

No. 3 of 2010

Wednesday, 10 March 2010

On the

Credit (Commonwealth Powers)
Bill 2010

Electricity Industry Amendment (Critical
Infrastructure) Bill 2009

Radiation Amendment Bill 2010

Statute Law Amendment (National
Health Practitioner Regulation) 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 –

Credit (Commonwealth Powers) Bill 2010

Radiation Amendment Bill 2010

Statute Law Amendment (National Health Practitioner Regulation) Bill 2010

The Committee notes the following correspondence –

Electricity Industry Amendment (Critical Infrastructure) Bill 2009



Role of the Committee

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

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

Alert Digest No. 3 of 2010

Credit (Commonwealth Powers) Bill 2010

Introduced	23 February 2010
Second Reading Speech	24 February 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tony Robinson MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The Bill adopts certain Commonwealth Acts as Victorian law. The relevant Commonwealth Acts are the –

- *National Consumer Credit Protection Act 2009* (Cth) (the NCCP Act) as amended at the time of adoption by the *National Consumer Credit Protection Amendment Act 2010* (Cth); and the
- *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth).

Subject to certain exclusions (see Part 3) the Bill refers certain matters relating to credit and consumer leases to the Parliament of the Commonwealth pursuant to section 51(xxxvii) of the Constitution of the Commonwealth. **[6 and 7]**

The Bill contains an amendment and termination power. **[8 to 10]**

Note: *Section 51(xxxvi) enables State Parliaments to refer matters to the Commonwealth Parliament, or to adopt Commonwealth laws that have been enacted pursuant to such referrals.*

The Bill repeals and amends certain Victorian laws relating to consumer credit and makes consequential amendments to Victorian Acts and includes transitional provisions dealing with the treatment of proceedings under existing Victorian laws relating to consumer credit and with the transfer of functions to the Australian Securities and Investments Commission (ASIC). **[20 to 59]**

Extracts from the Second Reading Speech –

The Credit (Commonwealth Powers) Bill is part of the national business and regulatory reform agenda agreed by the Council of Australian Governments (COAG).

... Presently in Victoria, most consumer credit contracts are regulated by the Uniform Consumer Credit Code (the UCCC). The UCCC was developed in the early 1990s in an endeavour to achieve national uniformity in the regulation of consumer credit. Each State and Territory has adopted the UCCC as law in their respective jurisdictions.

... The national credit laws introduce a single, uniform licensing scheme for those who engage in credit activities. Credit providers, finance brokers and others who provide credit assistance or act as intermediaries will be required to hold an Australian credit licence from 1 July 2011.

... It will replace the existing State and Territory schemes. The Commonwealth regulations will exempt certain classes of people from the licensing requirements, such as point-of-sale

retailers who arrange credit or act as intermediaries through an arrangement with a credit provider.

... Licensees will be required to be members of an approved external dispute resolution scheme. Credit providers in Victoria are already subject to this important requirement, which is designed to ensure that consumers have access to low-cost dispute resolution options.

... The Bill grants to the Commonwealth Parliament the constitutional powers it requires for the effective enactment and operation of the national credit laws. It includes provisions dealing with the repeal of certain Victorian legislation relating to credit, makes necessary consequential amendments to Victorian laws, and deals with the transition to the new national scheme.

The Bill adopts, for the purposes of section 51(xxxvii) of the Commonwealth constitution, the text of the National Consumer Credit Protection Act and the National Consumer Credit Protection (Transitional and Consequential Provisions) Act. The adoption of the national legislation allows these acts, as originally enacted by the Commonwealth, to operate as a law of the Commonwealth in and for the State of Victoria. The adoption is necessary to ensure that the Commonwealth has sufficient constitutional power to enact and administer the national credit laws.

In addition, the Bill refers to the Commonwealth the power to make amendments to the national credit laws in the future. The amendment power is limited to amendments that relate to the subject matters of 'credit' or 'consumer leases' as those terms are defined in the national credit code.

The amendment power is further limited by provisions which confirm that the Commonwealth cannot make amendments to the national credit laws that would interfere with specified areas of State legislative responsibility.

... The Bill also includes a provision which allows Victoria, by a proclamation of the Governor in Council, to terminate the adoption or the referral of powers to the Commonwealth.

The Bill repeals most of the provisions in the Consumer Credit (Victoria) Act 1995 to make way for the new national scheme. These repeals will abolish Victoria's registration scheme for credit providers and negative licensing scheme for finance brokers.

The Credit Act 1984 and the Credit (Administration) Act 1984 will be retained, with appropriate consequential amendments. The retention of these two acts is necessary because they apply to certain contracts entered into prior to November 1996 that are not captured by the new national credit laws.

Content of the Commonwealth Acts

The Committee notes certain provisions of the Commonwealth Act and Code that if present in Victorian legislation would engage a term of reference of the Committee. The Committee observes that these provisions are discussed in the Statement of Compatibility and the Charter Report below.

The National Consumer Credit Protection Act 2009 (Cth) (the 'NCCP Act')

This NCCP Act implements a national licensing regime for credit providers, brokers and intermediaries. It introduces new responsible lending conduct requirements, which will be a key condition of holding a licence. As the sole regulator of the scheme, the Australian Securities and Investments Commission (ASIC) is provided with enforcement powers. This Act also introduces dispute resolution mechanisms, remedies for consumers including compensation, and criminal and civil penalties for licensee misconduct.

Self-incrimination – use immunity does not extend to derivative use immunity – Compelled testimony – Documents – absence of use immunity

The NCCP Act (section 295(3)) abrogates the privilege against self incrimination by compelling testimony but provides a limited use immunity. The Statement discusses the absence of derivative use immunity and the absence of immunity in respect to the compelled production of documents. The Committee deals with this provision in the Charter Report below.

Reverse legal onus – Defence – Presumption of innocence – Conceal or destroy documents

The NCCP Act (section 291) makes it an offence to give false or misleading information in certain circumstances. The penalty for the offence includes imprisonment for a maximum of 2 years. The section provides a defence where the defendant believed on reasonable grounds that the information was true and not misleading at the time it was given.

The NCCP Act (section 294) makes it an offence to conceal, destroy, mutilate or alter a book relating to a relevant ASIC investigation. The penalty provision includes a maximum term of imprisonment of 5 years. It is a defence under the section if the defendant proves he or she did not intend to defeat the purposes of the Act, delay or obstruct the investigation. The provision therefore imposes a legal burden on a defendant in respect to the defences.

The Committee notes the Statement's section 7(2) analysis discusses the need for such a reverse legal burden and provides that the '*the purpose of imposing a legal burden is to ensure the effectiveness of enforcement of and compliance with the NCCP Act*' and '*to provide a defendant with an opportunity, in appropriate circumstances, to escape culpability...because the contravention was not deliberate*' and '*the defences relate to matters that are within the knowledge and control of the accused and it would be difficult and onerous for the Crown to investigate and prove them beyond reasonable doubt*'.

Reverse evidential onuses – Excuse, proviso or exception – Presumption of innocence

The Committee notes a number of regulatory offences in the NCCP Act (sections 29, 88, 124, 147, 207, 227, 240, 274, 290, 292 and 293) impose an evidential reverse onus on a defendant in the sense of requiring the defendant to establish a reasonable excuse, exception, proviso or defence. The Statement notes these sections and provides that they are justified in a regulatory environment because '*once the defendant has adduced or pointed to some evidence, the burden is on the prosecution to prove beyond reasonable doubt the absence of the exception raised*' and '*the defences and excuse provided for relate to matters within the knowledge of the defendant*'.

The National Credit Code (the 'Code')

The Code is similar to the current *Uniform Consumer Code* and is attached as a Schedule to the NCCP Act. The Code provides a consumer protection framework for consumer credit and related transactions.

Reverse legal burden – Due diligence – Presumption of innocence

The Code is attached as a Schedule to the NCCP Act and provides (section 150) that a breach of the advertising requirements in the Code is a criminal offence with a penalty of 100 penalty units. Section 152 of the Code provides a due diligence defence where the breach was outside the defendant's control. Also refer to the Charter Report below.

Entry to residential premises – Repossession of goods

The Committee notes that the provisions of the Code (sections 99 to 101) allow entry to a person's home for the purpose of repossession either with a court order or by written consent of the occupier.

Charter report

Adoption of Commonwealth Act – Operation of the Charter

Summary: Cooperative regimes like the national credit legislation may undermine the Charter's protections in several respects. The Charter's operative provisions are partially available as the Supreme Court may declare that clause 4 or clause 6 cannot be interpreted consistently with human rights if a provision of the national credit legislation or an amendment to that legislation is incompatible with the Charter. Parliament has the option of departing from the national scheme by excluding specified provisions in their application to natural persons in Victoria.

The Committee notes that clause 4 makes several federal statutes that comprise the 'national credit legislation' applicable in Victoria even if they otherwise fall outside of the constitutional powers of the federal parliament. Clause 6 empowers the federal parliament to make amendments to those statutes that are also applicable in Victoria regardless of the federal parliament's constitutional powers. **The Committee has reported on several occasions that cooperative regimes like the national credit legislation may undermine the Charter's protections in several respects.**¹

First, the adopted federal statutes will not be subject to the Charter's operative provisions. The Statement of Compatibility remarks:

The national credit legislation is not subject to the interpretive obligation under section 32 of the charter because it will operate as Commonwealth legislation. The power to make declarations of inconsistent interpretation under section 36(1) of the charter will likewise not be available. Further, the regulator of the national credit legislation, the Australian Securities and Investments Commission (ASIC), is not a public authority for the purposes of the charter.

The Committee observes that, in all these respects, the national credit legislation differs from the current Consumer Credit (Victoria) Code, which 'applies as a law of Victoria'.² **However, the Committee notes that the Charter's operative provisions are partially available as the Supreme Court may declare that clause 4 or clause 6 cannot be interpreted consistently with human rights, if a provision of the national credit legislation or an amendment to that legislation is incompatible with the Charter.**

Second, the Charter's parliamentary scrutiny provisions may not operate effectively in relation to a uniform national cooperative scheme. While the Statement of Compatibility provides an assessment of the compatibility of the present national credit legislation with human rights, it remarks:

It is not possible to assess the charter compatibility of any future amendments that may be made by the Commonwealth Parliament in an exercise of the referred power. However, under clause 5.4(2) of the agreement, the Commonwealth minister will not pursue an amendment voted against by three or more State ministers. The adoption Bill also empowers the governor to terminate the adoption of the amendment reference.

¹ See the reports on the National Gas (Victoria) Bill 2008 (Alert Digests Nos 6 & 9 of 2008); the Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 (Alert Digests Nos 6 & 8 of 2009); the Fair Work (Commonwealth Powers) Act 2009 (Alert Digests Nos 7 & 12 of 2009); the Personal Property Securities (Commonwealth Powers) Bill 2009 (Alert Digests Nos 10 & 12 of 2009); and the Health Practitioner Regulation National Law (Victoria) Bill 2009 (Alert Digest No 13 of 2009.)

² *Consumer Credit (Victoria) Act 1995* (Vic), s. 5.

The Committee notes that both the Minister for Consumer Affairs and the Governor are public authorities under the Charter and will therefore be subject to Charter s. 38 when making decisions about voting or termination.

Moreover, the Committee observes that, pursuant to s. 24 of the *National Consumer Credit Protection Act 2009 (Cth)*, Parliament has the option of departing from the national scheme by excluding specified provisions (such as the two provisions discussed below) to the extent that they apply to natural persons in Victoria.

The Committee therefore draws Parliament's attention to the Statement of compatibility's remarks about the operation of the Charter and to s. 24 of the National Consumer Credit Protection Act 2009 (Cth).

Self-incrimination – Examinations by ASIC – No derivative use immunity

Summary: Section 295 of the *National Consumer Protection Credit Act 2009 (Cth)* allows ASIC to force people suspected of holding information relevant to an investigation relating to credit activity to lead investigators to information that may be used to convict them of any criminal offence. The Victorian Supreme Court has held that schemes of this sort limit the Charter's right against self-incrimination. The Committee considers that s. 295 may be incompatible with the Charter's right against compelled self-incrimination.

The Committee notes that s. 253(2) of the *National Consumer Protection Credit Act 2009 (Cth)* empowers the Australian Securities and Investments Commission ('ASIC') to require anyone who ASIC suspects has information relevant to a matter that ASIC is investigating to be examined on oath by an ASIC member. Failure to comply with the examiner's instructions attracts a penalty of up to 2 years in prison. No similar examination powers are available in relation to the present *Consumer Credit (Victoria) Act 1995 (Vic)*.

Section 295 provides:

- (1) *For the purposes of this Chapter, it is not a reasonable excuse for a person to refuse or fail:*
 - (a) *to give information; or*
 - (b) *to sign a record; or*
 - (c) *to produce a book;*

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.
- (2) *Subsection (3) applies if:*
 - (a) *before:*
 - (i) *making an oral Statement giving information; or*
 - (ii) *signing a record;*

pursuant to a requirement made under this Chapter, a person (other than a body corporate) claims that the Statement, or signing the record, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and
 - (b) *the Statement, or signing the record, as the case may be, might in fact tend to incriminate the person or make the person so liable.*
- (3) *The Statement, or the fact that the person has signed the record, as the case may be, is not admissible in evidence against the person in:*
 - (a) *criminal proceedings; or*
 - (b) *proceedings for the imposition of a penalty;*

other than proceedings in relation to:

- (c) *in the case of the making of a Statement--the falsity of the Statement; or*
- (d) *in the case of the signing of a record--the falsity of any Statement contained in the record.*

As the immunity in s. 295(3) is limited to the use of the examinee's answers, rather than information derived from those answers, s. 295's effect is to allow ASIC to force people suspected of holding information relevant to an investigation to lead ASIC or prosecutors to information that may be used to convict them of any criminal offence. For example, ASIC can require an examinee to reveal the identity of people she has lent money to. Then, ASIC can use that information to call those people as witnesses in a subsequent prosecution of the examinee for engaging in a credit activity without a licence.

The Victorian Supreme Court has held that schemes of this sort limit the Charter's right against self-incrimination, subject to the test for reasonable limits on rights in Charter s. 7(2).³ The Statement of Compatibility remarks:

ASIC can compel evidence only for the specific purpose of monitoring compliance with the national credit legislation. The people who will be subject to those powers have chosen to participate in regulated credit activities in which they have assumed duties and obligations....

Experience in the related context of enforcing corporations law has shown that granting immunities in a regulated commercial context to the type of individuals most likely to be examined and exposed to criminal and civil penalties (those who are responsible for the proper administration of credit activities) leads to protracted investigations, with the result that those responsible for wrong doing and misconduct can ultimately escape liability. ...

Investigations into credit and financial services offences face similar difficulties because the evidence of offences is generally only to be found within the domain of the relevant operator and knowledge of the offences is held by those responsible for compliance and day to day operations...

The Committee agrees that it is reasonable to limit the Charter's self-incrimination rights for people who 'have chosen to participate in regulated credit activities in which they have assumed duties and obligations' by requiring them to answer questions 'for the specific purpose of monitoring compliance with national credit legislation'. However, the Committee is concerned that s. 295 goes beyond this description in two respects.

First, ASIC investigations are not limited to 'compliance with the national credit legislation'. Section 247(1)(b) also permits ASIC to investigate:

a contravention of a law of the Commonwealth, or of a law of a referring State or a Territory, being a contravention that:

- (i) *concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engages in a credit activity; or*
- (ii) *involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease.*

Such investigations may include breaches of non-credit laws, such as laws against theft, assault, money laundering or tax evasion.

Second, ASIC examinations are not limited to people 'responsible for the proper administration of credit activities' but rather can include anyone who ASIC reasonably suspects 'can give information relevant to a matter that it is investigating, or is to investigate'.⁴ So, for example, ASIC's powers could be used against a credit consumer, such

³ *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, applying Charter s. 25(2)(k), guaranteeing that a criminal defendant is 'not to be compelled to testify against himself or herself or to confess guilt.'

⁴ *National Consumer Credit Protection Act 2009* (Cth), s. 253.

as a victim of an unfair credit contract. For example, a victim could be asked to explain how he or she has been paying off an unfair loan and the victim's answers could, in turn, be used to prosecute the victim for unrelated crimes such as embezzlement or drug trafficking.

While the Committee appreciates the importance and difficulties of effectively regulating credit activity, it observes that the Victorian Supreme Court did not consider that such concerns justified compelled self-incrimination in relation to the investigation and prosecution of serious organised crime. Moreover, the scheme in the *National Consumer Protection Credit Act 2009* (Cth) is less protective than other compulsory examination schemes in several respects:

- no court orders are required before someone can be compulsorily examined.⁵
- the direct use immunity provided by the scheme is only available if the examinee expressly claims the privilege before every answer.⁶
- the record of examination can be passed on to other agencies regardless of their connection to credit activity.⁷
- Neither the legislation nor ASIC is subject to the operative provisions of the Charter.⁸

In light of these factors and the Supreme Court's clear ruling that a more protective scheme relating to organised crime was incompatible with the Charter, the Committee considers that s. 295 of the *National Consumer Protection Credit Act 2009* (Cth), may be incompatible with the Charter's right against compelled self-incrimination.

The Statement of Compatibility remarks:

I have also taken account of the importance of uniform legislation in this area, which is driven by recognition of the complex role played by the credit industry in the national economy... The purpose of the adoption of national credit legislation is to end the inconsistent operation of the current Uniform Consumer Credit Code across the States, reduce duplication and compliance costs for business, and complexity for consumers.

The Committee observes that a government Bill presently before the ACT Legislative Assembly proposes to modify the compulsory questioning powers in the National Health Practitioner Registration Law in their application to the ACT in response to the Victorian Supreme Court's ruling on self-incrimination.⁹

The Committee refers to Parliament for its consideration the question of whether or not s. 295 of the *National Consumer Protection Credit Act 2009* (Cth), by permitting ASIC:

- **to require people who are not chosen to take on the duties and obligations of the national credit legislation;**
- **to lead investigators to evidence that can be used against them in any criminal prosecution, including for offences unrelated to the national credit legislation**
- **with limited immunity from self-incrimination available only if the privilege is expressly claimed at each relevant point of the examination**

⁵ Unlike the *Major Crimes (Investigative Powers) Act 2004* (Vic), s. 8.

⁶ Unlike the *Major Crimes (Investigative Powers) Act 2004* (Vic), s. 39.

⁷ See *Australian Securities and Investments Commission Act 2001* (Cth), s. 127(4), in contrast to the *Consumer Affairs Legislation Amendment Act 2010* (Vic), s. 63.

⁸ Unlike the *Major Crimes (Investigative Powers) Act 2004* (Vic), s. 39 and the *Consumer Affairs Legislation Amendment Act 2010* (Vic), s. 63.

⁹ Health Practitioner National Law (ACT) Bill 2009, schedule 1, items [1.23] & [1.24] of the bill's explanatory statement at pp. 17-18. (The Committee expresses no view on the human rights arguments made in the explanatory statement.)

- ***without court supervision or the protection of the Charter***

is a reasonable limit on the Charter's right against compelled self-incrimination in light of the provision's goals of ensuring compliance with and a uniform approach to the regulation of consumer credit.

Presumption of innocence – Offence of publishing a non-compliant credit advertisement – Defendant who is named in an advertisement must prove that he or she did not cause the publication

Summary: Section 151(1) of the National Credit Code requires a person who is charged with causing the publication of a non-compliant credit advertisement that mentions his or her name to prove that he or she did not cause its publication. The Committee observes that s. 151(1) engages the Charter right of criminal defendants to be presumed innocent until proved guilty of an offence. In light of s. 151(1)'s reversal of the onus of proof in relation to the essential issue of the defendant's actual involvement in the offence, and the resultant risk of a wrongful conviction, the Committee considers that s. 151(1) may be incompatible with the Charter's right to be presumed innocent.

The Committee notes that s. 150 of the *National Credit Code* makes it an offence to 'publish, or cause to be published an advertisement that States or implies that credit is available' where the advertisement does not comply with the Code and regulations. The penalty for the offence is 100 penalty units (\$11,000).

Section 151(1) provides:

A person is, in the absence of proof to the contrary, taken to have caused an advertisement to be published if:

- (a) the person provides credit, owns or has an interest in any goods, or supplies or has an interest in the supply of any goods or services, which the advertisement promotes; and*
- (b) the advertisement specifies the name, business name, address, telephone number, facsimile number or post office box number of the person or the person's agent.*

Section 151(1) requires a person who is charged with causing the publication of a non-compliant credit advertisement that mentions his or her name to prove that he or she did not cause its publication. So, if a non-compliant advertisement that names a person involved in credit activity is published anywhere in Australia, then that person will be found guilty and fined unless he or she can prove in court that he had nothing to do with the publication.

The Committee observes that s. 151(1) engages the Charter right of criminal defendants to be presumed innocent until proved guilty of an offence.¹⁰ The Statement of Compatibility remarks:

The burden of proof is imposed in respect of a defence only, and does not apply to an essential element of the offence. Before the defence could apply, the prosecution would have to establish that the advertisements did not meet the code's requirements.

The imposition of a burden of proof on the accused is directly related to its purpose, which is to ensure that people responsible for credit advertisements act reasonably and diligently to comply with their obligations under the code.

Removing the defence altogether would not infringe the right to be presumed innocent... Although an evidential onus would be less restrictive upon the right to be presumed innocent, it would not be as effective in achieving the purpose of the provision because the defence relates to matters that are principally within the knowledge and/or control of the defendant.

¹⁰ Charter s. 25(1) provides: 'A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.'

However, the Committee observes that the fact that the defendant had some involvement or responsibility for the conduct comprising the offence is always an essential element of a criminal offence.¹¹ Section. 151(1) is not a defence, but rather a statutory presumption of guilt, removing any obligation for the prosecution to prove this essential element. Its effect is to require a defendant who is simply named in a non-compliant advertisement to prove his or her innocence of any involvement in the advertisement.

While the Committee appreciates that s. 151(1) is intended to overcome the practical difficulty of proving a connection between a person and an advertisement, it observes that it is very difficult for an innocent defendant to prove his or her lack of connection to a publication that he or she did not have anything to do with. For example, if a non-compliant advertisement referring to a credit provider is published by an unscrupulous rival, a disgruntled ex-employee or a prankster, then it may be impossible for the named person to prove that he or she did not cause the advertisement to be published. The effect of s. 151(1) is that a defendant in such a circumstance will be wrongly convicted and liable to an \$11,000 fine.

While some meritorious prosecutions may fail in the absence of s. 151(1), the Committee is concerned that s. 151(1) may be a disproportionate way of avoiding this result. The State, in prosecuting an offence against s. 150, can rely not only on circumstantial inferences arising from the fact of publication, but also the State's powers to gather evidence of how the publication came about, including compulsorily examining witnesses, executing search warrants, accessing an array of technological surveillance measures, utilising government forensic labs and making offers of immunity from prosecution. By contrast, the defendant's resources to prove the opposite are much more limited.

The Committee observes that a provision equivalent to s. 151(1) is presently part of Victorian law.¹² However, s. 151(1) is less protective than the present law, because it is not subject to the operation of the Charter. In particular, a defendant charged under s. 150 will not be able to argue that s. 151(1) should be re-interpreted to impose a lesser burden pursuant to the interpretation rule in Charter s. 32, as the Charter's interpretative provision only applies to Victorian statutory provisions.

In light of s. 151(1)'s reversal of the onus of proof in relation to the essential issue of the defendant's actual involvement in the offence, and the resultant risk of a wrongful conviction, the Committee considers that s. 151(1) 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 s. 151(1) of the National Credit Code, by requiring a defendant who is named in a non-compliant credit advertisement to prove his or her innocence of the offence of causing its publication, is a reasonable limit on the Charter right of defendants to be presumed innocent of an offence until proved guilty.

The Committee makes no further comment.

¹¹ *Robinson v California*, 370 US 660 (1962). The same point is made by Gilbert and Sullivan in a passage from Act 2 of *The Mikado* that is well known to criminal lawyers: '**Poo Bah**: I wasn't there. **Mikado**: That's the pathetic part of it. Unfortunately, the fool of an Act says "compassing the death of the Heir Apparent." There's not a word about... not being there. There should be, of course, but there isn't. That's the slovenly way in which these Acts are always drawn. However, cheer up, it'll be alright. I've have it altered next session. Now, let's see about your execution...'

¹² *Consumer Credit Code*, s. 141(1), adopted as part of the law of Victoria by s. 5(a) of the *Consumer Credit (Victoria) Act 1995*.

Radiation Amendment Bill 2010

Introduced	23 February 2010
Second Reading Speech	24 February 2010
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Purpose and Background

The Bill amends the *Radiation Act 2005* to –

- allow the Secretary to impose further conditions on management licences relating to the management or control of the use of a radiation source **[4]**;
- clarify the scope of certain offences by inserting a ‘fault element’ into those offences **[5 and 7]**;
- allow the Secretary to impose conditions on licence exemptions that require compliance with incorporated documents such as codes of practice **[6]**;
- allow the Secretary to publish on the Internet specified parts of the register maintained under the Act that relate to use licences and to publish on the internet any information about any cancelled or suspended licences **[8]**; and
- make other minor statute law revision amendments to the *Radiation Act 2005* as described in the explanatory memorandum. **[9]**

The Committee makes no further comment.

Statute Law Amendment (National Health Practitioner Regulation) Bill 2010

Introduced	23 February 2010
Second Reading Speech	24 February 2010
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Purpose and Background

The Bill amends the *Health Professions Registration Act 2005* to reflect the enactment of the National Law (see *note below*), in particular, the Bill amends references to definitions of various registered health practitioners and makes consequential amendments to other Victorian legislation, including provisions in the *Drugs, Poisons and Controlled Substances Act 1981* which authorise persons to have possession of poisons or controlled substances. The Bill further provides for transitional arrangements to reflect the National Law.

In particular the amendments to the *Health Professions Registration Act 2005* will –

- allow for the regulation of Chinese medicine and medical radiation practitioners to continue unchanged until they join the national scheme on 1 July 2012. **[3, 14, 16 and 17]**
- allow for the continued operation of the Pharmacy Board of Victoria for the purpose of pharmacy premises regulation until the Victorian Pharmacy Authority is established. **[18, 23 and 29]**
- allow for the current State Health Profession Registration Boards to continue in operation beyond 1 July 2010 for the purpose of finalising their financial reports for the year ending 30 June 2010 in accordance with Victorian financial management legislation. **[29]**

Note: *The Health Practitioner Regulation National Law (Victoria) Act 2009 establishes the regulatory framework for the national scheme for the health professions and creates a single registration and accreditation scheme for ten of the health professions from 1 July 2010. The professions of Aboriginal and Torres Strait Islander health practitioners, Chinese medicine practitioners, medical radiation practitioners and occupational therapists will also join the scheme from 1 July 2012.*

Extract from the Statement of Compatibility –

This Bill makes consequential amendments to Victorian legislation following the enactment of the Health Practitioner Regulation National Law (Victoria) Act 2009 ('the National Law'). The National Law establishes a new national scheme for the accreditation and registration of health practitioners.

Health practitioners in 12 health professions in Victoria are currently regulated by the Health Professions Registration Act 2005.

Health practitioners in all but two of those health professions will be regulated by the national law as of 1 July 2010. Chinese medicine and medical radiation practitioners will be included in the national scheme on 1 July 2012.

It is necessary to amend the Health Professions Registration Act 2005, and other Acts, as a consequence of the new national scheme.

The Committee makes no further comment.

Ministerial Correspondence

Electricity Industry Amendment (Critical Infrastructure) Bill 2009

The Bill was introduced into the Legislative Assembly on 13 October 2009 by the Hon. Peter Batchelor MLA. The Committee considered the Bill on 9 November 2009 and made the following comments in Alert Digest No. 13 of 2009 tabled in the Parliament on 10 November 2009.

Committee's Comments

Charter report

Expression – Trespass on property related to electricity generation – Offence more onerous than regular trespass – Adequacy of Statement of compatibility

Summary: Clause 5 creates a criminal offence that may restrict and punish certain forms of protest about electricity generation more heavily than similar protests about other matters. The Committee will write to the Minister concerning the adequacy of the Statement of compatibility in relation to clause 5.

The Committee notes that clause 5, inserting a new section 79 into the Electricity Industry Act 2000, creates an offence of being on land or premises or in an enclosure containing large electricity generating facilities or related infrastructure without authority.

The Statement of Compatibility remarks:

The Bill does not raise any human rights issues because it simply creates new criminal offences and makes associated technical amendments.

The Committee observes that, while trespass on private land and scheduled public land is already a criminal offence, new section 79 is more onerous in two respects:

- There is no defence of 'lawful excuse', 'legitimate purpose' or that the defendant 'acted under a fair and reasonable supposition that he had a right to do the act complained'.*
- The penalty is one year imprisonment, rather than the six months imprisonment that applies to all other private land and scheduled public land*

The creation of a new and more onerous criminal offence specific to property related to electricity generation may restrict and punish certain forms of protest about electricity generation more heavily than similar protests about other matters. The Committee therefore considers that new section 79 may engage such protesters' Charter right to expression. While limitations on this right may be readily justified under the Charter, such a justification should be provided in the Statement of compatibility.

The Second Reading Speech remarks:

In recent times, the Latrobe Valley power stations have become a major focus of some protest groups. The actions of some protesters, however, in breaking into power stations... have the potential to disrupt production and threaten supply to the National Electricity Market...

Intruders into critical infrastructure sites are putting their lives at risk. Power stations, electricity switchyards and other critical infrastructure sites are not public places. They

are industrial sites with significant inherent dangers, and access must be restricted for safety reasons. Simply being in these areas can be very dangerous and lead to serious injury and possible death.

While the purposes of protecting essential services from disruption and people from serious injury or death are clearly important enough to justify limiting human rights, the Charter requires consideration of whether the particular limitation in new section 79 is 'reasonably necessary'. Overseas courts have held that limitations on political speech must not single out particular messages and must be the minimal impairment of those messages that is consistent with the goals of the limitation. The Committee notes that new section 79 does not apply to trespass on industrial sites or critical infrastructure that are unrelated to electricity generation; and does not require proof of either a potential disruption to the electricity supply or a risk to anyone's safety.

The Committee will write to the Minister expressing its concern about the Statement of compatibility. Pending the Minister's response, the Committee draws attention to new section 79.

Minister's Response

Thank you for your letter dated 11 November 2009, regarding the Electricity Industry Amendment (Critical Infrastructure) Bill 2009 (the Bill).

The Bill makes amendments to the Electricity Industry Act 2000, to provide for new offences relating to critical electricity infrastructure. The new offences created by the Bill will not prohibit demonstrations and protests provided those activities are conducted lawfully and do not affect the rights of other persons. The offences aim to deter unlawful acts that present risks to public safety and have the potential to disrupt the generation or distribution of electricity.

Responses to the specific comments made by the Committee are set out below:

The creation of a new and more onerous criminal offence specific to property related to electricity generation may restrict and punish certain forms of protest about electricity generation more heavily than similar protests about other matters. The Committee therefore considers that new section 79 may engage such protesters' Charter right to (freedom of) expression. While limitations on this right may be readily justified under the charter, such a justification should be provided in the Statement of compatibility.

The Bill does not single out protestors but applies to any persons committing the unlawful acts. Further, the Bill does not prevent free expression and protest so long as they occur outside critical electricity infrastructure sites, or even if they occur on such sites provided the protestors are authorised to enter.

The right to freedom of expression is subject to special duties and responsibilities including respecting the rights of others and for the protection of public order. The right does not extend to damaging or interfering with private property or trespassing on private land.

For these reasons, it is considered that the Bill does not engage the right to freedom of expression and this is why the Statement of Compatibility is silent as to this right.

The Committee notes that new section 79 does not apply to trespass on industrial sites or critical infrastructure that are unrelated to electricity generation; and does not require proof of either a potential disruption to the electricity supply or a risk to anyone's safety.

As the Bill amends the Electricity Industry Act 2000, a statute whose application is limited to the electricity sector, it would not be appropriate for the new offences to have been drafted so as to apply more broadly.

Whether, in particular cases, there is a potential for disruption to electricity supply or, anyone's safety is affected, are matters a court will no doubt consider. As noted in the Second Reading speech, the Bill recognises that power stations, switchyard and other electricity infrastructure sites are not public places but industrial sites with significant inherent dangers. Access is restricted for safety reasons. This is the normal State of affairs at power stations, not a special arrangement invoked only when a protest is announced.

I thank the Committee for its comments on the Bill.

*Peter Batchelor MP
Minister for Energy and Resources*

Received 3 March 2010

The Committee thanks the Minister for this response.

**Committee Room
9 March 2010**

Appendix 1

Index of Bills in 2010

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Constitution (Appointments) Bill 2009	1
Consumer Affairs Legislation Amendment Bill 2009	2
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Crimes Legislation Amendment Bill 2009	1
Education and Training Reform Amendment Bill 2009	1
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Serious Sex Offenders (Detention and Supervision) Bill 2009	1
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Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

Accident Compensation Amendment Bill 2009 1

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

Transport Integration Bill 2009 1

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

Transport Integration Bill 2009 1

(vi) inappropriately delegates legislative power

Public Finance and Accountability Bill 2009 1

Transport Integration Bill 2009 1

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

Crimes Legislation Amendment Bill 2009 1

Livestock Management Bill 2009 1

Severe Substance Dependence Treatment Bill 2009 1

Section 17(b)

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

Accident Compensation Amendment Bill 2009 1

Appendix 3

Ministerial Correspondence 2009-10

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

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Electricity Industry Amendment (Critical Infrastructure) Bill 2009	Energy and Resources	10.11.09 03.03.10	13 of 2009 3 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
Transport Integration Bill 2009	Transport	02.02.10 22.02.10	1 of 2010 2 of 2010

Outstanding correspondence

Justice Legislation Miscellaneous Amendments Bill 2009	Police and Emergency Services	10.11.09	13 of 2009
Accident Compensation Amendment Bill 2009	Finance, WorkCover and the Transport Accident Commission	02.02.10	1 of 2010
Crimes Legislation Amendment Bill 2009	Attorney-General	02.02.10	1 of 2010
Public Finance and Accountability Bill 2009	Treasurer	02.02.10	1 of 2010
Severe Substance Dependence Treatment Bill 2009	Mental Health	02.02.10	1 of 2010