

No. 17 of 2013

**Tuesday, 10 December
2013**

**On the following Bills and
Regulations**

Bills

Local Government Amendment
(Performance Reporting and
Accountability) Bill 2013

Transport (Compliance and
Miscellaneous) Amendment (On-the-
Spot Penalty Fares) Bill 2013

Regulations

Planning and Environment (Fees)
Further Interim Regulations 2013
(SR No. 127 / 13)

Subdivision (Fees) Further Interim
Regulations 2013
(SR No. 128 / 13)

The Committee



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Hon. Richard Dalla-Riva MLC
Member for Eastern Metropolitan



Deputy Chairperson
Hon. Christine Campbell MLA
Member for Pascoe Vale



Ms Ann Barker MLA
Member for Oakleigh



Mr Michael Gidley MLA
Member for Mount Waverley



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Terms of Reference - Scrutiny of Bills

The functions of the Scrutiny of Acts and Regulations Committee are –

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

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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

'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. 17 of 2013

Local Government Amendment (Performance Reporting and Accountability) Bill 2013

Introduced	26 November 2013
Second Reading Speech	27 November 2013
House	Legislative Assembly
Member introducing Bill	Hon Jeanette Powell MLA
Portfolio responsibility	Minister for Local Government

Purpose

The Bill amends the *Local Government Act 1989* to:

- require a Council to report against prescribed performance indicators in the report of operations and performance statement in the Council's annual report
- require a Council to include in its annual report the results of the Council's assessment against the prescribed governance and management checklist
- require a Council to include financial statements in its Strategic Resource Plan, budget, revised budget and annual report
- require a Council to ensure consistency between its Strategic Resource Plan and the resourcing of plans to provide services or take initiatives in the period covered by the Strategic Resource Plan
- require a Council to include Major Initiatives in its budget, revised budget and annual report
- require a Council to adopt its budget by 30 June each year
- require a Council to publish its Council Plan, Strategic Resource Plan, budget, revised budget and annual report on its Internet website
- make consequential and minor amendments.

Charter report

The Local Government Amendment (Performance Reporting and Accountability) Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Report on Regulations¹

Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)

Authorisation

The Regulations were made by the Governor in Council pursuant to section 203 of the *Planning and Environment Act 1987*. They commenced operation on 19 October 2013 and expire on 18 October 2014.

Effect

The Regulations remake the current Planning and Environment (Fees) Interim Regulations 2013 with the same effect and structure. They prescribe fees for amendments to planning schemes and fees for applications for permits etc.

Section 9(1) exemption certificate

The Regulations are made with a section 9(1) Premier's certificate. The reasons for the exemption are as follows: -

- “• There is insufficient time to finalise replacement Regulations before the existing regulations expire;
- The Interim Regulations will ensure that existing fees can be charged until the replacement Regulations are finalised;
- If the Interim Regulations are not made, the resulting revenue shortfall may impact on the ability of Councils to deliver planning and other services as they will not be able to charge fees for services provided;
- It is anticipated that replacement Regulations will be made in 2014 and that a Regulatory Impact Statement will be prepared for those Regulations.”

Fourth Premier's certificate

This is the fourth time the Regulations have been made with a Premier's certificate. The repeated making of regulations with a Premier's certificate may be the subject of Committee comment.

- The Planning and Environment (Fees) Interim Regulations 2011 were made with a Premier's certificate;
- The Planning and Environment (Fees) Interim Regulations 2012 were made with a Premier's certificate;
- The Planning and Environment (Fees) Interim Regulations 2013 were made with a Premier's certificate.

¹ The Committee reports on these regulations pursuant to section 17(d) of the *Parliamentary Committees Act 2003* and section 21(1)(i) of the *Subordinate Legislation Act 1994*.

Scrutiny of Acts and Regulations Committee

- The Planning and Environment (Fees) Further Interim Regulations 2013 are now also made with a Premier's certificate.

It was originally estimated in 2011 that permanent regulations would be made by July 2012. It is now December 2013 and the current Regulations do not expire until October 2014. The Committee will write to the Minister noting that this is the fourth time the Regulations have been made with a Premier's certificate and request further information.

The Committee makes no further comment

Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)

Authorisation

The Regulations were made by the Governor in Council pursuant to section 43 of the *Subdivision Act 1988*. They commenced operation on 17 October 2013 and expire on 18 October 2014.

Effect

The Regulations revoke the Subdivision (Fees) Interim Regulations 2013. They remake them with the same effect and fee structure. They prescribe various fees including the fee to certify a plan of subdivision and empower councils to waive or rebate the payment of a fee in specified circumstances.

Section 9(1) exemption certificate

The Regulations are made with a section 9(1) Premier's certificate. The reasons for the exemption are as follows:-

- “• There is insufficient time to finalise replacement Regulations before the existing regulations expire;
- The Interim Regulations will ensure that existing fees can be charged until the replacement Regulations are finalised;
- If the Interim Regulations are not made, the resulting revenue shortfall may impact on the ability of Councils to deliver planning and other services as they will not be able to charge fees for services provided;
- It is anticipated that replacement regulations will be made in 2014 and that a regulatory impact statement will be prepared for those regulations.”

Fourth Premier's certificate

This is the fourth time the Regulations have been made with a Premier's certificate. The repeated making of regulations with a Premier's certificate may be the subject of Committee comment.

- The Subdivision (Fees) Interim Regulations 2011 were made with a Premier's certificate.
- The Subdivision (Fees) Interim Regulations 2012 were made with a Premier's certificate.
- The Subdivision (Fees) Interim Regulations 2013 were made with a Premier's certificate.
- Now the Subdivision (Fees) Further Interim Regulations 2013 are made with a Premier's certificate.

It was originally estimated in 2011 that permanent regulations would be made by July 2012. It is now December 2013 and the current Regulations do not expire until October 2014. The Committee will write to the Minister noting that this is the fourth time the Regulations have been made with a Premier's certificate and request further information.

The Committee makes no further comment

Ministerial Correspondence

Transport (Compliance and Miscellaneous) Amendment (On-the-Spot Penalty Fares) Bill 2013

The Bill was introduced into the Legislative Assembly on 30 October 2013 by the Hon. Terry Mulder MLA. The Committee considered the Bill on 11 November 2013 and made the following comments in Alert Digest No. 15 of 2013 tabled in the Parliament on 12 November 2013.

Committee Comments

Charter report

Rights in criminal proceedings – On-the-spot penalty fare – Whether criminal penalty

Summary: The effect of clause 7 is to permit authorised employees of public transport and bus companies to offer immunity from criminal prosecution to certain criminal suspects if they pay the amount prescribed for an on-the-spot penalty fare within a reasonable period of time. The Committee will write to the Minister seeking further information as to whether or not an on-the-spot penalty fare is a criminal penalty for the purposes of the Charter.

The Committee notes that clause 7, inserting a new section 212AA, provides that an authorised employee of a public transport or bus company ‘who believes on reasonable grounds that a person has committed an on-the-spot penalty fare offence may offer the person the opportunity to pay an on-the-spot penalty fare’. If the person pays the prescribed amount (or arranges for someone else to pay), then:

- the employee must give the person an on-the-spot penalty ticket that ‘entitles the person... to use a public transport service’; and
- the person ‘cannot be prosecuted or served with an infringement notice for’ any on-the-spot ticket offence to which the fare relates or in respect of the same use of public transport services.
- the amount must be paid into the Consolidated Fund after the deduction of ‘reasonable costs in administering the on-the-spot penalty fares scheme’.ⁱ

‘[I]f the fare is not paid within a reasonable period of time’, then the employee ‘may withdraw the offer’.

The Committee observes that the effect of clause 7 is to permit authorised employees of public transport and bus companies to offer immunity from criminal prosecution to certain criminal suspects if they pay the amount prescribed for an on-the-spot penalty fare within a reasonable period of time.

The Second Reading Speech remarks:

The on-the-spot penalty fares scheme is similar to overseas public transport penalty fares schemes which give people caught fare evading the opportunity to pay a penalty immediately on the spot.

...

ⁱ New section 220DD, inserted by clause 8.

At \$75 initially, the on-the-spot penalty fare will be substantially lower than the current adult infringement penalty of \$212. However, while the amount is low enough to encourage many fare evaders to dispense with the matter by paying immediately, it is still a substantial amount of money and a significant deterrent to those consider travelling on public transport without paying first and getting the right ticket. Penalty fares will not be offered to minors.

An on-the-spot penalty fare is not a criminal matter and therefore does not involve the criminal justice system. In essence, this is a new compliance method as the fare is a hybrid. It is part fare for a fare evader's use of public transport and part civil penalty.

However, the Committee observes that on-the-spot penalty fares:

- are issuable to the entire general public rather than a particular sector;
- are issued by people who have statutory authority to enforce the criminal law,ⁱⁱ
- can only be issued after a determination has been made that there are reasonable grounds to believe that a criminal offence has been committed;
- are issued to and payable by (or at the arrangement of) a person who is reasonably believed to have committed a criminal offence;
- if paid, bar the enforcement of the criminal law against that person for that and other offences;
- are payable (after the deduction of administration costs) into the Consolidated Fund.
- are proposed to be set at an amount – about one third of an infringement penalty for a ticketing offence and many times more than a regular metropolitan fareⁱⁱⁱ – that is intended to operate as a 'significant deterrent' to criminal behaviour.

The Committee therefore notes that, although Victorian law classifies an on-the-spot penalty fare as a civil penalty, it may nevertheless be regarded as a criminal penalty under the Charter.

The Statement of Compatibility does not address whether or not clause 7 is a criminal penalty under the Charter.^{iv}

The Committee notes that, if a person is not offered an opportunity to pay an on-the-spot penalty fare or does not pay the fare, then the sole consequence is that the person may be issued an infringement notice or otherwise prosecuted for a ticketing offence. Accordingly, clause 7 does not engage the Charter's rights in criminal proceedings of people who are not offered or who do not pay an on-the-spot penalty fare.

ⁱⁱ Section 221AB provides that authorised officers are authorised to act for the purposes of Part 7 of the *Transport (Compliance and Miscellaneous) Act 1983*, which is titled 'Prosecutions, Enforcement, Penalties and Other Matters'. The powers that Part currently gives to such officers are to issue ticket infringement notices (s. 212(1B)(c)), to demand the identity of a person believed to have committed an offence under Part 7 or the regulations (s. 218B), arrest or remove a person believed to have committed an offence under the Act, the regulations or a graffiti offence (ss. 219-220), to take other action to obviate any danger, annoyance or hindrance arising from an offence (s. 218D(4)) and to issue evidentiary certificates that are admissible as evidence in proceedings for a ticketing offence (230AC).

ⁱⁱⁱ The proposed \$75 amount is currently over 21 times a 2-hour zone 1 full fare, 30 times a 2-hour zone 2 full fare and 12 times a 2-hour zone 1 & 2 full fare, and respectively 42, 60 and 24 times equivalent concession fares: see <http://ptv.vic.gov.au/tickets/metropolitan-myki-fares/>.

^{iv} The Statement of Compatibility remarks that 'the only charter act right relevant to the bill' is Charter s. 8's right to equality before the law. The Statement remarks that that rights may be engaged by a proposed direction under new section 220DC (inserted by clause 8) imposing a condition on authorised officers that they may only offer an on-the-spot penalty fare to a person aged 18 or over.

However, the Committee observes that, if an on-the-spot penalty fare is a criminal penalty for the purposes of the Charter, then clause 7 may engage the Charter rights of people who pay the fare:

- 'to have adequate time... to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her'.^v The Committee notes that this right may be engaged by the authorised officer's power to withdraw the offer if payment is not made in a 'reasonable period of time'.^{vi}
- 'to have any conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with the law'.^{vii} The Committee notes that there is no provision in the Bill for a person who paid a fare to recover the payment on the basis he or she did not commit the on-the-spot penalty fare offence.^{viii}

The Committee observes that penalty fare schemes for public transport in the United Kingdom allow people issued with penalty fares twenty-one days both to pay and appeal those fares.^{ix}

As the Committee noted in its previous Alert Digest, a recent practice note of the federal Parliamentary Joint Committee on Human Rights usefully addresses the meaning of a 'criminal penalty' under the international treaty on which the Charter's rights are based.^x Relevant extracts from that practice note were set out in Appendix No. 5 of that Alert Digest.

The Committee will write to the Minister seeking further information as to whether or not an on-the-spot penalty fare is a criminal penalty for the purposes of the Charter and, if so, whether or not clause 7 is compatible with the Charter rights of criminal defendants to adequate time to prepare their defence and communicate with a lawyer and to have any conviction and sentence reviewed in accordance with the law.

Minister's Response

Thank you for your letter of 12 November 2013 regarding the Transport (Compliance and Miscellaneous) Amendment (On-the-Spot Penalty Fares) Bill 2013.

The Committee has asked for further information about whether or not an on-the-spot penalty fare is a criminal penalty for the purposes of the Charter of Human Rights and Responsibilities Act 2006 (Charter Act). If so, the Committee asks whether or not clause 7 is compatible with the Charter Act rights of criminal defendants to have adequate time to prepare their defence and communicate with a lawyer and to have any conviction and sentence reviewed in accordance with the law.

^v Charter s. 25(2)(b). See also Charter s. 24(1)'s right to have a criminal charge determined after a fair hearing.

^{vi} In *Deweert v Belgium* [1980] ECHR 1, [54], the European Court of Human Rights has held that, where a person under investigation for a criminal offence was given 48 hours to pay a fine to stop the prosecution or be subjected to a much more costly process (in that case, closure of his business), his 'waiver of a fair trial attended by all the guarantees which are required in the matter by the [European] Convention [on the Protection of Human Rights and Fundamental Freedoms] was tainted by constraint'.

^{vii} Charter s. 25(4).

^{viii} The Committee notes that it may be possible to pursue a civil action in respect of an authorised officer's decision to offer an on-the-spot penalty fare if the officer did not 'believe on reasonable grounds' that an offence was committed. However, such proceedings may not provide any remedy for a person who an authorised officer reasonably, but wrongly, believed had committed an on-the-spot penalty fare offence (e.g. because of a fault in a myki card reader or myki card, or because the officer was unaware of or did not accept evidence that would establish a defence under ss. 12 or 13 of the *Transport (Ticketing) Regulations 2006*.)

^{ix} *Penalty Fares Rules 2002*, paras. 8.3 and 9, available at <<https://www.ircas.co.uk/docs/SRA%20-%20Penalty%20Fare%20Rules%202002.pdf>>.

^x Parliamentary Joint Committee on Human Rights, *Practice Note No 2 (interim)*, 19 June 2013, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Practice_Notes/practicenote2/in dex>.

Consistent with the statements I made in my second reading speech when I introduced the Bill, I confirm that the on-the-spot penalty fare scheme established by the Bill does not involve the imposition of criminal penalties for the purpose of the Charter Act. As such, the scheme and the provisions in the Bill do not attract the Charter Act rights which relate to criminal proceedings.

On-the-spot penalty fares are distinguishable from civil penalties imposed by a court. A person has no say about whether to accept the penalty or not in proceedings for civil penalties of that type. If the case is made out, the court may impose a civil penalty. By contrast, the on-the-spot penalty fares provided for by the Bill are a ground level enforcement mechanism which enable a person who does not have a valid public transport ticket to mitigate the potential misconduct by electing whether to accept an offer to buy a penalty fare.

On-the-spot penalty fares are not mandatory: a person has a completely free choice about whether to accept the offer of such a fare. They are therefore not 'imposed'. There are therefore also no criminal or civil proceedings instituted in respect of the on-the-spot penalty fare and there is no finding of culpability which precedes the imposition of a fare.

If an on-the-spot penalty fare is not offered, or if an on-the-spot penalty fare is offered and rejected, an authorised officer may report a person to the Department of Transport, Planning and Local Infrastructure for a transport ticketing offence. The Department may then serve an infringement notice or commence criminal proceedings.

If that occurs, a person may seek a review of the service of an infringement notice or proceed to have the matter determined by a court if the person considers that he or she has a defence. A person may also seek legal representation in that instance. Nothing in the Bill affects or detracts from these rights.

If you require further information, please contact Ian Shepherd of the Department of Transport, Planning and Local Infrastructure on telephone (03) 8392 6886.

Hon Terry Mulder MP
Minister for Public Transport

Received 9 December 2013

The Committee thanks the Minister for this response.

Appendix 1

Index of Acts, Bills and Regulations in 2013

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Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

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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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Section 17(d) of the Parliamentary Committees Act 2003 and Section 21(1)(i) of the Subordinate Legislation Act 1994

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Appendix 3

Ministerial Correspondence 2013

Table of correspondence between the Committee and Ministers and members during 2012-13

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	Ms Colleen Hartland MLC	11-12-12 06-02-13	18 of 2012 2 of 2013
Statute Law Amendment (Directors' Liability) Bill	Attorney-General	05-02-13 18-02-13	1 of 2013 2 of 2013
Co-operatives National Law Application Bill 2013	Consumer Affairs	19-02-13 28-02-13	2 of 2013 3 of 2013
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Heavy Vehicles National Law Application Bill 2013	Roads	07-05-13 27-05-13	6 of 2013 7 of 2013
Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2013	Attorney-General	17-05-13	[xiii] 7 of 2013
Justice Legislation Amendment Bill 2013	Attorney-General	11-06-13 22-06-13	8 of 2013 9 of 2013
Marine (Domestic Commercial Vessel National Law Application) Bill 2013	Ports	28-05-13 13-06-13	7 of 2013 9 of 2013

^{xii} The Committee's report on the Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013 appeared in *Alert Digest No. 2 of 2013*.

^{xiii} The Committee's report on the Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2013 appeared in *Alert Digest No. 6 of 2013*.

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Plant Biosecurity Amendment Bill 2013	Agriculture and Food Security	03-09-13 16-09-13	11 of 2013 12 of 2013
Radiation Amendment Bill 2013	Health	03-09-13 17-09-13	11 of 2013 13 of 2013
Workplace Injury Rehabilitation and Compensation Bill 2013	Assistant Treasurer	15-10-13 08-11-13	13 of 2013 15 of 2013
Courts and other Justice Legislation Amendment Bill 2013	Attorney-General	29-10-13 11-11-13	14 of 2013 15 of 2013
Crimes Amendment (Investigation Powers) Bill 2013	Attorney-General	11-11-13	[xiv] 16 of 2013
Victoria Police Bill 2013	Police and Emergency Services	29-10-13 11-11-13	14 of 2013 15 of 2013
Transport (Compliance and Miscellaneous) Amendment (On-the-Spot Penalty Fares) Bill 2013	Public Transport	12-11-13 09-12-13	15 of 2013 17 of 2013
Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)		09-12-13	17 of 2013
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)		09-12-13	17 of 2013

^{xiv} The Committee's report on the Crimes Amendment (Investigation Powers) Bill 2013 appeared in *Alert Digest No. 14 of 2013*.