 in these circumstances.

The Committee will again write to the Attorney-General seeking his advice about the effect of Charter s. 30.

Commonwealth laws made pursuant to a Victorian referral – Application of Charter's operative provisions – Whether Charter will be overridden

Summary: A Victorian referral of legislative power to the Commonwealth raises uncertainties about the operation of the Charter with respect to laws enacted pursuant to the referral. The Act may reduce the Charter's protection of Victorian employers' and employees' human rights. The Committee will write to the Attorney-General seeking further information.

The Committee notes that s. 4(1)(a), referring power to the Commonwealth to enact a proposed new Division 2A into Part 3-1 of the *Fair Work Act 2009* (Cth), permits the application of the Commonwealth Act to Victorian employers, employees and outworker entities who would not otherwise be subject to that law.[3] Section 4(1)(b) additionally authorises the Commonwealth Parliament to amend the Act in the future on various 'referred subject matters'.

In its *Alert Digest Nos. 6 of 2008 and 6 of 2009*, the Committee observed that a Victorian statute giving a South Australian statute the force of law in Victoria raises uncertainties about the operation of the Charter. A Victorian referral of legislative power to the Commonwealth raises similar uncertainties and distinct ones of its own, including the possibility that the Act may reduce the Charter's protection of Victorian employers' and employees' human rights.

The common uncertainties relate to the continuing operation of the Charter's provisions for:

- **scrutiny of new laws** made pursuant to Victoria's referral,[4] given that future amendments will be enacted by the Commonwealth (rather than the Victorian) parliament[5]
- **interpretation of legislation** supported by Victoria's referral,[6] given that the *Fair Work Act 2009* is a Commonwealth (rather than Victorian) statute and is subject to the Commonwealth's interpretation law[7]

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1 *Parliamentary Committees Act 2003*, s. 17(c)(ii)

2 Charter s. 30 provides that '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.' (emphasis added)

3 See clause 3 and schedule 1, clause 11 of the *Fair Work (State Referral and Consequential Amendments) Bill 2009*, which is presently before the Commonwealth Parliament.

4 Division 1 of Part 3 of the Charter requires a statement of compatibility and SARC report for each bill introduced into the Victorian parliament.

5 Pursuant to s. 4(1)(b) of the *Fair Work (Commonwealth Powers) Act 2009*.

- **court declarations of inconsistent interpretation** about statutory provisions made pursuant to Victoria's referral,[8] given that those laws are Commonwealth (rather than Victorian) statutory provisions and courts examining them may be exercising federal (rather than state) judicial power.
- **obligations of public authorities** administering laws made pursuant to Victoria's referral,[9] given that those entities are established by Commonwealth (rather than Victorian) enactments.[10]

In its *Alert Digest No. 9 of 2008*, the Committee published the Minister for Energy and Resources' view that Charter s. 32 applies to national cooperative laws in force in Victoria.[11] In its *Alert Digest No. 6 of 2009*, the Committee wrote to the Minister seeking information about the Charter obligations of corporations administering those laws in Victoria. However, the Committee observes that different considerations may arise in relation to federal laws that extend to some Victorians because of a Victorian referral of legislative power.

An additional uncertainty that arises when Victoria refers legislative power is that valid Commonwealth statutes may invalidate State statutes, including the Charter.[12] This means that the Victorian Act might authorise the removal or reduction of the Charter's protections for the human rights of Victorian employers and employees who are brought within the Commonwealth law, including both protections from the federal scheme itself (to the extent that it or any future amendments limit Charter rights) and Charter protections that are additional to that scheme (e.g. from Victorian laws that limit employment rights protected by the Charter or against Victorian public authorities whose acts or decisions limit such rights.)

The Committee is especially concerned that neither the Victorian Act nor the Commonwealth Act expressly provides that the Charter continues to apply. In particular, while both Acts expressly preserve the *Equal Opportunity Act 1995* (Vic),[13] neither expressly preserves the additional protections against discrimination in Charter s. 8.[14] Also, it is possible that Part 3-1 of the Commonwealth Act, once it applies to most Victorian workplaces, will 'cover the field' on the 'right to form and join trade unions', potentially rendering the right to freedom of association in Charter s. 16(2), or Charter provisions protecting that right, partially invalid.[15]

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6 Charter s. 32(1) provides that: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.' Charter s. 32(2) provides that: 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.'

7 Proposed new section 30J of the *Fair Work Act 2009* (Cth) provides that 'The *Acts Interpretation Act 1901*… applies to this Act.'

8 Charter s. 36(1) that: '[I]f in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect'.

9 Charter s. 38(1) provides that: '[I]t is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' The section provides for defences to that obligation.

10 Fair Work Australia is established by s. 575 of the *Fair Work Act 2009* (Cth). For entities with public functions to be bound by Charter s. 38(1), they must be either 'established by a statutory provision' or 'exercis[e] those functions on behalf of the State': Charter s. 4(1).

11 The Minister wrote that 'As the National Gas (Victoria) Law, the National Gas (Victoria) Regulations, and the National Gas Rules are Victorian law, Charter 32 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* does apply.'

12 Section 109 of the *Commonwealth of Australia Constitution Act* provides that 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

13 *Fair Work (Commonwealth Powers) Act 2009*, s. 3 (para (a) of the definition of 'State subject matters'); *Fair Work Act 2009* (Cth), s. 27(1)(b).

14 Charter s. 8(3) provides that: 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.'

15 Charter s. 16(2) provides that: 'Every person has the right to freedom of association with others, including the right to form and join trade unions.'

The Committee will write to the Attorney-General seeking further information as follows:

1. ***Will future amendments to the Fair Work Act 2009 (Cth) made pursuant to the referred power in s. 4(1)(b) be scrutinised for their compatibility with human rights pursuant to Division 1 of Part 3 of the Charter?***
2. ***Will the Fair Work Act 2009 (Cth), to the extent that it is supported by the Victorian referral in s. 4(1)(a), be interpreted pursuant to Charter s. 32?***
3. ***Will a court be able to make declarations of inconsistent interpretation pursuant to Charter s. 36(1) if the Fair Work Act 2009 (Cth), or future amendments to that Act, cannot be interpreted consistently with a human right?***
4. ***Will Fair Work Australia be subject to Division 4 of Part 3 of the Charter when it is administering laws made pursuant to the Victorian referral in s. 4(1)(a)?***
5. ***Will the Charter, or any provision of it, be rendered invalid to any extent by the enactment of the proposed new Division 2A of Part 1-3 of the Fair Work Act 2009 (Cth)?***
6. ***Has Charter s. 30 been complied with in relation to the Fair Work (Commonwealth Powers) Bill 2009? If not, what are the consequences of non-compliance?***

Pending the Attorney-General's response, the Committee draws attention to the Charter's interaction with the Fair Work Act 2009 (Cth).

The Committee makes no further comment.

Food Amendment (Regulation Reform) Bill 2009

Introduced	9 June 2009
Second Reading Speech	10 June 2009
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrew MLA
Portfolio responsibility	Minister for Health

Background

The overall objectives of the Bill are to amend the *Food Act 1984* (the Act) to —

- strengthen the governance and accountability of food safety regulators;
- reduce the duplication of regulatory requirements and better target regulation to the risk associated with particular food premises, whilst continuing to protect public health; and
- improve the enforcement and administration of the Act.

Extracts from the Second Reading Speech –

> *In Victoria, the Food Act 1984 sets out the basic obligations on all persons to ensure that the food they sell, or handle for sale, is safe. It also requires compliance with the nationally agreed Food Standards Code. Local government and the Department of Human Services administer the Act.*
>
> *…*
>
> *The Bill clarifies the roles and responsibilities of local government and the Department of Human Services. It proposes that the department will have a statutory role of providing guidance to councils to promote the consistent administration of the Act throughout the State.* **[7]**
>
> *… It is important to remember that the Act requires all food businesses to handle food safely. The nationally agreed Food Standards Code is incorporated into the Act and applies generally. The new Part 3B in the Bill establishes a revised process for applying additional requirements that promote adherence to these general obligations. The declaration under the new section 19C will specify the classes of food premises that must comply with particular requirements. … The declaration would set out which of these regulatory requirements would apply to each particular class.* **[13]**
>
> *… Drawing on feedback from consultation, it is envisaged that the following scheme would apply.*
>
> *Nursing homes, hospitals and also child-care centres providing long day care will continue to be 'class 1' premises under the proposed declaration and will need to have a food safety program. This draws on the approach taken nationally. They will need to have a food safety supervisor, and be registered.*
>
> *… Class 2 is likely to apply to medium-risk activities such as the handling of unpackaged food that requires temperature control. This would include many manufacturers, restaurants and cafes that prepare meals. It is expected that this group will continue to be required to be registered with the council, and to have a food safety program and a food safety supervisor.*
>
> *…It is expected that class 3 will include lower risk activities such as the baking of bread, the wholesale of pre-packaged food, or the retail of only pre-packaged food that requires temperature control. These premises would continue to be registered and inspected annually by councils. However, because this group has been identified as generally lower risk, class 3 premises will no longer require a food safety program or food safety supervisor. Instead, the bill provides that minimum record-keeping requirements will need to be met.*

…It is intended that class 4 will include activities that are defined as very low risk, such as the sale of shelf-stable pre-packaged foods, and uncut fruit and vegetables at places such as farmers' markets.

…Class 4 would also apply to not-for-profit fundraising activities such as community sausage sizzles where this food is cooked and served immediately, and to kindergartens where basic food such as cut fruit is served. The food safety risk for such activities can be adequately addressed through the measures that will apply to this class. This will include targeted guidance material about how to comply with the general obligations regarding food safety, and encouragement to use the free online training.

The proprietor of a class 4 premises will no longer need to obtain registration from the council. A simple notification to the council of the food-handling activities will be sufficient. Councils will retain the discretion to inspect, but will no longer be required under the Act to do so annually.

… The Bill proposes that councils be able to charge 'poor performers' additional fees for follow-up inspections where there has been repeated non-compliance to recover the greater costs that they incur in focusing their efforts more on businesses that pose a greater risk to public health. Fees cannot be charged separately for any minimum mandatory assessments specified in the new section 19C declaration, or for an annual statutory inspection. **[13]**[16]

…

Statewide scheme for market stalls and food vans

The Act currently requires each market stall or food van to be separately registered in each municipality in which it operates. The Bill amends the Act to create a single registration and notification system for such temporary or mobile food premises and food vending machines.

The registration or notification would apply across all municipalities throughout the state. This will substantially simplify the application process for these businesses, but especially community groups and farmers' market stalls. …Part 2 of the Bill also enables a council to choose to recognise the registration of a temporary or mobile food premises granted by another council. If that registration is recognised, the premises can operate in the municipality of the recognising council.

This will assist a number of food businesses that currently require multiple registrations. This change will come into effect in conjunction with the reforms to the food premises classification system in 2010 and is an interim measure. It will not be required when the full Statewide scheme for market stalls and food vans in Part 4 of the Bill comes into effect in 2011. **[43 to 57]**

…

Councils will also be able to issue infringement notices for certain offences under the Act. **[39 and 40]**

The Bill also enables councils to make an order requiring food premises to cease to operate, or to stop particular food-handling activities, pending the taking of steps that would render the premises clean or otherwise improved so that food prepared at those premises is safe. … Given the key role that councils play in assessing compliance with the Act, it is logical for councils to have this power. The Chief Health Officer would be available to provide advice to councils where needed. As a delegate of the Secretary under the Act, that officer would still be able to act in the event that no action is taken by a council and there is a serious risk to public health. **[24]**

… The Bill also inserts new Part VIIIA into the Act to establish a register of convictions under the Food Act. The purpose of this register is to inform the public about convictions for offences committed in relation to the conduct of food businesses. ... This register is to be kept by the Secretary and published on the Department's website. Each conviction is to be included in this register for 12 months. As councils ordinarily prosecute these offences, councils will provide relevant information to the Secretary for inclusion in the register. **[27]**

[16] Proposed new section 19UA.

…

The Bill also includes amendments to enable the public to be informed when a food premises is subject to a temporary closure order. Such an order may operate until the proprietor remedies food hygiene problems. The Bill allows a temporary closure order to be published, and permits it to be affixed to the exterior of the premises, whilst it is in force. **[9]**

Committee comment

[Clauses]

The Bill provides that some provisions commence on Royal Assent and also provides for staggered forced commencement for various other Parts of the proposed amendments to the Act up to 1 July 2011. **[2]**

The Committee notes the following explanation provided in the Second reading Speech for the delayed forced commencement provisions –

As these reforms require a high level of collaboration between the department, councils and business, there will be a staged commencement of the provisions in the bill. This is designed to ensure that these changes will be successfully implemented.

The key changes that will reduce the level of unnecessary regulation on food businesses will come into operation as soon as is feasible. The main changes to food premises classification and regulation will therefore come into effect by 1 July 2010.

Other provisions have been assigned later default commencement dates, to provide sufficient time for necessary information technology system upgrades.

Some of the changes in relation to enforcement -- such as infringement notices -- will come into effect separately when relevant regulations are made and enforcement manuals and training are completed.

… Existing council databases may need upgrades to connect with a system that is to be developed for the statewide registration of market stalls and food vans. It is for this reason that there is a default commencement date in the bill of July 2011 for this reform in Part 4.

The Bill substitutes a new Part IIIB in the Act concerning “Food Safety" and moves from the current two tier system where registration is compulsory and in which it is mandatory for declared premises to comply with requirements relating to food safety programs and other matters to a more flexible system of classification where the requirements pertaining to the different declared classes of food premises vary according to the level of risk associated with each class of food premises. The Part deals with minimum record keeping, food safety programs, food safety supervisors and audit requirements for food premises. **[13]**

The Bill inserts a new Part 8A in the Act concerning the "Publication of Convictions" and establishes a register of convictions for offences to be kept by the Secretary under the Act. The purpose of the register is to inform the public about convictions for offences committed in connection with the conduct of food businesses. **[27]**

The Bill prohibits a council from making a local law for, or with respect to, food safety. **[41]**

The Bill will permit councils to recognise the registration of another registration authority for a temporary food premises or mobile food premises. **[16]**

The Bill introduces new provisions known as the "Single Notification or Registration Scheme" in Division 4 of Part VI of the Act to create a single registration and notification system for temporary food premises, vending machines and mobile food premises. The registration will apply throughout the State. **[53]**

The scheme as a whole seeks to ensure that temporary food premises, mobile food premises, and food vending machines must either—

- be registered annually with the council in which they are based, if the Act requires them to be registered; or
- if the premises are exempt from registration, notify the council in which the premises are based, on a once off basis (as notification under the Act is not annual). **[53]**

The Committee makes no further comment.

Gambling Regulation Amendment Bill 2009

Introduced	9 June 2009
Second Reading Speech	10 June 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tony Robinson MLA
Portfolio responsibility	Minister for Gaming

Background

The Bill amends the *Gambling Regulation Act 2003* (the 'Act') to –

- amend new sections 3.4A.18 and 3.4A.19 to be inserted into the *Gambling Regulation Act 2003 by the Gambling Regulation Amendment (Licensing) Bill 2009 ('licensing bill')*. That Act inserts a requirement that venue operators who transfer gaming machine entitlements within a specified period must pay to the State 50 per cent of any profit made. The Bill amends these sections to increase the amount of prescribed profit payable by a venue operator from 50 per cent to 75 per cent. **[5 and 6]**

- provide a process whereby the current gaming operator's licence, held by the Tatts Group, which is scheduled to expire on 14 April 2012, can be extended to 15 August 2012 (to align its expiry with the expiry date of the gaming licence under the Act). **[4]**

- amend the definition of 'participants' in sections 6.1.2 of the Act and to amend 6.5.1 which provides for the Minister to declare a company to be a participant, in order to ensure that a gaming operator that extends their gaming operator's licence under the process referred to in clause 4 will not be a 'participant' in Club Keno games for the period of the licence extension. **[7 and 8]**

The Committee makes no further comment.

National Parks Amendment (Point Nepean) Bill 2009

Introduced	9 June 2009
Second Reading Speech	10 June 2009
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Portfolio responsibility	Minister for Community Development

Background

The Bill amends the *National Parks Act 1975* (the 'Act') to

- extend Point Nepean National Park by adding land at the Quarantine Station and the adjoining intertidal zone to the existing park **[7]**
- provide leasing powers (and associated licensing powers) to enable the Minister to lease land (including buildings) for a period up to 21 years (and up to 50 years in specified circumstances) for purpose(s) which the minister considers are not detrimental to the protection of the park, including its historic, indigenous, cultural, natural and landscape features **[5]**
- provide for the Minister to grant a licence or permit for up to seven years to occupy or use any land (including any buildings) in the quarantine station area of the park, consistent with the objects of the Act **[5]**
- recognise that the Commonwealth will no longer own land at Point Nepean after it transfers the land at the Quarantine Station to the State. The Bill also repeals provisions which granted an easement over part of Defence Road to the Commonwealth **[4]**
- declare that the amendments made to the Act by the Bill are not intended to affect native title rights and interests other than where they are affected or are authorized to be affected by or under the *Native Title Act 1993* (*Cth*) **[6]**.

The Committee makes no further comment.

Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009

The Bill was introduced into the Legislative Council on 1 April 2009 by the Ms Colleen Hartland MLC. The Committee considered the Bill on 1 June 2009 and made the following comments in Alert Digest No. 6 of 2009 tabled in the Parliament on 2 June 2009.

Committee's Comments

Charter Report

Freedom of movement – Offence to bring a beverage container into Victoria without paying a levy – Whether reasonable limit

Summary: New section 52D makes it an offence to import a beverage container into Victoria without paying a levy. The Committee is concerned that this provision may limit the Victorians' Charter right to 'enter' Victoria. It will write to the Member seeking further information.

The Committee notes that clause 4, inserting a new section 52D into the Environment Protection Act 1970, makes it an offence to 'import' a beverage container into Victoria without either paying a beverage container environmental levy or obtaining an exemption from the Environmental Protection Authority*. The term 'import' is defined to mean 'import or bring into Victoria from another State of Territory or other country'. The penalty for non-compliance is 2400 penalty units.*

The Committee observes that new section 52D is not limited to containers intended for sale in Victoria. Rather, it appears to apply to all containers in the possession of someone entering Victoria by any means. New section 52D requires such travellers to choose between throwing out or leaving all their beverage containers behind when entering Victoria, paying the levy on each container, seeking an exemption from the Authority, or risking a hefty fine.

The Committee is concerned that new section 52D may limit Victorians' Charter right to enter Victoria. *The ubiquity of beverage containers and their utility in particular to travellers mean that even a modest levy may limit that right, unless it satisfies the test for reasonable limits on rights in Charter s. 7(2). Whilst the purpose of environmental protection may justify restrictions on what people bring into Victoria, the environmental benefit of imposing on a levy on containers that are not sold in Victoria is not apparent, as new section 52K bars any refunds for such containers. The Committee observes that the South Australian deposit scheme avoids limiting people's right to enter that state, by imposing a levy on suppliers or sellers of containers, instead of importers or producers.*

The Committee will write to the Member seeking further information as to the compatibility of new section 52D with Charter s. 12. Pending the Member's response, the Committee draws attention to new section 52D.

Constitutional validity

The Committee notes that the Bill proposes to introduce a State levy or tax on imported beverage containers with a refund payable only on containers sold within Victoria, and considers that this may have constitutional implications pursuant to section 92 of the Commonwealth Constitution. Section 92 provides –

Section 92 – Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

The Committee will seek further advice from the Member concerning this question.

Member's Response

Thank you for your fax of 2 June, and for SARC's consideration of the above Bill.

My intention is that the levy should apply to all drink containers (as defined) sold in Victoria. The implication for travellers to Victoria who possess drinks purchased interstate were unintentional. I am grateful to SARC for pointing out this error.

I intend to fix the error by circulating an amendment to s.52D, for addition of the words "for the purpose of sale within Victoria" after the word "Victoria" in each case.

I have sought written advice from Brian Walters SC of counsel in relation s. 92 of the Commonwealth Constitution. It addresses the concerns raised by SARC, and forms part of the advice requested of me in your fax of 2 June.

Please let me know if you require any additional information.

Colleen Hartland
4 June 2009

In the matter of the Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 (Vic)

MEMORANDUM OF ADVICE

I am asked to advise in relation to the Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 (Vic) ("the Bill").

The Bill proposes an amendment to the Environment Protection Act 1970 by the introduction of a new Division 6 entitled "Beverage Container Deposit and Recovery Scheme".

In particular, I am asked to consider whether the proposed new s 52D of the Bill offends s 92 of the Constitution of the Commonwealth of Australia.

I am instructed that the form of the proposed new s 52D is to be amended as follows: after the word "Victoria" in each case, the following further words are to be added: "for the purpose of sale within Victoria". I provide this advice on the assumption that such an amendment is to be made.

I have been provided with the report of the Scrutiny of Acts and Regulations Committee in relation to the Bill. One of the concerns expressed by the Committee relates to the fact that the proposed new s 52D is not limited to containers intended for sale in Victoria. In view of my instructions as to the proposed amendment, that concern no longer applies.

Section 92 of the Commonwealth Constitution

Section 92 provides –

92 Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

The section is designed to ensure freedom of trade between States – or put another way, to remove protection - and has been the subject of consideration by the High Court on a number of occasions, the leading authorities being Cole v Whitfield[1] *and Castlemaine Tooheys Ltd v South Australia*[2]*.*

Cole v Whitfield concerned the validity of Tasmanian regulations prohibiting the sale and possession of undersized crayfish. The Respondents in the appeal had imported undersized crayfish from South Australia (where they were not regarded as undersized). The High Court upheld the regulations. Although the regulations were unquestionably a burden on interstate trade and commerce:

(a) they did not bear the character of being discriminatory against interstate trade and commerce, because the prohibition against sale and possession of undersized crayfish applied alike to crayfish caught in Tasmanian waters and those that were imported;

(b) the regulations did not operate to protect the Tasmanian crayfish industry and give it an advantage over imported crayfish, but even if they did, the measure was designed to protect and conserve the stock of Tasmanian crayfish, and allowing imported undersized crayfish would render such protection practically unenforceable. Therefore, the burden imposed on interstate trade was not relevantly discriminatory or protectionist.

Castlemaine Tooheys Ltd v South Australia concerned amendments made in 1986 to the South Australian container deposit legislation.

The High Court upheld the validity of the deposit and return system, and of some features of the 1986 amendment, but struck down the provisions which penalized interstate brewers, as being discriminatory, and as not being necessary and adapted to their purpose.

In particular, the High Court struck down s 5b of the amending legislation - the Beverage Container Act Amendment Act 1986 (SA). This provision empowered the Minister to exempt some glass containers from the requirements of s 7, which made it an offence for a retailer to refuse to accept containers marked in accordance with s 6(1) or fail to pay the refund amount[3]*.*

Under this provision the Minister exempted the bottles of the Plaintiff's South Australian competitors, making it uneconomic for the Plaintiff to supply its product in South Australia. The High Court held that neither the need to protect the environment from litter nor the need to conserve energy resources explained or justified the differential treatment given to the Plaintiff's products. The treatment amounted to discrimination in a protectionist sense in relation to interstate trade.

Application to the Bill

The questions that arise may be distilled as follows:

(a) would the proposed new s 52D set out in the Bill, if enacted, confer a comparative competitive advantage on Victorian traders over their interstate counterparts or remove a comparative competitive disadvantage from Victorian traders?

(b) Is the measure designed to serve a purpose other than discrimination against trade and commerce?

(c) Is the measure appropriate and adapted to that purpose?

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1 (1988) 165 CLR 360

2 (1990) CLR 436

3 Note that the High Court upheld both ss 6 and 7 as valid.

The measure applies to Victorian and interstate traders equally. There is no comparative competitive advantage or disadvantage on the face of the legislation.

However, the High Court has held that it will consider discrimination not merely on the face of the legislation concerned, but also "factual discrimination"[4]. In other words, the court will consider the practical operation of the legislation. In the Castlemaine Tooheys example, it was the ability for the Minister to give exemptions, and the exemptions given in a discriminatory way, which invoked the intervention of the High Court. Whilst there is nothing about the proposed s 52D in the Bill which gives rise to such concerns, I note that the proposed s 52N in the Bill provides for exemptions from either the whole or part of s 52D, which is the section that requires payment of the levy. Such exemptions must be granted "if the Authority is satisfied that the criteria and considerations prescribed" apply. I am not provided with any proposed criteria and considerations. As the matter stands, then, there is nothing to invalidate s 52D, but if the practical result of exemptions were ultimately to lead to discrimination in interstate trade, there is potential for s 52N to be struck down as contrary to s 92 – the result that occurred in Castlemaine Tooheys. This is a matter which should be addressed in framing any regulations.

In relation to s 52N, the Second Reading speech for the Bill contains the following statement:

> *New section 52N enables the EPA to grant exemptions for some drinks not to be part of the scheme. I call this the 'Swords wine exemption'. It would also apply to companies such as ReWine* ***that charge a premium*** *for a reusable bottle, then refill it.*
>
> *Those bottles are 'reusable', which is better for the environment than melting down single-use containers. An exemption is consistent with the principle of wastes hierarchy set out in section 1I of the Act, by providing a financial incentive to reuse containers. (emphasis added)*

Further, the Explanatory Memorandum states:

> *New section 52N enables the Authority to grant exemptions under new section 52D. This is intended to provide an exemption for beverages sold in containers that are intended for re-use or re-filling by the producer or retailer,* ***and for which a separate deposit and refund scheme is provided.*** *Such exemption is consistent with the principle of wastes hierarchy set out in section 1I of the Act, by providing a financial incentive to re-use containers. (emphasis added)*

If the exemptions are granted in accordance with the intention set out in the Second Reading Speech and the Explanatory Memorandum, there will be no contravention of s 92 by the enactment of the Bill, particularly ss 52D and 52N.

Section 52D is designed to serve a purpose other than discrimination against interstate trade, namely "to make further provision for environmentally sustainable uses of resources and best practices in waste management by establishing a beverage container deposit and recovery scheme to be administered by the Environment Protection Authority" (to quote from the long title of the Bill). It follows that on this ground alone s 52D would be held to be in accordance with s 92 of the Constitution.

However, if regulations made in relation to s 52N of the Bill were to provide exemptions in a way which does not conform to this purpose, then there is potential for the High Court to strike down such regulations, and s 52N, as not being in conformity with s 92 of the Constitution. There is nothing to give rise to that outcome on the legislation as it stands, but this should be a consideration in drafting any regulations. Once again, if the statements in the Second Reading speech and the Explanatory Memorandum are adhered to, there will be no difficulty.

As it stands, the measure is appropriate and adapted to its purposes. Only if regulations and decisions in relation to s 52N gave rise to exemptions which had the practical effect of discriminating against interstate trade would the result be otherwise, and such a result can be avoided by proper framing of regulations in accordance with the statements set out in the Second Reading speech and the Explanatory Memorandum.

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[4] eg *Cole v Whitfield* (1988) 165 CLR 360, at 399

Conclusion

The new s 52D of the Bill does not offend s 92 of the Constitution, either on its face or in its practical operation. The section provides for equal levying of beverage containers produced within Victoria and imported into Victoria. It does not confer a comparative competitive advantage on local traders over their interstate counterparts or remove a comparative competitive disadvantage from local traders, and therefore does not have an effect that is discriminatory on protectionist grounds.

Section 52N gives power to grant exemptions. This section does not on its face contravene s 92, but it has the potential to contravene s 92 if the power is exercised in a way that in effect causes discrimination. If the Authority were to grant exemptions in a manner that was discriminatory in a protectionist sense, and did so for reasons not supported by the purpose of the legislation, and not appropriate and adapted to that purpose, then the situation would be analogous to that found in Castlemaine Tooheys Ltd v South Australia, and is likely to be unconstitutional. At present this possibility remains hypothetical, and no practical discrimination can be shown. Further, if the exemptions are provided for in accordance with the Second Reading Speech and Explanatory Memorandum, no difficulty will arise.

If you have any further queries in relation to this matter, please do not hesitate to let me know.

Brian Walters SC
Flagstaff Chambers

4 June 2009

The Committee thanks the honourable member for this response.

Occupational Health and Safety Amendment (Employee Protection) Bill 2009

The Bill was introduced into the Legislative Assembly on 2 December 2008 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 2 February 2009 and made the following comments in Alert Digest No. 1 of 2009 tabled in the Parliament on 3 February 2009.

Committee's Comments

Charter report

Presumption of innocence – Extension of existing criminal offence that places an onus of proof on defendants – Not addressed in statement of compatibility

Summary: Clauses 4(1) & (2) engage the Charter's presumption of innocence. The statement of compatibility does not address these clauses. The Committee will write to the Minister seeking further information as to whether and how the clauses are compatible with the Charter.

The Committee notes that clauses 4(1) & (2) extend the scope of an existing criminal offence in s.76 of the Occupational Health and Safety Act 2004. Section 76 makes it an offence for an employer to take various actions against employees or prospective employees because of their role in relation to health and safety. Clauses 4(1) & (2) extend the offence to cover employees who assist, give information to or raise issues or concerns with an authorised representative of a registered employee organisation.

Section 77 provides that, in proceedings under s.76, defendants bear the onus of proof on the issue of the reasons for their conduct. ***The Committee therefore considers that clauses 4(1) & (2) may limit the Charter right of defendant's charged with an offence to be presumed innocent of that offence until proved guilty.***

Although the Statement of Compatibility addresses other clauses of the Bill that impose a similar reverse onus on civil defendants (who do not have a right to be presumed innocent), ***the Statement does not address whether and how clauses 4(1) & (2) (which apply to criminal defendants) are compatible with the Charter.*** *The Committee observes that, given the introduction of parallel civil proceedings for discrimination against employees on health and safety grounds, the usual justification for reverse onuses in regulatory offences – that they are necessary to ensure compliance with the regulations – may no longer apply. An evidential burden on the defendant may therefore be a 'less restrictive means reasonably available to achieve the purpose of' the existing offence.*

The Committee will write to the Minister seeking further information about whether and how the reverse onus in s. 77 is compatible with the Charter. Pending the Minister's response, the Committee draws attention to clauses 4(1) & (2).

The Committee makes no further comment.

Minister's Response

I refer to your correspondence of 4 February 2009 to the Attorney-General regarding comments made by your Committee in Alert Digest No.1 of 2009 regarding the Occupational Health and Safety Amendment (Employee Protection) Bill 2008 (the OHS Amendment Bill).

The Committee suggests that clauses 4(1) and (2) of the OHS Amendment Bill extend the scope of existing criminal anti-discrimination provisions in the Occupational Health and Safety Act 2004 (the OHS Act) to which a reverse onus of proof applies, and that this engages the Charter of Human Rights and Responsibilities Act 2006. .

I am advised that the amendments to section 76(2) of the OHS Act do not impact on any lights under the Charter of Human Rights and Responsibilities Act 2006 that are not

already engaged by section 76 of the OHS Act. The criminal anti-discrimination provisions in the OHS Act include a number of 'protected' employee activities.

Broadening section 76(2) to include an employee interacting with an authorised representative of a registered employee organisation (ARREO) does not change the intent of the occupational health and safety (OHS) discrimination provisions. These provisions aim to protect employees when proactively raising workplace health and safety concerns and ARREOs, with their specific OHS functions and powers under the OHS Act, play an important role in this context.

It is also noted that neither the types of discriminatory employer actions in section 76(1), nor the reverse onus in section 77, would be changed by the OHS Amendment Bill.

The Committee also queried whether, in view of the new civil anti-discrimination provisions being introduced by the OHS Amendment Bill, the justification for a reverse onus of proof for criminal anti-discrimination provisions in the OHS Act still exists.

I am advised that these provisions are necessary in this context to ensure a prosecuting authority retains a reasonable prospect of proving such offences. This remains the case irrespective of the proposed civil anti-discrimination provisions in the OHS Amendment Bill.

I hope this information is of assistance and thank the Committee for bringing these matters to my attention.

Tim Holding MP
Minister for Finance, WorkCover
and the Transport Accident Commission

29 May 2009

Committee's further comments

The Committee thanks the Minister for his response.

The Committee notes the Minister's remark that clause 4(1) and 4(2) neither engage new Charter rights nor change the intent of existing ss. 76 and 77 of the Occupational Health and Safety Act 2004. However, the Committee considers that the statement of compatibility should address any clause that increases the impact of an existing law on any Charter right (even if the same rights are engaged and the same purpose is furthered.) Clauses 4(1) and 4(2) increase the impact of ss. 76 and 77 on the Charter's right to be presumed innocent set out in Charter s. 25(1). In particular, a defendant who has engaged in the conduct proscribed by s. 76 will, if clauses 4(1) and 4(2) are enacted, have to prove on the balance of probabilities that his or her dominant purpose was not because the employee or prospective employee assisted or raised a concern with an authorised representative (in addition to all the other prohibited purposes outlined in the existing s. 76(2).

The Committee also notes the Minister's remark that existing s. 77 is 'necessary in this context to ensure a prosecuting authority retains a reasonable prospect of proving such offences.' The Committee observes that the test for limiting Charter rights is set out in Charter s. 7(2), which provides that:

> *A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-*
>
> *(a) the nature of the right; and*
>
> *(b) the importance of the purpose of the limitation; and*
>
> *(c) the nature and extent of the limitation; and*
>
> *(d) the relationship between the limitation and its purpose; and*
>
> *(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

The Committee considers that it is essential that any reverse onus be demonstrably justified according to this test, especially where the offence carries a prison sentence. In particular, a reverse onus provision may be incompatible with Charter s. 25(1) if the

alternative of placing an evidential burden on the defendant was 'reasonably available to achieve the purpose' of ensuring a reasonable prospect of successful prosecutions.

The Committee refers to Parliament for its consideration the questions of:

1. ***whether or not clauses 4(1) and 4(2), by extending the operation of a reverse onus provision in s. 77 of the Occupational Health and Safety Act 2004, limit the Charter right of defendants charged under s. 76 of that Act to be presumed innocent until proved guilty according to law?***
2. ***If so, whether or not those clauses are a reasonable limit according to the test set out in Charter s. 7(2)?***

Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009

The Bill was introduced into the Legislative Assembly on 10 March 2009 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 30 March 2009 and made the following comments in Alert Digest No. 4 of 2009 tabled in the Parliament on 31 March 2009.

Committee's Comments

Charter Report

Presumption of innocence – Preservation of reverse onuses in current proceedings – Meaning of 'commenced'

Summary: Clauses 4, 9, 12 and 16 preserve current limitations on defendants' Charter rights for proceedings that have already commenced. The Statement of Compatibility does not address these clauses. The Committee will write to the Minister seeking further information.

The Committee notes that clauses 3, 10, 11, 14 and 15 repeal existing 'reverse onus' provisions that may limit defendants' Charter right to be presumed innocent until proved guilty. ***However, clauses 4, 9, 12 and 16 preserve the existing provisions – and, hence, any limitations on defendants' Charter rights – for proceedings that have already 'commenced'. The Statement of Compatibility does not address these clauses.***

While it is common for ongoing proceedings to be exempted from changes to procedural rules, the Committee observes that such exemptions may be unnecessary with respect to alterations to the burden of proof, which only affect the final, verdict stage of any criminal proceeding. The effect of clauses 4, 9, 12 and 16 (and, hence, the extent of any limitation on the Charter right to be presumed innocence) is unclear, because 'commenced' may refer to the laying of charges, or a variety of later events in criminal proceedings.

The Committee will write to the Minister seeking further information as follows:

1. ***Do clauses 4, 9, 12 and 16 limit the Charter's right to be presumed innocent until proven guilty and, if so, are those limits reasonable according to the test in Charter s. 7(2)?***
2. ***When do proceedings 'commence' for the purposes of clauses 4, 9, 12 and 16?***

Pending the Minister's response, the Committee draws attention to clauses 4, 9, 12 and 16.

Presumption of innocence – Reverse onus provision – Overlapping defences – Transitional operation

Summary: New sub-section 228ZL(5) engages the Charter right of defendants to be presumed innocent until proven guilty. The statement of compatibility does not address this provision. The Committee will write to the Minister seeking further information.

The Committee notes that clause 14, amending s. 228ZL of the Transport Act 1983 – a criminal offence for failing to obey a direction from a transport safety office – replaces the following provision that sets out two defences:

> *(4) In proceedings for an offence against subsection (3), it is a defence if the person charged establishes that –*
>
> *(a) the direction was unreasonable; or*
>
> *(b) without limiting paragraph (a), the direction or its subject-matter was outside the scope of the business or other activities of the person.*

New sub-section 228ZL(4) re-enacts s228ZL(4)(a) as a traditional defence (where the prosecution bears the burden of proof.) By contrast, new sub-section 228ZL(5) re-enacts

s. 228ZL(4)(b) as an express 'reverse onus' provision, with the defendant bearing the burden of proof. The Committee considers that new sub-section 228ZL(5) may limit defendants' Charter right to be presumed innocent until proved guilty.

The Committee has three concerns about the new sub-section 228ZL(5):

*First, **the statement of compatibility does not address this provision** and, in particular, whether or not it is a reasonable limit on the Charter's right to be presumed innocent until proved guilty according to the test in Charter s. 7(2).*

Second, the existing defence in s. 228ZL(4)(b) uses the term 'establishes', which is capable of being re-interpreted under Charter s. 32 in a way that doesn't limit the Charter's right to be presumed innocent. By contrast, the new sub-section 228ZL(5) uses express language that is not capable of such re-interpretation. Clause 14 may, therefore, have widened the definition of the criminal offence in s. 228ZL. The Committee is concerned that it may not be possible for a court to read new sub-section 228ZL(5), which may widen criminal liability, as only applying prospectively, as it is not severable from new sub-section 228ZL(4), which is clearly intended to apply retrospectively. New sub-section 228ZL(5) may therefore engage the right of defendants not to be subject to wider criminal liability than applied when they committed the alleged criminal conduct.

Third, the subject-matter of the defence in sub-section 228ZL(5) appears to overlap with the subject-matter of the defence in sub-section 228ZL(4). It is unclear who bears the burden of proof if the defence adduces evidence suggesting that the defence was unreasonable because its scope was outside the business or other activities of the defendant.

The Committee will write to the Minister seeking further information as follows:

1. ***Is new sub-section 228ZL(5) a reasonable limit on the Charter's right to be presumed innocent until proven guilty according to the test in Charter s. 7(2)?***
2. ***Will new sub-section 228ZL(5) apply to offences committed before the commencement of the Bill?***
3. ***What is the relationship between new sub-sections 228ZL(4) and 228ZL(5)?***

Pending the Minister's response, the Committee draws attention to clause 14.

Minister's Response

Thank you for your letter of 31 March 2009 enclosing a copy of the report of the Scrutiny of Acts and Regulations Committee (the Committee) in Alert Digest No. 4 of 2009 regarding the Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009 (the Bill).

The Bill amends provisions in seven Acts. The provisions are potentially incompatible with the human rights contained in the Charter of Human Rights and Responsibilities (the Charter).

The Bill amends several reverse onus provisions in four Acts which potentially limit the right to be presumed innocent under the Charter. Clauses 3 and 4 amend provisions in the Australian Grands Prix Act 1994, clause 7 amends the Fair Trading Act 1999, clauses 10 and 11 amend the Forests Act 1968 and clauses 14 and 15 amend the Transport Act 1983.

Clauses 4, 9, 12 and 16 provide transitional provisions to cover any existing but incomplete proceedings pursuant to the abovementioned four Acts. These clauses provide that the old provisions, which contain a legal reverse onus, continue to apply to legal proceedings already commenced at the time the Bill comes into force.

The Committee's report asks two questions in relation to clauses 4, 9, 12 and 16.

First, the report considers whether clauses 4, 9, 12 and 16 impose limitations on the right of accused to be presumed innocent until proven guilty. The report asks whether the transitional provisions limit the Charter's right to be presumed innocent.

Clauses 4, 9, 12 and 16 do not limit the right to be presumed innocent. They merely preserve the status quo for proceedings that have commenced, in order to avoid confusion, and clarify the timing in relation to the commencement of the new provisions.

As you note in your letter, it is standard practice for ongoing proceedings to be exempted from changes to procedural rules during a transition period. The provisions in question not

only affect the verdict stage, but also potentially entire criminal proceedings, as the provisions relate to the determination of whether the accused will succeed in his or her defence. It would be undesirable for the new provisions to commence operation immediately. It might lead to ongoing proceedings having to be reviewed, because they are based on investigations and prosecutions prepared pursuant to the existing law.

The Committee's Report seeks clarification of when proceedings 'commence' for the purposes of clauses 4, 9, 12 and 16. Section 26 of the Magistrates' Court Act 1988 stipulates that proceedings 'commence' when charges are laid and the same meaning of 'commence' will apply in relation to clauses 4, 9, 12 and 16.

The Committee's report raises three further questions in relation to proposed clause 14 which amends section 228ZL of the Transport Act 1983.

Firstly, the report asks whether new sub-section 228ZL(5) is a reasonable limitation on the Charter's right to be presumed innocent until proven guilty and whether an analysis of the clause should have been included in the Statement of Compatibility.

The proposed new sub-section 228ZL(5) is essentially the same as current sub-section 228ZL(4)(b). To the extent that the provision engages the presumption of innocence, the reverse onus is reasonable and justifiable. An accused can be expected to easily be able to point to evidence that the direction was outside the scope of the person's business or other activities, for example, evidence of their employment position, daily duties and job description. It would be more difficult for the prosecution to prove these matters, particularly because the context in which such an offence may arise is likely to be one where third persons may also be under investigation or prosecution and therefore be unwilling to assist the prosecution.

Secondly, the report asks whether the new sub-section 228ZL(5) would apply to offences committed before the commencement of the Bill. The report argues that the word 'establishes' could be read down, unlike the new word 'proves', and therefore the amended Act will impose a heavier burden on accused.

Pursuant to clause 2 of the Bill this new provision will take effect on the day after the Act receives Royal Assent. The meaning of the verb 'establishes' has not been judicially considered in Victoria in relation to reverse onus provisions and it is not a commonly used word in such provisions. The ordinary meaning of 'establish' is that it is a synonym of 'prove'. According to the Oxford English Dictionary 'to establish' means 'to place beyond doubt; to prove (a proposition, claim, accusation)'. By replacing 'establishes' with the more commonly used verb 'proves' the Bill preserves the status quo and simply clarifies that the accused has to discharge a legal onus.

Thirdly, the report asks about the relationship and possible overlap between new sub-sections 228ZL(4) and 228ZL(5). It would be open to an accused to argue as a first defence that a direction was unreasonable because its scope was outside the business or other activities of the accused. The court would have to decide whether in the particular circumstances of the case it is open to the accused to argue unreasonableness. If the court is satisfied that the direction was unreasonable, the accused could seek to take advantage of the lower, evidential onus in subsection 228ZL(4). The court may conclude that the direction was reasonable, because in the circumstances the transport safety officer could not reasonably have known that the direction was outside the scope of the business or other activities of the accused. The accused could then still seek to rely on sub-section 228ZL(5) and argue that the direction's scope was outside his or her business or other activities but would need to prove the defence on the balance of probabilities.

Thank you for the opportunity to respond to the issues raised by the Committee in relation to this Bill.

ROB HULLS MP
Attorney-General

4 June 2009

Committee's further comments

The Committee thanks the Attorney-General for his response.

The Committee notes the Attorney-General's remark that clauses 4, 9, 12 and 16, which prevent amendments removing incompatible reverse onus provisions from applying to proceedings that have already commenced, are necessary to avoid the possibility of 'ongoing prosecutions having to be reviewed, because they are based on investigations and prosecutions prepared pursuant to existing law.' However, the Attorney-General does not explain why such reviews should not occur. The Committee observes that, if an existing reverse onus is incompatible with the Charter, then a continuation of an ongoing prosecution that would not succeed without that reverse onus may be incompatible with Charter s. 25(1).

The Committee also notes the Attorney-General's remark that new sub-section 228ZL(5), which preserves a reverse onus in relation to one of two defences to the crime of failing to obey a direction from a transport safety officer, is justifiable according to the test in Charter s. 7(2) because the defendant can easily 'point to evidence' that a direction was outside the scope of the person's business or other activities. The Committee observes that this remark only addresses the defendant's ability to satisfy an evidential burden, whereas new sub-section 228ZL(5) imposes a legal burden on defendants to prove these matters to the court.

The Committee further notes the Attorney-General's comment that 'establishes' (in the existing s. 228ZL(4) and 'proves' (in the new sub-section 228ZL(5)) have the same meaning. The Committee observes, even if this is correct, clause 14's addition of the words 'on the balance of probabilities' (which do not appear in the existing s-s. 228ZL(4)) may prevent Victorian courts from following UK decisions that interpret 'proves' as imposing only an evidential burden.[5] The Attorney-General's remarks do not address whether or not clause 14 applies retrospectively. If the new sub-section 228ZL(5) is applicable to conduct committed before clause 14 commenced, then that clause may infringe the Charter's rights against retrospective criminalisation.[6]

The Committee understands that a case that may address the interaction between Charter ss. 7(2), 25(1) and 32(1) will soon be argued before the Court of Appeal.[7]

The Committee refers to Parliament for its consideration the questions of:

1. ***Whether or not clauses 4, 9, 12 and 16, by allowing people charged with offences prior to the commencement of the Bill to be subjected to reverse onus provisions that the Bill repeals, are compatible with those people's Charter right to be presumed innocent until proven guilty.***
2. ***Whether or not clause 14, by replacing the word 'establishes' with the phrase 'proves on the balance of probabilities', is compatible with the Charter's rights against retrospective criminalisation.***
3. ***Whether or not clause 14, by preserving a reverse onus on the issue of whether a direction was outside of the scope of the defendant's business or other activities (rather than replacing it with an evidential burden on the defence), is a reasonable limit on the Charter's right to be presumed innocent according to the test set out in Charter s. 7(2).***

Committee Room
22 June 2009

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5 E.g. *R v Lambert* [2001] UKHL 37, [94]. In *Kracke v Mental Health Review Board* [2009] VCAT [646], Bell J held that Charter s. 32(1) and s. 3(1) of the *Human Rights Act 1998* (UK) 'express the same special interpretative obligation and are of equal force and effect'.

6 Charter s. 27(1) provides that 'A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.'

7 See *Re Momcilovic* [2008] VSCA 183, concerning s. 5 of the *Drugs, Poisons and Controlled Substances Act 1981*.

Appendix 1
Index of Bills in 2009

Appendix 2
Committee Comments classified by Terms of Reference

This Appendix lists Bills under the relevant Committee terms of reference where the Committee has raised issues requiring further correspondence with the appropriate Minister.

Alert Digest Nos.

Section 17(a)

(vi) inappropriately delegates legislative power

Bus Safety Bill 2008	1, 5
Criminal Procedure Bill 2008	1, 3

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

Bus Safety Bill 2008	1
Crimes Amendment (Identity Crime) Bill 2009	4
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	6
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	6
Fair Work (Commonwealth Powers) Bill 2009	7
Justice Legislation Amendment Bill 2009	5
Major Sporting Events Bill 2009	3
Occupational Health and Safety Amendment (Emplyee Protection) Bill 2008	1
Road Legislation Amendment Bill 2009	5
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1
Serious Sex Offenders Monitoring Amendment Act 2009	2
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	4
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1

Section 17(b)

(i) and (ii) repeals, alters or varies the jurisdiction of the Supreme Court

Criminal Procedure Bill 2008	1
Equal Opportunity Amendment (Governanace) Bill 2008	1

Appendix 3
Ministerial Correspondence

Table of correspondence between the Committee and Ministers during 2008-09

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Assisted Reproductive Treatment Bill 2008	Health	06.11.08 *08.12.08*	12 of 2008 *1 of 2009*
Major Crime Legislation Amendment Bill 2008	Attorney-General	02.12.08 *23.02.09*	15 of 2008 *3 of 2009*
Primary Industries Legislation Amendment Bill 2008	Agriculture	02.12.08 *10.03.09*	15 of 2008 *4 of 2009*
Relationships Amendment (Caring Relationships) Bill 2008	Attorney-General	02.12.08 *19.12.08*	15 of 2008 *1 of 2009*
Bus Safety Bill 2008	Public Transport	04.02.09 *30.03.09*	1 of 2009 *5 of 2009*
Criminal Procedure Bill 2008	Attorney-General	04.02.09 *23.02.09*	1 of 2009 *3 of 2009*
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	Attorney-General	04.02.09 *29.06.09*	1 of 2009 *7 of 2009*
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	Finance	04.02.09 *21.04.09*	1 of 2009 *5 of 2009*
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	Public Transport	04.02.09 *30.03.09*	1 of 2009 *5 of 2009*
Salaries Legislation Amendment (Salary Sacrifice) Act 2008 AND Transport Legislation Amendment (Driver and Industry Standards) Act 2008	Attorney-General	04.02.09	1 of 2009
Serious Sex Offenders Monitoring Amendment Act 2009	Corrections	26.02.09 *22.04.09*	2 of 2009 *5 of 2009*
Major Sporting Events Bill 2009	Minister for Sport & Recreation	20.03.09 *01.04.09*	3 of 2009 *5 of 2009*
Crimes Amendment (Identity Crime) Bill 2009	Attorney-General	31.03.09 *04.05.09*	4 of 2009 *6 of 2009*
Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009	Energy and Resources	31.03.09 *09.04.09*	4 of 2009 *5 of 2009*

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	Attorney-General	31.03.09 *04.06.09*	4 of 2009 *7 of 2009*
Justice Legislation Amendment Bill 2009	Racing	08.05.09 *29.05.09*	5 of 2009 *6 of 2009*
Road Legislation Amendment Bill 2009	Roads and Ports	06.05.09	5 of 2009
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	Energy and Resources	02.06.09	6 of 2009
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	Ms Colleen Hartland MLC	02.06.09 *04.06.09*	6 of 2009 *7 of 2009*
Superannuation Legislation Amendment Bill 2009	Finance	02.06.09	6 of 2009
Fair Work (Commonwealth Powers) Bill 2009	Industrial Relations	23.06.09	7 of 2009