

No. 9 of 2013

Tuesday, 25 June 2013

On the

Bail Amendment Bill 2013

Justice Legislation Amendment
Act 2013

Major Transport Projects Facilitation
Amendment (East West Link and
Other Projects) Bill 2013

Marine (Domestic Commercial Vessel
National Law Application) Act 2013

Road Legislation Amendment (Use and
Disclosure of Information and Other
Matters) Bill 2013

Road Safety and Sentencing Acts
Amendment Bill 2013

The Committee



Chairperson
Hon. Richard Dalla-Riva MLC
Member for Eastern Metropolitan



Deputy Chairperson
Hon. Christine Campbell MLA
Member for Pascoe Vale



Mr Colin Brooks MLA
Member for Bundoora



Mr Michael Gidley MLA
Member for Mount Waverley



Mr Don Nardella MLA
Member for Melton



Dr Bill Sykes MLA
Member for Benalla



Mr Graham Watt MLA
Member for Burwood

Parliament House, Spring Street
Melbourne Victoria 3002

Telephone: (03) 8682 2895

Facsimile: (03) 8682 2858

Email: andrew.homer@parliament.vic.gov.au

Web: www.parliament.vic.gov.au/sarc

Committee Staff

Ms Helen Mason, Senior Legal Adviser
and Legal Adviser - Regulations

Mr Simon Dinsbergs, Business Support Officer

Ms Sonya Caruana, Office Manager

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;

Table of Contents

	Page Nos.
Alert Digest No. 9 of 2013	
Major Transport Projects Facilitation Amendment (East West Link and Other Projects) Bill 2013	1
Road Legislation Amendment (Use and Disclosure of Information and Other Matters) Bill 2013	4
Road Safety and Sentencing Acts Amendment Bill 2013	6
Ministerial Correspondence	
Bail Amendment Bill 2013	9
Justice Legislation Amendment Act 2013	10
Marine (Domestic Commercial Vessel National Law Application) Act 2013	12
Appendices	
1 – Index of Acts and Bills in 2013	17
2 – Committee Comments classified by Terms of Reference	19
3 – Ministerial Correspondence 2013	21

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. 9 of 2013

Major Transport Projects Facilitation Amendment (East West Link and Other Projects) Bill 2013

Introduced	11 June 2013
Second Reading Speech	13 June 2013
House	Legislative Assembly
Member introducing Bill	Hon. Terry Mulder MLA
Portfolio responsibility	Minister for Roads

Purpose

The Bill amends the *Major Transport Projects Facilitation Act 2009* and the *Transport Integration Act 2010*. The purposes of the Bill are: -

- To facilitate the East West Link project and other major projects (the Melbourne Metro rail tunnel and the Port of Hastings) by reducing the procedural delays and red tape;
- Make project assessments more efficient and effective by introducing a more risk-based assessment regime;
- Facilitate associated works on projects;
- Reduce statutory timeframes to improve productivity and streamline projects;
- Increase project flexibility;
- Facilitate land acquisition and project delivery

Part 2 – Amendments to the *Major Transport Projects Facilitation Act 2009*

- The Premier may declare a transport to be a ‘declared project’ for the purposes of the Act by publication in the Government Gazette and on the Department of Premier and Cabinet internet site.[7] The Planning Minister may declare certain works to be ‘associated works’ by publication in the Government Gazette. Before carrying out associated works, a project authority must obtain all relevant applicable approvals.[10] Additional scoping directions may be included in directions to the project proponent. When preparing scoping directions the Minister must have regards to the preliminary risk report.[14] It further specifies matters which may be considered and addressed in a comprehensive impact statement, eg: a consideration of methods to avoid, minimise , manage or offset the impacts of the declared project. The Minister has 10 rather than 25 business days to give scoping directions after making a comprehensive impact statement determination.[17]
- The Second Reading Speech extract: - *‘Moving progressively to a risk based assessment enables a more proportionate approach to different risks. This will improve assessment efficiencies and deliver a more practical and focused assessment report for public exhibition and consultation. Early works on projects can provide an opportunity to structure projects to maximise efficiency and create jobs sooner. This Bill makes clear that declaration of a project does not prevent the delivery of early works outside of the Act’s provisions. The Act expands, rather than replaces, the methods of obtaining the necessary approvals for a major transport project. For projects with early works, it is simply a matter of obtaining any required planning or environment approvals in accordance with existing applicable laws.*

This Bill makes significant cuts to timeframes for decisions in the assessment and approval process. Timeframes for decisions around pathways, scoping, release of key documents and approvals have all been halved or more than halved ... What the Bill does not do is to reduce the timeframe for public exhibition – the onus is on Government and Government agencies to work more efficiently. This power does not prevent Government from consulting with Councils where relevant.'

- It provides that a project proponent for a declared project may apply to the Planning Minister to amend the scoping directions at any time before the Secretary makes a determination under section 42 to release a comprehensive impact statement for public exhibition in relation to the project.[20] A comprehensive impact statement must identify all of the applicable approvals that are required.[23] Comprehensive impact statements are considered by the Secretary instead of the Planning Minister. The Secretary must make a written determination within 10 rather than 20 business days as to the adequacy of a comprehensive impact statement for public exhibition.[25, 27]
- Preliminary hearings of the assessment committee must be concluded within 20 business days after the end of the public exhibition period.[30] A project proponent must review the comprehensive impact statement and publish any revisions.[33, 34] The Environment Protection Authority (EPA) must advise the Planning Minister regarding works approvals within 30 days of formal public hearings conducted by the assessment committee in relation to comprehensive impact statements.[35] An approval decision must be made by the Minister in 20 rather than 40 business days.[28] The Planning Minister making determinations on applications for variations of approval decisions may request further information about the variation and any other matter from the project authority or consult with any person that the Minister considers has an interest in the declared project or proposed variation.[44]
- A designation of the project area under section 95 may specify an area of land where associated works will be carried out.[45] It clarifies that land which is subject to a project area designation is subject to Part 5 of the *Planning and Environment Act 1987*. [55] New sections 137A(1) and (2) provide that the Governor in Council may on the recommendation of the Project Minister, grant to a project authority for the purposes of an approved project, land that is surrendered under existing sections 134 or 135.[58] New section 142A sets out a process by which the Project Minister may recommend to the Governor in Council that certain crown land in the project area be designated for the purposes of an approved project.[59] The project authority may transfer any easement acquired by the project authority over project land to a utility for the purposes of relocating utility infrastructure as a result of an approved project.[63] Public officials such as the Planning Minister or Secretary are required to make decisions or act as expeditiously as is reasonably practicable.[66] It amends existing section 258 so that approval of councils is not required by the project authority. Standards of construction and safety under other Acts still apply.[68]

Section 17(a)(vii) – insufficiently subjects the exercise of legislative power to parliamentary scrutiny

- It amends the *Major Transport Projects Facilitation Act 2009* so that various Orders and Determinations made in respect of various projects are not 'legislative instruments' for the purposes of the *Subordinate Legislation Act 1994*. The Orders made under existing provisions of the *Major Transport Projects Facilitation Act 2009* are published in the Government Gazette and include:- An Order under section 126 relating to the compulsory acquisition of native title interests; an Order under section 134(1) requiring a public authority or Council in which land in the project area is vested to surrender that land to the Crown or divest land in the project area from a public authority or Council; a Governor in Council order under section 135(3) (made on the recommendation of the Project Minister on receiving a plan of land signed by the Surveyor-General) after being satisfied that the land shown on the plan

represents land, the interests in which are to be surrendered to the Crown; an Order in Council under section 139(2) reserving the land or any Crown grant, certificate of title or folio of the Register issued or created with respect to the land; an Order in Council under section 140(2) which revokes any Order in Council reserving the land or any Crown grant, certificate of title or folio of the Register issued or created with respect to the land; an Order under section 144(3) which specifies that any project land that was a freeway, an arterial road, a non-arterial State road or a municipal road immediately before it became a reserved project land is taken to be a freeway, an arterial road, a non-arterial road or a municipal road; an Order under section 162 declaring that a stratum of land below ground level in a project area is project land; an Order under section 180 that certain project land is not required for an approved project (and is therefore surplus land); an Order under section 182(2) revoking an Order reserving the land or any Crown grant, certificate of title or folio of the Register issued or created with respect to the land and an Order under section 183 reserving all or part of any surplus land that is Crown land.[69]

The Committee notes that amendments made to the *Subordinate Legislation Act 1994* by the *Subordinate Legislation Amendment Bill 2010* came into effect on 1 January and 1 July 2011. The amendments essentially extended the arrangements relating to the scrutiny of statutory rules to legislative instruments. The amendments outlined above in relation to clause 69 provide that various Orders and Determinations are not ‘legislative instruments’ for the purposes of the *Subordinate Legislation Act 1994* although they are published in the Government Gazette.

The Committee notes that prior to the 2011 amendments to the *Subordinate Legislation Act 1994* such Orders and Determinations would not have been subject to scrutiny by the Committee as they did not fall within the definition of ‘statutory rule’ as set out in that Act. The Committee draws the provisions to the attention of the Parliament.

Charter report

The Major Transport Projects Facilitation Amendment (East West Link and Other Projects) Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Road Legislation Amendment (Use and Disclosure of Information and Other Matters) Bill 2013

Introduced	11 June 2013
Second Reading Speech	12 June 2013
House	Legislative Assembly
Member introducing Bill	Hon. Terry Mulder MLA
Portfolio responsibility	Minister for Roads

Purpose

The purposes of the Bill are: -

- To repeal and replace the provisions of the *Road Safety Act 1986* which relate to the use and disclosure of information by the Corporation;
- To limit the information to be regulated under the *Road Safety Act 1986* that identifies an individual and is collected or received by the Corporation in relation to its registration or licensing functions and activities.

Part 2 – Amendments to *Road Safety Act 1986*

- It inserts new Part 7B into the *Road Safety Act 1986* in relation to the use and disclosure of information. Note current ‘confidentiality agreements’ between VicRoads and proposed recipients of information are renamed ‘information protection agreements’. The facial image of an individual is information which is protected. It sets out the particular authorised use or disclosure of such information. The penalty for unauthorised use and or disclosure of information is 120 penalty units or 12 months imprisonment.[7] The Second Reading Speech extract:- ‘*The Bill introduces new provisions that address the main issues identified during the review. The key features of these provisions are as follows. They will only apply to information that identifies a person (whether living or deceased) that VicRoads collects or receives in relation to its registration or licensing functions or activities. This information warrants a high degree of protection due to its potential for criminal use, such as for identity fraud purposes. It is therefore appropriate that criminal penalties be imposed for its unauthorised use or disclosure ... The new regime will authorise the use and disclosure of this information for a range of relevant purposes.*

For example, the Bill will allow VicRoads to disclose identifying registration and licensing information to Victoria Police to assist in it locating missing persons and for the purpose of a vehicle recall procedure in relation to a possible safety-related defect in a vehicle ... Commercial information will no longer be regulated under the Road Safety Act 1986. Any requests for access to commercial information will generally be dealt with under the provisions of the Freedom of Information Act 1982 ... The Bill will retain the current confidentiality agreement but will rename them information protection agreements and will require that additional safeguards be included in these agreements. These safeguards include the requirement that the agreements must specify how compliance with its terms will be monitored and enforced and auditing arrangements.’

- It makes consequential amendments to the *Marine Safety Act 2010* so that confidential registration information obtained by VicRoads (as engaged by the Safety Director to deliver marine registration and licensing services) is subject to the same level of protection.[10] Similar amendments are also made in respect of confidential information requested by the Transport Accident Commission pursuant to the *Transport Accident Act 1986*.[12] VicRoads is required to maintain a register of written-off vehicles that includes vehicles of the class or classes prescribed by regulations.[17] It amends the *Accident Towing Services Act 2007*

enable VicRoads to approve applications for tow truck driver accreditation from persons who do not hold a Victoria driver licence but can feasibly work from another State, across the border.[21]

Charter report

The Road Legislation Amendment (Use and Disclosure of Information and Other Matters) Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Road Safety and Sentencing Acts Amendment Bill 2013

Introduced	11 June 2013
Second Reading Speech	12 June 2013
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Road Safety Act 1986* and the *Sentencing Act 1991*. The main purposes are:-

- To consolidate into a single, simplified process, the statutory provisions relating to obtaining a driver licence or learner permit after disqualification and;
- To consolidate into a single, simplified process, the statutory provisions relating to imposing or removing an alcohol interlock condition from a driver licence or learner permit (regardless of whether the disqualification for the alcohol based offence was imposed under the *Road Safety Act 1986* or the *Sentencing Act 1991*);
- To re-enact sentencing powers for courts to impose driving bans for any offence and for the Magistrates' Court to impose an alcohol interlock condition for any offence committed where the offender was under the influence of alcohol or drugs which contributed to the offence;
- Create new powers for the Magistrates' Court to impose alcohol interlocks where a person is convicted of the offences of driving dangerously or negligently while being pursued by police or theft of a motor vehicle, if committed under the influence of alcohol.

Part 2 – Driver Licence and Learner Permit Eligibility following disqualification

- Part 2 creates a new single process under the *Road Safety Act 1986* for applying to the Magistrates' Court for an order declaring that a person disqualified under that Act or the *Sentencing Act 1991* from obtaining a driver licence or learner permit is eligible to apply to the Roads Corporation for a licence or permit. New section 31A provides that a person who has been disqualified in certain circumstances, may only apply to the Roads Corporation for the grant of a driver licence or learner permit if the Magistrates' Court has made a licence eligibility order under new section 31H. Assessment reports are required at the hearing of the application.[3]

Part 3 – Alcohol interlock conditions

- Part 3 creates a single new process to impose or remove an alcohol interlock order condition on a driver licence or learner permit under the *Road Safety Act 1986* irrespective of whether the original offence committed under the influence of alcohol arose from a disqualification under that Act or the *Sentencing Act 1991*. This covers the making of both mandatory and discretionary alcohol interlock orders depending on the offence as set out in Schedule 1B. New Schedule 1B codifies the requirements of the alcohol interlock scheme.[6, 13] It sets out provisions for the removal of alcohol interlock orders.[7]
- Appeals may be made to the County Court.[8] It provides concessions to assist with the cost of installation and regular maintenance of an alcohol interlock condition depending on the class of person eligible for the concession.[10] It also sets out new alcohol interlock conditions which may be imposed on a person convicted of the offences of driving dangerously while being pursued by police or theft of a motor vehicle if committed under the influence of alcohol.[13, Schedule 1B]

Part 4 – Consequential amendments – Part 5 – Transitional arrangements

- Part 4 of the Bill makes various technical and consequential amendments to ensure that the new single processes in relation to a licence eligibility order and the imposition and removal of an alcohol interlock condition apply irrespective of whether the disqualification was imposed under the *Road Safety Act 1986* or the *Sentencing Act 1991*. [14-30] Part 5 contains transitional provisions.

Charter report

The Road Safety and Sentencing Acts Amendment Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Ministerial Correspondence

Bail Amendment Bill 2013

The Committee reported on the Bill in Alert Digest No. 6 of 2013 tabled in the Parliament on 7 May 2013. A submission from the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) was noted in Alert Digest No. 6 of 2013 and published on the Committee's website.

A letter was received from the Attorney-General dated 22 June 2013 concerning the VEOHRC submission to the Bail Amendment Bill 2013. The Attorney-General's response will be posted on the Committee's website: www.parliament.vic.gov.au/sarc.

Justice Legislation Amendment Act 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

Charter report

Extension of assessment and referral court list trial in the Magistrates' Court

Summary: The effect of s. 7 was to extend the current trial of an assessment and referral court list in the Magistrates' Court for an additional two years. The Committee will write to the Attorney-General seeking supplementary information as to the compatibility of s. 7 with the rights set out in the Charter.

The Committee notes that s. 7 of the Act, amending existing s. 2 of the *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010*, changed the default commencement date of sunset provisions in the latter Act from 1 August 2013 to 1 August 2015. **The Committee observes that the effect of s. 7 was to extend the current trial of an assessment and referral court list in the Magistrates' Court for an additional two years.**

As s. 7 was the result of a house amendment, its effect was not addressed in the Statement of Compatibility for the Bill. The Committee notes, in the Statement of Compatibility for the Bill that became the *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010*, the then Attorney-General discussed the compatibility of the assessment and referral court list with the Charter's rights to equality, privacy and the presumption of innocence and against double punishment.ⁱ

This Committee has previously remarked:ⁱⁱ

While Charter s. 28 only requires a statement of compatibility for Bills, not amendments, the Committee considers that a supplementary statement should be given where, as here, amendments are proposed that are unrelated to the purposes of the Bill as introduced. The Committee is concerned that, unless such a practice is adopted henceforth, the Charter's requirement of parliamentary human rights scrutiny of all new legislation may be significantly undermined in the future.

In previous correspondence to the Committee in relation to other house amendments, the Attorney-General remarked:ⁱⁱⁱ

I understand that there are procedural difficulties with the proposal for supplementary Statements of Compatibility. However, I will endeavour to ensure that supplementary information is provided to the Parliament for future house amendments to Bills within my portfolio where amendments are proposed that are unrelated to the original purpose of the Bill.

The Committee observes that the house amendments amended clause 1(d) of the Bill, which provided that one of the Bill's purposes was to amend the *Magistrates' Court Act 1989* in relation to the appointment of an Acting Chief Magistrate, to add the purpose of 'amend[ing] the *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010* to extend the trial period under the Act'.

ⁱ Statement of Compatibility for the Magistrates' Court Amendment (Mental Health List) Bill 2009, 10 December 2009, referring to Charter ss. 8(3), 13, 25(1) & 26.

ⁱⁱ Scrutiny of Acts and Regulations Committee, *Alert Digest No. 7 of 2011* (reporting on the *Justice Legislation Amendment (Infringement Offences) Act 2011*), p. 7, citing Scrutiny of Acts and Regulations Committee, *Alert Digest No. 4 of 2010* (reporting on the *Crimes Legislation Amendment Act 2010*), p. 7. See also Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011), [409]-[410].

ⁱⁱⁱ Scrutiny of Acts and Regulations Committee, *Alert Digest No. 8 of 2011* (reporting on the *Justice Legislation Amendment (Infringement Offences) Act 2011*), p. 13.

The Committee will write to the Attorney-General seeking supplementary information as to the compatibility of s. 7 with the rights set out in the Charter. Pending the Attorney-General's response, the Committee draws attention to s. 7.

Minister's Response

Thank you for your letter dated 11 June 2013 regarding the Scrutiny of Acts and Regulations Committee's consideration of the *Justice Legislation Amendment Act 2013*.

As the Committee reports, the effect of the amendments referred to in the report was to extend the trial of the Assessment and Referral Court (ARC) List in the Magistrates' Court for an additional two years.

Given that the amendments simply extended the term of operation of the ARC List, I consider that the original Statement of Compatibility for the Bill that became the *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010*, together with the Committee's consideration of that Statement, fully dealt with any Charter Act implications of the establishment of the ARC List.

As you will be aware, the Committee raised no issues in relation to the Bill in its report in Alert Digest No.1 of 2010.

In those circumstances, I consider that any supplementary information would have been of little, if any, assistance to the Parliament in relation to the amendments.

ROBERT CLARK MP

Attorney-General

22 June 2013

The Committee thanks the Attorney-General for this response.

Marine (Domestic Commercial Vessel National Law Application) Act 2013

The Bill was introduced into the Legislative Assembly on 7 May 2013 by the Hon. David Hodgett MLA. The Committee considered the Bill on 27 May 2013 and made the following comments in Alert Digest No. 7 of 2013 tabled in the Parliament on 28 May 2013.

Committee Comment

Charter report

Applied Commonwealth laws – Obligations of public authorities

Summary: Clauses 9 and 12 apply various Commonwealth criminal and administrative laws to offences against and matters arising under the Marine Safety (Domestic Commercial Vessel) National Law. The Committee will write to the Minister seeking further information as to the effect of clauses 9 and 12 on the operation of Charter s. 38's provision for the obligations of public authorities.

The Committee notes that clause 17 (in Part 7 of the Bill) provides that certain Victorian public officials (the Director, Transport Safety, Victorian public officials the Director appoints as transport safety officers, Victorian public servants and Victorian public officials appointed as marine safety inspectors) are 'public authorities for the purposes of' the Charter, when they are exercising powers or functions delegated under the *Marine Safety (Domestic Commercial Vessel) National Law or the Australian Maritime Safety Authority Act 1990*.^{iv}

The Statement of Compatibility remarks:

Public authorities are subject to obligations in section 38 to act compatibly with human rights and to give relevant human rights proper consideration when making decisions.

A number of functions are conferred on commonwealth officers and bodies, particularly the national regulator. Where the functions and powers are exercised by a commonwealth officer or body under the national law, the officers and bodies will not fall within the definition of public authority and the obligations on public authorities will not apply.

However, under section 11 of the national law, the national regulator may delegate powers and functions to officers or employees of a Victorian agency. Pursuant to section 4 of the charter act those officers and employees are public authorities.

The bill clarifies that the Charter of Human Rights and Responsibilities Act 2006 applies to a Victorian public authority (within the meaning of section 4 of that act) when exercising powers delegated to that public authority under the applied provisions or the commonwealth domestic commercial vessel national law or the Australian Maritime Safety Authority Act 1990 of the commonwealth.

Part 7 of the bill provides that, even though those officers and employees may be exercising powers and functions under a commonwealth act, they are public authorities and are therefore bound by the obligations in section 38 of the charter act.

The Committee notes that, in contrast to many national uniform law schemes considered by the Victorian Parliament, this scheme involves the application of a federal law. In this scheme, the applied federal laws include not only the national law itself, but also various Commonwealth criminal and administrative laws. The applied Commonwealth criminal laws include laws relating to the investigation and prosecution of offences. While the Statement of Compatibility, in accordance with this Committee's *Practice Note No 3*, addresses the interaction of the Charter with the national law, it does not address the interaction of the Charter with the applied Commonwealth criminal and administrative laws.

^{iv} Charter s. 4 defines 'public authority'. Charter s. 38 provides that it is unlawful for a public authority to act incompatibly with a human right or to fail to give proper consideration to a human right.

The Committee observes that Part 7 of the Bill clarifies the application of the Charter to powers and functions exercised under the national law, but does not expressly address the application of the Charter to the applied Commonwealth criminal and administrative laws.

The Committee notes that clauses 9(2) and 12(2) respectively provide that, '[f]or the purposes of a law of Victoria, 'an offence against' or 'a matter arising under' the applied national law must be treated as an offence against or matter arising under Commonwealth, not Victorian, law. In the case of matters arising, clause 12(3) provides for an exception to clause 12(2) 'as provided by Part 7'. There is no similar exception to clause 9(2)'s provision for offences against the national law.

The Committee will write to the Minister seeking further information as to the effect of clauses 9 and 12 on the operation of the Charter s. 38's provision for the obligations of public authorities. Pending the Minister's response, the Committee draws attention to clauses 9 and 12.

Privacy – Boarding and searching vessels without reasonable grounds

Summary: Sections 97 and 99 of the *Marine Safety (Domestic Commercial Vessel) National Law* permit marine safety inspectors to board and search any vessel at any time for the purpose of assessing compliance with that law, whether or not the inspector suspects that the search will reveal evidence of a breach of that law. The Committee refers to Parliament for its consideration the question of whether or not sections 97 and 99, by allowing inspectors to conduct random compliance inspections of any vessel (including hired recreational vessels) at any time, are compatible with the Charter's right against arbitrary or unlawful interferences in privacy.

The Committee notes that section 97 of the *Marine Safety (Domestic Commercial Vessel) National Law* provides that a marine safety inspector 'may board a vessel' for 'monitoring purposes'. 'Monitoring purposes' mean finding out whether the national law is being or has been complied with, assessing the correctness of information supplied under the national law or investigating a marine incident.^v

The Committee also notes that section 99 provides that a marine safety inspector may exercise one of the 'vessel monitoring powers' for monitoring purposes. The 'vessel monitoring powers' include 'the power to search the vessel and any thing on the vessel'.^{vi} Clause 99(1) specifies that this power applies 'whether or not the inspector has reasonable grounds for suspecting that there may be evidential material on the vessel'.

In short, sections 97 and 99 of the national law permit marine safety inspectors to board and search any vessel at any time for the purpose of assessing compliance with that law, whether or not the inspector suspects that the search will reveal evidence of a breach of that law. The Committee considers that sections 97 and 99 may engage the Charter's right against arbitrary or unlawful interferences in privacy.^{vii}

The Statement of Compatibility remarks:

The legal basis for the exercise of these powers is clearly prescribed in the relevant sections. They are sufficiently precise to enable an individual to regulate a marine safety inspector's conduct... Masters, owners and operators of vessels who are the persons most likely to be subject to the exercise of these powers can reasonably be expected to be aware of them, having regard to their qualifications and the requirements for commercial vessel operation.

Further, the provisions are drafted with sufficient precision and contain appropriate safeguards to ensure that the degree of interference is proportionate to that objective.

As noted earlier in this statement, commercial vessels are inherently mobile and the nature of the commercial activities means that they do not necessarily follow any predictable pattern or timetable.

A number of provisions therefore allow searches without the need for a warrant.

^v *Marine Safety (Domestic Commercial Vessel) National Law*, s. 3.

^{vi} *Marine Safety (Domestic Commercial Vessel) National Law*, s. 99(2)(a).

^{vii} Charter s. 13(a).

Monitoring and compliance activities often need to be undertaken as and when an opportunity presents, frequently while the vessel is at sea. The vessels may also be operating in geographically remote areas and with limited or no mobile telephone access. In these circumstances, obtaining a warrant can be impractical and may limit the regulator's capacity to undertake the regulatory role in a less restrictive manner. For this reason, the enforcement powers in the national law are appropriate and proportionate.

In summary, any permitted interferences with privacy are precise and circumscribed and the powers can only be exercised in controlled and prescribed circumstances.

Prosecutions under the national law would be frustrated without these powers as evidence may not otherwise be obtainable and could be concealed or destroyed.

I am therefore satisfied that the regime is compatible with the right to privacy.

The Parliament of Australia's scrutiny of bills committee, in its consideration of the federal Bill, remarked that 'it remains unclear to the Committee why an "oral authorisation scheme" could not be implemented, at least in a modified form'.^{viii}

The Committee notes that the terms of sections 97 and 99 not only permit the boarding and searching of vessels without an independent confirmation that there are grounds for such actions, but also expressly dispense with any requirement for the marine safety inspector to have 'reasonable grounds for suspecting that any evidential material' will be found as a result of the boarding or searching. In effect, sections 97 and 99 allow marine safety inspectors to conduct random compliance searches of any vessel. The Committee observes that Victoria's *Marine Safety Act 2010* was recently amended to similar effect.^{ix}

The federal Statement of Compatibility remarks:

The safety regulation of domestic commercial vessel activity is not new and regulation has occurred under State and Territory legislation for some time. Owners and masters of domestic commercial vessels are aware that the safety requirements pertaining to domestic commercial vessels are subject to regulatory oversight, and by applying for the unique identifier and certificates that allow them to operate as a commercial vessel they are implicitly accepting that their compliance with the regulatory requirements will be monitored.

The Committee notes that the national law may apply to vessels while they are being occupied and used for recreational purposes, for example hired recreational and residential vessels.^x The Committee also notes that the national law lacks a restriction contained in Victoria's similar law that boarding and searches of vessels for compliance inspections only occur 'at a reasonable time'.^{xi}

The Committee refers to Parliament for its consideration the question of whether or not sections 97 and 99 of the Marine Safety (Domestic Commercial Vessel) National Law, by allowing marine safety inspectors to conduct random compliance inspections of any vessel (including hired recreational vessels) at any time, are compatible with the Charter's right against arbitrary or unlawful interferences in privacy.

^{viii} Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2012*, p. 278 (reporting on the Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (Cth).) The Committee noted that such a scheme is provided for in the Maritime Powers Bill 2012 (Cth), clause 25(1). In addition, that Bill provides for complete exemptions from the requirement for authorisation where powers are exercised 'to ensure the safety of the officer or any other person': clause 29.

^{ix} *Marine Safety Act 2010*, s. 126B(2), inserted by the *Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Act 2012*, s. 26. See Scrutiny of Acts and Regulations Committee, *Alert Digest No. 14 of 2012*, p. 7-8 (reporting on that Bill) and *Alert Digest No. 15 of 2012*, pp. 15-18 (Ministerial correspondence on the Committee's report.)

^x *Marine Safety (Domestic Commercial Vessel) National Law*, s. 7(2). The Explanatory Memorandum to the national law states: 'An example of this is a vessel used for hire and drive purposes where the hirer is undertaking recreational activities'.

^{xi} *Marine Safety Act 2010*, s. 126B(3)(a).

Minister's Response

Thank you for your letter of 28 May 2013 regarding the Marine (Domestic Commercial Vessel National Law Application) Bill 2013.

Before addressing the specific matters raised by the Committee, it may be helpful to provide some brief background about how the national scheme for commercial vessels (the national scheme) is structured.

The national scheme

The Commonwealth and the States and the Northern Territory entered into an intergovernmental agreement (IGA) to establish the national scheme in August 2011.

The intergovernmental agreement establishes the model for the national scheme as an applied laws scheme.

The Commonwealth passed legislation (the *Marine Safety (Domestic Commercial Vessel National Law) Act 2012* - the national law) in accordance with the IGA using its Constitutional powers (the corporations and external affairs powers) to the fullest extent possible.

The IGA requires the States and the Northern Territory to pass local legislation to apply the national law to the commercial vessels that are beyond the Commonwealth's legislative reach. The Bill satisfies Victoria's obligations in that regard.

The Bill applies the Commonwealth domestic commercial vessel national law to those commercial vessels operating in Victorian waters which are not within the Commonwealth's legislative reach. It is important that the same laws apply to those vessels within the Commonwealth's reach and those which are transferred to Commonwealth control by the States and the Northern Territory.

The Committee's question

The Committee asked for further information about the effect of clauses 9 and 12 of the Bill on the operation of the Charter of Human Rights and Responsibilities Act 2006 (Charter). The Committee has raised a complex point.

Clause 9 applies Commonwealth criminal laws to offences against the Victorian applied law.

Clause 12 applies Commonwealth administrative laws to the Victorian applied law.

The Bill meets the Government's policy objective in respect of the Charter. The intention is to apply the Charter to key Victorian marine officials involved in administering the national scheme in Victoria on behalf of AMSA. The same officials also administer a range of State laws in respect of commercial and recreational vessels.

What the Government is seeking to avoid is a situation where the officials may be required to observe the Charter in respect of the exercise of functions and powers under certain State laws but not in respect of the exercise of functions and powers under Commonwealth and applied laws. I consider that clause 17 of the Bill achieves this policy objective.

Clause 17(1) puts beyond doubt that Victorian public officials engaged in the administration and enforcement of the Commonwealth domestic commercial vessel national law or the Australian Maritime Safety Authority Act 1990 (Cth) as delegates of AMSA are subject to the section 38 Charter obligations on public authorities.

Clause 17(2) also puts beyond doubt that Victorian public officials appointed as marine safety inspectors (which includes a member of the police force of a State as well as a person appointed as an inspector) exercising powers under the Commonwealth domestic commercial vessel national law or the Victorian applied domestic commercial vessel national law are subject to the section 38 Charter obligations on public authorities.

Where an action of a Victorian public official under the applied laws is challenged, it will be reviewed by the Commonwealth Administrative Appeals Tribunal (AAT). Clause 12(3) puts it beyond doubt that the AAT must consider the Charter Act obligations of public officials if they amount to relevant considerations in a particular case.

I am advised that the same provision is not needed for clause 9 because clause 17 already applies the Charter to Victorian public officials acting as delegates of AMSA, or exercising powers under the Commonwealth or applied laws. For example, when investigating offences. It is not intended, however, that the Charter affect the interpretation of Commonwealth offences applied as laws of Victoria under the Victorian applied law as to do so would cause inconsistency problems and risk involving section 109 of the Commonwealth Constitution.

Therefore, the Bill achieves the Government's policy objective, but I would be happy for you to discuss this further with representatives of my Department as the matter is complex as it touches on the difficult interface of State and Commonwealth laws.

Please feel free to contact Ian Shepherd, Deputy Executive Director, Regulation, Governance & Law Division on (03) 9655 1701 or at ian.shepherd@transport.vic.gov.au.

THE HON DAVID HODGETT MP

Minister for Ports

Received 13 June 2013

The Committee thanks the Minister for this response.

Committee Room

24 June 2013

Appendix 1

Index of Acts and Bills in 2013

	Alert Digest Nos.
Aboriginal Lands Amendment Bill 2013	6
Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011	2
Adoption Amendment Bill 2013	4, 5
Alpine Resorts And National Parks Acts Amendment Bill 2013	3
Appropriation (2013-2014) Bill 2013	7
Appropriation (Parliament 2013-2014) Bill 2013	7
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
Company Titles (Home Units) Bill 2013	3
Co-Operatives National Law Application Bill 2013	2, 3
Corrections Amendment Bill 2012	1
Corrections Further Amendment Bill 2013	5
Courts Legislation Amendment (Reserve Judicial Officers) Bill 2012	1
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
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
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
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

Scrutiny of Acts and Regulations Committee

State Tax Laws Amendment (Budget and Other Measures) Bill 2013	7
Statute Law Amendment (Directors' Liability) Bill 2012	1, 2
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

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)

(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
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.