

# **No. 7 of 2014**

**Tuesday, 10 June 2014**

**On the following Bills**

Building Legislation Amendment  
Bill 2014

Native Vegetation Credit Market  
Bill 2014

Private Health Care Facilities Bill 2014

Road Safety Amendment Bill 2014

# The Committee



Chairperson  
Hon. Richard Dalla-Riva MLC  
Member for Eastern Metropolitan



Deputy Chairperson  
Hon. Christine Campbell MLA  
Member for Pascoe Vale



Ms Ann Barker MLA  
Member for Oakleigh



Mr Michael Gidley MLA  
Member for Mount Waverley



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## Terms of Reference - Scrutiny of Bills

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

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

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# Useful information

## Role of the Committee

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

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

## Interpretive use of Parliamentary Committee reports

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

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

## When may human rights be limited

Section 7 of the *Charter* provides –

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

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

## Glossary and Symbols

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

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

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

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

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

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

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (as from 1 July 2013 one penalty unit equals \$144.36 )

'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. 7 of 2014

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## Native Vegetation Credit Market Bill 2014

Introduced	27 May 2014
Second Reading Speech	28 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Ryan Smith MLA
Portfolio responsibility	Minister for Environment and Climate Change

### Purpose

The Bill is for a principal Act to:

- a) provide for the creation of native vegetation credits **[Parts 2 and 3]**
- b) enable native vegetation management agreements to be made between the Secretary and landowners **[Part 5]**
- c) enable vegetation improvement plans to be created for certain Crown land **[Part 3]**
- d) establish a Register of records and information relating to native vegetation credits **[Part 6]**
- e) set out the purposes for which native vegetation credits may be used **[Part 7]**
- f) provide for the transfer of native vegetation credits (Part 8) and the suspension and cancellation of native vegetation credits **[Part 9]**
- g) establish a Fund for the holding of certain monies related to native vegetation credits **[Part 10]**
- h) provide for the enforcement of native vegetation management agreements through a variety of mechanisms **[Part 11]**
- i) make consequential amendments to the *Conservation, Forests and Lands Act 1987*, the *Crown Land (Reserves) Act 1978*, the *National Parks Act 1975*, the *Planning and Environment Act 1987* and the *Traditional Owner Settlement Act 2010*. **[Part 13]**

### Content

***Rights or freedoms – Presumption of innocence – Reverse legal burden – Native Vegetation management agreement – Criminal offence for breach of agreement — Damage or degradation to protected native vegetation***

The Bill creates criminal offences concerning contravention of a native vegetation agreement. The offences apply to the owner of the land that is subject to the agreement. It is a defence to each offence if the owner proves (a legal burden on the balance of probabilities) that he or she took all reasonable steps to comply with the agreement. The penalties for breach range from 600 penalty units (section 118) to 120 penalty units (section 119). Neither offence is punishable by imprisonment. **[118, 119]**

**The Committee notes the detailed explanation in the statement of compatibility justifying the imposition of a legal burden upon a defendant for these regulatory offences.**

## **Charter report**

The Native Vegetation Credit Market Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment**

## Private Health Care Facilities Bill 2014

<b>Introduced</b>	27 May 2014
<b>Second Reading Speech</b>	28 May 2014
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon Mary Wooldridge MLA
<b>Portfolio responsibility</b>	Minister for Health

### Purpose

The Bill is for an Act to provide for:

- a registration scheme for private health care facilities
- oversight mechanisms to ensure the welfare of patients of private health care facilities
- compliance notices to be issued to proprietors of health care facilities requiring the proprietor to remedy breaches where there is an identified non-compliance with the legislation **[Part 4]**
- enforcement mechanisms to ensure compliance with the proposed Act. **[Part 5]**

The Bill repeals Part 4 (Health Services Establishments) of the *Health Services Act 1988* and makes various consequential amendments to that Act.

### Charter report

The Private Health Care Facilities Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment**

## Road Safety Amendment Bill 2014

<b>Introduced</b>	27 May 2014
<b>Second Reading Speech</b>	28 May 2014
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon Terry Mulder MLA
<b>Portfolio responsibility</b>	Minister for Roads

### Purpose

The Bill amends the *Road Safety Act 1986* to:

- a) create a new offence of combined drink-driving and drug-driving with a mandatory minimum 12 month licence cancellation with longer periods for higher BAC and for repeat offences
- b) expand the circumstances in which a driver
  - will have his or her driver licence or learner permit cancelled, or be disqualified from obtaining one, for a drink-driving offence
  - will be subject to a zero blood or breath alcohol requirement or an alcohol interlock requirement when driving
- c) empower the Roads Corporation (VicRoads) to:
  - impose or remove alcohol interlock conditions on driver licences or learner permits in certain circumstances
  - exempt certain persons from a requirement to have an alcohol interlock condition imposed on their driver licence or learner permit
  - require certain approved alcohol interlocks to be capable of recording the identity of users
  - impose revised inspection, record-keeping and other conditions on approved alcohol interlock suppliers
  - impose cost recovery fees on persons who have had an approved alcohol interlock installed in a motor vehicle and provide for its collection
- d) allow cost recovery for vehicle removal from registered operators of vehicles in addition to owners of vehicles
- e) empower the Magistrates' Court to determine whether a particular person is responsible for an attempt to start a motor vehicle that failed because an approved alcohol interlock installed in the vehicle detected more than a certain concentration of alcohol
- f) expand the vehicle impoundment scheme to cover certain first offences involving drink-driving with a BAC of 0.10 or higher and the new combined drink and drug driving offences
- g) increase from one year to 3 years the zero blood or breath alcohol requirement for motor cyclists who already hold a licence to drive a car and expand the circumstances in which motor cyclists must carry their driver licence.

The Bill amends the:

- *Accident Compensation Act 1985*, the *Transport Accident Act 1986* and the *Workplace Injury Rehabilitation and Compensation Act 2013* to include the new combined drink and drug driving offences as offences that, if a person is convicted or found guilty, can affect income compensation payments and lump sum impairment compensation

- *Rail Management Act 1996* to provide for the continuation beyond their expiry date of binding access arrangements under that Act
- *Transport (Compliance and Miscellaneous) Act 1983*, the *Rail Safety (Local Operations) Act 2006*, the *Road Safety Act 1986*, the *Road Safety Amendment (Operator Onus) Act 2012* and the *Transport (Compliance and Miscellaneous) Amendment (On-the-Spot Penalty Fares) Act 2013* for the purpose of making statute law revision and minor technical amendments.

Extract from the second reading speech:

This Bill addresses stage 1 and will make interlocks mandatory for:

- every first offender who has a probationary licence or learner permit
- other drivers who have a BAC of 0.07 to 0.15
- drivers with a BAC under 0.07 whose licences are cancelled, including professional drivers of buses and taxis, as well as first year motorcycle riders who are subject to a zero BAC limit
- all repeat offenders with a BAC reading under 0.07
- serious alcohol-related vehicle offences under the Sentencing Act 1991, including first offences.

The Bill will make licence cancellation mandatory for learner and probationary drivers with a first offence below 0.07 BAC and all repeat offenders with a BAC below 0.07. The minimum licence cancellation for a first offence under 0.05 BAC will be three months.

## Content

### ***Delayed commencement of more than 12 months***

The Bill provides that Part 2, Division 1 of Part 4 and Division 2 of Part 5 come into operation on 1 August 2015. Part 2 deals with the new combined drink and drug driving offences. Division 1 of Part 4 deals with vehicle impoundment, immobilisation and forfeiture.

In respect to the delayed commencement the explanatory memorandum provides:

This is to allow time for systems to be put in place to effectively administer these new provisions. Division 2 of Part 5 contains amendments to other Acts consequential on the new combined drink and drug driving offences. **[2(3)]**

## Charter report

The Road Safety Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment**



# Ministerial Correspondence

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## Building Legislation Amendment Bill 2014

The Bill was introduced into the Legislative Assembly on 6 May 2014 by the Hon. Robert Clark MLA. The Committee considered the Bill on 26 May 2014 and made the following comments in Alert Digest No. 6 tabled in the Parliament on 27 May 2014.

### Committee Comments

#### **Delayed commencement of more than 12 months**

The Bill provides that some provisions may not commence before 1 July 2016. The Committee refers to its Practice Note concerning commencement provisions in excess of 12 months from Royal Assent and notes that no explanation justifying a commencement in excess of 2 years is provided in either the explanatory memorandum or the second reading speech. [2]

**The Committee will write to the Minister seeking further information to justify such a provision.**

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#### **Charter report**

**Fair hearing – Self-incrimination – Victorian Building Authority, municipal building surveyors and Energy Safe Victoria may require any person to lead them to information that may be used to prosecute them**

Summary: The Committee refers to Parliament for its consideration the question of whether or not clause 86, by empowering the Victorian Building Authority, municipal building surveyors and Energy Safe Victoria to require any person to lead them to information that may be used to prosecute them, is compatible with the Charter's rights to a fair hearing and against compelled self-incrimination.

The Committee notes that clause 86, inserting new sections 227G and 227H into the *Building Act 1993*, provides that, if the Victorian Building Authority, municipal building surveyors or Energy Safe Victoria believes that 'a person is capable of providing information':

- that may assist in monitoring compliance with the *Building Act 1993* or its regulations or the assessment of a person's fitness to continue to practice as a registered building practitioner; or
- relating to a matter that constitutes, or may constitute, a contravention of the *Building Act 1993* or may assist in the assessment of a person's fitness to practice as a registered building practitioner;

then that person may be required to provide the information in writing or to appear to give that information orally (or, in some instances, by oath or affirmation.) Sub-sections 227G(3) and 227H(4) provide that the person is required to give information even if it may tend to incriminate that person; however, 227G(4) and 227H(5) provide that 'the answer by a person to any question asked... under this section or the provision by a person of any information... under this section is not admissible in evidence against the person' in most proceedings.

The Statement of Compatibility remarks:

Neither sections 227G or 227H, or section 232F,<sup>i</sup> apply to ‘derivative’ use, which is when, as a result of the compelled statement, further evidence is uncovered that incriminates the maker of the statement. This means that such further evidence is permitted to be used in a criminal prosecution against the person, which arguably limits the right against self-incrimination...

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 wrongdoing and misconduct may escape liability. The limitation on derivative use immunity addresses this issue by allowing authorised persons 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.

However, the Committee notes that new sections 227G and 227H are not limited to builders and other commercial operators. For example, the powers may be applied to the clients of builders, families, neighbours and any others who may have relevant information about compliance or fitness. The information derived from their answers may be used to prosecute those people for complicity in offences against the *Building Act* or for other general crimes, such as tax evasion or damage to property.

**The Committee refers to Parliament for its consideration the question of whether or not clause 86, by empowering the Victorian Building Authority, municipal building surveyors and Energy Safe Victoria to require any person to lead them to information that may be used to prosecute them, is compatible with the Charter’s rights to a fair hearing and against compelled self-incrimination.<sup>ii</sup>**

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#### **Fair hearing – Directors liable to pay penalty imposed on body corporate**

Summary: New section 243B may make one person liable for a criminal punishment imposed on another, without that person being a party to the hearing where the punishment was imposed and without proof of that the person had any responsibility for the offending. The Committee will write to the Minister seeking further information.

The Committee notes that clause 95, inserting a new section 243B into the *Building Act 1993*, provides that, if a body corporate is found guilty of an offence under the Act or regulations and any penalty imposed on the corporate is not paid within the time required for payment, then joint and several ‘liability to pay the penalty attaches to’ every director of the body corporate (both when the offence was committed and the penalty was imposed.)

**The Committee observes that new section 243B may make one person liable for a criminal punishment imposed on another, without that person being a party to the hearing where the punishment was imposed (or provision for that person to appeal the verdict or penalty imposed on the corporation) and without proof that the person had any responsibility for the offending.**

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<sup>i</sup> The Committee notes that new section 232F does not abrogate the privilege against self-incrimination for compelled statements (see sub-section 232F(1)), but instead only does so for the compelled production of pre-existing documents (see sub-section 232F(2)).

<sup>ii</sup> See Charter ss. 24(1) and 25(2)(k).

The Committee notes that new section 243B differs from other common provisions that make corporate directors:

- criminally liable for offences committed by a body corporate, as such provisions generally require proof of (or the absence of defences to) each director's responsibility for such an offence.<sup>iii</sup>
- liable to pay fines imposed on an insolvent body corporate, as such provisions require that the director was aware that the corporate could not pay the penalty or failed to take reasonable steps to require the corporate to pay.<sup>iv</sup>

The Statement of Compatibility does not discuss new section 243B. The Committee observes that the provision appears to be based on s. 111C of the *Queensland Building and Construction Commission Act 1991* (Qld). When that provision was introduced, the accompanying explanatory notes stated: 'The aim of this provision is to replace the Deeds of Guarantee and Indemnity currently required by the Authority from all directors of a company who is licensed.'<sup>v</sup>

**The Committee will write to the Minister seeking further information as to the compatibility of new section 243B of the *Building Act 1993* with the Charter's right to have criminal charges decided after a fair hearing.<sup>vi</sup> Pending the Minister's response, the Committee draws attention to clause 95.**

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#### **Fair hearing – Analyst certificate is proof of facts stated in the certificate unless defendant gives 14 days notice**

Summary: New section 84 of the *Domestic Building Contracts Act 1995* provides that the production by a prosecutor of the certificate of an analyst is proof of the facts stated in the certificate in any proceedings for an offence under the Act unless the defendant gives 14 days notice. The Committee observes that nearly all other Victorian provisions for analyst certificates require the prosecutor to serve the certificate on the defendant or only make the certificate rebuttable evidence of the facts in the certificate. The Committee will write to the Minister seeking further information.

**The Committee notes that clause 178, inserting a new section 84 into the *Domestic Building Contracts Act 1995*, provides that the 'production by a prosecutor of the certificate of an analyst is proof of the facts stated in the certificate' in any proceedings for an offence under the Act unless the defendant gives 14 days notice that he or she requires the analyst to be called as a witness.**

The Statement of Compatibility does not address new section 84. The Committee notes that new section 84 is based on existing s. 214(3) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic), which is in turn based on earlier provisions in s. 156 of the *Fair Trading Act 1999* and s. 67(2) of the *Consumer Protection Act 1972*.<sup>vii</sup> **However, the Committee observes that nearly all other Victorian provisions for analyst certificates require the prosecutor to serve the certificate on the defendant or only make the certificate rebuttable evidence of the facts in the certificate (rather than conclusive proof of those facts.)<sup>viii</sup>**

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<sup>iii</sup> E.g. new sections 243 and 243A.

<sup>iv</sup> *Infringements Act 2006* (Vic), s. 91; *Sentencing Act 1991* (Vic), s. 55.

<sup>v</sup> Explanatory notes to the Queensland Building Services Authority Amendment Bill 1999, clause 35.

<sup>vi</sup> Charter s. 24(1).

<sup>vii</sup> The 1972 Act only required 24 hours notice.

<sup>viii</sup> See *Dangerous Goods Act 1985*, s. 24A; *Drugs, Poisons and Controlled Substances Act 1981*, s. 120; *Environment Protection Act 1970*, s. 59AB; *Evidence Act 2008*, s. 177; *Food Act 1984*, s. 50 c.f. s. 45; *Marine (Drug, Alcohol and Pollution Control) Act 1988*, ss. 32, 32A, 32B; *Public Health and Wellbeing Act 2008*, s. 224; *Radiation Act 2005*, s. 13;

The Committee will write to the Minister seeking further information as to the compatibility of new section 84 of the *Domestic Building Contracts Act 1995* with the Charter's right to have criminal charges determined after a fair hearing. Pending the Minister's response, the Committee draws attention to clause 178.

## Committee Comments

Thank you for the opportunity to comment in response to your letter of 27 May 2014 in relation to the consideration of the Building Legislation Amendment Bill 2014 ('the Bill') by the Scrutiny of Acts and Regulations Committee ('the Committee').

I note that the Committee has raised four issues, and seeks comments on three of those issues. My comments on these issues are below.

### Issue 1: Delayed commencement date

The default commencement date of 1 July 2016 contained in clause 2 of the Bill is to give flexibility in the implementation of certain measures in the Bill. In particular, it is likely that the implementation of the new domestic building consumer protection scheme and the building permit number system will require significant upgrades to the Victorian Building Authority's information technology systems. While it is anticipated that the new arrangements will be in place by 1 July 2015, the Bill provides for flexibility to ensure that the new arrangements can commence smoothly.

### Issue 2: Application of sections 227G and 227H

The powers in sections 227G and 227H enable the Victorian Building Authority, municipal building surveyors and Energy Safe Victoria to obtain information, documents and, in the case of section 227H, evidence. It is expected that these powers will mostly be used with respect to persons who participate in the operation of a business through corporate structures. On occasion, however, these powers might be applied to other persons.

Accordingly, important safeguards have been built into the provisions to limit the use of information, documents and evidence gathered directly through the powers contained in sections 227G and 227H with respect to natural persons.

In particular, information and documents gathered through these provisions cannot be used in criminal proceedings against a natural person, except with respect to criminal proceedings under sections 227G and 227H relating to the truth or falsity of the answer given, non-compliance or hindering or obstructing an authorised person. The ability to use the information and documents in prosecutions under sections 227G and 227H is a limitation on the privilege against self-incrimination, but one that is necessary and reasonable to ensure the effectiveness of the information-gathering powers.

Additionally, in my view, it is highly unlikely that persons such as those referred to by the Committee would be at risk of incriminating themselves by providing information which they will be required to provide by virtue of the operation of these provisions. Authorised persons can only require information to be provided in accordance with the terms of sections 227G and 227H and, as is made clear by new section 232L of the Building Act, will only be able to use such information for the purposes for which it was obtained (see also *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 424 per Brennan J). The information-gathering powers in new sections 227G and 227H are consequently appropriately confined and will not authorise an authorised person to engage in a wide-ranging inquiry that may lead to a person who is not a commercial operator to incriminate himself or herself. A person who was asked a question that extended beyond the scope of the questioning power provided in these

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*Rail Safety Act 2006*, ss. 83, 84; *Road Safety Act 1986*, ss. 55E, 57, 57A, 57B; *Water Act 1989*, s. 302; *Water Industry Act 1984*, s. 177A. The exception is s. 71(4) of the *Agricultural and Veterinary Chemicals (Control of Use) Act 1991*.

sections could refuse to answer the question. Further, an authorised officer will not be able to use or disclose the information obtained except in accordance with new section 232L, and also new section 259B, which allows for information sharing arrangements to occur in certain circumstances.

In relation to the rare situation in which a client of a builder may be complicit in an offence against the Building Act, I consider that it is still appropriate not to provide a derivative use immunity in such cases for the reasons outlined in the statement of compatibility in relation to why it was justifiable not to provide a derivative use immunity.

### Issue 3: Directors' liability to pay penalties

The Committee has asked for further information as to the compatibility of new section 243B of the Building Act with the Charter Act's right to have criminal charges decided after a fair hearing. Section 243B will apply where a body corporate is found guilty of an offence against a provision of this Act or the regulations; a penalty for the offence is imposed on the body corporate and the amount of the penalty is not paid within the time required for payment. In such circumstances, the liability to pay the penalty attaches to each person who was a director of the body corporate when the offence was committed and each person who is a director of the body corporate when the penalty is imposed.

In my view, new section 243B imposes a civil liability on directors in certain circumstances. It does not impose criminal liability upon a director following on from a company being charged with a criminal offence. Its purpose is to prevent the corporate veil from being used in order to avoid the payment of penalties, but it does not result in a director being criminally liable for offences committed by a body corporate without a hearing of the charges against the body corporate first occurring.

I therefore consider new section 243B to be compatible with the right to have criminal charges determined after a fair hearing, which is contained in section 24 of the *Charter of Human Rights and Responsibilities Act 2006* ('Charter Act').

It should also be noted that the Sentencing Advisory Council ('SAC'), in its report: *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria* released on 30 May 2014, has recommended that directors of corporations be made personally liable for the payment of fines incurred by those corporations.

The SAC saw four problems with the current approach that generally allows directors to avoid liability. First, the SAC found it is common for corporations with very few, or no, assets to incur numerous fines or penalties and avoid payment, because the corporation's property is insufficient to discharge the debt. Second, the SAC found that directors' personal liability provides one means of addressing phoenix activity by corporate offenders. Third, directors' personal liability is a 'last resort' sanction for wilful default by a corporation. Directors' personal liability targets the 'guiding mind' of the corporation, at whose behest the corporation has defaulted. Fourth, directors' personal liability means that law-abiding corporations – which comprise approximately 60% of all corporations issued with a fine – are not disproportionately penalised because of the unlawful behaviour of the remaining 40%.

The SAC concluded: 'Directors' personal liability strengthens the effectiveness and credibility of fines and penalties by limiting the opportunity for corporations to evade payment at the behest of their directors.'

I would note that the SAC recommended that two defences, modelled on the Director Penalty Notice regime under income tax legislation, be made available to directors, namely that the director:

- did not take part in the management of the corporation when the penalty became payable, and it would not have been reasonable to expect the director to take part in the management of the corporation at that time due to illness or another reason; or

- took reasonable steps to (or there were no such reasonable steps the director could take to) cause the corporation to pay the penalty, have the corporation placed into administration or begin winding up the corporation.

The first of these defences appears appropriate, given that a director in such circumstances would not be acting as a guiding mind of the corporation. Similarly, part of the second defence also appears appropriate. That is, it appears appropriate that a director who took reasonable steps to cause the corporation to pay the penalty is not held liable themselves.

On the other hand, the other aspects of the second proposed defence, namely the act of putting a corporation into administration or winding up a corporation due to its insolvency, do not appear appropriate. While such defences are appropriate with respect to civil debts such as income tax, allowing such defences in the context of criminal penalties would facilitate the avoidance of liability of the penalty and, therefore, would be contrary to the aims of the provision, being to deter phoenixing activity and non-compliance.

As the SAC's report was issued only on 30 May 2014, I have not had time to examine it in detail. However, these proposed defences raised by the SAC are important, and I will therefore consider them further in consultation with the Attorney-General.

#### Issue 4: Analysts' certificates

New section 84 of the *Domestic Building Contracts Act 1995* is, as the Committee surmises, modelled on section 214(3) of the *Australian Consumer Law and Fair Trading Act 2012*. The provision has a long lineage dating back at least as far as the *Goods (Amendment) Act 1941* and the *Public Health Amendment Statute 1883*, which in turn can be traced to Imperial legislation.

The effect of the provision is to provide a fair balance between the need for efficiency in the conduct of criminal and civil proceedings with procedural fairness, embodied in section 24 of the Charter Act. It ensures that, while a certificate of an analyst is generally considered proof of the facts contained therein, procedural fairness is not limited by ensuring that the defendant in a criminal proceeding or a party in a civil proceeding can call the analyst and cross-examine that person as to the validity of the contents of the certificate.

As was noted in *Mallard v R* (2005) 224 CLR 125, "the prosecution must at common law ... disclose all relevant evidence to an accused". A failure by the prosecution to provide an analyst's certificate in advance of proceedings with sufficient time to enable that evidence to be questioned would, like any other instance of non-disclosure, result in a real risk that any guilty verdict would be quashed.

Further, even before the Charter Act came into operation, courts have been particularly careful to ensure procedural fairness in the contents and use of analysts' certificates without the need for detailed and prescriptive legislation. There is a considerable body of common law to this effect. In *Iles v Orr* [1935] VLR 203 for example, Mann J observed: 'it is of great importance that some just and uniform practice should be observed with regard to analysts' certificates. The limits of what may be put in a certificate are not to be ascertained merely by referring to the consideration that "if the defendant does not like it, he can require that the analyst be called." It is not to be supposed that the Legislature intended to confer upon a scientific expert the duty or the power of becoming in effect both accuser and judge, as well as a witness in the cause'. These observations remain true today. In practice, therefore, the effect of new section 84 is similar to other provisions listed in the Alert Digest.

For these reasons, I consider new section 84 in clause 178 of the Bill to be compatible with the right to have a fair hearing, which is contained in section 24 of the Charter Act.

I trust this information addresses the matters raised by the Committee. Please do not hesitate to contact me if you require further information.

**MATTHEW GUY MLC**  
Minister for Planning  
Received 6 June 2014

**The Committee may further consider this detailed response at its next meeting.**

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

**Committee Room**  
**10 June 2014**



# Appendix 1

## Index of Bills in 2014

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### Alert Digest Nos.

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Appropriation (Parliament 2014-2015) Bill 2014	6
Assisted Reproductive Treatment Further Amendment Bill 2013	1
Building Legislation Amendment Bill 2014	6, 7
Building a Better Victoria (State Tax and Other Legislation Amendment) Bill 2014	6
Children, Youth and Families Amendment Bill 2014	6
Children, Youth and Families Amendment (Security Measures) Bill 2013	1
Consumer Affairs Legislation Amendment Bill 2014	5
Corrections Amendment (Further Parole Reform) Bill 2014	4
Corrections Amendment (Parole) Bill 2014	3
Corrections Amendment (Smoke-Free Prisons) Bill 2014	5
Corrections Amendment (Smoke-Free Prisons) Bill 2014 (Assembly initiated)	6
Corrections Legislation Amendment Bill 2013	1
Crimes Amendment (Grooming) Bill 2013	1
Crimes Amendment (Protection of Children) Bill 2014	5
Crime Statistics Bill 2014	5
Drugs, Poisons and Controlled Substances (Poppy Cultivation and Processing) Bill 2013	1
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	2, 3
Energy Legislation Amendment (Customer Metering Protections and Other Matters) Bill 2014	5
Environment Protection and Sustainability Victoria Amendment Bill 2014	2
Fences Amendment Bill 2013	1
Fences Amendment Bill 2014	3
Film Approval Bill 2014	5
Fines Reform Bill 2014	6
Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014	5, 6
Gambling and Liquor Legislation Amendment (Reduction of Red Tape) Bill 2014	3
Game Management Authority Bill 2013	1
Health Services Amendment Bill 2014	2
Honorary Justices Bill 2014	3
Jury Directions Amendment Bill 2013	1
Jury Directions Amendment Bill 2014 (Council initiated)	5
Justice Legislation Amendment Bill 2014	5
Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Bill 2014	2
Legal Profession Uniform Law Application Bill 2013	1, 2
Local Government Amendment (Governance and Conduct) Bill 2014	5
Local Government (Brimbank City Council) Amendment Bill 2014	6
Mental Health Bill 2014	3, 4
Native Vegetation Credit Market Bill 2014	7
Parliamentary Budget Officer Bill 2013	1
Private Health Care Facilities Bill 2014	7
Road Safety Amendment Bill 2014	7
Sale of Land Amendment Bill 2014	2
Sentencing Amendment (Baseline Sentences) Bill 2014	5

## Scrutiny of Acts and Regulations Committee

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Small Business Commissioner Amendment Bill 2013	1
State Taxation Legislation Amendment Bill 2014	2
Summary Offences and Sentencing Amendment Bill 2013	1
Transport Legislation Amendment (Further Taxi Reform and Other Matters) Bill 2014	4
Transport (Safety Schemes Compliance and Enforcement) Bill 2014	3
Treasury Legislation and Other Acts Amendment Bill 2014	6
Vexatious Proceedings Bill 2014	3, 4
Vexatious Proceedings Bill 2014 (Council initiated)	5
Victorian Civil and Administrative Tribunal Amendment Bill 2014	2
Victoria Police Amendment (Consequential and Other Matters) Bill 2014	4
Water Amendment (Flood Mitigation) Bill 2014	6
Water Amendment (Water Trading) Bill 2014	2
Witness Protection Amendment Bill 2014	4
<b>Regulations</b>	
Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	2
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	2

## **Appendix 2**

# Committee Comments classified by Terms of Reference

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

**Alert Digest Nos.**

### **Section 17(a)**

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

Building Legislation Amendment Bill 2014	6
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	2
Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014	5
Legal Profession Uniform Law Application Bill 2013	1
Mental Health Bill 2014	3
Vexatious Proceedings Bill 2014	3



## Appendix 3

### Ministerial Correspondence 2014

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**Table of correspondence between the Committee and Ministers and members during 2013-14**

<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>
Legal Profession Uniform Law Application Bill 2013	Attorney-General	04-02-14 14-02-14	1 of 2014 2 of 2014
Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	Education	18-02-14 26-02-14	2 of 2014 3 of 2014
Mental Health Bill 2014	Mental Health	06-03-14 24-03-14	3 of 2014 4 of 2014
Vexatious Proceedings Bill 2014	Attorney-General	06-03-14 22-03-14	3 of 2014 4 of 2014
Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014	Liquor and Gaming	06-05-14 23-05-14	5 of 2014 6 of 2014
Building Legislation Amendment Bill 2014	Planning	27-05-14 06-06-14	6 of 2014 7 of 2014