

# **No. 5 of 2011**

**Tuesday, 23 May 2011**

**On the**

Accident Towing Services Amendment  
Bill 2011

Appropriation (2011/2012) Bill 2011

Appropriation (Parliament 2011/2012)  
Bill 2011

Environment Protection Amendment  
(Landfill Levies) Bill 2011

Equal Opportunity Amendment Bill  
2011

Justice Legislation Amendment  
(Infringement Offences) Bill 2011

State Taxation Acts Amendment Bill  
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) presented to the Parliament. The Committee does not make any comments on the policy aspects 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*;

'*child*' means a person under 18 years of age;

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

'*court*' refers to the Supreme Court, the County Court, the Magistrates' Court or the Children's Court as the circumstances require;

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

'*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 \$119.45).

'*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. 5 of 2011

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## Accident Towing Services Amendment Bill 2011

|                                 |                       |
|---------------------------------|-----------------------|
| <b>Introduced</b>               | 3 May 2011            |
| <b>Second Reading Speech</b>    | 5 May 2011            |
| <b>House</b>                    | Legislative Assembly  |
| <b>Member introducing Bill</b>  | Hon. Terry Mulder MLA |
| <b>Portfolio responsibility</b> | Minister for Roads    |

### Background

This Bill amends the *Accident Towing Services Act 2007* (the 'Act').

**Note:** *The Act regulates accident towing in Victoria by providing that accident towing businesses and drivers must be licensed by VicRoads. The scheme also regulates the price of some accident towing services in the 'Melbourne controlled area' (metropolitan Melbourne and Mornington Peninsula).*

### Content

1. The Bill provides for automatic annual indexation of all regulated accident towing and storage charges and requires a four yearly review of all regulated charges.
2. In the non-regulated area the Bill reintroduces the requirement that charges be reasonable and provides that if an unreasonable charge is made, that a court may require the operator to refund the consumer a portion of the charge.
3. The Bill empowers the responsible Minister to determine the charges for basic salvage and requiring complex salvage fees to be reasonable, paralleling the regime for accident towing and storage charges. These charges will be subject to the annual indexation and four-yearly Essential Services Commission review that will apply to regulated accident towing and storage charges.
4. The Bill will enable regulations to be made in relation to the conduct of salvage activities.
5. The Bill provides a requirement that tow-truck operators take all reasonable steps to prevent loss or damage to an accident-damaged vehicle whilst that vehicle is being stored by the operator.
6. The Bill reduces the maximum penalty (from 60 penalty units to 30 penalty units) for a failure to renew accreditation under the Act where the person concerned was previously accredited under the Act but inadvertently failed to renew his or her accreditation.
7. The Bill will enable tow-truck operators to store accident-damaged vehicles in secure areas which have been approved by VicRoads provided that the premises are located within a short distance of the place identified in the Authority to tow location.

**The Committee makes no further comment.**

## **Appropriation (2011/2012) Bill 2011**

|                                 |                      |
|---------------------------------|----------------------|
| <b>Introduced</b>               | 3 May 2011           |
| <b>Second Reading Speech</b>    | 3 May 2011           |
| <b>House</b>                    | Legislative Assembly |
| <b>Member introducing Bill</b>  | Hon. Kim Wells MLA   |
| <b>Portfolio responsibility</b> | Treasurer            |

### **Background**

This Bill provides appropriation authority for payments of certain sums out of the Consolidated Fund for the ordinary annual services of the Government for the financial year 2011/ 2012.

**The Committee makes no further comment.**

## Appropriation (Parliament 2011/2012) Bill 2011

|                                 |                      |
|---------------------------------|----------------------|
| <b>Introduced</b>               | 3 May 2011           |
| <b>Second Reading Speech</b>    | 3 May 2011           |
| <b>House</b>                    | Legislative Assembly |
| <b>Member introducing Bill</b>  | Hon. Kim Wells MLA   |
| <b>Portfolio responsibility</b> | Treasurer            |

### Background

This Bill provides appropriation authority for payments of certain sums out of the Consolidated Fund to the Parliament for the financial year 2011/2012.

**Note:** *In addition to appropriating money for the purposes of the Parliament the Bill appropriates money for the financial year 2011/ 2012 for the Auditor-General for the State of Victoria, being an independent officer of the Parliament pursuant to sections 94A to 94C of the Constitution Act 1975.*

**The Committee makes no further comment.**

# Environment Protection Amendment (Landfill Levies) Bill 2011

|                          |   |
|--------------------------|---|
| Introduced               | 3 May 2011                                  |
| Second Reading Speech    | 5 May 2011                                  |
| House                    | Legislative Assembly                        |
| Member introducing Bill  | Hon. Ryan Smith MLA                         |
| Portfolio responsibility | Minister for Environment and Climate Change |

## Background and Content

The Bill amends the *Environment Protection Act 1970* to increase municipal and industrial waste landfill levies by substituting Schedule D of the Act.

**Note:** *New Schedule D increases the amount payable as landfill levy for each tonne of municipal and industrial waste deposited on Schedule C premises and Non-Schedule C premises. The increases are in 4 increments, that is, for waste deposited in the 2011, 2012 and 2013 financial years and on or after 1 July 2014.*

**The Committee makes no further comment.**

# Equal Opportunity Amendment Bill 2011

|                                 |                       |
|---------------------------------|-----------------------|
| <b>Introduced</b>               | 3 May 2011            |
| <b>Second Reading Speech</b>    | 5 May 2011            |
| <b>House</b>                    | Legislative Assembly  |
| <b>Member introducing Bill</b>  | Hon. Robert Clark MLA |
| <b>Portfolio responsibility</b> | Attorney- General     |

## Background and Content

The Bill amends the *Equal Opportunity Act 2010* (the '2010 Act').

**Note:** *The Act is not yet in force and has a default commencement of 1 August 2011.*

The Bill amends the 2010 Act to –

1. Substitute a new Part 9 concerning the powers of the Commission to conduct investigations to –
  - provide that the investigatory powers of the Commission are to be exercised in cases where there are reasonable grounds to suspect that there is systemic discrimination that cannot reasonably be expected to be resolved by dispute resolution or by application to VCAT. **[21]**
  - provide that the Commission has the power to provide a report on the outcome of an investigation directly to Parliament. **[21]**
  - remove the power for the Commission unilaterally to compel the production of information or documents and attendance as part of its investigation processes; and instead provide that the Commission may apply to VCAT for the necessary order. **[21]**
  - remove the powers of the Commission to issue compliance notices or enter into enforceable undertakings, and instead provide for the Commission to be able to bring proceedings before the VCAT where the Commission finds that discrimination has occurred, or else to enter into an agreement with a party or parties about action required to comply with the Act. **[21]**
2. Remove the ability of the Commission to conduct public inquiries. **[6 and 20]**
3. The Bill reinstates an independent Chair of the Board of the Commission. **[25]** The Bill provides savings and transitional provisions in respect to the current Board and current Commissioner. **[29]**
4. The Bill will allow the Commission to charge a fee for service when conducting voluntary reviews of compliance with the Act, on terms agreed to by the requesting party. **[22]**
5. Repeal the provisions of the 2010 Act under which religious bodies and religious schools could only discriminate in employment where conforming with the doctrines of the religion is an inherent requirement of the position. **[18 and 19]** (*Refer to Charter report also note the Statement of Compatibility*)
 

From the Explanatory Memorandum – *The effect of these amendments is that the terms of the exception allowing discrimination in employment by religious bodies and religious schools will be the same as for other activities.*
6. Provide an exception to permit the payment of youth wages consistent with the authorisation of youth wages under Federal workplace laws. **[8]** (*note the Statement of Compatibility*)
7. Provide an exception which allows a person to refuse to provide accommodation to a child or a person with a child if premises are unsuitable or inappropriate for occupation by a child because of their design or location. **[14]** (*Refer to Charter report also note the Statement of Compatibility*)

8. Provide an exception that ensures that the views of school communities are given proper recognition in considering what are reasonable standards of dress, appearance and behaviour for students. **[11]** (*Refer to Charter report also note the Statement of Compatibility*)
9. Provide an exception for clubs formed principally for a political purpose, so that such clubs are free to decide on the membership of the club on the basis of a potential member's political belief or activity. **[15]** (*Refer to Charter report also note the Statement of Compatibility*)
10. Introduce two new categories of exception for competitive sport activities. The first exception (new section 72(1A)) permits single sex competitions in competitive sporting activities if such competitions are necessary to allow participants to progress to elite level national or international competitions. **[17]** (*note the Statement of Compatibility*)

The second exemption (new section 72(1B)) permits single sex competitions or restrictions on the participation of one sex, where such competitions are intended to facilitate participation in the sport and are, otherwise reasonable with regard being paid to the nature of the sport, the consequences of the exclusion on the excluded or restricted sex and whether there are other opportunities for persons of the excluded or restricted sex to participate in the activity. **[17]** (*note the Statement of Compatibility*)

11. The Bill proposes to clarify that compliance with an applicable Commonwealth standard under the *Disability Discrimination Act 1992 (Cth)* (the 'DDA') satisfies the requirements of the 2010 Act in relation to a relevant reasonable adjustment provision. **[7,9, 10, 12 and 13]** (*note Statement of Compatibility*)

**Note:** From the Statement of Compatibility – *These amendments clarify the relationship between the 2010 Act, standards under the DDA and determinations made under section 160B of the Building Act. The amendments make clear that employers, firms, educational authorities and service providers are not required to make a reasonable adjustment to the extent that they have already complied with, or have been exempted from compliance with, a relevant disability standard made under the DDA.*

...

*The amendments also make clear that employers, firms, educational authorities and service providers are not required to make an adjustment that relates to a building or land when a determination in relation to that adjustment has already been made under section 160B of the Building Act. As explained in the statement of compatibility in relation to the Building Amendment Bill of 2011, which enacted s 160B of the building act, where a person meets the test for an exemption, any limit on the right to equality would be reasonable and justifiable under section 7(2) of the charter act.*

12. The Bill also changes the terminology of the 2010 Act from 'impairment' to 'disability'. **[5, 34 and the Schedule]**
13. The Bill will allow the Commission to disclose certain information in limited circumstances pursuant to a court order in criminal proceedings or where the relevant parties consent to the release of the information. **[27]**
14. The Bill amends the current requirement that the Commission publish an action plan lodged with it on the register of action plans to allow instead for the Commission to publish a plan at its own discretion. **[23]**
15. Insert a new section 188A to replace current section 135 (to be repealed by the new Part 8) to provide that the privilege against self-incrimination applies to a natural person without any limitation. **[28]**

The Bill amends the 2010 Act to make consequential amendments to the *Victorian Civil and Administrative Tribunal Act 1998*. **[30 and 31]**

The Bill amends the *Electoral Act 2002* to insert a statutory exemption in that Act (new section 17A) to enable the Victorian Electoral Commission (the 'VEC') to discriminate in employment on the basis

of political belief or activity without the need to apply to VCAT for an exemption every 3 years. The VEC [35] (*Refer to Charter report also note the Statement of Compatibility*)

## Charter report

### ***Recognition and equality before the law – Lawful discrimination – Exceptions and exemptions – Balancing rights***

*Summary: The Committee refers to Parliament for its consideration whether the exceptions introduced by clauses 11, 14, 15, 18 and 19 are the least limit which can be imposed on the Charter's equality rights to achieve a balance with the rights of school communities, children, political clubs and religious bodies.*

The Committee notes that the Bill permits discrimination:

- on any ground, when an educational authority 'has taken into account the views of the school community in setting' standards of dress, appearance or behaviour for school students (clause 11, amending existing s. 42)
- on the ground of age, when providing accommodation in premises that 'because of their design or location, are unsuitable or inappropriate for occupation by a child' (clause 14, inserting a new section 58A)
- on the ground of political belief or activity, when excluding a person from membership of a club 'established principally for a political purpose' (clause 15, inserting a new section 66A)
- on the grounds of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity, when a religious body or school refuses to employ someone and the refusal either conforms with the doctrines, principles or beliefs of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents (clauses. 18 and 19, amending existing sections 82 and 83)

The Statement of Compatibility remarks that each of the exceptions is intended to facilitate competing rights, respectively, 'of a school community to set standards', of children to protection, of political clubs to freedom of association and of religious bodies to freedom of religion.

The Committee observes that, of the above exceptions, the first is the broadest, as it permits discrimination on any ground and is limited only by a procedural requirement (consultation with the school community), rather than a characteristic of the discriminating entity. The Statement of Compatibility remarks:

*For the provision to apply, the educational authority must have taken into account the views of the school community. The provision would not be satisfied if the authority only took account of the views of one sector of the community and ignored the contrary views of other sectors of the community...*

*I note that this provision does not override the obligation on public schools to comply with their obligations as public authorities under the charter act... [I]n the case of private schools, individuals and their families have their capacity to make a choice about whether or not to attend a particular school...*

The Committee notes that the choice whether or not to attend a particular school may be limited by the availability of places in accessible schools offering comparable education.<sup>1</sup>

Recently, the Victorian Civil and Administrative Tribunal remarked:<sup>2</sup>

<sup>1</sup> See the partial dissents of Lord Nicholls and Baroness Hale in *Begum, R (on the application of) v. Denbigh High School* [2006] UKHL 1, [41], [92]-[93].

<sup>2</sup> *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613, [39].

*The scheme of the Charter allows for the limitation of rights where one person's enjoyment of a Charter right impinges on or impairs another's enjoyment of a Charter right. No right in the Charter, including the right to freedom of religion and the right to express it is absolute. The... obligation, when rights compete [is] to determine the least limit which can be imposed on the enjoyment of both rights to achieve a balance between them.*

**The Committee refers to Parliament for its consideration whether the exceptions introduced by clauses 11, 14, 15, 18 and 19 are the least limit which can be imposed on the Charter's equality rights to achieve a balance with the rights of school communities, children, political clubs and religious bodies.**

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### **Recognition and equality before the law – Lawful discrimination – Exceptions and exemptions – Replacement of tribunal exemption with statutory exception**

*Summary: The Committee refers to Parliament for its consideration the question of whether or not clauses 17 and 35, by replacing exemptions proven before, designed by and monitored by VCAT, with statutory exceptions, is a reasonable limit on the Charter's equality rights to achieve the purposes of promoting participation in elite and competitive sport and the integrity of elections.*

The Committee notes that the Bill permits discrimination:

- on the basis of sex, when excluding people from a sporting team or participation in a sporting activity, when the exclusion is either necessary for progression to an elite level competition or is reasonable to facilitate participation by people of a particular sex (clause 17, amending existing s. 72)
- on the basis of political activity, when the Victorian Electoral Commission employs people or appoints them to its audit committee (clause 35, inserting a new section 17A into the *Electoral Act 2002*.)

The Statement of Compatibility argues that these exceptions are reasonable limits on the Charter's equality rights, aimed at facilitating participation in elite and competitive sports and preserving the integrity of elections.

The Committee notes that these exceptions are in similar terms to exemptions granted by the Victorian Civil and Administrative Tribunal in recent years.<sup>3</sup> In relation to the Victorian Electoral Commission, VCAT remarked:<sup>4</sup>

*Under current equal opportunity legislation, this exemption will need to be renewed every three years. In the long term, rather than fashioning an exemption based on concepts illsuited to dealing with the particular challenges faced by the VEC in protecting our democracy, it may be more sensible for the VEC to be given a statutory exemption which addresses the particular unique characteristics of its office.*

The Committee observes that tribunal exemptions require entities to establish the continuing need for discrimination and to comply with conditions imposed by the tribunal. For example, in granting an exemption permitting girls only netball competitions, VCAT remarked:<sup>5</sup>

*It should not be assumed that the exemption will be automatically renewed everlastingly. Current research will need to be presented on each renewal application to show that the basis of the exemption*

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<sup>3</sup> *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption) [2008] VCAT 241; Victorian Netball Association Inc (Anti-Discrimination Exemption) [2008] VCAT 2651; Victorian Electoral Commission (Anti-Discrimination Exemption) [2009] VCAT 2191*

<sup>4</sup> *Victorian Electoral Commission (Anti-Discrimination Exemption) [2009] VCAT 2191, [188]*

<sup>5</sup> *Victorian Netball Association Inc (Anti-Discrimination Exemption) [2008] VCAT 2651, [46]*

still exists. Research about relative differences in strength, stamina and physique between boys and girls is still limited, and new research may alter the situation.

The exemption for VEC was more limited than that permitted by clause 35:<sup>6</sup>

- (i) *Current membership or membership within the past 15 years of any political party in any State or Territory or the Commonwealth.*
- (ii) *A course of conduct within the past 15 years directed to supporting the aims of a political party or an independent candidate in a State, Territory or Federal election.*
- (iii) *A person who has held the office of councillor for a Victorian local council within the past 15 years’.*
- (iv) *A course of conduct within the past 15 years directed towards supporting the political aims of a local councillor*
- (v) *A person who has publicly engaged in conduct promoting a political position in respect of an issue currently before the electorate in the election for which that person is to be employed’.*
- (vi) *A person who is a member of a lobby group (not being a union or professional association) which promotes a political position in respect of an issue currently before the electorate in the election for which that person is to be employed.*

Both of the VCAT exemptions were also subject to requirements that their beneficiaries regularly report to VCAT on the incidence of and continuing need for discrimination.<sup>7</sup>

***The Committee refers to Parliament for its consideration the question of whether or not clauses 17 and 35, by replacing exemptions proven before, designed by and monitored by VCAT, with statutory exceptions, is a reasonable limit on the Charter’s equality rights to achieve the purposes of promoting participation in elite and competitive sport and the integrity of elections.***

**The Committee makes no further comment.**

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<sup>6</sup> *Victorian Electoral Commission (Anti-Discrimination Exemption) [2009] VCAT 2191, [182]. See also Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption) [2008] VCAT 241, [75].*

<sup>7</sup> *Victorian Netball Association Inc (Anti-Discrimination Exemption) [2008] VCAT 2651, Order (condition 1); Victorian Electoral Commission (Anti-Discrimination Exemption) [2009] VCAT 2191, [186].*

# Justice Legislation Amendment (Infringement Offences) Bill 2011

|                          |                       |
|--------------------------|-----------------------|
| Introduced               | 3 May 2011            |
| Second Reading Speech    | 5 May 2011            |
| House                    | Legislative Assembly  |
| Member introducing Bill  | Hon. Robert Clark MLA |
| Portfolio responsibility | Attorney-General      |

## Background and content

The Bill provides for the continued use of infringement notices for the following offences on an ongoing basis, following the three-year trial period which was due to expire on 30 June 2011.

1. the public order offence of indecent or offensive language under section 17(1)(c) of the *Summary Offences Act 1966*. [6]
2. the public order offence of offensive behaviour under 17(1)(d) of the *Summary Offences Act 1966*. [6]
3. consume, supply, or possess liquor on unlicensed premises or permit the consumption, supply, or possession of liquor on unlicensed premises under sections 113(1), (1A), (1B) and (1C) of the *Liquor Control Reform Act 1998*. [4]
4. party bus operator permits liquor to be consumed on board without licence/permit under section 133A of the *Liquor Control Reform Act 1998*. [4]
5. failure by a drunk, quarrelsome or violent person to leave licensed premises when requested to do so under section 114(2) of the *Liquor Control Reform Act 1998*. [4]

**Note:** *The Infringements Act 2006 provides a person who pays an infringement penalty and any prescribed costs within the time required under that Act expiates the offence by that payment. Section 33 of that Act provides that, generally, expiation means that no further proceedings may be taken against the person for that offence and no conviction is taken to have been recorded against the person for that offence. Payment is not to be taken as an admission of guilt or liability and payment is not to be referred to in any report provided to a court for the purposes of determining sentence for an offence.*

The Bill provides for a further one-year trial period during which infringement notices will be able to be issued for the following offences: shop theft of goods valued at up to \$600 under section 74A of the *Crimes Act 1958*. [5]; wilful damage of property valued at less than \$500 under section 9(1)(c) of the *Summary Offences Act 1966*. [6]

Extract from the Second Reading Speech –

*The data from the trial suggests that people receiving shop theft infringements are repeat offenders with a wide spectrum of offences on their record. Further evaluation will include the views of key stakeholders and the impact of expiated shop theft offences not going on a person's criminal record. In the case of wilful damage, more work needs to be done to determine whether the needs and rights of the victim of the damage are being taken into account as they should be when the infringements process is used.*

The Bill clarifies that only a judicial officer (as opposed to a registrar) may cancel an infringement notice under the relevant provisions in the *Children, Youth and Families Act 2005*. [7]

## **Submissions received**

The Committee received a written submission from Dr Helen Szoke, Commissioner, Victorian Equal Opportunity and Human Rights Commission.

The submission concerned the suitability of and potential impact of the infringement penalty regime in respect to vulnerable persons and people with special circumstances such as the young, homeless or persons experiencing financial hardship.

The submission will be posted on the Committee's website.

**The Committee makes no further comment.**

## State Taxation Acts Amendment Bill 2011

|                          |                      |
|--------------------------|----------------------|
| Introduced               | 3 May 2011           |
| Second Reading Speech    | 5 May 2011           |
| House                    | Legislative Assembly |
| Member introducing Bill  | Hon. Kim Wells MLA   |
| Portfolio responsibility | Treasurer            |

### Purpose

The Bill amends the –

*Duties Act 2000* to—

- reduce the duty payable for eligible first home buyers on the purchase of a principal place of residence in certain circumstances. **[7, 17, 18]**
- extend the exemption and concession available for eligible concession card holders. **[12 to 16]**
- provide a duty exemption for young farmers (under the age of 35 years) purchasing their first farmland property in certain circumstances. The new provisions are sections 69AA to 69AI of the Act **[19]**
- correct outdated references in the Act to the Australian Stock Exchange. **[20 to 29]**

*First Home Owner Grant Act 2000* to —

- extend the availability of the first home bonus of \$13,000 for eligible transactions entered into on or before 1 July 2012. **[32]**
- extend the availability of the first home regional bonus of \$6,500 for eligible transactions entered into on or before 1 July 2012. **[32]**
- increase the penalty which may apply where a first home owner grant applicant does not give written notice of their failure to comply with the residence requirement and repay the grant within 14 days of the end of the period allowed for compliance. The penalty is increased from 60 penalty units to 120 penalty units (\$14,334). **[30]**

- ***Presumption of innocence – Reverse burden of proof – Potential custodial sentence*** – The Bill substitutes an amended section 47 of the Act to broaden the scope of the offence for providing false or misleading statements (the current offence), to include the giving of information or producing a document which is false or misleading in connection with an application for the first home owner grant, or omitting information or failing to produce a document, without which, the application is to the person's knowledge, false and misleading and increase the penalty for the offence from 60 penalty units to 120 (\$14,334) penalty units or a maximum 12 month term of imprisonment (or both). **[31]** (*Refer to Charter report below*)

*Payroll Tax Act 2007* to replace references to in the Act to outdated *Income Tax Assessment Act 1936 (Cth)* contained in provisions relating to employee share and options schemes and to align definitions and concepts with the new income taxation provisions in the *Income Tax Assessment Act 1997 (Cth)*. **[33 to 39]**

*Taxation Administration Act 1997* to deem that a notice of an assessment of duty has been issued and served where a transaction is processed using the online system for payment of land transfer duty. **[40 to 44]**

**Note:** This ensures that taxpayers have objection rights under the Taxation Administration Act 1997 for a transaction processed using the on-line system in the same way as a transaction that is not processed using the on-line system.

## Charter review

### **Presumption of innocence – Reverse onus – False or misleading information – Penalty of imprisonment**

**Summary:** The Committee refers to Parliament for its consideration the question of whether or not clause 31, by exposing defendants who are unable to prove that they did not know that information they supplied in connection with a first home owner grant was false or misleading to a potential prison sentence, is a reasonable limit of the Charter's right to be presumed innocent until proved guilty according to law.

The Committee notes that clause 31, substituting a new section 47 of the First Home Owner Grant Act 2000, provides that a person who has given false or misleading information in relation to an application for a first home owner grant is not guilty if the trial court 'is satisfied that the person did not know that the information... was false or misleading'. This means that such a person will be found guilty unless he or she can prove to the court on the balance of probabilities that he did not know that the information was false or misleading.<sup>8</sup> The Committee considers that clause 31 may limit the Charter's right to be presumed innocent until proved guilty according to law.<sup>9</sup>

The Statement of Compatibility remarks:

*The purpose of the limitation is to provide an opportunity for an individual to escape liability, where they did not know the information, statement or document given in or in connection with a first home owner grant application was false and misleading...*

*An evidential onus would be less restrictive upon the right to be presumed innocent, however, it would not be as effective because it could be too easily discharged by the accused, leaving the prosecution in the difficult position of having to prove what the accused did reasonably know. The inclusion of a defence with a burden on the accused to prove the matters on the balance of probabilities achieves an appropriate balance of all interests.*

The Committee observes that:

- Clause 31 provides that the offence of providing false or misleading information carries a maximum sentence of a year in prison.
- Equivalent offences in the ACT, New South Wales, the Northern Territory, Queensland, South Australia and Tasmania require the prosecution to prove the defendant's fault beyond reasonable doubt.<sup>10</sup>
- Neither of the remaining equivalent offences in Australia that are subject to similar reverse onus provisions expose the defendant to imprisonment.<sup>11</sup>
- The question of the compatibility of reverse onus provisions with the Charter's right to be presumed innocent is presently being considered by the High Court of Australia.<sup>12</sup>

<sup>8</sup> *R v Momcilovic* [2010] VSCA 50, [22]-[23] (presently on appeal to the High Court.)

<sup>9</sup> Charter s. 25(1).

<sup>10</sup> *Criminal Code 2002* (ACT), s. 337 (providing recklessness as an alternative); *First Home Owner Grant Act 2000* (NSW), s. 44; *First Home Owner Grant Act 2000* (NT), s. 42 (providing recklessness as an alternative); *First Home Owner Grant Act 2000* (Qld), ss. 42-43; *First Home Owner Grant Act 2000* (SA), s. 38(1) (requiring proof of dishonesty); *First Home Owner Grant Act 2000* (Tas), s. 37 (requiring proof of dishonesty, intent or negligence).

<sup>11</sup> *First Home Owner Grant Act 2000* (SA), s. 38(2) (\$5000 fine); *First Home Owner Grant Act 2000* (WA), s. 47 (\$20,000 fine).

***The Committee refers to Parliament for its consideration the question of whether or not clause 31, by exposing defendants who are unable to prove that they did not know that information they supplied in connection with a first home owner grant was false or misleading to a potential prison sentence, is a reasonable limit of the Charter's right to be presumed innocent until proved guilty according to law.***

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***Statement of compatibility – Clarification of intended legal effect of provision***

The Committee notes that the statement of compatibility on clause 31 (substituting a new section 47(2)) contains a number of statements that the Committee considered Parliament may be assisted with further clarification: The statements:

- refer to a requirement that defendants 'adduce or point to the evidence' of their lack of knowledge, that is, a reverse evidential burden.
- remark that 'where a defendant raises evidence of lack of knowledge, the prosecution will have the burden of disproving these matters beyond reasonable doubt', that is, no legal burden on the accused.
- remark that clause 31 imposes 'a defence with a burden on the accused to prove the matters on the balance of probabilities achieves an appropriate balance of all interests', that is, a reverse legal burden.

***The Committee will write to the Treasurer seeking further information as to the precise effect of clause 31.***

**The Committee makes no further comment.**

**Committee Room  
23 May 2011**

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<sup>12</sup> *Momcilovic v R* [2011] HCAASP 4.

# Appendix 1

## Index of Bills in 2011

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### Alert Digest Nos.

|  |      |
|--|------|
| Accident Towing Services Amendment Bill 2011                               | 5    |
| Appropriation (2011/2012) Bill 2011  | 5    |
| Appropriation (Parliament 2011/2012) Bill 2011                             | 5    |
| Building Amendment Bill 2011   | 1, 2 |
| Bushfires Royal Commission Implementation Monitor Bill 2011                | 1    |
| Civil Procedure and Legal Profession Amendment Bill 2011                   | 1    |
| Civil Procedure Bill 2010  | 1    |
| Country Fire Authority Amendment (Volunteer Charter) Bill 2011             | 2    |
| Crimes Amendment (Bullying) Bill 2011                                      | 4    |
| Dental Hospital Land Bill 2011   | 4    |
| Education and Training Reform Amendment (School Safety) Bill 2010          | 1, 3 |
| Environment Protection Amendment (Landfill Levies) Bill 2011               | 5    |
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| Family Violence Protection Amendment (Safety Notices) Bill 2011            | 4    |
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| Liquor Control Reform Amendment Bill 2011                                  | 3, 4 |
| Multicultural Victoria Bill 2011   | 3    |
| Parliamentary Committees Amendment Bill 2011                               | 2    |
| Parliamentary Salaries and Superannuation Amendment Bill 2011              | 3    |
| Police Regulation Amendment (Protective Services Officers) Bill 2010       | 1    |
| Public Holidays Amendment Bill 2011  | 4    |
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| Residential Tenancies Amendment (Public Housing) Bill 2011                 | 3    |
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| Shop Trading Reform Amendment (Easter Sunday) Bill 2011                    | 1    |
| Shrine of Remembrance Bill 2011  | 1    |
| State Taxation Acts Amendment Bill 2011                                    | 5    |
| Statute Law Revision Bill 2011   | 1    |
| Victoria Law Foundation Amendment Bill 2011                                | 1    |



## Appendix 2

### Committee Comments classified by Terms of Reference

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

#### Alert Digest Nos.

#### Section 17(a)

**(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**

Justice Legislation Amendment Bill 2011

2

**(iv) unduly requires or authorise 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 authorise 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 Act 2006***

Building Amendment Bill 2011

1

Education and Training Reform Amendment (School Safety) Bill 2010

1

Justice Legislation Amendment Bill 2011

2

Liquor Control Reform Amendment Bill 2011

3

Sentencing Amendment Act 2010

1

#### Section 17(b)

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



## Appendix 3

### Ministerial Correspondence 2011

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**Table of correspondence between the Committee and Ministers during 2011**

| <b>Bill Title</b>   | <b>Minister/ Member</b>       | <b>Date of Committee Letter / Minister's Response</b> | <b>Alert Digest No. Issue raised / Response Published</b> |
|---|-------------------------------|---|---|
| Building Amendment Bill 2011                                      | Minister for Planning         | 01.03.11<br>21.03.11                                  | 1 of 2011<br>2 of 2011                                    |
| Education and Training Reform Amendment (School Safety) Bill 2010 | Minister for Education        | 01.03.11<br>28.03.11                                  | 1 of 2011<br>3 of 2011                                    |
| Justice Legislation Amendment Bill 2011                           | Minister for Consumer Affairs | 22.03.11<br>04.04.11                                  | 2 of 2011<br>3 of 2011                                    |
| Sentencing Amendment Act 2010                                     | Attorney-General              | 01.03.11<br>05.04.11                                  | 1 of 2011<br>4 of 2011                                    |
| Liquor Control Reform Amendment Bill 2011                         | Consumer Affairs              | 05.04.11<br>21.04.11                                  | 3 of 2011<br>4 of 2011                                    |

**Table of Ministers responses still pending**

| <b>Bill Title</b> | <b>Minister/ Member</b> | <b>Date of Committee Letter / Minister's Response</b> | <b>Alert Digest No. Issue raised / Response Published</b> |
|-------------------|-------------------------|---|---|
|                   |                         |   |   |