

# **No. 14 of 2012**

**Tuesday, 9 October 2012**

**On the**

Local Government Legislation  
Amendment (Miscellaneous) Bill 2012

Primary Industries and Food  
Legislation Amendment Bill 2012

Retail Leases Amendment Bill 2012

Road Safety and Sentencing Acts  
Amendment Bill 2012

Serious Sex Offenders (Detention and  
Supervision) Amendment Bill 2012

Traditional Owner Settlement  
Amendment Bill 2012

Transport Legislation Amendment  
(Marine Drug and Alcohol Standards  
Modernisation and Other Matters)  
Bill 2012

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# Useful information

## Role of the Committee

The Scrutiny of Acts and Regulations Committee is an all-party Joint House Committee, which examines all Bills and subordinate legislation (regulations) introduced or tabled in the Parliament. The Committee does not make any comments on the policy merits of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan legislative scrutiny. These traditions have been developed since the first Australian scrutiny of Bills committee of the Australian Senate commenced scrutiny of Bills in 1982. They are precedents and traditions followed by all Australian scrutiny committees. Non-policy scrutiny within its terms of reference allows the Committee to alert the Parliament to the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances.

The *Charter of Human Rights and Responsibilities Act 2006* provides that the Committee must consider any Bill introduced into Parliament and report to the Parliament whether the Bill is incompatible with human rights.

## Interpretive use of Parliamentary Committee reports

Section 35 (b)(iv) of the *Interpretation of Legislation Act 1984* provides –

In the interpretation of a provision of an Act or subordinate instrument consideration may be given to any matter or document that is relevant including, but not limited to, reports of Parliamentary Committees.

## When may human rights be limited

Section 7 of the *Charter* provides –

Human rights – what they are and when they may be limited –

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
  - (a) the nature of the right; and
  - (b) the importance of the purpose of the limitation; and
  - (c) the nature and extent of the limitation; and
  - (d) the relationship between the limitation and its purpose; and
  - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

## Glossary and Symbols

'AAT' refers to the Administrative Appeals Tribunal;

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

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

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

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

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

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

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (currently one penalty unit equals \$140.84).

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.

'VCAT' refers to the Victorian Civil and Administrative Tribunal;

[ ] denotes clause numbers in a Bill.

# Alert Digest No. 14 of 2012

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## Retail Leases Amendment Bill 2012

<b>Introduced</b>	11 September 2012
<b>Second Reading Speech</b>	12 September 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon Louise Asher MLA
<b>Portfolio responsibility</b>	Minister for Innovation, Services and Small Business

### Purpose

The Bill amends the *Retail Leases Act 2003*. Its purpose is to reduce red tape and improve the operation of the Act. More specifically:-

- The Bill removes the requirement for the landlord of a retail lease premises to notify the Small Business Commissioner of the particulars of a retail lease within 14 days of the lease being entered into [7]. It also removes the requirement for the Small Business Commissioner to create and maintain a register of retail lease information [8].
- It also provides that retail lease obligations (to provide a copy of the lease (section 15), to provide a landlord disclosure statement (section 18) extend to a prospective landlord or a person acting on behalf of a landlord to a tenant or prospective tenant [3,4].

**The Committee makes no further comment.**

## Serious Sex Offenders (Detention and Supervision) Amendment Bill 2012

Introduced	11 September 2012
Second Reading Speech	12 September 2012
House	Legislative Assembly
Member introducing Bill	Hon Andrew McIntosh MLA
Portfolio responsibility	Minister for Crime Prevention and Minister for Corrections

### Purpose

The Bill amends the *Serious Sex Offenders (Detention and Supervision) Act 2009*. It makes a number of miscellaneous amendments to improve the operation of the Act.

#### Amendments to the *Serious Sex Offenders (Detention and Supervision) Act 2009*

- There are two additional instances specified when a supervision order expires; when the offender is deported or removed from Australia under the *Migration Act 1958* or when the offender dies [4-6]. Periodic three year review of supervision orders under section 65 must also include review of non-publication orders [7].
- The Bill inserts a definition of 'publish' [11]. (This assists with the operation of section 182 which makes it an offence to publish any evidence given in a proceeding under the Act.) The amendments provide that when considering an application for a non-publication order the court must have regard to the protection of children, families and the community. This includes consideration of the offender's history of compliance or non-compliance with any order and their whereabouts [13].

**The Committee makes no further comment.**

## Traditional Owner Settlement Amendment Bill 2012

Introduced	11 September 2012
Second Reading Speech	12 September 2012
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MLA
Portfolio responsibility	Attorney-General

### Purpose

The Bill generally makes further provision with respect to indigenous land use agreements, land use activity agreements. It also facilitates authorisation orders for flora and forest produce to include commercial uses.

#### Amendments to the *Traditional Owner Settlement Act 2010*.

- It inserts a new definition of ‘traditional owner group’ so it more specifically refers to a group that is capable of having a settlement under the Act. A group of aboriginal persons is able to enter an indigenous land use agreement with the Minister [4]. A settlement package may include an indigenous land use agreement [5]. The Second Reading Speech extract: - ‘*The Bill will amend the definition of traditional owner group in section 3 of the Act specifically sub-section (a). This amendment will make it clear that a traditional owner group for the purposes of this Act is one that has or is able to have a native title settlement – that is, a group that can enter into a registered and legally binding Indigenous Land Use Agreement to withdraw native title and compensation claims and not to lodge any in the future. This definition ensures that the Government has settled with the ‘right people for the right country’ and that the settlement can provide legal finality and ongoing certainty.*’
- Additional authorisations can be included in a land use activity agreement. This includes, a consent for the development of coastal Crown land, a lease for a surf life saving association, a carbon sequestration agreement [10]. Additional activities can be included in a land use activity agreement. This includes the issuing of a commercial access licence or an aquaculture licence and the preparation of a management plan for coastal Crown land [11]. A land use activity agreement may include standard conditions in relation to aboriginal cultural heritage that must be accepted by the parties and any person who seeks to carry out the agreement activity. The conditions must not be inconsistent with the *Aboriginal Heritage Act 2006* [15].
- It provides clarity in relation to land use activities in alpine resorts [16]. The Second Reading Speech extract: -‘*The amendments provide for certain land use activities in Alpine Resorts to give rise to advisory procedural rights – providing traditional owners with notification of those activities. These amendments bring the Traditional Owner Settlement Act procedural rights into line with the level of Native Title Act 1993 (Cth) procedural rights available in Alpine Resorts.*’ (Land use activities in Part 4 of the Act are subject to review in VCAT as per Part 15 of the Act.)
- The Governor in Council may make an Order authorising the members of a traditional owner group to access and use protected flora for a commercial purpose eg: bush crafts [25]. Amendments to sections 86 ensure that all members of the traditional owner group (not just those who are members of the entity) may exercise their traditional owner rights in accordance with a camping authorisation [29]. The definition of owner in the *Planning and Environment Act 1987* is amended to ensure that a traditional owner group entity that has a land use activity agreement will receive notification of and the opportunity to

comment on planning scheme amendment that affect Crown land that is covered by that land use activity agreement [30].

**The Committee makes no further comment.**

# Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012

Introduced	11 September 2012
Second Reading Speech	12 September 2012
House	Legislative Assembly
Member introducing Bill	Hon Denis Naphine MLA
Portfolio responsibility	Minister for Ports

## Purpose

The Bill amends various pieces of Marine related legislation. Generally the purposes are:-

- To create new offences prohibiting the operation of a vessel whilst impaired by a drug other than alcohol and to prescribe a zero concentration of alcohol for persons under the age of 21 years;
- Align penalty and enforcement provisions for drug and alcohol offences with equivalent provisions under the *Road Safety Act 1986*;
- Provide for a drug assessment and testing regime; clarify functions and powers and responsibilities in relation to marine pollution and make various other amendments;
- Give police officers powers to enforce general marine safety standards.

### Amendment of *Marine (Drug, Alcohol and Pollution Control) Act 1988*

- The Bill provides that a person under 21 years who operates or is the master of a vessel, a commercial vessel, a government vessel is guilty of an offence if the person has any concentration of alcohol present in his or her breath or blood. The provision contains a reverse onus presumption. (See Charter report below) [4]. A person who operates a vessel or is the master or pilot of a vessel underway or at anchor<sup>1</sup> whilst impaired by a drug<sup>2</sup> is guilty of an offence. New section 31(2AA) provides that a person may be required to remain at the relevant place for the purposes of drug assessment for up to 3 hours. It is an offence to refuse to comply with any requirement [5].
- The penalties are aligned with equivalent offences in the *Road Safety Act 1986* are set out in amended section 28 [6]. (A person guilty of an offence of operating a vessel while under the influence of alcohol to such an extent as to be incapable of not having proper control is liable for a second offence of a maximum fine of 120 penalty units or imprisonment for not more than 12 months; for a subsequent offence a maximum of 180 penalty units or imprisonment for not more than 18 months; for a first offence to a fine of not more than 25 penalty units or to imprisonment for not more than 3 months.) A court may cancel, or suspend or disqualify a person from obtaining a licence for a minimum period a marine licence if a person is convicted of an offence as per new section 28A. (See Charter report

<sup>1</sup> Note the meaning of 'At anchor' as per amended new section 27(3) is 'at anchor in relation to a vessel, does not include a vessel properly made fast at a registered mooring or at anchor at a registered mooring'. Note also the definition of 'vessel under way' as per amended new section 27(3). The Explanatory Memorandum states '*The new definition in the Marine (Drug, Alcohol and Pollution Control) Act 1988 specifies for the purpose of the marine, drug and alcohol controls only, that a vessel is underway when the vessel is being secured, moored or retrieved from the water. The definition also specifies that a vessel is not underway when the vessel is ashore. Although axiomatic, this clarification ensures that the master or pilot of a vessel does not commit an offence when the vessel is ashore.*'

<sup>2</sup> 'Drug' has the same meaning as in the *Road Safety Act 1986*. That is, a substance that is a drug for the purposes of the *Road Safety Act 1986* by virtue of a declaration under subsection 3(3) of that Act, or any substance (other than alcohol) which, when consumed or used by a person, deprives that person (temporarily or permanently) of any of his or her normal mental or physical faculties.



below) (The minimum disqualification periods are set out in new Schedule 1 as inserted by clause [18]) [7-8].

- Provision is made for preliminary breath testing and breath testing stations. A person is not obliged to undergo a preliminary breath test or furnish a sample if more than 3 hours has passed since the person was operating a vessel [9-11]. New sections 31AA to 31AE set out the process and procedures for conducting drug assessments. A person may be required by the police (on the grounds of reasonable belief) to furnish a sample within 3 hours of operating a vessel. A drug assessment must be video recorded unless there are exceptional circumstances. Procedures to be followed in assessing drug impairment are published by notice in the Government Gazette [13].
- New section 32A sets out detailed evidentiary provisions in respect of urinary tests and the serving of affidavits and certificates. (See Charter report below) [14-6]. New standard regulation making powers in relation to taking and testing of samples of oral fluid are set out in clause [19]. The Secretary is defined as the appropriate authority in relation to marine pollution controls. The Secretary may make directions in respect of the Victorian Marine Pollution Contingency Plan [20-24].

#### Amendment of the *Marine Safety Act 2010*

- A vessel may be registered in the name of an incorporated or unincorporated body or in the name of a natural person who is 14 years of age or over [25]. New sections 162A-162C set out the police powers to inspect vessels. Inspection must be at a reasonable time. Police may enter vessels without consent or warrant and search and inspect equipment [26]. (See Charter Report)

#### ***Section 17(a)(i) – rights or freedoms***

**Clause 26 sets out the police powers in relation to inspection of vessels. It engages the Committee’s terms of reference pursuant to section 17(a)(i) of the *Parliamentary Committees Act 1968*. The Committee draws the provision to the attention of the Parliament.**

#### Amendment of *Port Management Act 1995*

- New section 94 deals with directors liabilities in respect of offences by bodies corporate of which the person is an officer. It aligns the directors’ liability provisions with the Council of Australian Government principles [28]. Clause [30] sets out regulation making powers for the purposes of transport safety infringements in the *Transport (Compliance and Miscellaneous) Act 1983*.

## **Charter report**

### ***Fair hearing – Rights in criminal proceedings – Restrictions on conduct of defence***

Summary: Clauses 4, 6 and 15 restrict how a person accused of some marine drug and alcohol offences may conduct his or her defence in some circumstances. The Committee will write to the Minister seeking further information as to the compatibility of clauses 4, 6 and 15 with defendants’ Charter rights to a fair hearing, to call and examine witnesses and to not be compelled to testify against themselves.

The Committee notes that clauses 4, 6 and 15, amending existing ss. 27 & 28 and inserting new sections 32A and 32B into the *Marine (Drug, Alcohol and Pollution Control) Act 1988*, provide that, for certain marine drug and alcohol offences:

- an accused who wants a court to find that drugs found in a sample taken up to 3 hours after an alleged offence were due solely to use or consumption after his or her operation or

control of a vessel underway or at anchor must both give sworn evidence and ensure that his or her evidence is corroborated by another person.<sup>3</sup>

- an accused is barred from calling evidence as to the effect of the consumption or use of a drug for purposes other than proving the above fact.<sup>4</sup>
- an accused who has been served with an analyst's certificate stating that drugs were present in his urine or saliva is barred from calling the analyst to testify without the court's leave.<sup>5</sup>

**The Committee observes that the effect of these provisions is to restrict how a person accused of some marine drug and alcohol offences may conduct his or her defence in some circumstances.** The Committee notes that these provisions are similar to existing provisions governing trials for drink-and drug-driving offences.<sup>6</sup>

The Statement of Compatibility discusses whether some of the proof provisions in the Bill are compatible with the Charter's right to be presumed innocent until proved guilty according to law.<sup>7</sup> However, the Committee notes that the above provisions may engage further Charter rights of the accused: to a fair hearing of the determination of a marine drug or alcohol charge;<sup>8</sup> to call and examine defence witnesses under the same conditions as prosecution witnesses;<sup>9</sup> and to not be compelled to testify against himself or herself.<sup>10</sup>

**The Committee will write to the Minister seeking further information as to the compatibility of clauses 4, 6 and 15 with defendants' Charter rights to a fair hearing, to call and examine witnesses and to not be compelled to testify against themselves. Pending the Minister's response, the Committee draws attention to clauses 4, 6 and 15.**

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### ***Privacy – Power to enter and search any vessel without warrant, consent or grounds***

Summary: New section 162B(2) provides police officers with the power to enter and search any vessel in Victoria without a warrant, consent or grounds to suspect a contravention. The Committee will write to the Minister seeking further information as to the compatibility of new section 162B with the Charter's right against arbitrary or unlawful interferences with privacy.

The Committee notes that clause 26, inserting a new section 162B(2) into the *Marine Safety Act 2010*, provides that '[a] member of the police force may enter and search a vessel... in order to

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<sup>3</sup> New section 27(1AA), (1B), governing charges under s. 28(1)(ba), (g) & (h). See also existing s. 27(1A), which is extended by clause 4(2).

<sup>4</sup> New section 28(6A), governing charges under s. 28(1)(g) & (h). See also existing s. 28(5A), which is effectively extended by clauses 5(6) & 5(8).

<sup>5</sup> New sections 32A(9) and 32B(8), governing questions of the presence of a drug in the body of the accused that arise under s. 28(1) (as well as the offences of culpable and dangerous driving in the *Crimes Act 1958*, as they apply to the operation of vessels.) See also existing s. 32(2), which is extended by clause 14. The court must presume the analyst's certificate to be true unless there is evidence to the contrary: new sections 32A(3) and 32B(3). The accused is also completely barred from calling the analyst on the question of whether leave should be given: new sections 32A(11) and 32B(10).

<sup>6</sup> *Road Safety Act 1986*, ss. 48(1AC), 48(1B), 49(6A), 57A(8) & 57B(8).

<sup>7</sup> Charter s. 25(1).

<sup>8</sup> Charter s. 24(1), i.e. by requiring the accused to adduce corroborating evidence and barring the accused from adducing evidence about the effect of the consumption or use of a drug in some circumstances. The Committee notes that nearly all common law corroboration requirements (which generally applied to the prosecution) have been abolished in Victoria: see *Evidence Act 2008*, s. 164(1).

<sup>9</sup> Charter s. 25(2)(h), i.e. by requiring the accused, but not the prosecution, to seek leave before calling an analyst to testify in some circumstances.

<sup>10</sup> Charter ss. 25(2)(k), i.e. by requiring the accused to give sworn evidence (and thus expose himself or herself to cross-examination) in some circumstances.

determine whether this Act and the regulations are being complied with'. The Committee considers that new section 162B(2) may engage the Charter's right against arbitrary or unlawful interferences in privacy.<sup>11</sup>

The Statement of Compatibility does not address new section 162B(2). **The Committee observes that new section 162B(2) applies to any vessel in Victoria;<sup>12</sup> provides police officers with powers of entry and search without a warrant or the consent of the vessel's owner or occupier; and does not require that the police officer have any reasonable grounds to suspect a contravention of any law.** However, the Committee notes that new section 162B is limited by requirements that the entry and search must be done 'at a reasonable time';<sup>13</sup> and 'in order to determine whether' the *Marine Safety Act 2010* and *Marine Safety Regulations 2012* 'have been complied with'.

**The Committee will write to the Minister seeking further information as to the compatibility of new section 162B with the Charter's right against arbitrary or unlawful interferences with privacy. Pending the Minister's response, the Committee draws attention to clause 26.**

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### ***Statement of Compatibility – Practice Note No. 2***

Summary: The Committee will write to the Minister regarding the Statement of Compatibility.

The Committee notes that the Statement of Compatibility for the Bill:

- does not expressly or accurately identify the inserted or amended reverse onus provisions in its discussion of 'Rights in criminal proceedings';<sup>14</sup>
- does not discuss a search and entry provision that may engage the Charter's right against arbitrary or unlawful interferences in privacy in a significant respect.<sup>15</sup>

The Committee recalls its *Practice Note No. 2*, which states that the Committee will write to the Minister where, in the Committee's opinion, a Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right.<sup>16</sup>

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<sup>11</sup> Charter s. 13(a).

<sup>12</sup> 'Vessel' is defined in s. 3 to mean 'any kind of vessel that is used, or capable of being used, in navigation by water, however propelled or moved'. There is no requirement that the vessel be on 'State waters' (compare existing s. 162) or be, or have been or will be, operated on water (compare new section 162A and also the narrower power of a police officer under s. 216(1)(c) of the *Transport (Compliance and Miscellaneous) Act 1983* to 'request the driver of any motor vehicle.... to permit an inspection and examination' to assess compliance with transport legislation.)

<sup>13</sup> New section 162B(3)(a). However, there are no requirements that the owner be notified of the entry or search, either before or after.

<sup>14</sup> The Statement's discussion of '[c]lauses 4 and 6 of the bill' only identifies '[n]ew sections 27(1AA) and 27(3) inserted by clause 4' as 'reverse onus provisions'. New section 27(3) is a definitional provision that is amended (not inserted) by clause 4 and contains no provisions governing proof. The Statement does not expressly identify other reverse onuses introduced by clauses 4 and 6, i.e. new sections 27(1), 27(1B) and 28(3C) (reversing the legal onus) and new section 28(3B) (reversing the evidential onus.) The Statement's further discussion of 'provisions set out in clause 11 and 13' does not identify any of the inserted provisions expressly or by adequate description. Clause 11 relates to police powers and does not address any rules of proof. Clause 13 contains two evidential onuses in new sections 31AA(10) and 31AE(22), which provide for presumptions concerning authorisations to order drug analyses. On the need for the Statement of Compatibility to expressly identify relevant sections inserted or amended by complex Bills, see *Alert Digest No. 14 of 2007*, p. 6 (reporting on the Animals Legislation Amendment (Animal Care) Bill 2007.)

<sup>15</sup> See the above discussion of new section 162B of the *Marine Safety Act 2010*. On the importance of Statements of Compatibility addressing any provisions that fairly raise a Charter implication, see *Alert Digest No. 4 of 2007*, p. 10 (reporting on the Infertility Treatment Amendment Bill 2007).

<sup>16</sup> *Practice Note No. 2* states:

The Committee will write to Ministers where, in the Committee's opinion, a Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right.

**The Committee will write to the Minister regarding the Statement of Compatibility.**

**The Committee makes no further comment.**

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The Committee has determined that it will characterise a Statement of Compatibility as a form of explanatory memoranda equivalent in status to an explanatory memorandum accompanying a Bill.

The Committee considers that the provision to Parliament of reasonable explanatory material is critical to the Parliament's exercise of legislative power in an informed manner.

The Committee once again endorses the following remarks from a report of the Senate Standing Committee for the Scrutiny of Bills –

The committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions. In particular, the committee expects that an explanation will be given for any provision within a bill that appears to test or infringe the committee's terms of reference and provide reasons or justification for this.



# Ministerial Correspondence

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## Local Government Legislation Amendment (Miscellaneous) Bill 2012

The Bill was introduced into the Legislative Assembly on 19 June 2012 by the Hon. Jeanette Powell MP. The Committee considered the Bill on 13 August 2012 and made the following comments in Alert Digest No. 11 of 2012 tabled in the Parliament on 14 August 2012.

### Committee Comment

The Bill makes a variety of amendments to local Government legislation to improve the operation of councils.

It amends the Local Government Act 1989 to: -

- Insert the word 'only' after 'rateable property' in section 15(3) [4]. By way of background section 15 of the Act sets out the circumstances in which occupier ratepayers may apply to be enrolled on the voters' roll of a Council. Section 15(3) sets out two circumstances when someone can be considered to 'liable to pay the rates' for the purposes of determining if they can be on the electoral role for a Council.

The current section 15(3) is set out: -

*'(3) For the purposes of subsection (1), an occupier is liable to pay the rates in respect of that rateable property if-*

*(a) The occupier is paying the rates to the Council; or*

*(b) The lease under which the occupier occupies the rateable property specifies that the occupier is liable to pay the rates'*

The Explanatory Memorandum states that the amendment made by the insertion of the word 'only' after 'rateable property': -

*'clarify that sections 15(3)(a) and (b) are exhaustive of the circumstances in which a person can be considered to be liable to pay the Council rates on land they occupy for the purpose of the section'. In this respect the Explanatory Memorandum appears correct.*

However the Explanatory Memorandum also states: -

*'This clarifies the entitlement of a person to be enrolled on the voters' roll as an occupier of rateable land within the meaning of section 15(1)(c). This reflects Justice Beach's judgment in Powell v Athanasopoulos [2010] VSC 558.'*

The relevant extract of Beach J's judgment at paragraph 28 is set out: -

*'Section 15(3) is not exhaustive of the circumstances in which an occupier might be liable to pay the rates in respect of a rateable property within the meaning of section 15(1)(c). Whilst the plaintiff submitted that in order to come within s 15(1)(c), a person claiming an entitlement must satisfy one of the limbs of s 15(3), I reject that submission. To uphold the plaintiff's submission, one would have to read the word 'only' into s 15(3) immediately before the word 'if'. Section 15(3) expands the operation of s 15(1)(c) in at least on respect when it provides that an occupier who is paying the rates to the council is (for the purposes of section 15(1)) a person 'liable to pay the rates in respect of that rateable property'. Section 15(3) is*

*not intended to cut down the operation of section 15(1)(c). However, given the concession by the plaintiff that the word 'lease' in s 15(3)(b) includes a licence of the kind here in existence, the two construction issues I have identified may be moot (subject to an additional argument of the plaintiff which I will deal with below).'*

- Provide for public reporting of election campaign donations including a summary on the Internet website of the Council. This includes the name of the donor and the value of the donations made by each donor [9]; specify that a majority of councillors (as opposed to all councillors) in a meeting must vote in favour of a motion before it passes [16], allow a councillor with conflicts of interests in sequential items before Council to make all disclosures before the first item rather than having to re-enter the meeting for each one [11]. It also repeals section 101(2) of the Act which relates to long service leave [17]. This is a redundant provision.
- Provide for the appointment of a probity auditor in relation to the handling by a Council of a complaint relating to the conduct of the Chief Executive Officer [18].
- Provide that Councils may raise general rates by the application of a differential rate if it uses the capital improved value system of the valuing land. The Minister may issue guidelines on the appropriate uses of different rates [21]. It also sets out the method by which interest is charged on unpaid rates and charges [22]. It amends Schedule 3 to allow councils to dispose of unregistered and abandoned vehicles. Reasonable steps must be taken to notify the owner. This mirrors provisions in the *Road Management Act 2004* which apply to VicRoads [28].

It amends the *City of Melbourne Act 2001* to: -

- Clarify the procedures for the process of serving infringement notices in respect of failure to vote at City of Melbourne elections.

It amends the *Victorian Civil and Administrative Tribunal Act 1998* to: -

- Provide that the Council must bear costs to a proceeding referred to VCAT only if the Council is the applicant in VCAT or where the Council voluntarily becomes a party to the matter [32].

**The Committee will write to the Minister seeking clarification of the Explanatory Memorandum and whether the amendment reflects Beach J's judgement in *Powell v Athanopoulos* [2010] VSC 558.**

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## Charter report

### Right to vote and be elected at municipal elections – Occupier ratepayers

Summary: The effect of clause 4 may be to remove the entitlement to vote for or be elected to a Council for some ratepayers who are liable to pay rates for a property they occupy otherwise than pursuant to a lease. The Committee will write to the Minister seeking further information as to the compatibility of clause 4 with the Charter's rights with respect to voting and eligibility to stand for municipal elections.

The Committee notes that clause 4, amending existing s. 15 of the *Local Government Act 1989*, provides that an occupier of a rateable property can only be taken to be liable to pay rates if the occupier either paid the rates or is liable to do so under a lease. Section 15 provides an entitlement for non-resident, non-owner occupiers of a rateable property to be enrolled as ratepayers on the voters' roll if they 'are liable to pay the rates in respect of' the property they occupy. People on the voters' roll are entitled to vote at Council elections and are qualified to be a candidate for the office of Councillor.<sup>i</sup> **The effect of clause 4 may be to**

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<sup>i</sup> *Local Government Act 1989*, ss. 22, 28.

remove the entitlement to vote for or be elected to a Council for some ratepayers who are liable to pay rates for a property they occupy otherwise than pursuant to a lease (e.g. if they are liable to pay rates under a licence to remain on the premises they occupy.<sup>ii</sup>)

The Committee will write to the Minister seeking further information as to the compatibility of clause 4 with the Charter's rights with respect to voting and eligibility to stand for municipal elections. Pending the Minister's response, the Committee draws attention to clause 4.

## Minister's response

I refer to the Parliament of Victoria, Scrutiny of Acts and Regulations Committee's letter of 14 August 2012, and the extract from Alert Digest No. 11 of 2012 regarding clause 4 of the Local Government Legislation Amendment (Miscellaneous) Bill 2012 ('Miscellaneous Bill').

Clause 4 of the Miscellaneous Bill makes a technical amendment to s 15(3) of the *Local Government Act 1989* (Act). This amendment clarifies the list of circumstances—when an occupier of rateable land is liable to pay council rates in respect of that property, and in turn is eligible to be enrolled on the voters' roll for the purpose of s 15(1)(c)—as exhaustive.

This amendment was made following Justice Beach's judgement in *Powell v Athanasopoulos* [2010] VSC 558, as outlined in the Explanatory Memorandum of the Miscellaneous Bill.

According to Justice Beach, s 15(3) of the Act was not exhaustive of the circumstances in which an occupier might be liable to pay rates in respect of rateable property within s 15(1)(c). He further stated that in order for the limbs in s 15(3) to be exhaustive, the word 'only' would have to be inserted into s 15(3) immediately before the word 'if'.

Prior to this judgement, Local Government Victoria, councils and the Victorian Electoral Commission operated on the basis that the list under s 15(3) was exhaustive. The Clause 4 amendment removes the doubt arising from Justice Beach's judgement.

I note your view that the effect of Clause 4 of the Bill is to remove the entitlement to be enrolled on the voters' roll for persons that occupy rateable property other than pursuant to a lease, such as under a license.

I further note that you therefore query whether Clause 4 is compatible with s 18 of the *Charter of Human Rights and Responsibilities Act 2006*, which provides the right to participate in public life, including the right to vote and be elected at municipal elections.

The intention of s 15(3) is to only allow persons who have exclusive occupancy and control in relation to the rateable property, such as under a lease arrangement, to be eligible to be enrolled on the voters' roll.

It was never intended to provide persons with non-exclusive rights, such as licensees, with this privilege. Under a license arrangement, licensees are often only entitled to use the property rather than occupy it.

It should be noted that tenants under a residential lease are not required to pay council rates, and therefore s 15 primarily relates to commercial occupancy arrangements.

Persons who occupy property under a lease hold a significant interest in the municipal property, unlike licensees. Lessees are therefore more likely to have a legitimate interest in the affairs of the municipality than those under a licence—who generally do not occupy the property.

<sup>ii</sup> *Powell v Athanasopoulos* [2010] VSC 558, [28], [38]. (The Court did not decide whether or not a licence is a lease for the purposes of s. 15(3).)



Consequently, Clause 4 of the Bill seeks to amend the Act to reflect its original intention and subsequent practice. For this reason, I would regard any limitation under Clause 4 on the ability of a licensee to vote in and stand for municipal elections as justified.

Thank you for raising this matter with me.

**JEANETTE POWELL MP**  
**Minister for Local Government**

4 October 2012

**The Committee thanks the Minister for this response.**

# Primary Industries and Food Legislation Amendment Bill 2012

The Bill was introduced into the Legislative Assembly on 14 August 2012 by the Hon. Peter Walsh MLA. The Committee considered the Bill on 27 August 2012 and made the following comments in Alert Digest No. 12 of 2012 tabled in the Parliament on 28 August 2012.

## Committee Comment

### Charter report

#### Statement of compatibility – Statutory defence

Summary: Clause 33 provides a defence to persons charged with cruelty or aggravated cruelty. The Committee will write to the Minister seeking further information as to whether the new defence imposes a legal or evidential burden on the accused.

**The Committee notes that clause 33, inserting a new sub-section 11(2) into the Prevention of Cruelty to Animals Act 1986, provides a defence to persons charged with cruelty or aggravated cruelty in the following terms:**

It is a defence to a prosecution for an offence under section 9 or 10 in relation to an activity if the person charged was carrying out the activity in accordance with a code of practice prescribed for the purposes of this subsection (other than a Code of Practice made under section 7) that regulates that activity.

The Statement of Compatibility remarks:

New subsection 11(2) places a legal burden on an accused, by requiring an accused to prove on the balance of probabilities that he or she acted in accordance with a code of practice prescribed in the regulations.

However, the Committee observes that new subsection 11(2) does not contain any language expressly placing any burden of proof on the accused. The general rule is that defences that lack such language only impose an evidential burden on the accused (i.e. to raise or point to evidence suggesting a reasonable possibility of the defence) rather than a legal burden (i.e. to prove that the defence is true on the balance of probabilities.)<sup>iii</sup>

**The Committee will write to the Minister seeking further information as to whether the defence introduced by clause 33 imposes a legal or evidential burden on the accused.**

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#### Presumption of innocence – Reverse onus – Statutory presumption

Summary: Clause 61 amends two existing evidentiary provisions in the Food Act 1984. The Committee will write to the Minister seeking further information as to the compatibility of clause 61 with the Charter right of defendants to be presumed innocent until proved guilty according to law.

**The Committee notes that clause 61 amends two existing evidentiary provisions in s. 50(1) of the Food Act 1984 as follows:**

- (a) the onus of proof in any prosecution under this Act that any food was not sold, prepared for sale, conveyed or intended for sale or produced by way of primary food production for human consumption is on the person charged with the offence;

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<sup>iii</sup> *Criminal Procedure Act 2009, s. 72.*

- (c) any food found in any premises or other place or vehicle used for the preparing for sale of food or for primary food production shall be presumed, until the contrary is proved, to be intended to be used in the preparation for sale of food or in primary food production;

The Committee observes that that existing s. 50(1)(a) places an onus of proof on an accused to disprove certain facts<sup>iv</sup> and existing s. 50(1)(c) requires a court to presume a fact in some circumstances unless the accused discharges a legal onus to disprove it.<sup>v</sup> The Committee notes that clause 61 may extend the operation of these provisions.

The Statement of Compatibility does not address clause 61. In its Practice Note No. 3, the Committee remarks that for any provision of a Bill that 'extends the operation of... a provision... that place[s] the legal onus of proof on an accused with respect to any issue in a criminal proceeding [or] deem[s] a fact to be proved in any circumstance', the Statement of Compatibility 'should state whether and how that provision satisfies the Charter's test for reasonable limits on rights'.

**The Committee will write to the Minister seeking further information as to the compatibility of clause 61 with the Charter right of defendants to be presumed innocent until proved guilty according to law.<sup>vi</sup> Pending the Minister's response, the Committee draws attention to clause 61.**

## Minister's Response

### Clause 33 of the Primary Industries and Food Legislation Amendment Bill 2012

The Committee has sought further information as to whether the defence introduced by clause 33 of the Primary Industries and Food Legislation Amendment Bill 2012 (the Bill) imposes a legal or evidential burden on an accused.

Clause 33 inserts a new subsection 11(2) into the Prevention of Cruelty to Animals Act 1986. Subsection 11(2) provides that it is a defence to a prosecution for an offence under section 9 or 10 in relation to an activity if a person charged was carrying out the activity in accordance with a prescribed code of practice for the purposes of this subsection.

The Statement of Compatibility provided that the defence in the new subsection 11(2) places a legal burden on an accused by requiring an accused to prove that he or she acted in accordance with a prescribed code of practice for the purposes of this subsection.

The Committee's view is that, given that the new subsection 11(2) does not contain language expressly placing any burden of proof on the accused, the new subsection places an evidential, as opposed to a legal, burden on an accused.

The new subsection 11(2) is intended to operate in such a way so as to place a legal onus on an accused to demonstrate that he or she acted in accordance with a prescribed code of conduct. It was the opinion of the Office of Chief Parliamentary Counsel at drafting that the provision achieves this intention and further that it is not necessary for express words to be used to place a legal burden. The Victorian Government Solicitor's Office had the same view. Having regard to this advice, I consider that the wording of clause 33 achieves its intention, and that the new subsection 11(2) will place a legal, rather than evidential, burden on an accused.

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<sup>iv</sup> Section 50(1)(a) is in similar terms to clause 99(a) of the Model Food Bill agreed to by COAG in 2000 and enacted as *Food Act 2001* (ACT), s. 132(a); *Food Act 2003* (NSW), s. 127(a); *Food Act 2004* (NT), s. 119(a); *Food Act 2001* (SA), s. 102(a); *Food Act 2003* (Tas), s. 110(a); and *Food Act 2008* (WA), s. 132(a).

<sup>v</sup> Section 50(1)(c) is in similar terms to *Food Act 2001* (ACT), s. 132(b); and *Food Act 2003* (Tas), s. 110(g).

<sup>vi</sup> Charter s. 25(1).

**Clause 61 of the Bill**

Clause 61 of the Bill amends subsection 50(1) of the Food Act 1984 (Food Act) to insert "or produced by way of primary food production" after "(food) sold, prepared for sale, conveyed or intended for sale" in paragraph (a) and "or in primary food production" after "preparing for sale of food" in paragraph (c) of that subsection.

I consider the amendment to subsection 50(1) is of a minor and technical nature. Therefore, in my view, it was not necessary to assess the compatibility of subsection 50(1) with the right to be presumed innocent under section 25(1) of the Charter Act.

In my view, clause 61 may not increase the scope of the operation of subparagraphs 50(1)(a) and (c) of the Food Act in practice as, in general, food produced in primary food production will be covered by the current ambit of the provision as food which is sold, intended for sale, prepared for sale or conveyed for sale. If the scope is increased it will be marginal. The purpose of this amendment was to ensure that the provision properly reflected the types of food regulated by the Food Act. This amendment was included in the Bill out of an abundance of caution to confirm that food produced by way of primary food production was covered.

In any event, having regard to advice from the Victorian Government Solicitor's Office, I consider that any burden of proof placed on an accused by virtue of the operation of subparagraphs 50(1)(a) and (c) would not unjustifiably limit the right to be presumed innocent in the Charter Act, as I consider that an accused can easily provide evidence that the relevant food was not for human consumption or was not intended to be used in the preparation for the sale of food, and that it is appropriate for an accused to provide such evidence.

I thank the Committee for its careful consideration of the Bill.

**Peter Walsh MLA**

Minister for Agriculture and Food Security

Received 12 September 2012

**The Committee thanks the Minister for this response.**

## Road Safety and Sentencing Acts Amendment Bill 2012

The Bill was introduced into the Legislative Assembly on 14 August 2012 by the Hon. Robert Clark MP. The Committee considered the Bill on 27 August 2012 and made the following comments in Alert Digest No. 12 of 2012 tabled in the Parliament on 28 August 2012.

### Committee Comment

#### **Section 17(a)(i) – rights or freedoms – retrospectivity**

- It also retrospectively validates all court directions to impose an alcohol interlock condition on a person's licence or learner permit following disqualification under the old section 50AAA on or after 11 October 2006 and before the date of Royal Assent of the Bill [5].

The Explanatory Memorandum observes: -

'New section 105A validates all court directions to impose an alcohol interlock condition on a person's driver licence or learner permit following a disqualification in accordance with section 89C of the Road Safety Act 1986 where the direction was purported to have been made under section 50AAA of the Road Safety Act 1986 on or after 11 October 2006 and before the date of Royal Assent of the Bill.

...

Clause 3 closes the legislative gap created by the Road Legislation (Projects and Road Safety) Act 2006 which had the unintended effect of distinguishing between offenders disqualified by infringement notice and offenders disqualified by court order.'

The Committee notes that clause 3 amended sub-section 50AAA(1) of the Road Safety Act 1986. The previous sub-section 50AAA(1) provided for alcohol interlock conditions only for people who were disqualified from obtaining a driver licence or permit 'under s. 50' (which provides for disqualification by courts.) The Committee observes that sub-section 50AAA(1) was inserted in that form by the Road Safety (Alcohol Interlock) Act 2002 and was not expressly amended by the Road Legislation (Projects and Road Safety) Act 2006.

The Committee will seek further information as to which provisions beyond those mentioned in the Explanatory Memorandum give rise to the concerns regarding interlocks as a result of the 2006 amendments.

**The Committee will write to the Minister seeking further information as to the provisions of past legislation that created the legislative gap referred to in the Explanatory Memorandum to clause 3 of the Bill for the Act.**

**The Committee notes the retrospective operation of clause 5 engages its terms of reference under section 17(a)(i) of the Parliamentary Committees Act 2003 and the explanation provided in the Statement of Compatibility. The Committee draws attention to the provision in the Bill.**

### Minister's Comment

Thank you for your letter dated 28 August 2012 which was received by my office on 29 August 2012.

The Scrutiny of Acts and Regulations Committee (Committee) requests further information on the legislative gap caused by the Road Legislation (Projects and Road Safety) Act 2006. The legislative gap is referred to in the Explanatory Memorandum on clause 3 of the Road Safety and Sentencing Acts Amendment Bill 2012 (Bill). The Committee also draws attention

to the retrospective operation of clause 5 of the Bill. The Bill received Royal Assent on 17 August 2012.

*The legislative gap*

As the Committee observes, the Road Safety (Alcohol Interlock) Act 2002 first introduced alcohol interlocks on 13 May 2002. As part of the re-licensing process, section 50AAA of the Road Safety Act 1986 requires or enables courts to impose an alcohol interlock condition on a person's driver licence or permit following a disqualification from driving for a drink-driving offence.

One of the purposes of the Road Legislation (Projects and Road Safety) Act 2006 was to increase the use of alcohol interlock conditions. This included reducing the level of blood or breath alcohol concentration (BAC) which could lead to the imposition of such a condition. In particular:

- from 11 October 2006, courts were given power to direct the Roads Corporation to impose an alcohol interlock condition when re-licensing a person who had been disqualified as a result of a first drink-driving offence involving a BAC of 0.07 grams or more but less than 0.15; and
- from 1 January 2007, courts were required to direct the Roads Corporation to impose an alcohol interlock condition when re-licensing a person who had been disqualified as a result of a first drink-driving offence involving a BAC of 0.07 grams or more if he or she was under the age of 26 years or a probationary driver at the time of the offence.

For the first time, alcohol interlock conditions were able to be imposed when the drink-driving offence involved a BAC of 0.15 or less under the Road Safety Act, a drink-driving offence can be dealt with by an infringement notice (rather than through a criminal charge) if it is a first offence involving a BAC of less than 0.15. Section 89C of the Act allows for the cancellation of a driver licence or learner permit following a drink-driving infringement.

The Road Legislation (Projects and Road Safety) Act amended the alcohol interlock laws in section 50AAA and the drink-driving infringement provisions in section 89C (for example, sections 3 to 5 inclusive, 19, 49 and 50 of that Act) to increase the courts' powers to impose an alcohol interlock condition. Unfortunately, the legislation failed to amend section 50AAA(1) to refer to disqualifications by drink-driving infringement under section 89C of the Road Safety Act.

The 2006 amendments intended to make alcohol interlock conditions available for persons disqualified by drink-driving infringements but the legislation as drafted did not achieve this outcome. This error caused an anomaly whereby offenders who committed the *same* drink-driving offence but were subject to different types of disqualification (i.e. a court based disqualification or an infringement based disqualification) were not subject to the same application of alcohol interlock laws.

The Bill closes the legislative gap created by the 2006 amendments by amending section 50AAA(1) to insert an express reference to a person disqualified by a drink driving infringement in accordance with section 89C of the Road Safety Act.

The Bill validates court directions to the Roads Corporation made since 11 October 2006 to 17 August 2012 regarding alcohol interlock conditions where the direction was purported to have been made under section 50AAA following a disqualification in accordance with section 89C. In addition, the legislation validates all legal consequences flowing from each court direction including actions made in relation to the condition, for example acts or decisions made by the Roads Corporation and Victoria Police.

The Bill limits the validation to the legislative defect and preserves the rights to appeal an alcohol interlock condition, or any subsequent direction, process or order, on any other

ground. This validation of alcohol interlock conditions and their consequences does not interfere with Charter Act rights.

I trust this assists in the deliberations of the Committee.

**ROBERT CLARK MP**

Attorney-General

20 September 2012

**The Committee thanks the Attorney-General for this response.**

**Committee Room**

**8 October 2012**

# Appendix 1

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## Appendix 2

### Committee Comments classified by Terms of Reference

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*This Appendix lists Bills under the relevant Committee terms of reference where the Committee has raised issues requiring further correspondence with the appropriate Minister or Member.*

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#### Section 17(a)

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

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#### Section 17(b)

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

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## Appendix 3

### Ministerial Correspondence 2012

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**Table of correspondence between the Committee and Ministers during 2012**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Associations Incorporation Reform Bill 2011	Minister for Consumer Affairs	07-02-12 24-02-12	1 of 2012 4 of 2012
Australian Consumer Law and Fair Trading Bill 2011	Minister for Consumer Affairs	07-02-12 24-02-12	1 of 2012 4 of 2012
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Criminal Procedure Amendment Bill 2012	Attorney-General	14.08.12 23.08.12	11 of 2012 12 of 2012
Primary Industries and Food Legislation Amendment Bill 2012	Minister for Agriculture and Food Security	28.08.12 13.09.12	12 of 2012 14 of 2012
Road Safety and Sentencing Acts Amendment Act 2012	Attorney-General	28.08.12 20.09.12	12 of 2012 14 of 2012
Local Government Legislation Amendment (Miscellaneous) Bill 2012	Minister for Local Government	14.08.12 04.10.12	11 of 2012 14 of 2012

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Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Drugs, Poisons and Controlled Substances Amendment Bill 2012	Police and Emergency Services	11.09.12	13 of 2012