

PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

**REVIEW OF THE
*THEATRES ACT 1958***

REPORT

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CONTENTS

	Committee Membership.....	iii
	Committee Staff	v
	Contents.....	vii
	Chairman’s Foreword.....	xi
	Functions of the Committee	xiii
	Terms of Reference	xv
	List of Recommendations.....	xvii
1	INTRODUCTION.....	1
	Scope of the Inquiry	1
	Structure of the Report	2
2	HISTORICAL CONTEXT	5
	Sunday Entertainment Act 1967	6
	Other Acts amended in 1993.....	7
	Developments after 1993	10
3	CURRENT VICTORIAN CONTEXT.....	13
	Theatres and Cinemas	13
	Shop Trading Hours	15
	Melbourne Crown Casino	16
	Liquor Licensing	16
	Gaming Machines	17
	Lotteries, Gaming and Betting	17
	Busking.....	17

	Sport	18
	Racing.....	18
	TV / Pay TV	18
	Video Hire	19
	Summary of restrictions	19
	Table 1: Restrictions of Entertainment Activities in Victoria.....	20
4	COMPARATIVE OVERVIEW OF AUSTRALIAN JURISDICTIONS.....	21
	New South Wales	21
	Australian Capital Territory	22
	Queensland	23
	Tasmania	24
	Western Australia.....	25
	Northern Territory	26
	South Australia.....	26
5	COMPARATIVE OVERVIEW OF INTERNATIONAL JURISDICTIONS.....	29
	United Kingdom.....	29
	General Licensing Scheme.....	29
	Opening Hours on Christmas Day and Good Friday	30
	United States	31
	New York.....	31
	Mississippi	32
	The Establishment Clause.....	32
6	ENTERTAINMENT LICENSING	35
7	ENTERTAINMENT ON GOOD FRIDAY AND CHRISTMAS DAY	37
8	ENTERTAINMENT ON ANZAC DAY.....	43

9	EFFECT OF THE REPEAL OF THE <i>THEATRES ACT</i>	49
	Sexually Explicit Material.....	49
	Other Legislative Schemes.....	53
	Consumer Advice Schemes	55
	Blasphemous Material.....	55
	Breach of the Peace	56
	Discriminatory Material	57
	Conclusion.....	59

APPENDICES

Appendix 1	The <i>Theatres Act 1958</i>	61
Appendix 2	Comparison of Legislation - Australian States and Territories.....	77
Appendix 3	Example – Press Coverage	79
Appendix 4	List of Submissions	81
Appendix 5	List of Witnesses	83

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.

William Shakespeare
Measure for Measure

CHAIRMAN'S FOREWORD

I present the Report of the Victorian Parliament Law Reform Committee on the *Theatres Act 1958*. The Committee has found it to be an interesting and thought provoking reference which required a careful consideration of community values and expectations.

The ban, and subsequent reversal of the ban, on the screening of *The Exorcist* on Good Friday this year, means that the release of this Report is timely. The ban saw the *Theatres Act* become the centre of public debate, and clearly illustrates that, although on one level this reference has involved a pragmatic analysis of a specific regulatory scheme, it has also raised a number of larger social issues. The relationship between Church and State, the censorship debate, and the way in which public observances can reflect a society's identity are all matters which have required attention in drafting this Report. Strongly held views were keenly debated and the Report has benefited from the range of perspectives considered.

Overseas and interstate comparative legislation was reviewed by the Committee, and while noting the importance of days of special religious significance to any society, on balance, the Committee formed the view that 'the observance of such occasions should not depend on government enforcement'. The Committee is of the view that the recommendations arrived at clarify and simplify the legislative controls over live entertainment and cinema.

To those individuals and organisations who have made a contribution to the reference by preparing a submission and/or appearing at a public hearing, I express my thanks on behalf of the Committee. In particular, I would like to thank Dr Mark Williams for his assistance in the research process. I would also like to thank the other Members of the Committee for their input into the discussions and deliberations involved in this review.

Finally, the Committee would like to extend its thanks to the research and administrative staff, who have worked hard to produce a thoughtful and considered document.

I commend the Report to the Parliament.

FUNCTIONS OF THE COMMITTEE

PARLIAMENTARY COMMITTEES ACT 1968

- 4E.** The functions of the Law Reform Committee are—
- (a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;
 - (b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

TERMS OF REFERENCE

Under the powers found in Section 4F (1) (a) (ii) and Section 4F (3) of the *Parliamentary Committees Act 1968* the Governor in Council refers the following matters to the Law Reform Committee —

To inquire and report to Parliament on the relevance of the *Theatres Act 1958* to Victoria's society and in particular -

- a. the need to retain a licensing scheme for live entertainment which is performed for reward;
- b. the appropriateness of requiring that 'licensed' entertainers obtain special permission if they wish to perform on particular public holidays, namely Good Friday, Anzac Day and Christmas Day;
- c. the appropriateness of retaining a permit scheme for cinemas (which are not licensed) if they wish to operate on Christmas Day or Good Friday; and
- d. the impact of repealing the *Theatres Act 1958*

The Committee is requested to make its final report to Parliament by the first day of the Autumn 2001 Parliamentary sittings.

Dated, 22 February 2000, as gazetted on 29 February 2000

Responsible Minister: Hon. Rob Hulls, MP
 Attorney General

LIST OF RECOMMENDATIONS

Recommendation 1

That the provisions in sections 3 to 5 of the Theatres Act, which impose a general licensing scheme for theatres, be repealed.

Recommendation 2

That the provisions in sections 7 to 10 of the Theatres Act which require a theatre production or cinema to obtain a permit to operate on Good Friday or Christmas Day, be repealed.

Recommendations 3

That the Anzac Day Act be amended so as to prohibit the performance of live entertainment before 1.00pm on Anzac Day.

Recommendation 4

That providers of live entertainment consider adopting a self-regulatory 'consumer advice' scheme whereby a ratings system similar to that used by the Office of Film and Literature Classification is used to advise patrons of entertainment content.

Recommendation 5

That no additional legislative provisions be enacted to substitute for s 6, if s 6 is repealed.

Recommendation 6

That the Theatres Act 1958 (Vic) be repealed.

Scope of the Inquiry

The Committee received Terms of Reference from the Governor-in-Council on 22 February 2000 to report on the relevance of the *Theatres Act 1958* to Victoria's society. In particular the Committee was requested to have regard to the need to retain a licensing scheme for live entertainment which is performed for reward; the appropriateness of requiring that licensed entertainers obtain special permission if they wish to perform on particular public holidays, namely Good Friday, Anzac Day and Christmas Day; the appropriateness of retaining a permit system for cinemas (which are not licensed) if they wish to operate on Christmas Day or Good Friday; and the impact of repealing the *Theatres Act 1958*.

The Law Reform Committee is a joint investigatory committee of the Victorian Parliament with statutory power to conduct investigations into matters concerned with legal, constitutional and Parliamentary reform or the administration of justice.¹ The Committee's membership, which includes lawyers and non-lawyers, is drawn from both houses of the Victorian Parliament and both the government and the opposition parties are represented.

The Committee held public hearings in Melbourne and sought input from a range of organisations during its inquiry. The Committee received eight written submissions and took evidence from nine witnesses. This was a small number compared to the number of organisations contacted by the Committee and invited to make submissions and/or participate in its public hearings.² The Committee also advertised its public hearings via newspaper advertisements.

¹ *Parliamentary Committees Act 1968* (Vic) s 4E.

² The Committee sent formal invitations to 12 church organisations, the Returned and Services League, the relevant union and a number of industry and arts organisations.

Structure of the Report

Within Australia, places of public entertainment have traditionally been regulated by government. Licensing regimes relating to public entertainment are concerned with two aspects of potential regulation. The first can be described as public safety, and deals with aspects such as minimum building requirements and safety features. It is the view of the Committee that these matters are adequately dealt with in other legislation covering practical aspects of public safety.³ Hence these matters are not discussed further in this report.

The second type of regulation relates to concerns for the public's moral and spiritual wellbeing. Traditionally there have been limitations or prohibitions on entertainment on Christmas Day, Good Friday and Sundays. All Australian jurisdictions have now lifted restrictions on Sunday entertainment. In Victoria the *Sunday Entertainment Act 1967* was repealed in 1993. Restrictions remain in some states, including Victoria, on public entertainment on the traditional Christian holidays of Christmas and Good Friday.

Public entertainment on Anzac Day has also been restricted in some jurisdictions, and such restrictions remain in a number of states, namely Victoria, Queensland and Tasmania.

This Report looks at a number of related issues. Firstly it will consider the need to retain a general licensing system for theatres in Victoria. Currently every theatre and performance is required by the *Theatres Act* to be licensed, although in practice this is not enforced.

Secondly the Report will consider whether theatres and cinemas should be restricted in their opening hours on Christmas Day and Good Friday. As the arguments for both these days are similar they will be treated together. The Committee did not receive evidence that the two days were viewed differently by those who were proponents of restricted opening on these days.

Thirdly the report will consider the issue of restrictions on opening hours on Anzac Day. The *Theatres Act* places a restriction on theatres opening on Anzac Day, but does not prohibit cinemas from opening on this day. The *Anzac Day Act 1958* (Vic) however, does limit cinema opening hours on Anzac Day. The Committee is of the view that cinemas and theatres should have consistent opening hours and hence this

³ This view was also expressed to the Committee in evidence received, see Submission No 8, 3.

section of the Report can be assumed to express the Committee's view on the opening hours of both, although strictly interpreted the reference does not require an assessment of the provisions applying to cinemas contained in the *Anzac Day Act*.

Lastly the Report will consider what the effect would be of repealing the *Theatres Act* in its entirety.

Sunday observance laws stem from principles laid down mainly in the seventeenth and eighteenth centuries in England. These were to encourage Church attendance and religious conformity through the prohibition of secular activities on Sundays, and by restricting employment which may have impeded religious observance.

The spirit of the Act is to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion...⁴

Laws were passed as early as the fifteenth century to restrict commercial and recreational activities taking place on Sundays.⁵

Amongst the earliest such Acts to have effect in the Australian colonies were the *Sunday Observance Act 1677* (UK) and the *Act for Preventing Certain Abuses and Profanations on the Lord's day called Sunday 1780* (UK).⁶ The former prohibited the undertaking of any 'labour, business or work upon the Lord's Day', whilst the latter prohibited any public entertainment on Sunday for which an admission fee was charged.⁷ The intention of the 1780 Act was not so much the promotion of religion as the restriction of any assembly for political purposes on the one work-free day of the week.⁸ That Act was held to be in force in Victoria and NSW in nineteenth century case law, but is no longer applicable.⁹

In Australia in the nineteenth century, both Sunday observance laws and laws dealing specifically with public entertainments restricted the operation of theatres and

⁴ *Fennel and another v Ridler* (1826) 5 B.&C 406; 108 ER 151 as cited in Law Reform Committee of South Australia, *Inherited Imperial Sunday Observance or Lord's Day Acts*, Report No 92 (1987) 12. This report gives a comprehensive history of the development of Sunday Observance Acts.

⁵ *Sunday Fairs Act 1448* (UK) prohibited fairs and markets on Sundays excepting 'necessary victuals' and Sundays in the harvest season.

⁶ The earliest example of case law in which this legislation was held to be in force in NSW is *Melbourne Banking Co v Brewer* (1875) SCR NSW 10.

⁷ *An Act for Preventing Certain Abuses and Profanations on the Lord's Day called Sunday 1780* (UK) s 1.

⁸ Law Reform Committee of South Australia, *Inherited Imperial Sunday Observance or Lord's Day Acts*, Report No 92 (1987) 8.

⁹ *McHugh v Robertson* (1885) 11 VLR 410, *Walker v Solomon* (1890) 11 NSWLR 88.

cinemas. The current state of the law in each Australian State and Territory is set out in the following chapters.

A full history of the relevant laws in Victoria is not provided in the Report as it was not considered it would contribute significantly to the current reference.¹⁰

Our discussion begins with the repeal in 1993 of the *Sunday Entertainment Act 1967*. The debates which took place at the time of this Act's repeal are worth reviewing in light of the current consideration of the *Theatres Act*.

Sunday Entertainment Act 1967

The *Sunday Entertainment Act 1967* was repealed in Victoria in 1993. That Act regulated the holding or conducting of public entertainment on Sunday and was the modern day version of the original 17th and 18th century Acts. 'Public entertainment' was defined to include virtually all entertainment for which an admission fee was charged. The Act prohibited entertainment from being held or conducted on a Sunday without the written permission of a Minister.

When this Act was repealed, it was said during the second reading of the Repeal Bill that:

It is the view of the government that the Act has become irrelevant because it no longer reflects community attitudes to entertainments held on Sundays and does not serve the community as was originally intended. The government also believes that it imposes unnecessary and restrictive controls on business, industry and the public by requiring a permit to hold or conduct entertainments on Sundays. The repeal of the Act will also remove duplication of regulatory controls over Sunday entertainments and will complement current community views to entertainments being held on Sundays.¹¹

The amendment also received support from the Opposition:

The Sunday Entertainment Bill...is one of those sensible Bills that relates Sunday entertainment to the changing times we live in. When the principal Act was passed community feeling was different: Sundays were considered sacrosanct and any entertainments planned for that day had to be authorised by the responsible Minister. Those days are gone. Sunday is just another day of the week...

These days few people conducting Sunday events for which admission is charged bother to obtain a permit under the *Sunday Entertainment Act*. If legislation is seen to be out of date and

¹⁰ For a more complete historical review of the origins and development of this area of law see Department of Public and Consumer Affairs, South Australia, *Review of Places of Public Entertainment Act -A Discussion Paper*, March (1992).

¹¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 1993 (Hon. Roger Pescott, Mitcham).

not being taken notice of – if it is not working – there is little sense in leaving it on the statute books...¹²

For many people in our community Sunday is not even necessarily their Sabbath; it could be Saturday or, as for Moslems, on Friday. Sunday is very much a day that should be reserved for leisure, recreational activities or religious worship, depending on the beliefs and values of the individual concerned. The Bill follows from that and will enable people to carry out leisure and recreational activities without the archaic process of applying to the minister for approval.¹³

The Act was repealed without opposition. The commentary above shows that there was agreement that community attitudes to Sunday were such that allowing public entertainment on that day was not a controversial issue.

Other Acts amended in 1993

During 1993 amendments were also proposed to a number of other Acts which restricted activities on Sunday. As well as the *Sunday Entertainment Act 1967*, amendments to the *Racing Act 1958* (Vic), the *Shop Trading (Further Amendment) Act 1991* (Vic) and the *Liquor Control Act 1987* (Vic) were also proposed.

The amendments to the *Racing Act* provided that when a public holiday fell on a Sunday, a race meeting could be held on that day.¹⁴

The provisions were supported by both sides of Parliament:¹⁵

Under the Bill if a public holiday falls on a Sunday a race meeting can still be held. That will allow race followers and their families to enjoy a great day out if they wish to do so. The amendments will enhance the racing industry in Victoria...¹⁶

Changes to Sunday racing meetings must be applauded. Many honourable members would remember that many years ago Sunday racing would not be condoned, but one must move with the times, and the racing industry must keep up with the competition, especially with other forms of entertainment and gambling.¹⁷

¹² Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 1993 (Mr Edward Micallef, Springvale).

¹³ Victoria, *Parliamentary Debates*, Legislative Assembly, 30 September 1993 (Mr Michael Leighton, Preston).

¹⁴ *Racing (Amendment) Act 1993* s 11.

¹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 May 1993.

¹⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 May 1993 (Mr Kim Wells, Wantirna).

¹⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 May 1993 (Ms Carole Marple, Altona).

In the same year the Act was further amended to allow racing to take place on any Sunday with the approval of the Minister. The amendment was supported by the Government on the basis that it would bring racing into line with the recent amendments made to the *Sunday Entertainment Act*.¹⁸

People have said that having more Sunday meetings will put pressure on the traditional family day, but racing is an entertainment, and rapidly changing lifestyles and flexible working weeks mean the racing industry must move with the times. Many other sports are played on Sundays. The Bill will allow the number of Sunday meetings to be increased to the extent approved by the Minister.¹⁹

Sunday racing offers the industry the opportunity to present to the community a viable and worthwhile alternative to other forms of recreation... That is consistent with our approach to freeing up the operations of various industries on Sundays provided it is not inconsistent with community views and values.²⁰

The proposal to extend shop trading hours on Sundays generated more debate but not in relation to the effect it may have on the community generally. The debate centred on the welfare of employees who it was thought would be obliged to work on a day which should have been a family day and/or a day of worship.

The deregulation of shopping hours is a rejection of the importance of the family unit... How can parents in a normal family unit or single parents maintain proper relationships with their children if they are asked to work on the two days of the week when their children are not at school?...

A similar situation occurs in relation to worship, which is still an important part of the lives of many Victorians. The fact that some people are not active in or do not involve themselves in religious practice at all is beside the point: worship is an important part of the lives of a significant number of people in our community. Although Friday and Saturday are the days of worship for some people, Sunday is the day of worship for most Victorians.

How can a person who is expected by his or her employer, sometimes at short notice, to work on Sundays maintain his or her faith and religious practice?²¹

Such objections were not in the majority however and the hours were extended. Shop trading hours as they now stand are quite liberal as discussed in Chapter 3 of this report which compares various Victorian regulatory schemes.

¹⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 1993, (Hon. Thomas Reynolds, Minister for Sport, Recreation and Racing).

¹⁹ Victoria, *Parliamentary Debates*, Legislative Council, 26 October 1993, (Hon. Bruce Skeggs, Templestowe).

²⁰ Victoria, *Parliamentary Debates*, Legislative Council, 26 October 1993, (Hon. Ron Bowden, South Eastern).

²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 1 April 1993, (Dr Kenneth Coghill, Werribee).

The *Liquor Control Act 1987* was also amended to increase trading hours on Sundays. While there was a considerable amount of debate about the effect this would have on the business of small liquor outlets and the impact of extending the hours of trading for the sale of packaged liquor, there was little comment about the effect of extended Sunday trading on religious and family activities.

The Opposition supports the sensible reform that increases Sunday trading hours for hotels and restaurants. The Sunday closing time of 8pm is no longer appropriate given the changes in our community. On Sunday nights many people want to go out to hotels or restaurants... where they can enjoy meals and drinks after 8pm.²²

Comments in the press at the time also focus on the economic issues related to extended trading hours. In an editorial comment on Sunday trading which notes that football has also become a Sunday activity, the writer continues:

But Melbourne has not become Sodom or Gomorrah as a result of the city being open on Sundays.

There are many people – Muslims and Jews for instance - for whom Sunday has no religious significance. It is also true that in a society full of busy people, it makes no sense for Sunday to be a day when nothing is open.²³

The early 1990s thus saw a significant trend towards liberalising restrictions on commercial activities on Sundays. However, in general, the amendments did not address the issue of restricted opening on the specific holidays of Christmas Day and Good Friday. Nor was there considerable debate about Anzac Day restrictions at this time.

The only occasion on which these issues were given general attention was in the debate over the Public Holidays Bill in 1993. This Bill, when eventually passed, saw much of the existing legislation relating to public holidays consolidated under one instrument, and the number of public holidays most Victorians were entitled to effectively reduced. The *Public Holidays Act 1993* provides that where Anzac Day and/or Christmas Day fall upon a Saturday or Sunday, in general, employees will not be entitled to holidays in lieu.

The parliamentary debates surrounding the Bill centred mainly around the potential effect of such a change on the tourism industry and on individual employees. The debates are noteworthy in regard to the terms of reference of this review in that both

²² Victoria, *Parliamentary Debates*, Legislative Council, 30 November 1993, (Hon. Theo Theophanous).

²³ 'Sunday Trading is Great for Melbourne', *The Age* (Melbourne), Tuesday 18 May 1993.

parties acknowledged the fluid and variable nature of public observances and the fact that decisions made should take into account changing community values and practices.²⁴

Developments after 1993

In 1995 some public debate was generated when cinema operators publicly criticised the State Government for refusing them permission to open on Christmas Day.²⁵ The refusal caused particular anger because the Crown Casino, which includes a cinema complex, was allowed to operate on Christmas Day.

A newspaper article published at the time reported that the then Attorney-General, the Hon. Jan Wade had refused the application of one cinema operator on the grounds that Christmas Day was a religious day and that cinemas should remain closed for at least one day of the year.²⁶ The unnamed cinema operator was reported as saying that this was the same argument used by church groups in arguing that Crown Casino should remain closed on Christmas Day but that this was rejected by the Attorney-General and the Casino allowed to open.

Subsequently the Casino trading hours were reviewed and the Casino closed between 4.00am and 12.00 noon on Christmas Day. It is also closed between 4.00am and 12.00 noon on Good Friday and Anzac Day.²⁷

In December 1998 applications for cinemas to operate on Christmas Day were again refused. The Entertainment Industry Employers Association (EIEA) wrote to the Hon Jan Wade as follows:

I am writing to request a review of the current Attorney-General's Guidelines for the operation of Cinemas on public holidays: Good Friday, Anzac Day and Christmas Day. ...The EIEA recently received advice from the Department of Justice, confirming that no permits will be granted this year for any cinemas to open on Christmas Day...

In recent years the business and general community have embraced substantial change in the trading environment, including 24 hour, Sunday trading and flexible working arrangements. As you are aware, many industries, such as hospitality, transportation, and some forms of entertainment (eg Crown casino) operate throughout the year without restrictions...the EIEA proposes that it is appropriate that the Attorney-General's Guidelines...be revised to reflect

²⁴ Victoria, *Parliamentary Debates*, Legislative Council, 16 November 1993 (Hon. Geoffrey Craige, Public Holidays Bill, Second Reading, and Hon. Theo. Theophanous, Public Holidays Bill, Second Reading).

²⁵ 'Anger over cinema hours' *Herald Sun*, (Melbourne) 28 December 1995. The permit scheme for cinemas set out in s 10 of the *Theatres Act* is discussed in greater detail in Chapter 7.

²⁶ *Ibid.*

²⁷ Under s 65 of the *Casino Control Act 1991* (Vic) the power to determine casino opening hours is vested in the Victorian Casino and Gaming Authority.

the diversity of views held in the community about religion and to ensure that its application is consistent with the broader trading environment and to remove current discrimination.²⁸

A submission accompanied the letter and made the point that only Western Australia and Victoria restrict the opening hours of cinemas. It was also noted that the targeting of only cinemas for restricted opening did not promote a fair trading environment in Victoria.

In their submission to the Committee this Association, now called the Australian Entertainment Industry Association (AEIA), noted that their letter to the Attorney-General had been acknowledged but that there had been no further response to their request for a review. A more detailed background of this issue is provided in Chapter 7.

²⁸ Letter, Jan Stoneham, Chief Executive EIEA to the Attorney-General Hon. Jan Wade, 15 December 1998.

3 CURRENT VICTORIAN CONTEXT

Theatres and Cinemas

In Victoria today two acts still regulate live entertainment and the operation of cinemas. These are the *Theatres Act 1958* and the *Anzac Day Act 1958*. Sunday trading is no longer restricted in practice, although in theory live entertainment still requires a licence to operate at any time under the provisions of the *Theatres Act*.

The first part of the *Theatres Act* (sections 3 to 9) provides for the regulation of live entertainment. Briefly, these sections require that a written authority or licence from the Attorney-General must be obtained for live entertainment. This includes ‘plays, pantomime, melodrama, dancing, tumbling or horsemanship’. Further, a special permit is required for live entertainment on Christmas Day and Good Friday and live entertainment is not permitted before 1.00pm on Anzac Day. The licence requirements affect both the performer and anyone else gaining financial reward from the performance, such as the owner and operator of the venue.²⁹ The Act is set out in full in Appendix 1, and the relevant section is also extracted below.

every person who acts, represents or performs or causes to be acted represented or performed for hire gain or reward...and every person who takes or receives or causes to be taken or received any money goods or valuable thing whatsoever by way of rent fee or reward for the use or hire (*of the premises*)...shall, in case the place wherein the same are acted represented performed or exhibited is without the written authority or licence of the Minister for every such offence be liable to a penalty of not more than 10 penalty units.³⁰

However, on advice from the Department of Justice, such regulation has been neither monitored nor enforced for a number of years.³¹ Despite the existence of the Act, there is no licensing of live entertainment in Victoria, and no monitoring of live entertainment on Anzac Day, Good Friday or Christmas Day.

²⁹ *Theatres Act 1958* (Vic) s 3.

³⁰ *Ibid.*

³¹ Department of Justice, *Briefing for the Victorian Law Reform Committee*, 20 March 2000.

Section 10 of the Act concerns cinemas and provides that cinemas can only show films on Christmas Day or Good Friday if they have a permit from the Attorney-General. This section is partially enforced.

No person shall without a permit in writing from the Minister use any non-licensed picture theatre or allow the same to be used for the exhibition of any film or cinematograph display on Christmas Day or on Good Friday.³²

The existing practice is that cinema operators who wish to show films on Good Friday or Christmas Day must request a permit from the Attorney-General. The Director of Legal Policy in the Department of Justice, in accordance with an authority from the Attorney, will either approve or reject the application on behalf of the Attorney in accordance with the guidelines.³³ The guidelines have been operative since 1995 and state that permits will not be issued on Christmas Day, but will be granted for Good Friday. However, a request to screen a movie on Good Friday which may be likely to cause controversy (for example, religious satire, extreme violence etc.) is to be referred to the Attorney-General for consideration.

Advice from the Department of Justice is that in practice no permits have been granted in regard to Christmas Day in recent years. In 1991 however, cinemas were allowed to open on this day. Adverse public reaction to this relaxation of the regulations, particularly from union groups and churches, saw the prohibition restored the following year.³⁴ With respect to Good Friday, advice from the Department indicates that up until this year all applications submitted since 1994 have been granted, with the exception of 1995. In that year the Department received 22 applications and only 5 were approved. Advice from the Department indicates that the late date at which the applications were submitted was the reason behind the failure to grant the remaining 17 permits. In 2001 the Department initially refused to grant a permit for the screening of the uncut version of the film *The Exorcist* on Good Friday. This matter is discussed in detail in Chapter 7.

Furthermore, it is necessary to note that section 5 of the *Anzac Day Act 1958* is relevant to the regulation of cinemas. No films may be shown in a cinema before 1.00pm on Anzac Day without a permit from the Minister of Small Business.

Advice from the Minister for Small Business states that although inquiries relating to the granting of permits for Anzac Day opening have been received, no applications

³² *Theatres Act 1958* (Vic) s 10.

³³ Department of Justice, above n 32.

³⁴ See for example 'Christmas Gift for Cinemas' *The Age*, (Melbourne) 20 December 1991 and 'Xmas Movie Plan Panned' *Herald Sun*, (Melbourne) 21 December 1991.

have been made.³⁵ Hence no permits have been considered, granted or refused under this provision.

While the operation of cinemas on Anzac Day is not part of the terms of reference for this report, the reference does concern the operation of live entertainment on Anzac Day, and the operation of cinemas on Christmas Day and Good Friday. The omission from the Committee's reference of cinema operation on Anzac Day reflects the fact that the prohibition, as noted above, is contained not in the *Theatres Act* but rather in the *Anzac Day Act*.

While outside its terms of reference, the Committee notes that the issues raised in relation to the operation of live entertainment on Anzac Day would be equally relevant to any consideration of the provisions relating to the operation of cinemas in the *Anzac Day Act*, should these provisions be reviewed in the future.³⁶

Shop Trading Hours

Shop Trading Reform Act 1996 (Vic)

Local Government Act 1989 (Vic)

Under the *Shop Trading Reform Act* ordinary shop closing times are:

- all times on Christmas Day and Good Friday; and
- between the hours of 12.01am and 1.00pm on Anzac Day.

There are a large number of exempt shops which are not required to close during the ordinary shop closing times.³⁷ Such shops must have less than 20 employees. The list covers almost all types of shops and services (clothing, footwear and electrical goods being notable omissions).

Exempt shops have no restrictions on their opening hours.

The *Local Government Act 1989* also has an impact upon trading hours in Victoria. The Act was amended in 1996 by the *Shop Trading Reform Act* to allow individual

³⁵ Hon. Marsha Thompson, Minister for Small Business, Department of State and Regional Development, Submission No 9, 1.

³⁶ A Federal Government funded review of the various state legislation relating to Anzac Day has in fact been proposed and is to be conducted later this year. See n 91, Chapter 8 for further details.

³⁷ See Schedule 1, *Shop Trading Reform Act 1991 (Vic)*.

local councils to make laws placing restrictions on Sunday trading.³⁸ The only relevance of the amendment in regard to the terms of reference of this review is in so far as it permits councils to require non-exempt shops to remain closed all day on Anzac Day, in the event of Anzac Day falling on a Sunday.

Melbourne Crown Casino

Casino Control Act 1991 (Vic)

The Act requires the Casino to open at all times as directed by the Victorian Casino and Gaming Authority (s 65). Currently the Casino is open to the public 24 hours a day except between 4.00am and 12 noon on Christmas Day, Good Friday and Anzac Day.

However, commission based gamblers (often referred to as high rollers) domiciled outside of Victoria and lodging sufficiently large amounts of stake money do have access to certain restricted areas from 4.00 am to 12 noon on Christmas Day.

This exception was justified in a press release from the Authority in December 1993 on the basis that there would be tourism benefits to the State flowing from the number of overseas and interstate visitors in Melbourne for Christmas.³⁹ The Authority also noted that the Burswood Casino in Perth had similar arrangements and that the Sydney Star Casino is open to the public all day on Christmas Day.

Liquor licensing

Liquor Control Reform Act 1998 (Vic)

Liquor licensing is quite complex and depends on the type of licence granted. There are currently ten categories of licence. Ordinary trading hours for most types of licences allow trading on Good Friday and Anzac Day from noon to 11.00pm. Trading on Christmas Day is allowed as for any ordinary day. The exception is for the sale of packaged liquor (take away alcohol sales) where trading hours are more restricted. No trading in packaged liquor is allowed on Good Friday or Christmas Day.

³⁸ See *Shop Trading Reform Act 1996 (Vic)* ss 6 and 13 and *Local Government Act 1989 (Vic)* s 111A.

³⁹ See Victorian Casino and Gaming Authority, *Casino Trading Hours*, Press Release (23 December 1997) 1.

In addition to the hours allowed under the particular licence type, each individual licensee can apply for extended trading hours. The matter largely rests with the relevant local council. Without planning approval for an application for extended trading hours, the Director of Liquor Licensing will not grant the extension. As well as local councils, police licensing inspectors or members of the public (usually neighbours) may also lodge objections.

Inquiries with Liquor Licensing Victoria suggest that as a matter of policy, applications for the extension of hours for the sale of packaged liquor on Good Friday and Christmas Day have not been granted.⁴⁰

Gaming Machines

Gaming Machine Control Act 1991 (Vic)

The availability of gaming machines depends on the hours of trading allowed in the liquor licence of the particular venue. The Act contains no restriction on the times they may be used.

Lotteries, Gaming and Betting

Lotteries, Gaming and Betting Act 1966 (Vic)

The Act restricts only the types of activities by designating which activities are legal. It does not restrict the hours of operation of venues or the hours in which activities pertaining to lotteries, gaming and betting may be undertaken.

Section 11A allows for an exemption from the general prohibition on the game known as two-up which may be played on Anzac Day in certain locations and in some situations up to 7 days before Anzac Day.

Busking

Local Government Act 1989 (Vic)

Busking activities are controlled by local council laws. The *Local Government Act 1989* gives local councils the power to make such laws.

⁴⁰ Liquor Licensing Victoria is the regulatory body charged with administering liquor licensing in Victoria and is a Business Division of the Department of State and Regional Development.

The City of Melbourne *Activities Local Law 1999* covers busking within the Council's borders. The Act prohibits busking without a permit.

Advice from the City of Melbourne is that permits granted pertain to certain areas. There are no restrictions on the days on which busking can be undertaken. There are some restrictions on the times that busking is allowed in residential areas due to noise concerns, and busking may be prohibited for the duration of certain parades or public events if it would obstruct the event.

Sport

Anzac Day Act 1958 (Vic)

Section 4 of the Act prohibits any sporting activities on Anzac Day without approval of the Minister. Where approval is given, section 4 requires that nevertheless no sporting activities (not including horse races, trotting races or dog races) are to take place before 1.00pm.

The section also provides that a negotiated proportion of the profits of the sports event shall be paid to the Anzac Day Proceeds Fund.⁴¹

Racing

Racing Act 1958 (Vic)

Section 6 of the Act prohibits the holding of any race meeting (including horse racing, harness racing or greyhound racing) on Christmas Day or Good Friday.

There are restrictions on race meetings on Anzac Day (s 22A & s 63A), and on that day they may not be held before 1.00pm. The whole of the net profit from any such race meeting held on Anzac Day must be paid to the Anzac Day Proceeds Fund.⁴²

TV / Pay TV

There are no restrictions on TV broadcasting which relate particularly to Christmas Day, Good Friday or Anzac Day. General codes of practice apply on these days.

⁴¹ The proportion is variable and is determined through consultation with sporting event operators and the RSL.

⁴² *Racing Act 1958* ss 22A and 63A.

Video Hire

Shops which only hire videos do not come within the definition of a shop for the purposes of the *Shop Trading Reform Act 1996*. They are not subject to restrictions on trading hours.

However, most shops hiring videos also sell some goods. Sale of any goods would bring them within the regulation of the Act. Sale of video cassettes or confectionery for example are included in the schedule to the Act which lists exempt shops but these would need to be more than just a sideline to the business. Once brought within the definition of a shop, any video shop with less than 20 employees may be an exempt shop and therefore not subject to any restrictions on opening hours.

Larger stores would be required to comply with the ordinary shop closing hours (see above) if they fell within the definition of a shop.

Summary of restrictions

The following table shows the various activities and how they are restricted on the three relevant days.

On Christmas Day theatres and cinemas require licences. Non-exempt shops are closed, racing is prohibited and the Casino is closed between the hours of 4.00am and 12 noon. The sale of packaged liquor is prohibited.

On Good Friday, the same restrictions apply as for Christmas Day except that there is an additional restriction on most liquor outlets which may open only between noon and 11.00pm.

On Anzac Day, very little is open before 1.00pm. Only exempt shops may open. Liquor outlets usually open at 11.00am and the Casino reopens at 12.00 noon.

RESTRICTIONS ON ENTERTAINMENT ACTIVITIES IN VICTORIA

	Christmas Day	Good Friday	Anzac Day
Theatres	Permit required	Permit required	Not before 1.00pm and then only with a permit.
Cinemas	Permit required	Permit required	Permit required before 1.00pm
Shops	Closed (not exempt shops)	Closed (not exempt shops)	Closed before 1.00pm (not exempt shops)
Crown Casino	Closed 4.00am-12.00 noon	Closed 4.00am - 12.00 noon	Closed 4.00am - 12.00 noon
Liquor outlets	As for ordinary day (no packaged liquor)	Most open noon – 11.00pm (no packaged liquor)	Most open noon – 11.00pm
Gaming machines	As for liquor licence	As for liquor licence	As for liquor licence
Lotteries, Gaming and Betting	none	none	none
Busking	none	none	none
Sport	none	none	Prohibited until 1.00pm without permission
Racing	prohibited	prohibited	Prohibited until 1.00pm
TV/Pay TV	none	none	none
Video hire	None unless within the definition of “shop”	None unless within the definition of “shop”	None unless within the definition of “shop”

4 COMPARATIVE OVERVIEW OF AUSTRALIAN JURISDICTIONS

New South Wales

Theatres and Public Halls Act 1908 (NSW)

Sunday Entertainment Act 1966 (now repealed) (NSW)

The *Theatres and Public Halls Act* has undergone a number of amendments since its adoption at the beginning of the century, and indeed is facing renewed scrutiny as this Report is being compiled.⁴³ Originally, public entertainments, apart from sacred concerts, were prohibited on Sundays, Good Friday and Christmas Day in NSW.

Most of the Act has been repealed, however, the existing provisions allow some regulation of public entertainment. For example, section 27 of the Act allows the Minister to prohibit or regulate any public entertainment if she or he is of the opinion that it is fitting for the preservation of good manners and decorum to do so. The penalty for a breach of this prohibition is 20 penalty units. Other provisions allow for inspections of theatres and proceedings for offences against the Act.

The prohibition against entertainment on Christmas Day and Good Friday was lifted in 1983 by an amending Act, which came about due to requests by the film industry.⁴⁴ At the same time, a Bill was passed to repeal the *Sunday Entertainment Act 1966* which prohibited the conduct of public entertainment and public meetings before 12.30pm on Sundays without the Minister's approval, and further provided that the Minister may prohibit such entertainment or meetings after 12.30pm.

⁴³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 April 2001, Summary Offences Amendment (Minors in Sex Clubs) and Theatres and Public Halls Repeal Bill 2001, Second Reading Speech, (Mr Paul Whelan, Minister for Police).

⁴⁴ *Theatres and Public Halls (Amendment) Act 1983* (NSW).

During the parliamentary debate preceding the introduction of the repealing legislation, it was said that:

Strong representations have been made to the Government by the film industry that the anomalous, and in that industry's view, discriminatory, situation be ended...The general community, more and more, has come to regard Sunday, Christmas Day and Good Friday, as days on which to follow normal leisure pursuits. The widespread loosening of restrictions in recent years, particularly in regard to the sale of liquor and the opening of cinemas on Sundays, has not resulted in complaints to my department that public disturbance or interference with religious worship has resulted.⁴⁵

The repeal and amendment of these Acts has meant that since 1983 there have been no special day restrictions on public entertainment in New South Wales. As previously mentioned, the *Theatres and Public Halls Act* is currently the subject of a Repeal Bill in that state. In his Second Reading Speech, the Minister for Police stated that the Act should be repealed on the grounds that 'it no longer serves its principal purpose of protecting public safety' and that, in particular, s 27 (the Minister's discretion) is 'rarely used' and 'outmoded'.⁴⁶

There are no restrictions on public entertainment on Anzac Day in New South Wales.

Australian Capital Territory

Theatre and Public Halls Act 1928 (ACT)

As in Victoria, this legislation requires that any public entertainment held on Christmas Day or Good Friday must have authorisation from the Minister in writing. The definition of public entertainment is such that cinemas would be included. The relevant Minister is the Chief Minister for the ACT (who also holds the Arts portfolio). There is no reference to Anzac Day, nor is there a specific Act regulating that day.

Section 27 makes it an offence to hold a public entertainment on Christmas Day or Good Friday without written authorisation from the Minister. The penalty for a breach of this section is 10 penalty points for a person or 50 penalty points for a corporation. On the advice of the ACT Department of Justice and Community Services,⁴⁷ these

⁴⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 23 November 1983, (Hon. Jack Hallam).

⁴⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, April 5 2001, Summary Offences Amendment (Minors in Sex Clubs) and Theatres and Public Halls Repeal Bill, Second Reading Speech, (Hon. Paul Whelan, Strathfield, Minister for Police).

⁴⁷ Notes of discussion, ACT Department of Justice and Community Services, General Law Group, July 2000.

provisions have not been enforced since at least 1960 and even before. It was suggested that the Act will soon be repealed.

Section 26 of the Act allows the Minister to prohibit or regulate the holding of any public entertainment, notwithstanding the terms of a licence issued under the Act, 'whenever he is of the opinion that it is in the public interest to do so'. The penalty for a contravention of such a prohibition is 50 penalty points for a person or imprisonment for 6 months or both, and 250 penalty points for a corporation.

In relation to the day to day regulation of public entertainment there is no general requirement for licensing the entertainment itself. However in regard to the actual premises, each theatre or public hall must have a licence. The requirements for obtaining a licence relate to public safety issues.

Queensland

Trading (Allowable Hours) Act 1990 (QLD)

The legislation has no general requirement for licensing of public entertainment and no references to opening hours for places of public amusement (which includes cinemas, theatres etc.) on Christmas Day or Good Friday. There is no requirement for cinemas or theatres to obtain special permission if they open on those days. However in practice cinemas open after 12.00pm on Good Friday and remain closed on Christmas Day.⁴⁸

Section 35 requires that a 'place of public amusement' be closed on Anzac Day until 1.30pm unless written permission has been granted by the Minister, where 'a place of public amusement' is defined to include a 'cinema, theatre, dance hall or music hall'.⁴⁹ The relevant Minister is the Minister for Employment, Training and Industrial Relations. On advice from the Department of Employment, Training and Industrial Relations this provision is strictly enforced, and permits are not generally granted.⁵⁰

Failure to comply will be seen as a breach of an implied condition of any local government licensing provisions and will be taken into account in a determination of whether to suspend or revoke such a licence.⁵¹

⁴⁸ Notes of discussion, Queensland Department of Employment Training and Industrial Relations, July 2000.

⁴⁹ *Trading (Allowable Hours) Act 1990 (QLD)* s 4.

⁵⁰ Queensland Department of Employment Training and Industrial Relations, above n 49.

⁵¹ *Ibid.*

Tasmania

Anzac Day Observance Act 1929 (Tas)

Sunday Observance Act (Repeal) Act 1997 (Tas)

Police Offences Act 1935 (Tas)

The above legislation has no general requirement for licensing of public entertainment.

Under the *Police Offences Act 1935* s 49C a permit is required to hold indoor public entertainment (including films at cinemas) on Christmas Day and Good Friday. The permit is granted by the Commissioner of Police, with the approval of the Minister. An application form for the permit is available online. Conditions may be applied as the Commissioner sees fit. No permit will be granted unless the granting would be in the public interest, and would not offend the sanctity of the specified day. The penalty for a breach of this prohibition is 10 penalty units.

In practice, this section is not applied unless there is a large gathering which would require police attendance.⁵² Cinemas and theatres are therefore not restricted in their opening hours on Christmas Day or Good Friday.

Additionally, section 49B of the Act allows the Commissioner, with the consent of the Minister, to prohibit or regulate any public entertainment if the Commissioner is of the opinion that it is fitting to do so, for 'the preservation of public morality, good manners or decorum, or to prevent a breach of the peace or danger to a performer or other person'. The penalty for a breach of this prohibition is 10 penalty units.

Section 4 of the *Anzac Day Observance Act 1929* prohibits any public entertainment on Anzac Day before 12.15pm. There is no provision for obtaining permits or licences during the prohibited time. The penalty for a breach of this prohibition is 10 penalty units.

The *Sunday Observance Act 1968*, which was repealed in 1997, prohibited most forms of work on a Sunday, although there were many exceptions. However, it specifically allowed attendance at entertainment which included theatres and cinemas. The second reading of the repealing Act in the Tasmanian Legislative Assembly included the following observation:

⁵² Notes of Discussion, Office of the Commissioner of Police, Tasmania, July 2000.

Any act which can be regularly and publicly breached but where no prosecutions follow, brings the law concerned into disrepute. As far back as January 1981, the then Minister for Police said, and I quote: 'It has become the usual practice of police to ignore the provisions of the act because any action on their part...would cause considerable public dissatisfaction.'

...Several church groups made submissions to the review. There was a belief that Sunday should be seen as a 'special' day but that it is not a matter which should be depended upon for enforcement by government. That appears to be a sensible position to take, especially in relation to a piece of legislation which is so widely ignored in practice.

I make the point that there is no observance act for Christmas Day or Good Friday and yet they are observed by many in the community simply because of their significance...⁵³

Western Australia

Sunday Entertainments Act 1979 (WA)

Anzac Day Act 1960 (WA)

There is no general requirement for licensing of public entertainment.

Section 3 of the *Sunday Entertainments Act* allows the opening of a place of public entertainment (including cinemas) on Sundays, Christmas Day or Good Friday in two situations:

- where the Minister of Fair Trading has declared by way of a notice published in the Government Gazette that the relevant subsection does not apply to particular persons or classes of persons; or
- where the Minister has granted a permit to a person or persons.

The penalty for a breach of this prohibition is \$500.00 or imprisonment for 6 months.

In practice, the Minister grants permits for cinemas to show all films except those rated "R" on Good Friday.⁵⁴ According to the Office of Fair Trading, no applications have been made for cinemas to operate on Christmas Day. The Minister formerly also prohibited R-rated films from being shown on Sundays, however, this restriction has been relaxed since 1993.

⁵³ Tasmania, *Parliamentary Debates*, House of Assembly, 15 October 1997, (Mr Ray Groom, Minister for Workplace Standards).

⁵⁴ Notes of Discussion, Ministry of Fair Trading, Western Australia, Co-ordinator Retail Trading, July 2000.

The *Anzac Day Act 1960* does not refer to public entertainment and hence there is no prohibition on public entertainment on Anzac Day.

Northern Territory

Places of Public Entertainment Act 1985 (NT)

The legislation requires that each place of public entertainment must have a licence. The requirements for obtaining a licence relate to public safety issues.

Section 17 of the Act allows the Minister to prohibit or regulate the holding of any public entertainment, notwithstanding the terms of a licence issued under the Act, 'whenever he is of opinion that it is in the public interest so to do'. The penalty for a contravention of such a prohibition, for a first offence, is \$1,000.00 or imprisonment for 6 months.

Section 5 of the Act allows the Minister to delegate any powers and functions he/she possesses under the Act.

There are no specific provisions relating to Christmas Day, Good Friday or Anzac Day, and no restrictions on opening hours for theatres or cinemas.

South Australia

Places of Public Entertainment Act 1913 (SA)

The *Places of Public Entertainment Act 1913* repealed earlier legislation which had existed in South Australia since the 1880s. The Act addressed two essential concerns: firstly, it ensured that existing regulation of places of public entertainment was placed under centralised control; and secondly, it addressed issues of public safety. Although most provisions concerned public safety, the Act also placed limitations on the opening of places of public entertainment on Sundays, Christmas Day and Good Friday.

In 1992 the Act was reviewed by a Working Party consisting of representatives from government departments, and a Green Paper produced. As a result of the review, the government decided to repeal the legislation. Limitations on opening hours were repealed, although some control was retained over the Adelaide Showgrounds, where no trading is permitted before 10am on Sundays. At the same time, provisions relating

to public safety were placed into other appropriate pieces of legislation. It is stated in the discussion paper that:

The review found that no application had been refused in the last five years for entertainment on Sunday, Good Friday and Christmas Day and this alone could provide an indication that the need to regulate this activity is no longer required. There is no doubt that the extent of entertainment provided on Sundays, Good Friday and Christmas Day with or without legislative barriers will bear a direct relationship to community demand.⁵⁵

There are therefore no restrictions on public entertainment on Christmas Day or Good Friday.

There are no provisions in this or any other act which place any restrictions on public entertainment on Anzac Day.

⁵⁵ Department of Public and Consumer Affairs, South Australia, above n 10, i.

5 COMPARATIVE OVERVIEW OF INTERNATIONAL JURISDICTIONS

United Kingdom

Local Government (Miscellaneous Provisions Act) 1982 (UK)

London Government Act 1963 (UK)

Theatres Act 1968 (UK)

Cinemas Act 1985 (UK)

Sunday Observance Act 1780 (UK)

General licensing scheme

The licensing of public entertainment in the UK contains comprehensive controls, with much of the regulatory function being undertaken by local authorities under the *Local Government (Miscellaneous Provisions) Act 1982*, or, in Greater London, the *London Government Act 1963*. The focus of the legislation, however, has moved away from the earlier Acts' emphasis on censorship to be more concerned with health and safety issues. It has retained only minimal censorship and breach of the peace provisions.

The *Theatres Act 1968* requires the licensing of premises used for the public performance of plays (section 12). Licences are granted by licensing authorities, being, for the purposes of this Act, the council of the relevant borough or district. Only the premises need be licensed, not the entertainment itself. The Act specifically abolishes the provisions in previous legislation (*Theatres Act 1843*) which allowed the censorship of theatre performances. The 1968 Act states, in section 1:

In granting, renewing or transferring any licence under this Act for the use of any premises for the public performance of plays or in varying any of the terms, conditions or restrictions on or subject to which any such licence is held, the licensing authority shall not have power to

impose any term, condition or restriction as to the nature of the plays which may be performed under the licence or as to the manner of performing plays thereunder.

There is a proviso that restrictions necessary in the interests of physical safety or health are not prohibited.

However, Section 2 of the Act allows the prohibition of the presentation of an obscene performance, to be judged obscene

if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances to attend it.

This section is tempered by section 3 which allows a defence of

being for the public good on the grounds that it was in the interests of drama, opera, ballet or any other art or of literature or learning.

The section also specifically declares admissible, in any proceedings under section 2, the opinion of experts as to the artistic, literary or other merits of a performance.

Section 4 specifies that for the purposes of the laws of libel and slander, including criminal libel, the publication of words in the course of the performance of a play will be treated as publication in permanent form.

The Act also includes a prohibition on the provocation of a breach of the peace by a public performance of a play. Section 6 provides that the person presenting or directing a performance which uses threatening, abusive or insulting words or behaviour, may be guilty of an offence, if this was done with intent to provoke a breach of the peace. It will also be an offence if the performance, taken as a whole, was likely to occasion a breach of the peace. This latter situation does not require an intention on the part of the presenter or director.

Section 7 restricts the bringing of proceedings under section 2 dealing with obscene performances, or section 6 dealing with breach of the peace. Such proceedings cannot be instituted except by or with the consent of the Attorney-General.

Opening Hours on Christmas Day and Good Friday

There are no restrictions on the opening hours for theatres or cinemas on Christmas Day and Good Friday. Neither the *Theatres Act 1968* nor the *Cinemas Act 1985* make mention of these occasions.

The only potential restraint upon entertainment being conducted on these days is the *Sunday Observance Act 1780* (UK), which is still in force in the United Kingdom. The Act prohibits the holding of any entertainment for which an admission price is paid being held upon a Sunday.⁵⁶ However the effect of the legislation is now minimal as cinema,⁵⁷ theatre,⁵⁸ sporting events,⁵⁹ musical entertainment⁶⁰ and most recently, ‘dancing’⁶¹ have been made exempt from this requirement. The only potential impact, in regard to the terms of reference of this report, is in respect to forms of live entertainment which do not fall into these broad exemptions, and, in the event of Christmas Day falling upon a Sunday.

United States

The many states of the United States have not been fully canvassed for their various regulatory regimes. However brief surveys of the states of Mississippi and New York have been included by way of example. A general discussion of US jurisdictions in regard to considerations of the appropriateness of states legislating to prohibit entertainment on Christian holidays follows.

New York

New York is one of the 37 US states in which Good Friday is not a public holiday, and the New York Consolidated Laws appear to make no special provision in regard to the activities that are permissible on that day or Christmas Day.⁶² Under s 61.01 of the Consolidated Laws however, ‘public entertainment’ on a Sunday is prohibited, although local authorities are able to legislate to permit entertainment after 1.05pm. The statute also allows any ‘city, town or village’ to permit Sunday entertainment if such entertainment has always been conducted on Sundays in that locality.⁶³ Health and safety regulations pertaining specifically to cinemas do exist in the state, but there appears to be no specific licensing scheme in regard to the performance of live theatre.⁶⁴

⁵⁶ *Sunday Observance Act 1780* (UK) s 1.

⁵⁷ *Cinemas Act 1985* (UK) s 9.

⁵⁸ *Sunday Theatre Act 1972* (UK) s 1.

⁵⁹ *Deregulation and Contracting Out Act 1994* (UK) s 21.

⁶⁰ *Sunday Observance Act 1780* (UK) s 4 and *Sunday Entertainments Act 1932* (UK) s 3.

⁶¹ The Deregulation (Sunday Dancing) Order 2000, Statutory Instrument 2000 No 3372.

⁶² Bill Summary AO2993. An Act to amend the General Construction Law, in relation to making Good Friday a public holiday, New York State Assembly, 29 January 2001, see <http://assembly.state.ny.us/leg/?bn=AO2993>.

⁶³ New York State Consolidated Laws s 61.01.

⁶⁴ New York State Consolidated Laws, Article 19, Public entertainments or exhibition by cinematograph or any other apparatus for projecting moving pictures.

Mississippi

In the southern state of Mississippi public entertainment and religious observances are more regulated. Under s 21-19-39 of that state's code, local governing authorities have the power to draft ordinances 'regulating, restricting and prohibiting the sale of goods and services' on Sunday. The sale of alcoholic beverages on Sundays or Christmas Day is also specifically prohibited by s 67-1-83. Under s 27-65-22 a licensing scheme for all public 'amusements' is outlined, and under s 67-3-53, 'lewd, immoral or improper entertainment, conduct or practices' and conduct that may 'disturb the peace' in venues licensed to sell liquor is prohibited. Separate breach of the peace provisions are also housed in s 97-35-3.

Veterans Day is a public holiday across the United States, but most services are still operational on this day.⁶⁵

The Establishment Clause

The First Amendment of the US Constitution states that:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...

This clause, known as the Establishment Clause, has been the subject of extensive interpretation in case law and academia. It has generally been interpreted as prohibiting governments from passing laws that aid or favour one religion over another, that favour religious belief over non-belief, or that force a person to profess a belief.⁶⁶

The framers of the Constitution consciously avoided any mention of God in the instrument; the separation of Church and State was seen as a way of guaranteeing religious diversity, not hindering it.

Various court decisions in the US have affirmed that laws which endorse a specific religious practice constitute a violation of the Establishment Clause and are therefore impermissible.⁶⁷ However, laws with religious origins have been held to be permissible as long as they currently further secular ends. *McGowan v Maryland*

⁶⁵ Lawanda Turnage, Mississippi Division of Tourism, <http://www.visitmississippi.org/>.

⁶⁶ For example, see *Thornton v Calder Inc*, 472 US 703 (1985) where it was held that a law requiring that employers give all employees the day off if it was their chosen day of worship was unconstitutional because it had the direct effect of advancing a particular religious practice.

⁶⁷ *Ibid*.

(1961)⁶⁸ decided that Sunday trading laws had evolved to the extent that they now furthered secular ends and therefore did not violate the Establishment Clause.

In order to determine whether a particular piece of legislation is proscribed under the Establishment Law the question asked is whether the intent of the legislation is secular or religious. The test is firstly to establish whether the government's actual purpose in promulgating the law is to endorse or disapprove of religion, and secondly, whether the practice under review in fact conveys a message of endorsement or disapproval, irrespective of that intent.

Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favoured members of the political community. Disapproval sends the opposite message.⁶⁹

Some cases in the US have sought to assert that Christmas as a federal holiday is unconstitutional in that it violates the Establishment Clause. It has been consistently held, however, that Christmas is now secularized to a significant extent (even though it may still hold religious significance for some of the population), and that a law need not be purely secular to be constitutional.⁷⁰

This approach is reflected in the more liberal approach the US has taken to the issue of entertainment on Good Friday and Christmas Day. There are no restrictions on cinemas operators on these days, and in fact Christmas Day is one of the most profitable days for cinema operators in that country.

⁶⁸ 366 US 420 (1961).

⁶⁹ *Lynch v Donnelly* 463 U.S. 783 (1983).

⁷⁰ *Ibid.*

The first part of the Committee's terms of reference concerns the need to retain a licensing scheme in general. It has already been noted that in fact the provisions requiring licensing have not been enforced for a number of years.

Retention of a general licensing scheme received no support in evidence taken by the Committee. In fact many organisations were unaware of the existence of such provisions or, being aware, had never applied for licences under the provisions because they knew they were not enforced.⁷¹ Of the eight submissions received, four specifically stated that they did not think there was a need for a general licensing scheme.⁷² The Salvation Army submission noted that while they saw no need to retain the general licensing provisions, they did see a need for provisions relating to obscene or sexually explicit material.⁷³ Similarly the submission from the Moderator of the Presbyterian Church in Victoria also expressed concern that the removal of all licensing provisions may allow the proliferation of sexually explicit live entertainment.⁷⁴ The remaining two submissions did not directly address the issue.

This issue of censorship raised by the two submissions from religion-based organisations is addressed in more detail in Chapter 9.

Many good arguments for the removal of the general licensing provisions were put forward and can be summarised as follows:

- The provisions are currently not enforced, which suggests they are unnecessary.
- Laws which are not enforced bring the law generally into disrepute and should be removed.

⁷¹ John Bates, Australian Entertainment Industry Association, Submission No 3,1.

⁷² Tim Jacobs, Victorian Arts Centre, Submission No 1; John Bates, Australian Entertainment Industry Association, Submission No 3; John Dalziel and Captain Malcolm Roberts, Salvation Army, Submission No 6 and Dr Mark Williams, Logie-Smith Lanyon Lawyers, Submission No 8.

⁷³ John Dalziel and Captain Malcolm Roberts, Salvation Army, Submission No 6, 1.

⁷⁴ Moderator Brian Bayston, Presbyterian Church of Victoria, Submission No 2, 2.

- All matters which the licensing provisions could legitimately cover are more appropriately covered by other pieces of legislation.
- Such a scheme is contrary to the *National Competition Policy Reform Act 1996* (Cth).

The submission received from Dr Mark Williams, a solicitor who has published in the area of entertainment regulation, raised a number of these points. He notes that section 6, which allows the Minister to prohibit any performance, is the only matter which the *Theatres Act* still uniquely controls. He wrote:

The majority of the types of mischief that have been historically the subject of specific legislative provision in the *Theatres Act* (particularly offences relating to drunk and disorderly conduct) has been consolidated into the *Summary Offences Act 1966 (Vic)*. I point out in particular that the advertisement of sexually explicit material is governed by section 39 of that Act...

...I note, in particular, the provisions of the *National Competition Policy Reform Act 1996 (Commonwealth)* and suggest that the requirements for venues, venue operators and producers to obtain licences has the effect of preventing new entrants into these particular activities. In view of the fact that the present discretions open to the Minister would appear merely residual and, potentially, contrary to the right of freedom of expression and assembly guaranteed under international treaties, the present provisions of the Act may be regarded as having an anti-competitive effect without any corresponding social benefit. In my respectful submission, no serious case can be made for the continued executive control through the mechanism of this legislation above and beyond the existing controls in the other Victorian legislation...⁷⁵

The Committee believes that there is no good reason to retain the general licensing scheme contained in the *Theatres Act*. This conclusion is based on an assessment of the evidence received by the Committee, none of which supported the retention of the scheme. In addition, the fact that the provisions have been ignored for many years without any apparent negative effect on the provision of theatre performances supports the conclusions reached.

The Committee notes the approach taken in the United Kingdom. However, the Committee considered that the Victorian situation, where public health and safety issues are dealt with in other legislation, made the UK approach unsuitable.

Recommendation 1

That the provisions in sections 3 to 5 of the Theatres Act, which impose a general licensing scheme for theatres, be repealed.

⁷⁵ Dr Mark Williams, Logie-Smith Lanyon Lawyers, Submission No 8, 3.

ENTERTAINMENT ON GOOD FRIDAY AND CHRISTMAS DAY

The Committee received six written submissions which addressed the issue of opening hours on Christmas Day and Good Friday. Of these, three came from industry representatives and three from religious organisations. Two of the industry representatives and one of the religious organisations also gave evidence at a public hearing. An invitation to contribute was extended to the relevant union, however it was declined on the basis that they did not feel they could make a significant contribution.⁷⁶

The three industry representatives each supported the removal of the restrictions on Good Friday and Christmas Day opening, in fact supporting the abolition of the Act entirely. Many of the issues covered in the arguments put for removing the licensing system are also relevant to the Christmas Day and Good Friday debate. In addition it was argued that in our multicultural society it is inappropriate and discriminatory to prevent non-Christians from accessing entertainment options on two Christian holidays.

The submissions from the Christian organisations provided more variety of opinion. The submission received from the Moderator of the Presbyterian Church of Victoria, Mr Brian Bayston provided his personal opinion. Having explained that his church has repudiated holy days such as Easter and Christmas in favour of the observance of the Lords day or Sabbath he continued:

Accordingly our Church is primarily an advocate of Lord's day observance and would encourage the retention of laws which protected the Lord's day. Nevertheless it recognises that laws which do not command a substantial level of community obedience are of little value.

My Church would support the continued protection of Christmas and Easter...in sympathy with other Christian Churches for which those days are genuinely holy days.

⁷⁶

An invitation was extended to the Media, Entertainment and Arts Alliance, on advice from the Victorian Trades Hall Council that this was the appropriate union.

While I would prefer to see cinemas closed on Good Friday and Christmas, the real threat to these festivals is the replacement of Easter with a fertility cult and the submergence of Christmas in commercialism.⁷⁷

The Salvation Army submission provided six reasons for the retention of legislation requiring the closure of theatres on Christmas Day and Good Friday which can be summarised as follows:⁷⁸

- The days are the most holy in the Christian calendar and should command respect in the community;
- If the Christian significance of the days is removed they should no longer be holidays;
- Both the Australian and Victorian communities are predominantly Christian;
- Many people who do not otherwise attend church do attend on these two days;
- The days have significant social functions apart from their religious significance including spending time together with family and friends. Employees of theatres would be excluded from such activities if they were required to work;
- The closure of theatres and cinemas on these two days would have little effect on profitability.

The Salvation Army also provided evidence in a public hearing. They elaborated on their views on the Christian cultural heritage of Australian society:

We would argue that the cultural heritage of this nation is based on a Christian cultural heritage, as is our whole system of law and governance, and that that is something worth celebrating. Now, that is true to all people, whatever their religion at the moment is, because in the end if they become Australian their heritage is that.⁷⁹

The Social Responsibility Committee of the Anglican Diocese of Melbourne also made a written submission.

While recognising Australia as a multi-cultural and multi-faith community Christianity still has a significant place within the life of our community...

The idea of a Sabbath, a day of rest has diminished in significance in Victoria over the past few years with changes...to allow trading on Sunday and public holidays. This has had the impact of restricting the ability of households (families) to have a day in which they can

⁷⁷ Moderator Brian Bayston, Presbyterian Church of Victoria, Submission No 2, 2.

⁷⁸ John Dalziel and Captain Malcolm Roberts, Salvation Army, Submission No 6, 2,3.

⁷⁹ J Dalziel, *Minutes of Evidence*, 7 August 2000, 73.

interact and maintain family relationships. The Social Responsibility Committee therefore urges that no further expansion of existing entertainment arrangements be considered and that the Victorian government should ensure that the current Act is adhered to...

There already exists sufficient entertainment outlets to meet the needs of those who no longer adhere to a faith perspective.⁸⁰

As with any matter which impinges upon the rights or choices of individuals it is important to consider firstly whether the state should be pursuing the objective which is the justification for the restriction, and secondly whether the restriction itself is a necessary, appropriate and justifiable means to achieve the desired end.

In relation to these two religious days it is not easy to identify the aim of the restriction. If it is to encourage the observance of the Christian religion it would be difficult to accept this as a legitimate activity of the modern state even though it has historically been an explicit objective of the forerunners to the present legislation. However, many of the submissions sought to emphasis that while the holidays have their historical origin in Christianity they now have a much broader meaning in our society.⁸¹ Echoing the type of arguments mounted in the 1993 debates over the Public Holidays Bill, it was argued that the days served important social functions particularly in allowing families to come together.⁸² In addition it was argued that the days are significant because they marked historically important cultural occasions; occasions stemming from our present society's origins in a predominantly Christian tradition.⁸³

These arguments bear much in common with the line of reasoning used in United States case law. US cases have held that Christmas Day, while based on a Christian religious holiday, has now become so secularised that legislating a public holiday on that day does not breach that country's constitutional guarantee of freedom of religion.⁸⁴

The Committee holds the view that there are sufficient reasons, which are not purely religious, for the Victorian Parliament to consider legislation which restricts the opening of entertainment venues on these two days. It accepts, furthermore, that the

⁸⁰ Canon Ray Cleary, Anglican Diocese of Melbourne, Submission No 7, 2.

⁸¹ See the evidence of the Salvation Army, *Minutes of Evidence*, p 65, where it is noted that Christmas Day was originally a Hebrew festival which was taken on by the Christian Church.

⁸² Victoria, *Parliamentary Debates*, Legislative Assembly, Public Holidays Bill, Second Reading Speech, 11 November 1993.

⁸³ In the 1996 national population census 70% of Australians identified themselves 'as Christians or as members of a Christian denomination' Human Rights and Equal Opportunity Commission, *Article 18- Freedom of Religion and Belief*, July 1998 12.

⁸⁴ *McGowan v Maryland* 366 US 420 (1961).

strengthening of family and community ties is a legitimate purpose for state legislative regulation.

The question which remains to be answered is whether the restrictions imposed by the *Theatres Act* are an appropriate and effective means by which to achieve this purpose.

The Committee is of the view that limiting the choices of entertainment open to individuals is not an appropriate or indeed efficacious way of encouraging family and community cohesion. Attendance at the theatre or the cinema may well be the activity chosen by a family to undertake on a public holiday. It is not for the State to legislate as to what is an appropriate family activity at this level.

In the Committee's view arguments in relation to the ability of employees to enjoy a public holiday are more persuasive. The Committee did contact the relevant union to invite them to submit and/or attend a public hearing but the offers were not accepted on the basis that the union did not feel it would have a significant contribution to make to the discussion. Mr Coulter, proprietor of the Lumiere Cinema reported that he had spoken to his employees about this issue:

...asking my staff this morning about what they would feel about working on Christmas Day, the answer was triple time and on repeated asking it was the same answer.⁸⁵

On the evidence received the Committee does not believe that the restrictions on entertainment could be justified on the basis of the protection of employees in the industry.

One further question remains to be canvassed.

Section 10 is one of the few provisions of the *Theatres Act* that remains operative. It requires cinema operators to obtain a permit from the Attorney-General's office if they wish to operate on Christmas Day and Good Friday and vests in that office the discretion to allow or prohibit the screening of individual films. In practice this discretion is exercised upon the basis of the film's content:

No person shall without a permit in writing from the Minister use any non-licensed picture theatre or allow the same to be used for the exhibition of any film or cinematograph display on Christmas Day or on Good Friday.⁸⁶

⁸⁵ P Coulter, *Minutes of Evidence*, 7 August 2000, 37. Under the Entertainment and Broadcasting Industry Cinema Award 1998, staff are entitled to double time payment on this day. This anecdotal evidence is included as an indication of employee attitudes.

⁸⁶ *Theatres Act 1958* (Vic) s 10(1)(a).

It is the Committee's recommendation that as a general proposition cinema operators should not be prohibited from screening films on Good Friday and Christmas Day. However, should this proposition stand irrespective of film content and/or classification? Or, does the religious significance of such occasions demand additional scrutiny of entertainment content?

The issue was recently highlighted in the public debate surrounding the decision taken at a departmental level not to issue a permit to allow screening of the uncut version of the film *The Exorcist* on Good Friday. The permit was not granted on the grounds that the nature of the film might be found to be offensive by some members of the community.

The proposed ban attracted considerable public comment.⁸⁷ Overwhelmingly, reaction indicated that state intervention into entertainment content on this day was viewed as 'anachronistic' and inappropriate in a 'multi-religious' society.⁸⁸ Community concern was such that the decision was reversed and a permit granted.

The ban was also seen as confusing in light of the wide range of other activities now permitted on Good Friday, and in view of the fact that screening was not prohibited in all other Australian states.⁸⁹

The refusal to grant a permit also attracted fresh scrutiny of the *Theatres Act* itself.

The Act has largely fallen into disuse - thank heaven. But when dusted off, it still entrenches sectarianism and allows *ad hoc* censorship by unrepresentative public servants.⁹⁰

It is the view of the Committee that the function of the Office of Film and Literature Classification is sufficient in terms of achieving an appropriate level of government scrutiny of film content on Good Friday and Christmas Day. In light of the increasing 'secularization' of these holidays, the Committee believes that it is unlikely community expectations as to appropriate film content on these occasions will differ markedly from those held in regard to other days of the year. The strength of the reaction prompted by this latest invocation of s 10, suggests that the existence of the provision is inconsistent with contemporary views about acceptable levels of state intervention into entertainment content.

⁸⁷ See Appendix 3 for an example of press coverage of this issue.

⁸⁸ 'Easter Film Ban', Your Say, *The Age*, (Melbourne) 5 April 2001.

⁸⁹ 'The Exorcist 'Unfairly singled out'', *ABC News*, (Melbourne), 5 April 2001.

⁹⁰ 'Censorship threatens our secular society', *The Australian*, (Sydney), 6 April 2001.

Recommendation 2

That the provisions in sections 7 to 10 of the Theatres Act which require a theatre production or cinema to obtain a permit to operate on Good Friday or Christmas Day, be repealed.

Section 7A of the *Theatres Act* requires that a permit is also required for the performance of live entertainment on Anzac Day after 1.00pm. The repeal of this provision, included in the recommendation above, is discussed in the next Chapter.

8 ENTERTAINMENT ON ANZAC DAY

The Committee received one written submission which supported the retention of restrictions on the opening of cinemas and theatres on Anzac Day. As noted earlier, the restriction on the opening of cinemas is in fact contained in the *Anzac Day Act 1958* and is therefore outside the terms of reference of this inquiry. However the *Theatres Act* requires that licensed theatres must have a permit to operate on Anzac Day. Of the eight written submissions received, three (each from industry representatives) supported the opening of theatres and cinemas on Anzac Day. Submissions from two of the three religious organisations declined to comment on Anzac Day, generally noting that it was outside of their brief.

The arguments for removing restrictions were similar to those put forward for Christmas and Good Friday. Essentially they were that people should have a choice of activity on this day as on others, that the laws were inconsistent and allowed the Crown Casino cinema to open, and that such restrictions did not apply in most other Australian States and Territories.⁹¹

There was also a view expressed that if the 1.00pm opening time was to be retained, it would be helpful if workers could commence work earlier in order to be ready to open at 1.00pm.⁹²

The written submission which supported the retention of Anzac Day closures came from the Presbyterian Church of Victoria:

A significant body of people within our church would support laws for the protection of the observance of Anzac Day, not because the observance of it is to glorify war, but because the observance of it commemorates self sacrifice and focuses attention on the values of peace. However Anzac Day is not a specifically Christian festival, and no special religious aspect is involved.⁹³

⁹¹ The Committee also notes that during the writing of this report a review of the legislation governing Anzac Day observances across Australia has been proposed by the Federal Government and will commence later this year. The RSL led consultation process will be funded by the Federal Government. See RSL *Preserving Anzac Day*, Press Release, 2 April 2001.

⁹² D Hamilton, *Minutes of Evidence*, 7 August 2000, 8.

⁹³ Moderator Brian Bayston, Presbyterian Church of Victoria, Submission No 2, 2.

In its public hearing the Committee received evidence which strongly supported the retention of the current restriction on cinemas and theatres operating before 1.00pm on Anzac Day. Most notably the evidence provided by the Victorian Returned and Services League (RSL) opposed any commercial activities before 1.00pm and proposed that current restrictions on theatres should also be enforced.

...we want Anzac Day up until 1 o'clock, to be a closed holiday. That applies to live theatre as well as film theatre.

...we do not want them to open on Anzac morning and I just want to make that quite clear because we want the public's whole attention focused on remembrance on Anzac morning. People carry on about remembrance...but we want to see it reflected in legislation and, furthermore we want to see the legislation upheld and enforced.⁹⁴

Brigadier Rossi of the RSL spoke about the symbolism of Anzac Day and how important this was in providing some counter-focus to the more material interests of our time such as the acquisition of wealth.⁹⁵ He also agreed strongly with the proposition put to him by the Committee that the general interest in Anzac Day seemed to be increasing.⁹⁶ This perception was supported by the strong opposition voiced from some sectors of the community in response to recent suggestions that Anzac Day be merged with Australia Day.⁹⁷

Support for the retention of Anzac Day closures was also given in evidence by the Director of Multicultural Arts Victoria, Mr Fotis Kapertopoulos.

I make a distinct separation between Anzac Day and the holy days. I think Anzac Day is very much a secular national day and that needs a special understanding... I revere national symbols and I believe it is very important to have national days, as long as they bring the community together...

I think it is very important to honour the dead...and if we cease to honour the dead and make it (Anzac Day opening) a market viability issue, then really it makes us less human.⁹⁸

The Committee is aware that this is a sensitive issue for many people. The comments of the RSL representative refer to the significant place in Australian history and national remembrance which Anzac Day continues to occupy. Its continuing importance to many people is shown by the increasing numbers attending the Anzac Day march over recent years. In reaching its conclusions on this issue the Committee

⁹⁴ Brigadier Rossi, *Minutes of Evidence*, 7 August, 2000, 58.

⁹⁵ Ibid 65.

⁹⁶ Ibid 64.

⁹⁷ Michael Gordon and Mark Forbes, 'Our Own Independence Day', *The Age*, (Melbourne), 26 April 2001.

⁹⁸ F Kapertopoulos, *Minutes of Evidence*, 8 August 2000, 47.

has attempted to look beyond the emotional responses often provoked by discussions of Anzac Day, but in no way wishes to diminish or discount the depth of feeling associated with it.

As with the assessment of provisions in the *Theatres Act* relating to Christmas Day and Good Friday the Committee considered firstly whether the state should be pursuing the objective which is the justification for the restriction, and secondly whether the restriction itself is a necessary, appropriate and justifiable means to achieve the desired end.

In relation to Anzac Day closures, the first question then posed is – is it appropriate for the Victorian Government to pursue the aim of encouraging people to remember and respect Australians who died during the various wars fought on behalf of the Australian nation? The Committee has no difficulty in accepting that this is a legitimate purpose. The Committee considers that Anzac Day is to be distinguished from Good Friday and Christmas Day in being a secular observance which recognizes an element of Australia's national history that is not specific to any particular religious or cultural background.

The second question is whether the closure of various forms of public entertainment on Anzac Day morning is a necessary or appropriate means to achieve that end. Will such a restriction encourage remembrance of and/or promote community participation in the commemoration of Anzac Day? Further, does the community believe that the closure of entertainment venues is an appropriate way in which to mark this day of remembrance?

These questions require a weighing up of the competing rights and expectations of different interest groups. The Committee was disappointed that it did not receive submissions on these issues from any members of the public. However, the Committee did have before it a number of submissions and a considerable amount of evidence. The Committee also took account of the position in other states and territories in Australia, and the extent to which venues other than theatres and cinemas are restricted in their opening hours on Anzac Day in Victoria.

Most Australian states and territories do not have restrictions on public entertainment on Anzac Day. Only in Victoria, Queensland and Tasmania are restrictions applied. Whilst the Committee believes there is value in encouraging consistency between states, it considered achieving consistency across Victorian legislation to be a more relevant consideration.

In Victoria under present legislation, theatres and cinemas are prohibited from opening on Anzac Day before 1.00pm. Non-exempt shops are also closed until 1.00pm, however, as noted by Brigadier Rossi, the number of exempt shops is considerable and these may open on Anzac Day morning. Sports and race meetings may not be held before 1.00pm and those held after this time must pay a negotiated proportion of their net profit to the Anzac Day Proceeds Fund. Most liquor outlets and the Casino open at 12.00 noon. There are therefore a number of activities currently prohibited on Anzac Day morning in Victoria.

While the cinema industry argued for consistency with other forms of entertainment and with restrictions that apply in most other states, the RSL argued that consistency between forms of entertainment would be achieved by enforcing the restriction on the operation of theatres before 1.00pm on Anzac Day which it believes is not being enforced at present.

Taking into account all the evidence received, the Committee is of the view that the restrictions on entertainment on Anzac Day reflect a strong feeling within the Victorian community that Anzac Day should be observed. Limiting certain forms of entertainment on this day has both a practical and symbolic function. The restrictions can be seen to constitute a formal statement of the significance the community attaches to the occasion, and, at the same time, as a practical means by which individual participation in specific commemorative events is encouraged and facilitated.

The Committee agrees with the proposition that priority should be given to the achievement of a regulatory scheme which is consistent in the range of activities it permits on Anzac Day, and that does not discriminate between different forms of entertainment. As restrictions on cinema operating hours are currently housed in the *Anzac Day Act*, the Committee suggests that there be a transfer of the relevant restrictions on live entertainment at present contained in section 7A of the *Theatres Act* to the *Anzac Day Act*. This would ensure restrictions applied equally to all forms of entertainment and have the advantage of consolidating the regulation of entertainment on the day into one Act.

The Committee also believes that the restrictions on the operation of entertainment should apply to all cinema or theatre operators on Anzac Day, including operators at Crown Casino.

The Committee sees no reason to prohibit cinema and theatre operators employing staff before 1.00pm on Anzac Day, provided that public performances and screenings do not commence before that time.

Recommendation 3

That the Anzac Day Act be amended so as to prohibit the performance of live entertainment before 1.00pm on Anzac Day.

The repeal of the *Theatres Act* would achieve the two key recommendations made above, namely the abolition of a general licensing scheme for live theatre, and the removal of restrictions on opening hours on Christmas Day and Good Friday for both live theatre and cinema. In addition there are four matters which were identified as possibly being left unregulated if the general licensing scheme was removed. These are censorship issues relating to sexually explicit, blasphemous or discriminatory material and breach of the peace considerations. These issues are the only effects of repealing the *Theatres Act* not yet addressed, and relate only to live entertainment as films are already regulated by classification restrictions contained in the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)*.

Sexually explicit material

Two church groups expressed a concern that sexually explicit live entertainment may not be adequately controlled without the general licensing provisions of the *Theatres Act*. Section 6, in particular, is drafted in sufficiently broad terms to allow the prohibition of sexually explicit or obscene live entertainment. These parties argued that such a mechanism should be retained.

Section 6 provides:

It shall be lawful for the Minister, whenever he is of opinion that it is fitting for the preservation of good manners, decorum or of the public peace so to do, to forbid by writing under his hand the acting or presenting any stage play or any act scene or entertainment of the stage as hereinbefore mentioned or part thereof or any prologue or epilogue or any part thereof in such theatres or other places for which an authority or license has been granted.

The Moderator of the Presbyterian Church of Victoria wrote:

What we need to realise is that when the defences of good manners and of good taste are broken down, then the erosion of public morals is not far away. Having said this we must recognise that good manners and good taste come from example and from education rather than from the enforcement of certain standards of morality by law.

Nevertheless I sense a growing concern that the extent to which our society tolerates the debasement of good taste has gone too far... I suspect that if the licensing of live entertainment was removed then sexually explicit live entertainment could well proliferate...⁹⁹

In their evidence the Salvation Army stated:

It (the *Theatres Act*) seems convoluted and outdated and in many respects we cannot see the need to retain a licensing system for theatres and cinemas...save for anything that might be obscene or sexually explicit.¹⁰⁰

Both submissions express concerns which to a certain extent are unfounded given the complete lack of enforcement of the existing provisions. Indeed the application of s 6 is at present hypothetical as it is a power exercisable in relation to licensed theatres only and Victorian theatres remain unlicensed despite the Act. However, the theoretical application of the regulatory scheme as a whole is under review, and whilst the scheme exists it is foreseeable that the licensing requirement may be enforced if a s 6 order was sought. There have been instances in the past where live performances have been banned and the matter requires some consideration.¹⁰¹ The submission from Dr Williams commented as follows on this matter:

The classification and censorship of the content of theatre remains the only matter which might not readily be incorporated into other existing land use or health & safety regimes or of the prohibitions on offensive behaviour. This does not fit readily into the definitions of “submittable publication” within the censorship legislation... The nature of modern theatre largely does not guarantee that a “script” or “prompt copy” is in existence sufficient for it to be read prior to performance whilst, until the performance takes place and the majority of the presenter’s investment undertaken, it is not possible to clarify what material, if any, is liable to give offence and to whom.¹⁰²

Dr Williams also noted that the current provisions which allow the Minister to prohibit a theatre production are anachronistic in terms of censorship restrictions generally, which in most other cases are no longer exercised by elected officials but have instead been placed in the hands of administrative bodies, such as the Film and Literature Classification Board.¹⁰³

In addition to the comments noted above by church groups, only Dr Williams expressed a view as to the need for censorship of live theatre. It was his view that any censorship

⁹⁹ Moderator Brian Bayston, Presbyterian Church of Victoria, Submission No 2, 2.

¹⁰⁰ Captain Roberts, *Minutes of Evidence*, 7 August 2000, 57.

¹⁰¹ See the discussion in the minutes of evidence of the productions *The Boys in the Band*, *Oh Calcutta* and *Men of Flowers* and also the discussions of *The Happy Land*, *The Boys in the Band* and *Oh Calcutta* later in this chapter.

¹⁰² Dr Mark Williams, Logie-Smith Lanyon Lawyers, Submission No 8, 3.

¹⁰³ Dr M Williams, *Minutes of Evidence*, 7 August 2000, 22.

...largely goes against the principle that adults should be entitled to have access to such material as they choose...¹⁰⁴

By way of comparison, in NSW the amendments to the *Theatres and Public Halls Act 1908*, while removing restrictions on opening hours from all special days, retained the provision which allows the relevant Minister to prohibit or regulate any public entertainment if she or he is of the opinion that it is fitting for the preservation of good manners and decorum to do so.¹⁰⁵ However, as previously mentioned, a Bill is currently before the NSW Parliament to repeal the Act. In addition Tasmania has to date retained a provision which uses the phrase, ‘the preservation of public morality, good manners or decorum, or to prevent a breach of the peace or danger to a performer or other person’.¹⁰⁶ The power to prohibit or regulate public entertainment is given to the Commissioner of Police, who acts with the consent of the relevant Minister.

In the ACT and the Northern Territory similar provisions allow the relevant Minister to prohibit or regulate on the grounds of ‘public interest’.¹⁰⁷

The Committee believes that the key issue for consideration is whether there is a need to retain some residual power to prohibit live theatre which may be considered offensive for reasons of sexual explicitness or obscenity. A central consideration here is how widely utilized such powers have been in the past.

The earliest record of legislation regulating public entertainment being invoked to prohibit the production of a live performance in Victoria is that of the *Licensed Theatres Statute 1865 (Vic)* - a predecessor of today’s *Theatres Act*.¹⁰⁸ Section 6 of the statute was drafted in terms identical to the current s 6, and under this provision the then Chief Secretary prohibited the performance of Marcus Clarke’s political satire *The Happy Land* in Victoria in 1880.¹⁰⁹ Since then actual reported instances of these powers being invoked in Victoria are difficult to find. In 1969 actors in a Melbourne production of Mart Crowley’s *The Boys In the Band* were charged under obscenity laws for their role in its performance, but the play itself was allowed to continue with no action being taken under the *Theatres Act*.¹¹⁰ In 1970 the play *Oh Calcutta* was

¹⁰⁴ Dr Mark Williams, Logie-Smith Lanyon Lawyers, Submission No 8, 3.

¹⁰⁵ *Theatres and Public Halls Act 1908 (NSW)* s 27.

¹⁰⁶ *Police Offences Act 1935 (Tas)* s 49B.

¹⁰⁷ *Theatres and Public Halls Act 1928 (ACT)* s 26 and *Places of Public Entertainment Act 1985 (NT)* s 17.

¹⁰⁸ Veronica Kelly, *Annotated Checklist of Comments on the Performances and Banning of Marcus Clarke’s The Happy Land in Melbourne and Sydney* (1985) 1.

¹⁰⁹ *Ibid* 2.

¹¹⁰ ‘3 Boys in Band Fined’, *The Herald*, (Melbourne), October 9 1969.

banned in Victoria, but on the grounds that it involved an ‘indecent exhibition’ and ‘would corrupt the public morals’.¹¹¹ An injunction to stop the performance was granted, but again the ministerial power existing in the *Theatres Act* was not invoked.¹¹²

In other Australian jurisdictions the equivalent provisions have been similarly overlooked. In South Australia *Oh Calcutta* was also banned and although the censorship power under that state’s *Places of Public Entertainment Act 1913* was discussed, it was not employed.¹¹³ Advice from the Attorney-General’s Department in NSW indicates that there are only four recorded instances of that state’s equivalent provision being invoked,¹¹⁴ and in one such instance the ban was subsequently lifted.¹¹⁵

The fact that there is no confirmed record of s 6 of the current Victorian legislation being used at any time in its 43 year history, whilst a persuasive factor, does not automatically lead to the conclusion that the provision is unnecessary. In examining this issue, the Committee considered firstly whether the state should be pursuing the objective which is the justification for s 6, and secondly whether s 6 itself is a necessary, appropriate and justifiable means to achieve the desired end.

The Committee accepts the proposition that there are some forms of speech, conduct or material so offensive to common standards of decency that there is a public interest in not allowing them to be voiced or performed. The fact that as a society we see the need to maintain some degree of censorship over film and literature content is testimony to this, as is the growing body of anti-discrimination legislation. The very fact that some material is performed or enacted in public can be intrinsically offensive to some sectors of the community and the Committee considers that it is a legitimate public purpose to minimize and/or regulate the degree to which the public is exposed to this. The question which remains to be answered, however, is whether s 6 of the *Theatres Act* is an appropriate and effective means by which to achieve this purpose.

The Committee is of the view that the arguments raised by Dr Williams in his submission are persuasive. It considers that the public purpose the provision is

¹¹¹ ‘Stayed- filth’, *The Age*, (Melbourne), 24 February 1970.

¹¹² *Attorney-General of Victoria v Lido Savoy Pty Ltd. And Others*. (Unreported, Supreme Court of Victoria, Little J, 23 February 1970). It is unclear on what specific grounds Little J granted the injunction.

¹¹³ *Attorney-General v Huber* (1971) 2 SASR 215.

¹¹⁴ Notes of Discussion, Legislation and Policy Division, NSW Attorney General’s Department, April 2001.

¹¹⁵ In 1948 Sumner Locke Elliott’s play *Rusty Bugles* was banned under the NSW *Theatres and Public Halls Act 1908* but public outcry was such that the ban was reversed. See Philip Parsons (ed) *Companion to Theatre in Australia* (1995) 132.

directed towards is ill achieved by s 6, as it vests a large degree of discretion in an elected official without relevant expertise. Furthermore the penalties it imposes for its contravention are so low as to be ineffective.¹¹⁶ The Committee notes that in practical terms the provision does nothing whatsoever to protect the public from material it may find offensive, in so far as it is an *ad hoc* provision that has never been invoked in its current form.

The other persuasive argument for the repeal of the provision is the existence of a wide range of other legislative schemes which would be likely to be invoked in preference to the *Theatres Act* if a situation in which s 6 could apply should arise. At the time the *Theatres Act* was drafted, the legislative landscape was quite different to that of today. The Committee believes that the potential effect of other legislative schemes upon the type of sexually explicit content towards which s 6 is directed should be taken into account in determining whether the power should be preserved.

Other Legislative Schemes

Summary Offences Act 1966 (Vic)

Prostitution Control Act 1994 (Vic)

Planning and Environment Act 1987 (Vic)

A range of other legislative schemes impact upon the performance of live entertainment and could be invoked as a means of proscribing the types of sexually explicit material or conduct that s 6 is directed toward. The opportunity to have these matters heard in a court of law, tribunal or commission as opposed to trusting in an elected official, would also seem to be a factor in favour of dealing with such matters under one of these Acts. The relevant legislation is canvassed briefly below.

Summary Offences Act 1966 (Vic)

An important instrument, in terms of its potential impact upon the type of content envisaged by s 6, is the *Summary Offences Act 1966*. Section 17 of that Act proscribes ‘obscene’, ‘indecent’, or ‘threatening’ ‘language and behaviour’ in a ‘public place’ where ‘public place’ is defined to include any ‘place of public recreation or resort’ ‘notwithstanding that it may be formed on public property’.¹¹⁷ Equivalent obscenity

¹¹⁶ The *Theatres Act 1958* (Vic) s 6 imposes a maximum penalty of ‘10 penalty units’ if a performance is staged contrary to a prohibition made under the section, where a penalty unit is equal to \$100.00 as defined by *Sentencing Act 1991* (Vic) s 110.

¹¹⁷ *Summary Offences Act 1966* (Vic) s 3.

provisions under the existing South Australian legislation were in fact used in 1970 to prohibit the performance of the play *Oh Calcutta*. In that case a theatre was held by a majority of the judges to constitute a ‘public place’ even though entry was restricted to persons over the age of 18 and payment upon entry was required.¹¹⁸ The play, which involved nudity and simulation of intercourse, was held to be obscene and an injunction granted to restrain its performance.¹¹⁹ The fact that these provisions were invoked in preference to the ministerial discretion given under that state’s *Public Places of Entertainment Act* is noteworthy. In fact in the same case Wells J expressed doubt about the appropriateness of the ministerial power under the *Places of Public Entertainment Act* in light of the ‘machinery of its enforcement’ and the ‘comparatively small penalty’ it imposed.¹²⁰

As previously discussed, obscenity or indecency was also the basis upon which the Victorian productions of *Oh Calcutta* and *The Boys in the Band* were challenged, with the mechanism contained in s 6 of the *Theatres Act* being overlooked.

Prostitution Control Act 1994 (Vic)

A concern expressed in some submissions was that repealing the *Theatres Act* may leave forms of sexually explicit live entertainment such as tabletop dancing unregulated. As previously stated, these concerns are largely unjustified as these types of entertainment are currently unaffected by the *Theatres Act* as the licensing system is not enforced. In addition the *Prostitution Control Act 1994* already provides some regulation in this area. In 1999 the Act was amended to widen the definition of ‘sexual services’ to include forms of sexually explicit live entertainment which involve bodily contact between performers and patrons. As a consequence, venues which provide live entertainment which falls into this category are now subject to licensing requirements and other controls under that Act and will not be left unregulated by the abolition of the licensing scheme and censorship provisions under the *Theatres Act*.

Planning and Environment Act 1987 (Vic)

Forms of live entertainment such as table-top dancing, irrespective of whether they involve physical contact between patrons and performers, is also subject to regulation by individual local governments under the *Planning and Environment Act 1987*. A broad range of provisions under this Act have been invoked in attempts to prohibit

¹¹⁸ *Attorney-General v Huber* (1971) 2 SASR 142.

¹¹⁹ The action was brought under the *Police Offences Act 1953* (SA) s 23 now the *Summary Offences Act 1953* (SA).

¹²⁰ *Attorney-General v Huber* above n 118, 215.

sexually explicit live entertainment in areas such as the King Street precinct in Melbourne's central business district.¹²¹

Consumer Advice Scheme

The Committee is of the view that the adoption of a 'consumer advice' scheme for live performances would be a preferable way of addressing the concerns raised by the submissions. A Committee member related a personal experience in which he had invited persons of the Muslim faith to attend a community festival. The festival involved Brazilian dancing and the level of semi-nudity involved in the performance was deeply offensive to his guests. The member expressed the view that knowledge of the content of the performance beforehand could have avoided this embarrassment. The Committee believes that if industry operators were encouraged to adopt a self-regulation scheme whereby theatre goers were advised of the content of individual productions, such incidents could be largely avoided. The Committee is of the view that a ratings system similar to that employed by the Office of Film and Literature Classification could be adopted on a voluntary basis to the benefit of both entertainment providers and patrons.

Recommendation 4

That providers of live entertainment consider adopting a self-regulatory 'consumer advice' scheme whereby a ratings system similar to that used by the Office of Film and Literature Classification is used to advise patrons of entertainment content.

Blasphemous Material

A separate but related issue is that of existing laws which relate to blasphemy. While no laws relating to blasphemy appear in Victorian statutes some common law still applies. This matter was raised by Dr Williams in his submission.

I note also that the issue of the power of private citizens to restrain a perceived blasphemous libel still remains part of the common law of Victoria, though its scope is still largely untested, see *Pell v The Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391.¹²²

In the case of *Pell v The Council of the Trustees of the National Gallery of Victoria*¹²³ it was held that the common law relating to a blasphemous libel was still part of the

¹²¹ See for example *Torill Pty Ltd & Ors v Melbourne CC and R Stone* [2000] VCAT 2236 (31 October 2000).

¹²² Dr Mark Williams, Logie-Smith Lanyon Lawyers, Submission No 8, 3.

¹²³ [1998] 2 VR 391.

law of Victoria. It was found, however, that in order for the matter complained of to amount to blasphemous libel:

it must raise the risk of a breach of the peace, perhaps general civil unrest.¹²⁴

Breach of the peace is discussed below.

Breach of the Peace

Section 6 of the *Theatres Act* allows the Minister to prohibit live entertainment where she or he is of the opinion that it is fitting for the preservation of, *inter alia*, the public peace to do so.

This issue was raised in the submission from Dr Williams who commented:

Whilst there is probably need for some residual control of entertainments and places in which they take place where a breach of the peace is threatened or is likely to be repeated, the present mechanism in section 6 of the Act is inappropriate and should be replaced with one allowing for clear guidelines to be available to the public and clear opportunities for administrative and judicial review.¹²⁵

Some protection against breaches of the peace is already contained in other pieces of Victorian legislation, for example, the *Unlawful Assemblies and Processions Act 1958* (Vic) section 5 which prohibits assemblies which disturb the public peace would appear to cover a demonstration held at a live entertainment venue.

The *Summary Offences Act 1966* section 9 makes it an offence to refuse to leave a venue after being warned to do so by the owner or other authorised person and would appear to cover a situation where a person or persons attempted to disrupt a performance from the audience.

As noted above, the common law of blasphemous libel would also be applicable to prevent a breach of the peace, in this case relating to a breach caused by a theatre production.

The Committee considers that due to the rarity of such matters arising and the existing range of possible legal actions no further provisions are necessary to replace provisions contained in the *Theatres Act*, were the Act to be repealed.

¹²⁴ Ibid.

¹²⁵ Dr Mark Williams, Logie-Smith Lanyon Lawyers, above n 122, 4.

Discriminatory Material

Human Rights and Equal Opportunity Commission Act 1986 (Cth)

Racial Discrimination Act 1975 (Cth)

Racial Hatred Act 1995 (Cth)

Sex Discrimination Act 1984 (Cth)

Disability Discrimination Act 1992 (Cth)

Equal Opportunity Act 1995 (Vic)

A plethora of different anti-discrimination legislation has been introduced into Australian jurisdictions since the enactment of the *Theatres Act* in 1958 and these also have an effect in circumscribing the range of content permissible in live entertainment. Louis Nowra's play *Miss Bosnia* was the subject of a complaint to the Human Rights and Equal Opportunity Commission in 1998,¹²⁶ and a live comedy performance has recently been considered by the Victorian Equal Opportunity Commission.¹²⁷ The wide ambit of this legislation means that many types of material that may offend certain sections of the community will be actionable under one of these Acts.

If an individual considers a live theatre production to infringe any of the various anti-discrimination statutes, a complaint can be lodged with either the Human Rights and Equal Opportunity Commission or the Victorian Equal Opportunity Commission.¹²⁸

Both bodies have the capacity to act expeditiously in certain circumstances. Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46PP, applicants, the Commission, a respondent or an affected person can apply for an interim injunction in the Federal Court or the Federal Magistrates' Court. The injunction can

¹²⁶ *Hanna Bryl v Anna Kovacevic And: Louis Nowra and Melbourne Theatre Company* [1999] HREOCA 11 (21 June 1999).

¹²⁷ The Christmas comedy performance *Midnight Mass* was the subject of a complaint to the Commission on the grounds that it was offensive to Catholics, see 'Christmas show sued', *The Age*, (Melbourne), May 1 2001.

¹²⁸ In some instances the Victorian legislation would offer a greater chance of success, in others an application under the federal scheme would be preferable. For example, the state Act allows complaints on several grounds which the federal legislation does not, eg marital status, sexual orientation and religious belief. On the other hand, the state Act defines the grounds of sex, gender and race more narrowly than does the federal legislation. The federal Commission may also be preferable in some instances, as in that forum one need only show that the attribute in question is one of the reasons the discrimination occurred, whilst the Victorian legislation requires it to be 'a substantial reason'.

be granted in order to ‘maintain the rights of any complainant, respondent or affected person’, if there has been a possible breach of the Act.¹²⁹ Under s 131 of the *Equal Opportunity Act 1995 (Vic)*, or s 123 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*, applicants can apply for an interim order from the Victorian Civil and Administrative Appeals Tribunal. This order works in a similar way to an interim injunction.¹³⁰

A potential problem with these mechanisms is the possibility of persons wishing to apply for such orders not doing so for fear of having damages awarded against them. A number of legislative provisions go some way toward alleviating these concerns.

Section 46PP(5) of the *Human Rights and Equal Opportunity Commission Act* stipulates that a court cannot require a person to give an undertaking as to damages as a condition of an interim injunction being granted, and in fact the Act creates two potential ways for the person objecting to the performance to avoid shouldering the risk of damages being awarded against them. These are either to seek the ‘assistance’ of the court under s 46PU of the Act or to invoke the *Amicus curiae* function of the Commission members under s 46PV.

Section 46PU provides that a person who has commenced proceedings in the Federal Court may apply to the Attorney-General for the provision of ‘legal or financial assistance’ if the Attorney-General is satisfied that ‘it will involve hardship to the person to refuse the application’ and that it is ‘reasonable to grant the application.’

The *Amicus curiae* function allows a special purpose Commissioner to ‘assist the court’ where the orders sought may affect the ‘human rights’ of persons not party to the proceedings, or, where there are ‘special circumstances’ whereby it is in the ‘public interest’ for the Commissioner to assist. It appears that s 46PP is broad enough to allow the Special Commissioner or the Commission to make an application for an interim injunction instead of the individual complainant in these circumstances.

Under the Victorian legislation a similar facility exists. Part 8 of the *Equal Opportunity Act* allows for investigations by the Commission and Tribunal (VCAT). Section 156(1) states that if the Tribunal ‘becomes aware’ of a contravention of the Act it may refer the matter to the Commission for investigation. Alternatively, s 156(2) allows that if ‘in the course of performing its functions’ under its educative and research powers the Commission ‘becomes aware’ of circumstances where

¹²⁹ Complainants must lodge a complaint with the Commission at the same time. Obviously this type of remedy could only be invoked after at least one performance (ie a possible breach) had occurred.

¹³⁰ Complainants must file a complaint with the Equal Opportunity Commission at the same time.

contraventions of the Act may have occurred, it can, with the consent of the Minister, investigate. Under s 157 matters which may be investigated include situations where a possible contravention concerns ‘a class or group of people’ or where ‘the circumstances are such that the lodging of a complaint by one person only would not be appropriate’. Section 158 states that such procedures are to be treated as if they are a complaint, and if the Commission considers such matters cannot be conciliated they are to be referred to the Tribunal. Section 159 states that matters referred to the Tribunal in this way can result in an order that the contravention cease or that the person do anything necessary to ensure there is no future contravention.

Conclusion

The Committee does not believe s 6 of the *Theatres Act* should be retained. The views expressed in the NSW Parliament in regard to the repeal of the NSW legislation, that such provisions are ‘quaint’ and ‘outmoded’, is shared by the Committee.¹³¹ The retention of s 6 would be particularly undesirable if all other provisions of the Act were to be repealed, as s 6 is exercisable only with respect to those theatres licensed under the Act.

Recommendation 5

That no additional legislative provisions be enacted to substitute for s 6, if s 6 is repealed.

In conclusion it is the view of the Committee that the repeal of the *Theatres Act* is desirable.

Recommendation 6

That the Theatres Act 1958 (Vic) be repealed.

¹³¹ New South Wales, *Parliamentary Debates*, April 5 2001, Summary Offences Amendment (Minors in Sex Clubs) and Theatres and Public Halls Repeal Bill, Second Reading Speech, (Hon. Paul Whelan, Strathfield, Minister for Police).

**Adopted by Committee
21 May 2001**

APPENDIX 1 - THE THEATRES ACT

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Version No. 021 Theatres Act 1958

Act No. 6393/1958

Version incorporating amendments as at 1 July 1997

TABLE OF PROVISIONS

<i>Section</i>	<i>Page</i>
1. Short title and commencement	
2. Repeals	
PART 1—GENERAL	
3. Unlicensed stage entertainment	
4. Police may enter unlicensed premises	
5. Proof of being licensed	
6. Minister may prohibit any performance in licensed theatre	
7. Minister may cancel or suspend licences	
7A. Further provisions as to licences	
7B. Special permit	
7C. Special permit holder not liable	
7D. Fees for special permits	
8. Inquiry and notice to show cause	
9. Publication of order	
10. Non-licensed picture theatre	
10A. <i>Repealed</i>	
11. Appeal, application of penalties	
12. Limitation of actions	
12A. Regulations	
PART 2—<i>Repealed</i>	
13–39. <i>Repealed</i>	

SCHEDULES.....

SCHEDULE 1—Repeals

SCHEDULE 2—*Repealed*.....

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NOTES.....

1. General Information

2. Table of Amendments

3. Explanatory Details

Version No. 021
Theatres Act 1958

Act No. 6393/1958

Version incorporating amendments as at 1 July 1997

An Act to consolidate the Law relating to Theatres.

Long title
amended by
No. 8161
s.2(1)(a).

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

S.1
amended by
Nos 8161
s.2(1)(b),
57/1989 s.3(Sch.
item 197.1).

1. *Short title and commencement*

This Act may be cited as the **Theatres Act 1958**, and shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the Government Gazette.

2. *Repeals*

- (1) The Acts mentioned in the First Schedule to this Act to the extent thereby expressed to be repealed are hereby repealed accordingly.
- (2) Except as in this Act expressly or by necessary implication provided—
 - (a) all persons things and circumstances appointed or created by or under the repealed Acts or existing or continuing under any of such Acts immediately before the commencement of this Act shall under and subject to this Act continue to have the same status operation and effect as they respectively would have had if such Acts had not been so repealed;
 - (b) in particular and without affecting the generality of the foregoing paragraph such repeal shall not disturb the continuity of status operation or effect of any regulation

s. 2

order authority notice return application
registration certificate approval permit
exemption revocation suspension
cancellation forfeiture retention appointment
proceeding warrant appeal liability or right
made effected issued granted given accrued
incurred or acquired or existing or
continuing under such repealed Acts before
the commencement of this Act.

s. 3

PART I—GENERAL

No. 3786 s. 3.
S. 3
amended by
Nos 9554
s. 2(2)(Sch. 2
item 345), 10087
s. 3(1)(Sch. 1
item 254).

3. *Unlicensed stage entertainment*

Every person who acts represents or performs or causes to be acted represented or performed for hire gain or reward any interlude tragedy opera comedy stage play farce burletta melodrama pantomime or any stage dancing tumbling or horsemanship or any other entertainment of the stage whatsoever to which admission is or may be procured by payment of money or by tickets or by any other means token or consideration as the price hire or rent of admission, and every person who takes or receives or causes to be taken or received any money goods or valuable thing whatsoever by way of rent fee or reward for the use or hire of any house room building or place wherein any such entertainments of the stage as aforesaid are acted represented performed or exhibited or being the owner or occupier thereof knowingly permits or suffers the same to be so used and applied, shall, in case the place wherein the same are acted represented performed or exhibited is without the written authority or licence of the Minister for every such offence be liable to a penalty of not more than 10 penalty units.

No. 3786 s. 4.
S. 4
amended by
Nos 7208 s. 2,
9554 s. 2(2)(Sch.
2 item 346),
10087
s. 3(1)(Sch. 1
item 255),
57/1989 s. 3(Sch.
item
197.2(a)(b)).

4. *Police may enter unlicensed premises*

Every house room building garden or place wherein any such entertainments of the stage as aforesaid are acted represented performed or exhibited, unless the same is authorized and licensed by the Minister as hereinbefore mentioned, shall be deemed a disorderly house room building or place; and it shall be lawful for any member of the police force with such assistance as may be necessary being authorized by a warrant issued by a magistrate (which

s. 5

warrant the magistrate is hereby empowered to issue upon complaint being made to him on oath that there is reason to suspect that any house room building garden or place is used for the purpose aforesaid without being duly licensed) to enter into such house room building garden or place and to seize every person found therein; and every person so found shall be liable to a penalty of not more than 10 penalty units.

5. *Proof of being licensed*

Nos 3786 s. 5,
3943 s. 2.

In any proceedings to be instituted against any person for having or keeping an unlicensed theatre or other house room building garden or place as aforesaid or for acting for hire in an unlicensed theatre or other house room building garden or place, if it is proved that such theatre or other house room building garden or place is used for the public performance of entertainments of the stage as hereinbefore described, the burden of proof that such theatre or other house room building garden or place is duly licensed or authorized shall lie on the party accused and until the contrary is proved such theatre or other house room building garden or place shall be taken to be unlicensed: Provided always that no person shall be liable to be prosecuted for any offence against this Part unless such prosecution is commenced within three months next after the offence committed.

6. *Minister may prohibit any performance in licensed theatre*

Nos 3786 s. 6,
3943 s. 2.

S. 6
amended by
Nos 9554
s. 2(2)(Sch. 2
item 345), 10087
s. 3(1)(Sch. 1
item 255).

It shall be lawful for the Minister, whenever he is of opinion that it is fitting for the preservation of good manners decorum or of the public peace so to do, to forbid by writing under his hand the acting or presenting any stage play or any act scene or entertainment of the stage as hereinbefore mentioned or part thereof or any prologue or epilogue or any part thereof in such theatres or

s. 7

other places for which an authority or licence has been granted by him in pursuance of the authority vested in him by this Part or any corresponding previous enactment. And every person who for hire acts or presents or causes to be acted or presented any stage play or other entertainment as aforesaid or any act scene or part thereof or any prologue or epilogue or part thereof contrary to such prohibition as aforesaid shall for every such offence be liable to a penalty of not more than 10 penalty units; and every authority or licence (in case there is any such) by or under which the theatre was opened in which such offence has been committed shall become absolutely void.

No. 3786 s. 7.
S. 7
amended by
Nos 6607 s. 5(a),
7807 s. 2, 7906 s.
2, 10087
s. 3(1)(Sch. 1
item 255).

7. Minister may cancel or suspend licencesⁱ

Where a written authority or licence has at any time either before or after the commencement of this Act been granted by the Minister in respect of any theatre house room building garden or place it shall be lawful for the Minister by order published in the Government Gazette to cancel or suspend for such period as he thinks fit such authority or licence if it is proved to the satisfaction of the Minister that such theatre house room building garden or place has during the currency of such authority or licence and without a special permit in writing from the Minister been used on Christmas Day or on Good Friday for any entertainment of the stage whatsoever or for any public concert reading lecture recitation or musical entertainment but no such special permit shall authorize the use of any theatre house room building garden or place for any interlude tragedy opera comedy stage play farce burletta melodrama pantomime or any stage dancing tumbling or horsemanship on Christmas Day or on Good Friday or, subject to section 7B, the holding on Christmas Day or on Good Friday of any public concert reading lecture recitation or musical

s. 7A

s. 7B

entertainment to which members of the public are admitted upon the payment of money or other consideration or by ticket programme donation or other device purchased for money or other consideration.

7A. Further provisions as to licences

Where a written authority or licence has at any time either before or after the commencement of this Act been granted by the Minister in respect of any theatre house room building garden or place it shall be lawful for the Minister by order published in the Government Gazette to cancel or suspend for such period as he thinks fit such authority or licence if it is proved to the satisfaction of the Minister—

S. 7A
inserted by No.
6607
s. 5(b), amended
by No. 10087
s. 3(1)(Sch. 1
item 255).

- (a) that such theatre house room garden or place has during the currency of such authority or licence and without a special permit in writing from the Minister been used on Anzac Day for any entertainment of the stage whatsoever or for any public concert reading lecture recitation or musical entertainment; and
- (b) that the performance or the giving of such entertainment of the stage concert reading lecture recitation or musical entertainment commenced before the hour of one o'clock in the afternoon.

S. 7A(a)
amended by
No. 10087
s. 3(1)(Sch. 1
item 255).

S. 7A(b)
amended by
No. 2/1987 s. 4.

7B. Special permit

A special permit under section 7 may authorize the use of a theatre house room building garden or place licensed under this Act on Christmas Day or Good Friday for any concert play drama or opera of a sacred nature.

S. 7B
inserted by No.
7906
s. 3.

7C. Special permit holder not liable

S. 7C
inserted by No.
7906
s. 3.

s. 9

A person conducting any such concert play drama or opera under and in accordance with the terms and conditions of a special permit shall not be liable to any penalty under this Act or under any other Act or law for the conduct thereof on Christmas Day or Good Friday.

S. 7D
inserted by No.
7906
s. 3.

7D. Fees for special permits

The Governor in Council may make regulations fixing the fees (not exceeding \$20) to be paid for the issue of special permits under section 7.

No. 3786 s. 8.

S. 8(1) amended
by No. 10087
s. 3(1)(Sch. 1
item 255).

8. Inquiry and notice to show cause

- (1) No such authority or licence held by any person shall be cancelled or suspended by an order of the Minister by reason of any contravention of the last preceding section until after the expiration of seven days from the posting of a written notice from the Minister to him at the address specified in his authority or licence or at the theatre house room building garden or place to which such authority or licence relates.
- (2) Such notice shall state shortly the contravention which is believed to have occurred, and also notify that at a time specified in such notice such person may show cause to the Minister why such authority or licence should not be cancelled or suspended. Before making any such order the Minister shall be satisfied that such notice was duly posted.

S. 8(2) amended
by No. 10087
s. 3(1)(Sch. 1
item 255).

Nos 3786 s. 9,
3943 s. 2.

9. Publication of order

- (1) On and after the publication in the Government Gazette of any such order, the authority or licence to which it refers shall be cancelled or suspended as directed in such order.
- (2) The publication of any such order in the Government Gazette shall be conclusive evidence that the requirements of this Part precedent to any

such cancellation or suspension have been duly complied with.

10. *Non-licensed picture theatre*

Nos 3786 s. 10,
3943 s. 2.

(1) In the case of any theatre house room building garden or place in or in connexion with which any film or cinematograph display is exhibited for hire gain or reward and to which section seven of this Act is not applicable (hereinafter called a non-licensed picture theatre) the following provisions shall apply:

(a) No person shall without a permit in writing from the Minister use any non-licensed picture theatre or allow the same to be used for the exhibition of any film or cinematograph display on Christmas Day or on Good Friday in any year.

S. 10(1)(a)
amended by
No. 10087
s. 3(1)(Sch. 1
item 255).

(b) No person shall exhibit or cause to be exhibited or do any act or thing in or in connexion with the exhibition of any film or cinematograph display on Christmas Day or on Good Friday in any year in or in connexion with any non-licensed picture theatre with respect to which the Minister has not granted a permit as aforesaid.

S. 10(1)(b)
amended by
No. 10087
s. 3(1)(Sch. 1
item 255).

(c) Every person who fails to comply with any of the foregoing provisions of this subsection shall be liable to a penalty of not more than 10 penalty units.

S. 10(1)(c)
amended by
No. 9554
s. 2(2)(Sch. 2
item 345).

(2) Without affecting the generality of the provisions of this Part every corporation shall be liable to have its authority or licence cancelled or suspended pursuant to this Part and this section or (as the case may be) to any penalty under this section as if it were a private person; and every chairman, member of the governing body, director, manager, secretary, or officer of such corporation who knowingly authorizes or permits

s. 11

the commission of any offence under this section shall also be liable therefor.

S. 10A inserted by No. 7208 s. 3, repealed by No. 7634 s. 15.

Nos 3786 s. 11, 3943 s. 2.

S. 11(2) amended by No. 10087 s. 3(1)(Sch. 1 item 256).

Nos 3786 s. 12, 3943 s. 2, 5914 s. 2.

* * * * *

11. Appeal, application of penalties

- (1) Any person feeling aggrieved by any judgment or conviction under this Part may appeal therefrom in the manner provided by any law in force for the time being in that behalf.
- (2) All fines forfeitures and penalties imposed by this Part shall be paid, one moiety to the Consolidated Fund and the other moiety to the use of the informant.

12. Limitation of actions

No action at law shall lie against any member of the police force for or on account of any matter or thing whatsoever done by him in the execution of his duty under this Part against any person

s. 12A

offending or suspected to be offending against the provisions of this Part, unless there is direct proof of corruption or malice.

12A. Regulations

S. 12A inserted by No. 7807 s. 3.

The Governor in Council may make regulations prescribing the form of applications licences and permits desirable or necessary under this Part and prescribing fees for licences and permits not exceeding in any case the sum of \$10.

* * * * *

Pt 2 (Heading and ss 13-39) repealed by No. 8161 s. 2(1)(c).

NOTES

1. General Information

The **Theatres Act 1958** was assented to on 30 September 1958 and came into operation on 1 April 1959: Government Gazette 18 March 1959 page 893.

Notes

2. Table of Amendments

This Version incorporates amendments made to the **Theatres Act 1958** by Acts and subordinate instruments.

Anzac Day Act 1960, No. 6607/1960

Assent Date: 7.4.60
Commencement Date: 7.4.60
Current State: All of Act in operation

Subordinate Legislation Act 1962, No. 6886/1962

Assent Date: 8.5.62
Commencement Date: 1.8.62: Government Gazette 4.7.62 p. 2314
Current State: All of Act in operation

Theatres (Sunday Films) Act 1964, No. 7208/1964

Assent Date: 15.12.64
Commencement Date: 15.12.64
Current State: All of Act in operation

Sunday Entertainment Act 1967, No. 7634/1967

Assent Date: 19.12.67
Commencement Date: 1.3.68: Government Gazette 8.2.68 p. 315
Current State: All of Act in operation

Theatres (Amendment) Act 1969, No. 7807/1969

Assent Date: 29.4.69
Commencement Date: Ss 1–3 on 23.7.75: Government Gazette 23.7.75 p. 2658; ss 4–16 were never proclaimed, repealed by No. 8161 s. 2(2)
Current State: All of Act in operation

Theatres (Performance of Sacred Works) Act 1969, No. 7906/1969

Assent Date: 9.12.69
Commencement Date: 9.12.69
Current State: All of Act in operation

Films Act 1971, No. 8161/1971

Assent Date: 26.10.71
Commencement Date: 15.11.71: Government Gazette 10.11.71 p. 3535
Current State: All of Act in operation

Penalties and Sentences Act 1981, No. 9554/1981

Assent Date: 19.5.81
Commencement Date: S. 2(2) (Sch. 2 items 345, 346) on 1.9.81: Government Gazette 26.8.81 p. 2799
Current State: This information relates only to the provisions amending the **Theatres Act 1958**

Statute Law Revision Act 1984, No. 10087/1984

Assent Date: 22.5.84
Commencement Date: 22.5.84: subject to s. 3(2)
Current State: All of Act in operation

Anzac Day (Amendment) Act 1987, No. 2/1987

Assent Date: 31.3.87
Commencement Date: 31.3.87
Current State: All of Act in operation

Magistrates' Court (Consequential Amendments) Act 1989, No. 57/1989

Assent Date: 14.6.89
Commencement Date: S. 4(1)(a)–(e)(2) on 1.9.89: Government Gazette 30.8.89 p. 2210; rest of Act on 1.9.90: Government Gazette 25.7.90 p. 2217.
Current State: All of Act in operation

3. Explanatory Details

¹ S. 7: Anzac Day is the 25th April. As to picture theatres etc. to which this section is not applicable, see section 5 of the **Anzac Day Act 1958**, No. 6198/1958.

APPENDIX 2 – COMPARISON OF LEGISLATION – AUSTRALIAN STATES AND TERRITORIES

	Requirement for a licence at all times for reasons related to public morality	Provision for prohibition of specific entertainment	Requirement for special licence for Christmas Day & Good Friday	Requirement for special licence for Anzac Day before 1.00pm ¹³²	Test used for prohibition of specific entertainment	Test used for granting of special licences
Victoria	<i>Yes</i> ¹³³	Yes	Yes (cinemas) <i>Yes (other public entertainment)</i>	Yes (cinemas) <i>Yes (other public entertainment)</i>	Is fitting for the preservation of good manners, decorum or of the public peace (s 6)	Cinemas Only 1. Christmas Day - No permits granted 2. Good Friday - Films will be referred to the A-G if reasonably likely to cause controversy (eg. religious satire, extreme violence) 3. Anzac Day – provisions contained in <i>Anzac Day Act</i>
New South Wales	No	Yes	No	No	Is fitting for the preservation of good manners and decorum (s 27)	Not applicable
Australian Capital Territory	No	Yes	<i>Yes</i>	No	In the public interest (s 26)	Not specified
Queensland	No	No	No	Yes	Not applicable	Not specified
Tasmania	No	Yes	<i>Yes</i>	No. An absolute prohibition on operation before 12.15pm	For the preservation of public morality, good manners or decorum, or to prevent a breach of the peace or danger to a performer or other person (s 49B)	Christmas Day and Good Friday - Granting a permit must be in the public interest and not offend the sanctity of the day specified in the application (s 49C)

¹³² 1.30pm Qld, 12.15pm Tas

¹³³ Entries in *italics* denote the fact that existing regulations are not enforced.

	Requirement for a licence at all times for reasons related to public morality	Provision for prohibition of specific entertainment	Requirement for special licence for Christmas Day & Good Friday	Requirement for special licence for Anzac Day before 1.00pm¹³²	Test used for prohibition of specific entertainment	Test used for granting of special licences
Western Australia	No	No	<i>Yes, also for Sunday</i>	No	Not applicable	Not specified
Northern Territory	No	Yes	No	No	In the public interest (s 17)	Not Applicable
South Australia	No	No	No	No	Not applicable	Not applicable

APPENDIX 3 EXAMPLE – PRESS COVERAGE

Australian (The)

06/04/2001 AUSTRALIA: *CENSORSHIP THREATENS OUR SECULAR SOCIETY.*

AUSTRALIA is not the place it was when the Theatres Act (Victoria) 1958 was conceived as a way of restricting cinemas on Christian holidays - and nor should it be. The act has largely fallen into disuse - thank heaven. But when dusted off, it still entrenches sectarianism and allows ad hoc *censorship* by unrepresentative public servants. The ban on Good Friday of The Exorcist: The Director's Cut is a prime example.

Victorian MPs are reviewing the offending act. They should follow the lead of other states and repeal it, for no other reason than it is useless. Videos of The Exorcist and other R-rated film can always be viewed on Good Friday and Christmas Day.

But something more important is at stake. The ban of The Exorcist is an unacceptable action in a *secular* society with a *secular* constitution. Lately, there has been a growing attempt, especially by religious lobbies, to encourage their brand of morality by legislation. They do not seem to realise that the trend could well lead to parallel efforts to restrict religious freedom eventually, as a quid pro quo.

There is a clear difference between respecting someone's faith and having it shoved down your throat. The widespread tolerance enjoyed by believers and unbelievers in our society depends on the acceptance of both to disagree, even fundamentally, but remain harmonious. To deny those with no particular personal respect for the significance of Good Friday the right to view any film on that day *threatens* personal freedom...

APPENDIX 4

LIST OF SUBMISSIONS

<i>No.</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
1	31 May 2000	Mr Tim Jacobs	Victorian Arts Centre
2	19 July 2000	Moderator Brian Bayston	Presbyterian Church of Victoria
3	30 May 2000	Mr John Bates	Australian Entertainment Industry Association (AEIA)
4	19 July 2000	Dr Mark Williams	Logie-Smith Lanyon Lawyers
5	7 August 2000	Mr Paul Coulter	Lumiere Theatre
6	7 August 2000	Mr John Dalziel Captain Malcolm Roberts	Salvation Army
7	14 August 2000	Canon Ray Cleary	Anglican Diocese of Melbourne
8	4 August 2000	Dr Mark Williams	Logie-Smith Lanyon Lawyers
9	19 October 2000	Ms Marsha Thompson, Minister for Small Business	Department of State and Regional Development

APPENDIX 5

LIST OF WITNESSES

<i>No.</i>	<i>Date of Hearing</i>	<i>Witness</i>	<i>Affiliation</i>
1	7 August	Mr John Bates	Australian Entertainment Industry Association
2	MELBOURNE	Mr David Hamilton	Palace Cinemas
3		Mr Benjamin Zeccola	Logie-Smith Lanyon Lawyers
4		Dr Mark Williams	Lumiere Cinemas
5		Mr Paul Coulter	Multicultural Arts Victoria
6		Mr Fotis Kapetopoulos	Returned & Services League
7		Brigadier Keith Rossi	Salvation Army
8		Mr John Dalziel	
9		Captain Malcolm Roberts	
