

No. 9 of 2011

Tuesday, 30 August 2011

On the

Commercial Arbitration Bill 2011

Parliamentary Salaries and
Superannuation Further Amendment
Bill 2011

Resources Legislation Amendment Bill
2011

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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) 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.

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*;

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

'*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;

'*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 \$119.45).

'*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.

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Commercial Arbitration Bill 2011

Introduced	16 August 2011
Second Reading Speech	17 August 2011
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Background and Content

The purpose of the Bill is to:

- repeals the *Commercial Arbitration Act 1984 (Vic)* and replace it with a new model Bill agreed to by the Standing Committee of Attorneys-General, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the model law) where appropriate, supplemented by provisions relevant to a domestic commercial arbitration scheme.
- make Victoria's commercial arbitration laws as consistent as possible with the Acts already passed in New South Wales and Tasmania and introduced this year, in South Australia, Western Australia and the Northern Territory.
- assist the alignment of the domestic commercial arbitration regime with the *International Arbitration Act 1974 (Cth)*.
- create an environment which encourages better use of the domestic commercial arbitration regime ensure that businesses have better access to processes for the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.
- develop the model law arbitration expertise of Australian courts, lawyers and businesses and Australia as a centre for international arbitration.

Extract from the Explanatory Memorandum –

The model Bill encourages the use of arbitration agreements to manage domestic commercial disputes by adopting the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law), taking into account the Commonwealth's International Arbitration Act 1974 (the Commonwealth Act) and with appropriate modifications for domestic commercial arbitration. This Bill contains minor technical amendments to the model Bill to make it consistent as far as possible with the Commercial Arbitration Acts already passed in New South Wales and Tasmania.

The paramount object of this Bill is to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense. The Bill will help align the domestic commercial arbitration regime with the Commonwealth Act, which is based on the Model Law and was amended in 2010 to ensure greater conformity with the model Bill. The Bill supports the Government's commitment to promote a business environment which encourages efficiency and fairness.

The Bill also contains a number of additional provisions supporting the arbitration process and some optional provisions which may be used by the parties to an arbitration agreement should a dispute arise between them. These include provisions relating to assistance from the Supreme Court (or another court nominated by the parties), the consolidation of arbitral proceedings, the disclosure of confidential information and the awarding of interest and costs. The Bill also provides for the issue of subpoenas, and

the recognition and enforcement of awards with respect to domestic commercial arbitrations. In addition, the Bill enacts provisions of a savings and transitional nature and makes consequential amendments to other Acts.

Notes in the Bill identify where the Bill and the Model Law differ (in other than minor technical respects). The Bill reflects the numbering of the Model Law and, to ensure consistency with the numbering in it, contains gaps in numbering and use of alphabetical numbering.

Committee comment

Repeal, alteration or variation of section 85 of the Constitution Act 1975 (unlimited jurisdiction of the Supreme Court)

Limitation concerning the jurisdiction of the Supreme Court – Decision in certain cases to be final – Right to a fair hearing

The Bill declares that it is the intention of clauses 5, 11(5), 13(5), 14(3), 16(10), 27H(5) and 27I(4) to alter or vary section 85 of *Constitution Act 1975*. [40]

The Committee notes the section 85 *Constitution Act 1975* statement delivered with the Second Reading Speech –

Extent of court intervention

Clause 5 of the Bill provides that 'in matters governed by this Act, no court must intervene except where so provided by this Act'. Clause 5 varies section 85 of the Constitution Act 1975 by limiting the intervention of the Supreme Court (the court) to instances specifically provided for in the Bill.

The reason for the variation to section 85 of the Constitution Act 1975 is to help achieve certainty regarding the maximum extent of judicial intervention by the court.

This will strengthen the finality and authority of arbitral tribunal decisions, providing parties with reduced scope for recourse to the courts during and after arbitral proceedings. This is consistent with the overall objective of the Bill.

Decision of the court is final

Clauses 11(5), 13(5), 14(3), 16(10), 27H(5) and 27I(4) of the Bill provide that a decision of the court that is made within the limits of the authority of the court is final.

These clauses vary section 85 of the Constitution Act 1975 as they limit the jurisdiction of the court by providing that certain decisions made under the Bill within the court's powers and functions are final and binding and are not subject to appeal or review by a court or tribunal.

These are decisions of the court: under clause 11(3) to appoint an arbitrator; under clause 11(4) to take an action under an appointment procedure; under clause 13(4) on a challenge to an arbitrator; under clause 14(2) on the termination of the arbitrator's mandate; under clause 16(9) on the arbitral tribunal's jurisdiction; under clause 27H to prohibit a party from disclosing confidential information in relation to the arbitral proceedings; and under clause 27I to allow a party to disclose confidential information in relation to arbitral proceedings.

The reason for the variation to section 85 of the Constitution Act 1975 is to provide finality for the court's decisions. This will strengthen the authority of the court's decisions, thus reducing the scope for further recourse to the courts and ensuring that the arbitral tribunal can carry out its functions expeditiously.

Constitution Act 1975, section 85 – Repeal, alteration or variation of the unlimited jurisdiction of the Supreme Court

The Committee having reviewed the section 85 statement made in the Second Reading Speech, the enabling and declaratory clauses, the Statement of Compatibility and the Explanatory Memorandum is of the opinion that the proposed provisions altering or varying section 85 of the Constitution Act 1975 are appropriate and desirable in all the circumstances.

The Committee makes no further comment.

Parliamentary Salaries and Superannuation Further Amendment Bill 2011

Introduced	16 August 2011
Second Reading Speech	17 August 2011
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Premier and Assistant Finance Minister

Background

The Bill amends the *Parliamentary Salaries and Superannuation Act 1968* to limit the increase in the salary payable to members of the Parliament of Victoria to 2.5% for the 2011–2012 financial year. The proposed amendment is deemed to come into operation on 1 July 2011.

Explanatory Memorandum (clause 3) –

[the clause] amends section 3A of the Parliamentary Salaries and Superannuation Act 1968 by substituting the date "1 July 2009" with "1 July 2011" and the date "30 June 2009" with "30 June 2011". These amendments will put in place a different definition of basic salary for the financial year commencing 1 July 2011. Section 3 defines basic salary to mean the amount of the annual allowance by way of salary from time to time payable to Members of the House of Representatives under the law of the Commonwealth less \$5733. The amendments will mean that for the period 1 July 2011 to 30 June 2012 the new basic salary will be set as the basic salary on 30 June 2011 increased by 2.5%.

Retrospective commencement

The Committee notes the retrospective commencement of the provision and the following explanation in the explanatory memorandum

This retrospective operation will ensure the amendments operate for the whole of the 2011–2012 financial year.

The Committee makes no further comment.

Resources Legislation Amendment Bill 2011

Introduced	16 August 2011
Second Reading Speech	17 August 2011
House	Legislative Assembly
Member introducing Bill	Hon. Michael O'Brien MLA
Portfolio responsibility	Minister for Energy and Resources

Background and Content

The Bill amends the:

- *Mineral Resources (Sustainable Development) Act 1990* to —
 - (i) to further provide for the introduction of prospecting and retention licences; and
 - (ii) to provide that applicants for a prospecting licence must give notice to land owners and occupiers.
- *Mineral Resources Amendment (Sustainable Development) Act 2010* to provide additional transitional arrangements for certain exploration licences.
- *Geothermal Energy Resources Act 2005* to empower the Minister to authorise the Department of Primary Industries to carry out certain surveys and drilling operations on any land for the purpose of geothermal exploration.
- *Greenhouse Gas Geological Sequestration Act 2008* to provide that the holder of an authority (the successful applicant under the tender process) must submit a community consultation plan within 3 months of the grant of the authority.
- *Pipelines Act 2005* to provide for part of a pipeline to be decommissioned.

The Bill makes minor and technical amendments to the *Mineral Resources (Sustainable Development) Act 1990*, the *Pipelines Act 2005* and the *Offshore Petroleum and Greenhouse Gas Storage Act 2010* to clarify regulation making powers in order to ensure consistency with the Commonwealth offshore legislation.

Committee comment

Delayed commencement – Delegation of legislative power – 12 months rule

The Committee notes that the Bill has a default commencement provision of 31 December 2012. There appears to be no explanation given for this delayed commencement clause, therefore the Committee draws attention to its Practice Note No. 1 of October 2005 dealing with the inclusion of provisions in Bills that allow for delayed commencement of more than one year after introduction. Such provisions should be accompanied by explanatory material justifying the delayed commencement. [2]

The Committee will seek further advice from the Minister.

The Committee makes no further comment.

**Committee Room
29 August 2011**

Appendix 1

Index of Acts and Bills in 2011

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Bushfires Royal Commission Implementation Monitor Bill 2011	1
Civil Procedure and Legal Profession Amendment Bill 2011	1
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Commercial Arbitration Bill 2011	9
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Country Fire Authority Amendment (Volunteer Charter) Bill 2011	2
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Drugs, Poisons and Controlled Substances Amendment (Drugs of Dependence) Bill 2011	8
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Environment Protection Amendment (Landfill Levies) Bill 2011	5
Equal Opportunity Amendment Bill 2011	5
Family Violence Protection Amendment (Safety Notices) Bill 2011	4
Farm Debt Mediation Bill 2011	8
Fisheries Amendment Bill 2011	3
Health Practitioner Regulation National Law (Victoria) Amendment Bill 2011	6
Health Services Amendment (Health Innovation and Reform Council) Bill 2011	3
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Shop Trading Reform Amendment (Easter Sunday) Bill 2011	1
Shrine of Remembrance Bill 2011	1
State Taxation Acts Amendment Bill 2011	5
Statute Law Revision Bill 2011	1
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Transport Legislation Amendment (Port of Hastings Development Authority) Bill 2011	6
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Victoria Law Foundation Amendment Bill 2011	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 or Member.

Alert Digest Nos.

Section 17(a)

(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

Justice Legislation Amendment Bill 2011

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

(v) unduly requires or authorise 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 Act 2006*

Building Amendment Bill 2011

1

Education and Training Reform Amendment (School Safety) Bill 2010

1

Justice Legislation Amendment Bill 2011

2

Justice Legislation Amendment (Infringement Offences) Act 2011

7

Liquor Control Reform Amendment Bill 2011

3

Sentencing Amendment Act 2010

1

Section 17(b)

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

Commercial Arbitration Bill 2011

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Appendix 3

Ministerial Correspondence 2011

Table of correspondence between the Committee and Ministers during 2011

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Building Amendment Bill 2011	Minister for Planning	01.03.11 21.03.11	1 of 2011 2 of 2011
Education and Training Reform Amendment (School Safety) Bill 2010	Minister for Education	01.03.11 28.03.11	1 of 2011 3 of 2011
Justice Legislation Amendment Bill 2011	Minister for Consumer Affairs	22.03.11 04.04.11	2 of 2011 3 of 2011
Sentencing Amendment Act 2010	Attorney-General	01.03.11 05.04.11	1 of 2011 4 of 2011
Liquor Control Reform Amendment Bill 2011	Consumer Affairs	05.04.11 21.04.11	3 of 2011 4 of 2011
State Taxation Acts Amendment Bill 2011	Treasurer	25.05.11 09.06.11	5 of 2011 6 of 2011
Justice Legislation Amendment (Infringement Offences) Act 2011	Attorney-General	28.06.11 12.08.11	7 of 2011 8 of 2011

Table of Ministers responses still pending

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Resources Legislation Amendment Bill 2011	Minister for Energy and Resources	30-08-11	9 of 2011