



SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

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Annual Review 2006
Regulations 2006

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**Scrutiny of Acts and Regulations
Committee**

**Subordinate Legislation
Regulations 2006**

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Terms of Reference

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 17 of the *Parliamentary Committees Act 2003* are —

17. Scrutiny of Acts and Regulations Committee

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 on rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent on 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;
- (c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill—
 - (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or
 - (ii) within 10 sitting days after the Act receives Royal Assent—whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;

- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (fa) the functions conferred on the Committee by the *Charter of Human Rights and Responsibilities*;
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

Principles of Regulation Review

The principles of regulation review are set out in Section 21 of the *Subordinate Legislation Act 1994* —

21. Review of statutory rules by the Scrutiny Committee

- (1) The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament—
 - (a) does not appear to be within the powers conferred by the authorising Act;
 - (b) without clear and express authority being conferred by the authorising Act—
 - (i) has a retrospective effect; or
 - (ii) imposes any tax, fee, fine, imprisonment or other penalty; or
 - (iii) purports to shift the onus of proof to a person accused of an offence; or
 - (iv) provides for the sub-delegation of powers delegated by the authorising Act;
 - (c) appears to be inconsistent with the general objectives of the authorising Act;
 - (d) makes unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of that Act;
 - (e) contains any matter or embodies any principles which should properly be dealt with by an Act and not by subordinate legislation;
 - (f) unduly trespasses on rights and liberties of the person previously established by law;
 - (g) makes rights and liberties of the person unduly dependent upon administrative and not upon judicial decisions;
 - (ga) 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;
 - (gb) 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;
 - (h) is inconsistent with principles of justice and fairness;
 - (ha) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
 - (i) requires explanation as to its form or intention;
 - (j) has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature;
 - (k) is likely to result in administration and compliance costs which outweigh the likely benefits sought to be achieved by the statutory rule.

- (2) A report of the Scrutiny Committee under this section may contain any recommendations that the Scrutiny Committee considers appropriate, including a recommendation that a statutory rule should be—
- (a) disallowed in whole or in part; or
 - (b) amended as suggested in the report.

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Chairpersons' Foreword

The Regulation Review Subcommittee performs an important task within the context of legislative scrutiny of the Parliament of Victoria. The Annual Review summarises the operations of the Regulation Review Subcommittee during 2006. This year the Regulation Review Subcommittee scrutinised one hundred and seventy nine regulations.

The Subcommittee continues to be impressed with the quality of the Regulatory Impact Statements which accompany the regulations. The Regulation Review Subcommittee did not make any reports to the Parliament. Each year fewer concerns are raised by the Regulation Review Subcommittee. This means that from the scrutiny perspective, generally, the area of regulation review is working well. The Regulation Review Subcommittee wishes to thank Ministers for their prompt responses. Our Legal Adviser, Ms Helen Mason also wishes to thank those departmental officers with whom she liaises on a daily basis. The efficient and friendly manner with which the officers respond to queries greatly facilitates the work of reviewing regulations.

The next year will be interesting for the Regulation Review Subcommittee. The introduction of the *Charter of Human Rights and Responsibilities Act 2006* will have a significant impact on its workload. Every regulation will be reviewed in the context of human rights and compatibility with the *Charter of Human Rights and Responsibilities Act 2006*. This change in jurisdiction has not affected the 2006 statutory rule series the subject of this Annual Report. However, it will affect the 2007 statutory rule series.

A general election was held in November 2006. Prior to that election the Regulation Review Subcommittee was ably chaired by Mr Peter Lockwood MLA. The members were Ms Lily D'Ambrosio MLA, The Honourable Andrew Brideson MLC, Mr Jude Perera MLA and Mr Ken Jasper MLA. The current Regulation Review Subcommittee particularly wishes to thank Mr Lockwood MLA for his work. He did an excellent job chairing the Subcommittee and ensuring that it ran smoothly. The Regulation Review Subcommittee also wishes to acknowledge the hard work of the previous Subcommittee members. Their constant attendance at meetings ensured that every statutory rule was reviewed in accordance with the legislative timeframe.

Finally we wish to thank our staff for their commitment and dedication. We thank Ms Helen Mason our Legal Adviser for her prompt and excellent advice. We thank Ms Sonya Caruana for her outstanding administrative support. We also thank Mr Simon Dinsbergs for this constant and efficient editing of reports when required.

The Regulation Review Subcommittee looks forward to another challenging year. In particular, the Regulation Review Subcommittee anticipates that the scrutiny of regulations in the context of human rights will keep members and advisers engaged. Enthusiastic and robust discussions are the sign of a healthy, democratic society. The Regulation Review Subcommittee looks forward to dealing with the variety of issues with which it will be presented during the coming year.

**Ken Jasper MP
Chairperson
Regulation Review
Subcommittee**

**Carlo Carli MP
Chairperson
Scrutiny of Acts and
Regulations Committee**

August 2007

Chapter 1 – Introduction

This Annual Review examines the major issues arising out of the scrutiny of Regulations made in Victoria in 2006 by the Regulation Review Subcommittee (the Subcommittee).

WHAT IS THE REGULATION REVIEW SUBCOMMITTEE?

The Scrutiny of Acts and Regulations Committee (the Committee) is a joint investigatory Committee of the Parliament of Victoria. It has members from the Upper and Lower Houses, the Government and the Opposition. The Regulation Review Subcommittee is a subcommittee of the Committee. The Subcommittee scrutinises regulations and conducts inquiries related to regulations.¹

WHAT ARE 'REGULATIONS'?

Regulations are often referred to as 'subordinate legislation' or 'statutory rules'. Legislation made by Parliament is referred to as primary legislation or Acts of Parliament. Legislation cannot be made by bodies other than Parliament unless Parliament authorises those bodies (by means of an Act of Parliament) to make 'subordinate legislation' or 'statutory rules'. The Subcommittee prefers the word 'regulations' to 'subordinate legislation' or 'statutory rules'. It is of the view that this is a more commonly understood term. In this Annual Review 'regulations' will be used to refer to all 'statutory rules' or 'subordinate legislation'.

The term 'regulations' encompasses a variety of legislative instruments such as statutory rules, court rules, local laws, orders-in-council, proclamations, notices, guidelines, ministerial directions, codes of practice and so on. The power to make regulations is delegated by Parliament to the Executive and other non-Parliamentary bodies including government departments, statutory authorities and agencies. The powers delegated to the Executive by Parliament are contained in Acts of Parliament.

PARLIAMENTARY OVERSIGHT

The validity of a regulation depends upon the regulation-making power conferred by the Act under which the regulation is made. Parliament authorises the Executive to make regulations because there is insufficient time to debate and pass all the legislation which needs to be enacted. This is particularly the case where the proposed legislation is very technical or scientific.

While regulations are sometimes perceived to be of lesser importance than Acts of Parliament, regulations do control and prohibit the conduct of citizens and may adversely affect the rights and liberties of citizens in much the same way as Acts of Parliament. The potential for abuse of

¹ Prior to 1 May 2000 the Regulation Review Subcommittee was known as the Subordinate Legislation Subcommittee.

the regulation-making power and erosion of citizens' rights always exists. As Mr Justice Stephen commented in *Watson v. Lee*² the history of delegated legislation:–

reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed "requires an adequate measure of control if it is not to degenerate into arbitrary government".

Parliamentary scrutiny committees, with power to examine regulations made by the Executive, are one of the most important safeguards against the misuse of Executive power. Since the 1930s most Westminster style Parliaments have kept control over regulations through the use of scrutiny committees. Scrutiny committees exist in all Australian states and territories. Some of these scrutiny committees examine bills and regulations, while others examine only regulations.³

Victoria has scrutinised regulations since 1956.⁴ From 1982 to 1992 the Legal and Constitutional Committee was responsible for scrutinising regulations. In 1992, the Committee was created by the *Parliamentary Committees (Amendment) Act 1992* (Vic). It scrutinises regulations and bills.

SCOPE OF THE SUBORDINATE LEGISLATION ACT 1994

The *Subordinate Legislation Act 1994* (Vic) (the Act) contains the procedures for making regulations. It sets out the scrutiny functions of the Subcommittee. Only those regulations which come within the definition of 'statutory rule' as contained in section 3 of the Act are subject to the Act. Section 3 defines 'statutory rule' to include:–⁵

- Regulations made, approved or consented to by the Governor-in-Council;
- Regulations which may be disallowed by the Governor-in-Council excluding regulations made by local authorities;
- Rules relating to a court or tribunal or the procedure, practice or costs of a court or tribunal;
- Instruments prescribed to be statutory rules by the Governor-in-Council; and
- Instruments deemed to be statutory rules by their own authorising Act.

² (1979) 155 CLR 374 at 394.

³ Australian jurisdictions which examine regulations and bills include the ACT, the Commonwealth, New South Wales, Queensland and Victoria and those committees include – the Standing Committee on Legal Affairs; Scrutiny of Bills Committee (Cth); Senate Committee on Regulations and Ordinances (Cth); Legislation Review Committee (NSW), Scrutiny of Legislation Committee (Qld) and Scrutiny of Acts and Regulations Committee (Vic). The New South Wales Legislation Review Committee only recently acquired the function of scrutinising bills under section 8A of the *Legislation Review Amendment Act 2002*. Previously the Committee was known as the Regulation Review Committee and it scrutinised regulations only. Australian jurisdictions which examine regulations only include Northern Territory, South Australia, Tasmania and Western Australia and those committees include – Subordinate Legislation and Publications Committee (NT); Legislation Review Committee (SA); Subordinate Legislation Committee (Tas) and Delegated Legislation Committee (WA).

⁴ *Subordinate Legislation Act 1956* (Vic).

⁵ *Subordinate Legislation Act 1994* (Vic), s. 3.

Regulations in the form of statutory rules constitute only a small portion of the continually growing number of different types of regulations made each year. Some examples of regulations which fall outside the definition of 'statutory rule' are – guidelines, ministerial directions, local laws, codes of practice, notices, declarations and licences. Regulations which fall outside the definition of 'statutory rule' are not subject to:–

- the procedures of the Act. However they remain subject to any requirements contained in legislation under which they are made;
- scrutiny by the Subcommittee and generally not subject to Parliamentary review. However it should be noted that some regulations which fall outside the definition of 'statutory rule' are subject to specific Parliamentary review requirements. For example, planning schemes (and amendments) must be tabled in Parliament within 10 sitting days after being approved.⁶

The Committee remains concerned about regulations which fall outside the definition of 'statutory rule' because it means that they are not subject to consistent regulation-making procedures nor generally to Parliamentary review, allowing the potential for powers to be used improperly and for rights to be adversely affected. This issue is discussed in detail in the Committee's Report on the *Subordinate Legislation Act 1994*.⁷

ROLE OF THE SUBCOMMITTEE

The Subcommittee examines and reviews:–

- Regulations within the meaning of 'statutory rule' contained in the Act;
- State Environment Protection Policies and Waste Management Policies made under the *Environment Protection Act 1970* (Vic);
- Directions made under the *Public Sector Management and Employment Act 1998* (Vic).

The Subcommittee generally meets once each month to discuss regulations. Meetings of the Subcommittee are not open to the public. However the Subcommittee may invite members of the public or representatives from various organisations or government departments and agencies to address it at one of its meetings. At its meetings the legal adviser presents the Subcommittee with written and verbal advice in respect of each regulation. The Subcommittee members discuss each regulation and any issues and concerns. When the Subcommittee is satisfied that a regulation complies with the Act, it passes a motion of approval.

Where the Subcommittee is dissatisfied with any matters or needs clarification, it corresponds with the responsible Minister. The Subcommittee will highlight its concerns to the Minister. It will seek in the first instance an explanation or amendment of the regulation. If the Subcommittee does not receive a satisfactory explanation it may prepare a Report to Parliament. This Report is submitted to all members of the Committee for formal approval and adoption.⁸ The Committee may adopt or reject the Report or part of it or make any changes it deems necessary.⁹ A Report to Parliament may include a recommendation that a regulation be amended or disallowed in whole or in part. Alternately a Report provided by way of information to the Parliament may simply outline the Committee's concerns. As a regulation has already commenced operation by the time it comes before the Subcommittee, the power to recommend

⁶ *Planning and Environment Act 1987* (Vic).

⁷ This Report was tabled in Parliament in September 2002.

⁸ The Regulation Review Subcommittee has all the powers and privileges of the full Committee. However it cannot report directly to Parliament.

⁹ *Parliamentary Committees Act 1968* (Vic), s. 4L(5).

disallowance is only used in exceptional circumstances. Generally, such a power would be used where all other efforts to resolve the issue have failed.

Where the Committee decides to Report to Parliament it may also recommend that a regulation be suspended whilst Parliament considers the issues contained in the Report.¹⁰ Such a course may be undertaken in the interests of justice and fairness. When regulations are suspended in this manner they are deemed not to have been made. This means they have no effect. People are not required to comply with them during the period of suspension.¹¹

DISALLOWANCE

Any Member of either House of Parliament may give notice of a disallowance motion but must do so within 18 sitting days of the tabling of the regulation in that House. Disallowance will not be effective unless that House passes a disallowance resolution within 12 sitting days of the disallowance notice. If the Committee wants to Report to Parliament recommending disallowance, it must also comply with the 18 sitting days requirement. This means that the Subcommittee must review and discuss all regulations within strict time limits.

SCRUTINY OF REGULATIONS

The Subcommittee scrutinises regulations after they have been made to determine whether they comply with the legislative principles specified in the Act.¹² These principles require the Subcommittee to ensure that regulations do not unduly trespass on rights and freedoms and comply with the procedural and practical requirements of the Act. The Subcommittee does not comment on matters involving government policy. The review focuses on the technical criteria contained in the Act. More specifically, under section 21 of the Act the Subcommittee ensures that regulations:–

- Are within the powers of the authorising Act;
- Do not, without clear and express authority;
 - have a retrospective effect;
 - impose a tax, fee, fine, imprisonment or other penalty;
 - purport to shift the onus of proof to a person accused of an offence;
 - provide for the sub-delegation of powers delegated by the authorising Act;
- Are consistent with the general objectives of the authorising Act;
- Do not make unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of the authorising Act;
- Do not contain any matters which should be contained in an Act of Parliament rather than subordinate legislation;
- Do not unduly trespass on rights and liberties of the person previously established by law;
- Do not make rights and liberties of the person unduly dependent on administrative rather than judicial decisions;
- Do not authorise or require any acts or practices which may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000* (Vic);

¹⁰ *Subordinate Legislation Act 1994* (Vic), s. 22(1).

¹¹ *ibid.*, s. 22(5).

¹² *Subordinate Legislation Act 1994* (Vic), s. 21.

- Do not authorise or require any acts or practices which may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2000* (Vic);
- Are consistent with principles of justice and fairness;
- Is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- Do not require explanation as to form or intention;
- Do not substantially or materially contravene the practical requirements of the Act or the Premier's Guidelines;¹³ and
- Are not likely to result in administration and compliance costs which outweigh the benefits sought to be achieved.

The Subcommittee also ensures compliance with the procedural requirements of the Act. Where a Regulatory Impact Statement (RIS) has been prepared, some of the procedural issues the Subcommittee examines include whether:–

- all appropriate certificates have been received by the Subcommittee;
- consultation is adequate and in particular whether appropriate organisations and individuals have been consulted;
- certificates are dated and signed by the responsible Minister;
- certificates contain all the required information; and
- the RIS is adequate and in particular whether it properly explains the nature and extent of the problem to be dealt with by the new regulation; the extent to which alternatives have been considered and the appropriateness of those alternatives; the costs and benefits of the proposed regulations and whether the benefits outweigh the costs.

Where a regulation is exempted or exempted from the RIS process, some of the procedural requirements the Subcommittee examines include whether:–

- the regulation is correctly exempted or excepted or whether it should have been made with a RIS;
- the regulation is exempted or excepted under the appropriate category in the Act;
- the exemption or exception certificate specifies the section under which the exemption or exception was granted;
- the exemption or exception certificate is signed and dated by the responsible Minister;
- the exemption certificate contains reasons for granting the exemption as required by section 9(2);
- a regulation exempted by a Premier's certificate sunsets within 12 months.

The Subcommittee also ensures that:–

- explanatory memoranda clearly set out the nature and extent of any changes and the reasons for the changes; and
- there is compliance with all notice, gazettal and tabling requirements of the Act.

¹³ Department of Premier and Cabinet, *Premier's Guidelines*, December 2004.

SCRUTINY OF ENVIRONMENT PROTECTION AND WASTE MANAGEMENT POLICIES

The Subcommittee also has responsibility for reviewing policies made under Part 3 of the *Environment Protection Act 1970* (Vic). These policies include State Environment Protection Policies and Waste Management Policies.

More specifically State Environment Protection Policies include:–

- policies concerning the environment generally;¹⁴
- policies concerning the removal, disposal or reduction of litter in the environment;¹⁵
- policies concerning the re-use and recycling of substances.¹⁶

Until recently waste management policies made under the *Environment Protection Act 1970* (Vic) applied only to industrial waste. With changes brought about by the *Environment Protection (Resource Efficiency) Act 2002* (Vic) waste management policies now apply to waste generally.¹⁷ Waste management policies are now enacted under s. 16A of the *Environment Protection Act 1970* (Vic).¹⁸

Waste Management Policies include policies dealing with:–¹⁹

- the generation, storage, treatment, transport and disposal and general handling of waste;
- the procedures to be implemented in the recycling, recovery, reclamation and re-use of waste and recycled substances;
- the methods of disposal of specified substances;
- the routes and methods of transportation of waste;
- the location of treatment and disposal plants;
- the allocation of responsibility for waste management operations and disposal; and
- the use and disposal of notifiable chemicals.

State Environment Protection Policies and Waste Management Policies are made by the Governor-in-Council on the recommendation of the Environment Protection Authority (EPA) by publishing an Order declaring the policy in the Victorian Government Gazette.²⁰ These policies must be tabled in each House of Parliament on or before the sixth sitting day after the Order is published in the Victorian Government Gazette.²¹

Section 18A of the *Environment Protection Act 1970* (Vic) sets out the requirements which must be followed when making State Environment Protection Policies and Waste Management Policies. Certain policies are excluded from the provisions concerning the preparation of policies. For example, the variation of a State Environment Protection Policy or Waste Management Policy which the EPA determines to be fundamentally declaratory, machinery or administrative in nature. Otherwise the following procedures must be followed:–

¹⁴ *Environment Protection Act 1970* (Vic), s. 16(1).

¹⁵ *ibid.*, s. 16(1B).

¹⁶ *ibid.*, s. 16(1C).

¹⁷ See definition of 'waste' in the *Environment Protection Act 1970* (Vic), s. 4.

¹⁸ Previously Industrial Waste Management Policies were made under section 16(1A) of the *Environment Protection Act 1970* (Vic).

¹⁹ *Environment Protection Act 1970* (Vic), s. 16A.

²⁰ *ibid.*, s. 16(1).

²¹ *ibid.*, s. 18D(1).

- during a minimum period of 21 days, the EPA must publish on three occasions in a relevant newspaper – notice of intention to declare a policy. The notice must include the area affected and advise that any person affected may submit information to the EPA;
- the EPA must consider information provided to it by any person affected or likely to be affected;
- the EPA must consult with any government department or statutory authority whose responsibilities may be affected by the policy;
- the EPA must prepare a draft policy;
- the EPA must prepare a draft impact assessment;
- during a minimum period of 21 days the EPA must publish on three occasions in a relevant newspaper – notice of preparation of a draft policy. The notice must include the reasons for and objectives of the policy, a description of the area affected, details of where a copy of the draft policy may be obtained and specify that any person likely to be affected may make a submission;
- the EPA must allow a period of at least three months for submissions;
- the EPA must consider all submissions; and
- the EPA must write a separate letter to each person who has lodged a submission.

Section 18C of the *Environment Protection Act 1970* (Vic) sets out the matters which a policy impact assessment must discuss:–

- the purposes of the policy;
- the alternatives for achieving the objectives, including consideration of not declaring the policy or varying the existing policy; and
- an assessment of the possible financial, social and environmental impacts of each alternative in qualitative and, where practicable, in quantitative terms.

A copy of the following documents must be forwarded to the Committee:–

- the final policy impact assessment;
- a summary of submissions;
- a statement of the EPA's evaluation of the submissions and any changes made to the draft policy;
- a copy of the review panel's advice if there was a review panel.

The Committee may report to Parliament where these policies are beyond power or do not comply with the provisions of the *Environment Protection Act 1970* (Vic). Section 18D(3) provides that the Committee may report to Parliament where a policy:–

- does not appear to be within the powers conferred by the *Environment Protection Act 1970* (Vic);
- has been prepared in contravention of the *Environment Protection Act 1970* (Vic); or
- contains any matter in contravention of *Environment Protection Act 1970* (Vic).

Initial reviews of State Environment Protection Policies and Waste Management Policies are carried out by the Subcommittee. Where the Subcommittee is unable to resolve any issues, it may recommend to the Committee that a report be made to Parliament. A report to Parliament

by the Committee may make any recommendations considered appropriate including that a policy be disallowed in whole or in part.²²

The disallowance provisions contained in sections 23 and 24 of the Act apply to State Environment Protection Policies and Waste Management Policies.²³ This means that the 18 sitting day deadline applies, that is the Committee must table a motion for disallowance within 18 sitting days after the Policy has been tabled before that House.

SCRUTINY OF DIRECTIONS OF THE COMMISSIONER FOR PUBLIC EMPLOYMENT

The Subcommittee also reviews Directions made by the Commissioner for Public Employment. These Directions concern the application of employment and conduct principles contained in sections 7 and 8 of the *Public Sector Management Employment Act 1998* (Vic). The employment principles require agency and public sector authority heads to establish employment processes that will ensure that:—²⁴

- employment decisions are based on merit;
- employees are treated fairly and reasonably;
- equal employment opportunities are provided; and
- employees have a reasonable avenue of redress against unfair or unreasonable treatment.

The conduct principles require public sector employees to:—²⁵

- act impartially;
- act with integrity and avoid any real or apparent conflicts of interest;
- be accountable for their results; and
- to provide responsive service.

Section 40 of the *Public Sector Management Employment Act 1998* (Vic) provides that the tabling and scrutiny provisions of the Act apply to Directions. This gives the Committee the power of review. If Directions do not comply with the tabling requirements or the principles of review contained in section 21 of the Act, the Committee may report to Parliament recommending disallowance in whole or in part or amendment.

Directions were last issued in 1998 – Directions on Public Sector Employment and Conduct Principles in the Victorian Public Service 1998. These Directions covered five major areas:—

- selecting on merit;
- managing and valuing diversity;
- managing under performance;
- reviewing personal grievances; and
- upholding public sector conduct.

The Subcommittee reviewed the 1998 Directions and found that adequate consultation had taken place and that they complied with the requirements of the *Public Sector Employment and Management Act 1998* (Vic).

²² *ibid.*, s. 18D(4).

²³ *ibid.*, s. 18D(6).

²⁴ *Public Sector Management Employment Act 1998* (Vic), s. 7.

²⁵ *ibid.*, s. 8.

NEW AREA OF SCRUTINY – THE SCRUTINY OF HUMAN RIGHTS – NEW LEGISLATIVE REQUIREMENTS THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

This year the *Charter of Human Rights and Responsibilities 2006* (the Charter) commenced operation on 1 January 2006. Pursuant to the Charter the Subcommittee is required to consider every statutory rule in the context of human rights and compatibility with the Charter. This applies to all statutory rules in the 2007 series, not the 2006 series the subject of this report. Mention is made of this new area of scrutiny for the sake of completeness. It is discussed in further detail in Chapter 2.

Chapter 2 – Significant Issues

In 2006, the Subcommittee held **6** meetings. During those meetings it considered **78** statutory rules made during 2006. Of those rules **20** were accompanied by Regulatory Impact Statements. Of the total regulations made **101** were actually considered by the Subcommittee in early 2007.

The Subcommittee did not make any reports to Parliament during 2006. However, of the statutory rules examined during 2006, the Subcommittee had concerns with **five**. In each instance, it wrote to the responsible Minister. Generally, the Subcommittee received satisfactory responses to the issues raised. The Subcommittee thanks the Ministers for their responses.

Generally, the Subcommittee has classified the issues it encounters into particular categories. This year the Subcommittee did not encounter any significant problems. From the Subcommittee's perspective, the area of regulation review is working well. Communication from Departments is generally punctual and addresses concerns. The Subcommittee wishes to thank departmental officers for the prompt and friendly manner with which they respond to queries. This greatly facilitates the work of reviewing regulations.

For the sake of consistency the areas which have been discussed on previous occasions are listed as follows:-

(a) The Statutory Rule has been prepared in contravention of any of the provisions of the Act or of the Guidelines with respect to the statutory rule and the contravention is of a substantial or material nature	12
(b) Consultation	12
(c) Consideration of Submissions – General expectations – Response required	13
(d) Technical matters – Incomplete certificates – Dates of publication in the Government Gazette and newspaper – Premier's Certificate – Special circumstances	17
(e) Setting a package of fees – The basket approach – The impact of the Premier's Guidelines	17
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(g) Section 9(1)(a) – Section 21(1)(l) – Requires explanation as to its form or intention	20
(h) Other matters – General clarification – The 'balanced scorecard approach' – What is it?	21
(i) Section 9(1)(a) – Is there any appreciable economic or social burden on any sector of the public?	21
(j) Commendations	22
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(A) THE STATUTORY RULES HAS BEEN PREPARED IN CONTRAVENTION OF ANY OF THE PROVISIONS OF THE ACT OR OF THE GUIDELINES WITH RESPECT TO THE STATUTORY RULE AND THE CONTRAVENTION IS OF A SUBSTANTIAL OR MATERIAL NATURE

Under section 21(1)(j) of the Act the Subcommittee examines regulations to ensure that they have been properly prepared. It examines them to see whether they have been prepared in contravention of any of the provisions of the Act or of the guidelines with respect to the statutory rule. It examines the regulations to see whether the contravention is of a substantial or material nature.

This year no statutory rules came within this category.

(B) CONSULTATION

Section 6 of the Act sets out the requirements for consultation. These requirements apply to regulations made with or without RIS's. Responsible Ministers must ensure that there is consultation "where the guidelines require consultation"²⁶ with "any sector of the public on which an appreciable economic or social burden may be imposed."²⁷

The Premier's Guidelines²⁸ provide as follows:–

5.19 If the proposed statutory rule is likely to impose any appreciable burden, cost or disadvantage on any sector of the public, consultation must take place with that sector, eg business groups, community groups, special interest groups. That consultation should include discussion of the need for and method of the proposed regulation.

The Premier's Guidelines indicate that the "nature and degree of consultation that is appropriate for any particular rule will vary with the nature of that rule."²⁹ This places the final responsibility on Ministers to ensure that appropriate consultation takes place and includes all those affected by a proposed regulation.

While the Premier's Guidelines provide assistance with the consultation process, the Subcommittee acknowledges that some sections are unclear and ambiguous. This makes it difficult for department and agency officers to determine in what circumstances consultation should take place. There is, for example, an inconsistency between the *Act* and the Premier's Guidelines as to whether consultation **must** or **should** occur in accordance with the Premier's Guidelines. It is the strong preference of the Subcommittee that consultation take place with all those affected by a particular regulation and that the current ambiguities be resolved.

The Subcommittee considers it is important for all consultation certificates to provide details of all those consulted.

²⁶ *Subordinate Legislation Act 1994*, s. 6.

²⁷ *ibid.*, s. 6(b).

²⁸ Section 5.19, *Premier's Guidelines*, December 2004.

²⁹ *ibid.*, Section 5.13.

(C) CONSIDERATION OF SUBMISSIONS – GENERAL EXPECTATION – RESPONSE REQUIRED

Section 11(3) of the Act imposes a duty on Ministers “to consider all submissions and comments received on a draft statutory rule where a RIS has been prepared.”³⁰ The Premier’s Guidelines also emphasise the need for proper consultation³¹ before a regulation is made.

The Subcommittee considers that appropriate consultation is essential for the effectiveness of the regulatory system. The Subcommittee expects that submissions will be appropriately considered. To that end, a considered response from the Department to an individual submission is tangible evidence that matters have been considered. The Subcommittee’s firm view is that responses ought to be sent to those who have taken the time and effort to send in a submission.

The Subcommittee understands that occasionally there may be a large number of submissions in respect of a particular regulation. However, the Subcommittee’s view is that the number of submissions does not alter the expectation that an appropriate response should be sent. It simply means that there are a large number of people who have issues with the proposed regulation. Whilst this may mean an increased workload occasionally, the Subcommittee’s strong view is that this is simply a part of the democratic regulatory process. Appropriate weight and consideration ought to be given to the submissions sent in. Transparency is a critical part of the process. The Minister is required to perform his or her duty in accordance with section 11(3) of the Act. The Subcommittee’s firm view is that publication of a response to issues on a website is a quite inadequate response.

This year the Subcommittee has noticed a considerable improvement in the quality of responses prepared by the Departments in respect of submissions. Generally, Departments prepare a table summary of the issues raised in the submissions. This is the case particularly where there are a large number of submissions. The Subcommittee finds this to be extremely helpful. This year, in many Regulations where there are a large number of submissions, Departments have sent a general letter covering the various themes to those who made submissions. In other instances, where there were few submissions Departments have written individual letters to those who made submissions, discussing the various matters raised in detail. Frequently, the Subcommittee has written commending a particular Department on its outstanding work.

The Department’s response in respect of *SR No. 96 – Rail Safety Regulations 2006* was excellent. Below is the Subcommittee’s letter to the Minister.

Example 1:

SR No. 96 – Rail Safety Regulations 2006

*Subcommittee’s Letter*³²

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 21 February 2007.

Over sixteen submissions were received during the regulatory impact statement process. The Subcommittee was provided with an extremely thorough analysis of the

³⁰ Subordinate Legislation Act 1994, s. 11(3).

³¹ Sections 5.12 - 5.17, *Premier’s Guidelines*, December 2004.

³² Letter dated 26 February 2007 to the Hon Lynne Kosky, MP, Minister for Public Transport from the Regulation Review Subcommittee.

submissions. The comprehensive manner in which the Department summarised the issues facilitated the Subcommittee's work. In addition, the Department wrote a detailed letter to each organisation or individual responding to the issues raised.

The Subcommittee wishes to acknowledge the outstanding manner with which the Department dealt with the submissions. The Subcommittee commends those involved and requests that you forward its comments to the relevant officers.

A letter of commendation was also sent to the Minister in respect of SR No. 68 – *Building Regulations 2006*.

Example 2:

SR No. 68 – Building Regulations 2006

Subcommittee's Letter³³

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 12 February 2007.

Over two hundred submissions were received during the regulatory impact statement process. The Subcommittee was provided with an extremely thorough analysis of the submissions. The comprehensive manner in which the Department and the Commission summarised the issues facilitated the Subcommittee's work. In addition, the Building Commission wrote a detailed letter to each organisation or individual responding to the issues raised.

The Subcommittee wishes to acknowledge the outstanding manner with which the Department and the Building Commission dealt with the submissions. The Subcommittee commends those involved and requests that you forward its comments to the relevant officers.

The Subcommittee also considered the matter of responses to the submissions in relation to SR No. 29 – *Working with Children Regulations 2006*. The Subcommittee advised the Minister of its expectations. It also sought further information in relation to the matters raised by the Privacy Commissioner. The Subcommittee is pleased to note that as a result of the correspondence, written responses were ultimately sent to those who made submissions. The Subcommittee thanks the Minister for his prompt response. Set out below are the relevant letters.

Example 3:

SR No. 29 – Working with Children Regulations 2006

Subcommittee's Letter³⁴

The Regulation Review Subcommittee considered the above Regulations at a meeting on 12 July 2006.

Advertisement of Regulatory Impact Statement

³³ Letter dated 14 February 2007 to the Hon Justin Madden, MP, Minister for Planning from the Regulation Review Subcommittee.

³⁴ Letter dated 19 July 2006 to the Hon. Rob Hulls, MP, Attorney-General from the Regulation Review Subcommittee.

Please advise the date on which the Regulatory Impact Statement (RIS) was advertised in the Government Gazette and in a daily newspaper. Please also advise the name of the newspaper in which the RIS was advertised.

Consideration of submissions

Thirty eight submissions were received. The Department provided to the Subcommittee an analysis of the submissions and the various issues. This was of considerable assistance to the Subcommittee. However, there has been no written response sent to those who made submissions. The Subcommittee made relevant enquiries of the Department by email on 27 June 2006. The Subcommittee's expectation is that a written response ought to be sent to those who made submissions. Transparency and accountability are an integral part of the RIS process. Accordingly, please advise the Subcommittee when a written response has been sent to those who sent submissions.

Submission from the Privacy Commissioner

In particular, the Privacy Commissioner raises some sensible matters. The Privacy Commissioner made the following submission. Question 10 of the prescribed form asks applicants to indicate 'all areas' of child-related work in which they work or volunteer or intend to volunteer. The question then lists each of the categories of a child-related work set out in section 9 of the Working with Children Act 2005. The list ends with a work category for "Other" (specify)". The Privacy Commissioner argues that this form of question is likely to result in an excessive collection of information. The Privacy Commissioner made the point that the list of child-related areas is exhaustive. Individuals are not required to apply for the Working with Children check for any 'other' category of child-related work. The Subcommittee seeks your response to the matters raised by the Privacy Commissioner. The Subcommittee is of the view that a written response ought to be sent to the Privacy Commissioner. Please advise the Subcommittee when this occurs.

The Subcommittee looks forward to your immediate response to the above matters.

Please do not hesitate to contact me should you wish to discuss any of the foregoing.

Minister's Response³⁵

Thank you for your letter of 19 July 2006 regarding the review of the Working with Children Regulations 2006 by the Regulation Review Subcommittee.

The Working with children Regulatory Impact Statement was advertised on 5 January 2006 in the Government Gazette and in a number of metropolitan and regional newspapers between 5 and 18 January 2006. A comprehensive list of the newspapers the RIS was advertised in is attached for your information.

Written responses to the Regulatory Impact Assessment submissions have been sent to all those (with the exception of one) who made submissions including the Privacy Commissioner. The one outstanding response has been delayed as it refers to a complex issue which has legal and policy implications. This issue and a response to the submission are currently under review by legal officers and a response will be forwarded to the author shortly.

³⁵ Letter dated 23 August to the Regulation Review Subcommittee from the Hon. Rob Hulls, MP, Attorney-General.

In his submission the Privacy Commissioner raised the issue that the option for specifying a work category that is not included in Section 9 of the Working with Children Act goes beyond the requirements of the Act and is likely to result in an excessive collection of information.

Since receiving the Privacy Commissioner's submission, the application form and guide for a Working with Children Check have been amended. In the new form, the table of child-related categories that the applicant uses to fill out Section 11 of the form specifies that "other" only relates to those involved in the 'administration of the Working with Children Act 2005.' It is considered that this amendment has addressed the Privacy Commissioner's concerns about the use of 'other' on the form.

If you have any further queries regarding the Regulatory Impact Statement or the Working with Children Check please contact Mr Peter Hibbins, director Working with children Check Unit on telephone 8684 1200.

The Subcommittee also considered the adequacy of the response in relation to SR No. 17 – Fisheries (Fees, Levies and Royalties) Regulations 2006.

Example 4:

SR No. 17 – Fisheries (Fees, Levies and Royalties) Regulations 2006

Subcommittee's Letter³⁶

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 12 July 2006.

Seven submissions were received in relation to the accompanying Regulatory Impact Statement (RIS). The Subcommittee acknowledges the work undertaken by the Department in relation to the submission. However, the Subcommittee's view is that an appropriate response ought to be communicated to those members of the public involved in the RIS process. The Subcommittee contacted the Department on 5 June requesting information as to whether responses had been sent. The Subcommittee received confirmation on 7 June 2006 that responses were in the process of being prepared but had not been sent out.

The Subcommittee requests confirmation that the responses have been sent.

Please do not hesitate to contact me should you require any further information.

Department's Response³⁷

Please find attached copies of the response sent to authors of submissions to the Regulatory Impact Statement Fisheries (Fees, Levies and royalties) Regulations 2006 which was published in January 2006.

³⁶ Letter dated 19 July 2006 to the Hon. Bob Cameron, Minister for Agriculture from the Regulation Review Subcommittee.

³⁷ Letter dated 1 November 2006 to the Regulation Review Subcommittee from the Department of Primary Industries.

Department's Response to Submissioners

On behalf of the Minister, I would like to thank you for submission on the Regulatory Impact Statement (RIS) – Fisheries (Fees, Levies and Royalties) 2006.

After close consultation with industry through the Fisheries Cost Recovery Standing Committee (FCRSC), the RIS was prepared and circulated to all licence holders in January 2006. Seven submissions were received and analysed to determine whether further amendments to the proposed Regulations were required. Following advice from the Department, it was determined that the statutory rules would be amended to ensure that the amount of abalone royalty payable on an individual quota unit does not vary depending on whether or not an Abalone Fishery Access Licence is also held.

The FCRSC, consisting of industry and Departmental representatives, will continue to meet on a regular basis to discuss and analyse cost data associated with the delivery of fisheries management services and will advise the Minister on further implementation of the cost recovery program. Please forward any issues or concerns you may have regarding the cost recovery process to your industry representative on the FCRSC so that it may be presented to the Committee.

Thank you, once again, for your input into this process.

The Subcommittee has frequently been provided with a thorough summary of the issues raised during the RIS process. The Subcommittee's view is that transparency is an important part of the regulatory statement process. To that end, the Subcommittee's view is that an appropriate response ought to be communicated to those members of the public involved in the process. The fruit of the considerable labour already undertaken needs to be shared to add a further degree of transparency.

(D) TECHNICAL MATTERS – INCOMPLETE CERTIFICATES – DATES OF PUBLICATION IN THE GOVERNMENT GAZETTE AND NEWSPAPER – PREMIER'S CERTIFICATE – DETAILS OF 'SPECIAL CIRCUMSTANCES'

The Subcommittee is concerned to ensure technical compliance with the Act. Pursuant to section 11(a) and (b) of the Act, the RIS must be published in the Government Gazette and a daily newspaper circulating generally throughout Victoria. All relevant certificates should accompany the regulations and be signed and dated. Failure to do so will ensure a letter from the Subcommittee requesting rectification of the matter.

The Subcommittee had no concerns in respect of this area this year.

(E) SETTING A PACKAGE OF FEES – 'THE BASKET APPROACH' – THE PREMIER'S GUIDELINES

The Guidelines³⁸ provide as follows:–

5.25 It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process

³⁸ Sections 5.12 - 5.17, *Premier's Guidelines*, December 2004.

needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

By way of example in *SR No. 57 – Plumbing (Fees Amendment) Regulations 2005*³⁹ increased a number of fees. This was done using the ‘basket’ approach. In this instance, four of the seventeen fee increases exceeded the Treasurer’s approved rate of 2.25% although the actual monetary increases were extremely small. In addition, the package as a whole fell within the Treasurer’s approved rate. The increases were 0.03% above the approved rate. The table set out below illustrates the dollar value of the four fee increases which were marginally above the approved rate. In real terms, the largest monetary amount above an increase of 2.5% was eight cents. The smallest monetary amount above an increase of 2.5% was three cents.

Item	Current Fee	Proposed Fee	Dollar Increase Based on 2.5%	% Increase	Actual Increase
For registration under section 221O or a renewal of registration under section 2221ZB	\$237.00	\$243.00	\$5.92	2.53%	\$6.00
For provisional registration or renewal of provisional registration	\$79.00	\$81.00	\$1.97	2.53%	\$2.00
For restricted registration or a renewal of restricted registration	\$237.00	\$243.00	\$5.92	2.53%	\$6.00
For an application to modify the plumbing regulations under section 221ZZO	\$79.00	\$81.00	\$1.97	2.53%	\$2.00

The Subcommittee is bound by the Guidelines. A strict interpretation of the Guidelines leads to the view that as a matter of principle individual fees in a ‘basket’ package should not exceed the Treasurer’s annual rate. However, the Subcommittee is of the view that fee increases and the Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a ‘basket’ package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee’s view is that it is a matter of balance. The ‘basket’ of fees in its entirety must not exceed the Treasurer’s approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer’s annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each Regulation will be examined on its merits and in context.

During the year, there have been Informal discussions with officers from the various Departments and the Legal Adviser. The discussions suggest that a strict interpretation of the Guidelines may make it difficult for Departments in practical terms in setting a package of routine fee increases. Ultimately, Regulations are the practical arm of the legislation. They need to function and be made in a commonsense and practical manner where possible. The Subcommittee will continue to monitor the impact of the Guidelines. If and when appropriate it will recommend changes to the wording of the Guidelines. At this stage, the Guidelines have only been in operation for over a year. The Subcommittee’s will carefully scrutinise the

³⁹ *Annual Review 2005, Regulations 2005*, p. 21.

Regulations and the Guidelines during the coming year. The Subcommittee welcomes input from Departments.

(F) SIGHTING OF MATERIAL INCORPORATED BY REFERENCE

Regulations often include a table of applied, adopted or incorporated matter in accordance with the requirements of regulation 6 of the *Subordinate Legislation Regulations 1994*. Such a table lists all the material applied, adopted or incorporated by reference in the regulations. Occasionally, the Subcommittee is placed in the position where it has to consider and or approve regulations without sighting the material which is incorporated into them. Where the Subcommittee does not sight the material it cannot form a view as to whether it conforms with the requirements of the Act.

The Premier's Guidelines provide some assistance:⁴⁰

7.03 Section 32 of the Interpretation of Legislation Act 1984 prescribes the procedural requirements which must be fulfilled whenever a statutory rule applies, adopts or incorporates material by reference. Section 32(5) of the Interpretation of Legislation Act 1984 provides that a failure to comply with the tabling requirements does not affect the validity, operation or effect of a statutory rule but agencies should nevertheless ensure compliance with the requirements of section 32 as amended by the Subordinate Legislation Act 1994.

7.04 When considering whether to incorporate a particular document in a statutory rule it should be remembered:

- *that the provisions of the rule will only refer to the incorporated material and members of the public affected by the rule must see the incorporated document before they can understand the contents and effect of the rule:*
- *that the incorporated material may not be readily available at a reasonable cost:*
- *that the procedures set out in section 32 are designed to facilitate Parliamentary oversight of incorporation of material and to ensure that such material is publicly available so that members of the public affected by the rule can have access to the rules with which they must comply.*

7.05 It needs to be remembered that the incorporated material may not be a single document. The problem is exacerbated by the drafting style adopted by the Standards Association of Australia as these standards are frequently not self contained but adopt the provisions of other standards. This can create a chain of material incorporated by reference leading to the possibility that the need to table a particular document will be overlooked.

7.06 Consideration should also be given in drafting statutory rules as to whether the reference to an Australian Standard should be to a specific standard (eg AS 1234) or to a specific version of a standard by reference to its date (eg AS 1234, 1997). The latter approach means that if a later amended version of a standard is to be adopted it will require the amendment of the statutory rule and the undertaking of the RIS process. The former approach may result in significant changes to the effect of the statutory rule with no automatic mechanism to review the changes to the costs and benefits of the statutory rule.

⁴⁰ Sections 7.03 - 7.08, *Premier's Guidelines*, December 2004.

7.07 *The aim of the procedures set out in section 32 of the Interpretation of Legislation Act 1984 is to guarantee the availability of any material which is incorporated into a statutory rule by reference, to ensure that citizens may have access to the laws with which they must comply.*

7.08 *In deciding whether to incorporate material by reference, agencies need to take care to balance the drafting convenience with ease of access to the incorporated material and understanding of it by those affected by it or required to comply with it. Agencies should reserve the use of incorporated detailed and extensive technical material to regulations concerning industries familiar with and using the material. The use of the material then has the benefit of removing duplication. In such cases agencies should also consider whether performance standards are the more appropriate means of regulations.*

The Subcommittee's preference is that all material is provided to it simultaneously so that it can all be considered in the context of the Regulation.

This year the Subcommittee has again noticed that generally material incorporated by reference has been provided to it with the original material in respect of the Regulation. This certainly makes the Subcommittee's task easier. The Subcommittee wishes to acknowledge and thank those Departments who make the effort to forward to it additional material.

(G) SECTION 9(1)(A) – SECTION 21(1)(L) – REQUIRES EXPLANATION AS TO ITS FORM OR INTENTION

This year the Subcommittee wrote seeking further explanation in respect of one regulation. The Subcommittee sought clarification of a fee for uncertified copies of historical records. The Subcommittee's letter is set out:–

Example:

SR No. 61 – Births, Deaths and Marriages Registration (Fees) Regulations 2006

Subcommittee's Letter⁴¹

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 4 September 2006.

The Subcommittee seeks your advice in respect of the following matters.

- 1. Which two genealogical bodies were consulted in relation to the Regulations?*
- 2. The standard letter sent to those who made submissions states that the 'fees for uncertified copies of historical records either downloaded on-line (using the Registry's online service) or purchased in person or via mail (if a customer supplies the correct registration number) will not increase and will remain at \$17.50.' Please verify that this is the case.*

Please do not hesitate to contact Peter Lockwood should you wish to discuss any of the above.

⁴¹ Letter dated 8 September 2006 to the Hon. John Thwaites, Minister for Victorian Communities from the Regulation Review Subcommittee.

Minister's Response⁴²

Thank you for your letter of 8 September 2006 regarding the Births, Deaths and Marriages Registration (Fees) Regulations 2006.

In response to your questions:

1. *The two genealogical bodies consulted regarding the Regulations were the Genealogical Society of Victoria and the Australian Institute of Genealogical Studies.*
2. *I can confirm that if a customer wishes to purchase an uncertified copy of an historical record from the register and that they either:*
 - a. *download the record online (via the Registry's website) or*
 - b. *apply via mail or in person and quote the correct registration number**they pay a fee of \$17.50.*

If you require any further information regarding the above please do not hesitate to contact the Acting Registrar Ms Camille Kingston on 9613 5931.

(H) OTHER MATTERS – THE ‘BALANCED SCORECARD APPROACH’ – WHAT IS IT?**The ‘Balanced Scorecard Approach’ – What is it?**

Generally a RIS which accompanies the Regulations includes a summary of alternatives. Often the summary of alternatives includes a Table. The Table contains a subjective assessment of the proposed regulations and the alternatives compared to the ‘Base Case’ using the ‘Balanced Scorecard Approach’.

The Subcommittee reiterates the comments made last year.⁴³ It is fair to say that the Subcommittee does not find that the use of such a Table provides great illumination in the context of an assessment of alternatives. On one view, the inclusion of such a Table to the average reader of the RIS adds little in terms of understanding and clarity. If such a Table is to be used, then there ought to be appropriate commentary which explains it.

The Subcommittee notes that some RISs this year have included further explanation. This is of assistance to the Subcommittee but more particularly to the average reader of the RIS. The Subcommittee acknowledges these efforts and hopes this trend will continue.

(I) SECTION 9(1)(A) – IS THERE ANY APPRECIABLE ECONOMIC OR SOCIAL BURDEN ON ANY SECTOR OF THE PUBLIC?

Many regulations are accompanied by a section 9(1)(a) certificate of exemption which states that they do not impose an appreciable economic or social burden on any sector of the public.

Paragraph 5.33 of the *Premier's Guidelines*⁴⁴ set out the particular requirements in respect of the exemption certificates.

⁴² Letter dated 3 October to the Regulation Review Subcommittee from the Hon. John Thwaites, MP, Minister for Victorian Communities.

⁴³ *Annual Review 2005, Regulations 2005*, p. 25.

⁴⁴ Section 5.33, *Premier's Guidelines*, December 2004.

The Minister must include in the exemption certificate detailed reasons as to why the proposed rule does not impose an appreciable economic or social burden on a sector of the public under section 9(2).

The Subcommittee takes the view that it is not sufficient to simply assert that there is no appreciable economic or social burden on a sector of the public in the exemption certificate. The Subcommittee expects that detailed reasons will be given as to why there is no appreciable economic or social burden on a sector of the public and will examine those reasons closely.

This year there have been no Regulations on which the Subcommittee has commented in respect of this matter. The Subcommittee acknowledges the high standard of the exemption certificates provided to it. The quality of the work presented to the Subcommittee has made its consideration of these matters easier. The detailed nature of the exemption certificates signifies to the Subcommittee a very real attempt to grapple with whether there “is an appreciable economic or social burden” imposed or not. The Subcommittee’s is guided by the Premier’s Guidelines. It also uses a common sense approach. Each Regulation will be considered in its context and on its merits.

(J) COMMENDATION

The Subcommittee commends Ministers to the particular attention to detail in respect of the work presented to it. The Subcommittee acknowledges properly drawn certificates. The Subcommittee also acknowledges the excellent work by many Departments in responding to the large number of people and organisations who sent in submissions in respect of a particular RIS.

(K) NEW AREA OF SCRUTINY – NEW LEGISLATIVE REQUIREMENTS – HUMAN RIGHTS

History

For the sake of completeness, mention should be made of the Subcommittee’s new area of scrutiny. At the time of writing this Report the Subcommittee is required to consider whether all statutory rules are incompatible with human rights. However, this applies to all statutory rules in the 2007 series, not the 2006 series the subject of this Report.

SARC has a considerable history in terms of the protection of human rights. The review of subordinate legislation has been conducted in the Victorian Parliament since 1956. The scrutiny of bills⁴⁵ was first mooted and indeed recommended in 1987 in a “Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights”⁴⁶ prepared by the Legal and Constitutional Committee, the predecessor to this Committee. The scrutiny of bills commenced in Victoria in 1993. Section 21(f) of the *Subordinate Legislation Act 1994* uses the language of human rights. For several years, the Subcommittee has had to consider whether a regulation:–

Unduly trespasses on rights and liberties of the person previously established by law;

⁴⁵ Scrutiny of Acts and Regulations Committee, *First Annual Report*, April 1994, p. vii.

⁴⁶ Legal and Constitutional Committee, *Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights*, April 1987, pp. 123.

Rights

The Chair's introduction to the First Annual Report⁴⁷ is useful in considering the concept of rights. It demonstrates the complexities associated with rights.

⁴⁸Human rights have been generally argued to include civil and political rights and legal and political rights.⁴⁹ There is much greater division on the status of socio-economic rights and cultural rights.....The legislative charter of the Committee is broad. The word 'rights' include natural rights and other moral rights established by the writings of the philosophers, jurists and churchmen. It most certainly includes the positive, empirical category of legal rights – rights whose existence is established by examining existing statutes, codes and decisions comprising the common law of Victoria. There are also internationally acknowledged human rights which can be found in the instruments of international and domestic law.

It is now some thirteen years since the Committee was required to grapple with the concept of rights. The Australian Capital Territory introduced a statutory Bill of Rights in 2004. The idea of a Bill of Rights for Victoria was floated in 2004. The Victorian Government appointed a Human Rights Consultation Committee in 2005. During 2005 that Committee heard submissions and compiled a report. The report recommended a Bill of Rights in December 2005. The *Charter of Human Rights and Responsibilities 2006* (the Charter) was enacted in July 2006 and commenced operation on 1 January 2007. As a result of the introduction of the Charter and other legislative amendments there are now defined human rights which the Subcommittee must consider in the scrutiny of subordinate legislation.

Legislative scheme and requirements

The Charter of Human Rights and Responsibilities Act 2007

The *Charter of Human Rights and Responsibilities Act 2007* (the Charter) commenced on 1 January 2007. Section 30 of the Charter is set out:–

30. Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Note: The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see section 21 of the *Subordinate Legislation Act 1994*.

The Subordinate Legislation Act 1994 – section 21(ha)

Amendments were also made to the *Subordinate Legislation Act 1994*. The general principle of review is set out in section 21(ha) of the *Subordinate Legislation Act 1994*. Section 21(ha) is set out:–

Section 21. Review of statutory rules by the Scrutiny Committee

⁴⁷ Scrutiny of Acts and Regulations Committee, *First Annual Report*, April 1994, p. ix.

⁴⁸ *ibid.*

⁴⁹ Legal and Constitutional Committee, *Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights*, Chapter 2, April 1987, pp. 8-18.

(1) The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament-

.....

(ha) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;

The particular responsibilities of the Subcommittee to review Human Rights certificates are set out in section 12A.

12A. Human rights certificate

- (1) The responsible Minister must ensure that a human rights certificate is prepared in respect of a proposed statutory rule, unless the proposed statutory rules is exempted under sub-section (3)*
- (2) A human rights certificate must–*
 - (a) certify whether, in the opinion of the responsible Minister, the proposed statutory rule does or does not limit any human right set out in the Charter of Human Rights and Responsibilities; and*
 - (b) if it certifies that, in the opinion of the rule does limit a human right set out in the Charter of Human Rights and Responsibilities, set out–*
 - (i) the nature of the human right limited; and*
 - (ii) the importance of the purpose of the limitation; and*
 - (iii) the nature and extent of the limitation; and*
 - (iv) the relationship between the limitations and its purpose; and*
 - (v) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*
- (3) Sub-section (1) does not apply if the responsible Minister certifies in writing that in his or her opinion–*
 - (a) the proposed statutory rule is a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or*
 - (b) the proposed statutory rule only–*
 - (i) prescribes under section 4(1)(a) an instrument or class of instrument to be a statutory rule: or*
 - (ii) exempts under section 4(1)(b) an instrument or class of instrument from the operation of this Act; or*
 - (iii) extends under section 5(4) the operation of a statutory rule that would otherwise be revoked by virtue of section 5.*

Subcommittee's obligations – What are human rights?

Compatibility – Ensure that human rights protected and promoted by the Charter are protected in subordinate legislation

Essentially, the Subcommittee is required to consider whether each statutory rule is compatible with human rights as enunciated in the Charter. The Subcommittee needs to ensure that the human rights protected and promoted in the Charter are also protected in subordinate legislation.

In order to properly scrutinise and assess every statutory rule and the section 12A certificate, the Subcommittee must have a working knowledge of and consider the particular human rights set out in Part 2 of the Charter. The human rights are set out below.

- Recognition and equality before the law
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Freedom from forced work
- Freedom of movement
- Privacy and reputation
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Protection of families and children
- Taking part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Children in the criminal process
- Fair hearing
- Rights in criminal proceedings
- Right not to be tried or punished more than once
- Retrospective criminal laws

These human rights are based in part on the International Covenant on Civil and Political Rights (ICCPR). The Subcommittee needs to consider whether there is any possibility that these human rights may be breached.

If a statutory rule does not comply with the Charter, there is a possibility that it may fall outside the scope of the authorising Act

The Subcommittee is required to consider the compatibility of the regulations with the Charter and to report to Parliament where it considers a statutory rule to be incompatible with the Charter. In determining this the Subcommittee must consider the section 12A Human Rights certificate provided by each Minister in respect of each statutory rule. First, the Subcommittee must consider whether it agrees on assessment that a particular regulation does not limit any human right set out in the Charter. However, if there is some limitation in respect of a human right, the Subcommittee must consider:–

- The nature of the human right limited; and
- The importance of the purpose of the limitation; and
- The nature and extent of the limitation; and
- The relationship between the limitation and its purpose; and

- Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

If the Subcommittee decides on the basis of the information that the proposed regulations are incompatible with the Charter, it may report this to the Parliament.

The Subcommittee will report on the operation of the Charter in the context of the scrutiny of subordinate legislation next year in its Annual Report of the statutory rule series 2007.

Appendix 1 – Regulations 2006⁵⁰

Regulation Impact Statements

SR No. 3	Prevention of Cruelty to Animals (Amendment) Regulations 2006
SR No. 17	Fisheries (Fees, Levies and Royalties) Regulations 2006
SR No. 29	Working with Children Regulations 2006
SR No. 37	Geothermal Energy Resources Regulations 2006
SR No. 38	Gambling Regulation (Commercial Raffle Organisers) Regulations 2006
SR No. 49	National Parks (Cape Howe Marine National Park) Regulations 2006
SR No. 57	Drugs, Poisons and Controlled Substances Regulations 2006
SR No. 59	Environment Protection (Ships' Ballast Water) Regulations 2006
SR No. 60	Planning and Environment (Fees)(Further Amendment) Regulations 2006
SR No. 61	Births, Deaths and Marriages Registration (Fees) Regulations 2006
SR No. 62	Plant Health and Plant Products Regulations 2006
SR No. 64	Prostitution Control Regulations 2006
SR No. 66	Transfer of Land (Fees)(Amendment) Regulations 2006
SR No. 84	Sustainable Forests (Timber Harvesting) Regulations 2006
SR No. 86	Transport (Ticketing) Regulations 2006
SR No. 96	Rail Safety Regulations 2006
SR No. 99	Retirement Villages (Contractual Arrangements) Regulations 2006
SR No. 100	Estate Agents (Retirement Villages) Regulations 2006
SR No. 118	Land Regulations 2006
SR No. 130	Victorian State Emergency Service Regulations 2006
SR No. 143	Prevention of Cruelty to Animals (Domestic Fowl) Regulations 2006
SR No. 153	Owner Drivers and Forestry Contractors Regulations 2006
SR No. 157	Australian Grands Prix (Formula One) Regulations 2006
SR No. 159	Water Industry Regulations 2006
SR No. 172	Livestock Disease Control Regulations 2006

⁵⁰ This Appendix lists all regulations made during 2006. The Appendix categorises regulations according to whether they were made with a Regulation Impact Statement or whether they were exempted or excepted from those requirements. The Committee did not move for disallowance of any of the regulations made in 2006, however the Regulation Review Subcommittee did correspond with responsible Ministers concerning some regulations.

Exceptions under Section 8

S. 8(1)(a) — Fee Increases

SR No. 2	Planning and Environment (Fees)(Amendment) Regulations 2006
SR No. 42	Country Fire Authority (Charges) Regulations 2006
SR No. 51	Chattel Securities (Fees) Regulations 2006
SR No. 52	Road Safety (Drivers)(Fees) Regulations 2006
SR No. 53	Road Safety (Vehicles)(Fees) Regulations 2006
SR No. 67	Transfer of Land (Fees)(Further Amendment) Regulations 2006
SR No. 79	Plumbing (Fees) Regulations 2006
SR No. 85	Planning and Environment (Fees)(Indexation) Regulations 2006
SR No. 91	Zoological Parks and Gardens (Fees) Regulations 2006
SR No. 116	Intellectually Disabled Persons' Services (Fees) Regulations 2006
SR No. 121	National Parks (Fees and Charges)(Amendment) Regulations 2006
SR No. 123	Country Fire Authority (Amendment) Regulations 2006
SR No. 142	Metropolitan Fire Brigades (Fees and Charges) Regulations 2006

S. 8(1)(b) — Court Rules

SR No. 26	Magistrates' Court General (Infringements) Regulations 2006
SR No. 30	Magistrates' Court (Arbitration)(Professional Costs) Regulations 2006
SR No. 43	Supreme Court (Chapter I Amendment No.1) Rules 2006
SR No. 44	Supreme Court (Chapter V Amendment No.2) Rules 2006
SR No. 54	Victorian Civil and Administrative Tribunal (Amendment No.16) Rules 2006
SR No. 55	Magistrates' Court (Criminal Procedure) Rules 2006
SR No. 69	Magistrates' Court (Outworkers) Rules 2006
SR No. 72	Magistrates' Court (Criminal Procedure)(Amendment) Rules 2006
SR No. 83	Magistrates' Court (Family Violence)(Amendment) Rules 2006
SR No. 87	Magistrates' Court Civil Procedure (Amendment No.15) Rules 2006
SR No. 97	Supreme Court (Chapter VI Amendment No.9) Rules 2006
SR No. 98	Supreme Court (Chapter I Amendment No.2) Rules 2006
SR No. 102	Supreme Court (Chapter I Amendment No.3) Rules 2006
SR No. 161	Supreme Court (Chapter VI Amendment No.10) Rules 2006
SR No. 162	Supreme Court (Chapter I Amendment No.4) Rules 2006
SR No. 163	Supreme Court (Intellectual Property) Rules 2006
SR No. 164	Magistrates' Court Civil Procedure (Amendment No.16) Rules 2006
SR No. 165	Victorian Civil and Administrative Tribunal (Amendment No.17) Rules 2006
SR No. 166	County Court (Chapter II Amendment No.6) Rules 2006
SR No. 167	County Court (Chapter I Amendment No.19) Rules 2006
SR No. 168	County Court (Chapter I Amendment No.20) Rules 2006
SR No. 169	Supreme Court (Chapter I Amendment No.5) Rules 2006

S. 8(1)(b) — Court Rules (continued)

SR No. 170	Magistrates' Court Civil Procedure (Amendment No.17) Rules 2006
SR No. 171	Supreme Court (Chapter I Amendment No.6) Rules 2006
SR No. 178	Magistrates' Court Civil Procedure (Amendment No.18) Rules 2006
SR No. 179	Magistrates' Court (Criminal Procedure)(Further Amendment) Rules 2006

S. 8(1)(d)(iii) — Extension by 12 Months

SR No. 33	Subordinate Legislation (Domestic Building contracts and Tribunal (General) Regulations 1996 – Extension of Operation) Regulations 2006
SR No. 35	Subordinate Legislation (Extractive Industries Development Regulations 1996 – Extension of Operation) Regulations 2006
SR No. 45	Subordinate Legislation (Coroners Regulations 1996 – Extension of Operation) Regulations 2006
SR No. 56	Subordinate Legislation (Environment Protection (Scheduled Premises and Exemptions) Regulations 1996 – Extension of Operation) Regulations 2006
SR No. 88	Subordinate Legislation (Agricultural and Veterinary Chemicals (Control of Use) Regulations 1996 – Extension of Operation) Regulations 2006
SR No. 92	Subordinate Legislation (Heritage (Historic Shipwrecks)(General) Regulations 1996 – Extension of Operation) Regulations 2006
SR No. 126	Subordinate Legislation (Firearms Regulations 1997 – Extension of Operation) Regulations 2006
SR No. 129	Subordinate Legislation (Shop Trading Reform (Polls) Regulations 1996 – Extension of Operation) Regulations 2006
SR No. 131	Subordinate Legislation (Supreme Court (Sheriff's Fees) Regulations 1996 – Extension of Operation) Regulations 2006
SR No. 147	Subordinate Legislation (Travel Agents Regulations 1997 – Extension of Operation) Regulations 2006
SR No. 160	Subordinate Legislation (Transport Accident Regulations 1996 – Extension of Operation) Regulations 2006

Exemptions under Section 9**S. 9(1)(a) — No Economic Burden**

SR No. 1	Road Safety (Drivers)(Amendment) Regulations 2006
SR No. 5	Water (Permanent Transfer of Water Rights)(Amendment) Regulations 2006
SR No. 6	Magistrates' Court General (Amendment) Regulations 2006
SR No. 10	Transport (Infringements)(Amendment) Regulations 2006
SR No. 11	Racing (Racing Appeals Tribunal)(Amendment) Regulations 2006
SR No. 15	State Superannuation (Amendment) Regulations 2006
SR No. 18	Magistrates' Court General (Further Amendment) Regulations 2006
SR No. 20	Commonwealth Games Arrangements (Games Management Areas) Regulations 2006
SR No. 22	Road Safety (Road Rules)(Commonwealth Games) Regulations 2006
SR No. 23	Road Safety (General)(Commonwelath Games) Regulations 2006

S. 9(1)(a) — No Economic Burden (continued)

SR No. 24	Commonwealth Games Arrangements (Prescribed Powers and Functions) Regulations 2006
SR No. 25	Magistrates' court General (Further Waiver Amendment) Regulations 2006
SR No. 28	Fisheries (Amendment) Regulations 2006
SR No. 31	Magistrates' Court General (Waiver Periods Further Amendment) Regulations 2006
SR No. 41	Plumbing (Certification Marks) Regulations 2006
SR No. 46	Magistrates' Court General (Fifth Waiver Period Amendment) Regulations 2006
SR No. 47	Wrongs (Part VB)(Dust and Tobacco-Related Claims) Regulations 2006
SR No. 48	Magistrates' Court General (Specified Agencies) Regulations 2006
SR No. 58	Prevention of Cruelty to Animals (Rodeo Permits) Regulations 2006
SR No. 63	Fisheries (Salmonid) Regulations 2006
SR No. 80	Terrorism (Community Protection)(Chemicals and Substances) Regulations 2006
SR No. 81	Firearms (Amendment) Regulations 2006
SR No. 90	Administration and Probate (Deposit of Wills)(Fees) Regulations 2006
SR No. 94	Second-Hand Dealers and Pawnbrokers (Exemption) Regulations 2006
SR No. 101	Domestic (Feral and Nuisance) Animals (Amendment) Regulations 2006
SR No. 103	Infringements (General)(Amendment) Regulations 2006
SR No. 107	Parliamentary Salaries and Superannuation (Provision of Vehicles) Regulations 2006
SR No. 109	Fisheries (Documentation) Regulations 2006
SR No. 122	Fisheries (Further Amendment) Regulations 2006
SR No. 140	Conservation, Forests and Lands (Infringement Notice)(Fisheries) Regulations 2006
SR No. 149	Catchment and Land Protection (Amendment) Regulations 2006
SR No. 150	Conservation, Forests and Lands (Catchment and Land Protection Infringement Notice)(Amendment) Regulations 2006
SR No. 152	Financial Management (Amendment) Regulations 2006
SR No. 154	Plumbing (Shower Head) Regulations 2006
SR No. 156	World Swimming Championships Regulations 2006
SR No. 173	Infringements (General)(Miscellaneous Amendment) Regulations 2006
SR No. 175	Road Safety (General)(Safety Cameras and Other Amendments) Regulations 2006

S. 9(1)(b) — National Uniform Legislation

SR No. 34	Electricity Safety (Equipment Efficiency)(Amendment) Regulations 2006
SR No. 176	Road Safety (Vehicles)(Heavy Vehicle Fees) Regulations 2006

S. 9(1)(c) — Fundamentally Declaratory

SR No. 4	Residential Tenancies (Infringement Penalties) Regulations 2006
SR No. 8	Mineral Resources Development (Amendment) Regulations 2006
SR No. 9	Transport (Passenger Vehicles)(Amendment) Regulations 2006
SR No. 14	Corrections (Amendment) Regulations 2006
SR No. 27	Legal Profession (Board Election) Regulations 2006

S. 9(1)(c) — Fundamentally Declaratory (continued)

SR No. 32	Credit (Administration)(Committee) Regulations 2006
SR No. 36	Trustee Companies Regulations 2006
SR No. 71	Gambling Regulation (Infringement Offences) Regulations 2006
SR No. 82	Road Safety (General)(Vehicle Impoundment) Regulations 2006
SR No. 89	Electoral (Amendment) Regulations 2006
SR No. 93	Retirement Villages (Records and Notices)(Amendment) Regulations 2006
SR No. 95	Consumer Credit (Victoria)(Administration) Regulations 2006
SR No. 104	Bail (Amendment) Regulations 2006
SR No. 105	Estate Agents (General, Accounts and Audit)(Amendment) Regulations 2006
SR No. 106	Estate Agents (Infringements) Regulations 2006
SR No. 108	Veterans (Patriotic Funds) Regulations 2006
SR No. 110	Mineral Resources Development (Further Amendment) Regulations 2006
SR No. 111	Extractive Industries Development (Amendment) Regulations 2006
SR No. 112	Co-operative Housing Societies (Amendment) Regulations 2006
SR No. 113	Agricultural and Veterinary Chemicals (Control of Use)(Infringement Notices)(Amendment) Regulations 2006
SR No. 114	Livestock Disease Control (Amendment) Regulations 2006
SR No. 115	Plant Health and Plant Products (Amendment) Regulations 2006
SR No. 117	Valuation of Land (General Valuation)(Amendment) Regulations 2006
SR No. 119	Children and Young Persons (Children's Court)(Amendment) Regulations 2006
SR No. 124	Transport (Tow Truck)(Amendment) Regulations 2006
SR No. 125	Sentencing (Mental Health)(Amendment) Regulations 2006
SR No. 127	Sex Offenders Registration (Amendment) Regulations 2006
SR No. 128	Racing (Specified Race-Course) Regulations 2006
SR No. 132	Corrections (Victims Register)(Amendment) Regulations 2006
SR No. 133	Serious Sex Offenders Monitoring (Amendment) Regulations 2006
SR No. 134	Conservation, Forests and Lands (Infringement Notice)(Amendment) Regulations 2006
SR No. 135	Planning and Environment (Amendment) Regulations 2006
SR No. 136	Building (Amendment) Regulations 2006
SR No. 137	Hertiage (Infringement Notice)(Amendment) Regulations 2006
SR No. 139	Transport (Conduct)(Amendment) Regulations 2006
SR No. 141	Conservation, Forests and Lands (Infringement Notice)(National Parks Amendment) Regulations 2006
SR No. 144	Sentencing (Amendment) Regulations 2006
SR No. 148	Motor Car Traders (Amendment) Regulations 2006
SR No. 151	Catchment and Land Protection (Register of Interests) Regulations 2006
SR No. 155	Parliamentary Allowances (Amendment) Regulations 2006
SR No. 177	Water Industry (Prescribed Persons)(Amendment) Regulations 2006

S. 9(3) — Premier’s Certificate

SR No. 19	Legal Profession (Practising Certificate Fees)(Interim) Regulations 2006
SR No. 120	Tobacco (Grand Prix Events) Regulations 2006
SR No. 146	Trade Measurement (Interim) Regulations 2006

Exceptions and Exemptions under Combined Sections

S. 9(1)(a) — No Economic Burden and S. 9(1)(c) — Fundamentally Declaratory

SR No. 7	Human Tissue Regulations 2006
SR No. 12	Fisheries (Abalone) Regulations 2006
SR No. 13	Liquor Control Reform (Amendment) Regulations 2006
SR No. 16	Drugs, Poisons and Controlled Substances (Amendment)(Nurse Practitioners – Palliative Care) Regulations 2006
SR No. 21	Tobacco (Amendment) Regulations 2006
SR No. 39	Mental Health (Forms and Patient’s Rights) Regulations 2006
SR No. 40	Tobacco (Victorian Health Promotion Foundation) Regulations 2006
SR No. 50	Human Tissue (Removal of Tissue) Regulations 2006
SR No. 65	Environment Protection (Vehicle Emissions)(Amendment) Regulations 2006
SR No. 70	Drugs, Poisons and Controlled substances (Volatile Substances)(Extension of Provisions) Regulations 2006
SR No. 73	Surveillance Devices Regulations 2006
SR No. 74	Crimes (Assumed Identities) Regulations 2006
SR No. 75	Infringements (Reporting and Prescribed Details and Forms) Regulations 2006
SR No. 76	Infringements (General) Regulations 2006
SR No. 77	Evidence (Witness Identity Protection) Regulations 2006
SR No. 78	Crimes (Family Violence)(Amendment) Regulations 2006
SR No. 138	Transport (Infringements)(Further Amendment) Regulations 2006
SR No. 145	Infringements (General)(Further Amendment) Regulations 2006
SR No. 158	Road Safety (General)(Infringements) Regulations 2006
SR No. 174	Mental Health (Patient’s Rights) Regulations 2006

Appendix 2 – Ministerial Correspondence

This Appendix contains a list of correspondence sent to responsible Ministers by the Subcommittee regarding regulations made in 2005. The Appendix categorises correspondence in accordance with the nature of the issue raised by the Subcommittee.

Regulation	Minister	Issue
SR 17 – Fisheries (Fees, Levies and Royalties) Regulations 2006	Minister for Agriculture	Failure to respond to those who made submissions.
SR 29 – Working with Children Regulations 2006	Attorney-General	Seeking clarification on the advertising of the Regulatory Impact Statement. Failure to respond to those who made submissions and a response to the Privacy Commissioner's Submission.
SR 61 – Birth, Deaths and Marriages Registration (Fees) Regulations 2006	Minister for Victorian Communities	Seeking clarification on which two genealogical bodies were consulted. Verifying that the \$17.50 fee, would not increase for those persons wishing to obtain uncertified records.
SR 68 – Building Regulations 2006	Minister for Planning	Acknowledgement of the outstanding manner in which the Department and the Building Commission dealt with submissions and commends to the officers involved.
SR 96 – Rail Safety Regulations 2006	Minister for Transport	Acknowledgement of the outstanding manner in which the Department dealt with submissions and commends to the officers involved.

Appendix 3 – Committee Practice Notes

Exemptions and Exceptions

- **Dating Certificates.** The Subcommittee has been presented with a number of undated exemption and exception certificates. The Subcommittee expects all certificates to be dated.
- **Reasons for Exemption.** The Subcommittee has occasionally received regulations exempted under section 9 with certificates of exemption which fail to adequately explain the reasons for granting the exemption or with reasons for granting the exemption contained in the Explanatory Memorandum. It should be noted that it is a requirement of section 9(2) of the *Subordinate Legislation Act 1994* (Vic) that certificates of exemption 'specify the reasons for the exemption'. The Subcommittee expects all exemption certificates to contain adequate explanations of the reasons for granting the exemptions.
- **Extension of Regulations for Periods up to 12 months.** Regulations expire 10 years after they have been made. The Subcommittee has been presented with a number of regulations made under sections 8(1)(d)(iii) and 5(3) extending regulations due to expire for periods up to 12 months. Before an extension of time can be granted, the Minister must certify that due to 'special circumstances' there is insufficient time available to comply with the formal regulation-making requirements of the *Subordinate Legislation Act 1994*. The Subcommittee expects details of the 'special circumstances' to be contained in the section 5(3) certificate itself as required by the *Subordinate Legislation Act 1994*.
- **Using Appropriate Exemption and Exception Categories.** Department and agency officers need to be careful when determining which category to use when exempting and excepting regulations from the Regulation Impact Statement process. The Subcommittee has received regulations which are incorrectly exempted and excepted.
- **Typographical Errors.** Department and agency officers need to be careful when preparing certificates to ensure that they do not contain typographical errors.

Explanatory Memoranda

The Subcommittee expects an Explanatory Memorandum to comply with the requirements contained in Paragraph 8.10 *Premier's Guidelines*. An Explanatory Memorandum must contain:–

- A brief outline of each provision;
- An explanation of the changes effected by each provision;
- A statement of the reasons for making the rule;
- Where applicable, the reasons why no regulatory impact statement was prepared;
- a statement as to whether consultation has taken place, and if it has not taken place, an explanation as to why a decision was made not to consult.

Fee Increases: 8(1)(a) and 8(2)

Regulations increasing fees made under section 8(1)(a) of the *Subordinate Legislation Act 1994* (Vic) must not increase fees by more than the percentage set by the Treasurer. For each financial year a percentage increase is set by the Treasurer. The Treasurer notifies the Subcommittee in writing of the relevant percentage increase.

A regulation may increase a number of fees, with some individual fee increases falling outside the rate set by the Treasurer. However when the total average of fee increases for that regulation is calculated, it falls within the rate fixed by the Treasurer. This practice is referred to as the 'basket approach'. Paragraph 5.25 of the Premier's Guidelines provides that:–

It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

Section 8(2) of the *Subordinate Legislation Act 1994* (Vic) validates the rounding up of fee increases to the nearest whole dollar. Sometimes the total average increase may be greater than that set by the Treasurer but may be validated on the basis that there has been rounding up to the nearest whole dollar. The Subcommittee may only approve such increases where the extra amount can be considered trifling when compared to the whole fee. Where the amount is significant in proportion to the whole fee, the Subcommittee may request the Minister to reconsider the increase.

The Subcommittee is bound by the Premier's Guidelines. A strict interpretation of the Premier's Guidelines leads to the view that as a matter of principle individual fees in a 'basket' package should not exceed the Treasurer's annual rate. However, the Subcommittee is of the view that fee increases and the Premier's Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a 'basket' package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee's view is that it is a matter of balance. The 'basket' of fees in its entirety must not exceed the Treasurer's approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer's annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each regulation will be examined on its merits and in context.

At this stage, the Premier's Guidelines have only been in operation for over a year. The Subcommittee will continue to carefully scrutinise the regulations and the Premier's Guidelines.

The preparation of a table showing new and old fees and including an indication of the percentage increase or decrease is of great assistance to the Subcommittee. The Subcommittee provides the following as an example.

Description	Current Fee	Proposed Fee	% Increase
Application for ...	\$100.00	\$105.00	5.0
Application for	\$320.00	\$325.00	1.6

Independent Advice Certificates: 10(3)

Under section 10(3) of the *Subordinate Legislation Act 1994* (Vic) a Minister must ensure that independent advice as to the adequacy of a Regulation Impact Statement is obtained. The provision of that independent advice assists the Subcommittee in its review of the regulations.

Legislative Instruments outside the Subordinate Legislation Act 1994

The Subcommittee plays a vital role in ensuring that rights are adequately protected. It cannot do this if provisions are incorporated in legislative instruments outside its scrutiny. The Subcommittee prefers department and agency officers not to use Guidelines and Codes of Practice. Where Guidelines and Codes of Practice are used the Subcommittee would like those Guidelines and Codes of Practice to be published and available to the public at the same time as the regulation commences operation.

Provision of Documentation to Regulation Review Subcommittee

The Subcommittee needs to receive Explanatory Memoranda, all certificates, RISs and comments and submissions made in relation to RISs within 7 days after a regulation has been made. The Subcommittee has a limited time within which to review regulations. If the Committee wants to move for disallowance of a regulation it must do so within 18 sitting days of that regulation being tabled in Parliament. Prior to the Committee moving a motion for disallowance, the Subcommittee corresponds and negotiates with the particular Minister. The Subcommittee needs sufficient time for this process to take place.

Paragraph 5.51 of the Premier's Guidelines provides that:–

All certificates required under the Act are to be signed and dated with the date of the day of signing. Copies of all certificates prepared in the course of making statutory rules are to be forwarded to SARC within 7 days of the making of the statutory rule, or within 7 days of the establishment of SARC (whichever is the longer period of time).

Recommendations

The Subcommittee notes that some regulations are made on the recommendation of a Minister or some other authorised body. If the Subcommittee is provided with a copy of the recommendation, it can certify that the regulations have been validly made in accordance with that recommendation. Where the Subcommittee is not provided with a copy of that recommendation, it cannot certify that the regulations have been validly made. The Subcommittee would appreciate receiving copies of all recommendations.