

No. 1 of 2012

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On the

Associations Incorporation
Reform Bill 2011

Australian Consumer Law and
Fair Trading Bill 2011

Control of Weapons and Firearms Acts
Amendment Bill 2011

Emergency Services Legislation
Amendment Bill 2011

Freedom of Information Amendment
(Freedom of Information
Commissioner) Bill 2011

Independent Broad-based
Anti-corruption Commission
Amendment (Investigative Functions)
Bill 2011

Port Management Amendment
(Port of Melbourne Corporation
Licence Fee) Bill 2011

Road Safety Amendment
(Drinking While Driving)
Act 2011

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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 \$122.14).

'*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. 1 of 2012

Associations Incorporation Reform Bill 2011

Introduced	6 December 2011
Second Reading Speech	7 December 2011
House	Legislative Assembly
Member introducing Bill	Hon. Michael O'Brien MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The purposes of the Bill are to:

1. introduce a new principal Act that will repeal and replace the *Associations Incorporation Act 1981*.¹
2. incorporate amendments to the *Associations Incorporation Act 1981* (the 'Act') contained in the *Associations Incorporation Amendment Act 2010* (the 2010 amending Act) and in Part 3 of the *Associations Incorporation Amendment Act 2009* (the 2009 amending Act). The Bill also provides for the repeal of the 2010 and 2009 amending Acts.
3. consolidate the provisions of the *Associations Incorporation Act 1981* that are most commonly used by volunteer members and office-holders of incorporated associations into the initial parts of the Act with technical and administrative provisions consolidated in later, separate parts.
4. modernise the language and structure of the associations incorporations legislation.
5. make technical and consequential amendments.

Content

Commencement

The Committee notes the default commencement provision of 1 July 2013 and the explanatory memorandum concerning the need to defer the commencement of the 2009 and 2010 amending Acts and the requirement to make regulations to support the operation of the proposed Act.

In the circumstances the Committee accepts the longer default commencement provision may be necessary.

Investigation powers – Self-incrimination – Derivative use immunity

Provisions in Part 11 of the Bill deal with the application of the *Corporations Act 2001 (Cth)* (the Corporations Act) to Victorian incorporated associations. The applied provisions have force as though they were Victorian laws. To the extent that they apply to examination and information-

¹ The Act provides for the incorporation of voluntary associations and the registration of other bodies as incorporated associations and makes provision for the corporate governance, financial accountability and other matters relating to the rules and membership of those associations registered under the legislative scheme. The Act was established to provide a simple and cost effective means for non-profit organisations to achieve corporate status. The explanatory material to the Bill points out that as at September 2011 there were over 37,000 incorporated associations on the register in Victoria.

gathering powers the Committee notes the detailed explanatory material provided in the Statement of Compatibility concerning self-incrimination and the justification for excluding derivative use immunity in respect to compelled testimony and documents required to be produced under the proposed legislation. (*Refer to Charter report below*).

Reverse evidentiary onus

The Committee notes that in respect to insolvency Part 5.7B of the Corporations Act applies to incorporated associations by the proposed legislation. This Part relevantly contains two offences concerning insolvent trading which place the legal onus of proof on a defendant with respect to available defences.

A number of other provisions also provide reverse evidential onus requiring a defendant to point to evidence of an exception, excuse or defence such as the offence of hindering or obstructing an inspector without reasonable excuse.

The Committee notes the rationale and justification for these provisions in the Statement of Compatibility.

Entry without warrant

Part 12 of the Bill sets out the powers of inspectors appointed by the Director of Consumer Affairs Victoria to monitor compliance and investigate contraventions.

An inspector may enter and search premises without consent or warrant. This applies to premises on which the inspector believes on reasonable grounds that the affairs of an incorporated association are being conducted or a person is keeping a record or document that is required to be kept under the legislation or is relevant to show compliance. However, an inspector must not exercise this power in any part of the premises that is used for a residential purpose, and may not enter and search premises except between the hours of 9.00 a.m. to 5.00 p.m., or when the premises are open for business. [166]

Charter report

Compelled self-incrimination – Lay people required to assist in investigations relating to incorporated associations

Summary: Clauses 153 and 158 respectively provide for two schemes that permit a court to require any person to assist in various investigations relating to incorporated associations. Each scheme partially removes the common law privilege against compelled self-incrimination. The Committee will write to the Minister seeking further information as to the compatibility of clause 178(2) (which requires people, including non-office-holders, to identify and correct any documents they are compelled to produce that they know to be false or misleading) with the Charter rights with respect to self-incrimination of people who did not voluntarily participate in the Bill's regulatory scheme. Pending the Minister's response, the Committee draws attention to clauses 153 and 158.

The Committee notes that the Bill provides for two schemes that permit a court to require any person to assist in various investigations relating to incorporated associations:

- Clause 153 applies a modified version of the federal corporations law's regime for investigating corporate affairs to some aspects of the affairs of Victorian incorporated associations.² Under

² See *Corporations Act 2001* (Cth), Part 5.9, Division 1. The relevant aspects of the affairs of Victorian incorporated associations that are subject to Part 5.9 are those aspects that clauses 147-152 provide to be subject to a modified version of federal corporations law, including receivership, voluntary administration, winding up and insolvency.

this scheme, the Supreme Court may summon people to an examination by the Court, the Registrar of Incorporated Associations or liquidators or administrators of the incorporated association about various 'examinable affairs'.³ It is an offence for a summonsed person to refuse to attend an examination or answer questions or to fail to provide documents requested or relevant to the examination.⁴

- Clause 158 empowers the Magistrates' Court to order any person to answer questions, supply information or produce documents required or specified by an investigator relating to a possible contravention of the Bill or its regulations. Clause 176 makes it an offence to fail to comply with such a request. Clause 178(2) requires a person who produces a document upon request that he or she knows is 'false or misleading in a material particular' to 'indicat[e] the respect in which it is false or misleading and, if practicable, provid[e] correct information'.

Each scheme partially abrogates the common law privilege against compelled self-incrimination, albeit in different ways.

Under the Supreme Court scheme, a person can be required to answer questions even if the answers are self-incriminatory.⁵ While the person's answers cannot be used against him or her in most subsequent proceedings, there is no bar on the use of information derived from those answers.⁶ For example, if an employee of an incorporated association is asked to identify suppliers to the association during a period of potential bankruptcy, then the employee's answers cannot be adduced in a later prosecution of the employee; however, testimony from the suppliers the employee identified can be used against him or her in a subsequent prosecution (e.g. for being knowingly concerned in fraud against the association's creditors.⁷) The Statement of Compatibility remarks:

The availability of derivate use immunity in relation to the Corporations Act provisions would not allow the legislative scheme to achieve its purpose because it would make investigations and prosecutions more complex and less effective. Having considered the right against self-incrimination in other common law jurisdictions and under human rights instruments, as well as commonwealth government reports on use immunity provisions in corporations law, I am of the view that direct use immunity for oral testimony is sufficient protection for individuals who have voluntarily taken on positions of responsibility and privilege in a regulated industry.

Under the Magistrates' Court scheme, possible self-incrimination is a reasonable excuse for failing to comply with most obligations, but is not a reasonable excuse for failing to produce a document.⁸ For example, where an association is being investigated for securing a pecuniary profit for its members,⁹ those members can refuse to answer questions about what money they have received from the association but cannot refuse a request for records of their communications with the association. Those records, information obtained from them, the fact that the member knew they existed and any identifications of falsehoods made by the member can be used against the member in a subsequent prosecution (e.g. for being concerned in the association's offence¹⁰ or for tax evasion.) The Statement of Compatibility remarks:

Any writing present in a document will have pre-existed the order to hand over the document, meaning that any self-incriminating evidence derived from the writing is not compelled. Furthermore, the handing over of pre-existing documents to investigators on request or as compelled by a court in

³ *Corporations Act 2001* (Cth), ss. 596A, 596B, 597, as modified by clause 145. 'Examinable affairs' include a variety of matters set out in *Corporations Act 2001* (Cth), s. 53.

⁴ *Corporations Act 2001* (Cth), s. 597(6), (7), (10A), as modified by clauses 145 and 154.

⁵ *Corporations Act 2001* (Cth), s. 597(12), as modified by clause 145. The section does not address incrimination by producing documents.

⁶ *Corporations Act 2001* (Cth), s. 597(12A), as modified by clause 145.

⁷ See *Corporations Act 2001* (Cth), s. 592(6), as applied by clause 153 and modified by clauses 145 and 154.

⁸ Clause 177. The clause does not address the admissibility of the document or evidence derived from it.

⁹ Clause 33(1).

¹⁰ Clause 33(3).

most circumstances is analogous to the seizing of documents or evidence through the execution of a lawful warrant....

[I]t is necessary for regulators to have access to relevant documents to ensure the effective administration of the regulatory scheme. Persons who will be subject to this power will be aware of their obligations to keep and provide such documents which relate to compliance (or non-compliance) with the regulatory scheme and cannot reasonably expect to be immunised from their production.

The Committee observes that, in common with many other compulsory questioning regimes,¹¹ both schemes extend beyond office holders of the incorporated association. The Supreme Court scheme can apply to anyone who 'may be able to give information about examinable affairs of the corporation.'¹² The Magistrates' Court scheme can apply to 'any person', whether or not they are the person suspected of contravening the Bill or regulations.¹³ In relation to the Supreme Court scheme, the Statement of Compatibility remarks:

While the Supreme Court also has a discretionary power under s596B(1)(b)(ii) of the Corporations Act to summon a broader class of people for examination, including any person able to give information about the examinable affairs of the incorporated association, I am of the view that the abrogation will still only occur in narrow and appropriate circumstances. In regards to the examination of persons who are not office-holders of an incorporated association... it is highly unlikely that this class of persons would be at risk of incriminating themselves with the information they provide to a court and eligible applicant through the operation of these provisions, given that such persons would not be subject to the duties and associated penalties of this bill.

The Committee notes that non-office-holders may still be prosecuted as accessories to office-holders' offences, or for general crimes such as embezzlement or fraud. The Committee also notes that the Statement of Compatibility does not address clause 178(2), which obliges people required to produce documents under the Magistrates' Court scheme to identify and correct any documents that they know to be false or misleading in a material particular.¹⁴ The Committee observes that, while such offences are a common feature of Victorian regulatory schemes,¹⁵ clause 178(2) may be applied to people who did not voluntarily participate in the regulatory field, e.g. non-office-holders who have access to documents that are relevant to an investigation.

The Committee will write to the Minister seeking further information as to the compatibility of clause 178(2) (which requires people, potentially including non-office-holders, to identify and correct any documents they are compelled to produce that they know to be false or misleading) with the Charter rights with respect to self-incrimination of people who did not voluntarily participate in the Bill's regulatory scheme.¹⁶ Pending the Minister's response, the Committee draws attention to clauses 153 and 158.

The Committee makes no further comment

¹¹ E.g. *Competition and Consumer Act 2010* (Cth), s. 155; *Police Integrity Act 2008*, s. 53; *Taxation Administration Act 1997*, s. 73.

¹² *Corporations Act 2001* (Cth), s. 596B(1)(b)(ii), as modified by clause 145.

¹³ Clause 158(1).

¹⁴ The relationship between clause 177 (partially abrogating the privilege against self-incrimination) and clause 178(2) is arguably ambiguous, as clause 177 is expressed in terms of the defence of 'reasonable excuse', which is not available for clause 178(2).

¹⁵ E.g. *Aboriginal Heritage Act 2006*, s. 183; *Gas Safety Act 1997*, s. 100; *Major Sporting Events Act 2009*, s. 145; *Owners Corporations Act 2006*, s. 189.

¹⁶ Charter ss. 24(1) & 25(2)(k).

Australian Consumer Law and Fair Trading Bill 2011

Introduced	6 December 2011
Second Reading Speech	7 December 2011
House	Legislative Assembly
Member introducing Bill	Hon. Michael O'Brien MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The Bill substantially re-enacts, with amendments and a new structure, the current provisions of the *Fair Trading Act 1999* in the form of a new principal Act, the proposed *Australian Consumer Law and Fair Trading Act 2012*.

The Bill includes the application of the Australian Consumer Law which is currently provided in Part 2 of the *Fair Trading Act 1999*¹⁷ and also specific Victorian laws which for the large part are also found in, or were to be included in, the *Fair Trading Act 1999*.

Extract from the Second Reading Speech:

The recent spate of significant consumer law reforms in Victoria has left the structure of the Act in need of improvement. Large parts of the Act have been repealed to make way for the application of the Australian Consumer Law in Victoria. In addition, reforms to other consumer Acts in recent years for modernisation purposes have resulted in the consolidation of many consumer protection schemes within the Act. These reforms have left the Act patchy and cumbersome to use.

... It re-enacts the remaining provisions of the fair trading Act, and renames the Act the Australian Consumer Law and Fair Trading Act. The legislation has been substantially reorganised to make the structure of the Act clearer and easier to navigate. Chapters have been introduced acknowledging significant components of the Act and extensive renumbering has been undertaken.

The purposes of the proposed Act are to:

- promote and encourage fair trading practices and a competitive and fair market
- protect consumers
- regulate trade practices
- provide for codes of practice
- provide for the powers and functions of the Director of Consumer Affairs Victoria including powers to conciliate disputes under this Act and powers to carry out investigations into alleged breaches of this Act
- promote uniformity with the consumer laws of other jurisdictions through the interpretation and application of the Australian Consumer Law in Victoria consistently with those laws
- regulate certain businesses

The Bill amends the *Credit (Administration) Act 1984* to close the Consumer Credit Fund and transfer any funds to the Victorian Consumer Law Fund.

The Bill repeals the:

- *Fair Trading Act 1999*

¹⁷ The Australian Consumer Law came into effect on 1 January 2011.

- *Disposal of Uncollected Goods Act 1961*
- *Carriers and Innkeepers Act 1958*
- *Landlord and Tenant Act 1958*

Content

Chapter 2

Australian Consumer Law applied as a law of Victoria

Chapter 2 of the Bill essentially re-enacts the provisions in the current Part 2 of the *Fair Trading Act 1999*. The Chapter applies the Australian Consumer Law (the 'ACL') as a law of Victoria. The ACL comprises Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* and the regulations made under section 139G of that Act. The ACL commenced on 1 January 2011 and the Committee reported on the application of these laws in Alert Digest No.12 of 2010.

Chapter 3

The Chapter essentially re-enacts Parts 2A and 2C of the *Fair Trading Act 1999* concerning implied conditions and warranties in certain contracts of supply and frustrated contracts.

Chapter 4

The Chapter contains a number of general business provisions. Part 4.1 regulates debt collection and essentially re-enacts Part 5B of the *Fair Trading Act 1999*. Part 4.2 makes provision for uncollected goods under bailment by re-enacting Part 2D of the *Fair Trading Act 1999*. Part 4.3 regulates credit reporting agencies and essentially re-enacts Part 5A of the *Fair Trading Act 1999*.

Chapter 5

The Chapter deals with two specific business areas. Part 5.1 deals with introduction agencies and essentially re-enacts the current Part 5AA of the *Fair Trading Act 1999*. Part 5.2 provides for limitations on the common law liability of accommodation providers.

Chapters 6 to 8

These Chapters respectively concern Consumer Affairs Victoria, the functions of VCAT and enforcement and remedies provisions.

Chapters 9 and 10

These Chapters make deal with repeals and provide for miscellaneous, savings, transitional and consequential amendment matters.

Presumption of innocence – Evidential onus of proof – Legal onus of proof – Defendant to point to evidence or prove a defence on the balance of probabilities – Justification for use in context of consumer regulatory regime

The Committee notes the explanation in the Statement of Compatibility justifying the provisions imposing reverse evidential and legal burdens of proof.

Repeal, alteration or variation of section 85¹⁸ of the Constitution Act 1975 (unlimited jurisdiction of the Supreme Court)¹⁹

Clause 231 of the Bill declares that it is the intention of clauses 187, 188 and 189 to alter or vary section 85 of the *Constitution Act 1975*.

Extract from the Second Reading Speech:

Clause 187 provides that if proceedings regarding a fair trading dispute or other matter under the Fair Trading Act, over which the Victorian Civil and Administrative Tribunal has jurisdiction, are commenced first in VCAT and are not struck out or withdrawn, the dispute is not justiciable by a court unless the proceeding in that court was commenced before the application to VCAT was made and that proceeding is still pending or VCAT refers the proceeding to that court under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998*.

Clause 188 provides that if proceedings regarding a fair trading dispute are first commenced in a court, the court must stay the proceedings if they could be more appropriately dealt with by VCAT, including if a party could obtain a material advantage in VCAT -- for example, if it would be cheaper or quicker -- provided that it is not outweighed by any material disadvantage suffered by another party if the dispute goes to VCAT. Where the court stays proceedings, a party may apply to VCAT for an order in relation to the proceedings, whereupon VCAT must notify the court, which must dismiss the proceedings -- except where VCAT has exercised its power to refer the matter to the court.

The reasons for the variation by sections 187 and 188 to section 85 of the *Constitution Act 1975* are to allow the parties to a fair trading dispute a choice of forums in which to litigate and to ensure that a party wishing to take advantage of the benefits offered by VCAT is not unfairly frustrated by another party commencing proceedings in a court merely as a tactical manoeuvre to put pressure on the other side to settle disadvantageously or to abandon the proceedings.

Clause 189 provides that where a consumer who is in dispute with a trader over a 'small claim'²⁰ makes an application to VCAT to hear the claim and lodges the amount in dispute with VCAT, VCAT has exclusive jurisdiction over the claim and that any proceedings by the trader in a court in respect of the claim be dismissed. This is to ensure that VCAT is retained as the only forum for dealing with claims that would formerly have been made to it under the *Fair Trading Act 1999*. Clause 189 also sets out a procedure for a consumer to lodge the amount in dispute with VCAT.

The reason why clause 189 allocates VCAT as the only forum able to deal with small claims is because it is intended to have an informal, low-cost procedure to deal with such claims, without, for instance, the expense involved in having legal representation. It is considered critical to keep costs at a minimum to ensure that the benefit of any judgement is not effectively rendered useless by the costs involved. That intention is frustrated if small claims can be taken to the courts.

Having reviewed the declaratory provision in clause 231, the substantive provisions in clauses 187, 188 and 189 and the section 85 statement of the member introducing the Bill in the Second Reading Speech the Committee is satisfied that the limitation provisions are in all the circumstances appropriate and desirable.

¹⁸ Section 85 provides that the Supreme Court is created the superior court of Victoria with unlimited jurisdiction and further provides that where a provision of an Act seeks to repeal, alter or vary the courts unlimited jurisdiction, the provision(s) will not be effective unless certain procedures are followed. Briefly, these procedures require the relevant provisions that intend to limit the court's jurisdiction to be specifically identified by the Bill (the declaratory provision) and also requires the member of Parliament introducing the Bill to make a statement of the reasons for seeking to limit the court's jurisdiction. Section 18(2A) of the *Constitution Act 1975* further provides that a limitation amendment fails if it does not receive an absolute majority of the members in both Houses.

¹⁹ Section 17(b) of the *Parliamentary Committees Act 2003* requires the Committee to report to the Parliament on any provision in a Bill that directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975* and to consider whether such provisions are in all the circumstances appropriate and desirable.

²⁰ The Bill defines 'small claims' in clause 183 as a claim for payment in an amount not exceeding \$10,000 or other prescribed amount, or a claim for performance of work of a value not exceeding \$10,000 or other prescribed amount that arises out of a contract for the supply of goods or the provision of services other than a contract of life insurance.

Charter report

Operation of the Charter – Interpretation of Australian Consumer Law (Victoria) – Misleading or deceptive conduct in trade or commerce

Summary: The Committee observes that the effect of clauses 1(f) and 11 is to give primacy to national uniformity in interpretations of the Australian Consumer Law (Victoria). Although these clauses may affect state interpretation rules (including Charter s. 32), they do not affect national interpretation rules including the common law and constitutional law on freedom of expression.

The Committee notes that clause 1(f) sets out a purpose of the Bill (not contained in the existing *Fair Trading Act 1999*) ‘to promote uniformity with the consumer laws of other jurisdictions through the interpretation and applicability of the Australian Consumer Law in Victoria consistently with those laws’. Clause 11 provides that the interpretation of the Australian Consumer Law is to be governed by the federal interpretation statute (including a requirement that courts prefer ‘the interpretation that would best achieve the purpose or object of the Act’²¹) rather than the state interpretation statute (with its milder requirement to prefer ‘a construction that would promote the purpose or object underlying the Act’²²).

The Second Reading Speech remarks:

This specifically addresses concerns that section 32 of the Charter of Human Rights and Responsibility Act applies to the Australian Consumer Law and, in cases of conflict, will result in provisions of the Australian Consumer Law being read in an unintended or inconsistent manner. The new purpose makes it clear that when considering the application of the charter to the operation of the Australian Consumer Law, the importance of maintaining a nationally uniform Australian Consumer Law must be recognised.

In relation to a key past provision of Victoria consumer law – the prohibition of misleading or deceptive conduct in trade or commerce previously contained in s. 9 of the *Fair Trading Act 1999* – the Supreme Court recently remarked:²³

The dividing line between what is “in” trade and commerce and what is not may not always be easy to determine. The expression of opinions and beliefs will frequently occur through, or incidental to, trade and commerce: lectures may be given in occasions of commerce to the organisers and opinions expressed in books or other publications may be an occasion of trade and commerce. Tests to determine whether speech is commercial are apt to depend upon judgments upon which reasonable people may differ as is a test of whether “expression related solely to the economic interests of the speaker and its audience”. Opinions and beliefs about working conditions might be seen by some as related solely to economic interests but by others as a wider political debate. An opinion about treatments and procedures may be nothing more than an opinion but found expressed as an incident of where or how to obtain the treatment or procedure. At times, indeed frequently, one may find these opinions, and their commercial availability, at the heart of deeply held social debates concerning such matters as the termination of pregnancies, voluntary euthanasia, religious practices and alternative therapies. In considering the proper construction of s 9 of the Fair Trading Act it may be assumed that it was not part of the purpose of the legislature to stifle unduly public discussion or the free expression of opinions however erroneous the opinions might be. Section 15 of the Charter gives recent expression to the right to hold an opinion without interference and to express that opinion orally, in writing, in print, by way of art or in any other medium chosen by him or her. The right in s 15 may be subject to lawful restrictions to respect the rights and reputations of other persons or for the protection of national security, public order, public health or public morality.

²¹ *Acts Interpretation Act 1901* (Cth), s. 15AA.

²² *Interpretation of Legislation Act 1984*, s. 35(a).

²³ *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) & Ors (No 2)* [2011] VSC 153, [5].

The Committee observes that the effect of clauses 1(f) and 11 is that the Charter's right to freedom of expression is to give primacy to national uniformity in interpretations of the Australian Consumer Law (Victoria), including its general ban on misleading or deceptive conduct in trade or commerce.²⁴ The Committee notes that, although these clauses may affect state interpretation rules (including Charter s. 32), they do not affect national interpretation rules, including the common law and constitutional law on freedom of expression.

Compelled self-incrimination – Lay consumers required to assist in investigations relating to consumer transactions

Summary: Clauses 125-126 and 145 respectively provide for two schemes that permit a court to require any person to assist in various investigations relating to consumer transactions. Each scheme partially removes the common law privilege against compelled self-incrimination. The Committee will write to the Minister seeking further information as to the compatibility of clause 171(2) (which requires people, potentially including consumers, to identify and correct any documents they are compelled to produce that they know to be false or misleading) with the Charter rights with respect to self-incrimination of people who did not voluntarily participate in the Bill's regulatory scheme. Pending the Minister's response, the Committee draws attention to clauses 125, 126 and 145.

The Committee notes that the Bill provides for two schemes that permit a court to require any person to assist in various investigations relating to consumer transactions:

- Clauses 125-126 empower the Director of Consumer Affairs Victoria to require any person who the Director believes has information that would assist in monitoring compliance with, or relates to a contravention of, the Bill or regulations (including the Australian Consumer Law), as well as a number of other Victorian consumer statutes, to provide information, produce documents or (for possible contraventions) give sworn evidence.²⁵ Refusal to comply or knowingly providing false information is an offence.²⁶
- Clause 145 empowers the Magistrates' Court to order any person to answer questions, supply information or produce documents required or specified by an investigator appointed by the Director relating to a possible contravention of the Bill or its regulations (including the Australian Consumer Law), as well as numerous other Victorian consumer statutes. Clause 169 makes it an offence to fail to comply with such a request. Clause 171(2) requires a person who produces a document upon request that he or she knows is 'false or misleading in a material particular' to 'indicat[e] the respect in which it is false or misleading and, if practicable, provid[e] correct information'.

Each scheme partially abrogates the common law privilege against compelled self-incrimination, albeit in different ways.

Under the Director's powers, a person can be required to provide information, answer questions or produce documents even if the information, answers or documents are self-incriminatory.²⁷ While the person's actual answers and information (and, for compliance requests, produced documents) cannot be used against him or her in most subsequent proceedings, there is no bar on the later use of information derived from that evidence.²⁸ For example, if a customer who supplied a testimonial in relation to goods or services was asked by the Director to provide information and documents about payments received for making it, that information (and, for compliance requests, the

²⁴ Australian Consumer Law, s. 18.

²⁵ Clauses 125(1), 126(1-2).

²⁶ Clauses 125(2), 126(3).

²⁷ Clauses 125(2), 126(3).

²⁸ Clauses 125(4), 126(5).

documents) couldn't be adduced in a later prosecution of the customer; however, the Director could then subpoena a bank for records that match the payments described by the customer and use them to prosecute him or her (e.g. for making a false representation concerning a testimonial.²⁹) The Statement of Compatibility remarks:

[I]t is likely that only a small percentage of persons in this class would be affected by the lack of derivative use immunity; being such persons who engage in regulated activities under the bill, and who would consequently be aware of their obligations to comply with the regulatory scheme. Additionally, the penalty for failing to comply with a notice issued by the director is relatively low under both provisions.

Granting immunities in a regulated commercial context to individuals most likely to be questioned and exposed to criminal and civil penalties leads to protracted investigations, and those responsible for wrong doing and misconduct may escape liability. The limitation on derivative use immunity addresses this issue by allowing the director to effectively monitor compliance with the regulatory scheme without jeopardising the success of any proceedings which may be brought after all relevant information concerning a person's activities have come to light.

Under the Magistrates' Court's powers, possible self-incrimination is a reasonable excuse for failing to comply with most obligations, but is not a reasonable excuse for failing to produce a document.³⁰ For example, where a potential pyramid scheme is being investigated,³¹ purchasers of the goods dealt with by the scheme can refuse to answer questions about their role in selling the goods but cannot refuse a request for records of their communications with the suppliers or potential other purchasers. Those records, information obtained from them, the fact that the purchaser knew they existed and any identifications of falsehoods made by the purchaser can be used against the participant in a subsequent prosecution (e.g. for participating in a pyramid scheme.³²) The Statement of Compatibility remarks:

The delivery of existing documents to investigators on request in most circumstances is analogous to the seizing of documents or evidence through execution of a lawful warrant, which is not considered as engaging the right to protection against self-incrimination...

The limitation is directly related to its purpose. The documents required to be produced are those that are connected with an alleged contravention of the bill. The duty to provide these documents assist [sic] is consistent with the reasonable expectations of those who operate a business within a regulated scheme. Moreover, it is necessary for regulators to have access to documents to ensure the effective administration of the scheme.

The Committee observes that, in common with many other compulsory questioning regimes,³³ both schemes extend beyond people who operate a business. The Director's powers can apply to anyone who 'the Director believes is capable of providing information' about compliance or a contravention.³⁴ The Magistrates' Court's powers can apply to 'any person', whether or not they are the person suspected of contravening the Bill.³⁵ The Committee also observes that neither scheme is limited to formal business records and therefore may encompass private documents, e.g. emails, or information, e.g. sources of income. The Committee additionally observes that each scheme extends to a variety of other Victorian regulatory schemes, including the *Residential Tenancies Act 1997*.³⁶ For example, consumers or tenants could be compelled to answer questions or provide private

²⁹ Australian Consumer Law, s. 151(1)(e).

³⁰ Clause 170. The clause does not address the admissibility of the document or evidence derived from it.

³¹ Australian Consumer Law, s. 164(1).

³² Australian Consumer Law, s. 164(2).

³³ E.g. *Corporations Act 2001* (Cth), s. 596B(1)(b)(ii); *Police Integrity Act 2008*, s. 53; *Taxation Administration Act 1997*, s. 73.

³⁴ Clauses 125(1) and 126(1).

³⁵ Clause 158(1).

³⁶ See Schedule 6, clause 36. The application of the Director's powers to residential tenancies was addressed by the predecessor to this Committee in *Alert Digest No. 12 of 2010* (discussing the Residential Tenancies Amendment Bill 2010.)

papers, even if the information supplied might lead the authorities to evidence of their own offences, or face a maximum penalty of over \$6000.³⁷

The Committee notes that the Statement of Compatibility does not address clause 171(2), which obliges people required to produce documents under the Magistrates' Court scheme to identify and correct any documents that they know to be false or misleading in a material particular.³⁸ The Committee observes that, while such offences are a common feature of Victorian regulatory schemes,³⁹ clause 171(2) may be applied to people who did not voluntarily participate in the regulatory field, e.g. lay consumers with access to relevant documents.

The Committee will write to the Minister seeking further information as to the compatibility of clause 171(2) (which requires people to identify, potentially including consumers, and correct any documents they are compelled to produce that they know to be false or misleading) with the Charter rights with respect to self-incrimination of people who did not voluntarily participate in the Bill's regulatory scheme.⁴⁰ Pending the Minister's response, the Committee draws attention to clauses 125, 126 and 145.

The Committee makes no further comment

³⁷ Clause 125(2) provides for a penalty of 20 penalty units. Clause 126(3) provides for a penalty of 60 penalty units.

³⁸ The relationship between clause 170 (partially abrogating the privilege against self-incrimination) and clause 171(2) is arguably ambiguous, as clause 170 is expressed in terms of the defence of 'reasonable excuse', which is not available for clause 171(2).

³⁹ E.g. *Aboriginal Heritage Act 2006*, s. 183; *Gas Safety Act 1997*, s. 100; *Major Sporting Events Act 2009*, s. 145; *Owners Corporations Act 2006*, s. 189.

⁴⁰ Charter ss. 24(1) & 25(2)(k).

Control of Weapons and Firearms Acts Amendment Bill 2011

Introduced	6 December 2011
Second Reading Speech	7 December 2011
House	Legislative Assembly
Member introducing Bill	Hon. Peter Ryan MLA
Portfolio responsibility	Minister for Police and Emergency Services

Purpose

The Bill amends the *Control of Weapons Act 1990* to:

1. amend sections 5 and 11A to subject prohibited persons to an indictable offence for possessing, carrying or using an imitation firearm. **[3, 4 and 6]**
2. amend section 10D(6) to remove the requirement that seven days must elapse from the publication in the Government Gazette of notice of a planned declaration of a designated area for random weapons searches before the search may occur. **[5]** (*Refer to Charter report below*)

The Bill also amends the *Firearms Act 1996* to amend:

1. Section 3 to extend the definition of a firearm to include blank firing pistols that are capable of being modified to fire a live round. **[7]**
2. Sections 5 and 7C(3) to remove the distinction between a registered or unregistered firearm when in possession, carried or used by a prohibited person. **[8 and 9]**
3. Section 16(3), 16(4), 16(5) and 16(6) to reduce the minimum number of shooting events that a licensed handgun owner with more than one class of handgun must participate in each calendar year. **[10]**
4. Sections 16(8)(b), 16(12), 16(13), 16(14), 16(15), 16(16), 123C(1)(c)(v) and 3(1) to allow international shooting events to be recognised for the purposes of the handgun participation rules. **[11]**
5. Schedule 3 to exempt members of Victoria's fire-fighting and emergency services who use a category E firearm for the purposes of backburning and planned burning. **[12]**

Charter report

Privacy – Protection of children – Liberty – Controlled weapons search regime – Designations based on previously violent or disordered events – Removal of seven-day period for notice

Summary: Clause 5's sole impact is to reduce the mandatory period between notification of a planned designation in the government gazette and when the designation may validly operate. The Committee will write to the Minister seeking further information as to the required period of time between notification of a designation in a daily newspaper and when the designation may validly operate.

The Committee notes that clause 5, amending existing s. 10D of the *Control of Weapons Act 1990*, provides that a declaration of a 'planned' designated search area may only take effect 'after the date of publication of the notice in the Government Gazette'. Existing s. 10D provides that a declaration may only take effect 'not less than 7 days after the date of the publication of the notice in the Government Gazette'. Previous statements of compatibility relating to the controlled weapons

search regime found that the regime was only ‘partially compatible’ with the Charter’s rights to privacy, the protection of children and (in relation to one Bill) liberty.⁴¹

The Statement of Compatibility for the present Bill remarks:

Clause 5 of the bill makes a minor amendment to the controlled weapons search regime and in my opinion has no impact on rights protected under the charter act.

The clause removes the requirement for a seven-day notice period between publication of a notice in the Government Gazette declaring an area to be a designated area and the commencement of random weapon searches under the planned designation provisions. However, the requirement to advertise planned designations in both the gazette and a daily newspaper is retained.

The Committee notes that clause 5’s sole impact is to reduce the mandatory period between notification of a planned designation of an area in the government gazette and when the designation may validly operate. While such a reduction has no practical impact on the controlled weapons search regime in its application to recently violent or disordered ‘areas’ (as such areas can already be subject to ‘unplanned’ – i.e. without notice – designations)⁴² the Committee observes that clause 5 may have a potential practical impact on the controlled weapons search regime in its application to previously violent or disordered ‘events’ (such as sporting, cultural or political events that move from place to place or extend for more than a year), to the extent that prospective attendees at such an event may be unaware that it is in an area that has been recently designated.⁴³ However, the Committee notes that all planned designations must still be notified in a daily newspaper⁴⁴ and that any notice must specify the period of operation of the designation.⁴⁵

The Committee will write to the Minister seeking further information as to the required period of time between notification of a designation in a daily newspaper and when the designation may validly operate. Pending the Minister’s response, the Committee draws attention to clause 5.

The Committee makes no further comment

⁴¹ Charter ss. 13(a), 17(2) and 21(1). See the Statements of Compatibility for the Summary Offences and Control of Weapons Acts Amendment Bill 2009 and the Control of Weapons Amendment Bill 2010.

⁴² Existing s. 10D(1)(a)(i) provides for ‘planned’ designations of areas where ‘more than one incident of violence or disorder has occurred in that area in the previous 12 months that involved the use of weapons’. In comparison, existing s. 10E provides for ‘unplanned’ designation of such areas without any notice before or after the designation, where such designations are ‘necessary... to prevent or deter... violence or disorder involving weapons’.

⁴³ Existing s. 10D(1)(a)(ii) provides for ‘planned’ designations of areas where ‘an event is to be held in that area and incidents of violence or disorder involving the use of weapons have occurred at previous occasions of that event (wherever occurring)’. There is no similar provision in existing s. 10E’s provision for ‘unplanned’ designations of areas.

⁴⁴ Existing s. 10D(4)(b)-(c) requires that the Chief Commissioner must publish a notice of a planned declaration ‘in a daily newspaper circulating generally in Victoria’ and, for declared areas outside Melbourne, ‘in a daily newspaper circulating generally in that area, if such a newspaper exists’.

⁴⁵ Existing s. 10D(5)(d).

Emergency Services Legislation Amendment Bill 2011

Introduced	6 December 2011
Second Reading Speech	7 December 2011
House	Legislative Assembly
Member introducing Bill	Hon. Peter Ryan MLA
Portfolio responsibility	Minister for Police and Emergency Services

Purpose

The Bill amends the:

1. *Country Fire Authority Act 1958*; and the *Metropolitan Fire Brigades Act 1958* to reflect current organisational arrangements and clarify the command structures applying at fires, to increase penalties and create new offences to mitigate risks that undermine effective emergency response and community safety and to modernise outdated provisions. **[3 to 98]**
2. *Victoria State Emergency Service Act 2005* to align compensation provisions with the *Accident Compensation Act 1985*, to clarify that the Victoria State Emergency Service is able to engage in fundraising and promotional activities and to provide a regulation making power regarding the administration and management of units. **[99 to 103]**
3. *Country Fire Authority Act 1958*, the *Metropolitan Fire Brigades Act 1958* and the *Victoria State Emergency Service Act 2005* to insert a definition of major emergency; and incorporate a general emergency responsibility to assist in the response to large scale emergencies. **[8, 63, 99]**
4. *Emergency Management Act 1986* to enhance police powers relating to the declaration of emergency areas and the operation of roadblocks and to realign the offence relating to the making of false claims for compensation. **[104 to 110]**
5. *Emergency Services Telecommunications Authority Act 2004* to allow the Emergency Services Commissioner to determine generic as well as agency specific standards for the service performance of the Emergency Services Telecommunications Authority and to remove redundant references to certain ambulance services. **[111 to 115]**
6. *Forests Act 1958* to insert an immunity provision applying to authorised officers and other persons in relation to things done or omitted to be done in the exercise of powers or the discharge of duties relating to fire management activities. **[116]**
7. *Summary Offences Act 1966* by repealing section 12 (wilfully giving false alarm of fire) as result of amendments made to the *Country Fire Authority Act 1958* and the *Metropolitan Fire Brigades Act 1958*. **[117]**

Content

Reverse Evidentiary Onus Provisions

The Statement of Compatibility refers to a number of clauses⁴⁶ that either impose an evidential onus or amend the penalty of a provision imposing an evidential onus on a defendant in a criminal proceeding. The clauses engage section 25(1) of the Charter which provides that a person charged with a criminal offence has the right to be presumed innocent until proven guilty in accordance with the law. The Committee notes the explanatory material provided in the Statement.

The Committee makes no further comment

⁴⁶ Clauses 23, 24, 26, 27(1), 28, 29, 37, 51, 53, 54, 55, 89, 90, 106 and 109(2).

Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011

Introduced	7 December 2011
Second Reading Speech	8 December 2011
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister responsible for the establishment of an Anti-Corruption Commission

Purpose

The Bill amends the *Freedom of Information Act 1982* (the 'FOI Act') to establish a Freedom of Information Commissioner. [6] The Bill also amends the *Parliamentary Committees Act 2003*⁴⁷ to establish an Accountability and Oversight Committee of the Parliament. [48, 49]

Extract from the Second Reading Speech:

The FOI Commissioner will be responsible for:

- conducting reviews of agencies' decisions;
- handling complaints about the administration of the FOI Act;
- monitoring agencies' compliance with professional standards; and
- reporting to the Parliament on the operation of the FOI Act.

A key feature of the legislation is the FOI Commissioner's role in educating about the FOI Act and promoting better decision making. The FOI Commissioner will be responsible for promoting understanding of the FOI Act, educating agencies about the FOI Act, providing advice to the Minister about the operation of the FOI Act and educating the public about the role of the FOI Commissioner in Victoria's FOI regime.

The FOI Commissioner replaces the Ombudsman's current role in relation to FOI under the FOI Act and the Ombudsman Act 1973. However, the Ombudsman's jurisdiction in relation to FOI whistleblowers complaints is unchanged.

... The most significant function of the FOI Commissioner will be to conduct reviews of government agencies' decisions to refuse access to documents, which will replace the current internal review process undertaken by agencies.

The FOI Commissioner will also undertake reviews of decisions to defer provision of access to a document, decisions refusing requests to amend a record and decisions of government agencies' not to waive or reduce the FOI application fee. In these circumstances, applicants will be provided with an independent, free and fair avenue in which to seek a review of agencies' decisions.

... The Bill provides that the FOI Commissioner's jurisdiction will not include the power to conduct reviews of decisions about documents that are claimed to be exempt as cabinet documents or on the grounds of national security. The Bill therefore recognises the overriding public interest in exempting from release cabinet material and documents that may affect national security. Appeal rights to VCAT⁴⁸ in respect of these documents are retained.

Where a decision involves documents that are exempt as cabinet or national security documents as well as other documents that are exempt on other grounds, applicants will have the right to apply to VCAT in respect of the cabinet or national security documents and to the FOI commissioner in respect

⁴⁷ Proposed new sections 5(aa) and 6A of the *Parliamentary Committees Act 2003*.

⁴⁸ Jurisdiction to hear appeals to VCAT in such matters must be exercised by a judicial member, *Victorian Civil and Administrative Tribunal Act 1998*, Schedule 1, Part 8.

of the balance of the exempt documents. This will ensure that applicants have direct appeal rights to the most appropriate forum to conduct the review.

... The review provisions in the Bill allow a person or a business to appeal to VCAT a decision of the FOI Commissioner to release that person's personal information or that business's commercial information on grounds that it would be an unreasonable disclosure of that person's affairs or the disclosure could cause an unreasonable disadvantage to that business's commercial position. This is an important mechanism to ensure that the interests of third parties are protected.

... The Bill ensures that FOI requests cannot be made in respect of the FOI Commissioner's review and complaints functions.

Accountability and Oversight Committee

Extract from the Second Reading Speech:

This Committee will also be responsible for considering matters that relate to Victoria's freedom of information regime more generally. It is intended that this Committee will be vested with oversight functions in relation to other integrity bodies in the future. ... The Accountability and Oversight Committee will be responsible for examining the FOI Commissioner's report.⁴⁹ The FOI Commissioner will also be required to report to the Committee on any FOI issues arising out of decisions of the Supreme Court or VCAT.

Terms of reference of Committee:

6A Accountability and Oversight Committee

- (1) The functions of the Accountability and Oversight Committee are —
 - (a) to monitor and review the performance of the functions and exercise of the powers of the Freedom of Information Commissioner; and
 - (b) to consider and investigate complaints concerning the Freedom of Information Commissioner and the operation of the office of the Freedom of Information Commissioner; and
 - (c) to report to Parliament on any matter relating to —
 - (i) the performance of the functions and the exercise of the powers of the Freedom of Information Commissioner; and
 - (ii) any complaint concerning the Freedom of Information Commissioner and the operation of the office of the Freedom of Information Commissioner—
that requires the attention of Parliament; and
 - (d) to examine the annual report of the Freedom of Information Commissioner and any other reports by the Commissioner and report to Parliament on any matters it thinks fit concerning those reports; and
 - (e) to inquire into matters concerning freedom of information referred to it by the Parliament and to report to Parliament on those matters.
- (2) Nothing in this section authorises the Accountability and Oversight Committee to —
 - (a) reconsider a decision of the Freedom of Information Commissioner in relation to a review of a particular matter; or
 - (b) reconsider any recommendations or decisions of the Freedom of Information Commissioner in relation to a complaint under the *Freedom of Information Act 1982*.

The Committee makes no further comment

⁴⁹ The Annual Report of the FOI Commissioner pursuant to substituted section 64 and new sections 64A and 64B of the Act proposed to be inserted by clause 30 of the Bill.

Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011

Introduced	8 December 2011
Second Reading Speech	8 December 2011
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister responsible for the establishment of an anti-corruption commission

Purpose

The Bill amends the *Independent Broad-based Anti-corruption Commission Act 2011* (the 'Act') to provide the Independent Broad-based Anti-corruption Commission (the 'IBAC') with the duties, functions and powers for the IBAC to:

- Identify, expose and investigate serious corrupt conduct.
- Identify, expose and investigate police personnel misconduct.
- Assess police personnel conduct.
- Prevent corrupt conduct and police personnel misconduct.

The Bill also makes consequential amendments to the *Parliamentary Committees Act 2003*, the *Police Regulation Act 1958*, the *Surveillance Devices Act 1999* and the *Telecommunications (Interception) (State Provisions) Act 1988*.

The Bill repeals the *Police Integrity Act 2008*.

Content

Rights and freedoms – Investigations concerning the conduct of judicial officers – Independence of the judiciary – Separation of powers

Extract from the Second Reading Speech:

The Bill contains special procedures for IBAC investigations in relation to the judiciary. This is to ensure that the separation of the powers between the executive, the Parliament and the judiciary, which is fundamental to the proper working of our system of government, remains paramount. These special procedures include requirements that an IBAC investigation into the conduct of judicial officers must be carried out by a sworn IBAC Officer who is also a former judge or former magistrate of a court of a higher level, or the same level but not of the same court as the person being investigated. The Bill strikes a balance between independence and accountability by recognising the special independent nature of the judiciary, while still providing a mechanism to investigate the judiciary for this type of conduct.

The Committee notes the special provisions in the Bill in respect to IBAC investigations concerning judicial officers. These provisions may raise issues concerning the separation of the powers between the executive, the parliament and the judiciary. [9] (new sections 42 to 44)

The Committee notes that the Act⁵⁰ provides that the IBAC Commissioner (the 'Commissioner') is an independent officer of the Parliament and further provides that the Commissioner, subject to the provisions of the Act and other laws of the State, has complete discretion in the performance of his

⁵⁰ Section 13

or her duties, powers and functions and is not subject to the direction or control of the Minister⁵¹ and is not eligible for re-appointment beyond the initial 5 year term of office.⁵²

The Committee is satisfied that the provisions of the Act and the proposed investigation powers in respect to judicial officers recognises the independence of the judiciary and does not unduly infringe on the doctrine of the separation of powers.

Ambit of IBAC's jurisdiction

Extract from the Second Reading Speech:

Crucially the Bill clarifies IBAC's jurisdiction in relation to corrupt conduct through defining 'public body', 'public officer' and 'public sector'.⁵³

In accordance with the government's policy, IBAC's jurisdiction is broadbased, capturing the wider public sector. This includes Ministers, Members of Parliament, Ministerial advisers, Parliamentary officers, all police personnel, the judiciary, local government and a broad range of other public officers and bodies.

... The exceptions to this broad definition are very limited and are justified on public policy grounds. The government has already passed legislation establishing a Victorian inspectorate to provide thorough and robust oversight of IBAC. Accordingly, the Victorian Inspectorate is excluded from IBAC's jurisdiction, because of the role that organisation has in holding IBAC to account. The Victorian Inspectorate will instead be overseen by the IBAC Parliamentary Committee, established under the IBAC Act 2011. Similarly, the public interest monitors appointed under the recently passed Public Interest Monitor Act 2011 are excluded from IBAC's jurisdiction, as they will have an oversight role relating to applications for covert and coercive warrants sought by IBAC. IBAC itself, and its officers, will be excluded from the jurisdiction because of the clear conflict that would arise if IBAC investigated its own officers.

Entry, search and seizure powers

Division 3 of Part 4 provides powers for authorised IBAC officers to enter police personnel premises without a search warrant, in order to search for, inspect and seize documents or things at those premises relevant to an investigation. The exercise of these powers is limited to non-residential police personnel premises and any vehicle, vessel or aircraft at those premises.

Division 4 of Part 4 provides a power for authorised officers of IBAC to apply for a search warrant in relation to particular premises including a residence, or a particular vehicle, vessel or aircraft in a public place. [new sections 54 to 69]

Defensive equipment and firearms

Part 5 establishes procedures for the use of defensive equipment (capsicum spray, body armour, batons and handcuffs or cable ties) and firearms by trained senior IBAC officers who have completed prescribed training courses. The Bill provides that it is an offence for an IBAC officer to contravene any conditions to which the weapon or firearm authorisation is subject. [new sections 70 to 82]

Surveillance devices

The Bill amends the *Surveillance Devices Act 1999* to provide that an IBAC officer may apply for or use surveillance devices in accordance with that Act for the purposes of covert investigations. In addition, the Bill makes legislative amendments to include IBAC within the *Telecommunications*

⁵¹ In respect to the independence of the IBAC Commissioner see proposed sections, 12, 13(7) and 18 of the Act.

⁵² In respect to terms and conditions of appointment see section 18 of the Act.

⁵³ Inserted by clause 4 as proposed section 3C.

(Interception) (State Provisions) Act 1988 requiring counterpart Commonwealth amendments to the relevant Commonwealth legislation to authorise IBAC as a body for such purposes.

Alcohol and drug testing of IBAC officers

Division 1 of Part 7 and related regulation-making powers in Division 3 establish a regime for testing IBAC officers (other than the Commissioner) for alcohol or drugs of dependence via breath, urine or blood sample. IBAC may direct an IBAC officer to be tested where IBAC reasonably believes that either the test is relevant to the IBAC officer's capacity to perform duties or exercise powers; or where the IBAC officer has been involved in a critical incident (as defined in the proposed legislation). [new sections 90 to 97]

Complaint made by a detained person

Proposed section 37 provides for a procedure by which a detained person can make a complaint to IBAC.⁵⁴

Recommendations, actions and reports

Part 6 deals with IBAC's role in making recommendations, requesting action by the Chief Commissioner, advising complainants and other persons, and publishing special and annual reports.

The Committee makes no further comment

⁵⁴ Being a person in a prison, police gaol, remand centre, youth residential centre or youth justice centre or other specified mental health, residential or treatment service.

Port Management Amendment (Port of Melbourne Corporation Licence Fee) Bill 2011

Introduced	6 December 2011
Second Reading Speech	7 December 2011
House	Legislative Assembly
Member introducing Bill	Hon. Dennis Napthine MLA
Portfolio responsibility	Minister for Ports

Purpose

The Bill amends the *Port Management Act 1995* to provide for the imposition of a licence fee on the Port of Melbourne Corporation. New sections 44H to 44L provide for the liability to pay the licence fee, the amount of the fee and makes provision for the annual CPI indexation of the fee. The commencing licence fee on 1 July 2012 is \$75 million.

The Committee makes no further comment

Road Safety Amendment (Drinking While Driving) Act 2011

Introduced	6 December 2011
Second Reading Speech	6 December 2011
Royal Assent	13 December 2011 ⁵⁵
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Note: The Committee reports on this Act pursuant to section 17(c)(ii) of the *Parliamentary Committees Act 2003*.

Purpose

The Act amends the *Road Safety Act 1986* (the 'Act') to establish two new offences:

- (a) consuming alcohol while driving a motor vehicle
- (b) consuming alcohol while accompanying a learner driver.

The Act provides Victoria Police discretion to issue and serve a traffic infringement notice under the Act with respect to these offences. The offences have a maximum penalty of 10 penalty units, or 2 penalty units where the driver receives a traffic infringement notice.

The Committee makes no further comment

⁵⁵ The Act came into operation on the day after Royal Assent.

Appendix 1

Index of Acts and Bills in 2012

	Alert Digest Nos.
Associations Incorporation Reform Bill 2011	1
Australian Consumer Law and Fair Trading Bill 2011	1
Control of Weapons and Firearms Acts Amendment Bill 2011	1
Emergency Services Legislation Amendment Bill 2011	1
Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011	1
Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011	1
Port Management Amendment (Port of Melbourne Corporation Licence Fee) Bill 2011	1
Road Safety Amendment (Drinking While Driving) Act 2011	1

Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

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

Associations Incorporation Reform Bill 2011	1
Australian Consumer Law and Fair Trading Bill 2011	1
Control of Weapons and Firearms Acts Amendment Bill 2011	1

Section 17(b)

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

Australian Consumer Law and Fair Trading Bill 2011	1
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Appendix 3

Ministerial Correspondence 2012

Table of correspondence between the Committee and Ministers during 2012

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Associations Incorporation Reform Bill 2011	Minister for Consumer Affairs	07-02-12	1 of 2012
Australian Consumer Law and Fair Trading Bill 2011	Minister for Consumer Affairs	07-02-12	1 of 2012
Control of Weapons and Firearms Acts Amendment Bill 2011	Minister for Police and Emergency Services	07-02-12	1 of 2012

Table of Ministers responses still pending

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	25-10-11	12 of 2011