

# **No. 13 of 2010**

**Tuesday, 14 September  
2010**

**On the**

Education and Care Services National  
Law Bill 2010

Fire Services Commissioner Bill 2010

Government (Political) Advertising  
Bill 2010

Judicial Commission of Victoria Bill 2010

Marine Safety Bill 2010

Road Safety Amendment (Hoon Driving)  
Bill 2010

Traditional Owner Settlement Bill 2010

Transport Accident and Accident  
Compensation Legislation Amendment  
Bill 2010

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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 \$116.82).
- ‘**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 –**

Education and Care Services National Law Bill 2010  
Fire Services Commissioner Bill 2010  
Government (Political) Advertising Bill 2010  
Judicial Commission of Victoria Bill 2010  
Road Safety Amendment (Hoon Driving) Bill 2010

## **The Committee notes the following correspondence –**

Marine Safety Bill 2010  
Traditional Owner Settlement Bill 2010  
Transport Accident and Accident Compensation Legislation Amendment Bill 2010



### **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. 13 of 2010

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## Education and Care Services National Law Bill 2010

<b>Introduced</b>	1 September 2010
<b>Second Reading Speech</b>	2 September 2010
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Maxine Morand MLA
<b>Portfolio responsibility</b>	Minister for Children and Early Childhood Development

### Purpose Background

The Bill adopts the Education and Care Services National Law (the 'National Law') which is to be hosted by the Victorian Parliament and set out in the Schedule to the Victorian Bill.

The Bill establishes the National Quality Framework (the NQF) and the Australian Children's Education and Care Quality Authority (the 'Authority') to oversee its administration and provides for a role for Regulatory Authorities in each jurisdiction (in Victoria the Secretary of the Department and Education and Childhood Development) in approving persons and services that provide early childhood education and care. The probity provisions in the *Working with Children Act 2005 (Vic)* will apply in Victoria. **[14]** The Victorian Department will also monitor compliance with the National Law and assess and publicly rate services against the NQF.

**Note:** From the explanatory memorandum – *The principal objective of the Bill is to provide a national approach to regulation, assessment and quality improvement for early childhood education and care and outside school hours care; replace existing separate licensing and quality assurance processes for pre-school (kindergartens), long day care, family day care and outside school hours care; and establish a public rating system for education and care services.*

### Background

1. The main purpose of the COAG agreement was the establishment of a jointly governed unified national quality framework (NQF) for early education and care and school-aged care which replaces existing separate licensing and quality assurance processes.
2. The new national quality framework will become operational from 1 January 2012.
3. The National Law will establish a new national body and a national licensing system and introduce a system of nationally consistent approval processes for providers and services.
4. The introduction of a public national rating system based on the new National Quality Standard (the 'NQS') which will provide information to parents relating to the quality of early childhood education and care services. The NQS will contain seven quality areas that will be defined in the associated regulations.
5. A key objective of the National Law is to reduce the significant duplication that exists under the current national and state or territory-based regulatory, licensing and approval systems. It will introduce a system of nationally consistent approval processes for providers and services.

6. The Authority will be responsible for the implementation and ongoing administration of the NQF and will have a key role in monitoring and promoting its consistent application across Australia.
7. State and Territory Regulatory Authorities will remain accountable to its own Minister and will continue to be the main point of contact for services through its operational responsibility for the NQF.
8. Under the NQF an approval to provide an education and care service is valid in all participating jurisdictions.
9. The regulations to accompany this law are currently being developed and will be subject to consultation in the near future.
10. A further Bill will be considered by Parliament in 2011 to address the consequential amendments to the *Children's Services Act 1996* and other consequential amendments.
11. Services that are not covered by the NQF, such as occasional care, 3 year old activity groups and limited hours service at sport and leisure services will continue to be regulated under the *Children's Services Act 1996*. A provider that operates a long day care service under the NQF and an occasional care service at the same premises will not be required to seek separate approvals.
12. As a transitional measure existing approved providers and services and certified supervisors will be moved over from the old system to the new.

### ***The National Law in outline***

Part 1 sets out the objectives and guiding principles, the definitions to be used and the scope of education and care services subject to the National Law.

Parts 2, 3, and 4 establish a national system of approvals to provide and operate an education and care service and to be a certified supervisor. These Parts set out the requirements for obtaining approval and the decision-making powers and responsibilities of the Regulatory Authority in participating jurisdictions.

Part 5 sets out the process for assessing and rating services against the National Quality Standard.

Part 6 creates a range of offences regarding the operation of education and care services, such as inadequate supervision of children, inappropriate discipline and staffing arrangements and the presence of unauthorised persons on service premises. The Part also places reporting requirements on a provider in respect to reportable incidents.

Part 7 provides for the tools that the Regulatory Authority may use to ensure compliance with the National Law including compliance notices, prohibition notices and enforceable undertakings.

Part 8 ensures the right of review (internal and external) of decisions made by a Regulatory Authority.

Part 9 provides powers to authorised officers engaged by Regulatory Authorities to monitor and enforce the National Law.

Part 10 sets out the functions and powers of the Ministerial Council in relation to the National Quality Framework, the National Quality Standard, the National Law and the Authority.

Part 11 establishes the Australian Children's Education and Care Quality Authority (the 'Authority') and its Board and provides for the engagement of a Chief Executive.

Part 12 sets out the functions of the State Regulatory Authorities, which include approving providers and services, certifying supervisors, assessing and rating services, and monitoring compliance with the National Quality Framework, the National Quality Standard, the National Law, and the national regulations.

Part 13 addresses information and privacy issues, including providing for the application of Commonwealth privacy and freedom of information laws.

Part 14 contains a range of miscellaneous provisions, including the establishment of the Australian Children's Education and Care Quality Authority Fund, reporting requirements, legal proceedings, and provides for the development, publication and commencement of national regulations.

Part 15 provides for transition from existing legislative and regulatory arrangements to the new arrangements set out under this national Law.

## **Content and Committee comment**

### ***Delegating legislative power to the executive – Whether appropriate – Commencement by proclamation – National scheme legislation***

The proposed Act is to commence on proclamation. The Committee notes that the provision will enable the simultaneous commencement of the National Law in other participating jurisdictions, and as such there may be appropriate reasons to allow for a commencement by proclamation provision. [2]

### ***Parliamentary supervision of regulations – Scrutiny and disallowance of regulations made by Ministerial Council made under the National Law***

The Bill provides that certain Victorian Acts do not apply to the National Law including the *Subordinate Legislation Act 1994*. [5] National regulations made pursuant to the National Law are to be published on the New South Wales Legislation website. [302] The Victorian Member of the Ministerial Council must table any national regulation so made in each House of the Parliament. [303] The Scrutiny Committee may report to the Parliament on national regulations as though they were statutory rules pursuant to the *Subordinate Legislation Act 1994*. A national regulation may be disallowed by the Parliament. However, a disallowed regulation does not cease to have effect unless it is disallowed by a majority of participating jurisdictions. [303]

### ***Delegation of legislative power – Modifications to certain Commonwealth Acts by regulations***

The Committee notes that for the purposes of the National Quality Framework (the 'NQF') certain provisions allow regulations to modify two Commonwealth Acts, these are the *Privacy Act 1988 (Cth)*, and the *Freedom of Information Act 1982 (Cth)*. Further regulations may modify the application of the *State Records Act 1998 (NSW)* that will apply for the purposes of the NQF. The explanatory memorandum in introducing these sections provides –

*In the interests of the nationally consistent application of this Law, Commonwealth information and privacy laws will be applied instead of separate laws in each participating jurisdiction.*

However, in respect to the relevant sections the explanatory memorandum does not provide any assistance as to the necessity or desirability to include provisions that allow a subordinate instrument to modify primary legislation. [263, 264 and 265]

The Committee notes that in general a power to allow a subordinate instrument to modify an Act should be considered to be an inappropriate delegation of legislative power.

***Inappropriate delegation of legislative power***

*The Committee will write to the Minister seeking further advice whether she is satisfied that there is a need to include provisions in the National Law that permit regulations to modify an Act.*

***Right to be presumed innocent – Suspension where person is charged with an offence***

The Bill provides that the Regulatory Authority may suspend a provider approval if the approved provider has been charged with an indictable offence. [25]

The Committee notes the Statement of Compatibility provides –

*It does not affect the criminal proceeding relating to the person. Nor does it presume that person to be guilty. Rather, it is simply a precautionary measure which protects children from exposure to persons charged with indictable offences, who may be unsuitable or inappropriate to engage in the provision of education and care services, until the matter is resolved. The suspension can only be in place for six months. Further, clause 26 provides that prior to any suspension, the person charged with the offence has the opportunity to make a written submission to the regulatory authority providing reasons why the suspension should not take place.*

***Privilege against self-incrimination – Limitation concerning mandatory documents***

The National Laws in the Schedule to the Bill provide monitoring and enforcement powers (Part 9 of the National Laws) including a requirement to give information, answer questions and produce documents. The privilege against self-incrimination is provided in the National Law, save for the requirement to produce a document required to be kept under the National Law. In respect to such documents a direct and derivative use immunity applies in criminal and civil proceedings other than criminal proceedings under the National Law. [211 and 219] (*The limitation to the privilege in respect to documents is reported in the Statement of Compatibility*)

**The Committee makes no further comment.**

## Fire Services Commissioner Bill 2010

<b>Introduced</b>	1 September 2010
<b>Second Reading Speech</b>	2 September 2010
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Bob Cameron MLA
<b>Portfolio responsibility</b>	Minister for Police and Emergency Services

### Purpose

The Bill –

- creates the position of Fire Services Commissioner (the ‘Commissioner’) and provides for the functions and powers of the Fire Services Commission.
- amends the *Forests Act 1958* to make the position of Chief Fire Officer in the Department of Sustainability and Environment a statutory position.
- makes related amendments to the *Emergency Management Act 1986*, the *Country Fire Authority Act 1958*, the *Metropolitan Fire Brigades Act 1958* and *Forests Act 1958*.

### Background

The Bill establishes the office of the Commissioner as a Governor in Council appointment. The Commissioner will be the permanent state controller responsible for the planning and preparation and overall response of the fire agencies to major fires. For this purpose the Bill will amend the *Emergency Management Act 1986*.

The Commissioner may delegate the State Controller responsibility to the chief officers of the fire services agencies. **[26]**

The Commissioner will be responsible for driving a reform program to improve the fire services agencies’ operational performance focused on enhancing the operational capacity and capability of the fire services agencies and in particular their ability to work together. **[4-30]**

The Commissioner must provide the Minister with an annual report which must be tabled in the Parliament. **[31 and 32]**

The Bill also amends the *Forests Act 1958* to make the Chief Fire Officer of the Department of Sustainability and Environment a statutory position. **[50]** The Bill also imposes a duty on the Secretary to carry on sufficient work in State forests, parks and lands for the prevention and suppression of fire and with a duty to warn the community when the Secretary considers it necessary for the purposes of protecting life and property. **[51 and 52]**

**The Committee makes no further comment.**

## Government (Political) Advertising Bill 2010

<b>Introduced</b>	1 September 2010
<b>Second Reading Speech</b>	1 September 2010
<b>House</b>	Legislative Council
<b>Member introducing Bill</b>	Hon. David Davis MLC
<b>Private Members Bill</b>	

### Background

The Bill seeks to prevent the Government misusing taxpayers' money on political advertising and information campaigns by Government departments and authorities, especially during election periods.

The Bill sets out criteria and principles for conducting a government advertising campaign (a campaign) and establishes an Independent Government Advertising Campaign Review Panel (the Panel). The Panel may issue a Notice of Compliance (a Notice) if the proposed campaign is consistent with the advertising principles. **[4 to 6]**

A campaign may not be undertaken without a Notice being given by the Panel. **[7]**

The Minister may issue an exemption certificate from the need for a Notice in certain defined circumstances such as a public safety or health campaign, an emergency, a matter of extreme urgency or other extraordinary circumstances. **[9]**

The Bill prohibits a campaign within 60 days of an election where the Parliament expires under section 38 of the *Constitution Act 1975* or in any other case from the time Parliament is dissolved to election day, unless it is an exempt campaign under section 9. **[10]**

The Bill prohibits a campaign other than an exempt campaign during the period of a by-election. **[11]**

**The Committee makes no further comment.**

## Judicial Commission of Victoria Bill 2010

<b>Introduced</b>	1 September 2010
<b>Second Reading Speech</b>	2 September 2010
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Portfolio responsibility</b>	Attorney-General

### Purpose

The Bill creates the Judicial Commission of Victoria (the 'Commission'), which will investigate and resolve complaints and concerns involving Victoria's judges, associate judges, magistrates, coroners, judicial registrars and VCAT members (officers). Matters relating to both conduct and health issues may be raised in complaints from the public, or referrals made either by the heads of each court and VCAT or the Attorney-General.

The Bill amends Part 3AA of the *Constitution Act 1975* to replace the current reference to investigating committee with references to investigating panel and repeal the provisions that deal with the judicial panel established under that Act and the provisions dealing with the functions and powers of the investigating committee which are redundant and superseded by the provisions in the Bill. **[128 to 130]**

The Bill repeals the *Judicial College of Victoria Act 2001* and incorporates the current functions in that Act within the new Commission. **[24, 26-27 and 125]**

### Background

1. The Bill establishes the Commission as an independent body with a conduct division which will investigate and hear complaints and concerns about judicial officers and an education division which will provide for the education and training of judicial officers, judicial registrars and VCAT members, assuming the current responsibilities of the Judicial College of Victoria. **[4-7 and 26-27]**
2. The Commission will have a governing Board of ten members. The Chair is the Chief Justice of Victoria. Six members are the heads of the five courts in Victoria and the head of VCAT. The four remaining members are people of high standing in the community and are appointed by the Governor in Council on the recommendation of the Attorney-General. The Attorney-General will make these recommendations following consultation with the Chief Justice. **[8 to 18]**
3. The Governor in Council on the recommendation of the Attorney-General will appoint a Chief Executive Officer who is responsible for the administration of the Commission. The CEO will be an administrative office head who has, on behalf of the Crown, all the powers and duties of an employer in relation to the public servants who work for the commission. The CEO may, but is not obliged to, report to the Attorney-General on any matter relevant to the performance of the commission's functions. **[19 to 25]**
4. A member of the public may make a complaint to the Commission about any conduct of a judicial officer whether or not the conduct was in court. The Commission may also receive and investigate referrals from the heads of jurisdiction or from the Attorney-General. The Commission has a duty to investigate complaints and referrals that are made under the Act unless the matter is too remote in time or the complainant is vexatious. A complaint or referral may be made even though the matter is or has been the subject of an investigation by police or by any other law enforcement agency or regulatory body or has been prosecuted in a court.

The Commission may take one of four actions in response to a complaint regarding a judicial officer –

- it may dismiss the complaint on specified grounds,
- it could determine that no further action is necessary where the matter has been resolved or the complaint relates to a relatively minor matter that occurred years ago,
- it may refer the complaint to the relevant head of jurisdiction, with the option of making recommendations as to how the head could deal with the complaint,
- it may refer the complaint to an investigating panel if it appears the complaint, if substantiated, could justify consideration of removal from office by Parliament.

The most serious action the commission may take is to refer a matter to an investigating panel. The panel is an independent body, taking over the position currently held by the investigating committee under Part 3AA of the *Constitution Act 1975*. An investigating panel has three members appointed by the Commission, two of whom must be current or former judges or magistrates in Australia. The third member is to be nominated by Parliament. The panel may hold private hearings, as well as receiving written submissions from the judicial officer. In appropriate circumstances, the panel may hold public hearings. In cases that do not justify removal, a report is made to the head of jurisdiction. This report can include recommendations as to how the head of jurisdiction may deal with the complaint or concerns. **[28 to 68]**

5. Where removal of a judicial officer is considered the appropriate action, the investigating panel must first find there are facts that could justify removal of the judicial officer due to proved misbehaviour or incapacity. In such cases, a report must be presented to the Governor in Council and to the Attorney-General, who must cause the report to be laid before both houses of Parliament. The matter is then considered by Parliament. **[65 to 66]**

**Note:** From the Second Reading Speech – *The Bill maintains the current constitutional protections for judicial officers and does not change Parliament's role as the ultimate decision-maker invested with the power to remove a judicial officer. The Bill therefore does not change the grounds for removal of office set out in Part 3AA of the Constitution Act 1975.*

6. The Bill adopts a modified process for complaints against judicial registrars and non-judicial officers and VCAT officers. If the investigating panel is of the opinion that the complaint or any part of it is substantiated and there are facts that could justify removal of the officer due to proved misbehaviour or incapacity, this must be reported to the Attorney-General. If the matter is substantiated in any part, but does not warrant consideration for removal, the matter must be referred to the relevant head of jurisdiction of that officer. **[88 to 114]**
7. The Bill expands the powers of the heads of jurisdiction to include the ability to stand down an officer if grounds may exist for the removal of the officer and where there is a substantiated complaint may also direct the officer to participate in professional development or continuing education or training. **[46 to 49]**
8. The Bill deals with health investigations of judicial and non-judicial officers. If the Attorney-General or head of jurisdiction is of the opinion that an officer may be suffering from an impairment, disability, illness or condition that may affect the performance of the officer's duties, the head of jurisdiction or Attorney-General may request the Commission to investigate the matter. The Commission may, if it considers it appropriate, request the officer to undergo a medical or psychological examination. If the officer refuses to undergo the examination, the matter may be referred to the investigating panel or investigator, which could find that the non-cooperation of the officer could justify consideration of their removal from office. If the medical examination discloses that an officer is suffering from an impairment which affects his or her performance, but the impairment is not sufficiently serious to warrant removal from office, the commission may

refer the matter back to the head of jurisdiction with recommendations as to how the matter should be dealt with. [39 to 45, 69 to 74]

## Content and Committee comment

### ***Rights or freedoms – Access to justice – Vexatious litigants***

The Bill provides that the Commission must dismiss a complaint or Part 4 referral (referral by the head of jurisdiction or the Attorney-General) in certain circumstances including where the complaint is made by a vexatious complainant. The Commission may declare a person to be a vexatious complainant. [36(1)(d), 52] (*Refer to Charter report below*)

### ***Rights or freedoms – Privilege against self-incrimination – Direct and derivative use immunity***

The Bill provides certain investigation powers to investigating panels pursuant to the *Evidence (Miscellaneous Provisions) Act 1958* (the 'Act'). The provisions of that Act (section 19C) require persons to answer questions even if they tend to incriminate them. The Committee notes that 19C(2) of the Act provides an immunity in criminal or civil proceedings against any compelled answers, information or documents given. However the Committee raises the issue as to whether the immunity extends to derivative use immunity. (*Refer to Charter report below*). [75 and 106]

## Charter report

### ***Fair hearing – Complete bar on complaints to the Commission by vexatious litigants***

*Summary:* Clause 36(1)(d) provides that the Commission must dismiss any complaint made by a vexatious complainant without investigation. The Committee considers that clause 36(1)(d) may engage the Charter right of people declared to be vexatious litigants to a fair hearing. It will write to the Attorney-General seeking further information.

**The Committee notes that clause 36(1)(d) provides that the Commission must dismiss any complaint 'made by a vexatious complainant' without investigation.** Clause 3 defines a 'vexatious complainant' to include a person declared by the Supreme Court to be a 'vexatious litigant'. So, people declared by the Supreme Court to be vexatious litigants are completely barred from pursuing complaints against judicial officers. **The Committee considers that clause 36(1)(d) may engage the Charter right of people declared to be vexatious litigants to a fair hearing.**<sup>1</sup>

While the Committee appreciates that any system of complaints (particularly one concerning the judiciary) requires protection from vexatious complainants, it observes that, in New South Wales, this goal is achieved by providing that its Commission 'may' – not 'must' – 'disregard any complaint made' by a person deemed to be a vexatious complainant.<sup>2</sup> By contrast, in Victoria, in the case of people declared to be vexatious litigants by the Supreme Court, such people will be unable to make complaints (including complaints about a Supreme Court judge) unless the Supreme Court itself revokes the declaration, even if the Commission would otherwise regard the complaint as meritorious.

***The Committee will write to the Attorney-General seeking further information as to whether or not merely permitting (rather than requiring) the Commission to disregard a complaint by a vexatious complainant is a less restrictive means reasonably available to achieve the purpose of protecting the Commission from vexatious***

<sup>1</sup> Charter s. 24(1).

<sup>2</sup> *Judicial Officers Act 1986* (NSW), s. 38(2).

**complainants. Pending the Attorney-General's response, the Committee draws attention to clause 36(1)(d).**

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***Self-incrimination – Investigators investigating judicial officers may compel people to lead investigators to evidence of their own criminality***

*Summary:* Clauses 75(1) and 106(1) permits investigating panels and investigators investigating judicial officers to oblige any person to lead them to evidence of their own criminality. The Committee considers that clause 75(1) and 106(1) may be incompatible with the Charter's rights with respect to self-incrimination. It will write to the Attorney-General seeking further information.

The Committee notes that clause 75(1) provides that investigating panels (investigating complaints or referrals about judicial officers) have the powers conferred by existing ss. 17, 18 and 19 of the *Evidence (Miscellaneous Provisions) Act 1958* (the 'Act') to examine 'any person' on oath on penalty of imprisonment. Clause 106(1) provides investigators (investigating complaints or referrals about judicial registrars and VCAT members) with identical powers if the Commission permits. Under s. 19C(1) of the Act such a person is obliged to answer questions even if they would tend to incriminate him or her. Although s. 19C(2) of the Act provides that those answers are generally inadmissible in later proceedings, that immunity does not apply to information derived from those answers. **So, clauses 75(1) and 106(1) permits investigating panels and investigators to oblige people to lead them to evidence of their own criminality.** The Victorian Supreme Court has held that such a scheme limits the Charter's rights with respect to self-incrimination.<sup>3</sup>

The Statement of Compatibility remarks:

*It is a central tenet of the rule of law and an inherent attribute of a just and democratic society that those who administer the law are, and are seen to be, subject to that same law. To prevent future prosecutions relating to misconduct in public office on the basis of material which is now in the public domain risks undermining public confidence in the ability of the judiciary to discharge its functions competently, independently and with integrity.*

*Judges and other people subject to the bill exercise coercive and far ranging powers, such as the power to imprison and to award significant monetary damages or penalties.*

*As with other individuals who voluntarily accept positions of public responsibility, judicial officers are subject to a necessarily higher expectation of public scrutiny. Such people must accept a greater level of accountability where they are found to have abused the responsibilities of public office or have otherwise brought that office into disrepute through improper or illegal behaviour....*

*Consistent with the need to prosecute officers on the basis of facts freely and public available (such to exceptions regarding the direct use of incriminating evidence) there are no less restrictive means to secure this public policy objective.*

The Committee observes that the compulsory examination powers in ss. 17-19 of the Act are not limited to examinations of judicial officers, registrars and VCAT members but instead extend to examinations of 'any person'. So, the powers conferred by clauses 75(1) and 106(1) may be used to compel the self-incrimination by the complainant, family, friends and neighbours of the judicial officer, and parties or participants in litigation before the judicial officer.

***In light of the judgement of the Supreme Court of Victoria and the application of clauses 75(1) and 106(1) to people other than judicial officers, registrars and VCAT***

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<sup>3</sup> *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381.

*members, the Committee considers that those clauses may be incompatible with the Charter's rights against self-incrimination.*

*The Committee will write to the Attorney-General seeking further information as to whether or not preserving derivative use immunity for people other than judicial officers, registrars and VCAT members would be a less restrictive alternative reasonably available to achieve the public policy objective of clauses 75(1) and 106(1). Pending the Attorney-General's response, the Committee draws attention to clauses 75(1) and 106(1).*

The Committee makes no further comment.

## Road Safety Amendment (Hoon Driving) Bill 2010

Introduced	1 September 2010
Second Reading Speech	2 September 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

### Purpose and Background

The Bill amends the *Road Safety Act 1986* (the 'Act') to –

1. extend the vehicle impoundment, immobilisation and forfeiture scheme in Part 6A of the Act to the following offences –
  - (a) driving with a blood or breath alcohol content of 0.10 or higher for the second or subsequent time.
  - (b) driving with drugs present in blood or oral fluid, for the second or subsequent time.
  - (c) unlicensed driving for the second or subsequent time, except in circumstances where the person merely failed to renew their driver licence or permit. **[4 and 5]**
2. strengthen the way the motor vehicle impoundment, immobilisation and forfeiture scheme in Part 6A of the Act operates with respect to the following offences –
  - (a) disqualified driving for a second offence will attract impoundment and a third offence may attract forfeiture (not a fourth offence as currently).
  - (b) driving at 70 kilometres per hour or more over the applicable speed limit or 170 kilometres per hour or more where the speed limit is 110 kilometres per hour. 3 month impoundment will apply for a first offence and forfeiture for a second offence.
  - (c) dangerous driving in circumstances where a vehicle is driven at 70 kilometres per hour or more over the applicable speed limit or 170 kilometres per hour or more if the speed limit is 110 kilometres per hour. **[4 and 5]**

Extracts from the Second Reading Speech in respect to paragraphs 1 and 2 above –

*... That review [Arrive Alive 2008-2010] has determined that penalties for drink and drug driving are currently inadequate and that the vehicle impoundment scheme should be extended to recidivist drink-driving and drug-driving offenders.*

*The Bill therefore provides that vehicle impoundment sanctions will be available in those cases where a driver is detected with a blood or breath alcohol concentration of 0.10 or higher for a second or subsequent time or where a driver is detected with drugs present in his or her system for a second or subsequent time. The offence of driving unlicensed for a second or subsequent time will also become subject to the vehicle impoundment scheme.*

*... That review has determined that tougher sanctions are required for extreme speeding offences. The Bill therefore provides that where a driver is detected driving at 70 kilometres per hour or more over the applicable speed limit or at a speed of 170 kilometres per hour in a 110-kilometres-per-hour speed zone, that driver will face vehicle impoundment or immobilisation sanctions for up to three months for a first offence. ... Also, for a second extreme speeding offence, the court will be empowered to order the forfeiture of the vehicle.*

*... Accordingly, the Bill will toughen the vehicle impoundment and forfeiture sanctions for disqualified driving offences. It provides that a second offence may result in up to three months vehicle impoundment or immobilisation and a third offence may result in forfeiture of the vehicle.*

*... The Bill provides that this initial impoundment or immobilisation period [currently 48 hours] will be increased across the board to seven days. This change will apply to all offences to which the vehicle impoundment scheme applies.*

... the Bill provides that in all cases where a person appears before the court for an offence for which a three-month impoundment or immobilisation sanction may be imposed, the court will be required, upon a finding of guilt and upon the application of the police, to impose a vehicle impoundment or immobilisation sanction for at least 28 days.

3. enable police under Part 6A of the Act to immediately immobilise or impound a motor vehicle for 7 days upon detection of a tier 1 relevant offence or a tier 2 relevant offence. (Refer to Charter report) **[41)(a)]**
4. provide that, under Part 6A of the Act, on a finding of guilt for a second or subsequent tier 2 relevant offence or any tier 1 relevant offence the court must, on the application of the police, order immobilisation or impoundment of the relevant motor vehicle for 28 days. **[16]**
5. facilitate the use of steering wheel locks as a new method of motor vehicle immobilisation with the benefit of allowing immobilised vehicles to be towed to an alternative location. Police will have power to enter a vehicle to install such devices. **[10 to 12, 14 and 15]**
6. provide police with additional limited powers to search premises without a warrant for the purposes of locating and accessing a motor vehicle that is to be impounded, immobilised or forfeited under the Act. **[6 to 8]**
7. provide that when an impoundment or immobilisation order or a forfeiture order is sought with respect to a motor vehicle, the police may concurrently apply for a search warrant to facilitate access to the vehicle. **[26 and 27]**
8. provide police with power to question adult persons as to the whereabouts of a motor vehicle to facilitate the impoundment, immobilisation or forfeiture of that vehicle. **[6 and 8]**
9. facilitate the sale or disposal of forfeited motor vehicles and uncollected impounded motor vehicles by extinguishing third party interests. **[18, 20, 28-35, 37 and 38]**

**Note:** From the Statement of Compatibility – ... *although security interests will be extinguished, the persons holding those interests will, where the vehicle is fit for sale, still be eligible to have their interests paid out when the proceeds of sale are distributed according to the current priority order set out in section 84ZS of the Road Safety Act 1986.*
10. ensure that applications for ‘exceptional hardship’ to avoid or vary orders for the immobilisation, impoundment or forfeiture of a motor vehicle are granted only in appropriate cases. The court must not decline to make a disposal order where the person is under a disqualification or suspension. The Bill clarifies the circumstances in which arguments relating to travelling for employment purposes can satisfy the ‘exceptional hardship’ test. **[13, 23, 24, 25, 36]**

The Bill also amends the *Melbourne City Link Act 1995* to provide the Minister administering that Act with power to revoke, in whole or in part, a road declaration made under that Act so that the relevant land may be used for other non-road purposes. The Minister must cause a notice of revocation to be published in the Government Gazette. **[41 and 42]**

## Content and Committee comment

Part 6A of the Act deals with impoundment, immobilisation and forfeiture of motor vehicles. Division 1 of Part 6A provides for definitions to be used in the Part and Division 2 deals with powers exercised by Victoria police whilst Division 3 sets out provisions that apply upon a court order. The Bill amends the definition of ‘designated period’ in section 84C for the purposes of sections 84G and 84H (Seizure and surrender of vehicle by Victoria Police under Division 2) so that it refers to 7 days rather than 48 hours. The amendments will therefore allow a vehicle to be impounded or immobilised by a member of the police force without court order for up to 7 days. **[4]** (Refer to Charter report below).

## Charter report

### ***Presumption of innocence – Immediate negative consequences for people believed by the police to have committed dangerous driving behaviour***

*Summary:* Clause 4(1)(a)'s purpose is to impose 'immediate negative consequences' on people who police believe have committed dangerous driving behaviour. The Committee considers that it may limit the Charter right of criminal defendants to be presumed innocent until proved guilty according to law

The Committee notes that clause 4(1)(a) extends the 'designated period' for the purposes of existing s. 84F(1)(b) from 48 hours to seven days. Section 84F(1)(b) permits a police officer who 'believes on reasonable grounds that a motor vehicle is being, or has been used in the commission of a relevant offence' to 'impound or immobilise the motor vehicle for the designated period'.

The Second Reading speech remarks:

*Increasing the initial impoundment or immobilisation sanction to seven days is expected to further deter dangerous driving behaviour as the immediate negative consequences of that behaviour mount up. In addition, offenders are less likely to [sic] able to conceal the sanction (and need to make alternative transport arrangements) from their families and friends who have the potential to intervene and so reduce further offending.*

**Clause 4(1)(a)'s purpose is therefore, not merely to reduce the risk of a continuation of a particular incident of dangerous driving, but rather to impose 'immediate negative consequences' on people who police believe have committed dangerous driving behaviour. The Committee considers that clause 4(1)(a) may limit the Charter right of criminal defendants to be presumed innocent until proved guilty according to law.<sup>4</sup>**

The Statement of Compatibility remarks:

*The imposition of vehicle impoundment or immobilisation for 7 days upon detection... by police allows for the immediate removal of an unsafe driver from the road and also provides significant deterrent to that person and other drivers from engaging in unsafe driving behaviour.*

*The limitation of the right to be presumed innocent is constrained by a number of safeguards. Firstly, section 84M of the act provides that any decision to impose a 7 day impoundment or immobilisation must be reviewed by a senior police officer within 48 hours of the impoundment or immobilisation being imposed.*

*Secondly, appeals rights exist under section 84O of the act where a person substantially affected by the 7 day impoundment or immobilisation sanction can seek the release of the vehicle on exceptional hardship grounds....*

*Thirdly, section 84R of the act provides that in the event that a person is found not guilty... or where charges are not proceeded with, the Crown is liable to refund any designated costs... and the motor vehicle... must be immediately released...*

*It would be possible to factor in some delay period before the impoundment or immobilisation could take effect... However this would reduce the effectiveness of the legislation in deterring unsafe driving practices. It is important that persons that disregard public safety by committing serious traffic offences are removed from the roads as quickly as possible.*

The Committee observes that clause 4(1)(a) will impose irreversible negative consequences, not only on actual dangerous drivers, but also people who police mistakenly believe to be dangerous drivers but who are subsequently cleared by the police or the court.

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<sup>4</sup> Charter s. 25(1).

In a case on the Charter right to be presumed innocent, the Court of Appeal has remarked:<sup>5</sup>

*There may be circumstances where the justification for interfering with a human right – and for doing so by the particular means chosen – is self-evident, but they are likely to be exceptional. The government party seeking to make good a justification case under s 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision.*

That case involved a provision requiring a defendant to prove their innocence in court. The Committee considers that the need for evidence may be stronger in the case of clause 4(1)(a), which provides for defendants to be punished before their case ever reaches a court.

***The Committee therefore considers that clause 4(1)(a) may be incompatible with the Charter's right to be presumed innocent.***

***The Committee refers to Parliament for its consideration the question of whether or not clause 4(1)(a), by extending the period where a motor vehicle may be impounded or immobilised by a police officer in order to provide immediate negative consequences for suspected offenders, is a reasonable limit on the Charter right of criminal defendants to be presumed innocent until proved guilty according to law.***

The Committee makes no further comment.

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<sup>5</sup> *R v Momcilovic* [2010] VSCA 50, [146].



# Ministerial Correspondence

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## Marine Safety Bill 2010

The Bill was introduced into the Legislative Assembly on 10 August 2010 by the Hon. Tim Pallas MLA. The Committee considered the Bill on 30 August 2010 and made the following comments in Alert Digest No. 12 of 2010 tabled in the Parliament on 31 August 2010.

### Committee's Comments

#### **[2] – Delayed commencement**

*The Committee notes that no explanation is given by the Minister concerning the desirability for providing a delayed commencement of more than 1 year from introduction. The Committee draws attention to Practice Note No. 1 (2005) concerning delayed commencement provisions.*

***The Committee will seek further advice from the Minister.***

### Minister's Response

*I refer to your letter of 31 August 2010, regarding this matter. Your letter requests my response to the issues raised in the Committee's report as tabled in the Legislative Assembly on 31 August 2010.*

*The further information requested by the Committee is attached to this letter. This information has also been sent to the Committee's Senior Legal Advisor, Andrew Homer.*

*Please do not hesitate to contact Ian Shepherd, Deputy Executive Director, DOT Legal, on 03 9655 1701 if you have any questions.*

**TIM PALLAS**  
**Minister for Roads and Ports**

*Received 13 September 2010*

#### **Marine Safety Bill 2010 Ministerial Response to Scrutiny of Acts and Regulations Committee**

*Thank you for your letter dated 31 August 2010 regarding the Committee's consideration of the Marine Safety Bill 2010 (the Bill).*

#### **Delayed commencement**

*The Committee has sought my advice on why the Bill makes provision for a delayed commencement of more than one year from introduction.*

*The target commencement date for the Bill is 1 July 2011, which may be achieved under clause 2 by proclamation to this effect. This would enable the reforms to be in place prior to the 2011/2012 boating season, which is the Government's intent. However, achieving this target date will be dependent on attaining passage of the Bill in 2010 and reaching satisfactory resolutions on the details of regulations with marine safety stakeholders.*

*New Marine Safety Regulations will be needed to support the reforms incorporated in the Marine Safety Bill. In particular, the details of licensing reforms and the proposed system of periodic safety checks for high risk vessels needs to be resolved. This will involve extensive consultation and sufficient time needs to be provided to ensure quality outcomes. In recognition of the need to provide sufficient time, I have already committed to doubling the*

*consultation period that normally would apply following the release of the regulatory impact statement.*

*Concurrent to the development of the regulations, changes to information technology systems need to be made and transport safety officers (previously 'authorised officers') needs to be retrained to ensure familiarity with the new Act and related changes. In addition, a range of guidelines and other subordinate instruments need to be developed and gazetted.*

*The complex and significant nature of these implementation tasks means that there is potential for unintended delay. The default commencement date of 1 July 2012 makes it clear that should delay occur, it is the intention of Parliament for the new Act to commence no later than that date, so that the marine safety reforms incorporated in the Bill are in place and communicated to marine safety stakeholders in advance of the 2012/13 boating season.*

### **Charter Report**

*The Committee has referred to Parliament for its consideration the question of whether or not clauses 175, 176, 179(1)(a) and 181(c) are compatible with the right to be presumed innocent in section 25(1) of the Charter of Human Rights and Responsibilities Act 2006 (the Charter).*

*The Committee has also sought further information regarding the compatibility of clause 180(2) of the Bill with section 25(1) of the Charter. I note that the Statement of Compatibility contained a typographical error, and that the reference to clause 181 in the Statement of Compatibility was intended to refer to section 180(2).*

*I provide further information in relation to each clause below.*

### **Clause 175**

*Clause 175 of the Bill provides definitions of relevant terms in relation to owner onus offences.*

### **Clause 176**

*The effect of clause 176 is that a person who, at the time of the offence is the responsible person in relation to the vessel, is guilty of the offence as if that person were the master of the vessel at that time. The owner of the vessel is presumed to be the responsible person in relation to the vessel unless they use an effective statement to avoid liability.*

*To escape liability, the owner of the vessel can provide a 'known user', 'illegal user', 'sold vessel' or 'unknown user' statement to escape liability for an offence (clause 178). Nominating another person as the master is a serious matter. It is an offence to provide false or misleading information in a statement (clause 182). If the statement is not accepted, the owner will continue to be held to be liable.*

*I do not accept the view that this constitutes the "say-so" of the owner in the sense of it being an unsupported statement or arbitrary assertion. This appears to be what is asserted in the Committee's report.*

### **Clause 179(1)**

*A person who has been nominated in a known user or sold vessel statement can make a nomination rejection statement providing reasons why liability should revert to the person who nominated the nominee. If nominated in a known user statement, the nominee could state that they had not had possession or control of the vessel before the offence nor was acting as the master of the vessel at the time of the offence. If nominated in a sold vessel statement, the nominee could state that the vessel had not been sold or disposed of to the person, and that no interest in it had otherwise vested in the nominee.*

*As was noted in the Statement of Compatibility, in most cases the statement will be accepted and no further action will be taken against the maker of the statement. An enforcement official, on receipt of a nomination rejection statement, is required to have regard to the matters stated in the nomination rejection statement and determine whether the nomination was incorrect (for example, if the owner mistakenly stated that another person was using the vessel at the time). If the nomination statement is found to be incorrect, the person who would, but for the statement, have continued to be the responsible person in relation to the vessel becomes again the responsible person.*

If a nominee does not provide a nomination rejection statement or such a statement is not accepted, the person may elect to have the matter dealt with in court pursuant to section 16 of the Infringements Act 2006. Alternatively, proceedings may be initiated against the person by way of charge and summons.

#### **Clause 180(2)**

Clause 180(2) provides that in the absence of evidence to the contrary, a known user or sold vessel statement is proof of the matters stated in it. Where this provision relates to proof of matters in criminal proceedings, the provisions have the effect of placing an evidential burden on the accused to rebut the presumption of proof of the matter. Where the accused points to relevant evidence, the prosecution is required to prove the matter in issue.

The effect of this section is that where proceedings are brought against a nominated person, a prima facie evidentiary provision applies. This provision, therefore, imposes an evidential onus on an accused to adduce or point to evidence that goes to the matter.

In my view, this provision does not transfer the burden of proof, because once the accused has adduced or pointed to some evidence, the burden is on the prosecution to prove beyond reasonable doubt the matters stated in the nomination statement.

I therefore consider that this provision does not engage the right to be presumed innocent in section 25(1) of the Charter. However, I note that in *R v Momcilovic* [2010] VSCA 50, the Court of Appeal, suggested that an evidential onus may, in some circumstances, limit the right to be presumed innocent in the Charter. If such circumstances were to arise by virtue of the owner onus provisions, I would still consider that the limitation would be justifiable under section 7(2). It would be unreasonable to require the prosecution to prove these matters in every case in the absence of any evidence to the contrary and it would be relatively easy for an accused to point to evidence that would put the prosecution to proof.

#### **Clause 181(c)**

Clause 181 provides a number of defences to owner onus offences. If the proceeding is against a nominee, the nominee may escape liability if he or she proves that he or she had made a nomination rejection statement and that an enforcement official ought to have been satisfied, having regard to the matters stated in the nomination rejection statement, that the nomination was incorrect.

Firstly, the accused must provide that he or she had made a nomination rejection statement. This would not be difficult to do as the accused would have obtained a copy of the statement provided from the prosecution as part of the brief of evidence.

Secondly, the accused would need to prove that an enforcement official ought to have been satisfied, having regard to the matters stated in the nomination rejection statement, that the nomination was incorrect. In practice, the accused would put into evidence the matters that were put to the enforcement official. For example, evidence that he or she had never signed a document transferring ownership of the vessel, or evidence that he or she were elsewhere at the time the offence was committed and not responsible for the vessel.

In most cases, discharging the onus will simply require production of the statement. The person does not have to prove on the balance of probabilities he or she was not responsible for committing the offence. As I noted in the *Statement of Compatibility*, an evidential onus would not be effective, given the particular difficulties associated with identifying the master of a vessel, where that vessel is involved in the commission of an offence.

I also note that the owner onus provisions are used to determine the identity of the accused in a proceeding, not the guilt or innocence of the accused. The prosecution still has the burden of establishing other elements of the offence.

The matters stated in the nomination rejection statement are only one of the elements required to establish the guilt of an accused. In any case, clause 180(2) applies to proceedings brought under clause 181(c). Under clause 180(2), the accused may still test the veracity of the information contained in a nomination statement. The provisions do not operate to prevent an accused calling evidence to examine or cross-examine witnesses, including the registered owner, as suggested in the Committee's report.

**Conclusion**

*In my opinion the provisions under consideration do not engage the right to be presumed innocent in section 25(1) of the Charter because it continues to be the case that:*

- *all elements of an alleged offence can be fully tested in court proceedings; and*
- *the onus is still on the prosecution to prove the offence beyond reasonable doubt.*

*However, should circumstances arise where the provisions under consideration would act to limit the right to be presumed innocent, I consider the nature of these limitations to be reasonable.*

*I note that the 'owner onus' provisions under consideration largely mirror the provisions in Part 6AA of the **Road Safety Act 1986**. The conclusion I have reached here applies equally to those provisions.*

*Thank you for giving me the opportunity to respond to the Committee's concerns. I trust that this further information is of assistance to the Committee.*

**Tim Pallas MP**  
**Minister for Roads and Ports**

**The Committee thanks the Minister for this response.**

## Traditional Owner Settlement Bill 2010

The Bill was introduced into the Legislative Assembly on 27 July 2010 by the Hon. John Brumby MLA. The Committee considered the Bill on 9 August 2010 and made the following comments in Alert Digest No. 11 of 2010 tabled in the Parliament on 10 August 2010.

### Committee's Comments

#### Charter report

#### **Cultural rights – Recognition of rights of traditional owner groups – Limits on recognition of non-native-title claimants and holders – Resolution of questions about membership of traditional owner groups**

*Summary:* Clauses 4 and 9 provide for the recognition of rights of traditional owner groups and therefore engage Aboriginal persons' Charter right not to be denied their distinctive relationship to the land. The Committee is concerned that clause 3's definition of 'traditional owner group' appears to give precedence to native title claimants and holders and to lack an independent mechanism to resolve questions about the membership of traditional owner groups. It will write to the Premier seeking further information.

**The Committee notes that clauses 4 and 9 provide for the recognition of rights of traditional owner groups in an area via an agreement reached between the State and the traditional owner group entity for that area.** Clause 3 defines a 'traditional owner group entity' to be corporation appointed by 'a traditional owner group for the area of public land to represent them in relation to that area'. The definition of 'traditional owner group, in relation to an area of public land' is as follows:

- (a) if there is a group of persons who are the persons in the native title group in relation to the area in accordance with section 24CD of the Native Title Act, that group of persons...
- (b) if there are native title holders (within the meaning of the Native Title Act) in relation to the area, the native title holders; or
- (c) *in any other case*, a group of persons who are recognised by the Attorney-General... as the traditional owners of the land, based on Aboriginal traditional and cultural associations with the land.

**The Committee considers that the Bill engages Charter s. 19(2)(d), which provides that 'Aboriginal persons... must not be denied the right, with other members of their community... to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs'.**

The Second Reading Speech remarks:

*This bill provides for the recognition of distinctive traditional owner groups in Victoria, identified by their group name, and to enter into agreements that give effect to the rights they hold in land and natural resources in concrete and meaningful ways...*

*Until now, traditional owner groups have had no concrete avenue for the recognition of their rights in land, other than through the commonwealth's native title system – a complex legal system that was never intended to address land justice in the more settled regions of Australia...*

*[T]he events and policies of nearly two centuries cast traditional owners from country, broke their means of subsistence and undermined their systems of law and relationships to country and to each other. This, of course, makes the task of meeting contemporary connection tests almost insurmountable...*

*The bill's approach is to put the question of native title to one side in exchange for recognition and a range of benefits related to that recognition.*

**While the Committee appreciates that the bill promotes Charter s. 19(2)(d), it is concerned that clause 3's definition of 'traditional owner group' appears to give**

**precedence to native title claimants and holders, i.e. those who claim or have proved that they have had a continuous tie to the relevant area of land, over other potential holders of rights under Charter s. 19(2)(d).** As para (c) of the definition is limited to 'any other case', it appears that people whose tie to their land was interrupted or who have developed ties to land to which they were displaced can only be recognised as traditional owners if there are no people who claim or have proved an uninterrupted tie to that area of land. So, clause 3's definition may deny some people's rights under Charter s. 19(2)(d).

The Committee also observes that, aside from the provisions of the federal Native Title Act, the only mechanisms provided in the Bill for resolving disputes about membership of a traditional owner group, either before or after an agreement is reached, are para (c)'s mechanism for groups of persons to be 'recognised' by the Attorney-General as traditional owner groups and any internal regulations of the entity that group appoints. **While the Committee appreciates that the Bill's purpose is to avoid litigation, the Committee is concerned that the apparent absence of a mechanism independent of the parties to the agreement to resolve questions about the membership of traditional owner groups may also result in the denial of some people's rights under Charter s. 19(2)(d).**

**The Committee will write to the Premier seeking further information as to the operation of the Bill in areas where there are both native title claimants/holders and other traditional owners, and as to the availability of independent mechanisms to resolve questions about the membership of traditional owner groups. Pending the Premier's response, the Committee draws attention to clause 3's definition of 'traditional owner group'.**

## Minister's Response

Thank you for your letter to the Premier regarding the Traditional Owner Settlement Bill 2010. The Premier has asked me to respond on his behalf.

I understand the Committee raises two related issues:

- The definition of 'traditional owner group' in clause 3 of the Bill appears to give precedence to native title claimants and holders who have proved that they have continuous ties to the relevant area of land, over other potential holders of rights under s19(2) of the Charter.
- The apparent absence of a mechanism independent of the parties to resolve questions about the membership of traditional owner groups may also result in the denial of some people's rights under the Charter s19(2)(d).

I will address each of these separately in this letter.

### 1. Definition of traditional owner groups

The Committee refers to the definition of traditional owners at clause 3 of the Bill. Clause 3 defines the traditional owner group as follows:

(a) if there is a group of persons who are the persons in the native title group in relation to the area in accordance with section 24CD of the Native Title Act, that group of persons, other than a group of persons that is a representative body under section 24CD(3)(b) of that Act; or

(b) if there are native title holders (within the meaning of the Native Title Act) in relation to the area, the native title holders; or

(c) in any other case, a group of persons who are recognised by the Attorney-General, by notice published in the Government Gazette as the traditional owners of the land, based on Aboriginal traditional and cultural associations with the land.

I note the Committee's concern that the words "in any other case" in part (c) of the definition may preference paragraphs (a) and (b), and might exclude people whose tie to their land was interrupted, or who have developed ties to land to which they were displaced.

Firstly, I wish to explain the importance of paragraph (b) of the definition. This paragraph ensures that persons who hold native title to an area are recognised as the traditional owner group for that area for the purposes of the Bill. Native title holders have proven to the high evidentiary standard required by the Native Title Act 1993 that they have continuous

connection to land and a relatively unchanged body of law and custom which links their group to that land. Such proof would clearly meet the definition of "connection under traditional laws and customs" in s19(2)(d) of the Charter. As such the Bill ensures that there is no additional burden on persons who have met the native title standards of evidence.

Secondly, persons who can demonstrate an association with the land relevant to s19(2)(d) of the Charter but who have not been determined to be native title holders - for example because their tie to their land was interrupted - can be recognised through the definition at paragraph (a) as well as paragraph (c).

Paragraph (a) allows any persons who are native title parties to a registered Indigenous Land Use Agreement (ILUA) to be recognised as traditional owners. Native title parties include persons who claim to hold native title. In accordance with section 24CD of the Native Title Act 1993, even where native title holders exist, the native title party may include both the native title holders and any other person who claims to hold native title to any undetermined part of the agreement area. Registration of the ILUA requires that all reasonable efforts are made to identify all persons who hold or may hold native title and that all such persons have authorised the making of the ILUA. As it is expected that in almost every case there would be undetermined parts of an agreement area, the native title group under paragraph (a) can be broader than a group that has proven continuous connection under native title.

Alternatively, it is open to the Attorney-General to make a gazettal notice to recognise a traditional owner group as the traditional owners of the land, based on Aboriginal traditional and cultural associations with the land (paragraph (c) of the definition). Such a definition allows greater flexibility than is currently available under native title and intends to allow for all persons who may have "connection under traditional laws and customs" under s19(2)(d) of the Charter to be able to be included in a traditional owner group. If any persons who have developed ties to land to which they were displaced can demonstrate that these ties constitute "Aboriginal traditional and cultural associations with the land", such people could be recognised as traditional owners.

## 2. Lack of independent mechanism in the Bill to resolve questions about the membership of traditional owner groups

I note that the Committee is concerned that the apparent absence of a mechanism independent of the parties to the agreement to resolve questions about the membership of traditional owner groups, and that this may also result in denial of some people's rights under s19(2)(d) of the Charter.

As the Committee notes, such a mechanism would contradict the intent of the Bill to avoid litigation on matters such as group membership, connection and identity.

Any decision made in relation to the recognition of a Traditional Owner Group is based on a rigorous, fully researched and evidenced assessment of their connection to country. The Attorney-General, on behalf of the Government, will require those seeking traditional owner recognition to show that they are descended from the Aboriginal people present at the time of European settlement, by way of genealogical links, and to demonstrate their association to their country. These are standards that traditional owners themselves support for their own cultural integrity. The role of the Attorney-General in taking such a decision is consistent the responsibility currently taken by the Attorney-General to consent to native title determination on behalf of the Government.

For the reasons stated above, the definition of traditional owners in the Bill is such that all persons who hold the rights under s19(2)(d) are able to be recognised as traditional owners.

Furthermore, and most relevant to the issues raised, in carrying out his or her responsibilities under the Bill the Attorney-General (or Minister), as a public authority under s4 of the Charter of Human Rights and Responsibilities, would be bound to act compatibly with the Charter. For this reason there is no need to create an independent mechanism solely for the purposes of protecting the rights of Aboriginal people under s19(2)(d).

Whilst the Bill does not include additional review mechanisms for decisions relating to the membership of traditional owner groups, a number of non-statutory mechanisms for resolving disputes about membership of traditional owner groups, including mechanisms led by traditional owners themselves, are in development to complement the Bill.

*I trust that this adequately addresses the matters raised by the Committee.*

**ROB HULLS MP**  
*Attorney-General*

*28 August 2010*

**The Committee thanks the Attorney-General for this response**

## **Transport Accident and Accident Compensation Legislation Amendment Bill 2010**

The Bill was introduced into the Legislative Assembly on 27 July 2010 by the Hon. Tim Holding MLA. The Committee considered the Bill on 9 August 2010 and made the following comments in Alert Digest No. 11 of 2010 tabled in the Parliament on 10 August 2010.

### **Committee's Comments**

#### **Clauses 2(2) to 2(6)**

##### ***Rights or freedoms – Retrospective provisions – Inadequate explanatory material***

*The Committee notes that a number of provisions in the Bill have retrospective commencement (clauses 2(2) to 2(6)). In each case neither the explanatory memorandum nor the Second Reading Speech provide any reasons as to the date chosen or the effect the retrospectivity may have on existing rights. The Committee once again draws attention to Practice Note No. 1 of 2005 concerning the need to provide adequate reasons for the inclusion of retrospective provisions in Bills and the rationale for choosing a particular date.*

*The Committee will seek the relevant advice from the Minister.*

### **Minister's Response**

*Thank you for your letter of 8 August 2010, in which you alerted me to the Scrutiny of Acts and Regulations Committee (SARC)'s report on the Transport Accident and Accident Compensation Legislation Amendment Bill 2010 (the Bill).*

*I am writing to advise you that SARC's concerns have been considered and as requested, I have provided further information about the need for retrospective commencement of the amendments affected by clauses 2(2) to 2(6).*

*Most of these provisions correct anomalies and technical errors in amendments that were made by the Accident Compensation Amendment Act 2010 (the Amendment Act) which received Royal Assent on 23 March 2010. In general, the retrospective commencement of these provisions is to align with the commencement of the substantive changes made by the Amendment Act. This is to ensure that the original intention of the earlier amendments is achieved.*

*I trust the attached information will adequately address SARC's concerns and I thank you for bringing these matters to my attention. If you require further clarification, please do not hesitate to contact Linda Timothy, at WorkSafe, on (03) 9641 1373.*

**TIM HOLDING MP**  
*Minister for Finance, WorkCover and the Transport Accident Commission*

*3 September 2010*

**Retrospective application of certain provisions in the Transport Accident and Accident Compensation Legislation Amendment Bill 2010**

SARC sought further advice concerning the significance of the dates chosen for retrospective commencement.

Clause 2(2)

**Clause 160** inserts a reference to 'section 138(6)' into section 349 which was inserted into the Accident Compensation Act 1985 (the ACA) by section 191 of the Accident Compensation Amendment Act 2010 (the Amendment Act)<sup>1</sup>.

Section 349 is the transitional provision for amendments to section 138 of the ACA made by section 122 of the Amendment Act. These amendments introduced new sub sections (6), (7), (8) and (9) into section 138 to give WorkSafe the discretion to recover, on behalf of an employer, any indemnity that the employer would be entitled to claim against a third party.

Section 349 stipulated that this discretion should apply in respect of any right of indemnity that WorkSafe, a self-insurer or an employer has regardless of when the right came into existence. However, due to a drafting error in section 122 of the Amendment Act, the reference to sub section 138(6) was omitted. Clause 160 inserts the reference to ensure that the transitional provision will operate as intended.

**Significance of retrospective commencement date and impact**

The commencement date for these provisions is 17 June 2009, which aligns the insertion of a reference to 'section 138(6)' with the commencement of that section. Without a retrospective commencement an anomaly would be created.

There is no detrimental impact on any person as a result of the retrospective application of this provision.

Clause 2(3)

**Clause 93** amends section 98C of the ACA to give full effect to the intent of earlier amendments to the provision made by section 54 of the Amendment Act in two respects, summarised below.

The effect of the earlier amendments to section 98C was to align (increase) the maximum amount payable under section 98C to workers with a whole person impairment (WPI) of more than 80% with the maximum damages payable at common law.

Clause 93 amends section 98C so that claims by workers with a WPI of 71% or more are calculated as at the date on which compensation is determined, rather than the date of the injury. This is to align the approach taken to assessing damages under the ACA with that at common law and ensure alignment of the maximum damages is available. It is more generous to workers as the calculation of compensation will be based on higher indexed statutory maximum amounts.

Clause 93 also amends section 98C to clarify the correct monetary amount is applied in the relevant formulae in section 98C depending on the year in which the worker sustained the injury resulting in the impairment, and to ensure that workers whose injuries occurred on or after 3 December 2003 and before 1 July 2010 obtain the intended compensation payments.

**Significance of retrospective commencement date and impact**

The commencement date for these provisions is 10 December 2009. Under section 2 of the Amendment Act, the section 54 amendments to section 98C commenced on 10 December 2009 (the date of the second reading speech of the Bill) to allow a greater number of injured workers to benefit from the changes, and to minimise the impact on claims lodgement patterns.

The actuarial estimation of the cost of the reforms incorporated the commencement date specified in this provision. Thus, the cost can be funded without increasing average premium rates.

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<sup>1</sup> The Amendment Act received Royal Assent on 23 March 2010.

Clause 2(4)

**Clause 51** amends section 82D of the ACA to clarify that workers disentitled to compensation under section 82C (by reason of a drink or drug driving conviction) have all forms of compensation reinstated if the conviction is later overturned.

Sections 82A to 82D were inserted into the ACA by section 15 of the Amendment Act to introduce a regime of compensation penalties where the worker's injury was contributed to by drink or drug driving. Under section 82C, where a worker has been convicted of a serious drink or drug driving offence, and that conduct contributed to the injury, the worker will be disentitled to compensation under the ACA. However, the intention of section 82D is that if the conviction is later overturned, the worker should be paid his or her compensation entitlement.

The amendments to be made by Clause 51 will clarify the drafting of section 82D so that it operates in this way.

**Significance of retrospective commencement date and impact**

Clause 51 commences on 5 April 2010, to align with the commencement of sections 82A and 82D. This will preserve workers' rights to compensation.

**Clause 56(2)** amends section 92B of the ACA. Section 92B was amended by the Amendment Act to increase the age that a dependant child continued to be eligible to receive a weekly pension. However these amendments inadvertently removed the mechanism for weekly pensions payable to the dependant to be indexed where the claim was made before 5 April 2010. Notwithstanding this error, WorkSafe has continued to index such pensions as at 1 July 2010.

**Significance of retrospective commencement date and impact**

Clause 56(2) restores the previous indexation provision and preserves the annual indexation of weekly pensions for claims made before 5 April 2010.

**Clause 66** amends section 103(4C) of the ACA.

The Amendment Act inserted new section 103(4C) into the ACA. The provision gives the Minister power to issue guidelines specifying the manner and form in which a claim may be given, served or lodged. The provision should also have given the Minister power to specify the manner in which a claim for compensation may be forwarded to the Authority. Clause 66 corrects this omission.

**Significance of retrospective commencement date and impact**

The commencement date (5 April 2010) aligns with the commencement date of section 103(4C) and causes no disadvantage.

**Clause 127** amends section 313 of the ACA, which is a transitional provision for section 93CD (substituted by section 34 of the Amendment Act).

Section 93CD allows workers to apply for the continuation of weekly payments after the expiry of the second entitlement period. The new section 93CD commenced on 5 April 2010 (section 2 of the Amendment Act) and applied in respect of an injury occurring on or after 5 April 2010 (section 313 of the ACA). However, the amendments inadvertently removed the application of the previous section 93CD, which applied in respect of injuries before 5 April 2010.

Section 127 therefore amends section 313 to ensure that the previous section 93CD applies in respect of injuries before 5 April 2010, as intended.

**Significance of retrospective commencement date and impact**

The commencement date (5 April 2010) aligns with the commencement of the new section 93CD and preserves the right of workers injured before 5 April 2010 to apply for the continuation of weekly payments after the expiry of the second entitlement period.

**Clause 154** inserts references to sub sections 103(4) to (4H) in section 306 of the ACA, which were omitted in error.

Section 306 was inserted by section 191 of the Amendment Act. This section is the transitional provision for the amendments made to section 103 of the ACA by section 19 of the

*Amendment Act. These amendments streamlined the process for making a claim for weekly payments under the ACA however references to sub sections 103(4) to (4H) were inadvertently omitted from section 306 creating an unintended anomaly. Clause 154 corrects this omission.*

**Significance of retrospective commencement date and impact**

*The commencement date (5 April 2010) aligns with the commencement date of the substantive changes to section 103 and causes no disadvantage.*

**Clause 155** amends section 307 of the ACA (inserted by section 191 of the Amendment Act).

*Section 307 is the transitional provision for section 20 of the Amendment Act which made a number of amendments to the provisions around medical certificates supporting a claim for weekly payments. Sub sections 20(1) and 20(2) made consequential amendments to section 105 of the ACA arising from other amendments to section 105 that were made by the Amendment Act; sub section 20(3) introduced a 10-day time period in which employers are required to forward a medical certificate to WorkSafe. Section 307 stipulated that these changes applied in respect of claims “first received” on or after 5 April 2010.*

*Clause 155 amends section 307 to clarify that this amendment applies to claims “given, served or lodged” from 5 April 2010. This reflects the original intention of the amendments.*

**Significance of retrospective commencement date and impact**

*The commencement date (5 April 2010) aligns with the commencement of the substantive changes to the ACA. This will not adversely affect any person.*

**Clause 156** makes a technical correction to section 311 of the ACA.

*Section 311 is the transitional provision (inserted by section 191 of the Amendment Act) for section 55AA of the ACA (inserted by section 29 of the Amendment Act) which commenced on 5 April 2010. Section 55AA sets out the process by which a Conciliation Officer may refer a medical question in a worker’s compensation dispute to a Medical Panel for an answer. The intention of section 311 was to make new section 55AA apply to medical questions arising in a dispute related to a section 93CD application (i.e. application for continuation of weekly payments in the second entitlement period).*

*Clause 156 amends section 55AA to give effect to this intention.*

**Significance of retrospective commencement date and impact**

*The commencement date (5 April 2010) aligns with the commencement date of section 55AA. This will not adversely affect any person.*

**Clause 157** makes a drafting correction to section 322 of the ACA, inserted by section 191 of the Amendment Act.

*Section 322 is the transitional provision for amendments made to section 43 of the ACA which removed the limits on the jurisdiction of the Magistrates’ Court to hear and determine workers compensation disputes, to give it the equivalent jurisdiction in the County Court. Section 322 had the effect of making the jurisdictional changes apply to “proceedings commenced under this Act” which is inconsistent with language of other transitional provisions.*

*Clause 157 removes the italicised words to ensure consistency with the other transitional provisions, and to thus avoid the potential for misinterpretation which might arise from inconsistent references.*

**Significance of retrospective commencement date and impact**

*The commencement date (5 April 2010) aligns with the commencement date of the substantive amendment to the ACA to reflect the original intention.*

**Clause 158** makes a technical correction to section 323 of the ACA which was inserted by section 191 of the Amendment Act.

*Section 323 is the transitional provision for amendments made to section 45 of the ACA. Section 45 of the ACA (inserted by section 76 of the Amendment Act) was amended to improve the efficiency and quality of referrals to the Medical Panel from the Courts. The*

*transitional referred to the amendment applying only to proceedings that commenced on or after the commencement date. In this context the word “only” was redundant and no effect on the transitional.*

*Clause 158 removed this redundant word.*

**Significance of retrospective commencement date and impact**

*The commencement date (5 April 2010) aligns with the commencement date of the substantive amendment to the ACA to reflect the original intention.*

**Clause 162** makes numerous typographical and punctuation corrections to various provisions in the Amendment Act.

**Significance of retrospective commencement date and impact**

*The commencement date (5 April 2010) aligns with the commencement of these various provisions and will not adversely affect the rights of any person.*

**Clause 2(5)**

**Clauses 110, 111 and 112** correct anomalies to amendments made by the Amendment Act to the return to work provisions (new Part VIIB- Return to Work inserted by section 129 of the Amendment Act).

**Clause 110** improves the usability of section 195 by moving the definition of “knows or ought reasonably to have known” (which relates only to section 195) for ease of reference. This clause moves the definition of “knows or ought reasonably to have known” from existing section 192(3) to within section 195.

**Clause 111** corrects an anomaly by moving the employer obligation to notify WorkSafe of a worker’s return to work from existing section 123 into Division 2 of Part 7B to consolidate it with the rest of the employer return to work obligation. This consolidation was overlooked in the Amendment Act and is required to fully implement the policy intent of the consolidation of return to work provisions under Part VIIB.

**Clause 112** amends section 208 of the ACA to correct anomalies, clarify the application of the obligation by WorkSafe and a self-insurer to provide information under this section, and makes a consequential amendment. It corrects the wording of the title to section 208. It clarifies that the section 208 procedural obligation on WorkSafe or a self-insurer to provide information to a worker does not affect the obligations of an employer, WorkSafe or a self-insurer under this Part. This amendment does not affect the substantive return to work rights and obligations, under Part VIIB, of an employer, WorkSafe or a self-insurer. It makes a consequential amendment to section 123A to clarify that the requirement under this section does not apply to section 208, given no substantive decision has been made by the employer, WorkSafe or self-insurer.

**Significance of retrospective commencement date and impact**

*The commencement date (1 July 2010) aligns the commencement of the new Part VIIB-Return to Work inserted by the Amendment Act and corrects anomalies.*

**Clause 139** clarifies the new definition of ‘WorkCover insurance policy’ in section 3(1) of the Accident Compensation (WorkCover Insurance) Act 1993 (ACWI Act) to ensure that the definition includes, as intended, policies that are deemed to be in force by operation of new section 7(3A) of the ACWI Act which was inserted by section 101 of the Amendment Act.

*Section 7(3A) of the ACWI Act (amended by section 101 of the Amendment Act) was introduced to deem an employer to have a policy in place, if that employer failed to arrange its own policy. However the Amendment Act failed to make the necessary consequential amendment to the definition contained within subsection 3 of ACWI Act to capture policies “deemed to be in place”. This gives rise to a potential for disputes. Section 139 corrects this omission.*

**Significance of retrospective commencement date and impact**

The commencement date (1 July 2010) aligns the correction with the commencement of section 7(3A) of the ACWI Act to ensure the definition is technically correct and reflects the manner in which it has been implemented. It will not adversely affect the rights of any person.

**Clauses 140 and 142** amend sections 7(3B), 7(3C) and 17 of the ACWI Act respectively to clarify that where an employer is deemed to have a deemed policy of insurance in a particular policy period, pursuant to new section 7(3A), the relevant premium payable by the employer for that deemed policy must be calculated in accordance with the relevant premiums order for that period. This confirms the intention, and reflects the manner in which the provisions have been implemented.

**Significance of retrospective commencement date and impact**

The commencement date (1 July 2010) aligns with the commencement of sections 7(3A) to (3D) of the ACWI Act. There is no detrimental effect on existing rights of employers or others.

**Clauses 143 and 144** amend section 7(1AAA) and section 9(2A) of the ACWI Act respectively to clarify that an employer will not be covered by its WorkSafe insurance policy for all elements of loss associated with a worker's action for discriminatory conduct under new sections 242AB and 242AD of the Act (inserted by section 23 of the Amendment Act).

Section 242AB and 242AD of the Act strengthened the anti-discrimination provisions within the ACA. Section 7 and 9 of ACWI was amended to ensure the employer remained liable for any loss arising from its discriminatory conduct but referred to an employer's "liability for damages" rather than liability more generally. This had the potential to create uncertainty.

Clauses 143 and 144 remove any doubt that the WorkSafe policy does not extend to liabilities under the new discrimination provisions. This confirms the intention, and reflects the manner in which the provisions have been implemented.

**Significance of retrospective commencement date and impact**

The commencement date (1 July 2010) aligns with the commencement date of new sections 242AB and 242AD. There is no detrimental effect on existing rights of employers or workers.

Clause 146 amends section 36H of ACWI (introduced by section 114 of the Amendment Act).

Section 36H was introduced to make WorkSafe liable to pay interest on amounts refunded following a review of premium. The intent of this amendment was that the payment of interest be limited to applications for review under the review provisions contained in new section 33 of ACWI (also introduced by section 114 of the Amendment Act). Clause 146 removes any doubt that the interest follows a review under section 33 of ACWI.

**Significance of retrospective commencement date and impact**

The commencement date (1 July 2010) aligns with the commencement date of new sections 33 and 36H and is a clarification for the avoidance of doubt.

**Clause 147** amends section 61 of the ACWI Act. Section 7(3A) of the ACWI Act was introduced to deem an employer to have a policy in place, if that employer failed to arrange its own policy. However a consequential amendment to section 61 of ACWI ensures that WorkSafe's power to recover compensation against a non compliant employer extended to such circumstances. Clause 147 makes this consequential amendment to section 61 of ACWI.

**Significance of retrospective commencement date and impact**

The commencement date (1 July 2010) aligns with the commencement date of new sections 7(3A) and is a consequential amendment.

**Clause 151** amends section 82 of the ACWI Act which is a transitional provision for section 16 of the ACWI Act (substituted by section 103 of the Amendment Act).

Section 16 of the ACWI Act (introduced by section 103 of the Amendment Act) was amended to provide for a premiums order to include provisions relating to the avoidance of premium. Section 82 (introduced by section 193 of the Amendment Act) is the transitional provision which applied section 16 to any premium order made on or after the commencement date.

Clause 151 amends section 82 to clarify that section 16 applies to any premium order made on or after commencement, not just the premium order made for the 2010/2011 financial year.

**Significance of retrospective commencement date and impact**

The commencement date (1 July 2010) aligns with the commencement date of new section 16. Given the amendment is consistent with the operation of section 16 its retrospective application will not adversely impact any person.

**Clause 152** amends section 87 of the ACWI Act which is a transitional provision for Part 2A of the ACWI Act (inserted by section 114 of the Amendment Act).

Part 2A of the ACWI Act provides for the review of premium and section 87 of the ACWI (introduced by section 193 of the Amendment Act) applies this Part to notices of premium served in respect of the premium year commencing in 2010.

Clause 152 clarifies that Part 2A of the ACWI Act applies to any notice of premium issued on or after commencement, not just the notices issued in the 2010 premium year as intended.

**Significance of retrospective commencement date and impact**

The commencement date (1 July 2010) aligns with the commencement date of new Part 2A. The retrospective application will not adversely impact any person.

**Clause 153** makes a minor typographical correction to section 80(4)(a) of the ACWI Act which is a transitional provision for Sections 7(3A) to (3D) of the ACWI Act (inserted by section 101 of the Amendment Act).

Sections 7(3A) to (3D) deem an employer to hold a relevant WorkSafe policy in circumstances where they have not complied with their premium obligations. Section 80 (introduced by section 193 of the Amendment Act) applies the new deeming provisions to employers who fail to keep a policy of insurance in respect of any of the five policy periods before the commencement date (1 July 2010) and in relation to which the Authority had not commenced proceedings.

Clause 153 adds the words “of the” to section 80(4)(a) to correct a grammatical error.

**Significance of retrospective commencement date and impact**

The commencement date (1 July 2010) aligns with the commencement date of new section 7 and corrects a grammatical error.

**Clause 2(6)**

**Clause 67** amends section 134AB of the ACA to clarify that a worker must not have a concurrent claim for compensation under section 98C of the ACA and a serious injury application under section 134AB(4) at the same time.

Currently section 134AB(3) prohibits the making of a serious injury application under 134AB(4) unless determination of the degree of impairment of the worker have been made. This has meant workers have been required to complete the process for bringing impairment benefit claims under section 98C before lodging an application under section 134AB(4).

Clause 67 was introduced to avoid doubt that this practice ought to continue.

**Significance of retrospective commencement date and impact**

The commencement date (29 July 2010, the date of second reading speech of this Bill) is to minimise the potential for fluctuations in lodgement patterns. The amendment confirms the operation of the existing provisions and current practice.

**The Committee thanks the Minister for this response**

**Committee room  
13 September 2010**

# Appendix 1

## Index of Bills in 2010

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# Appendix 2

## Committee Comments classified by Terms of Reference

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*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)

##### (i) trespasses unduly upon rights or freedoms

Accident Compensation Amendment Bill 2009	1
Occupational Licensing National Law Bill 2010	12

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

Transport Accident and Accident Compensation Legislation Amendment Bill 2010	11
Transport Integration Bill 2009	1

##### (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions

Transport Integration Bill 2009	1
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##### (iv) unduly requires or authorise acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;

Occupational Licensing National Law Bill 2010	12
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##### (vi) inappropriately delegates legislative power

Education and Care Services National Law Bill 2010	13
Justice Legislation Amendment Bill 2010	4
Marine Safety Bill 2010	12
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Transport Integration Bill 2009	1
Transport Legislation Amendment (Compliance Enforcement and Regulation) Bill 2010	4
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##### (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities

Associations Incorporation Amendment Bill 2010	8
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## **Section 17(b)**

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

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## Appendix 3

### Ministerial Correspondence 2009-10

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**Table of correspondence between the Committee and Ministers during 2009-10**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Electricity Industry Amendment (Critical Infrastructure) Bill 2009	Energy and Resources	10.11.09 03.03.10	13 of 2009 3 of 2010
Justice Legislation Miscellaneous Amendments Bill 2009	Police and Emergency Services	10.11.09 16.03.10	13 of 2009 4 of 2010
Constitution (Appointments) Bill 2009	Premier	24.11.09 12.01.10	14 of 2009 1 of 2010
Serious Sex Offenders (Detention and Supervision) Bill 2009	Corrections	24.11.09 16.12.09	14 of 2009 1 of 2010
Summary Offences and Control of Weapons Acts Amendment Bill 2009	Police and Emergency Services	24.11.09 07.01.10	14 of 2009 1 of 2010
Consumer Affairs Legislation Amendment Bill 2009	Consumer Affairs	08.12.09 15.02.10	15 of 2009 2 of 2010
Accident Compensation Amendment Bill 2009	Finance, WorkCover and the Transport Accident Commission	02.02.10 09.03.10	1 of 2010 4 of 2010
Crimes Legislation Amendment Bill 2009	Attorney-General	02.02.10 15.03.10	1 of 2010 4 of 2010
Transport Integration Bill 2009	Transport	02.02.10 22.02.10	1 of 2010 2 of 2010
Equal Opportunity Bill 2010	Attorney-General	23.03.10 13.04.10	4 of 2010 5 of 2010
Public Finance and Accountability Bill 2009	Treasurer	02.02.10 15.04.10	1 of 2010 6 of 2010
Severe Substance Dependence Treatment Bill 2009	Mental Health	02.02.10 21.04.10	1 of 2010 6 of 2010
Therapeutic Goods (Victoria) Bill 2010	Health	13.04.10 29.01.10	5 of 2010 6 of 2010
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<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
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Personal Property Securities (Statute Law Revision and Implementation) Bill 2010	Attorney-General	10.08.10 25.08.10	11 of 2010 12 of 2010
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Marine Safety Bill 2010	Roads and Ports	31.08.10 13.09.10	12 of 2010 14 of 2010
Traditional Owner Settlement Bill 2010	Aboriginal Affairs	10.08.10 28.08.10	11 of 2010 14 of 2010
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Transport Legislation Amendment (Compliance, Enforcement and Regulation) Bill 2010	Transport, Roads and Ports	23.03.10	4 of 2010
Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010	Attorney-General	13.04.10	5 of 2010
Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bongs) Bill 2010	Mr Peter Kavanagh MLC	25.05.10	7 of 2010
Associations Incorporation Amendment Bill 2010	Consumer Affairs	08.06.10	8 of 2010
Civil Procedure Bill 2010	Attorney-General	27.07.10	10 of 2010

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Plant Biosecurity Bill 2010	Agriculture	10.08.10	11 of 2010
Fair Trading Amendment (Australian Consumer Law) Bill 2010	Consumer Affairs	31.08.10	12 of 2010
Justice Legislation Further Amendment Bill 2010	Attorney-General	31.08.10	12 of 2010
Occupational Licensing National Law Bill 2010	Finance, WorkCover and the Transport	31.08.10	12 of 2010
Education and Care Services National Law Bill 2010	Children and Early Childhood Development	14.09.10	13 of 2010
Judicial Commission of Victoria Bill 2010	Attorney-General	14.09.10	13 of 2010