Inquiry into the Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011

Final Report

June 2013

Legislative Council

Economy and Infrastructure Legislation Committee

Report No. 2

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Legislative Council Economy and Infrastructure Legislation Committee

Inquiry into the Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011

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Table of contents

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Chair's Foreword

I am honoured to present the second report of the Economy and Infrastructure Legislation Committee.

The Committee was presented with a unique task in this Inquiry into the Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011. Rather than examining the merits of the policy behind the Bill, or the provisions of the Bill itself, the Committee was asked to examine the constitutional restrictions on the initiation of Bills in the Legislative Council.

The Inquiry involved a detailed analysis of constitutional law, parliamentary precedents and past practice. I thank all those who provided guidance to the Committee in examining these complex issues. The Committee received evidence from a number of constitutional experts and also received written submissions from two people who are currently overseas. The Committee notes it does not currently have the power to receive oral evidence using technology such as teleconferencing or Skype and has recommended this option be explored for future inquiries.

The Committee received conflicting views about the interpretation of section 62 of the *Constitution Act 1975* and found there have been differences in approach between the two Houses when applying this section in practice. It is currently the practice of the Legislative Council for the President to make a determination as to whether a Bill breaches any constitutional requirements before debate is permitted on the Bill. Given the complexity involved in interpreting section 62, the Committee concluded that the President should not be placed in the difficult position of being required to make decisions on matters of constitutional law.

The Committee examined the practices of other Houses of Parliament when determining the best way to proceed with these issues in future. The Committee concluded that the practice of the Senate, where matters of constitutional interpretation are left for the House to decide, rather than the Presiding Officer, is a preferable approach to the current Legislative Council practice. This approach also affirms the rights of Members of the Legislative Council to initiate legislation and the rights of the House to determine its own business.

The Committee also received significant evidence on the constitutionality of the Bill itself. The Committee was presented with strong arguments that the Bill may infringe section 62 of the *Constitution Act 1975* as it may impose an additional impost on employers. If the sponsor elects to reintroduce the Bill, the Committee believes the House should be given the opportunity to decide whether to allow the Bill to proceed, taking into account these constitutional issues, which are discussed in Chapter 3 of this Report.

The Committee was given the challenging task of completing this Inquiry in eight weeks. I thank my fellow Committee members for the work they have undertaken to enable the Committee to meet this tight deadline. I would also like to thank the Committee Secretariat for the assistance they provided to the Committee in undertaking the Inquiry and completing this Report. The ability of this Committee to complete such a difficult Inquiry in such a short timeframe demonstrates the effectiveness of the Legislative Council Legislation Committees and I look forward to this Committee being given the opportunity to undertake further inquiries into Bills in the near future.

ANDREA COOTE
CHAIR

Findings

Finding 1

There are differing views as to how section 62(1) of the *Constitution Act 1975* should be interpreted. Possible approaches include interpreting the paragraph with reference to the purpose of a Bill, the effect of a Bill or what is legally possible as a result of the Bill.

[page 22]

Finding 2

It is probable that the total amount of compensation paid to firefighters will increase under the provisions of the Bill.

[page 29]

Finding 3

Some of the costs of increased compensation may be offset by savings due to a reduction in administrative costs due to fewer disputed claims. The Committee cannot determine whether the full costs of increased compensation will be offset by these savings, and it is possible the net effect of the Bill will be an increase in costs.

[page 31]

Finding 4

Under Victoria's Accident Compensation Scheme, WorkSafe insurance premiums for large employers are directly impacted by the claims made against that employer. Therefore, any increase in compensation costs in relation to claims made by career firefighters will result in an increase to the WorkSafe insurance premiums paid by their employers.

[page 33]

Finding 5

The compensation scheme for CFA volunteers is funded by the CFA. Any increase in compensation claims paid to CFA volunteer firefighters will result in increased costs to the CFA. These costs would need to be met by an increased Fire Services Levy and/or increased appropriation provided to the CFA in the Budget from the Consolidated Fund.

[page 34]

Finding 6

If a narrow purposive interpretation of section 62(1) of the *Constitution Act 1975* is applied, the Bill does not infringe that section. However, if a broader interpretation is applied, taking into account the effects of the Bill and what is legally possible as a result of the Bill, the Bill may infringe section 62(1).

[page 35]

Recommendations

Recommendation 1

That the Legislative Council Standing Orders be amended to empower the Legislative Council Standing Committees to receive evidence by audio link or audio visual link.

[page 13]

Recommendation 2

That in future when Bills that potentially infringe section 62 of the *Constitution Act 1975* are introduced into the Legislative Council, the President should report his concerns to the House and the House should then determine whether to allow the Bill to proceed.

[page 25]

Acronyms

CFA – Country Fire Authority

DEPI – Department of Environment and Primary Industries

MFB – Metropolitan Fire Brigade

PWC – PricewaterhouseCoopers

VWA – Victorian WorkCover Authority

VMIA – Victorian Managed Insurance Authority

1. Introduction

1.1 Introduction of the Bill

The Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011 (the Bill) was introduced into the Legislative Council by Ms Colleen Hartland, MLC, on 7 December 2011. The Bill was second read on 6 February 2013. On 20 February 2013, the President of the Legislative Council ruled that the Bill was in breach of section 62 of the *Constitution Act 1975* and ordered that the Bill be withdrawn. On 17 April, 2013, the Legislative Council referred the Bill to the Economy and Infrastructure Legislation Committee. The Committee's Terms of Reference are as follows:

> *That the Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011, as introduced into this House by Ms Hartland and ruled out of order by the President on 20 February 2013 for infringing section 62 of the Constitution Act 1975, be referred to the Economy and Infrastructure Legislation Committee for consideration and report by 12 June 2013 on measures aimed at addressing any constitutional impediment to the Bill's introduction into the Legislative Council.*

1.2 Provisions of the Bill

The Bill has 7 clauses.

- **Clause 1** of the Bill states that the purpose of the Bill is to '*simplify compensation claims by firefighters exposed to the hazards of a fire scene as part of their employment by deeming prescribed types of cancers to be due to the nature of that employment*'. A second purpose of the Bill is to '*to simplify compensation claims made by volunteer officers or members exposed to the hazards of a fire scene due to voluntarily engaging in firefighting and participating in training exercises in order to engage in firefighting'*.
- **Clause 2** is the commencement clause. If passed, the Act will come into operation on the day after it receives the Royal Assent.
- **Clause 3** of the Bill adds a new section 86A into the *Accident Compensation Act 1985.*
    - Subsection (1) reverses the onus of proof, so that certain cancers suffered by firefighters will be deemed to be due to the nature of firefighting, and therefore automatically qualify for compensation, unless the employer, the WorkCover Authority, or a self-insurer proves to the contrary. This is often referred to as *presumptive legislation* as it is presumed the cancer is employment related, unless proved otherwise.

      The subsection includes a table of 12 cancers and relevant qualifying periods. A person must have been employed as a firefighter for the relevant qualifying period in order to access the presumption that the cancer was caused by his or her employment as a firefighter.
    - Subsection (2) provides that a worker is deemed to be employed as a firefighter if firefighting duties made up a substantial portion of his or her duties. It further provides that the qualifying period may be served in two or more periods.
    - Subsection (3) enables firefighters who have previously had their claims rejected because they could not prove the cancer was caused by their employment, to claim again under the new provisions.
    - Subsection (4) states that a firefighter who has previously successfully claimed compensation under the existing legislation cannot claim again under the new provisions.
    - Subsection (5) provides specifically for Mr Brian Potter that if he or his dependants make a claim in respect of a disease he is suffering, or has suffered, and if that disease is one of the 12 primary site cancers listed in the table in new subsection 86A(1), the disease is deemed to be due to the nature of his employment.
- **Clause 4** of the Bill amends the *Workers Compensation Act 1958* in the same way as clause 3 amends the *Accident Compensation Act 1985.* This would apply the same changes to claims made by persons employed as firefighters before 1985.

- **Clause 5** of the Bill amends the *Country Fire Authority Act 1958* to alter the interpretation of the Country Fire Authority Regulations 2004 and apply the same simplified claims process to volunteer firefighters who serve as members of the Country Fire Authority.
- **Clause 6** of the Bill requires the Minister to cause an independent review of the operation of the amendments made by the Bill to be undertaken and completed by 31 December 2015. The report must be published on the internet.
- **Clause 7** of the Bill is a standard technical provision relating to the repeal of the amending Act.

1.3 President's ruling

The Committee was asked to consider measures aimed at addressing any constitutional impediment to the Bill's introduction into the Legislative Council. On 20 February 2013, the President gave a ruling as follows:

> I wish to give a ruling on the question of whether the Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011, introduced by Ms Hartland, can be initiated in this House. After examination of the Bill and Ms Hartland's second-reading speech I am of the opinion that the Bill cannot proceed any further in this House because of the financial implications associated with it. The Bill itself does not appropriate money from the Consolidated Fund as the scheme under the *Accident Compensation Act 1985* is not funded by the budget. The scheme is, however, a fully funded scheme paid for by employers.
>
> The Bill proposes to extend the benefits under the Accident Compensation Act by introducing a presumption that certain diseases suffered by a firefighter are due to the nature of employment as a firefighter. An amendment of that kind would have the effect of increasing the benefits under the scheme with the consequential result of an increase in the costs of the scheme. In order to accommodate the increased costs, it may result in an increase in the cost of premiums payable by employers under the compulsory WorkCover insurance policies.
>
> Section 62 of the Constitution Act 1975 in part states:
>
> > (1) A Bill for appropriating any part of the Consolidated Fund or for imposing any duty, rate, tax, rent, return or impost must originate in the Assembly.
>
> While the primary purpose of the Bill is to extend the benefits under the scheme, it does appear to me that a consequence would be the imposition of a further tax or impost on employers, and therefore in breach of section 62 of the *Constitution Act 1975*. Consistent with past practice a Bill that causes increasing costs, whether as a tax or other impost, must originate in the Assembly, whether or not that is the primary purpose of the Bill. For these reasons it is therefore not in order for this House to initiate this Bill, and I order that the Bill be withdrawn.[1]

The President's ruling focussed on career firefighters, who are covered by the *Accident Compensation Act 1985*. The Committee has also examined the constitutional issues arising from clause 5 of the Bill, which relates to volunteer firefighters, who are covered under the *Country Fire Authority Act 1958* and Country Fire Authority Regulations 2004.

1.4 Scope of the inquiry

The scope of the Committee's inquiry is limited to measures aimed at addressing any constitutional impediment to the Bill's introduction into the Legislative Council. The Committee has not examined the merits of the Bill or the policy issues underlying its introduction as these are outside the Committee's Terms of Reference.

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[1] Legislative Council *Hansard*, 20 February 2013, p. 307.

1.5 Inquiry process

Upon receiving the reference from the Legislative Council, the Committee held a public hearing with the Bill's sponsor, Ms Colleen Hartland, MLC, on Wednesday, 8 May 2013. Also in attendance was Ms Liz Ingham.

The Committee called for submissions on Thursday, 9 May 2013. The Committee advertised on its website and through Twitter seeking input on its Terms of Reference. The Committee also wrote to constitutional experts and the Victorian WorkCover Authority seeking their input into the constitutional issues and cost impacts relevant to the Bill. The Committee received a total of 6 submissions. A full list of submissions received is provided in Appendix A.

The Committee held further public hearings with on Wednesday, 29 May 2013 with the Assistant Treasurer, Hon. Gordon Rich-Phillips, MLC and Miss Rowena Armstrong, QC. A full list of witnesses who appeared before the Committee is provided in Appendix B.

The Committee appreciates the efforts made by Dr Greg Taylor and Mr Ken Block to provide written submissions given they are both currently overseas. The Committee explored the option of receiving oral evidence from these witnesses through audio link or audio visual link, however, the Committee currently does not have the power to take evidence in this manner under the Legislative Council Standing Orders. The Committee notes that changes were made to the *Parliamentary Committees Act 2003* in 2006 to enable joint investigatory committees to take evidence by audio link or audio visual link following recommendations made by the Scrutiny of Acts and Regulations Committee in its Report on Electronic Democracy in 2005. Although the Committee was able to successfully complete this inquiry without oral evidence from these witnesses, the Committee believes that the capacity to take evidence from interstate or overseas with the assistance of technology would be beneficial for future inquiries. The Committee therefore recommends that the Standing Orders which govern the operation of the Legislative Council Standing Committees be amended to empower the Committees to receive evidence by audio link or audio visual link in future.

Recommendation 1

That the Legislative Council Standing Orders be amended to empower the Legislative Council Standing Committees to receive evidence by audio link or audio visual link.

1.6 Report structure

This report is structured into the following chapters:

- **Chapter 2** examines the interpretation of section 62 of the *Constitution Act 1975* and how it applies to Bills introduced in the Legislative Council. The Chapter details the legal advice provided to the Committee, as well as examining relevant parliamentary precedents.
- **Chapter 3** examines the cost impact of the Bill and outlines the arguments for and against that the contention that the Bill infringes section 62 of the *Constitution Act 1975*.
- **Chapter 4** examines measures aimed at addressing any constitutional impediment to the Bill's introduction into the Legislative Council and outlines options that could be considered to enable to the Bill to proceed or achieve the Bill's purposes.

2. Constitutional interpretation

2.1 Purpose of section 62 of the Constitution Act 1975

Central to the Committee's Terms of Reference is the interpretation and application of section 62(1) of the *Constitution Act 1975* which states:

> A Bill for appropriating any part of the Consolidated Fund or for imposing any duty, rate, tax, rent, return or impost must originate in the Assembly.

In his submission to the Committee, Dr Greg Taylor comments on the historical origin of section 62 of the *Constitution Act 1975*:[2]

> Section 62 may be traced back to s 56 of the original Victorian Constitution of 1855, where it is in virtually identical terms… At this stage in English constitutional history, it was clear that the House of Commons, as the people's house (within the limits of the restricted franchise of the day), had some form of primacy in financial matters… The predecessor of 62 was intended as a sort of hint to the new upper House - which was to be elective, even if on a very narrow franchise, and might get ideas above its station - that the lower House was meant to be the House with primacy in financial proposals on roughly the same basis as the House of Commons.

This is common in other Parliaments operating under a Westminster system. *House of Representatives Practice* states:[3]

> What is called the 'financial initiative of the Executive'—that is, the constitutional and parliamentary principle that only the Government may initiate or move to increase appropriations or taxes—plays an important part in procedures for the initiation and processing of legislation. … It is a long established and strictly observed rule which expresses a principle of the highest constitutional importance that no public charge can be incurred except on the initiative of the Executive Government.

Whist it is clear that the purpose of section 62 is to ensure the financial initiative of the Assembly, different Parliaments have taken different approaches to the extent of its application. In her submission to the Committee, Dr Rosemary Laing, the Clerk of the Australian Senate notes:[4]

> It would appear that subsection 62(1) of the Victorian *Constitution Act 1975* is much broader in its application than the provisions of the Australian Constitution which limit the financial powers of the Senate.

Therefore, whilst the practice of other jurisdictions may be informative to the Committee, the wording of the Victorian Constitution and Victorian precedents as to its application are of most relevance when determining how section 62 applies to Bills initiated in the Legislative Council.

2.2 Interpretation of section 62 of the Constitution Act 1975

The Committee was presented with very different views on how section 62(1) of the *Constitution Act 1975* should be interpreted. Dr Greg Taylor took the narrowest interpretation of the section, arguing for a purposive approach:[5]

> A Bill is to be judged by what its purpose is, not its effects; as it is not the purpose of this Bill to impose a tax, it does not fall under s 62, even if further taxation may - or then again may not - be a side-effect of its operation.
>
> Section 62 applies to Bills which are 'for imposing any duty, rate, tax, *etc*'. It is easy to overlook the importance of the word 'for'; but it is crucial. 'For' in this context means "with the

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2 Dr Greg Taylor, Submission No. 1, p. 2.
3 *House of Representatives Practice*, 6th ed, pp. 419-20.
4 Dr Rosemary Laing, Submission No. 2, p. 1.
5 Dr Greg Taylor, Submission No. 1, pp. 1, 4.

> purpose of". A Bill is a Bill for doing something if it means to do that thing, if that is its purpose, but not if it is a mere side-effect of its operation…
>
> Given that a Bill is 'for' what its purpose is, not what all its effects may be, only a Bill that actually imposes taxation is a Bill 'for' imposing taxation. If the Bill in question here contained provisions increasing taxation, it would fall under s 62, as that would be its purpose (or one of its purposes). It does not contain such provisions, and therefore it does not fall under s 62….The House's powers depend, rather, on a legal assessment of what counts, in law, as a Bill for imposing taxation: that is a Bill which is for imposing taxation, not any Bill which might or might not require extra taxation even though it does not itself impose taxation.

An alternative view on the interpretation of section 62 was provided to the Committee by the Clerk of the Legislative Council, who stated in his submission:[6]

> Sections 62 and 64 can be difficult to apply in practice. Many of the key terms in those sections are not defined and their interpretation has been complicated over the years by disagreements between the Houses, and between the Council, the Government and its legal advisers…
>
> The question of whether a Bill is one for 'appropriating any part of the Consolidated Fund' is a matter of statutory interpretation that requires consideration on a case by case basis and the task of determining whether a particular Bill is an appropriation Bill has been complicated in Victoria by debate about how widely section 62 should be interpreted, and whether the Assembly can lay claim to financial privileges beyond those in section 62.
>
> Section 62 clearly applies to Bills that *directly* appropriate part of the Consolidated Fund… The more difficult question is whether section 62 applies to Bills that, while not directly appropriating money from the Consolidated Fund, have the effect of forcing an appropriation because their implementation affects government expenditure…
>
> The Council and the Assembly have taken different views over time about whether section 62 extends to these types of Bills, as have the Government and its advisers …At the beginning of the 20th century, the Council resisted claims that section 62 applied to Bills beyond those directly appropriating part of the Consolidated Revenue… Over time, however, the Council began to accede to the view that section 62 could also apply to Bills that affected government expenditure without directly appropriating funds.

The approach of looking at the effects of a Bill is also taken by the Office of the Chief Parliamentary Counsel, which states in its *Legislative Process Handbook* (emphasis added):[7]

> An incidental message is used in respect of any other Bill that may have the **effect** of forcing an appropriation of the Consolidated Fund. An incidental message is also required if proposed house amendments to a Bill will have the **effect** of forcing an appropriation.

The Handbook outlines a number of "established categories of matters that have been interpreted as forcing an appropriation and thus requiring a Governor's message". These include the establishment of a public body (where establishment costs will need to be met by the State, or administrative assistance is to be provided by the State for the body to perform its functions) or the provision for appointment of public officers or members of bodies who will be entitled to remuneration, allowances or fees or reimbursement of expenses.[8]

Given these conflicting views, in further examining the issue of interpretation of section 62 of the *Constitution Act 1975*, the Committee has examined past precedents. These are discussed in the following sections.

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6 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Submission No. 3, pp. 2-5.

7 Office of the Chief Parliamentary Counsel, *Legislative Process Handbook*, July 2012, p. 46, <http://www.ocpc.vic.gov.au/CA2572B3001B894B/pages/publications-legislative-process-handbook>, accessed 17 May 2013.

8 Office of the Chief Parliamentary Counsel, *Legislative Process Handbook*, July 2012, p. 46, <http://www.ocpc.vic.gov.au/CA2572B3001B894B/pages/publications-legislative-process-handbook>, accessed 17 May 2013.

2.3 Victorian parliamentary precedent

The interpretation of section 62(1) of the *Constitution Act 1975* has been considered at two main stages after a Bill is introduced into the Legislative Council:

- the President of the Legislative Council can order a Bill to be withdrawn, or request its withdrawal or modification by the sponsor of the Bill, prior to its passage in the Council, if he or she is of the view it infringes the section; or
- the Legislative Assembly can refuse to entertain a Bill following its transmission from the Legislative Council and introduction in that House.

Examples of Bills that have been impacted by the operation of section 62(1) of *Constitution Act 1975* are discussed below.

2.2.1 Bills ruled out of order by the President

There are a number of previous examples of Bills being ruled out of order by the President of the Legislative Council for infringing section 62(1) of the *Constitution Act 1975*.

Legislative Council (Abolition) Bill (1959)

This Bill proposed to abolish the Legislative Council. It provided that, upon the Council's abolition, members of the Council would be treated as if they had been defeated at an election for the purposes of their pension entitlements. The Acting President noted that the Bill would create a further class of persons entitled to payments from the Parliamentary Contributory Retirement Fund. He stated this would involve an increase in the amount provided from the Consolidated Fund and that the power to make additional appropriations did not rest with the Council. He suggested the offending provisions be struck out during the Committee stage. The Acting President ruled this did not prevent debate continuing on the remainder of the Bill. The Bill was withdrawn and a new Bill introduced which omitted the offending provisions.[9]

Environment Protection (Licence Fees) Bill (1981)

This Bill increased fees for Environment Protection Authority (EPA)-issued licences. The Bill was introduced in the Council. Before the second reading speech, the responsible Minister advised the House that consideration had been given to whether the Bill should be introduced in the Council. He advised that it had been resolved that the Bill could not be regarded as a revenue raising or taxing Bill because the charges in the Bill were fees for licences and the amounts involved would not cover the EPA's costs. In the course of debate, the Minister advised the fees would not flow directly to the EPA. The President requested an explanation. The Minister advised that the fees would be paid into the Consolidated Fund but would then be used to fund the EPA. The President ordered the Bill be withdrawn.[10]

Coroners Bill (1985)

This Bill sought to reform Victoria's coronial system, including by creating a new Office of the State Coroner and the Victorian Institute of Forensic Pathology. Following the second reading speech, the President expressed reservations about the constitutionality of the Bill and advised he would consider the matter. The Attorney-General offered to obtain advice from the Crown Solicitor and Solicitor-General, which was provided to the President.

The President ruled the Bill was constitutional, except section 53 which provided that a coroner's jury empowered by the Bill would be entitled to claim and be paid workers compensation pursuant to Part VII of the *Juries Act 1967*. The President stated:[11]

> In effect, that clause activates the appropriation provided for in section 59(4) of the Juries Act, and, to that extent, the provision must be seen as authorizing payments of money in certain circumstances.

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9 Legislative Council *Hansard*, vol. 257, 22 April 1959, pp. 3225-32.
10 Legislative Council *Hansard*, vol. 360, 20 October 1981, p. 1698.
11 Legislative Council *Hansard*, vol. 379, 22 October 1985, p. 471.

The President therefore ruled the Bill should be allowed to proceed subject to it being withdrawn and re-introduced in a form that omitted the Juries Act clause. The responsible minister withdrew the Bill and presented a new Bill.

Environment Protection (Amendment) Bill (1987)

This Bill sought to amend Victoria's environment protection laws to, amongst other things, create an infringement notice system for some offences. Clause 4 of the Bill, which established this system, included a provision that allowed the relevant agency to withdraw the infringement notice and refund any penalty already paid.

The Bill was introduced in the Council by the responsible Minister and was read a first and second time. Before resumption of the second reading debate, the Clerk advised the Minister the Bill infringed section 62 because the refund of a penalty would force an appropriation from the Consolidated Fund. The Government withdrew the Bill but both the Minister and Opposition expressed disagreement with the Clerk's position calling it an "ultratechnical ruling". The Government re-introduced the Bill in the Legislative Assembly.[12]

Victorian Water Substitution Target Bill 2007

This Bill sought to promote a reduction in the use of potable water by establishing the Victorian Water Substitution Target scheme. The Bill imposed significant new functions on the Essential Services Commission and also contained a clause which specifically provided for the appropriation of certain money from the Consolidated Fund.[13] The President ordered the Bill be withdrawn.

2.2.2 Bills refused to be entertained by the Assembly

There are also several previous examples of Bills that were allowed to proceed in the Legislative Council and passed that House, but the Assembly then refused to entertain the Bills on constitutional grounds.

Tobacco (Control of Tobacco Effects on Minors) Bill 2007

The purpose of this Bill was to make it an offence to smoke in motor vehicles in the presence of minors. On receipt of the Bill, the Speaker stated:[14]

> I am of the opinion that the Bill is a direct infringement of the privileges of this house in that it seeks to force an appropriation from the Consolidated Fund, a matter that under the *Constitution Act 1975* must originate in the Assembly.

When explaining the reason the Assembly should reject the Bill, the Minister for Police and Emergency Services stated:[15]

> The Bill from the Upper House which purports to amend the Tobacco Act sets out new penalties. Therefore section 40 of the Tobacco Act, whereby any of those penalties must be paid into the Consolidated Fund, comes into play.
>
> Section 18 of the Infringements Act sets out that a penalty notice — that is, a fine — can be withdrawn. Section 18(3) sets out that:
>
> > *... an infringement notice may be withdrawn even if the infringement penalty and prescribed costs ... have been paid.*
>
> But to make it extremely clear, section 18(5)(a) sets out that:
>
> > *if the penalty and costs (if any) have been paid into the Consolidated Fund, the Consolidated Fund is, to the necessary extent, appropriated accordingly ...*

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12 Legislative Council *Hansard*, vol. 387, 14 April 1987, pp. 872-74.
13 Legislative Council *Hansard*, vol. 478, 7 May 2008, p. 1450.
14 Legislative Assembly *Hansard*, vol. 479, 26 June 2008, p. 2568.
15 Legislative Assembly *Hansard*, vol. 479, 26 June 2008, p. 2569.

> The words are very clear. This is a Bill which is offensive to the privileges of this house, but it is more offensive to section 62 of the Constitution, and it is appropriate that a Bill that is so offensive should be dispatched immediately.

The Assembly refused to consider the Bill and returned it to the Council with a Message "advising that the Legislative Assembly refuses to entertain the Bill as it seeks to force an appropriation from the Consolidated Fund, which is unlawful, being the exclusive power of the Legislative Assembly as set out in the *Constitution Act 1975*".[16]

Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009

The Bill sought to establish a beverage container deposit and recovery scheme to be administered by the Environment Protection Authority. The Bill was passed by the Legislative Council and transmitted to the Legislative Assembly. On receipt of the Bill, the Speaker advised the House that in her "opinion it is a direct infringement of the privileges of the House in that it seeks to impose a beverage container environmental levy. Section 62 of the Constitution Act 1975 requires a Bill which imposes any duty, rate, tax, rent, return or impost to originate in the Legislative Assembly".[17]

The Assembly refused to consider the Bill and returned it to the Council with a Message "advising that the Legislative Assembly refuses to entertain the Bill, as it seeks to impose a levy which is unlawful, being the exclusive power of the Legislative Assembly as set out in the *Constitution Act 1975*".[18]

2.2.3 Amendments refused to be entertained by the Assembly

House Contracts Guarantee (HIH Further Amendment) Bill (2001)

This Bill was initiated in the Assembly. The Opposition attempted to move amendments in the Assembly to narrow the exclusions from the Domestic Buildings HIH Indemnity Fund. The Chairman of Committees ruled that as narrowing the exclusions effectively increased the circumstances in which successful claims could be made. She further ruled that as the Fund included moneys appropriated by Parliament, the amendments forced an appropriation and infringed section 63 of the *Constitution Act 1975* as a Governor's message was required. The amendments were therefore not permitted to proceed.[19]

2.2.4 Bills allowed to proceed in the Assembly

Legal Profession Practice (Guarantee Fund) Bill (1993)

In 1993, the Government successfully introduced the Legal Profession Practice (Guarantee Fund) Bill into the Legislative Council. The Bill expanded the purposes for which money in the Solicitors Guarantee Fund could be used to include law reform projects. The Solicitors Guarantee Fund was funded through interest on moneys which the Act required solicitors to deposit in a Law Institute account. The Bill increased the amount of money required to be deposited in the Law Institute account from 66.66 per cent to 72 per cent of the total money held in the solicitors trust account. Although the money itself was returned to the solicitor when needed, the interest was kept by the Institute.

The Bill was passed by the Council and transmitted to the Assembly. It was argued in the Legislative Assembly that the Bill was unconstitutional as it increased the amount of money required to be deposited by solicitors, and therefore was an impost. Speaker Plowman ruled that:[20]

> Imposts envisaged in section 62 relate to imposts which are generally imposed and flow, when levied, to the Consolidated Fund. Imposts on the contributors to the Solicitors Guarantee Fund under the Legal Profession Practice Act 1958 flow to that fund and have no

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16 Legislative Assembly *Hansard*, vol. 479, 26 June 2008, pp. 2572-81.
17 Legislative Assembly *Hansard*, vol. 484, 24 June 2009, p. 2098.
18 Legislative Assembly *Hansard*, vol. 484, 24 June 2009, pp. 2098-102.
19 Legislative Assembly *Hansard*, vol. 453, 29 November 2001, pp. 2151-3.
20 Legislative Assembly *Hansard*, vol. 412, 18 May 1993, p. 2157.

> impact on the Consolidated Fund. That fact dismisses the second requirement of section 62 that bars introduction of the Bill in the Council.

In his book *The Constitution of Victoria*, Dr Greg Taylor comments "this is somewhat a questionable ruling, as there is no limitation of the rules applying to taxation for the benefit of the Consolidated Fund and taxation remains an imposition of the subject regardless of where the government puts the money".[21]

2.2.5 Bills allowed to proceed in the Council

In evidence to the Committee, the sponsor of the Bill, Ms Colleen Hartland, MLC, argued that there have been many Bills that have been allowed to proceed in the Legislative Council that have cost impacts:[22]

> The third element I would like the committee to examine is the practice of this Parliament when it comes to Bills with a peripheral impact on cost, whether that impact is speculative or otherwise. The Parliament does indeed examine debate and pass legislation introduced into the Legislative Council that causes an increase in cost to individuals, companies, groups, government departments and statutory authorities. The practice of Parliament in passing legislation of that kind amounts to a rule of practice in relation to section 62 of the Constitution Act.

In evidence to the Committee, Ms Liz Ingham, an adviser to Ms Hartland, listed a number of Bills which she believed arguably also infringed section 62, but were allowed to proceed in the Council and were then not objected to by the Assembly.[23] The Committee also discussed what does and does not constitute an impost with Miss Rowena Armstrong, QC at a public hearing.[24] The Committee is not in a position to determine the constitutionality of previous Bills introduced and passed by the Legislative Council, but notes it is a very technical area and open to differences of opinion.

2.2.6 Summary

The only Victorian parliamentary precedent the Committee was able to identify relating to the interpretation of the second part of section 62(1) and the imposition of an impost is the Legal Profession Practice (Guarantee Fund) Bill from 1993. That Bill was allowed to proceed as the impost did not flow to the Consolidated Fund. However, Dr Greg Taylor casts doubt on the authority of this precedent.

The remaining precedents relate to the first part of section 62(1), dealing with appropriation of the Consolidated Fund. However, the Assembly is likely to use similar principles when interpreting the second part, dealing with the imposition of a duty, rate, tax, rent, return or impost. It is clear from examining these precedents that the effect as well as the purpose of Bills have been considered when determining whether a Bill infringes section 62. The precedents also reveal that the Assembly has often made connections between Bills or amendments and existing legislation to determine the effect of a Bill and the operation of section 62(1).

2.4 Possible tests to be applied in interpreting section 62

Drawing on the various precedents, the Committee has explored whether there is a reliable test that could be applied to determine whether a Bill infringes section 62 of the *Constitution Act 1975*.

Dr Greg Taylor argues that a Bill should be judged by its purpose, not its effects. He further argues:[25]

> As far as the taxation side is concerned, which is in issue here, s 62 is nowadays of at best questionable utility : it assumes that the Parliament of Victoria is made up of one more and one less democratic House, as it was in 1856 when the upper House was elected on a very restricted franchise. On that assumption, its aim is to give financial primacy to the lower, the

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21 Greg Taylor, *The Constitution of Victoria*, Federation Press, Sydney, 2006, pp. 368-9.
22 Ms Colleen Hartland, MLC, *Transcript of Evidence*, 8 May 2013, p. 4.
23 Ms Colleen Hartland, MLC, *Transcript of Evidence*, 8 May 2013, pp. 4-5.
24 Miss Rowena Armstrong, QC, *Transcript of Evidence*, 29 May 2013, pp. 23-26.
25 Dr Greg Taylor, Submission No. 1, p. 3.

> more democratic House… Section 62 is concerned with ensuring that the lower House initiates proposals that on their face are taxation and should come from the (supposedly) more democratic House as the House that (supposedly) better represents the people on whom the burden of taxation will fall. It is about vindicating the financial primacy of that House over Bills that directly impose taxation, not over the much larger class of Bills that may imply the need for taxation. Its purpose is unconcerned with remote, possible knock-on effects, and indeed by any Bill which is not for imposing taxation…This results in a drastic reduction of the Bills that are subject to s 62. That is a good thing. The rights of the upper House to debate legislation should not be restricted without a very good reason.

Although Dr Taylor puts forward a convincing argument, it does not align with the parliamentary precedents discussed earlier in this Chapter. In his book, *The Constitution of Victoria,* Dr Taylor himself acknowledges "vestiges of the old non-purposive approach continue" and the Legislative Assembly continues to make reference to the effects of the Bill, not just its purpose.[26]

Similar disputes about constitutional provisions have occurred at a Commonwealth level between the Senate and the House of Representatives. In 1995, the House of Representatives Standing Committee on Legal and Constitutional Affairs examined the third paragraph of section 53 of the Commonwealth Constitution. In its report, the Committee attempted to devise a test that should be applied when determining whether a Senate amendment to a Bill increased the "proposed charge or burden" on the people.

The Committee identified a number of possible tests:[27]

1) Is it the **necessary, clear and direct impact** of the amendment to increase the proposed charge or burden.
2) Is it the **probable, expected or intended effect** of the amendment to increase the proposed charge or burden.
3) Would the amendment increase the amount **available** for expenditure, therefore is the Parliament increasing the money available to the Executive, that is a burden on the people, regardless of whether the money is actually spent.
4) Does the amendment make an increase in the total tax or charge payable **legally possible**.

The Committee believes many of these approaches can similarly be applied to the interpretation of the second part of section 62(1) of the *Constitution Act 1975*. Possible tests include:

1) Is the **necessary, clear and direct impact** of the Bill (that is its **purpose**) to impose or increase a duty, rate, tax, rent, return or impost?
2) Is the **probable, expected or intended effect** of the Bill to impose or increase a duty, rate, tax, rent, return or impost?
3) Is it **legally possible** that the Bill will impose or increase a duty, rate, tax, rent, return or impost?

Although the application of the first test would be the simplest to apply in practice, such a test is very narrow and would most likely be rejected by the Assembly.

The second test becomes more difficult to apply as it requires an assessment of the effect of the Bill and its impact on taxation. Dr Taylor argues strongly against such an interpretation stating:[28]

> Every Bill will require the expenditure of some public money - for printing it, time in Parliament spent debating it, and, once it is passed, amendments to on-line data bases of legislation and adjustments to take account of changes in the law in government administration. Thus every Bill implies the need for taxation for its operation. But the expenses associated with those things, although paid for from taxation, do not make any - or

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26 Greg Taylor, *The Constitution of Victoria*, Federation Press, Sydney, 2006, p. 371.
27 House of Representatives Standing Committee on Legal and Constitutional Affairs, *The Third Paragraph of Section 53 of the Constitution*, 1995, pp. 135-144.
28 Dr Greg Taylor, Submission No. 1, p. 2.

> rather every - Bill a Bill for imposing tax. They mean merely that one of numerous side-effects of the Bill will be the raising and expenditure of taxation.
>
> If I am thought to be going too far here, let those who maintain that I am doing so point out where they would draw the line between Bills that do and those that do not imply the need for taxation. I see no way of drawing such a line if we abandon the criterion of purpose - the true criterion - and instead adopt the criterion of effects. Once we start down that slippery slope, there is no way to stop ourselves from ending up right at the bottom.

Miss Rowena Armstrong, QC, provided a different view to the Committee on the application of section 62:

> I think in my view … there is a distinction between a Bill that actually provides for expenditure or implies expenditure in a positive way for the purpose of a Bill and the administrative costs of running government.[29]… Where the proposal and the legislation just cannot work without a significant increase in the size of the fund that really does raise the [constitutional] question.[30]

Recent precedents demonstrate that the Assembly continues to look at the effects of a Bill when determining whether it infringes its financial privileges. It could be argued the Assembly is most likely to apply the third test, which is the broadest. In the example discussed above of the Tobacco (Control of Tobacco Effects on Minors) Bill 2007, the Bill was rejected by the Assembly as an appropriation was legally possible, even though actual expenditure was arguably not the probable, expected or intended effect of the Bill.

The Committee is also attracted to the Senate precedents regarding requests for amendments.[31] Applying Senate precedents, it could be argued the Council is entitled to initiate legislation where:

- the connection between the Bill and an ultimate increase or imposition of a duty, rate, tax, rent, return or impost involves too many links in the chain of causation;
- where the effect of a Bill on a duty, rate, tax, rent, return or impost is uncertain;
- where a Bill would not in practice result in the increase or imposition of a duty, rate, tax, rent, return or impost;
- where it is not possible to determine whether the effect of the Bill would be to increase or impose a duty, rate, tax, rent, return or impost.

Ultimately, the Committee is unable to conclude that there is one reliable test for determining whether a Bill infringes section 62 of the *Constitution Act 1975*. While the sponsor of the Bill and Dr Greg Taylor argue for a purposive approach, which would significantly reduce the number of Bills to which the section applies, the Clerk of the Legislative Council and Miss Rowena Armstrong, QC note this is not consistent with Victorian parliamentary precedent, and the much broader application of the section by the Assembly.

Given the opposing views by legal and procedural experts, the Committee does not believe it is in a position to form a view as to the "correct" interpretation of section 62(1). As the application of the section is not justiciable by the courts, this issue may never be conclusively resolved, and the section is likely to continue to be subject to differences of opinion and disagreements between the Houses in the future. The Committee hopes that putting the differing views on record in this Report will be of benefit to the Houses and the Presiding Officers should similar questions of interpretation arise in the future.

Finding 1

There are differing views as to how section 62(1) of the *Constitution Act 1975* should be interpreted. Possible approaches include interpreting the paragraph with reference to the purpose of a Bill, the effect of a Bill or what is legally possible as a result of the Bill.

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29 Miss Rowena Armstrong, QC, *Transcript of Evidence*, 29 May 2013, p. 26.
30 Miss Rowena Armstrong, QC, *Transcript of Evidence*, 29 May 2013, p. 23.
31 *Odgers' Australian Senate Practice*, 13th edition, pp. 395-6.

2.5 Enforcement of section 62 of the Constitution Act 1975

In addition to examining the interpretation of section 62 of the *Constitution Act 1975* the Committee has also examined the way in which the section should be enforced.

Dr Greg Taylor points out in his book, *The Constitution of Victoria*:[32]

> Sections 62-64 concern the relationship of the Houses to each other and their relative powers, and are thus non-justiciable … Compliance with them is therefore the concern of the Houses themselves and an Act resulting from a breach of them is valid.

The practice of the Council has been for the President to intervene and order Bills to be withdrawn if he or she believes the Bill breaches the requirements of section 62 and therefore cannot be initiated in the Legislative Council. As most Bills are checked for constitutional compliance by the Clerks before their introduction in the House, occurrences of this are rare. Often Members will be informally advised that the Bill will be ruled out of order if introduced, and therefore do not proceed with the Bill, or the Bill is modified to remove any constitutional impediments before its introduction.

In cases where the problem can be attributed to a particular clause or clauses in a Bill, the President has sometimes given members the option of withdrawing the Bill and introducing a new version without the offending clauses.[33] In one case, the President offered to allow debate on a Bill to proceed, subject to an understanding that the offending clauses would be removed at the Committee stage.[34]

In his submission to the Committee, Dr Greg Taylor argues against the President taking a proactive role:[35]

> If the Assembly thinks that s 62 has been breached, it should object to the Bill when it gets it from the Council. If it does not object, or if it does object and the Houses agree to waive the point and discuss the actual question in hand, which will usually be the sensible thing to do, then the matter is closed, and the Bill, once assented to, cannot be challenged on the grounds of any supposed non-compliance with s 62…
>
> This makes it… strange beyond words that the Council is so eager to enforce this clause against itself. Something has clearly gone wrong here. The Council should not be arguing for a reduction in its own powers, particularly under a provision which has lost all point, as s 62 has. That is the Assembly's role, if it chooses to do that - which in this case it should not, as, properly interpreted, s 62 does not apply.

The Clerk of the Australian Senate advised the Committee:[36]

> It is a cardinal rule of interpretation, established by the Senate's first President, Sir Richard Baker, that the chair will lean towards a ruling which preserves or strengthens the powers of the Senate and the rights of senators, rather than towards a view that may weaken or reduce the Senate's powers or senators' rights…
>
> A ruling [that a Bill be withdrawn due to the financial implications of the Bill] by a President of the Senate would be unlikely except in the case of a blatant disregard of the Constitution… If a financial question involves issues of interpretation and judgment, then it is unlikely that a President would make a ruling that would prevent the Senate forming its own view and, if the Bill passed, transmitting it to the House for the normal bicameral negotiations.

However, previous Presidents of the Legislative Council in Victoria have taken a different approach. Former President Hon. Rod MacKenzie stated:[37]

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32 Greg Taylor, *The Constitution of Victoria*, Federation Press, Sydney, 2006, pp. 365-66.
33 Legislative Council (Abolition) Bill (1959) — Legislative Council *Hansard*, vol. 257, 22 April 1959, pp. 3225-32.
34 Coroners Bill (1985) — Legislative Council *Hansard*, vol. 379, 22 October 1985, p. 471.
35 Dr Greg Taylor, Submission No. 1, pp. 3-4.
36 Dr Rosemary Laing, Submission No. 2, pp. 2-4.
37 Legislative Council *Hansard*, vol. 379, 22 October 1985, p. 471.

> In its relationships with the other House on financial matters, regard has always been had to whether the Assembly would, pursuant to its longstanding rulings and practices, seek to obtain a message recommending an appropriation in a particular instance and, if so, this House has generally accepted that advice to prevent any cavil.

The Victorian Legislative Council has therefore taken a cautious approach and been reluctant to proceed with Bills and amendments likely to be objected to by the Assembly if later transmitted to them. The Clerk of the Legislative Council advised the Committee:[38]

> Ultimately, it is a matter for the President to determine the question in the first instance. Should the President not choose to intervene, it would then fall on the Council and then perhaps the Assembly to finally decide the fate of the Bill.

The practice of the Legislative Council that a President may order a Bill to be withdrawn for infringing constitutional provisions is derived from a convention of the House and not specifically provided for under the Standing Orders. The only Standing Order relating to the withdrawal of Bills is Standing Order 14.02 which states:

> A Bill not prepared according to the Standing Orders and practices of the Council will be ordered to be withdrawn by the President.

The Committee acknowledges that, based on past practice, the President has the power to order a Bill to be withdrawn if he or she is of the opinion that it infringes section 62 of the *Constitution Act 1975*. The President acted in accordance with this practice when ordering the Bill under consideration by this Committee to be withdrawn. However, given the difficulties interpreting section 62, the Committee does not support a continuation of this practice where the President alone orders such Bills to be withdrawn.

The Terms of Reference for this inquiry specifically ask the Committee to examine any constitutional impediment to the introduction of the Bill in the Legislative Council. At a public hearing Miss Rowena Armstrong, QC, was asked whether the Council had the power to consider a Bill that infringed section 62:[39]

> **The CHAIR**—So here with this Bill, if we were to recommend to the Council that this Bill be resubmitted to the Council, what would be the repercussions of this?
>
> **Miss ARMSTRONG**—Well, of course the Council can decide that.
>
> **The CHAIR**—The Senate does.
>
> **Miss ARMSTRONG**—Yes, I mean, they can do that but in introducing it into the Assembly, the Assembly might well take the view that this is really a breach of their privileges … I think I did make a comment that the Council is the master of its own business and if it passes the Bill, it passes the Bill.

It is therefore open for the Council to proceed with the Bill, even though the Assembly may later refuse to consider it.

The Committee believes there is merit in the Senate approach where, if a financial question involves issues of interpretation and judgment, the President leans towards an interpretation that would enhance the rights of Senators or allows the House itself to make a determination. The Committee believes it is more important to uphold the rights of the Legislative Council and the rights of its Members to initiate legislation than to protect the financial privileges of the Assembly. Given the uncertainty surrounding the interpretation of section 62(1), the Committee is concerned that in some cases an early intervention by the President may inadvertently constrain the powers of the Legislative Council by ruling out Bills that may later not be objected to by the Legislative Assembly. The Legislative Assembly also has the option of waiving its privileges, but it will never be required to decide whether to do so unless the Bill is first allowed to proceed in the Legislative Council.

The Committee notes there have been significant changes to the procedures of the Legislative Council since 2003 when reforms were made to the electoral system and composition of the

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38 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Submission No. 3, p. 8.

39 Miss Rowena Armstrong, QC, *Transcript of Evidence*, 30 May 2013, pp. 27, 31.

House. In his submission, Dr Greg Taylor points out that section 62 has less relevance now than when it was originally written:[40]

> The predecessor of 62 was intended as a sort of hint to the new upper House - which was to be elective, even if on a very narrow franchise, and might get ideas above its station - that the lower House was meant to be the House with primacy in financial proposals on roughly the same basis as the House of Commons … This purpose is now completely redundant as far as the appropriation side is concerned, as s 65 denies the Council the power to block the Budget … As far as the taxation side is concerned, which is in issue here, s 62 is nowadays of at best questionable utility : it assumes that the Parliament of Victoria is made up of one more and one less democratic House, as it was in 1856 when the upper House was elected on a very restricted franchise. On that assumption, its aim is to give financial primacy to the lower, the more democratic House. Nowadays the distinction between the Houses is, without putting too fine a point on it, not so sharp; and anyway, it is not as if the lower House can be by-passed - its consent is still required!

The Committee notes that in many areas the Legislative Council has been guided by the practices of the Senate, including the establishment of Standing Committees. The Committee believes the practice of the Senate is preferable to the current Victorian practice whereby the President can unilaterally rule out a Bill. The Senate practice also avoids the President being placed in the difficult position of determining complicated constitutional questions. Dr Greg Taylor points out that the Assembly should be the ultimate enforcer of section 62:[41]

> [T]he section exists for the Assembly's benefit - to secure its primacy - so there is nothing wrong with leaving the Assembly to attempt to enforce it as and when it chooses and thinks it worthwhile to do so. The section does not exist for the benefit of the public, for example; it does not protect the public from any wrong, but merely regulates an aspect of the internal relationship between the Houses - which is why it is unenforceable by the Courts.

In the Legislative Assembly, it is left to the House to enforce the constitutional provisions, not the Presiding Officer. If a Bill is transmitted from the Legislative Council and the Speaker is of the opinion it infringes section 62, the Speaker advises the House of his or her concerns and the House itself decides what action to take.[42] The Committee believes a similar approach should be adopted in the Legislative Council.

The Committee therefore recommends that in future when Bills potentially infringing section 62 of the *Constitution Act 1975* are introduced into the Legislative Council, the President should report his concerns to the House and it should then become a matter for the House to decide whether to allow the Bill to proceed. It is currently open to any Member to move a reasoned amendment to the question, "That the Bill be now read a second time", and this mechanism could be used by any Member who wished to seek the withdrawal of a Bill on the grounds that it infringed constitutional provisions.

The Bill currently under examination by the Committee has already been withdrawn. However, under Standing Order 7.06, the sponsor of the Bill is entitled to re-introduce the Bill as six months have already elapsed since the motion for the first reading was passed. Having regard to the recommendation made in this report, the Committee believes that if the sponsor elects to reintroduce the Bill, the House should then be given the opportunity to decide whether to allow the Bill to proceed taking into account the matters discussed in the next Chapter of this report.

Recommendation 2

That in future when Bills that potentially infringe section 62 of the *Constitution Act 1975* are introduced into the Legislative Council, the President should report his concerns to the House and the House should then determine whether to allow the Bill to proceed.

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40 Dr Greg Taylor, Submission No. 1, pp. 2-3.

41 Dr Greg Taylor, Submission No. 1, p. 4.

42 See for example Tobacco (Control of Tobacco Effects on Minors) Bill 2007 — Legislative Assembly *Hansard*, vol. 479, 26 June 2008, p. 2568.

3. Constitutionality of the Bill

Although the Committee has recommended in Chapter 2 that the House itself should ultimately decide whether to allow a Bill to proceed, the Committee received significant evidence as to whether the Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011 can be initiated in the Legislative Council according to section 62 of the *Constitution Act 1975*. This Chapter summarises the evidence received and the arguments put forward to the Committee to assist the House to make its decision.

3.1 Relevance of the cost impact of the Bill to the constitutional issues

As discussed in Chapter 2, there are differing opinions as to the interpretation of section 62(1) of the *Constitution Act 1975*. Consequently, there is also no established test for determining whether a Bill infringes that section. Possible tests identified in Part 2.4 of this report include an examination of (1) the necessary, clear and direct impact of the Bill; (2) the probable, expected or intended effect of the Bill; or (3) what is legally possible as a result of the Bill.

In ruling the Accident Compensation Legislation Amendment (Fair Protection for Firefighters) Bill 2011 be withdrawn the President of the Legislative Council stated:[43]

> While the primary purpose of the Bill is to extend the benefits under the scheme, it does appear to me that a consequence would be the imposition of a further tax or impost on employers, and therefore in breach of section 62 of the *Constitution Act 1975*. Consistent with past practice a Bill that causes increasing costs, whether as a tax or other impost, must originate in the Assembly, whether or not that is the primary purpose of the Bill.

In making this ruling, the President was applying either the second or third tests discussed above. It is clear that the imposition of an impost is not the necessary, clear and direct impact of the Bill and the Bill does not infringe section 62 if the first test is applied. However, utilising the second or third test, the questions to consider become:

- Is the probable, expected or intended effect of the Bill to impose or increase an impost on employers?
- Is it legally possible that the Bill will impose or increase an impost on employers?

In order to form a view on these issues, it is necessary to examine the effect of the Bill if it were enacted. The Committee therefore took evidence on the possible cost impacts of the Bill and its possible effects on employers.

3.2 Financial arrangements for the compensation for firefighters

In Victoria, all employers must take out insurance to cover for the cost of compensation if workers are injured or become ill because of their work.[44] Most Victorian employers take out this insurance through a WorkSafe insurance policy issued by the Victorian WorkCover Authority.[45]

The Bill being examined by the Committee also deals with compensation provided to CFA volunteers. Volunteers are not covered by the definition of "worker" in the *Accident Compensation Act 1985* therefore CFA volunteers are not covered by the same provisions as employees. Instead, the *Country Fire Authority Act 1958* confers certain rights to compensation on CFA volunteers who are injured in the course of fire-fighting or the performance of an authorised activity as a volunteer.

The financial arrangements covering compensation payments to career firefighters and CFA volunteers are discussed below.

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43 Legislative Council *Hansard*, 20 February 2013, p. 307.

44 *Accident Compensation Act 1985* and the *Accident Compensation (WorkCover Insurance) Act 1993.*

45 Under the Act, an organisation can also apply to be a self-insurer.

3.2.1 Career firefighters — Calculation of WorkSafe insurance premiums

Employers of firefighters, such as the MFB, CFA or DEPI, must pay WorkSafe insurance premiums to the Victorian WorkCover Authority in order to insure their employees against injuries suffered during the course of their employment. The WorkSafe insurance premiums are calculated yearly as a certain percentage of the rateable remuneration paid by the organisation to its employees.[46]

A different percentage premium applies to each employer. Each industry is allocated its own rate determined by the relative safety performance of that industry over the preceding five years. For large employers (employers with a total remuneration of its employees over $200,000), an individual insurance premium rate is then calculated each year using the industry rate and the employer's claims experience over the previous two years compared to the industry's experience.[47]

3.2.2 CFA volunteers

CFA volunteers are entitled to compensation for injuries suffered as a volunteer under section 63 of the *Country Fire Authority Act 1958* which states:

> **63 Compensation in respect of injury to casual fire-fighter**
>
> (1) If personal injury is suffered—
>
> (a) by a casual fire-fighter, by accident arising out of or in the course of fire-fighting at any fire in or outside Victoria with a Victorian brigade or group of brigades; or
>
> (b) by a volunteer auxiliary worker, by accident arising out of or in the course of the performance of an authorized activity in or outside Victoria—
>
> compensation is payable under this Part.
>
> […]
>
> (4) All claims for compensation under this section must be made to the Authority in accordance with the regulations.

As stated in subsection (4), the CFA is responsible for managing compensation under this section and for meeting the costs of the compensation.

3.3 Costs of the Bill

In the public hearing with the sponsor of the Bill, Ms Colleen Hartland stated:[48]

> The first step is to ask whether the cost to WorkCover will in fact increase or whether an increase in successful claims will be so modest they will be offset by other savings like a reduction in costs from contested claims, an outcome which is supported by overseas evidence…If this committee decides that costs would increase at all in the first step, the second step is to determine whether they would increase enough to have any chance of impacting on premiums.

The Committee agrees with Ms Hartland's statement and has examined each of these issues in turn.

3.3.1 Would the Bill result in increased compensation being paid out?

By reversing the onus of proof, the Bill aims to make it easier for firefighters to access compensation. It is clear that the intention of the Bill is that by making it easier to claim compensation, more firefighters will successfully do so, and therefore ultimately more compensation will be paid out. This was confirmed by the sponsor of the Bill, Ms Colleen Hartland, at a public hearing:[49]

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46 WorkSafe Victoria*, A Guide for Employers: Your WorkSafe Insurance*, p. 4.
47 WorkSafe Victoria*, A Guide for Employers: Your WorkSafe Insurance*, pp. 3, 4, 11.
48 Ms Colleen Hartland, MLC, *Transcript of Evidence*, 8 May 2013, pp. 3-4.
49 Ms Colleen Hartland, MLC, *Transcript of Evidence*, 8 May 2013, p. 6.

> **Ms PULFORD**— You would expect that if the Victorian legislation was changed, as your Bill would intend, there would be additional people successfully claiming compensation if that was the case.
>
> **Ms HARTLAND** — Yes.

Other clauses of the Bill will also result in increased compensation being payable than is currently possible under the existing Act. Clause 3(3) enables firefighters who have previously had their claims rejected because they could not prove the cancer was caused by their employment, to claim again under the new provisions. Clause 3(5) also makes specific reference to Mr Brian Potter. At a public hearing, Ms Liz Ingham, and adviser to Ms Hartland, commented on the effect of this subclause:[50]

> If Mr Potter were to make a claim he would still have to show that his primary site cancer was one of the 12 on the list, and those 12 on the list are the ones that the science say is caused by his work, which is firefighting. The effect of the provision would be that parliament declares that he has worked as a firefighter for the qualifying period, so that he will not have to go through his work and volunteer history back to 1964 and test the definition of what parts of his work amounted to firefighting duties, or any of the other things that you might expect the first person to make a complicated claim to have to go through.

At a public hearing the Assistant Treasurer advised the Committee:

> [T]here have been a cohort of claims made. Some of those claims have been successful, some of those claims have not been successful. Under a deemed model those claims would be deemed to be successful… It would necessarily be a larger cohort with successful claims.[51]
>
> On the question of cost, in relation to the VWA scheme, some actuarial work has been done by PriceWaterhouseCoopers and the preliminary figures suggest the cost to the scheme would be in the order of a $10 million annual cost and a liability impact on the scheme… the whole of life cost… calculated in terms of the future liabilities against the scheme. That has been assessed at around $120 million impact on the liability.[52]

Ultimately, any increase in compensation paid out will always be contingent on eligible firefighters being aware of their entitlement and lodging a claim. However, given the purpose of the Bill is to make access to compensation easier and claimants who have previously been unsuccessful under existing legislation will be able to claim again under the provisions of the Bill, the Committee concludes it is probable that the total amount of compensation paid to firefighters will increase under the provisions of the Bill.

Finding 2

It is probable that the total amount of compensation paid to firefighters will increase under the provisions of the Bill.

3.3.2 Would the increased compensation paid out under the Bill be offset by savings?

The principal argument put forward by the sponsor of the Bill in support of the argument that the Bill does not infringe any constitutional provisions was that the increased compensation paid out under the Bill will be offset by savings.

Under the Victorian WorkCover system, if an employer's rateable remuneration exceeds $200,000, their WorkSafe insurance premium is calculated taking into account the costs of WorkSafe claims

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50 Ms Liz Ingham, *Transcript of Evidence*, 8 May 2013, pp. 10-11.
51 Hon. Gordon Rich-Phillips, MLC, *Transcript of Evidence*, 30 May 2013, p. 17.
52 Hon. Gordon Rich-Phillips, MLC, *Transcript of Evidence*, 30 May 2013, p. 15.

against that employer over a previous two year period. Claim costs are payments made in relation to a claim, including an estimate of future costs. These costs include:[53]

- Compensation payments
- Costs and expenses relating to the claim
- Settlement payments
- The estimation of future payments, expenses, and costs

Whilst the compensation payments, settlement payments and future payments are unlikely to be affected by a simplification of the claims system, the sponsor of the Bill argued there would be a reduction in costs and expenses relating to the claim if the Bill were enacted, which would offset any increased amounts paid out. In the public hearing, Ms Colleen Hartland stated: [54]

> The incidence of these 12 cancers in the general population is very low. The 12 cancers are two to five times more prevalent in firefighters but we are still talking about a very low number of claims; indeed a handful of claims. It does not take a big reduction in the cost of contested claims to offset an increase in the benefits to firefighters who get cancer from their workplace and have their cancer treated and return to work… if you take away the costs of the contested claims we think that would be a huge saving that could offset the small number of claims that would occur.

The issue of costs was also addressed by the Senate Education, Employment and Workplace Relations Legislation Committee when it examined similar legislation at a Commonwealth level. That Inquiry found:[55]

> The committee explored the possibility that the Bill could bring about significant increases in premiums by improving the ease with which firefighters can access compensation. However, based on overseas experience as well as the fact that the legislation would not provide for any new grounds to claim, the committee is of the view that there would be negligible impact on the Commonwealth or ACT budget.
>
> For information on the cost impacts of similar presumptive legislation in other jurisdictions the committee considered evidence provided by the Fire Chief Ken Block of Edmonton Fire Rescue Services in Canada. Fire Chief Block informed the committee that the cost impact of presumptive legislation in Canada had been 'minimal if not negligible'.

Mr Ken Block provided updated data to the Committee confirming that after the introduction of similar legislation in Alberta, Canada, the Edmonton Fire Rescue service's Workers Compensation Board premium costs had remained stable.[56] The United Firefighters Union of Australia supported this view arguing that the legislation does not create new entitlements and the international and Commonwealth experience has confirmed the legislation has not resulted in an inflationary factor for costs.[57]

Whilst the experience at the Commonwealth level may give an indication of the costs involved, the Committee notes that the Bill examined at a Commonwealth level had several differences to the Bill introduced in Victoria. In particular, the Commonwealth Bill did not cover volunteer firefighters, did not provide that claimants previously rejected could reapply under the new provisions and did not refer to any particular individuals. These changes may have an impact on costs under the Bill, and also on potential cost savings achieved by the Bill.

The Committee also notes media reports indicating there may be more than a "handful of claims" estimated by Ms Hartland. Recent media reports have stated:

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53 WorkSafe Victoria, *How Claims Influence Your Insurance Premium*, <http://www.worksafe.vic.gov.au/insurance-and-premiums/calculating-your-insurance-premium/how-claims-influence-your-insurance-premium>, accessed 22 May 2013.

54 Ms Colleen Hartland, MLC, *Transcript of Evidence*, 8 May 2013, pp. 4, 6.

55 Senate Education, Employment and Workplace Relations Legislation Committee, *Report on Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011 [Provisions],* p. 30.

56 Mr Ken Block — Chief Fire Officer, City of Edmonton, Alberta, Canada, Submission No. 5, p. 5.

57 United Firefighters Union of Australia, Submission No. 4, p. 7.

> More than 200 workers, volunteers and family of those associated with the tainted Fiskville training centre have contacted law firms to pursue the case. About a third of those have been diagnosed with some form of cancer.[58]
>
> Law firm Slater and Gordon said it represented about 150 Fiskville volunteers suffering from illnesses ranging from cancer to respiratory diseases and was considering a class action. Fifty people have contacted law firm Maurice Blackburn over health concerns, but there are no current plans for a class action.[59]

It is difficult for the Committee to estimate how many of these potential claimants would seek to contest a claim under existing legislation, and how many of these would be successful under the provisions of the Bill. The Committee sought a view from the Victorian WorkCover Authority as to whether increased payments under the system proposed by the Bill would be offset by savings from a reduction in contested claims. In its submission, the Authority stated:[60]

> The VWA does not consider that presumptive legislation is likely to result in significant savings for firefighters' cancer claims made under the VWA scheme. This is primarily because historically, few such claims have been made. If more claims of this nature were to be received in the future, the area of greatest cost would be expected to arise from compensation benefits. Accordingly a low historical comparison point for firefighters cancer claims would make it more likely that future costs could be offset by only minimal savings arising from a reduction in disputation.

The Committee acknowledges that some of the costs of increased compensation may be offset by a reduction in administrative costs due to fewer disputed claims. However, based on the evidence it has been provided, the Committee cannot conclude the full costs of increased compensation will be offset by these savings, and it is possible the net effect of the Bill will be an increase in costs.

Finding 3

Some of the costs of increased compensation may be offset by savings due to a reduction in administrative costs due to fewer disputed claims. The Committee cannot determine whether the full costs of increased compensation will be offset by these savings, and it is possible the net effect of the Bill will be an increase in costs.

3.4 Would increased compensation costs result in an increased impost on employers?

In order to address the constitutional questions, it is necessary to examine whether it is likely that an increase in compensation costs would result in an increased impost their employers.

There are two principal employers of firefighters in Victoria, the Metropolitan Fire Brigade and the Country Fire Authority.[61] In addition to employing firefighters, the Country Fire Authority is assisted by a significant number of volunteer firefighters. These three types of firefighters — MFB employees, CFA employees and CFA volunteers — are discussed below.

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58 news.com.au, *Heat on Government to compensate cancer victims*, <http://www.news.com.au/national-news/victoria/heat-on-government-to-compensate-cancer-victims/story-fndo4cq1-1226424912446#ixzz2TyzbQ5WG>, accessed 22 May 2013.

59 The Sydney Morning Herald, *Vic firies furious over Fiskville illness*, <http://news.smh.com.au/breaking-news-national/vic-firies-furious-over-fiskville-illness-20120712-21wrp.html>, accessed 22 May 2013.

60 Victorian WorkCover Authority, Submission No. 6, p. 1.

61 There are also a number of firefighters employed by other bodies including the Department of Environment and Primary industries which employed 407 firefighters for 2012-2013 peak season and also employs Ongoing Field Services Officers who perform professional firefighting duties.

3.4.1 Metropolitan Fire Brigade (MFB)

The MFB provides a fire and rescue service covering more than 1,000 square kilometres and protects almost four million Melbourne residents, workers and visitors.[62] It employs more than 2,100 people comprising 1,800 operational firefighters and 330 corporate staff.[63]

MFB employees are covered by the WorkCover Scheme and the MFB pays annual WorkSafe insurance premiums to the Victorian WorkCover Authority. As a large employer, a premium rate is set for the MFB in accordance with the process outlined in section 3.2.1. In its annual report, the MFB reports on compensation claims and the amount it pays for workers' compensation insurance.

Table 1: Metropolitan Fire Brigade employee compensation costs 2002-03 to 2011-12

Year	Compensation claims by employees	Expenses for workers' compensation	Percentage increase
2002-03	282	$3.3 million	
2003-04	320	$1.9 million	-42.4%
2004-05	345	$3.17 million	66.8%
2005-06	361	$3.70 million	16.7%
2006-07	355	$3.80 million	2.7%
2007-08	328	$4.14 million	8.9%
2008-09	390	$5.57 million	34.5%
2009-10	352	$7.04 million	26.4%
2010-11	298	$7.40 million	5.1%
2011-12	310	$9.45 million	27.7%

Source: MFB Annual Reports, 2003-04 to 2011-12. Data refers to operational and non-operational employees.

As can be seen from Table 1, the amount of money paid by the MFB for workers' compensation is increasing each year, but the rate by which it increases varies significantly from year to year. The underlying overall increase is due to the steady increase in total salaries paid by the MFB due to wages growth. However, the variation in the increases is due to the impact of changes to the WorkSafe insurance premium rates which are in turn a result of variations in compensation paid out in successful claims made against the MFB.

3.4.2 Country Fire Authority (CFA) — Employees

According to its 2011-12 Annual Report, the CFA employs 2,237 staff. Of these, 681 are career firefighters and 1,556 are support staff.[64] The CFA includes in its annual report the number of WorkCover claims lodged by its employees and the impact these claims have on its WorkCover premiums.[65] These claims include claims by support staff, as well as firefighters.

Table 2: Country Fire Authority employee compensation claims and WorkSafe premiums 2003-04 to 2010-11

Year	Compensation claims by employees	WorkSafe Premium
2003-04	86	1.29%
2004-05	89	1.23%
2005-06	114	1.33%
2006-07	105	1.20%
2007-08	129	1.09%
2008-09	127	1.28%
2009-10	114	1.49%
2010-11	Not published	1.16% (indicative)

Source: CFA Annual Reports, 2007-08 to 2009-10. Data refers to operational and non-operational employees.

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62 Metropolitan Fire Brigade, *About the MFB*, <http://www.mfb.vic.gov.au/About-Us/About-the-MFB.html>, accessed 21 May 2013.

63 *Metropolitan Fire Brigade Annual Report 2011-12*, p. 8.

64 *Country Fire Authority Annual Report 2011-12*, p. 5.

65 These statistics only include CFA employees not CFA volunteers, who are discussed in the next section.

Table 2 shows that the WorkSafe premiums paid by the CFA vary significantly each year. As the CFA is a large employer, its premiums are linked to the amount of compensation paid in the previous two financial years. This noticeable variance in WorkSafe premiums paid by the CFA supports the link between changes in compensation claims and a consequent impact on the impost on the employer, the CFA, who has to pay the increased premium.

At a public hearing the Assistant Treasurer stated:

> I would say to the Committee, if you accept the proposition that the Bill you are looking at provides compensation for people who, in Ms Hartland's view, are not otherwise receiving compensation that will be at a cost, whether it is the $10 million assessed by PWC or whether it is a different cost, that will be at a cost which will be borne, in the case of professional firefighters, via the VWA scheme back to the employers and, in the case of the volunteers, through the mirror scheme managed through the CFA.[66]
>
> [T]he advice back from VWA… [is that] if there was an additional $500,000 worth of claims costs imposed on the MFB that the premium impact would be an additional $295,000—a bit over $295,000—per annum in terms of premium because of the way in which individual costs are then assessed for the likely future claims cost and the impact that has on the premium. That is indicative of the sort of impact on premiums.[67]

The Victorian WorkCover Authority's submission supported this view:[68]

> As large employers, the premiums of Victorian firefighter employers are determined under this approach. Any increase in successful compensation claims arising from the introduction of presumptive legislation would therefore be expected to adversely affect their premium rate.

Finding 4

Under Victoria's Accident Compensation Scheme, WorkSafe insurance premiums for large employers are directly impacted by the claims made against that employer. Therefore, any increase in compensation costs in relation to claims made by career firefighters will result in an increase to the WorkSafe insurance premiums paid by their employers.

3.4.3 Country Fire Authority (CFA) — Volunteers

CFA volunteer members who suffer personal injury (including death) are provided compensation through the CFA Volunteer Compensation Scheme. CFA self-insures for the costs of this scheme and carries the liability for payments under the scheme. Loss of income, medical and like expense compensation are paid directly from CFA's budget. CFA reinsures to meet the costs of claims for permanent disability and death. The reinsurance is through VMIA. The premium paid reflects the risk and the premium is paid from CFA's budget.

According to the 2011-12 CFA Annual Report, there are 55,240 CFA volunteer members. Of these, 38,319 are volunteer operational firefighters and 16,921 non-operational volunteers. [69] The CFA includes in its annual report information on the compensation paid to volunteer firefighters.

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66 Hon. Gordon Rich-Phillips, MLC, *Transcript of Evidence*, 30 May 2013, p. 18.
67 Hon. Gordon Rich-Phillips, MLC, *Transcript of Evidence*, 30 May 2013, p. 19.
68 Victorian WorkCover Authority, Submission No. 6, p. 2.
69 *Country Fire Authority Annual Report 2011-12*, p. 5.

Table 3: Country Fire Authority volunteer compensation costs 2003-04 to 2011-12

Year	Compensation claims by volunteers	Amount paid in volunteer compensation and insurance	Provision for Volunteer compensation and insurance
2003-04	177	$2.4 million	$5.1 million
2004-05	149	$2.4 million	$5 million
2005-06	222	$3.8 million	$6.2 million
2006-07	217	$3.6 million	$6.8 million
2007-08	143	$2.1 million	$6.5 million
2008-09	246	$4.2 million	$7.3 million
2009-10	179	$7.2 million	$9.9 million
2010-11	141	$7.5 million	$13.1 million
2011-12	128	$9.9 million	$18.4 million

Source: Country Fire Authority Annual Reports, 2003-04 to 2011-12.

The CFA Annual Report explains:[70]

> The Provision for Volunteer Compensation is the accrued liability after allowing for anticipated recovery from insurance in respect of all outstanding registered Volunteer Compensation claims… Outstanding claims are assessed on an actuarial basis. Future payments are projected using the Payment Per Claim Incurred (PPCI) method and the Payment Per Active Claim (PPAC) for older non-large weekly benefit claims and they allow for the potential additional liability arising from claims Incurred But Not Reported (IBNR), Incurred But Not Enough Reported (IBNER) and reopened claims.

As not all costs relating to claims are covered by insurance, the CFA must meet the unrecovered cost of volunteer compensation claims from its operating budget. It must also meet the cost if there is an increased risk assessed by its insurer. Under the *Country Fire Authority Act 1958*, the CFA currently receives 22.5 per cent of its funding form the State Government and 77.5% from insurance contributions. From 1 July 2013, the Fire Services Levy will be removed from insurance premiums and will instead be collected through council rates. If additional costs of compensation were imposed on the CFA, these additional costs would have to be met by increased funding from the Government (through an appropriation from the Consolidated Fund to increase its annual budget) or through an increase in the Fire Services Levy, or a combination of both.

Finding 5

The compensation scheme for CFA volunteers is funded by the CFA. Any increase in compensation claims paid to CFA volunteer firefighters will result in an increased costs to the CFA. These costs would need to be met by an increased Fire Services Levy and/or increased appropriation provided to the CFA in the Budget from the Consolidated Fund.

3.5 Application of section 62 to the Bill

3.5.1 Is the Bill a "Bill for imposing a tax or impost"?

It is clear that the purpose of this Bill is to make it easier for firefighters who suffer cancer to access compensation. This is logically intended to result in more firefighters lodging successful claims and therefore more money being paid out in compensation to firefighters.

The Committee received evidence that this increase in successful compensation claims would be offset by reduced administrative costs from fewer contested claims and a simplified claims system, resulting in no overall additional costs. However, the Committee is not convinced the full costs of increased compensation will definitely be offset by these savings, and believes it is possible the net effect of the Bill will be an increase in costs.

[70] *Country Fire Authority Annual Report 2011-12*, p. 46.

Under Victoria's Accident Compensation system there is a clear link between increased compensation costs from claims lodged by employees and increased WorkSafe insurance premiums imposed on their employers. Employers of career firefighters would be required to pay increased premiums if the net cost of claims lodged by their employees increased.

The constitutional issue central to this inquiry is whether a Bill that has the effect of increasing or potentially increasing WorkSafe insurance premiums infringes section 62 of the *Constitution Act 1975.* In his ruling, the President interpreted these WorkSafe insurance premiums to be an impost or tax within the meaning of section 62 of the *Constitution Act 1975*. Advice received from the Clerk of the Legislative Council supports this view: [71]

> [T]he question of whether a Bill imposes a duty, rate, tax, rent, return or impost is one of statutory interpretation that needs to be considered on a case by case basis. The words 'duty, rate, tax, rent, return or impost' in section 62 derive from Victoria's 1855 Constitution and are not defined in the *Constitution Act 1975*.
>
> The High Court has discussed what constitutes a 'tax' for the purposes of the Australian Constitution in a number of judgments. Although the classic legal description is 'a compulsory exaction of money by a public authority for public purposes, enforceable by law', the Court has stressed that this is not an exhaustive definition.

In his advice to the Committee, the Clerk of the Legislative Council further states: [72]

> The question of how much that impost will be is, in my view, not entirely relevant to the question of the restriction imposed by section 62 of the *Constitution Act 1975* which prohibits any Bill originating in the Council which may impose a tax or other impost.

Applying a strict purposive approach, the Bill does not infringe section 62 as it is not the aim of the Bill to impose an impost. However, applying one of the broader tests, such as it is the probable or expected effect of the Bill to impose or increase an impost or is it legally possible that the Bill will impose or increase and impost, the Bill may infringe section 62.

3.5.2 Is the Bill a "Bill for appropriating the Consolidated Fund"?

As outlined in section 3.5.3, CFA volunteer firefighters are not covered by the WorkSafe system, but are instead covered by a compensation system managed by the CFA. Any increase in compensation claims paid to CFA volunteer firefighters that is not offset by savings or covered by insurance will result in an increase in costs to the CFA.

Due to the funding arrangements for the CFA, these costs would need to be met by an increased Fire Services Levy and/or an increased appropriation provided to the CFA in the Budget from the Consolidated Fund.

As with the discussion in section 3.5.1, applying a strict purposive approach, the Bill does not infringe section 62 as it is not the aim of the Bill to appropriate the Consolidated Fund or increase the Fire Services Levy. However, applying one of the broader tests, such as is the probable or expected effect of the Bill to force an appropriation or is it legally possible that the Bill will force an appropriation, the Bill could be viewed as infringing section 62.

Finding 6

If a narrow purposive interpretation of section 62(1) of the *Constitution Act 1975* is applied, the Bill does not infringe that section. However, if a broader interpretation is applied, taking into account the effects of the Bill and what is legally possible as a result of the Bill, the Bill may infringe section 62(1).

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71 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Submission No. 3, p. 6.
72 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Submission No. 3, pp. 7-8.

4. Options for overcoming the constitutional impediments

The Terms of Reference require the Committee to examine measures aimed at addressing any constitutional impediment to the Bill's introduction into the Legislative Council. The Committee found in Chapter 2 that it is possible for the Legislative Council to consider and pass the Bill, although the Legislative Assembly may later refuse to consider it. In the event that the Assembly does refuse to consider the Bill if initiated and passed in the Legislative Council, this Chapter outlines other options that can be considered to enable the Bill to proceed or achieve the Bill's purposes.

4.1 Amending the Constitution Act 1975

The only guaranteed way to ensure there is no constitutional impediment to the Bill being initiated in the Legislative Council is to amend the *Constitution Act 1975* itself to remove the restrictions currently imposed on Bills being initiated in the Legislative Council.

This was proposed in 1985 when similar issues arose in relation to the Coroners Bill. Hon. A. Hunt stated in discussions on that Bill:[73]

> Nobody in this House wants in any way to trample upon the prerogatives of the Assembly in financial matters, but we do want to see the Constitution interpreted sensibly in a way that enables the Parliament to work effectively and in a way that does not make unwarranted assumptions of increased expenditure… To put it beyond any doubt… there could well be a very minor amendment to the Constitution with the support of all parties to achieve that result.

This option was also commented on by the Clerk of the Legislative Council, who stated in his submission:[74]

> I should point out that in some jurisdictions, lower houses have made permanent provision for waiving their financial privilege in certain cases. Some attempt was made to adopt some procedures here in Victoria in 1975, however because of some strong opposition by some members of the Assembly to any increase in the power of the Council in relation to financial matters, the matter was dropped. Sections 62 to 64 of the *Constitution Act 1975* are entrenched provisions, and therefore a Bill is required to be passed by the Assembly and Council to amend, vary or repeal those sections, following which the matter is required to be approved by a majority of electors at a referendum.

The Committee believes there would be great benefit in clarifying the constitutional provisions to provide certainty to the Parliament and avoid disagreements in interpretation between the Houses. However, as section 62 is now an entrenched provision, requiring a referendum to be altered, an amendment to the *Constitution Act 1975* to clarify or remove the constitutional impediments is no longer a realistic option.

4.2 Introducing the Bill in the Legislative Assembly

The Bill as currently drafted can clearly be introduced in the Legislative Assembly. However, as the sponsor of the Bill is a member of a party that does not have any Members in the Legislative Assembly, this would require a member of another party being willing to take charge of the Bill. Another obstacle to the introduction of the Bill in the Assembly by a member other than a Minister is that current Legislative Assembly Standing Orders provide limited time for General Business during which such a Bill could be debated.[75] Therefore, in order to have a reasonable prospect of being debated or passed, the Bill would need to be introduced by a Minister.

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73 Legislative Council *Hansard*, vol. 379, 22 October 1985, p. 475.

74 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Submission No. 3, pp. 8-9.

75 Under Legislative Assembly Standing Order 37, a non-government member can seek to debate a private member's Bill in place of a non-Government Matter of Public Importance for two hours each third sitting Wednesday with the prior agreement of the leaders of the government, opposition and third party.

Although it appears the Bill may infringe section 62 and therefore the Legislative Assembly may refuse to consider it if transmitted to the Legislative Assembly by the Legislative Council, a Member of the Legislative Council can propose a resolution calling for the Government or the Legislative Assembly to introduce such a Bill. Although it would be irregular, it may also be possible for the resolution of the Legislative Council to order a Message be transmitted to the Assembly informing it of the resolution.

4.3 Prescribing diseases under the Accident Compensation Act 1985

The Committee also examined whether the aims of the Bill could be achieved without legislation. In response to calls for the introduction of presumptive legislation similar to that proposed by the Bill, the Assistant Treasurer, Hon. Gordon Rich-Phillips, stated in October 2012:[76]

> The Government has asked the Victorian WorkCover Authority (VWA) to undertake some work with respect to presumptive legislation... [T]here is already a mechanism in place under the *Accident Compensation Act 1985* to allow diseases to be declared with respect to certain occupational groupings, but prior to that occurring the causal link has to be established to a very high standard.

Under section 87 of the *Accident Compensation Act 1985* the Government can proclaim a disease for a certain profession through a notice published in the Government Gazette. Section 87 states:

> (1) The Governor in Council, after consultation by the Minister with the Authority, may by proclamation published in the Government Gazette from time to time proclaim diseases in relation to places, processes or occupations for the purpose of this section.
>
> (2) Without derogating from section 86, if at the time a claim was made a proclamation under subsection (1) was in force and—
>
> (a) the worker has been employed at any place or in any process or occupation proclaimed under subsection (1); and
>
> (b) has contracted a disease specified in relation to that place, process or occupation—then the disease shall be deemed to be due to the nature of the employment at such place or in such process or occupation unless the employer or the Authority or a self-insurer, as the case may be, proves to the contrary.

There are currently 25 proclaimed diseases.[77] If a claim is made for compensation for a proclaimed disease, then the disease is deemed to be due to the nature of the employment, so long as the worker has been employed in any place, process or occupation proclaimed. In its submission on the Commonwealth Bill, the Victorian WorkCover Authority stated:[78]

> Firefighters' cancers are not included as proclaimed diseases currently. However a firefighter, as is any worker whose disease is contracted in the course of his or her employment, is generally entitled to compensation under the *Accident Compensation Act 1985*.
>
> The criteria for inclusion of a disease on the list of proclaimed diseases generally include:
>
> - a strong causal link exists between the disease and occupational exposure;
> - clear diagnostic indicators for the disease; and
> - the instance of the disease in a particular place, process or occupation comprises a considerable proportion of the cases of that disease in the overall population or in an identifiable subset of the population.

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76 Legislative Council *Hansard*, 9 October 2012, pp. 4370-1.

77 WorkSafe Victoria, *Making a claim for work-related injury or illness - Information for firefighters*, <http://www.worksafe.vic.gov.au/forms-and-publications/forms-and-publications/information-for-firefighters-making-a-claim>, accessed 24 May 2013.

78 Senate Education, Employment and Workplace Relations Legislation Committee, Inquiry into the Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011 [Provisions], *Submission No. 12 – WorkSafe Victoria,* pp. 1-2.

> Before WorkSafe Victoria could decide whether to seek to proclaim the cancers specified in the Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011, WorkSafe would need to consider, with medical expert input, the criteria described above.
>
> WorkSafe would also need to obtain and consider actuarial costing of the financial impact of new claims if these cancers were proclaimed for firefighters, the impact on the overall accident compensation scheme and any possible need to raise employers' premiums. Consultation with affected stakeholders would also need to take place.
>
> Harmonisation between the States and Territory jurisdictions on proclaimed diseases across all jurisdictions is generally seen as desirable, particularly for those workers and employers working or operating across borders, or in more than one jurisdiction generally.

In evidence to the Committee, Ms Liz Ingham, stated this was not a preferred alternative: [79]

> [T]he firefighters say that they want the certainty of having it in the legislation and especially with all of the other states starting to act, and an area of commonality is that they are all legislating the deeming clauses.

The Committee notes the preference for certainty to be provided through legislation. However, given Victoria already has a process for proclaiming diseases for certain occupations, proclaiming the diseases under section 87 may be an alternative to achieve the same outcome as the Bill, without any constitutional impediments. However, this would need to be supported by the Minister and the Victorian WorkCover Authority. This would also only extend to career firefighters and not CFA volunteer firefighters, who are not covered by the WorkSafe system, and would not allow those who have previously unsuccessfully submitted claims to re-submit their claims under the new provisions.

4.4 Modifying the Bill

In his advice to the Committee, the Clerk of the Legislative Council states:[80]

> I note that when the President ordered the Bill to be withdrawn, he advised the House that he was prepared to discuss with the sponsor of the Bill options in going forward on this matter. Depending on the Committee's recommendations in relation to this inquiry, it would be in order for the sponsor of the Bill or anyone else to reintroduce the Bill, perhaps drafted in an amended form different from the Bill in question.

The Committee briefly explored options for modifying the Bill to overcome the potential constitutional impediments. Other options may also be possible.

4.4.1 Splitting the Bill

Some Upper Houses in Australia attempt to address the issue of introducing financial Bills by 'splitting Bills' into separate administration/policy Bills and appropriation/taxation Bills at the drafting stage. The former can be introduced in the Upper House and form the basis for a policy debate on the subject matter of the Bill. During that debate, the Upper House acknowledges the need for introduction of the latter Bill in the Lower House to give full effect to the legislative scheme. One example from the Senate is the Plastic Bag Levy package of Bills introduced in 2002. The Senate introduced two of the Bills – one dealing with assessment and collection of the levy and one dealing with use of the proceeds for an education fund. It tabled a draft of a third Bill containing the provisions that imposed the levy.[81]

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79 Ms Liz Ingham, *Transcript of Evidence*, 8 May 2013, p. 9.

80 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Submission No. 3, p. 9.

81 See Harry Evans (ed), *Odgers' Australian Senate Practice*, Commonwealth of Australia, 12th edition, 2008, p 273.

This latter option has not been used in Victoria in the past, but the Office of the Chief Parliamentary Counsel advises drafters that it may be possible to structure a Bill (or use two Bills) to enable the Bill (or at least the primary Bill) to be introduced in the Council.[82]

However, given the narrow focus of this Bill, and that the policy issue is inherently linked to the entitlement to compensation, there is no apparent effective way to split the Bill to overcome the constitutional impediment.

4.4.2 Amending regulations

Clause 5 of the Bill amends the *Country Fire Authority Act 1958*. It inserts provisions that affect the interpretation of the Country Fire Authority Regulations 2004. Amongst other things, the regulations provide for "compensation for personal injury and destruction, damage or loss of wearing apparel and personal effects of volunteer members of brigades, members of forestry industry brigades, casual firefighters and volunteer auxiliary workers".[83]

An alternative to amending the *Country Fire Authority Act 1958* to include provisions as to how the regulations should be interpreted would be to directly amend the regulations themselves. It has previously been found at the Commonwealth level that although the process of using principal legislation to amend subordinate legislation is unusual it would seem to be valid.[84] Therefore it may be possible to redraft section 5 of the Bill to make direct amendments to the Country Fire Authority Regulations 2004, instead of amending the *Country Fire Authority Act 1958*.

Similarly, as discussed in section 4.4, under the *Accident Compensation Act 1985,* the Governor, on the recommendation of the Minister and the Victorian WorkCover Authority, can proclaim a disease for a certain profession through a notice published in the Government Gazette. An Act of Parliament cannot require the Government to issue such a notice, therefore it is not possible to modify the Bill to access this procedure.

However, it may be possible to amend section 87 of the *Accident Compensation Act 1985* so that instead of proclaiming diseases through a notice in the Government Gazette, diseases can also be proclaimed by regulation. It may then be possible to modify the Bill so that the simplified claims process for career firefighters suffering the 12 cancers listed in the Bill is introduced into regulations, as opposed to legislation. Whilst this may not provide the certainty preferred by the firefighters, who would prefer the guaranteed protection of legislation, it may achieve the desired result.

The making or amendment of regulations is only exercising a power already delegated in the principal Act. It is therefore arguable that a direct amendment to regulations would not be deemed to be imposing a further impost or forcing a further appropriation and therefore may not infringe section 62 of the *Constitution Act 1975*. However, such regulations would only be valid if they fell within the authorising powers of the principal Act. Miss Rowena Armstrong, QC advised the Committee at a public hearing:[85]

> [There may be] a lot of difficulty in making these provisions through regulation because if the scrutiny committee was doing its job it would disallow them because it is making an unusual use of the regulations, even supposing that the regulation making power could be interpreted to authorise that.

Further technical advice would need to be sought on the drafting of a Bill to see if this option is viable and whether it would overcome the constitutional impediments.

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82 Office of the Chief Parliamentary Counsel, *Legislative Process Handbook*, July 2012, p. 43, <http://www.ocpc.vic.gov.au/CA2572B3001B894B/pages/publications-legislative-process-handbook>, accessed 17 May 2013. See also Greg Taylor, *The Constitution of Victoria*, Federation Press, Sydney, 2006, p 361-2.

83 Country Fire Authority Regulations 2004, reg. 1(5).

84 Senate Economics Legislation Committee, *Report on the Bankruptcy Amendment (Exceptional Circumstances Exit Package) Bill 2011*, p. 3.

85 Miss Rowena Armstrong, QC, *Transcript of Evidence*, 29 May 2013, p. 27.

Appendix A:
List of written submissions received

1. Dr Greg Taylor — Associate Professor, Law School, Monash University
2. Dr Rosemary Laing — Clerk of the Australian Senate
3. Mr Wayne Tunnecliffe — Clerk of the Legislative Council
4. United Firefighters Union of Australia
5. Mr Ken Block — Chief Fire Officer, City of Edmonton, Alberta, Canada
6. Victorian WorkCover Authority

Appendix B:
Schedule of Public Hearings

Wednesday 8 May 2013

- Ms Colleen Hartland, MLC
- Ms Liz Ingham

Wednesday 29 May 2013

- Hon. Gordon Rich-Phillips, MLC — Assistant Treasurer
- Mr Jeremy Nott — Department of Treasury and Finance
- Ms Penny Dedes — Victorian WorkCover Authority

- Miss Rowena Armstrong, QC