

No. 12 of 2013

**Tuesday, 17 September
2013**

On the

Fisheries Amendment Bill 2013

Plant Biosecurity Amendment Bill 2013

Professional Boxing and Combat Sports
Amendment Bill 2013

Statute Law Revision Bill 2013

The Committee



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Member for Eastern Metropolitan



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Member for Pascoe Vale



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Terms of Reference - Scrutiny of Bills

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;

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Useful information

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) introduced or tabled in the Parliament. The Committee does not make any comments on the policy merits 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.

Interpretive use of Parliamentary Committee reports

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.

When may human rights be limited

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 limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

Glossary and Symbols

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

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

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

'DPP' refers to the Director of Public Prosecutions for the State of Victoria

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

'IBAC' refers to the Independent Broad-based Anti-corruption Commission

'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 \$140.84)

'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

Alert Digest No. 12 of 2013

Fisheries Amendment Bill 2013

Introduced	3 September 2013
Second Reading Speech	4 September 2013
House	Legislative Assembly
Member introducing Bill	Hon Peter Walsh MLA
Portfolio responsibility	Minister for Agriculture and Food Security

Purpose

The Bill amends the *Fisheries Act 1995* ('the Act') to establish a Fisheries Advisory Council. The purpose of the Council is to provide advice to the Minister for Agriculture and Food Security on strategic matters relating to fisheries management.

The Bill also makes miscellaneous amendments to the Act to:

- improve fisheries management outcomes, including streamlining the existing provisions which enable the Department to levy commercial fishers for the provision of government services and giving the Department more flexibility to determine the method for calculating levies
- replace the requirement for the Minister to publish a new fisheries notice in its entirety in a local newspaper with a requirement to publish the notice on the Department's website and a notice of the making of the fisheries notice in a local newspaper
- amend the definition of rock lobster to reflect new scientific information on the classification of the species.

Charter report

The Fisheries Amendment Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Professional Boxing and Combat Sports Amendment Bill 2013

Introduced	4 September 2013
Second Reading Speech	5 September 2013
House	Legislative Assembly
Member introducing Bill	Hon Hugh Delahunty MLA
Portfolio responsibility	Minister for Sport and Recreation

Purpose

The Bill amends the *Professional Boxing and Combat Sports Act 1985* ('the Act') to:

- specify the circumstances where a person will be automatically prohibited from obtaining or holding a licence under the Act. [6]
- require the licensing of time-keepers under the Act and subject them to the same probity requirements as promoters, judges, trainers and match-makers. [6, 12]
- allow the Professional Boxing and Combat Sports Board ('the Board') to consider whether an applicant for a licence is a fit and proper person and to consider public interest when determining whether to issue or renew a licence to act as a promoter, trainer, matchmaker, referee, judge or timekeeper. [6]
- enable the Chief Commissioner of Police ('the Chief Commissioner') to provide information to the Board in respect of a person applying for, or holding, a licence under the Act [6, 15]
- provide for the Board to vary, suspend or cancel existing licences issued to a person if, in the Board's opinion, that person is not a fit and proper person to hold a licence or it is no longer in the public interest for that person to hold a licence. [9]
- create a duty for a licensed promoter to neither employ nor enter into any business relationship or arrangement relating to a professional contest with any person who has been refused a licence or had their licence cancelled because they are not a fit and proper person to hold a licence or because it is not in the public interest for that person to hold a licence. [11]
- provide a procedure for the appointment of special counsel and the publishing of reasons for a decision where protected information is involved in a proceedings before the VCAT ('the Tribunal') [21]
- amend the *Casino Control Act 1991* and the *Racing Act 1958* to require the Chief Commissioner to advise the Board where an exclusion order has been made under either of these Acts. [24, 25]

Amendments to the Act

Rights or freedoms – Fair hearing – Administrative Law – Disclosure of evidence adverse to party – Duty to give reasons for decisions – Decisions based on protected information – Public interest – Appointment of Special Counsel by VCAT where protected information – Right to choose counsel – Counsel's limited contact with client – Closed hearings

The Bill includes definitions for 'protected information', 'prohibited person' [5] and 'probity requirement'. [19]

'protected information' – means intelligence, information, document or thing the production of which (to the Board) is likely to –

- reveal the identity of police who provided information or put such a person at risk

- reveal the identity of a person who has provided information to the police, or put such person at risk
- reveal the identity of a person whose name appears in any evidence or information provided to the police or put that person at risk
- reveal the identity of a person who is or has been under investigation by the police or put that person at risk
- places at risk an ongoing investigation by the police
- risk the disclosure of any investigative method used by the police
- is otherwise not in the public interest.

The Bill –

- inserts a new section 6A to require the Board to give a copy of an application for a licence under section 6 to the Chief Commissioner. The Chief Commissioner must advise the Board on certain matters including whether the person is a prohibited person or is a fit and proper person to hold a licence. In doing so the Chief Commissioner may rely on any information about the applicant including protected information. Where the Chief Commissioner's advice is wholly or partly based on protected information the Chief Commissioner may not include the protected information in the written response to the Board. **[6]**
- inserts a new section 6C requiring the Board to give reasons for a decision not to issue or renew a licence under the Act. In giving reasons for its decision whether to issue, renew or cancel a licence the Board must not disclose any protected information other than to state that the decision is based on information received from the Chief Commissioner of Police. **[6, 9]**
- inserts provisions to allow an inquiry to be held to determine whether a licensee continues to meet probity requirements. As with licensing and renewal the provisions include the use of protected information regime. **[9]**
- provides that decisions of the Board are appealed to VCAT. However a person who is a prohibited person may not appeal the Board's decision other than the threshold determination that the person meets the definition of 'prohibited person'. **[20]**
- inserts new sections 17A to 17E in the Act to set out a special procedure to be followed by VCAT when reviewing a decision of the Board where the decision was based on advice from the Chief Commissioner and that advice was based partly or wholly on protected information. VCAT must first determine whether the information is properly classified as protected information. In such cases VCAT must appoint special counsel (a barrister) to represent the applicant, and the Board where the protected information was not made known to the Board. The provisions set out how the special counsel may represent the parties before the VCAT hearing. Hearings are closed to the applicant, the public and the Board (in cases where the information was not made known to the Board). Special counsel may seek instructions from their client before a VCAT hearing commences but not after its commencement, other than where the VCAT approves written questions to be put to the client. The client may also be told of the outcome of the proceedings. A decision of VCAT where protected information is involved may only state whether the Board's decision is upheld or overturned. **[21]**
- provide that where the proceedings involve protected information the relevant provisions of the Victorian Civil and Administrative Tribunal Act 1998 and the Administrative Law Act 1978 do not apply. The excluded provisions ordinarily impose a duty on a decision maker to provide reasons for a decision. (new section 17F) **[21]**

The Committee notes that these provisions may derogate from a number of generally accepted principles of administrative law concerning natural justice (fair hearing), these are – (a) a party

should have full and fair disclosure and access to all relevant and admissible evidence in defending their own interests in a hearing or proceedings; (b) decision makers should in the ordinary course, give adequate and transparent reasons for their decisions; (c) a party should be free to choose counsel to represent their interests; (d) hearings or proceedings should be held in open session.

The Committee notes that, in recent years, the High Court has upheld the constitutional validity of other legislative schemes that permit a court or tribunal to make decisions based on evidence that is not revealed to a party, including schemes that provide for the appointment of a special counsel to represent that party's interests at a closed hearing.¹

The Committee accepts that there may be circumstances where sensitive information, which is otherwise relevant and admissible evidence, needs to be withheld from a party in the public interest. In these cases the applicant will be denied disclosure of this evidence. Further the Committee notes that the decision maker may itself not have full disclosure to this information, or where it has access, may not be able to include adequate reference to these excluded matters in the reasons for their decisions. Where protected information is involved the Committee notes that on appeal the Tribunal may only be able to state that the Board's decision is upheld or overturned, and where it is upheld, state no more than that, the applicant has failed to meet the probity requirements for holding a licence. The Tribunal may publish reasons to the extent that the reasons do not relate to protected information. Further the Committee notes that in circumstances involving protected information it may be necessary for the Tribunal to appoint special counsel to assist the parties, and to hold proceedings in private.

Whether the provisions in the Bill are reasonable and proportionate, are matters for the Parliament to consider.

Charter report

The Professional Boxing and Combat Sports Amendment Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

¹ See *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532; *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501; and *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7, respectively concerning schemes for fortification removal in Western Australia, liquor licensing in South Australia and the control of criminal organisations in Queensland.

Statute Law Revision Bill 2013

Introduced	3 September 2013
Second Reading Speech	4 September 2013
House	Legislative Assembly
Member introducing Bill	Hon Dr Denis Naphthine MLA
Portfolio responsibility	Premier

Purpose

The Bill proposes to make statute law revision amendments to:

- correct minor errors or omissions such as cross-references, spelling, drafting or grammatical errors
- repeal spent subsections, sections, divisions or parts of Acts
- remedy ineffective legislative instructions or amendments
- update the names of government departments
- re-enact transitional, savings and substantive provisions from various amending Acts into two Acts to enable the amending Acts to be repealed
- repeal spent or redundant Acts
- repeal an unproclaimed Act and other Acts with unproclaimed provisions.

The Bill in brief

[Clauses]

[1]. *Purpose* – The Bill revises the statute law of Victoria.

[2]. *Commencement* – Other than specified items in Schedule 1, the amendments and repeals come into force on 1 December 2013. The specified items have retrospective application and are examined individually in this report.

[3]. *Schedule 1* – provides for general statute law revision amendments such as the repeal of spent sections, divisions or parts, the correction of grammar, punctuation, spelling, cross referencing errors. Other amendments rectify failed or ineffective amendments.

[4]. *Schedule 2* – amends Acts to correct references in those Acts to names of government Departments.

[5]. *Schedule 3* – amends two Acts by re-enacting certain transitional and other provisions currently found in amending Acts that are proposed to be repealed by the Bill.

[6]. *Schedule 4* – lists Acts identified as suitable for repeal. The Acts proposed to be repealed fall into 4 categories. The reason for repeal of each Act is discussed in the explanatory memorandum.

[7]. *Self-repeal* – This Act will be automatically repealed on 1 December 2014. Once the amendments in the Bill have taken effect on 1 December 2013, the Statute Law Revision Act 2013 will be spent.

Retrospective provisions in Schedule 1

In each item below the retrospective application of the amendment seeks to remove any doubt that the amendments to be made took effect as intended from the commencement of the section.

Item 10 – County Court Act 1958

Amends section 28 by substituting a new subsection (1) to correct an amendment intended to be made by section 4(2)(b) of the *Justice Legislation Amendment Act 2012* (now repealed). Section 4(2)(b) referred incorrectly to the words to be omitted from section 28(1). The words to be removed were missing the word "the" and some punctuation. This item is made retrospective to 9 May 2012, the day on which section 4(2)(b) came into operation.

Item 24 – Integrity and Accountability Legislation Amendment Act 2012 ('the Act')

Corrects an error in section 27 which amended section 4 of the *Victorian Inspectorate Act 2011*, and should have been worded "In section 4" rather than "After section 4". This amendment is made retrospective to 9 February 2013, the day before section 27 of the Act came into operation.

Note: Section 4 of the Victorian Inspectorate Act 2011 was renumbered as section 5 by section 301 of the 2012 Act on 11 February 2013.

Item 35 – Mineral Resources (Sustainable Development) Amendment Act 2012

Substitutes section 6(1) so that it 'inserts' rather than 'substitutes' the heading to section 110 of the *Mineral Resources (Sustainable Development) Act 1990*. The 'old' heading to section 110 did not form part of the 1990 Act as it pre-dated amendments made to the Interpretation of Legislation Act 1984, which provided that section headings form part of an Act. This amendment is made retrospective to 31 January 2013, the day before the day section 6(1) came into operation.

Item 47 – Resources Legislation Amendment (General) Act 2012

Item 47.1 amends section 16 to correct an incorrect reference to the words of the provision being removed (section 14A of the *Mineral Resources (Sustainable Development) Act 1990*). The word "a" should have been included in the words to be removed from section 14A. This item is made retrospective to 30 November 2012, the day before the day section 16 came into operation.

Item 47.2 amends section 38(2) to correct an incorrect reference to the words of the provision being removed (section 77TD(5) of the *Mineral Resources (Sustainable Development) Act 1990*). The word "a" should have been included in the words to be removed from section 77TD(5). This item is made retrospective to 30 November 2012, the day before the day section 38 came into operation.

Item 57.2 – Victorian Commission for Gambling and Liquor Regulation Act 2011

Amends item 4.99 of the Schedule to correct an error in the amending words of that item. The item purported to "insert" a new Division heading in Part 2 of the *Liquor Control Reform Act 1998* when it should have "substituted" the new heading. This item is made retrospective to 5 February 2012, the day before the day item 4.99 came into operation.

Item 59 – Victorian Inspectorate Act 2011

This item amends clause 7(4) of the Schedule to correct a reference to a section of the *Independent Broad-based Anti-corruption Commission Act 2011*. A reference to section 82S of that 2011 Act is corrected to be a reference to section 134 of that Act. Section 82S of the *Independent Broad-based Anti-corruption Commission Act 2011* was renumbered as section 134 by section 298 of the *Integrity and Accountability Legislation Amendment Act 2012*, but that

2012 Act omitted to amend the reference to section 82S in clause 7(4) of the Schedule to the Victorian Inspectorate Act 2011. This item is made retrospective to 11 February 2013, the day on which the renumbering of section 82S to section 134 took effect, to ensure that clause 7(4) refers to section 134 of the Independent Broad-based Anti-corruption Commission Act 2011 from the day of the renumbering of that section.

Rights and freedoms – Justification for retrospective application of amendments

The Committee is satisfied that the retrospective amendments in items 10, 24, 35, 47.1, 47.2, 57.2 and 59 appear to be necessary and appropriate to be included in a statute law revision Bill. The amendments merely seek to remove any doubt that the amendments to be made took effect as intended from the commencement of the section.

The amendments do not appear to unduly trespass on rights and freedoms.

Repeal of Acts

Schedule 4 of the Bill proposes to repeal twenty (20) spent or redundant Acts in four categories –

1. Principal Acts listed in items 1.1 to 1.6 of the explanatory memorandum. These are principal Acts that have been identified as spent or redundant.
2. Amending Acts listed in items 2.1 to 2.9 of the explanatory memorandum. These Acts contain transitional, savings, or substantive provisions. The explanatory memorandum provides that the substantive provisions are no longer required because they have taken effect and are spent or they are redundant. Any residual operation or continuing effect of the transitional and savings provisions and the effect of any validation provisions will be preserved by section 14 of the *Interpretation of Legislation Act 1984*.
3. A spent wholly unproclaimed Act (item 3.1 in the explanatory memorandum), and unproclaimed provisions in two other Acts that are no longer required (items 3.2 and 3.3 in the explanatory memorandum).
4. Spent amending Acts listed in items 4.1 and 4.2 of the explanatory memorandum. These Acts are wholly in operation and have amended the Acts they were enacted to amend and contain no transitional or substantive provisions.

Charter report

The Statute Law Revision Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee will report further on the provisions in this Bill in response to a Legislative Assembly referral made to the Committee on 5 September 2013.²

² Votes and Proceedings of the Legislative Assembly - No 146 , Thursday, 5 September 2013.

Ministerial Correspondence

Plant Biosecurity Amendment Bill 2013

The Bill was introduced into the Legislative Assembly on 16 April 2013 by the Hon. Robert Clark MLA. The Committee considered the Bill on 7 June 2013 and made the following comments in Alert Digest No. 8 of 2013 tabled in the Parliament on 11 June 2013.

Committee Comment

Rights and freedoms – Retrospective provision – Charge on land for debt to State – Practice Note No. 1 – Absence of explanation justifying retrospective application

Clause 7 of the Bill inserts the new charge on land debt recovery scheme in the Act being new sections 59A to 59D. Clause 8 is a transitional provision (new section 144 in the Act) and effectively applies those new sections to the recovery of expenses and costs incurred on or after 1 July 2013 but not paid before the commencement date.

The Committee notes the retrospective application of this provision and will write to the Minister seeking further information justifying retrospective application of this provision.

[Charter report]

Right to property – Charge on land for expenses incurred following non-compliance with requirements – Transitional provision – Notice to prescribed owner of land

Summary: The Committee will write to the Minister seeking further information as to whether or not clause 8, by permitting a charge to be imposed on land for costs and expenses incurred between 1 July 2013 and the Bill's commencement by an inspector as a result of non-compliance with requirements relating to infestations, even if the land's owner was not notified of the requirements and was not responsible for the non-compliance, is compatible with the owner's Charter right not to be deprived of property other than in accordance with law.

The Committee notes that clause 7, inserting new sections 59A to 59C, provides for a charge to be placed on land for the amount of reasonable costs and expenses incurred by an inspector in carrying out requirements imposed under an infested land notice or accompanying a declaration that the land is an infested place or a restricted area. Existing s. 58 provides that the inspector can only carry out the requirements after the recipient of the notice or order failed to comply with them and that the inspector's reasonable costs and expenses may only be recovered from the recipient (or another person responsible for the non-compliance) if the Minister so determines. New section 59A(1) provides that a charge can be placed on land where there was 'a failure by an owner or occupier of land to comply with' a requirement.ⁱ

The Committee observes that the effect of clause 7 is that a charge can be placed on land even when the requirement was only directed to an occupier of the land and the owner was

ⁱ Existing s. 25 provides that the Secretary 'the Secretary may give the owner or occupier of the land' an infested land notice. New section 59A(1)(b), limits the application of the scheme, with respect to requirements imposed under an infested place or restricted area notice, to 'a requirement on the owner or the occupier of the land to do anything in relation to the land.'

not responsible for the non-compliance.ⁱⁱ The Committee considers that clause 7 may engage the Charter right of land owners not to be deprived of property ‘other than in accordance with law’.ⁱⁱⁱ The Statement of Compatibility does not address the compatibility of clause 7 with the Charter’s right to property.

The Committee notes that clauses 4 and 5, amending existing ss. 25 and 35, require that the ‘prescribed owner’ of the land be contemporaneously notified of all relevant requirements imposed on owners or occupiers after the Bill’s commencement.^{iv} The Committee observes that the effect of clauses 4 and 5 is to enable the prescribed owner to take steps to ensure timely compliance with the requirements or to challenge them, the inspector’s decision to carry them out or the Minister’s determination to recover the costs or expenses.^v The Committee therefore considers any charges on property made under clause 7 arising from requirements imposed after the Bill’s commencement are compatible with the Charter’s right to property.

However, the Committee observes that clause 8, inserting a new section 144, permits a charge to be made on land in respect of reasonable costs and expenses incurred on or after 1 July 2013 but not paid before the Bill’s commencement date, even when the prescribed owner was not given notice of the earlier requirements.^{vi} The Explanatory Memorandum remarks:

The new sections will apply even though the prescribed owner may not have received a copy of the notice under section 25(5) or direction under section 35(5), or a copy of the determination under section 58(1). However, in accordance with the provisions, the prescribed owner will be served with a notice to charge and have 30 days to arrange payment of the debt before the charge is created.

The Committee notes that, by the time a prescribed owner is given the notice to charge,^{vii} he or she will have no opportunity to ensure that the earlier requirements were complied with or to challenge the original requirements, the inspector’s decision to carry them out or the Minister’s decision to recover the inspector’s costs and expenses. The Committee observes that only a narrow category of owners – those who own land on which an inspector carried out defaulted requirements between 1 July 2013 and the Bill’s commencement – face this potential procedural disadvantage.^{viii}

ⁱⁱ The scheme also applies if the requirement was directed to one of several owners of the land and the other owners were not responsible for the non-compliance.

ⁱⁱⁱ Charter s. 20. The relevant ‘property’ is the amount of reasonable costs or expenses, either as a charge on the land or a payment to avoid the charge being imposed.

^{iv} See also clause 6, amending existing s. 58, providing for the prescribed owner to be contemporaneously notified of a Minister’s determination to recover the reasonable costs and expenses of carrying out requirements that weren’t complied with. Each notice requirement is subject to a proviso that no additional notice is required if the prescribed owner was notified as an owner, occupier or responsible person under existing ss. 25(1), 35(2) & 58(3). Clause 3, amending existing s. 3, defines ‘prescribed owner’ as the registered proprietor of registered land or the owner of non-registered land.

^v Existing s. 59 provides for a person affected by the Minister’s decision to recover costs and expenses to apply for VCAT to review the determination within 28 days. Existing s. 60(2) provides for a person affected by the Secretary’s decision to issue an infected land notice to have the decision reviewed by the Minister within 7 days.

^{vi} New section 144(2) provides that a charge may be made ‘even though the prescribed owner of the land to which the determination relates was not given notice under section 25(5) or 35(5) or, in the case of a determination made by the Minister before the commencement date, under section 58(4).’

^{vii} New section 59A(2)(a) provides for the notice to be given 7 days or more after the end of the period for applying to VCAT for review.

^{viii} Compare *Salvesen v The Lord Advocate (Scotland)* [2013] UKSC 22. [44], where the United Kingdom Supreme Court recently held that retroactive legislation that provided different procedural protections to categories of property owners based solely on the timing of a particular dealing relating to their property was incompatible with the right to property in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

The Committee will write to the Minister seeking further information as to whether or not clause 8, by permitting a charge to be imposed on land for costs and expenses incurred between 1 July 2013 and the Bill's commencement by an inspector as a result of non-compliance with requirements relating to infestations, even if the land's owner was not notified of the requirements and was not responsible for the non-compliance, is compatible with the owner's Charter right not to be deprived of property other than in accordance with law.

Minister's Response

Thank you for your letter dated 3 September 2013 regarding the Scrutiny of Acts and Regulations Committee's consideration of the Plant Biosecurity Amendment Bill 2013.

The committee has asked for further information about the compatibility of clause 8 of the Bill with the right not to be deprived of property other than in accordance with law, as protected by s. 20 of the *Charter of Human Rights and Responsibilities Act 2006* (CHRRRA). The committee has raised this question in the specific context of clause 8 potentially permitting a charge to be imposed on land for costs and expenses incurred between 1 July 2013 and the Bill's commencement as a result of non-compliance with requirements relating to infestations, in circumstances where the owner of the relevant land may not have been notified of such requirements and was not responsible for the relevant non-compliance.

New s. 59A (inserted by clause 7 of the Bill) provides that notice of a charge on land may be served on a prescribed owner of land where the minister has made a determination under s. 58(2) of the *Plant Biosecurity Act 2010* (PBA) to recover reasonable costs and expenses incurred by an inspector as a result of the failure of any person to comply with an order, direction, notice or requirement under s. 25 or s. 35 of the PBA. Under ss. 25 and 35, such requirements may be issued to owners or occupiers of relevant land. It is therefore conceivable that an owner of land could receive a notice under new s. 59A of the Bill, without having received prior notice of the relevant requirement (or an opportunity to either comply with such requirements, or challenge a determination to recover associated costs and expenses). I note, however, that a decision to issue a notice under s. 59A, being an exercise of statutory power, could be reviewed by the Supreme Court. In any case, it is the department's practice to advise an owner of the issue of a notice to an occupier so that both parties are aware of the biosecurity risk.

In my view, no issue arises in circumstances where a determination under s. 58(2) is made after the Bill's commencement. This is because under new s. 58(4), prescribed owners of land must be provided with a copy of any determination made under s. 58(2). Under s. 59 of the PBA, a prescribed owner may then apply to VCAT for review of the determination. On the other hand, I acknowledge that an issue may, theoretically, arise in circumstances where a determination under s. 58(2) is made before the Bill's commencement, in relation to costs and expenses incurred between 1 July 2013 and that date. However, I note that this is a hypothetical issue only. This is because the owner would in practice have been made aware of a notice sent to an occupier and because no determinations have in fact been issued under s. 58(2) since 1 July 2013; further, to my knowledge, no such determinations will be made prior to the Bill's commencement (which I expect to be imminent) as there are no outstanding requirements that could give rise to a determination.

In any event, I do not consider the issue raised by the committee to amount to a breach of s. 20 of the CHRRRA. This section protects against deprivations of property that are imposed other than in accordance with law. While a charge on land may be viewed as a 'burden' on the land, it does not, in my view, amount to any deprivation of property. An owner of land

will remain free to sell or dispose of the land, and use it in any lawful manner. Moreover, even if a charge could be considered a deprivation of property, any such deprivation would be in accordance with the act (as amended by the Bill), which establishes a clear and reasonable framework for ensuring compliance with requirements relating to infestations on private land, and the recovery of associated costs and expenses incurred by the state. Any deprivation would therefore be 'in accordance with law' and compatible with s 20 of the CHRR.

PETER WALSH MLA

Minister for Agriculture and Food Security

Received 16 September 2013

The Committee thanks the Minister for this response.

Appendix 1

Index of Acts and Bills in 2013

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Appropriation (2013-2014) Bill 2013	7
Appropriation (Parliament 2013-2014) Bill 2013	7
Assisted Reproductive Treatment Amendment (Access by Donor-Conceived People to Information About Donors) Bill 2013	10
Assisted Reproductive Treatment Amendment Bill 2012	1
Bail Amendment Bill 2013	6, 9
Building and Planning Legislation Amendment (Governance and Other Matters) Bill 2013	7
Children, Youth and Families Amendment Bill 2013	10
Company Titles (Home Units) Bill 2013	3
Consumer Affairs Legislation Amendment Bill 2013	11
Co-Operatives National Law Application Bill 2013	2, 3
Corrections Amendment Bill 2012	1
Corrections Amendment (Breach of Parole) Bill 2013	10
Corrections Further Amendment Bill 2013	5
Courts Legislation Amendment (Reserve Judicial Officers) Bill 2012	1
Courts Legislation (Judicial Officers) Bill 2013	11
Crimes Amendment (Gross Violence Offences) Bill 2012	1
Crimes Amendment (Integrity in Sports) Bill 2013	4
Education and Training Reform Amendment (School Attendance) Bill 2013	6
Education and Training Reform Amendment (Teacher Registration and Other Matters) Bill 2013	2
Energy Legislation Amendment (Feed-In Tariffs and Other Matters) Bill 2013	5
Energy Legislation Amendment (Flexible Pricing and Other Matters) Bill 2012	1
Fisheries Amendment Bill 2013	12
Fortification Removal Bill 2013	6, 7
Gambling Regulation Amendment Bill 2013	5
Heavy Vehicle National Law Application Bill 2013	6, 7
Integrity Legislation Amendment Bill 2013	5
Jury Directions Bill 2012	1
Justice Legislation Amendment Act 2013	9
Justice Legislation Amendment Bill 2013	6
Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013	2, 4
Major Sporting Events Amendment Bill 2013	3
Major Transport Projects Facilitation Amendment (East West Link and Other Projects) Bill 2013	9
Marine (Domestic Commercial Vessel National Law Application) Act 2013	9
Marine (Domestic Commercial Vessel National Law Application) Bill 2013	7
Open Courts Bill 2013	10
Parliamentary and Public Administration Legislation Amendment Bill 2013	7
Parliamentary Committees Amendment Bill 2013	5
Planning and Environment (Growth Areas Authority and Miscellaneous) Bill 2013	4
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Plant Biosecurity Amendment Bill 2013	11, 12
Professional Boxing and Combat Sports Amendment Bill 2013	12
Radiation Amendment Bill 2013	11
Rail Safety National Law Application Bill 2013	4, 5
Residential Tenancies Amendment (Rooming House Standards) Bill 2013	6
Road Legislation Amendment (Use and Disclosure of Information and Other Matters) Bill 2013	9
Road Safety and Sentencing Acts Amendment Bill 2013	9
Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2013	6, 7
State Tax Laws Amendment (Budget and Other Measures) Bill 2013	7
Statute Law Amendment (Directors' Liability) Bill 2012	1, 2
Statute Law Revision Bill 2013	12
Succession to the Crown (Request) Bill 2013	10
Superannuation Legislation Amendment Bill 2013	11
Sustainable Forests (Timber) Amendment Bill 2013	6
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	2
Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013	4, 5
University of Ballarat Amendment (Federation University Australia) Bill 2013	10

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 or Member.

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

Plant Biosecurity Amendment Bill 2013 11

(viii) is incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006*

Adoption Amendment Bill 2013 4

Co-operatives National Law Application Bill 2013 2

Fortification Removal Bill 2013 6

Heavy Vehicles National Law Application Bill 2013 6

Justice Legislation Amendment Act 2013 8

Marine (Domestic Commercial Vessel National Law Application) Bill 2013 7

Plant Biosecurity Amendment Bill 2013 11

Radiation Amendment Bill 2013 11

Rail Safety National Law Application Bill 2013 4

Statute Law Amendment (Directors' Liability) Bill 2012 1

Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013 4

Section 17(b)

Appendix 3

Ministerial Correspondence 2013

Table of correspondence between the Committee and Ministers and members during 2012-13

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	Ms Colleen Hartland MLC	11-12-12 06-02-13	18 of 2012 2 of 2013
Statute Law Amendment (Directors' Liability) Bill	Attorney-General	05-02-13 18-02-13	1 of 2013 2 of 2013
Co-operatives National Law Application Bill 2013	Consumer Affairs	19-02-13 28-02-13	2 of 2013 3 of 2013
Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013	Corrections	04-03-13	[i] 4 of 2013
Adoption Amendment Bill 2013	Community Services	19-03-13 04-04-13	4 of 2013 5 of 2013
Rail Safety National Law Application Bill 2013	Public Transport	19-03-13 01-04-13	4 of 2013 5 of 2013
Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013	Public Transport	19-03-13 01-04-13	4 of 2013 5 of 2013
Fortification Removal Bill 2013	Attorney-General	07-05-13 24-05-13	6 of 2013 7 of 2013
Heavy Vehicles National Law Application Bill 2013	Roads	07-05-13 27-05-13	6 of 2013 7 of 2013
Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2013	Attorney-General	17-05-13	[ii] 7 of 2013
Justice Legislation Amendment Bill 2013	Attorney-General	11-06-13 22-06-13	8 of 2013 9 of 2013
Marine (Domestic Commercial Vessel National Law Application) Bill 2013	Ports	28-05-13 13-06-13	7 of 2013 9 of 2013

ⁱ The Committee's report on the Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013 appeared in Alert Digest No. 2 of 2013.

ⁱⁱ The Committee's report on the Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2013 appeared in Alert Digest No. 6 of 2013.

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Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Plant Biosecurity Amendment Bill 2013	Agriculture and Food Security	03-09-13 16-09-13	11 of 2013 12 of 2013
Radiation Amendment Bill 2013	Health	03-09-13	11 of 2013